

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
O.O.C.J.  
**ELECTION PETITION NO.15 OF 2014**

Shri Abhay Bhakchand Chhajed

... Petitioner

Vs.

1. Smt.Madhuri Misal
2. Returning Officer,  
212, Paravati Assembly Constituency, Pune  
(deleted on 28.3.2016)
3. Election Commission of India

... Respondents

with  
**APPLICATION (L) NO.13 OF 2017**

AND  
**APPLICATION (L) NO.9 OF 2016**

Mr.V.P. Sawant with Tanaya Patankar i/b P.M. Jadhav for the Petitioner  
Mr.Vishal Kale i/b Amey Deshpande for Respondent No.1  
Mr.Pradeep Rajgopal with Ms.Drishti Shah i/b Ms.Rekha Rajgopal for  
Respondent No.3

CORAM : **MRS.MRIDULA BHATKAR, J.**

RESERVED ON : **JANUARY 19, 2018**  
DELIVERED ON: **FEBRUARY 23, 2018**

**ORDER:**

**1.** This Election Petition is filed under sections 99, 100, 123 of the Representation of the People Act, 1951 (for short, hereinafter called as 'the Act'). It challenges the validity of the election to the Maharashtra Legislative Assembly seat from 212, Parvati

Constituency, Pune, Maharashtra in the elections held on 15.1.2014 and the consequent result declared on 19.10.2014. The petitioner though contested the election, had lost the seat. Respondent No.1 is the elected candidate from 212, Parvati Constituency in the said election. Respondent No.2 is the Returning Officer, who was subsequently deleted on 28.3.2016 and respondent No.3, is the Election Commission of India.

**2.** At the request of the learned Counsel, the adjournments were sought mainly by the petitioner and the respondent and their counsel for personal pre-occupation and therefore, this Court granted adjournments time to time as per the convenience of the petitioner, though this is a proceeding under the Representation of the People Act.

**3.** It is the case of the petitioner that he contested the election in the said constituency as the official candidate of Indian National Congress, a registered political party and respondent No.1 was the official candidate of Bharatiya Janata Party, a registered political party. The petitioner has challenged the election and the result mainly on the grounds of mal practices or corrupt practices and tampering of electronic voting machines, which had taken place in his

constituency i.e., 212, Parvati Assembly Constituency. The challenge is also given on the ground that his polling agents were not given entry at the time of mock poll conducted at the polling stations i.e., 185 and 242 of 212, Parvati Assembly Constituency, on the ground that name and signature of his election agent Sunil Shinde was not correctly given. It is the case of the petitioner that votes of several supporters of the petitioner, who had voted for him, were not counted in his favor and thus, there is discrepancy with the election results. Thus, physical count of votes cast by his supporters does not match with the election results thereby led the discrepancy and thus, there is a blatant abuse of the election procedure.

**4.** Respondent No.1, who is the main contesting party, has categorically denied all the averments and contentions raised in respect of the election proceeding. So also, she rejected the allegations on authenticity of the working of the Electronic Voting Machines (EV Machines). The respondent justified the result declared by the Election Commission. She also denied that there were mal practices or abuse of the election procedure and prayed that the petition be rejected.

**5.** The petition is marked at exhibit 1. Affidavit in Reply of the elected candidate and MLA is marked at exhibit 2. Issues were framed and they are as follows:

- i) Whether the votes cast by voters by use of electronic voting machines used at Booth Nos.86, 185, 191, 242 and 305 at the election to 212 Parvati Legislative Assembly Constituency held on 15.10.2014 have been incorrectly recorded?
- ii) Whether the machines at booth Nos.86, 185, 191, 242 and 305 at the election to 212, Parvati Legislative Assembly Constituency were tampered?
- iii) Whether the petitioner proves that the results declared as output from the electronic voting machines in respect of Booth Nos.86, 185, 191, 242 and 305 at the election to 212, Parvati Legislative Assembly Constituency are incorrect?
- iv) Whether the petitioner proves that the election of Respondent No.1 from 212, Parvati Legislative Assembly Constituency is void under the provisions of the Representation of People Act, 1950?
- v) What order?"

Affidavit in examination in chief marked at exhibit 3.

**6.** The petitioner examined himself and his witnesses. The Respondent No.1 did not examine any witness and hence, Mr.Kale, the learned Counsel for the respondent, filed a purshis for closure of evidence. Therefore, the learned Counsel for the respondent No.1 argued first.

7. Learned Counsel Mr.Kale for elected candidate submitted that considering the evidence – oral and documentary, the petitioner has challenged the election mainly on three grounds:

**(i) His election agent Mr.Sunil Shinde and other polling agents were not allowed to enter the Booth No.185 when the mock poll took place;**

**(ii) There were many voters, who had voted for Indian National Congress i.e., the petitioner. However, the actual votes do not tally or match with number of these voters;**

**(iii) There was improper reception of votes as no VVPAT (Voters Variable Paper Audit Trail) was fixed and thus, the voting process was manipulated by a remote control which amounts to booth capturing.**

8. The learned Counsel submitted that it is necessary to see whether on the basis of the documents and the evidence adduced, it is difficult to say that the results declared are incorrect. He pointed out from the examination in chief of the petitioner that he has given the name of one Sudhir Shetye, who was not allowed to enter. He

relied on Form No.8 at exhibit 16, which was filled in by the petitioner himself on 10.10.2014 mentioning the name of Sunil Yadav Shinde as his election agent. However, at exhibit 18, annexure 23, the name of Sudhir Shetye was mentioned and Mr.Sudhir Shetye has signed the form. The learned Counsel submitted that at the time of mock poll, all the agents were allowed and the representative of the petitioner i.e., the election agent of the petitioner, was also present. In respect of manipulation of the EVMs, he relied on the report sent by the Central Forensic Science Laboratory, Hyderabad (CFSL, Hyderabad) dated 19.6.2017. In the said report, the analysts have mentioned that there is no evidence of tampering, altering or any other manipulation which could be detected. He submitted that the petitioner asked that the EVMs at polling station No.185 only are to be sent to the CFSL, Hyderabad out of the total 375 Control Units and Ballot Units. He submitted that there are no specific allegations about the mock poll. He pointed out that on 15.10.2014, mock poll was conducted and one Jayashree Sable, polling agent of the petitioner, was allowed at the mock poll. Therefore, the grievance of the petitioner that nobody attended the mock poll is baseless and there was a discrepancy in the name of the election agent by the petitioner himself. The learned Counsel further submitted that the

petitioner has deposed that VVPAT was not attached to the EVM and, therefore, there is a discrepancy in the physical count and election result.

**9.** Only oral allegations are made in respect of tampering of polling station Nos.86, 191, 242 and 305. He submitted that there was vast difference of votes i.e., 73611 votes between the elected candidate and the petitioner. However, the difference of only two votes at polling station No.185 i.e., 52 and 54 is alleged. The Election Commission has not committed any wrong. He relied on the report of PW2 Jyoti Kadam, Returning Officer. He submitted that the evidence of Jyoti Kadam shows that she was not at fault in respect of the name of the polling agent Sudhir Shetye. He submitted that VVPAT machine was not used at all in the entire process of election of Assembly Elections of 2014 and, therefore, the allegations of the petitioner of non-use of VVPAT in 212, Parvati Assembly Constituency, is not discriminatory.

**10.** On the point of inconsistency in the actual votes and the persons, who have in fact voted for Indian National Congress, he read over the relevant portions of evidence of the witnesses i.e., from 6 to 64. He submitted that out of total 64 witnesses examined by the

petitioner, 13 witnesses did not support the prosecution and from the evidence of remaining 51 witnesses, he could not prove his case that there is much discrepancy in the actual votes and the counted votes, as votes recorded were 52. He further argued that not a single complaint was lodged by the voters about the working of EVMs.

**11.** Per contra, Mr.Sawant, the learned Counsel for the petitioner, has argued that the case argued by the respondent is different than the grievance made out by the petitioner. The petitioner has voiced his grievance first on 13.10.2014 in respect of the EVMs and secondly, his grievance about non-compliance of the election Rules which are framed under the Representation of the People Act was also to be put before the Returning Officer well within time. The learned Counsel has submitted that the voting unit consists of balloting or voting unit, control unit and the cables. The EVMs are required to be approved by the Election Commission. However, one Praful Vithhal Lokhe, who unfortunately has expired, had made a query under Right to Information Act to the Election Commission about the approval of the election machines and the Election Commission gave a reply to his query at exhibit 11 dated 28.9.2013 wherein it is mentioned specifically that the EVMs were approved by



the Expert Committee and not by the Election Commission. The learned Counsel has submitted that this is a clear admission given by the Election Commission about the approval of the EVM. He submitted that the Returning Officer Jyoti Kadam (PW2) has corroborated this evidence (page 5).

**12.** He submitted that the election agent and polling agent are required to be appointed by every candidate who is contesting the election. The petitioner has appointed election agent Mr.Sunil Yadav Shinde. He was not a polling agent but the polling booth agents who were appointed at different polling stations by the petitioner could not attend the mock poll due to the variance in signature and the name of election agent. He submitted that instead of the name and signature of election agent Sunil Yadav Shinde mentioned in form No.8 (exhibit 16), the Returning Officer had communicated the name and signature of Sudhir Shetye, who was appointed by the petitioner as his permission agent (Parwana Agent) and not the election agent. Thus, instead of Sunil Shinde's name and signature, the name and signature of Sudhir Shetye was informed to all the polling stations and all the polling agents of the petitioner went to the respective polling stations with slips signed by Sunil Yadav Shinde, the election

agent. Due to variance in the name and signature, they were not allowed to enter and attend the mock poll which took place at around 6.30am before the actual polling commenced. The learned Counsel submitted that when this was pointed out to the Returning Officer, she circulated the name and photograph of the signature of Sunil Yadav Shinde to all the polling booth officers and thereafter, the polling agents of the petitioner were allowed in the polling station. However, at that time, many of them had missed the mock poll.

**13.** In support of his submissions, the learned Counsel relied on the relevant portion in the cross-examination of the Returning Officer (PW2) where she gave admission that Sunil Yadav Shinde was an election agent appointed by the petitioner and Sudhir Shetye was a permission agent. The learned Counsel pointed out 49A and Rule 49E(2) of the Conduct of Elections Rules, 1961 which state that mock poll is required to be conducted before the actual poll and the polling agents are supposed to attend. The said rules are as under:

“49A. Design of electronic voting machines – Every electronic voting machine (hereinafter referred to as the voting machine) shall have a control unit and a balloting unit and shall be of such designs as may be approved by the Election Commission:

Provided that a printer with a drop box of such design, as may be approved by the Election Commission, may also be

attached to a voting machine for printing a paper trail of the vote, in such constituency or constituencies or parts thereof as the Election Commission may direct.

49E. ...

(1) ...

(2) Immediately before the commencement of the poll, the presiding officer shall demonstrate to the polling agents and other persons present that no vote has been already recorded in the voting machine and it bears the label referred to in sub-rule (1), and where the printer for paper trail is used that the drop box of the printer is empty.”

**14.** The learned Counsel relied on the examination in chief of the petitioner on the point of working of EVM. He submitted that the Returning Officer (PW2) in her evidence has admitted that the EVMs were checked in the presence of the candidates, their agents and media 15 days prior to the actual voting day and they were sealed and kept in the godown. She admitted that after the mock poll, the machines should show number “0”. However, she has no personal knowledge as she could not remain present at all the polling stations.

**15.** Mr.Sawant submitted that the attendance of the polling agents at the mock poll is necessary and the polling agents of the petitioner were initially not allowed to attend and subsequently when they were allowed, some of them reached late and some of them could not go

when the mock poll was over. He demonstrated how presence at the mock poll of the polling agents is important. He pointed out that at the time of mock poll, the machines are brought to number "0" and then, they are required to be sealed at that time. He presented a list of 13 polling stations disclosing the presence / absence of polling agents of the petitioner. He relied on exhibit 41 which is a letter dated 12.5.2017 written by the CFSL to the Collector, Pune, by which the CFSL has sought extension of time for analysis as it is a complex procedure.

**16.** He also referred to exhibit 7 which is the expert committee report about working of EVMs. He submitted that as per this expert committee report, it shows the procedure followed while assuring complete exclusion of any kind of tampering in the EVM. He argued that as per the report of the expert committee, the tampering is possible in Control Unit and B0allot Unit either by attaching some extra device or through cable. He argued that exhibit 35 discloses that only Ballot Unit and Control Unit were sent to CFSL and Interconnecting Cables were not sent to CFSL. The learned Counsel further relied on exhibit 33, which is a print out of data and time key log of EVM, which was used in polling station No.185. On the basis

of the contents in this key log, he pointed out that the power of the machine was on. It is pointed out that on 14.10.2014, on the previous day of the voting day, the power of the EVM was on and this creates doubt about the manipulation in the EVM.

**17.** The learned Counsel submitted that exhibit 40 is with the Court and that is a sequential list print out and the said print out is to be tallied with clause 4.3. of the Expert Committee report and also exhibit 37 i.e., the Voters' Register, is to be compared with exhibit 40. He submitted that VVPAT is a must to stop functioning of EVM getting corrupted. The learned Counsel further submitted that he pointed out exhibit 37, the electoral roll and exhibit 32 is a voters' roll from polling station No.185. He pointed out that the mathematics of votes, as argued by the learned Counsel for the respondent, may look attractive on the face of it but it is not true and conclusive. He relied on the order of this Court passed on 5.5.2017 by which a questionnaire was sent to CFSL. He argued that on 19<sup>th</sup> May, 2014, the Petitioner gave complaint which is marked exhibit 5 and 5A about the working of EVM i.e., mal-practices at the election booth and it cannot be discredited for want of all details. The petitioner has not given up the case of improper reception of votes by EVM. He

submitted that the ratio laid down in **Dr.Subramanian Swamy vs. Election Commission of India**<sup>1</sup> is of 2013 wherein the election of 2010 was challenged. The printers and EVMs used in the said case which were challenged, were of 2010 and the present case is of 2014 i.e., subsequent to the case of **Subramanian Swamy (supra)**.

**18.** Issue Nos.(i), (ii) and (iii) are interconnected as they aim at tampering and faulty machines and, therefore, the results are incorrectly recorded in respect of the polling station Nos.86, 185, 191, 242 and 305 in 212, Parvati Legislative Assembly Constituency. Thus, the evidence on these issues is discussed together and issue No.(iv) is at the end.

**19.** Discussion on issue Nos.(i), (ii) and (iii) is also based on three grounds put forth by the petitioner as mentioned in paragraph 7 and they are answered accordingly.

**20.** The petitioner examined 54 witnesses. Out of 54 witnesses, PW3 to PW54 are the voters from 212, Parvati Legislative Assembly Constituency of October, 2014. The evidence of the said group of witnesses can be assessed together as they all mainly have examined for the purpose that they all have voted for the petitioner

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1 AIR 2014 SC 18

Abhay Chajed, the candidate of Indian National Congress. PW1 is the petitioner himself and PW2 is MrsJyoti Bhushan Kadam, the Returning Officer.

**21.** PW1, the petitioner, has deposed consistently about the facts which he has pleaded in the petition. He contested the election from Parvati constituency and also stated that proper procedure was not followed at the time of mock poll so also at the time of voting. He has put up a grievance about the same by sending a letter dated 19.10.2014 immediately after declaration of the results to the Chief Election Commissioner which was received by the office of the Election Commissioner at New Delhi on 24.10.2014 i.e., marked exhibit 5. He made a complaint regarding tampering of electronic voting machine and manipulation of the result of election. He also submitted that on 13.9.2014, in the meeting called by the District Collector of all the office bearers of all the political parties in Pune, he, being the President of Indian National Congress party, Pune, had attended the meeting and had raised the issue that Voters Verifiable Paper Audit Trail (VVPAT) is to be attached to the EVMs. Then, he further stated that he had appointed one Sunil Shinde, as his election agent and his name is also appearing on the form as election agent.

However, a wrong name of Sudhir Shetye was appearing on the specimen signature of the election agents and no signature of Sunil Shinde was appearing on the form i.e., exhibits 17 and 18. He deposed that the Returning Officer has circulated the signature of one Sudhir Shetye instead of Sunil Shinde to all the polling stations in the Constituency No.212. This has created chaos and for mock poll, his agents could not reach on time; they were late and reached in the midst of the mock poll in some places and in some places, they reached after the poll was over. Therefore, there was nobody from his side to verify whether the mock poll was conducted by following all the procedure or not?

**22.** Another grievance is that from polling station Nos.185 and 242 at Parvati, many people had voted for him, however, when the results were declared, he noticed that the number of voters, who have voted for him in polling station No.185 was miserably less. It was declared that he has received only 52 votes and, therefore, he examined many witnesses from 3 to 54 on the point of voting. All these witnesses i.e., from PW3 Mallesh Bangarappa Ambikar to PW54 Rupali Ramulu Koli were examined only on the point that they have voted for Indian



National Congress and they pressed the button in front of the symbol of the Indian National Congress i.e., "Palm".

**23.** Let me assess the evidence of the petitioner and the other witnesses on these points. Firstly, on the points of grievance of functioning of EVMs, the petitioner has stated that he sent a letter dated 19.10.2014 to the Chief Election Commissioner and which was received by the office of the CEC on 24.10.2014. It is marked at exhibit 5. In the said letter, he has mentioned the subject as "Tampering of EVMs during the State Assembly elections". This letter was sent by him on the day where he had knowledge that he had lost the elections. In the letter, he has stated that his complaint is based on well researched suspicion that EVMs have been tampered with and the result of election is manipulated. He has pointed out that it has taken place in 212, Parvati Legislative Assembly Constituency. He submitted the the election agent was Sunil Shinde and the name and signature of different person had been circulated to all polling agents and because of this, none of the polling agents was in a position to vet the actual signature of his election agent and it left the door open for manipulations. He has specifically referred to the exercise of mock poll which was carried

out to check functioning of EVMs. However, his all polling agents in polling stations were deprived of attending the mock poll and check whether the buttons were properly pressed and the machines are showing '0' figure. He has mentioned that it was the duty of the Chief Election Commissioner of Maharashtra to provide VVPAT to the EVMs to ensure physical verification of the acknowledgement slips in the event of disputes. However, ordinary EVMs have been issued for this process. He has expressed his fear about tampering of EVM through wire of the button A and button B connected to the in box. So he has demanded forensic enquiry into all EVMs. His supporters had communicated him the physical count of voting and it does not tally with the election results and so, he placed the said letter as a formal complaint as he wanted time to put up his grievance systematically. In his evidence, he relied on one letter (exhibit 6) dated 16.8.2014, which he had sent to the Election Commissioner, Government of Maharashtra in the capacity of President, Pune District Congress Committee. The subject was regarding EVMs. Two months prior to assembly elections, the letter was sent when the District Collector had invited the reports of all the political parties to check the electronic voting machines and after inspection, the petitioner has communicated the observations of his representatives

that all the EVMs had been brought from Uttar Pradesh and has expressed doubt about the authenticity of the machines and also expressed surprise that some machines were earlier used for the Lok Sabha elections and then how those machines can be used within six months for the Assembly elections of Maharashtra. He has referred to the judgment of the Supreme Court in the case of **Dr.Subramanian Swamy (supra)**.

**24.** This oral evidence can be appreciated on the basis of the documentary evidence especially exhibit 7 i.e., report of the expert committee for evaluation of the upgraded EVMs. The report was submitted by the Committee on 5.9.2006 when the EVMs have been put in use for a period of 15 years and, therefore, they were due for replacement. The committee under the Chairmanship of Shri P.V. Indersen and Members - Professor A.K. Agarwala and Professor D.T. Sahani, asked Bharat Electronics Ltd. (BEL) & Electronics Corporation of India Ltd. (ECIL) to introduce additional features to further the cause of reliability and tamperproof working of the new EVMs to be manufactured. They studied the working of EVMs, its results, functioning in the elections while preparing the report.

**25.** In order to assess the allegation of tampering, one has to know the constitution of the EVM. In clause 3.3 of the exhaustive report, it is mentioned that EVM system consists of three hardware sub-systems and one software namely, Control Unit (CU), Ballot Unit (BU) and Interconnection Cable between BU and CU. The CU is the main unit which stores all data and controls the functioning of the EVM. When the voter presses his choice key on the BU, then, the BU has to transmit faithfully the same information to CU as per the key pressed by the voter. This information has to be transferred through interconnecting cable. The essence of faultless, authentic and tamperproof working of EVM is in faithful recording of voting data. This is controlled and functioned through the micro chip embedded in the CU and the programmed software is installed in the chip. The committee has also considered the issue of tampering with Interconnecting Cable between the CU and BU. One of the measures to plug on tampering is the Presiding Officer to exhibit the cable to all the polling agents and get their certificate to make sure that no device has been inserted between the cable and the socket and once the cable is inserted, the machine is sealed. Precaution is also taken to stop wireless signal injection in the CU. In clause 3.6, the committee has mentioned that EVMs are subject to mock poll

validation at various stages in front of all party representatives and this is the best proof of validation of fairness of programme as well as data being stored inside. Sealing is also second level protection after which the Committee has to certify the EVM system as tamperproof.

**26.** The committee also gave recommendations i.e., (a) to (j) in para 3.9. Recommendation (i) in para 3.9 states that at the time of the insertion of the cable, it is formally recorded by the Presiding Officer and the polling agents, that no device has been inserted between the cable and the connector. In the evidence of the petitioner and in the letters (exhibit 6) and as argued by the learned Counsel, and as it is argued that at many places, the mock polling is unattended by the representatives of the petitioner because the name and signature of the polling agent supplied by the Returning Officer to all the booths, was found different and, therefore, the representatives were not given entry till the things were verified and set right by the Returning Officer by sending messages.

**27.** On this point, let me analyse the evidence of the Returning Officer Jyoti Kadam Bhosale . It is not disputed that she worked as a Returning Officer for the Legislative Assembly elections. She has

deposed that the copy of the report of the mock poll in respect of the polling station No.185 is marked exhibit 13 and polling station No.242 marked as exhibit 14. It shows the name of the candidates and the respective number of votes cast during the mock poll. It shows at the end that all the candidates at polling station No.185 and also polling station No.242 were certified by the Presiding Officer of 212, Parvati Legislative Assembly Constituency. Both No.185 is verified and found correct by one Koli Shivaji Chander on 15.10.2014 and in polling station No.242, it is verified by the Presiding Officer Qureshi Wahab Amir on 15.10.2014 at 6.35.

**28.** She produced the report of the mock poll in respect of 15 polling stations (in common parlance, sometimes also known as 'polling booths') of 212, Parvati Legislative Assembly Constituency, where 40 BUs and CUs were replaced by the Returning Officer and mock poll certificates issued by the Returning Officer and they are marked at exhibit 15/1 and 15/15. In the said report, on page No.2 shows the names of the candidates and page No.3 shows the names of the polling agents (column 2), names of the party (column 3), names of the candidates (column 4) and signatures of the polling

agent is mentioned in column No.5. In exhibit 14, no name of any polling agent is appearing. That means none was present.

All the mock poll certificates are prepared as per annexure XVII. The mock poll is conducted on the same day of the election but prior to the commencement of voting so that CU and BU and the connecting wire are available to representatives of all the parties for inspection and in their presence, the mock poll is conducted to show that no tampering is possible in EVM. Thus, the mock poll certificates are to be prepared and issued by the Presiding Officer of the polling station. At the end in the form, there is a typed endorsement as under:

“At the time scheduled for Mock Poll, no Polling Agent was present. ... After waiting for fifteen more minutes, I conducted Mock Poll along with other polling staff at \_\_\_\_\_AM.”

It is very much expected of the Presiding Officer to write the time and so also to score off or to keep the statement as per the attendance of the representatives of the parties. No time is mentioned. However, the representatives of two candidates i.e., MNS and BJP were present.

On page 3 of each Mock Poll Certificate, in clause 4, there is a declaration,

“I have cleared the memory of the EVM after the Mock Poll and verified that the memory has been cleared by pressing the Total button and seeing that the Total is shown as “0”.

Clause 5 mentions,

“At the time of Mock Poll, the following of Polling Agents representing the Candidates whose names mentioned against the names of such agents were present and I, have obtained their signatures.”

Clause No.6 is about Poll Start Date and Time seen on the display of CU at the time of start of actual poll ..... (To be filled in case of Post 2006 EVMs).” Then, there is a chart of the names of the polling agents; name of party; name of the candidates and signature of polling agent.

**29.** Exhibit 14 shows that on page 4, the presiding officer has scored off the sentence that the agent of only one contesting candidate was present. However, he kept the first part that at the time scheduled for mock poll, no polling agent was present and after waiting for 15 minutes, he conducted the mock poll in the presence of other officers at 6.35am.



**30. Exhibit 15 :-**

- Exhibit 15/1 – polling station No.114 – on page 3, the representatives of BJP, Shiv Sena and the petitioner's candidate were present, signed by Santosh Raghunath Punekar, the presiding officer. It was conducted at 6.15am.
- Exhibit 15/2 – polling station 82 – representatives of petitioner and Shiv Sena were present. Signed by the Presiding Officer at 6.45am.
- Exhibit 15/3 – Polling station No.56 – Representatives of Petitioner was present alongwith other candidates' representatives. Signed by the Presiding Officer at 7 am.
- Exhibit 15/4 – Polling station No.315 – Nobody's name is appearing. Signed by the Presiding Officer at 6.45 am.
- Exhibit 15/5 – Polling station No.291. Representative of Petitioner was not present. Signed by the Presiding Officer at 6.45 am.
- Exhibit 15/6 – Polling station No.68. Representative of BJP

was present however, the representative of the Petitioner was not present. Signed by the Presiding Officer at 6 am.

- Exhibit 15/7– Polling station No.300. Nobody was present  
Signed by the Presiding Officer. No time.
- Exhibit 15/8 – Polling station No.15. No Representative was present. Signed by the Presiding Officer at 6 am.
- Exhibit 15/9 – Polling station No.219A. None present.  
Signed by the Presiding Officer at 6.30 am.
- Exhibit 15/10 – Polling station No.130. None present.  
Signed by the Presiding Officer at 6am.
- Exhibit 15/11 – Polling station No.20. Representative of Petitioner was not present but representatives of BJP, Shiv Sena, NCP and MNS were present. Signed by the Presiding Officer at 6am.
- Exhibit 15/12 – Polling station No.156. Representative of Petitioner was present alongwith representatives of BJP, NCP and Shiv Sena. Signed by the Presiding Officer at 6am.

- Exhibit 15/13 – Polling station No.228. Representatives of Shiv Sena, NCP were present but representative of the Petitioner was not present. Signed by the Presiding Officer at 6.15 am.
- Exhibit 15/14 – Polling station No.37. Representative of Petitioner was not present. But representatives of BJP, NCP and Shiv Sena were present. Signed by the Presiding Officer at 6 am.
- Exhibit 15/15 – Polling station No.268. Representative of Petitioner was present alongwith the representatives of BJP and Shiv Sena. Signed by the Presiding Officer at 6.30 am.

**31.** Thus, it shows that at the time of mock poll, the representatives of the petitioner were present at some polling stations and at some places were absent. The grievance is made that due to variation in the signature of petitioner's election agent Sunil Shinde, his attendance was obstructed. Now, I will sift through the evidence of appointment of Polling Agent. The document at exhibit 16 is a letter of appointment of the polling agent where the petitioner's signature is appearing. Exhibit 16 is submitted under Rule 12(1) of Conduct of

Election Rules. The name of Sunil Shinde as election agent on 10.10.2014 is appearing. However, exhibit 17 is another document produced by the Returning Officer on which the name of the petitioner is shown and his signature is shown and the name of the election agent Sudhir Shetye is mentioned in one column and there is also a column of the signature of the election agent. Exhibit 17 is produced by Returning Officer and on that, it shows in Marathi "Parwanasathi Pratinidhi" (representative for permission) in the name of Sudhir Shetye and his signature is seen. However, Sunil Shinde is not mentioned. Exhibit 16, however, shows that the petitioner has appointed Sunil Yadav Shinde as election agent on 10.10.2014. But signature and name of Sudhir Shetye was provided in the other form. This can be explained by the petitioner only and neither Sunil Shinde nor Sudhir Shetye were examined.

**32.** The Returning Officer produced Exhibit 18. It is a form of candidates and their election agents' specimen signatures, copies of which are supplied to all the polling stations. The first column is about the name of the Candidate; 2<sup>nd</sup> column shows the specimen signature of the Candidate; the third column is about the name of their election agent and the fourth column mentions the signature of

the election agent. Copies of these forms are supplied to all the polling stations, to enable the presiding officer to verify the signature and identity of the election agent of each candidate. On this exhibit 18, the name of the petitioner and his signatures are seen and in the next column, the name of Sudhir Shetye is appearing as election agent and his specimen signature is seen in the column 4.

**33.** The Returning Officer in her evidence has stated that the petitioner has appointed Sunil Shinde as his election agent and no signature and no name of Sunil Shinde is appearing on other forms i.e., exhibits 17 and 18. She has deposed that she circulated all specimen signature of Sudhir Shetye as election agent of Abhay Chajed. She deposed that she did not remember whether she has circulated the corrected name of Sunil Shinde as election agent of the petitioner alongwith his specimen signature on Whatsapp of her cellphone. She has deposed that due to the lapse of two years, she DID not remember who has pointed out this variance in the name of the election agent from Sudhir Shetye to Sunil Shinde.

**34.** The Returning Officer was crossexamined on this point. In that, she has stated that the forms at exhibits 16 and 17 were submitted by the petitioner to the Returning Officer and exhibit 18 is

prepared by the Returning Officer. Exhibit 16 and 17 were submitted on different dates by the petitioner. She said that the person whose name is declared under Rule 12(1) on exhibit 16, is expected to sign as election agent on the form at exhibit 17, which is given to the candidate to procure the specimen signature of the election agent. However, it is found that she admitted that there is a variance in the name of the election agent Sunil Shinde as the name and signature appearing on exhibit 17 is Sudhir Shetye.

**35.** Thus, from this, it can be inferred that though the petitioner gave the name of Sunil Shinde as per the requirement of Rule 12(1) of the Conduct of Election Rules as his election agent and his signature is appearing on exhibit 16 so also the signature of the election agent that he has accepted his declaration and his signature are also appearing. However, this form is filled up on 10.10.2014. However, on the form at exhibit 17, there is no date to know as to when this form was filled up but the name and signature of the petitioner are appearing and instead of Sunil Shinde, the name of Sudhir Shetye and his signature are appearing. However, on the same form, there is an endorsement in Marathi such as “parwanasathi pratinidhi”. So, it appears that a representative was

also to be appointed to obtain some permission and for that purpose, the name of Sudhir Shetye was given and his specimen signature was supplied. It appears that there was some confusion on the part of the petitioner while filling the form at exhibit 17 and the name and signature therefore was circulated as specimen signature of Sudhir Shetye, as the election agent of the petitioner. On this basis, it cannot be said that the officers working in the election commission or the Returning Officer had deliberately misguided the petitioner. No suggestion is also put to her in her evidence. It appears that it is a bonafide mistake and subsequently, the Returning Officer had corrected it by replacing the name and signature by messaging on Whatsapp. The record shows that the representative of the petitioner was present at the polling station No.156 vide exhibit 15/12 at 6am. This shows that the representative of the petitioner was allowed in one polling station where the mock poll started at 6am. Considering the time record of all the polling stations as produced before the Court, 6am is the earliest time. As per 15/1 i.e., polling station No.114, he representative of the petitioner was present at 6.15am. Then, as per exhibit 15/12, i.e., at polling station No.8, the representative of the petitioner was present at 6.45am. Thus, this shows that no mock poll was conducted prior to 6am. The entry

given to the representative of the petitioner even in one polling station at 6am shows that the issue of signature of his election agent was either corrected or the issue was sorted out before 6am. How it was sorted out has not come up on record as PW2 the Returning Officer, did not remember it due to the time gap of two years.

**36.** One has to take into account the effect of this confusion on the polling day. The certificates of 15 polling stations alongwith polling station Nos.185 and 242 are produced disclosing the presence of representatives of each candidate. All these certificates show that some representatives of some candidates were present at some mock polls conducted at polling stations. There is not a single case where all the representatives of a particular candidate have attended the mock polls at all the polling stations. Thus, the grievance of the petitioner that only some of his representatives could enter at the polling stations because of confusion in the name of his election agent, may be true. The mock poll undoubtedly is not a mere formality but a very essential and important stage assuring that the machines are tamperproof so all the representatives of the candidates are required to be present at the mock poll. It is the duty of the presiding officer of a polling station to conduct mock poll in the



presence of the officers and in the presence of all the representatives at a particular time. However, if the representatives do not attend the mock poll in time, then, he cannot wait for long time. It is mentioned in the certificate at the end that he is expected to wait for only 15 minutes and then, shall conduct mock poll in the presence of the other officers.

**37.** On the basis of this oral, documentary and circumstantial evidence, it cannot be concluded that the representatives were obstructed for this reason. Not a single representative of the petitioner is examined to show that though he reached on time, he was not allowed only for the reason of identity of the election agent and due to variance in the specimen signature of the election agent. Further assuming, if at all they were not allowed, yet this fact itself is not enough to draw inference that due to the absence of the representatives of the petitioner, there was tampering at the time of mock poll. It is to be noted that the representatives of other candidates including the elected candidates were also not present at some polling stations. In 3 to 4 polling stations, no representative of either of the candidates was present and mock poll was conducted and certificate was issued and kept in the record. No other candidate

or representative raised objection. In the present scenario, the petitioner could establish that all his representatives were not allowed to enter the polling stations.

**38.** Let me advert to the issue of tampering of EVMs by relating to the evidence brought before the Court. It can be assessed on the basis of the report of the Expert Committee submitted on 5.9.2006. The committee has also considered the queries made by various organisations in 1990 and 2005. Two points were advanced that the machine could be tampered with and design may not be secure (trojan horse) and another, the machine denies the candidates the right to recount. In clause 4.3., the committee has said that the major advantage of the EVM developed in India is the fixed programme nature of the system. The programme is permanently fused and hence, cannot be read or tampered with even if it can be accessed from other source. Even then, as a matter of abundant precaution, the instrument may be tested by suppliers before the poll to check that it has not been replaced. An additional seal on CU, BU cards prior to candidate key allocation may be introduced to ensure that the card is not replaced.

**39.** In clause 4.4, it is mentioned about when the machine denies the right to recount. It is meted with by mentioning that the whole process is stored in memory and can be dumped through printer to get a detailed picture of voting so also the register of voters is to be maintained by the election commission in the sequence of voting. It is mentioned that the committee has stated that not only the process of recount is possible but also the verification of recount against any possible tampering is also feasible. Each role and key press is time / date stamped. This fact is corroborated with the documentary evidence i.e., the Time & Key Log at Exhibit 35 (Annexure C), the printout disclosing the time and date of the operations of various keys, that is of each voting machine.

**40.** Exhibit 4 is a final result sheet of the Election of the Maharashtra Legislative Assembly Constituency – 2014 from 212 Parvati Assembly (Part 1). In the said constituency, there are 328 polling stations. It contains details of bifurcation of the number of valid votes cast in favour of each candidate so also total rejected votes, NOTA total votes recorded in C.U. and tendered votes in the tables. The vote secured by each candidate and total valid votes are mentioned. It is form No.20 maintained under Rule 56(7) of the

Representation of People Act. This form is signed by the Returning Officer Jyoti Kadam. In all the polling stations, the total number of votes recorded were 189592, out of which 187818 are total valid votes. The candidate of Indian National Congress i.e., the petitioner got 21887 votes; the winning candidate of Bharatiya Janata Party secured 95498 votes. In between these two candidates, the candidates of Nationalist Congress Party and Shiv Sena respectively secured 26087 and 26471 votes. Thus, the petitioner was on the 4<sup>th</sup> rank. No grievance is made in respect of mock poll or manipulation of EVM by other candidates of Nationalist Congress Party or Shiv Sena or other party. The polling station No.185 Parvati is at serial No.192. The petitioner secured 52 votes; NCP got 139 votes, Shiv Sena got 132 and BJP got 206 votes. Similarly, at polling station No.242, the votes obtained are 27, 65, 82 and 168 respectively. Thus, it is clear that the difference between the votes secured by the petitioner and the votes secured by the winning candidate of BJP is approximately 73000 and as a test case, the record of polling stations, record of voters of polling station No.185 was called and was sent to Central Forensic Science Laboratory, Hyderabad.

**41.** Now, at this stage, let me deal with the evidence brought on record about the EVMs and all the voting of polling station no.185 of

Parvati constituency. The learned Counsel for the petitioner had filed Application (L) No.15 of 2017 for sending EVMs alongwith voters' register and the sequential list at polling station No.185. (Although the application was made for sending EVMs of both polling station Nos.185 and 242, the EVM of only polling station No.185 was sent.) The CEC also appeared at that time and gave say and also graciously offered full cooperation, if required. The respondents did not take objection and thus, in order to find out the truth, the application was allowed on 4.5.2017 by permitting the material i.e., the EVM with voter's register and the sequential list to be sent to the Central Forensic Science Laboratory, Hyderabad in a sealed condition. A questionnaire was sent to the Central Forensic Science Laboratory, Hyderabad, as a guideline provided in the order dated 3.5.2017 and 4.5.2017. Mr.Surya Prasad, Government Examiner of Questioned Documents and DFSS, Government of India at Hyderabad by his letter dated 19.6.2017 informed that analysis is ready and the report is also ready and requested to depute a special messenger. Thereafter, the Collector, brought the machines and report to Pune. The examination report of the Forensic Department is at exhibit 35.

**42.** The report at exhibit 35 dated 19.6.2017 discloses sealed parcels at serial Nos.1 to 3 which show C.U., B.U. and batteries. It was argued that the Electronic connecting wire was not sent, however, it was explained that the connecting wire is always attached to the B.U. and therefore, it is not treated as a separate article. The parcels were intact and sealed. In the result of the examination, it was mentioned that no additional external devices were mounted as well as no additional internal devices were embedded in the questioned exhibit. The hardware and software exhibits were tested and found that one time programmable code i.e., OTP was in working condition. The total number of votes were found 583. This tallies with form No.20 at exhibit 4 and the votes which are mentioned at polling station No.185. The polling data was shown as 15.10.2014. Polling start time was 7.11.56. When it is compared with exhibit 13, a mock poll certificate, it is found that the timing was not mentioned by the Presiding Officer. It was only mentioned that the actual poll start time was mentioned as 7.10. It was mentioned that the Control Unit was scanned through electro magnetic detector TDK-RF Solutions, EMI test for identification of any foreign body like Bluetooth, Wireless Fidelity (WiFi), Infra Red (IR) embedded in the Control Unit. The Spectral analysis of electromagnetic detector

reveals that no such devices were embedded in its Control Unit. The hard copy of the Electromagnetic Detector spectrum both OFF and On condition of Control Unit is given and produced and is marked exhibit B. The Control Unit was found to have provision to store last 100 votes and no evidence of any tampering or accessing the data was detected. It is opined as follows:

“(g) The exhibit control unit bearing serial number G 02053 marked Ex-CU1 and exhibit ballot unit bearing serial number J27793 marked Ex-BU1 were forensically analyzed and found that they are stand-alone, non-networked. One Time Programmable (OTP) machine, which is neither computer controlled externally nor could be connected internally or to any network. Hence, it is opined that no evidence of tampering, altering or any other manipulation could be detected.”

(Emphasis applied)

**43.** The learned Counsel for the petitioner by filing Application (Lodging) No.18 of 2017, requested for production of two documents i.e., Voters' Register and Sequential List. In para 1, a question was put to the Returning Officer Jyoti Kadam as to whether any application was made by the petitioner to her for correction in the name of his election agent at the polling time. The answer was no such application was made for correction of the name of the election agent.

**44.** I have taken note of section 94 of the Representation of People Act, which states that secrecy of voting not to be infringed and no witness or other person shall be required to state for whom he has voted at any election. However, in the present case, the petitioner chose to examine nearly 52 witnesses who stepped in the witness box and they themselves voluntarily have stated to whom they voted for. Nobody can be asked to give evidence and to disclose his choice of the candidate as in India, the secret ballot system is followed. However, this bar or rule does not operate against the voters who themselves voluntarily want to disclose their choice of the candidate and therefore, some persons voluntarily came before the Court as witnesses and disclosed that they have voted for most of them for the petitioner.

**45.** The documents which were asked for and marked exhibits in the examination in chief of the Returning Officer, were directed to be produced before the Court. This documentary evidence was discussed and the documents can be listed herein to recapitulate the evidence. They are: letter dated 19.10.2014 (exhibit 5A), letter dated 16.8.2014 (exhibit 6A), Copy of report of mock poll in respect of polling station 185 (exhibit 13) and polling station 242 (exhibit 14),



Reports of mock poll in respect of 15 polling stations of 212, Parvati Legislative Assembly Constituency (exhibit 15/1 to 15/15), letter of appointment of polling agent (exhibit 16), specimen signature of petitioner and election officer Mr.Sudhir Shetye (exhibit 17), specimen signature of all the candidates and their election agents (exhibit 18), etc. These documents were brought on record and copies supplied to both the parties. However, sequential list and voters' register are the confidential documents on the basis of which, the fact as to who voted for whom, is traceable, were kept with me in a sealed condition and the learned Counsel and the parties, regarding the principle behind section 94 the Representation of People Act, also did not press for the disclosure of the same.

**46.** On this point, it is useful to refer to the evidence of Returning Officer who threw light on the sealing of the machines and storage of the machines in the godown before the election. She has stated that VVPATs were not used but only EVMs were used. She has stated that as a Returning Officer she had checked whether the EVMs provided for the said constituency were in working condition and properly maintained or not. She admitted that she is not personally aware whether EVMs were approved by the Election Commissioner

or any committee of experts. She has said that prior to voting, she has verified the status of all the EVMs that they were showing 'zero'. She has also checked the EVMs in the presence of candidates, election agents, observers, media people on a scheduled date prior to the election and all the EVMs were found okay. After checking, the machines were sealed and kept in the godown. The record discloses the godown was also sealed and it was under the surveillance of CCTVs and the Central Reserve Police Force guards were deputed. This activity was done on 5.10.2014 to 6.10.2014 in a Government godown and after its sealing on the same day, all the EVMs were to be shifted to the strongroom at Koregaon road and thereafter on 13.10.2014, they were to be kept in a badminton hall of Kataria high school and they were to be sealed and then the strongroom was to be sealed. Then, on 14.10.2014 at 7am, the strongroom was to be opened and all the EVMS were to be sent to respective polling stations and the Returning Officer has asked the candidates to send their representative.

**47.** Returning Officer was questioned in respect of receipt of the complaint dated 19.10.2014 i.e., exhibit5 and she said that she replied to that by letter dated 20.10.2014 and informed that she could

not take steps because the complaint was not supported with concrete evidence and, therefore, she disposed of the said application.

**48.** The petitioner has filed the affidavit which is marked exhibit 19 wherein they have stated that they are the voters of Parvati constituency and their names are appearing in polling station 242 and they voted in room No.3 of Aranyeshwar Mandir, Sahakar Nagar, Pune and they all have voted for the petitioner. However, from the polling station No.242, the Indian National Congress has received 27 votes and the persons who have voted for Indian National Congress in reality, are more than 27 votes.

**49.** The petitioner has raised issue that though many voters had pressed the button of the symbol “palm” (“panja” in vernacular, as used by the witnesses), the actual result did not tally with their oral evidence. To prove this fact as a test case, he has examined the witnesses PW3 to PW54. All these witnesses are from one constituency and they claimed they voted in the Assembly elections and all of them have said that they voted for either the petitioner or his symbol “Palm” (panja). All the witnesses have mainly stated that they went to polling station No.242 and voted in the constituency for

assembly election on 15.10.2014 for Indian National Congress i.e., Palm (panja) symbol.

**50.** Exhibit 19 is the copy of the affidavit dated 30.11.2014 signed and affirmed by the voters from polling station No.242. Exhibit 19A is the original affidavit on stamp paper dated 30.11.2014 of polling station No.242. Exhibit 20 is the copy of the affidavit dated 30.11.2014 signed and affirmed by voters from polling station No.185. Nearly 120 persons signed their names and stated that they are voters from Parvati Constituency and their names were mentioned in polling booth No.185. They have voted in Room no.3, Gandhi Adhyapak Vidyalaya, Sahakarnagar, Pune and have voted for petitioner by pressing the button in front of “panja”. It was stated further that from polling booth No.185, Indian National Congress party received only 52 votes, however, the persons who have voted for Indian National Congress, are far more than the actual votes counted as 52.

**51.** Exhibit 20A is the original affidavit with the signatures. Many of them have put thumb impressions on exhibits 19A and 20A. Thereafter, exhibits 21 to 31 are the affidavits of the witnesses wherein they have stated that they have voted for Indian National

Congress from polling booth No.185 in 212, Parvati Legislative Assembly Constituency. Besides this, the persons gave the affidavits (exhibits 21 to 31) as witness Nos.3 to 54 are examined. All the witnesses have mainly stated the something that they have voted for 'panja'. They have also stated that they pressed the button in front of the symbol "panja". Most of them identified their signatures or thumb impression in the affidavit. However, some of them like witness No.13 Avale Vilas Baburao has denied that he made the affidavit and put the signature or thumb impression. He also stated that the contents in the affidavit were not explained. PW14 Prabhu Rama Aavle, PW 15 Bharti Prabhu Aavle also denied putting signatures or thumb impressions.

**52.** However, PW16 Suman Haril Aavle, admitted that she put the thumb impression on the affidavit. PW17 Chhaya Rajesh Aavle similarly admitted that she signed the affidavit. PW23 Shakuntala Prameshwar Londe stated that she casted her vote for Panja. She admitted that her signature is appearing on exhibit 20(exhibit 20A). Similarly, PW24 Salu Bhagwan Kendale, PW25 Nagarbai Sankar Gayakwad also admitted that they signed exhibit 20. PW34 Krushna Limbaji Kamble admitted that she voted for Panja and she identified

her signature on the exhibit 20. PW37 Surekha Datta Kamble admitted that she signed exhibit 20. PW40 Swati Malhari Pandgale also admitted that she voted and signed on exhibit 20. Like these witnesses, in the same manner, all the witnesses have deposed and corroborated that they voted for Indian National Congress party.

**53.** In the cross-examination, the learned Counsel for the respondents tried to demolish the evidence by asking questions that they have no proof to show that they have voted in the Assembly elections and none of them had proved that in fact they voted on that day or not.

**54.** Such proof is also not possible after 2 to 3 years. A question was also put to them about their capacity to read and write the affidavits and some of them have admitted that they are illiterate and therefore, they themselves did not read the affidavits but were read over to them. However, all of them did not admit that they did not vote for Indian National Congress in the election.

**55.** One Application (L) No.18 of 2017 was made with prayer that Central Forensic Science Laboratory, Hyderabad is to be directed to produce and provide a detailed voting or sequential printout which is

“DATE – TIME – STAMP recorded in the chip” with the assistance of M/s.ECIL, if required. This application was allowed and accordingly exhibit 40 is the sealed envelope containing sequential printout of polling station Nos.185 of 212, Parvati Legislative Assembly Constituency.

**56.** In order to test the veracity of the witnesses, Exhibit 40 was opened by me with a view to ascertain whatever stated by the witnesses about the voting to Indian National Congress party and their actual voting tallies or not. The process of actual voting is required to be taken into account. When the voter enters the polling booth and tells his name and also his electoral number, his name is written by the attending staff of the Election Commission in the voters register, which is maintained under Form 17A. Then, the name is written by the attending staff in the Register which is required to be maintained as per Election Rules i.e., Form No.17A. After writing the name, the staff asks the voter to sign on the register. The voter signs the register, indelible ink is put on the finger nail and thereafter, he goes to the machine where he is supposed to vote. As soon as he presses the button. After pressing the button, there is a beep sound, which gives the signal that the vote is recorded and only then, the

other voter is allowed to go and vote his vote. At that time it gets recorded and the vote is registered and recorded from the BU to CU. This data is not available to anybody because it is a secret ballot system. However, the data can be retrieved from the machine, if such order is passed. In the present case, the Returning Officer was directed to produce this retrieved data and this retrieved data is called the Sequential List, which is exhibit 40. This list shows that as per the sequence, the votes are registered as per the voters register (exhibit 37), which is maintained under Form 17A.

**57.** The voting register gives the serial number in column 1, then the name of the candidate is written; thereafter the Constituency number and the last column is the signature column. Thus, when a voter appears before the staff of the Election Commission and he writes the name and signature, all these names appear as per serial numbers. So, for example, if the number of voters, who have come for voting is 300, the numbers and not the names of the persons will appear from 1 to 300 in the sequential list. The EV machines have inbuilt programme of the serial numbers 1 onwards as mentioned in column 1 of the Voters Register under Form 17A. The Code numbers of each contesting candidates are also programmed and that in-built



programme is already fed to the computer and thus, as soon as the voter at serial No.1 presses button, the timing will be registered. This programme will follow the time sequence and the serial numbers of the voters as 1, 2, 3...., who comes and votes, is recorded as per the serial and time sequence. This data gets recorded in the machine and it can be retrieved.

**58.** As said above, the Sequential List (exhibit 40) was tallied on the basis of the voters' register (exhibit 37) which is mandatorily maintained by the Returning Officer. In the present case, on the basis of the sequence, the identity of the voter can be fixed after tallying the sequential list with the voters register and then, it can be traced as to who has voted for whom. When it was compared with, it is found that though some witnesses have stated that they have voted for Indian National Congress, in fact they have voted for other party and not Indian National Congress i.e., the symbol of "panja".

**59.** The witness is under moral as well as legal obligation to speak the truth. However, disregarding the sanctity of oath, the witnesses on oath may lie. Their evidence is to be sifted, weighed and if found reliable, then only can be believed. Most of the witnesses who are examined before the Court are from the category of illiterate voters.

Hardly, anybody was educated. It is not that a person who is an illiterate, will not speak the truth. However, education makes a difference in understanding the issue. A majority of them who have stated that they have voted for Indian National Congress, is found correct after comparing it with the Sequential List printout (exhibit 40) and Voters' Register (exhibit 37). However, it is found that some witnesses actually did not vote and lied. There is a possibility that they would have come from Pune to Mumbai only as a free trip or would have succumbed to the peer pressure or for any other reason. Thus, the number of witnesses examined and who have stated that they have voted for Indian National Congress party and the number of votes which were actually secured by the Indian National Congress party i.e., the petitioner, as found in exhibit 40, anyhow did not cross the number 52. The sequential list printout showed that 52 persons have voted for Indian National Congress and, therefore, the case of the petitioner cannot be accepted due to the discrepancy between the persons, who stated that they voted for Indian National Congress and the actual votes received by the party. It is not established that the witnesses who have stated that they have voted for Indian National Congress party, have really voted for it. Some of them have lied and therefore, the petitioner was misguided and could

not discharge the burden to prove that EV Machines were faulty and were not receiving the signals when a button is pressed by the voters and votes were transferred to some other candidate. On this point, the learned Counsel for respondent No.1 relied on the judgment of **Dr.Subramanian Swamy vs. Election Commission of India (supra)**.

**60.** Alongwith exhibit 35, annexures A, B and C are received. Annexure A is the breakup of the votes received by all 15 candidates of poll date 15.10.2014 and obviously of polling booth No.185, which was sent to Central Forensic Science Laboratory. The petitioner is the candidate 1, who has received 52 votes. He examined 54 witnesses. Candidate 2 has received 139. Candidate 3 received 33 votes and Candidate 4 has received 132 votes.

**61.** Annexure B is a sweep settings screen A. This is regarding testing of EVMs and has reference to EVM power ON and power OFF. Annexure C is the printout of the chart under three heads, namely, date, time and event of working of the particular EVM from polling booth No.185, which was sent to Central Forensic Science Laboratory and which was tested in the Forensic Laboratory. This is a sample case chosen by the petitioner. Let me analyse the said

evidence. The dates given are different in this chart. This is from month of April, May, June, August and October. So, it appears that in these months and on those dates, the machines were operated. Under the second heading, the timing is mentioned with precision of hour, minutes and seconds. In the third heading, i.e., 'Event', the functions of the EVM for which it was operated is also mentioned. The functions which are given are required to be explained. They are of different operations i.e., 'Power Off', Print Key, Total Key, Result Key, Close Key, Clear Key, Candidates Set Key. which are mentioned a number of times under this caption of Event. The machine was put to the function on many occasions during these months. This was mainly to see the operation and also keeping it in working condition. My attention was drawn to 2 - 3 dates which are very important. On 19.4.2014, Candidate Set Key was used. On the same day, at 00:00:00 hours, the Candidate Set Key was used. Thereafter, the Candidate Set Key was used on 19.8.2014 at 14:34:29 and again at 14:46:39. Again on 27.8.2014, at 16:36:16, the Candidate Set key was used. Thereafter, on 5.10.2014, at 17:37:42, the Candidate Set Key was used. The election day was 14.10.2014. Thus, after 5.10.2014 till 15.10.2014 and thereafter, on 15.10.2014 and 19.10.2014, the Candidate Set Key was not used.

However, it shows that on 15.10.2014, the machine was operated at 6:18:29 in the morning. Result Key was used thereafter on the same day at 6:18:29. There was a Total Key used at 6:18:40. At 6:19:36, it was a Close Key. At 6:20:37 again Result key. At 6:24:05, there was a Clear Key used. At 6:31:29, the Total Key and at 6:36:32, the Power Off key was used. Again, at 7:4:38, there was a Total Key. Also, at 7:12:39, the Total Key and the last on 15.10.2014, at 18:05:21, the Power Off key was used.

**62.** Thus, it shows that at 6:18:29 in the morning, the mock trial was conducted and the machine till evening at 18:03:58, was in operation. The power was OFF at 18:5:21 hours. This documentary evidence corroborates the evidence of the Returning Officer.

**63.** The second angle to the difference shown after random verification is also required to be discussed on the basis of submissions made by the learned Counsel for the petitioner raising point of absence of use of VVPAT. The judgment of the Supreme Court in the case of **Dr.Subramanian Swamy (supra)** is relied on by both the parties. The judgment directly emphasises the necessity and importance of use of VVPATs in our democratic country. The learned Advocate Mr.Kale for the respondent has submitted that the

judgment is delivered on 8.10.2013 by the Supreme Court and, therefore, the Supreme court was dealing with the issue about elections which had taken place in 2009. Therefore, the EV machines which were used in the Parliamentary or Assembly polls of 2009 were to be considered and the issue of use of EV machines before this Court is of Assembly Elections of 2014 i.e., after the judgment. He has argued that thereafter, these EV machines were used with ultimate precaution and they are tamperproof. Furthermore, it is not the case that in Assembly Elections in only Pune or only Maharashtra of 2014, the VVPAT units were not attached and not used. Thus, it is not the case that prejudice is caused and possibility of manipulations existed in the elections in Maharashtra only. He pointed out that all over India, VVPAT units were not attached to the EV machines.

**64.** Discussed earlier, as there is a possibility of voters lying on oath, similarly, a possibility of hacking of electronic gazettes cannot be overruled. In the judgment of **Dr.Subramanian Swamy (supra)**, the appellant in the Writ Petition has prayed for writ of mandamus directing the Election Commission of India to incorporate the system of paper train / paper receipt in the EV machines, which is a

convincing proof that a vote cast by a voter is a candidate of his / her choice is rightly registered or not. The VVPAT system supplements the procedure of voting, when a voter casts his or her vote, by pressing a button, the voter sees a light and his vote is registered and the data accordingly gets stored, even as the voting continues. Thus, it is an understanding of casting of vote virtually. However, by use of VVPAT, as soon as a button is pressed, light gets on and his/her vote is registered in the machine and simultaneously the voter gets a paper trail / slip from the machine showing the name or symbol whom he has voted for. Thus, this is a tangible / real proof of his/her act of voting. Voter can verify and confirm his/her own voting. The Representation of People Act, 1951 and the Rules framed thereunder i.e., the Conduct of Election Rules, 1961, are relied on by the learned Counsel for the petitioner. It is true that earlier, in the year 1950, there was no use of machines but it was an old method where voters used to put stamp on a symbol of his / her choice on the ballot paper. However, after the amendment, section 61A was inserted by the Act of 1989 w.e.f. 15.3.1989 which states about the use of voting machines at elections. Voting machines are explained as any machine or apparatus for giving or recording of votes. Responding to the astonishing technological development, the

Legislature has amended the Act and inserted section 61A. This has really reduced the use of manpower, preparation, distribution and manual counting in respect of ballot papers and also the votes. In consonance with section 61, Rule 49 was amended to a great extent. Rule 49 speaks about voting by ballot at notified polling stations. In the said section, Chapter II was inserted by amendment on 24.3.1992 and Rules 49A to 49X were added. These rules were framed for voting by EV machines.

**65.** Let me refer to the judgment of the Supreme Court in **Dr.Subramanian Swamy (supra)**, wherein the Supreme Court with the assistance of the petitioner and also the Election Commission of India has considered many affidavits and reports in respect of use of VVPAT. The reports of the technical experts committee i.e., Bharat Electronics Ltd. (BEL) & the Secretary of Electronics Corporation of India Ltd. (ECIL) were placed before the Supreme court. After various hearings before the Supreme Court, an affidavit dated 1.10.2013 was filed by the Election Commission of India placing on record the result of introduction of VVPAT system in the by-election from 51-NOCSEN (ST) assembly constituency of Nagaland for which the poll was conducted on 4.9.2013, wherein the VVPAT system was



being used for the first time in India by Election Commission of India. The Election Commission of India in the said case before the Supreme Court has informed that at the relevant time, if the VVPAT systems are to be used with all 13 lakh EV machines available, the total cost for purchase of VVPAT units may come about Rs.1,69,000 crores as the cost of a unit may come approximately to Rs.13,000/-.

**66.** It appears that the ECI and the Ministry of Law and Justice both have expressed a very positive approach which is manifested when the Ministry of Law and Justice notified the amendment to the Conduct of Election Rules 1961 in the Gazzette of India vide notification No.S.O.2470(E):MANU/LEGL/0005/2013 dated 14.8.2013 to enable use of VVPAT with EV machines. Pursuant to the said notification, amendment in Rule 49A to 49(X), 55(C), 56C, 57C and 66A were amended. Rule 49 and Rule 49A as amended are as follows:

“49

...

Provided that a printer with a drop box of such design, as may be approved by the Election Commission, may also be attached to a voting machine for printing a paper trail of the vote, in such constituency or constituencies or parts thereof as the Election Commission may direct.”

“49E. Preparation of voting machine for poll. - (1) The control

unit and balloting unit of every voting machine used at polling station and the printer for paper trail where used, shall bear a label marked with -

- (a) the serial number, if any, and the name of the constituency;
- (b) the serial number and name of the polling station or stations, as the case may be;
- (c) the serial number of the unit; and
- (d) the date of poll.

(2) Immediately before the commencement of the poll, the presiding officer shall demonstrate to the polling agents and other person present that **no vote has been already recorded in the voting machine and it bears the label referred to in sub-rule (1), and where the printer for paper trail is used that the drop box of the printer is empty.**”

(emphasis added)

**67.** Rule 56D is about Scrutiny of paper trail and Rule 57C states about sealing of voting machines. All these amendments came into effect w.e.f. 14.8.2013. They are as under:

56D. Scrutiny of paper trail.- (1) Where printer for paper trail is used, after the entries made in the result sheet are announced, any candidate, or in his absence, his election agent or any of his counting agents may apply in writing to the returning officer to count the printed paper slips in the drop box of the printer in respect of any polling station or polling stations.

(2) On such application being made, the returning officer shall, subject to such general or special guidelines, as may allow the application in whole or in part or may reject in whole, if it appears to him to be frivolous or unreasonable.

(e) Every decision of the returning officer under sub-rule(2) shall be in writing and shall contain the reasons therefor.

(4) If the returning officer decides under sub-rule (2) to allow counting of the paper slips either wholly or in part or parts, he shall -

(a) do the counting in the manner as may be directed by the

Election Commission;

- (b) if there is discrepancy between the votes displayed on the control unit and the counting of the paper slips, amend the result sheet in Form 20 as per the paper slips count;
- (c) announce the amendments so made by him; and
- (d) complete and sign the result sheet.”

57C. Sealing of voting machines. - (1) After the result of voting recorded in a control unit has been ascertained candidate-wise and entered in Part II of Form 17C and Form 20 under rule 56C, the returning officer shall reseal the unit with his seal and the seals of such of the candidates or their election agents present who may desire to affix their seals thereon so however that the result of voting recorded in the unit is not obliterated and the unit retains the memory of such result and where printer for paper trail is used, the returning officer shall seal the paper slips in such manner, as may be directed by the Election Commission.

(2) The control unit and the paper slips so sealed shall be kept in specially prepared boxes on which the returning officer shall record the following particulars, namely:-

- (a) the name of the constituency;
- (b) the particulars of polling station or stations where the control unit has been used;
- (c) serial number of the control unit and printer wherever used;
- (d) date of poll; and
- (e) date of counting.”

**68.** The Supreme Court has finally given directions about the use of VVPAT as follows:

“28. Though initially the ECI was little reluctant in introducing “paper trail” by use of VVPAT, taking note of the advantage in the system as demonstrated by Dr. Subramanian Swamy, we issued several directions to the ECI . Pursuant to the same, the ECI

contacted several expert bodies, technical advisers, etc. They also had various meetings with National and State level political parties, demonstrations were conducted at various places and finally after a thorough examination and full discussion, VVPAT was used successfully in all the 21 polling stations of 51-Noksen (ST) Assembly Constituency of Nagaland. The information furnished by the ECI, through the affidavit dated 01.10.2013, clearly shows that VVPAT system is a successful one. **We have already highlighted that VVPAT is a system of printing paper trail when the voter casts his vote, in addition to the electronic record of the ballot, for the purpose of verification of his choice of candidate and also for manual counting of votes in case of dispute.**

(emphasis applied)

29. From the materials placed by both the sides, we are satisfied **that the “paper trail” is an indispensable requirement of free and fair elections. The confidence of the voters in the EVMs can be achieved only with the introduction of the “paper trail”. EVMs with VVPAT system ensure the accuracy of the voting system. With an intent to have fullest transparency in the system and to restore the confidence of the voters, it is necessary to set up EVMs with VVPAT system because vote is nothing but an act of expression which has immense importance in democratic system.**

(emphasis applied)

**69.** On query to the learned Counsel appearing for Election Commission of India, who appeared in the present petition at the time of sending of the machines to the Forensic Laboratory, I found it is necessary and useful to ask the Election Commission of India that as on today, how far the orders of the Supreme Court regarding the use of VVPAT are implemented.

**70.** The learned Counsel for the Election Commission of India has informed the Court that till today, in Gujarat Assembly polls of 2017,

VVPAT apparatus was provided to all the EV machines. Though earlier, the VVPAT was not used in any Parliamentary elections. He submitted that the Election Commission of India will use EV machines alongwith VVPAT apparatus in the next Parliamentary as also the Assembly elections in future.

**71.** In a country like India, democracy keeps the nation alive. Elections are a vital and an integral part of any democracy. For this, a free and fair election process is essentially a lifeline. Therefore, it is the obligation of the State, especially the welfare State to assure a transparent and non-corrupt system for the same.

**72.** Thus, the use of VVPAT apparatus will be a step towards provision of tamperproof EV machines. Therefore, principally, the submissions made by the learned Counsel for the petitioner on the use of VVPAT, are accepted. However, I am fully aware that the proceeding before this Court is not under the writ jurisdiction but is under the Representation of People Act where election of one Legislative constituency is challenged and specifically under section 100 of the Representation of People Act praying that the election is to be declared void. At this stage, issue No.(iv) that whether election of respondent No.1 from 212, Parvati Legislative Assembly

Constituency is to be declared void, can be answered easily on the background of the earlier discussion. Section 100 reads as under:

“100. Grounds for declaring election to be void.—

(1)

(a) ...

(b) ...

(c) ...

(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 5[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.

....”

**73.** Admittedly, there is no use of VVPAT though the Rules are amended. However, as observed by the Supreme court, the Election Commission of India has assured that there will be phasewise use of VVPAT in view of the financial burden and technical availability. Thus, under the circumstances, it cannot be said that there is non-compliance with the provisions of the Rules or orders, by the Returning Officer or by the ECI.

**74.** It is not the case that only in Maharashtra or Pune VVPAT devices were not used but all over India, till today, the Election

Commission of India could not incorporate VVPAT system in the Parliamentary or State Assembly Elections. Moreover, the words used in section 100(d) are the result of election has been “materially affected”. It is not only “affected”. The adjective “materially” has been used and is required to be proved with sufficient evidence.

**75.** The petitioner has not made personal allegations against the respondent No.1, the elected candidate. No charges are made about hacking machines administration of mal-practices or use of threat, muscle power or vote purchasing, etc. The petitioner appears to be fair and balanced in not making baseless and irrelevant allegations against the elected candidate 1. The petitioner has in fact challenged the election machinery and the voting system and the use of Electronic Voting machines without VVPAT. Thus, though the main contesting party was the elected candidate, who would have been a sufferer of the fall-out of the decision of this case, the main grievance was against respondent No.3, the Election Commission of India. However, the Election Commission of India who appeared through its Counsel, rendered all necessary assistance and furnished the required information.

**76.** Thus, considering the entire evidence tendered before the Court, I answer the issues as follows:

- |    |                |   |          |
|----|----------------|---|----------|
| 1) | Issue No.(i)   | - | Negative |
| 2) | Issue No.(ii)  | - | Negative |
| 3) | Issue No.(iii) | - | Negative |
| 4) | Issue No.(iv)  | - | Negative |

**77.** The difference between the votes of the returned candidate and the elected candidate is of 73611 votes. Thus, the evidence is not sufficient to hold that the because of non-compliance of the Rules or because of the use of EV Machines or due to the change in the name and signature of polling agent, the case of the petitioner is materially affected to declare the election to be void and the petition fails. Accordingly, the petition is dismissed.

**78.** In view of the dismissal of the Election Petition, all the connected Applications filed in it are also dismissed.

**79.** I appreciate Mr.Vishwajeet Sawant, Mr.Prabhakar Jadhav, Mr.Vishal Kale and Mr.Amey Deshpande, who have worked on the issue for a long time and assisted the Court.

**(MRIDULA BHATKAR, J.)**