

IN THE HIGH COURT OF BOMBAY AT GOA

**APPLICATION IN ELECTION PETITION NO.9 OF 2017
AND
ELECTION PETITION NO.1 OF 2017**

Michael Vincent Lobo,
Son of Vincent Lobo,
Aged 40 years, Indian National,
Businessman, residing at
House No.181/15, Bhattivaddo,
Parra, Bardez, Goa.

... Applicant

Versus

1. Joseph Robert Sequeira,
Son of Robert Sequeira,
Aged 56 years, businessman,
Residing at House No.1/196,
Gaurawaddo, Calangute, Bardez, Goa.

2. Godwin Fernandes,
Son of Gorgonio Fernandes,
Aged 34 years, residing at
H.No.108/4, Near Roman Chambers,
Porbawaddo, Calangute, Bardez, Goa.

3. Returning Officer,
08, Calangute Constituency,
Office of Block Development Officer Bardez-I,
Government Office Complex,
Mapusa, Bardez, Goa.

... Respondents

Shri Pankaj Pai Vernekar, Advocate for the Applicant/Original
Respondent.

Shri P.A. Kamat, learned Advocate of the Original petitioner.

Coram : NUTAN D. SARDESSAI, J.

**Reserved on : 28th February, 2019
Pronounced on : 07th June, 2019.**

ORDER :

1. The original respondent being the successful candidate at the last assembly elections whose election has been challenged by the petitioner seeks a summary rejection / dismissal of the Election Petition under Section 83 of the Representation of People Act, 1951 read with Order VII Rule 11(a) and (d) CPC, 1908 or principles analogous thereto.

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

3. The applicant sought for a summary dismissal of the Election Petition for failure to disclose a cause of action inasmuch as in terms of Section 83 of the Representation of People Act, 1951('Act', for short hereinafter), an Election Petition was required to contain a concise statement of material facts upon which the petitioner relied and also to 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 date and place of such corrupt practice. The petition neither contained a statement of material facts nor did

it set out any particulars whatsoever of the corrupt practices, which are alleged in the petition. One of the grounds canvassed for assailing the election of the applicant was that the Returning Officer had allegedly acted with favourable bias towards the applicant and arbitrarily refused to order a recount of the votes polled in the Electronic Voting Machines (EVMs) of all the booths of the 08-Calangute Constituency and also refused to compare the same with the paper trail votes. There was a gross mismatch between the total number of votes polled and the votes found recorded in the EVMs in all the booths of the Calangute Constituency.

4. Rule 63 of the Conduct of Election Rules, 1961, prescribed that an application by any candidate to the Returning Officer to recount the votes had to be necessarily in writing and the same was required to state the grounds on which the recount was demanded. There were no averments whatsoever that the petitioner had made such a written application to the Returning Officer as required by Rule 63 and in the absence of a statement to that effect, no cause of action was made out against the applicant. On the contrary, the petitioner had made an averment in his

petition that his election agent made an oral request of recount to the Returning Officer in terms of Rule 63(2) of the said Rules which was not at all understandable.

5. It was further the case of the applicant that no details whatsoever were substantiated with facts and figures in support of the allegation that there was a gross mismatch in the number of votes actually polled and those recovered in the EVMs. The material facts and material particulars in support of the averments in the petition were missing. Another ground canvassed in the petition was that the applicant as the Chairman of the North Goa Planning and Development Authority (NGPDA) had offered and promised to the electors/voters to regularize their illegal structures and grant them favours by conversion of their lands from agricultural/orchard into Settlement Zone and increasing the Floor Area Ratio (FAR) for their structures. It was further alleged that one Fermino Fernandes was nominated by the applicant on the sub-Committee of the NGPDA for preparation of Land Use Map and ODP and that the said Fermino Fernandes was one of the main persons campaigning for the applicant and giving assurances to the voters that their illegal constructions would be regularized by

the applicant after the elections.

6. There was also an allegation that the Member Secretary of NGPDA Rajinder Pandita was also guilty of having committed corrupt practice since in his capacity as the Member Secretary of the NGPDA, he had issued approvals/ development permissions on the basis of the Draft Outline Development Plan (ODP) of Calangute- Calangute,2025. There was no averment to the effect that the said Fermino Fernandes, Antony D'Souza or Rajinder Pandita had committed the aforesaid corrupt practices (as alleged) with the consent of the applicant. The names of the voters to whom the alleged promises were given by the said Fermino or Anthony or the dates when such promises were given, had not been stated in the petition nor was there any averment in the petition that the electoral prospects of any particular person were materially affected thereby and to what extent and in what manner. All these material facts were required to be pleaded by the petitioner in support of his case.

7. The petitioner had taken another ground that the applicant was the Founder Member and Office bearer of a social organization

named Parra Citizens Forum Association and through it, the applicant had collected huge amounts of money from builders and others and this money was being used for the elections to influence the voters. Another office bearer of the said Forum named Anil Morajkar, had campaigned for the applicant in Parra Village as well as other places, seeking votes for the applicant and influencing the voters by distributing large amounts of money in cash. Even as regard this alleged corrupt practice it had not been averred by the petitioner that the said Anil Morajkar and others were acting with the consent of or upon the instructions of the applicant and that the electoral prospects of any person had been materially affected thereby. Even insofar as the allegation regarding collection of money from a builder and distribution of money amongst voters is concerned, there was no pleading as to the dates on which and at what time the tainted money was distributed, the builders from whom it was collected and who were some of the voters for Parra who purportedly informed the petitioner about the alleged incidents of distribution of money. It was otherwise alleged that the applicant was holding an office of profit at the relevant time, by virtue of being the Chairman of the NGPDA. However, as a matter of fact, the Goa Members of

Legislative Assembly (Removal of Disqualification) Act, 2005 has been enacted by the Goa State Legislative Assembly, in order to exempt the holders of the offices of the Chairman of the PDS from being disqualified on the ground of holding an office of profit. This was without prejudice to the fact that the applicant had resigned from the said post prior to the date of filing his nomination papers. However in the face of such a statutory protection, the petitioner had failed to show how the applicant still continued to attract the disqualification in the absence of any averment in the petition.

8. The petitioner had also alleged in his petition that the preparation of the ODP was a malafide exercise devised by the applicant in order to influence the voters keeping in view that the Goa State Assembly election would be declared sometime in the months of February/March, 2017. Even insofar as this allegation was concerned, the petitioner has admitted that the notification in question was issued on 23/11/2016, which was prior to even the declaration of the elections and the date of filing of the nomination papers by the applicant. No corrupt practice whatsoever was made out nor any cause of action was revealed against him. There was also an allegation that the applicant had purportedly tried to

get votes from the voters belonging to the Banjara community by allegedly constructing an illegal temple for them. It was further alleged that he had brought persons from outside Goa and illegally registered them as voters in the Calangute constituency. No details of such illegal voters, time/period when such voters were allegedly brought to Goa and registered as voters had been spelt out. The material facts which were primary and basic facts and which must be pleaded in the petition, were clearly missing. The Election Petition was liable to be dismissed summarily on the ground that the material documents on which the cause of action was based and upon which the petitioner was suing, had not been produced alongwith the petition. Therefore, the verification of the pleadings was not as per the prescribed procedure and the supporting affidavit also did not disclose the source of information. The petition also suffered from misjoinder of parties and misjoinder of causes of actions and was liable to be dismissal also on that ground and liable for rejection.

9. Heard Shri P. Pai Vernekar, learned Advocate for the applicant who contended that the disqualification was sought of the applicant on the ground of holding office of profit as the Chairman

of the NGPDA and having committed corrupt practices. It was his contention that material facts and material particulars were not pleaded in support of the corrupt practices. Material documents were not also produced with the Election Petition in terms of Order VII Rule 14 CPC. The Petition under Section 100 (1)(d) had to plead and show that the result of the election was materially affected due to the corrupt practice. The verification of the pleadings was also in accordance with the Act and Rule. The applicant had filed his nomination on 16/01/2017 and any liability for electoral wrong was only after the filing of the nomination. He adverted to the Goa Members of Legislative Assembly (Removal of Disqualification) Act, 2005 and Section 2(26) in particular to submit that there was clear immunity to the applicant from disqualification. The petitioner had not produced the resignation letter which was a material document. The pleadings in the matter of the allegation of the corrupt practices were vague and material documents and complaints were not produced on record. There was also an oral application unlike Rule 62(2) of the Conduct of Election Rules which required a written application to be submitted for recounting of votes. Shri P. Pai Vernekar, learned Advocate further contended that there was no disclosure of the

names of the voters or any material to show that the result of the election was materially affected. He adverted to Section 83 the Act and submitted that there was non-compliance therewith. There were no details of various allegations made against the applicant and in fact one of the allegations was based on the information which was contrary to the verification wherein the petitioner had stated the fact to be true to his own knowledge. It cast a serious doubt about the verification. Insofar as the so called agents were concerned namely Fermino Fernandes and Antony D'Souza, it was his contention that they were not the election agents of the applicant and nor was it the petitioner's case that the said persons had done any act with the consent or on the instructions of the applicant. He place 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], **P.A. Aziz V/s. K.V. Thomas** [2015 (1) KLJ 462], **C.P. John V/s. Babu Palissery & Ors.** [(2014) 10 SCC 547], **Pandurang Madkaikar v/s. Xavier Fialho** [Aelep No. 11 of 2017 & Elep No.5 of 2017] and Civil appeal No.9207 of 2018 and **Ram Sukh and Dinesh Aggarwal** [(2009)10 SCC 541] and pressed for the rejection of the petition.

10. Shri P.A. Kamat, learned Advocate for the original petitioner adverted to the relevant pleadings in the petition and submitted that there ought to have been a comparison of the votes with the VVPAT Machines and relied on Rule 63 of the Conduct of Election Rules. He placed reliance in **Navjot Sing Sidhu v/s. Om Prakash Soni and others** [AIR 2016 SC 4965], **Jitu Patnaik v/s. Santan Mohakud** [AIR 2012 SC 913], **Manohar Joshi v/s. Nitin Bhaurao Patil & Anr.**[(1996)1 SCC 169], **F.A. Sapa and others v/s. Singora and others** [1991(3) SCC 375], **Bhikji Kesho Joshi and another v/s. Brijlal Mandalal Biyani and others** [AIR 1955 SC 610], **Makhu Lal v/s. Bachcha Pathak** [AIR 1992 All 358], **G.M. Siddeshwar v/s. Prasanna Kumar** [AIR 2013 SC 1549], **Azhar Hussain v/s. Rajiv Gandhi** [(1986 (Supp) SCC 315] and **Dr. Subramanian Swamy v/s. Election Commission of India** [Civil Appeal No.9093 of 2013] and pressed for the dismissal of the application.

11. Shri P. Vernekar, learned Advocate in reply submitted that the judgment in **Dr. Swamy** (supra) indicated that VVPAT was desirable and it was not an authority for the proposition that a written application for recounting of the votes was dispensed with

which was mandated by Rule 63 of the Conduct of the Election Rules. Written submissions were filed on behalf of the applicant in support of his contentions while written submissions also came to be filed on behalf of the petitioner in support of his contention.

12. i would consider 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.

13. 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 petitioner adheres to these predicates which are interdependent.

14. **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.

15. 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.

16. 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.

17. 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.

18. 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.

19. 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.”

20. 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.

21. 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 noncompliance 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.

22. One of the grounds on which the original petitioner sought for the disqualification of the respondent No.1 was holding an office of profit as the Chairman of North Goa Planning and Development Authority and the second ground of committing corrupt practices. Insofar as the holding of an office of profit is concerned, Shri Pankaj Pai Vernekar, learned Advocate pointed out to The Goa

Members of Legislative Assembly (Removal of Disqualification) Act, 2005 and Section 2 thereof which clearly provided that a person shall not be disqualified for being chosen as or for being, a member of the Legislative Assembly of the State of Goa merely by reason of the fact that he holds any of the offices specified in the Schedule appended to the Act. The Clause 26 of Section 2 takes within its sweep the office of the Chairman and Member, Planning and Development Authority, Goa. Therefore even assuming that the respondent No.1 was holding the post of the Chairman of the North Goa Planning and Development Authority, it would not tantamount to a disqualification in terms Section 2(26) of the said Act, 2005 i.e. there would be an immunity from disqualification. This first ground raised on behalf of the petitioner thereby fails. Coming to the aspect of commission of corrupt practices, Section 100 of the Act, provides that if the High Court is of the opinion 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 that the result of the election, is so far as it concerns a returned candidate, has been materially affected by the improper acceptance or any nomination or by any corrupt practice committed in the interest of the returned

candidate (by an agent other than his election agent) or by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, the High Court shall declare the election of the returned candidate to be void.

23. The applicant i.e. the original respondent No.1 had filed his nomination on 19/01/2017. Any liability for the electoral wrong would come into play only after the nomination is filed. It was the case of the petitioner/respondent that the applicant had produced a resignation letter dated 13/01/2017 from the office of the Chairman of the North Goa Planning and Development Authority. This material document was not produced by the petitioner who sought leave to rely on it at a later date. It was the case of the petitioner that the applicant was instrumental in collecting huge amounts from builders and others by forming an association named Parra Citizens Forum Association to be used for the elections. However, a detailed reading of paragraph 11 of the petition would reveal that there are no specific dates or instances when such instances at all took place to substantiate the case of the petitioner that the applicant had committed corrupt practices. Besides, it was his case that he had filed the complaint before the

Returning Officer on 16/01/2017 but no such complaint being a material document came to be produced on record.

24. The petitioner at paragraph 18 of the petition alleged that the counting of votes through voting machine was not reliable, proper verification was not done and there was a gross mismatch between the total number of votes polled and votes found recorded in the EVM's of all the booths for the 08-Calangute Constituency and the votes were not counted properly and thereby favouring the winning candidate i.e. the applicant herein. However in terms of Rule 63(2) of the Conduct of Election Rules, a candidate or in his absence his election agent or any of his counting agents may apply in writing to the Returning Officer to recount the votes either wholly or in part stating the grounds on which the demands for such recount are made. An oral application is not at all contemplated under the Conduct of Election Rules, 1961 and therefore this objection too fails to inspire confidence. Moreover, the petitioner had not disclosed the names of the voters nor was there any disclosure that the result of the election was materially affected.

25. The petitioner had also reiterated in his petition that the applicant had offered and promised the electorals /voters to regularize their illegal structures through NGPDA and the Government and grant in their favour by conversion of their lands from agricultural/orchard into Settlement Zone and give increased Floor Area Ratio (FAR) for their structures if they voted for him. This statement was made on information and no details were set out unlike the verification that the contents of paragraph 24 of the petition were true to his own knowledge. It therefore cast a serious doubt about the verification as rightly submitted by Shri Pankaj Pai Vernekar, learned Advocate for the applicant. The petitioner had otherwise alleged at paragraph 24(d) of his petition that the applicant had appointed one of the members of the Village Panchayat Candolim Mr. Fermino Fernandes on the Sub-Committee of NGPDA for preparation of Land Use Map and ODP and that he was one of the main persons campaigning for the applicant in the Calangute constituency and more particularly Candolim Panchayat wards and giving assurances to the voters that their illegal constructions shall be regularized by him after the election and plans would be approved. There was another person named Antony D'Souza from Calangute who was the Attorney of the

Comunidade of Calangute and campaigning for the applicant had converted his property under Survey No. 476 of village Calangute as settlement zone with 6mtrs access shown for development under the draft ODP and the said Antony D'Souza had given NOC for conversion of Comunidade land to be shown as settlement / development for public project through the applicant when he was the Chairman of the NGPDA.

26. No material has been produced on record by the petitioner to show that the said Fermino Fernandes and Antony D'Souza were the election agents of the applicant nor was it the petitioner's case that the said Fermino Fernandes and Antony D'Souza had done any act with the consent and/or under the instructions of the applicant. At paragraph 24(g) the petitioner had alleged that the applicant had used religion to get votes, constructed an illegal temple in Orda, Candolim named Shree Sevalal and Durga Devi to influence the voters from the Banjara community who have a number of houses and constituting a sizable voter in the constituency. However no details of the dates, persons etc. have been produced on record nor any news which according him would be adequate to substantiate his case that the

applicant had indulged in corrupt practices. The applicant in order to incur any liability in connection with the elections had to commit the electoral wrong after the date of filing of the nomination. In the present case, the applicant had filed his nomination papers on 16/01/2017 but had tendered his resignation from the post of the Chairman NGPDA vide his letter dated 13/01/2017 well prior to the said date and which fact too was set out by the petitioner without producing the resignation letter on record. Therefore it is most unconvincing that the applicant had committed any electoral wrong by holding such office of profit assuming he had not tendered his resignation.

27. Shri Kamat, learned Advocate for the petitioner/ respondent had taken a plea that the verification of votes and counting was not proper and the oral application was made by the petitioner through his election agent seeking recounting of the votes under Rule 62(2) of the Rules, 1961 on the ground that the voting machine was not reliable and proper verification was not done and besides, there was gross mismatch between the total number of the votes polled and the votes found recorded in the EVMs of all the booths of 08-Calangute Constituency. It was also his

contention that there was a strong doubt that the electronic voting machine(EVM) had been tampered favouring the winning candidate i.e the applicant and therefore the petitioner/respondent had demanded for a recounting of the votes in the EVMs of all the booths and by comparing it with the paper trail votes for the 08-Calangute constituency for the Assembly Election 2017. The request for recounting was made prior to the completion of formalities of signing of election sheet in Form 20. The Returning Officer expressed her unwillingness to accept and permit a recall of all VVPAT machines stating that the officers/ staff had to start counting of the next Assembly Constituency i.e. Porvorim and it would take a long time to count the votes from paper trail and refused to give recounting. However as observed earlier, there was no written application submitted to the Returning Officer in terms of Section 63(2) of the Conduct of Election Rules, 1961 and therefore this contention on behalf of Shri Kamat, learned Advocate also fails to inspire confidence.

28. The petitioner had taken another point to seek the disqualification of the respondent No.1 namely that he had issued a Notification dated 23/11/2016 bringing out the ODP for

Calangute Condolim 2025 and also put the said ODP into operation at the draft stage itself. It was alleged that the ODP was notified by the applicant before the declaration of the elections since he was aware that the elections to the legislative assembly would be held sometime in the month of February or March, 2017. This ground taken up on behalf of the petitioner also does not stand to reason firstly on the premise that a declaration of certain portions of the Calangute Constituency as a planning area and to bring it in the ambit of the ODP are decisions to be taken by the Planning Authorities in discharge of its statutory duties and functions. It cannot be assumed that the concerned Authority had acted out of favour towards its Chairman and that too for electoral purposes. Besides, there is no averment in paragraph 24 of the petition that the Notification and further procedure relating to the ODP were initiated by or at the behest of the applicant as an inducement, allurement or illegal gratification towards the voters and for the propose of electoral gains. Last but not the least, the Notification dated 23/11/2016 was issued much prior to the declaration of the model code of conduct and therefore on that ground too there is no basis to allege the commission of any electoral offence by the applicant since the said acts were admittedly committed prior to

the date of filing of the nomination papers on 16/01/2017.

29. Shri Kamat, learned Advocate for the petitioner had relied in **Dr. Swamy**(supra), wherein it was stated that Rule 49A of the Conduct of Election Rules, 1961 under the Act was amended to the effect that the printer with a drop box or such design as approved by the Election Commission will also be attached to a voting machine for printing a paper trail of the vote in such a constituency/constituencies or parts thereof as the Election Commission may direct. Section 61A of the Act and Chapter II of Conduct of Election Rules provide for voting through electronic machines. The Hon'ble Apex Court observed at paragraphs 28 and 29 as under:

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.

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.

30. However, this judgment only holds that the VVPAT is desirable and it is not an authority for the proposition that a written application for recounting of votes is dispensed with.

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

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

NUTAN D. SARDESSAI, J.

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