

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

**CIVIL WRIT PETITION NO.4838 OF 2019**

Mr. Ashok Rajaram Raul  
Age 67 years, Address-5B/11,  
Pereira Nagar Co-Op.Hsg. Society,  
Khopat, Thane(W).

.. Petitioner

Vs.

1. Mr. Mandar Pramod Vichare  
Age 41 years, Address - Flat No.601,  
Samarth Ganga Niwas, Govind  
Bachaji Road, Charai, Thane (W).

2. Mr. Mahesh Parshuram Kadam  
Age 38 years, Address-Lad Chawl,  
Almeida Road, Opp. Vidhata Society,  
Chandanwadi, Thane (W).

3. Mr. Tushar Ramesh Gaikwad  
Age 33 years, Address-6A/21,  
Pareira Nagar, Near S. T. Workshop,  
Khopat, Thane (W).

4. Mr. Yogesh Vishwanath Godbole  
Age 40 years, Address-A3/301,  
Jasmine Bldg., Parijat Garden CHS,  
G. B. Road, Thane (W).

5. The Returning Officer, Ward12-D,  
C/o. Thane Municipal Corporation,  
Mahapalika Bhavan, Dr. Almeida Road,  
Panchpakhadi, Thane (W).

6. Thane Municipal Corporation  
Headquarters at Mahapalika Bhavan,  
Dr. Almeida Road, Panchpakhadi,  
Thane (W).

..Respondents

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Mr. P.K. Dhakephalkar, Senior Advocate a/w S.M. Oak a/w Sagar Joshi i/b Manesh Kale, for the Petitioner.

Mr. S.S. Kulkarni, for the Respondent No.1.

Mr. R.S. Apte, Senior Counsel a/w Mandar Limaye, for the Respondent No. 6.

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**CORAM : C.V. BHADANG, J.  
RESERVED ON : 6<sup>th</sup> JANUARY 2021  
PRONOUNCED ON : 17<sup>th</sup> MAY 2021**

**JUDGMENT :**

. Rule. Rule made returnable forthwith. The learned counsel for the respondents waive service. Heard finally by consent of parties.

2. The challenge in this petition is to the judgment and order dated 16 March 2019 passed by the learned Civil Judge, Senior Division at Thane in Election Petition No.2/2017. By the impugned judgment, the election petition filed by the first respondent has been allowed, thereby setting aside the election of the petitioner as a Councilor from Ward No.12-D of Thane Municipal Corporation and the first respondent is declared as an elected candidate from the said ward in the place of the petitioner.

3. The brief facts necessary for the disposal of the petition may be stated thus-

That the general elections of the Municipal Corporation, Thane were held in February 2017 in which the petitioner and the respondent Nos.1 to 4 were the contesting candidates, from Ward No.12-D, Siddheshwar Talav, Nagdevwadi, Chandanwadi, Thane (West). In the said election, the petitioner polled highest number of votes being 9184. The first respondent was the immediate rival who polled 8171 votes. The respondent Nos.2 to 4 secured respectively 4446, 1600 and 216 votes. The petitioner having secured the highest number of votes was declared elected.

4. The first respondent filed election petition, under Section 16 of the Maharashtra Municipal Corporations Act, 1949 ('Act of 1949') being Election Petition No.02/2017 before the learned Civil Judge, Senior Division at Thane, challenging the election of the petitioner on the ground that the petitioner was disqualified to contest the said election and on account of a material irregularity in the election proceedings and the corrupt practice. In short, according to the first respondent, the petitioner (the respondent No.1 before the Trial Court) filed his nomination form furnishing false, misleading and incomplete information. While

elaborating the said ground, it was contended that the petitioner had disclosed in the nomination form that there is only one criminal case pending against him, while there were two other criminal cases in which the petitioner was facing trial. According to the first respondent, the following two criminal cases were not disclosed by the petitioner while filling the nomination form.

(i) Regular Criminal Case No.294/2015, (FIR bearing No. CR/231/2000, Naupada Police Station) wherein Respondent No.1 is Accused No.2 and which is pending before the Hon'ble 1<sup>st</sup> Chief Judicial Magistrate, Thane, at Thane, for offences punishable u/s. 406, 409, 34 of I.P.C.

(ii) Case No.4414/SS/2005, pending before the Hon. 43<sup>rd</sup> Metropolitan Magistrate Court, Mumbai, wherein the Respondent No.1 is arrayed as Accused No.1.

5. It was contended that by furnishing such false, incomplete and misleading information, the petitioner has mislead and mis-represented to the voters of the constituency about his clean image "resulting in supremacy over other candidates". According to the first respondent, on account of such misleading information, the voters were induced by the petitioner, to cast votes in favour of the petitioner, although the petitioner was facing offences of cheating,

criminal breach of trust and other offences, involving moral turpitude. It is contended that this has materially affected the result of the election.

6. On behalf of the first respondent, reliance was placed on a notification dated 1 September 2006 issued by the State Election Commission, according to which, a candidate contesting an election is obliged to make full and complete disclosure with regard to the matters in para 5 of the preamble of the said notification. It was contended that in the event of a candidate furnishing incomplete, incorrect or false information, or failing to furnish full and correct information with regard to the five matters, it would be a sufficient ground for setting aside his election, as he would be disqualified under the relevant provisions of law. The disclosure which is required to be made by the candidate on the five aspects is as under-

- (i) Conviction / acquittal / discharge in a criminal case.
- (ii) Pendency of any criminal case for any offence punishable with imprisonment of two years or more and in which the charge is framed or cognizance taken.
- (iii) Assets of the candidate and his spouse.

(iv) Liabilities including liability to public financial institutions and Government dues.

(v) Educational qualifications.

The material case is that the false and misleading information was furnished relating to clause (ii) above.

7. It was contended that had the petitioner not made any false representation and/or misleading statements and declarations, the first respondent would have had a level playing field in the election.

8. There was another ground about the cheque issued by the petitioner as a Chairman of Jagmata Charitable Trust Colbar towards the property taxes pertaining to Jagmata Shankar Mandir being returned as dishonoured. It was therefore, contended that No Dues certificate, issued by the Corporation was not valid.

9. For the present purpose, we are not concerned with the said ground as the Trial Court has principally allowed the election petition on the ground of alleged non disclosure of the two criminal cases in the nomination form, although the Trial Court has held that this does not amount to a corrupt practice. The Trial Court has

relied upon the decision of the Supreme Court, in the case of **Krishnamoorthy Vs. Sivakumar**<sup>1</sup> in order to find that the petitioner was disqualified on account of the improper disclosure in the nomination form. The Trial Court had further gone ahead and has declared the first respondent to be elected as a Corporator (inasmuch as the first respondent had secured the next highest votes) in place of the petitioner.

10. It may be mentioned that the petitioner had filed an application (Exh.37) under Order VII Rule 11(a) of the Code of Civil Procedure ('CPC', for short) for rejection of the petition on the ground that it does not disclose any cause of action. The learned Trial Court by an order dated 5 December 2017 dismissed the said application, thus refusing to reject the election petition. The petitioner challenged the same before this Court in C.R.A No.100/2018. This Court by a judgment and order dated 22 March 2018 dismissed the revision application thereby confirming the order passed by the Trial Court.

11. The petitioner resisted the election petition. It was contended that the allegations regarding corrupt practice and/or

<sup>1</sup>(2015) 3 SCC 467

undue influence were vague and baseless and in fact defamatory in nature. It was denied that the petitioner had intentionally concealed the pendency of any criminal case. It is submitted that except the case which was disclosed, there were no other criminal cases pending against the petitioner “which were required to be disclosed in the nomination form”. It was contended that in RCC No.294/2015 charge was yet to be framed and therefore, it was not obligatory on the part of the petitioner to disclose the same, in the nomination form, as the cognizance was not yet taken. In so far as RCC No.4414/SS/2005 is concerned, it was pointed out that the same is dismissed long back in the year 2009. It was thus denied that there was any false, incomplete or misleading information furnished in the nomination form. The allegations about there being default in the payment of taxes in respect of Jagmata Charitable Trust Colbar were also denied.

12. On the basis of the rival pleadings, the learned Trial Court framed the following issues.

| Sr.<br>No. | Issues                                                                                                                                |
|------------|---------------------------------------------------------------------------------------------------------------------------------------|
| 1          | Does the petitioner prove that, respondent No.1 has made false, incomplete and misleading statement in declaration furnished by him ? |

- 2 Does said alleged statements in declaration have materially affected result of election ?
- 3 Is respondent No.1 liable for disqualification on account of said alleged statements made in declaration ?
- 4 Is the petition tenable on grounds mentioned in it ?
- 5 Is the petitioner entitled for relief sought for ?
- 6 Costs on whom to be saddled ?
- 7 What order and decree ?

13. At the trial, the first respondent examined himself (PW.1) alongwith Ms. Snehlata Kolte (PW.2) and produced documents including certified copy of the roznama in RCC No.1690/2019 alongwith others.

14. The petitioner examined himself (R.W.1). The respondent Nos.5 and 6 examined one Junia Pandey Pardeshi. The nomination form was produced at Exh.156.

15. The learned Trial Court answered Issue Nos.2 to 5 in the affirmative and Issue No.1 partly in the affirmative and by the impugned judgment and order allowed the petition as aforesaid. Feeling aggrieved, the petitioner is before this Court.

16. I have heard Mr. Dhakephalkar, the learned Senior counsel for the petitioner and Mr. Kulkarni, the learned counsel for the contesting respondent No.1. I have also heard Mr. Apte, the learned senior counsel for the respondent No.6. The parties have also filed synopsis of their arguments. With the assistance of the learned counsel for the parties, I have gone through the record.

17. It is submitted by Mr. Dhakephalkar, the learned Senior counsel for the petitioner that the first respondent in this case was required to plead and prove three aspects namely – i) non-disclosure of the offence (which the petitioner was required to disclose in accordance with law) in the affidavit filed alongwith the nomination form; ii) such non-disclosure being in breach of any law or notification which is applicable and which is binding and iii) that such non-disclosure has materially affected the result of the election.

18. It is submitted that none of these aspects have been pleaded or proved by the first respondent. It is pointed out that the learned Trial Court in paragraph 25 of the judgment has held that there is no evidence to establish the ground of corrupt practice as against the petitioner. It is submitted that in such circumstances, the ground based on Section 100(1)(b) of the Representation of the

Peoples Act, 1951 ('Act of 1951'), no longer survives. It is submitted that in so far as non-disclosure of offence / criminal cases is concerned, the Trial Court has failed to notice as to under which law the petitioner was mandated to make such disclosure. The learned counsel was at pains to point out that strict rules of pleading apply to election petition. It is pointed out that the first respondent, apart from failing to plead necessary details, had also failed to produce the notification dated 1 September 2006. It is submitted that thus the fundamental requirement of clause (iv) of Section 100(1)(b) was not satisfied. It is submitted that the learned Trial Court in paragraph 49 of the judgment has also observed that the first respondent has not pleaded that the non-disclosure of the offence has materially affected the election of the petitioner and in spite of that the learned Trial Court has erroneously proceeded to hold that the non-disclosure of the offence has materially affected the election. It is pointed out that the reliance placed on the decision in the case of *Krishnamoorthy* is misplaced in as much as it was a case of corrupt practice which is not held to be proved on facts in the present case. It is submitted that the Trial Court was also in error in placing reliance on the decision in the case **Kisan Shankar Kathore Vs. Arun Dattatray Sawant**<sup>1</sup>. It is submitted that the election

<sup>1</sup>(2014) 14 SCC 162

petition was essentially under Section 16 r/w. Section 403 of the Act of 1949 and therefore, the first respondent ought to have pleaded and proved the fact of non-disclosure of the offence having materially affected the result of the election. It is thus submitted that the Trial Court was in error in setting aside the election of the petitioner.

19. The learned counsel has also taken exception to the first respondent being declared as elected in the place of the petitioner. It is submitted that no such course was open having regard to the provisions of the said Act of 1949.

20. Mr. Kulkarni, the learned counsel for the respondent No.1 has supported the impugned judgment. It is submitted that the State Election Commission, has issued an order on 5 October 2015 under Article 243-ZA of the Constitution of India read with Section 14 of the said Act prescribing the nomination form and the affidavit in support thereof. It is submitted that the said order is a piece of subordinate legislation which need not be pleaded. It is submitted that the Court can take judicial notice of the same under Section 57 of the Evidence Act. It is submitted that under Section 16 read with Section 403(3) of the Act, the Trial Court has all the powers and

jurisdiction to take cognizance of the said order and to decide the election petition accordingly.

21. In so far as the ground about non-production of notification dated 1 September 2006 is concerned, it is submitted that this was not the ground raised before the Trial Court, nor it has been raised in the present petition. Quite to the contrary, in the Written Statement the petitioner has conceded about the existence of the notification dated 1 September 2006, being part and parcel of the general election 'guidelines and regulations'. It is submitted that the petitioner in the Written Statement has raised a defence that he was required to disclose only those cases where the charge is framed and not the cases where merely the cognizance is taken. It is submitted that thus the contention about the non-production of the notification dated 1 September 2006 is misconceived.

22. The learned counsel placing reliance on the decision of the Supreme Court in the case of *Krishnamoorthy* has submitted that once it is established that the successful candidate was involved in certain criminal cases and there is no disclosure of those cases, the same would amount to corrupt practice. It is submitted that the petitioner has admitted in the cross examination that he did not

disclose Criminal Case No.294/2015 because no charge was framed against him in that case. It is submitted that thus the only question before the Trial Court was whether the non-disclosure of the said case will result into invalidation of the election. It is submitted that the first respondent, has clearly pleaded, that non-disclosure of the criminal cases involving offences inviting sentence of two years or more, has deprived the voters from exercising their franchise, freely and the election is vitiated by undue influence and corrupt practice. The learned counsel has pointed out that in paragraph 8 of the election petition it has been specifically pleaded that such non-disclosure has materially affected the result of the election.

23. The learned counsel placing reliance on the decision of the Supreme Court in *Krishnamoorthy and Kisan Shankar Kathore* has submitted that such non-disclosure will result into the election being materially affected. It is submitted that there is no perversity in the findings recorded by the Trial Court and even assuming that the Trial Court, has misread paragraph 83 and 86 of the judgment in *Krishnamoorthy*, this Court can clarify the same while refusing to interfere with the ultimate finding which does not suffer from any perversity. In support of such proposition, the learned counsel has placed reliance on the decision of the Constitution Bench of the

Supreme Court in the case of **Syed Yakoob Vs. K. S. Radhakrishnan & Others** <sup>1</sup>. It is submitted that an error of law which is apparent on the face of the record can be corrected by the Writ Court but not an error of fact.

24. The learned counsel has submitted that the election of the petitioner having been found to be invalidated, the Trial Court was justified in declaring the first respondent as elected, as he was the candidate having secured the second highest number of votes.

25. The learned counsel was at pains to point out that the offences for which the petitioner is facing prosecution are under Section 406 and 409 read with Section 34 of the IPC which invites sentence of more than two years. It is submitted that this Court while deciding the revision application challenging the order passed by the Trial Court under Order VII Rule 11 of CPC, has held that cognizance was taken by the Court and that finding having attained finality cannot be revisited. Reliance is placed on the decision of the Supreme Court in the case of **R.R. Chari Vs. State of Uttar Pradesh** <sup>2</sup>

<sup>1</sup>AIR 1964 SC 477

<sup>2</sup>AIR 1951 SC 207

**and State of Karnataka and Anr. Vs. Pastor P. Raju<sup>1</sup>** in order to submit that taking cognizance does not involve any formal action, and cognizance is taken once the Magistrate has applied his mind to the facts about commission of the offence. It is submitted that the impugned judgment does not suffer from any infirmity and the petition be dismissed.

26. I have carefully considered the rival circumstances and the submissions made. Following points arise in this petition for determination.

(i) Whether the election of the petitioner is liable to be set aside on the ground of non disclosure of the pending criminal case/s by the petitioner, in the nomination form/affidavit, amounting to undue influence and/or corrupt practice, vitiating the election ?

(ii) If yes whether the first respondent is entitled to be declared as elected in the place of the petitioner under section 16(3) of the Act ?

(iii) Whether the impugned judgment needs interference ? If yes to what extent?

<sup>1</sup>(2006) 6 SCC 728

## 27. Point No. (i)

The election of the petitioner is challenged under section 16 of the Act. Section 16 if paraphrased would indicate that it provides for a challenge to the election in the following circumstances

I If the qualification of any person declared elected as a councilor is disputed or

II if there is improper rejection of the nomination paper or

III improper reception or refusal of a vote or

IV if there is material irregularity in the election proceedings or corrupt practice or

V any other thing materially affecting the result of the election

28. In the present case the election is challenged on the ground of the petitioner having furnished false, misleading and incomplete information in the nomination form. In short according to the first respondent the petitioner failed to disclose two criminal cases namely RCC No.294/2015 and 4414/SS/2005 in the nomination form in which the petitioner was facing prosecution for offences involving moral turpitude. It is contended that it was mandatory on the part of the petitioner to furnish true and correct

information about the pending criminal cases. It is contended that on account of the nondisclosure of the criminal cases the petitioner is disqualified and the election is vitiated by reason of a material irregularity in the election proceedings and corrupt practice. The first respondent has placed reliance on the notification dated 1 September 2006 of the State Election Commission in this regard. Admittedly a copy of the said notification is not produced on record. That appears to be the main plank of the argument on behalf of the petitioner. It is contended by the petitioner that strict rules of pleadings apply to the election petition and in the absence of the production of the copy of the said notification the election petition could not have been allowed.

29. It has come on record that RCC No.4414/SS/2005 has already been disposed of in the year 2009. Thus we are only concerned with RCC No.294/2015. ( Old RCC No.690/2011). The said case arose out of Crime no 231/2000 of PS Naupada under section 406, 409 read with section 34 of IPC. That case was pending before the Chief Judicial Magistrate (CJM) Thane in which the petitioner was accused No.2. The nomination form (Exh.156) with affidavit was filed by the petitioner on 3 February 2017 when the said case was pending. It is also a matter of record that the

petitioner only disclosed one criminal case as Case No.250 ( without mentioning the year) in the nomination form. The petitioner mentioned that the said case was pending before the Thane court under section 143 and 145 in which the court had taken cognizance on 27 January 2017. We are principally concerned with the non disclosure of RCC No.294/2015 ( Old RCC No.690/2011) and the effect thereof.

30. Clause 7 of the nomination form is relevant for the purpose. It contains two parts. Part 7(a) which is relevant is in vernacular.

31. It can thus be seen that it pertains to disclosure of offence/s which would attract sentence of two years or more and whether a chargesheet is filed or not in respect thereof. Part 7(b) pertains to conviction, with which we are presently not concerned. Admittedly the pendency of RCC No.294/2015 in which the petitioner was facing prosecution for the offences under section 406 and 409 r/w section 34 of IPC has not been disclosed in the nomination form and the affidavit. The petitioner has not disputed the pendency of RCC No.294/2015 in which he is accused No.2. In the written statement he claimed that he received the

summons/notice in the said case after filing of the nomination form. It is next contended that even otherwise it was not necessary for the petitioner to disclose the said case as the court had not taken cognizance or framed charge in it. In para 12 of the written statement the petitioner however did not dispute that “every candidate contesting an election is obliged to make true and correct disclosure of all his details before the public at large so as to enable the voters to make a meticulous decision as to in whose favour the vote is to be cast”.

32. It would now be necessary to refer to the evidence of the petitioner. The petitioner has admitted that it is mandatory to mention the criminal background in the nomination form as per the election rules and the “Supreme Court decisions”. He claimed that he did not mention the said case in the nomination form as there was no charge framed in the said case. He admitted the documents at Exh.123, 124, 126, 127 and 128 which would clearly go to show that the petitioner had appeared in the said case. Exh.128 for instance is a copy of the exemption application filed on behalf of the petitioner much prior to the filing of the nomination form. It can thus be seen that the factum of the pendency of the said case under section 406, 409 of IPC in which the petitioner was accused No.2

and the petitioner being aware of the said case, prior to the filing of the nomination form, is well established on record. The offences are punishable with a sentence in excess of two years. The record also discloses that the court had taken cognizance in the matter as summons was issued and the petitioner had put in appearance. It is now well settled that the court takes cognizance when the court applies its mind to the prosecution case and the material produced and proceeds against the accused. Framing of charge in warrant triable case (the offences under section 406 and 409 are warrant triable) is a further stage where the accused is not discharged under section 329 of the Code of Criminal Procedure (where the charge is found to be groundless) and under section 240 of the code the court is of the opinion that there is ground for presuming that the accused has committed the offence.

33. It is true that the ground on which the election is assailed have to be properly pleaded. I have carefully gone through the election petition and I find that the ground based on non disclosure of the criminal antecedent has been adequately pleaded in the petition. It is true that the burden to establish the ground/s would lie on the candidate assailing the election. However it can not be equated with the burden similar to one on the prosecution in

a criminal case. In the present case as noticed earlier the petitioner did not dispute that every candidate was under obligation to disclose the criminal antecedent. He also did not dispute the pendency of the RCC No.294/2015. The contention that he was not aware of the said case prior to filing of the nomination form cannot be accepted in view of the documents referred to above which were confronted to the petitioner in the cross examination and have been admitted. It also appears that a summons/notice was issued to the petitioner which would indicate that the CJM had applied mind and the cognizance was taken. The offences indeed invite sentence in excess of two years. Thus the contention based on the want of adequate pleadings and the failure to produce the notification dated 1 September 2006 in my view cannot be accepted more so when the ground about non production was not raised before the trial court nor it is raised in the petition. The ground appears to have been pressed in service for the first time during the submissions at the bar. That apart as per section 14(1) of the Act, the superintendence, direction, control and conduct of the election to the corporations vests in the State Election commission. The Commission in exercise of the said powers has prescribed the form of nomination and affidavit by orders from time to time which have been revised by order dated 5 October 2015. The nomination form in this case is as

prescribed by the Commission of which judicial notice can be taken. For this reason also the ground based on the non production of the Notification dated 1 September 2006 cannot be accepted.

34. The trial court has relied on the decision of the Supreme Court in *Krishnamoorthy* and *Kisan Kathore*. The learned counsel for the petitioner has submitted that the said decisions will be inapplicable as they arose out of an election dispute under the Representation of the Peoples Act. It is submitted that in the case of *Kisan Kathore* there were statutory provisions which were found to be not complied and in the election petition it was pleaded that the same has materially affected the result of the election. It is contended that the requirements of Section 100(1) (d) of the said Act were complied in that case. It is pointed out that the learned Trial Court in para 49 of the judgment has found that the petitioner had not pleaded that the election is materially affected by the alleged non disclosure.

35. In so far as the case of *Krishnamoorthy* is concerned it is submitted that it was a case where the election was challenged on the ground of corrupt practice under section 100(1)(b) of the Act of 1951. It is pointed out that the Trial Court in this case has refused to

uphold the ground of corrupt practice and in any event the case of *Krishnamoorthy* did not apply in this case.

36. Before dealing with the submissions, as raised it is necessary to make a reference to the decision of the Supreme Court in **Union of India Vs. Association of Democratic Reforms**<sup>1</sup>. The question involved in that case was whether, the voters have a right to know relevant particulars of the candidate. The Supreme Court referring to its earlier decisions found that right to vote is a part of fundamental right to freedom of speech and expression, under Article 19(1) (a) of the Constitution of India as a voter's speech or expression in case of election would include casting of votes. For this purpose information about the candidate to be selected is a must. It has been held that the right to know the antecedents including criminal past of the candidate contesting election for Member of Parliament (MP) and Member of Legislative Assembly (MLA) is much more fundamental and basic for the survival of democracy. The Supreme Court in para 48 of the Judgment directed the Election Commission to call for information on affidavit by issuing necessary order in exercise of powers under Article 324 of the Constitution of India, on the five aspect as referred to above. It is true that the said

<sup>1</sup>(2002) 5 SCC 294

case pertained to the election of the MPs and the MLAs. In para 49, the Supreme Court has noted that the Election Commission has from time to time issued instructions/orders to meet the situation where the field is unoccupied by legislation.

37. It appears that after the said decision, the Act of 1951 came to be amended in the year 2002 by introduction of Section 33A. It is true that there is no similar provision which could be found in the Mumbai Municipal Corporation Act, 1988 ('Act of 1988'). However, as noticed earlier the Election Commission being entrusted with the powers of superintendence, control and conduct of the elections to the corporations, under section 14(1) of the Act has issued the orders including the order dated 5 October 2015 prescribing the form incorporating the requirement of disclosure of the criminal antecedents. Thus it cannot be accepted that there is no statutory basis or requirement for disclosure made out in this case.

38. In the case of *Kisan Kathore*, the election of the appellant was set aside by the High Court on account of non disclosure on certain aspects as noted in the judgment. The Supreme Court while upholding the same has noted the decision in *Association for Democratic Reforms* to hold that the main reason for

issuing the directions by the Supreme Court and the guidelines by the Commission, pursuant thereto is that the citizens have a right to know about the candidate including his/her criminal antecedents.

39. In *Krishnamoorthy*, the election was challenged on the ground of non disclosure of full particulars of criminal cases at the time of filling of nomination form as in the present case. The Supreme Court found that it creates impediment in free exercise of electoral right and the election is liable to be declared as null and void. The court summed up the law in para 86 as under-

*86. In view of the above, we would like to sum up our conclusions :-*

*(a) Disclosure of criminal antecedents of a candidate, especially, pertaining to heinous or serious offence or offences relating to corruption or moral turpitude at the time of filing of nomination paper as mandated by law is a categorical imperative.*

*(b) When there is non-disclosure of the offences pertaining to the areas mentioned in the preceding clause, it creates an impediment in the free exercise of electoral right.*

*(c) Concealment or suppression of this nature deprives the voters to make an informed and advised choice as a consequence of which it would come within the compartment of direct or indirect*

*interference or attempt to interfere with the free exercise of the right to vote by the electorate, on the part of the candidate.*

*(d) As the candidate has the special knowledge of the pending cases where cognizance has been taken or charges have been framed and there is a non-disclosure on his part, it would amount to undue influence and, therefore, the election is to be declared null and void by the Election Tribunal under Section 100(1)(b) of the 1951 Act.*

*(e) The question whether it materially affects the election or not will not arise in a case of this nature.*

*(Emphasis supplied)*

40. It is true that both, the case of *Kisan Kathore* and *Krishnamoorthy* arose out of the Act of 1951. However in my humble opinion the ratio would be applicable with equal force in as much as the local authorities such as corporations are also democratic institutions of local self governance. It would be atrocious to assume that the requirement of such disclosure will not apply only because the decision in *Kisan Kathore* and *Krishnamoorthy* are rendered in the context of elections under the Act of 1951. It will lead to a situation where a voter exercising his franchise at the election of a MP and MLA will have a right to know the criminal antecedents of the candidate but will not have any such

right at the election of a councilor. It is necessary to note that I have already dealt with ground of non production of the notification/order dated 1 September 2006 and the absence of statutory requirement none of which can be accepted. Thus in my considered view the principles and the spirit of the aforesaid decisions would equally apply to the present case.

41. It is necessary to note that there is a specific averment in para 8 of the petition that the non disclosure of the criminal cases has materially affected the result of the election.

42. Thus the point No.1 is answered accordingly. The election of the petitioner is liable to be set aside on account of nondisclosure of the Criminal Case No.294/2015 which amounts to undue influence which is an irregularity affecting the result of the election.

43. Point No. (ii)

This takes me to the relief which can be granted in addition to the setting aside of the election. Precisely the question is whether the first respondent can be declared to be elected.

44. The learned counsel for the first respondent submitted that section 18 read with subsection 5 of section 403 of the Act of 1949 clothes the Trial Court to declare the candidate securing second highest votes to be deemed to be elected in the place of the candidate whose election is set aside. He submits that the Trial Court placing reliance on the decision of this court in **Mrs. Geeta Kisan Gore Vs. State of Maharashtra & Ors.**<sup>1</sup> has rightly declared the first respondent to be elected in the place of the petitioner.

45. Mr Dhakephalkar the learned Senior counsel for the petitioner has placed reliance on the decision of the Supreme Court in **Vishwanatha Reddy Vs. Konappa Rudrappa Nadgouda and Anr.**<sup>2</sup>, **D.K.Sharma Vs. Ram Sharan Yadav and others**<sup>3</sup> and the decision in **Dnyaneshwar Rambhau Barabudhe Vs. Returning Officer /Dy. Collector (EGS), Amravati & Ors.**<sup>4</sup>. He submits that the first respondent could not have been declared elected by 'throwing away' the votes cast in favour of the petitioner. He therefore submitted that the learned Judge was in error in declaring the first respondent elected.

<sup>1</sup>2003(4) ALL MR 548

<sup>2</sup>AIR 1969 SC 604

<sup>3</sup>AIR 1993 SC 95

<sup>4</sup>1998 (4) Bom.C.R. 578

46. Section 18 and subsection 5 of section 403 of the Act of 1949 which are relevant for the purpose read thus.

*18. (1) If at any general elections or an election held to fill a casual vacancy, no councilor is elected or an insufficient number of councilors are elected or the election of any or all of the councilors is set aside under this Act and there is no other candidate or candidates who can be deemed to be elected in his or their place, the (State Commissioner) shall appoint another day for holding a fresh election and a fresh election shall be held accordingly.*

*(2) A councilor elected under this section shall be deemed to have been elected to fill a casual vacancy under Section 15.*

*403 – (1) -----*

*(2) -----*

*(3) -----*

*(4) -----*

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

*If the Judge is of opinion-*

*(i) that in fact any candidate in whose favour the declaration is sought has received a majority of the valid votes, or*

*(ii) that but for the votes obtained by the returned candidate by corrupt practices, such candidate would have obtained a majority of the valid votes (the judge shall after declaring the election of the returned candidate to be void declare the candidate in whose favour the declaration is sought to have been duly elected.*

*(6) ----*

*(7) ----*

47. A conjoint reading of the aforesaid provisions would show that in appropriate case the Court is clothed with jurisdiction to declare the other candidate as elected. There cannot be any manner of dispute that such power can be exercised only in accordance with the statutory provisions. To that extent the learned Senior Counsel for the petitioner is right that such power cannot be exercised for equitable reasons, for instance saving of election expenses or for any other similar reason. He pointed out that the reliance placed by the learned Trial Court on the decision in *Geeta Gore* is misplaced as that case arose under the provisions of the Act of 1888 where there is specific enabling provision to declare the immediate rival who has secured the next highest number of votes

as elected. He submitted that the learned Trial Court was in error in properly appreciating the ratio in the case of *Dnyaneshwar Barabudhe* and *D.K.Sharma*.

48. On the contrary, it is submitted by Mr Kulkarni the learned counsel for the first respondent that the proposition that unless the voters are informed about the disqualification of the candidate, at the time of election, when there are more than two candidates in the fray, is not an absolute proposition for declaring the candidate receiving second highest votes as elected.

49. In the case of *Konappa Nadgouda* the Supreme Court has held thus

*If the number of candidates validly nominated is equal to the number of seats to be filled, no poll is necessary. Whereby an erroneous order of the Returning Officer poll is held which, but for that order, was not necessary, the Court would be justified in declaring those contesting candidates elected, who, but for the order, would have been declared elected. Where there are more than two candidates in the field for a single seat, and one alone is disqualified, on proof of disqualification all the votes cast in his favour will be discarded and the candidate securing the next*

*highest number of votes will be declared elected. In such a case, question of notice to the voters may assume significance, for the voters may not, if aware of the disqualification have voted for the disqualified candidate.*

50. In the case of *D.K. Sharma*, the respondent Ramsharan Yadav was declared elected to the Bihar Legislative Assembly in February 1990 in which the appellant D.K.Sharma was the immediate rival having secured second highest votes. The appellant challenged the election of Ramsharan Yadav on the ground that his nomination was illegally accepted by the returning officer. It was claimed that in the previous assembly election in June 1977 the election of the first respondent Ramsharan Yadav was set aside on the ground of commission by him of corrupt practice and he had incurred disqualification for a period of six years which was to expire on 30 October 1990. It was thus claimed that the acceptance of the nomination paper in the election in February 1990 (which was subject matter of challenge) was illegal. It so happened that during pendency of the said election petition the President of India in exercise of powers under subsection 3 of section 8A of the Act of 1951, issued a notification disqualifying the respondent Ram Sharan Yadav for a period of six years. Thus the relief in the election

petition was confined to the appellant being declared as elected having secured second highest votes. Admittedly there were eighteen other candidates at the said election.

51. In such circumstances taking a cue from the decision in *Konappa Nadgouda* the appellant led evidence to show that the voters were given sufficient notice and they were aware of the disqualification. It was therefore contended that the votes cast in favour of Ram Sharan Yadav have to be regarded as votes 'thrown away'. The High Court on facts found that the evidence was not sufficient to hold that the voters who had cast their votes in favour of Ram Sharan Yadav had done so after having noticed the disqualification. The Supreme Court concurred with the finding of fact so recorded and dismissed the appeal.

52. It can thus be seen that the legal position is well settled. In order to treat the votes cast in favour of the successful candidate (whose election is set aside for having incurred a disqualification and/or improper acceptance of the nomination paper) it ought to be proved that the voters had adequate notice and were aware of the disqualification and in spite of such knowledge voted for the candidate. This requirement of notice to the voters arises only where

there are more contestants than two. Thus such a requirement of the notice would not arise where there are only two candidates in the fray. This is because in such a case if the Trial Court finds that the nomination of the successful/elected candidate was wrongly accepted, there would only be one candidate left in the fray not requiring any election.

53. It is not possible to accept the contention on behalf of the first respondent that the aforesaid proposition as laid down in the case of *Konappa Nadgouda* which has been followed in the case of *D.K.Sharma* and relied upon by this court in the case of *Dnyaneshwar Barabudhe*, is not an absolute proposition. It is clear that it is the well settled principle to which no exception is shown to be carved out in the decision in *Konappa Nadgouda* except where there are only two candidates in the fray. No decision has been brought to my notice that the said proposition is not an absolute proposition or that it admits of any exception and if so in what circumstances.

54. Coming to the present case it was a multicorned contest involving more than two candidates. The First respondent has neither pleaded nor there is any evidence to show that the

voters were put to notice about the disqualification or otherwise of the petitioner. Thus although the election of the petitioner is set aside the votes polled in his favour cannot be treated as votes 'thrown away' there by entitling the first respondent to be declared as elected in the place of the petitioner.

55. I find that the reading of the decision of this court in *Dnyaneshwar Barabudhe* by the learned Trial Court is entirely wrong. In that case the concerned ward of Amaravati Municipal Corporation was reserved for candidate belonging to Other Backward Class (OBC). It was a multicornered contest having more than two candidates in the fray. In that case the election of the third respondent was challenged by the second respondent on the ground that the third respondent was not belonging to the OBC category. The second respondent also sought a declaration about his election in the place of the third respondent as the second respondent had secured the second highest number of votes. It appears that the election petition was allowed and the election of the third respondent was set aside on the ground as urged and the third respondent was declared elected in his place on the ground that the election would entail further expenses by the candidates and the corporation which in the opinion of the Trial court could be

avoided by declaring the second respondent as elected thereby obviating the need for a election. It appears that the third respondent did not challenge the judgment by which his election was set aside. The petitioner before the High Court was the original respondent no 8 before the trial court who took exception to the part of the judgment by which the second respondent (the election petitioner) was declared elected.

56. This court found that the reason for which the second respondent was declared elected, namely to save the expenses for reelection was not a valid ground. This court placing reliance on the decision of the Supreme Court in *Konappa Nadgouda* also found that the second respondent ( the election petitioner) had not led any evidence whatsoever to show that the voters were given notice about the disqualification of the third respondent. In that view of the matter the judgment declaring the second respondent as elected was set aside.

57. The trial court while distinguishing the said judgment has observed that the declaration of election was not granted as the seat was reserved for a OBC candidate and the second highest candidate was a non OBC candidate which is factually incorrect.

58. The reliance by the learned Trial Court on the decision in *Geeta Gore* is equally misplaced. That was a case of an election of a councilor of the Brihan Mumbai Corporation under the Act of 1888. The concerned ward was reserved for a candidate belonging to OBC women category. During the pendency of the election petition, the Caste Scrutiny Committee had invalidated the caste claim of the petitioner *Geeta Gore* which was upheld by this court. Thus the only question in the election petition was about the relief of declaration of the respondent No.4 ( the election petitioner ) as elected in the place of *Geeta Gore*. This court, placing reliance on section 33(2) of the Act of 1888, found that the language of the said section is explicitly clear and unequivocal under which if the Chief Judge of the Small Causes Court finds that the elected councilor is disqualified and his election is declared null and void, the Chief Judge shall direct the candidate securing the next highest votes to be deemed to have been elected.

59. The learned Senior Counsel for the petitioner is right that there is no similar provision which could be found in the Act of 1949. Thus the relief of declaration granted cannot be sustained on the basis of the judgment in the case of *Geeta Gore* which is

inapplicable in this case. In my considered view, the said declaration could not have been granted in the absence of a finding as to satisfaction of the requirements of section 403(5) of the Act of 1949. The point No.2 is answered accordingly.

60. The impugned order needs to be partly modified. In the result, the petition is partly allowed. The part of the judgment declaring the first respondent elected as a Councilor from Ward No.12-D is hereby set aside. The part of the judgment setting aside the election of the petitioner from the said ward is hereby confirmed. Rule is partly made absolute in the aforesaid terms with no order as to costs.

61. At this stage, the learned counsel for the Petitioner seeks extension of the interim relief which is operating from 15 April 2019.

62. Mr. Kulkarni, the learned counsel for the first respondent has strongly opposed the same. He points out that there is now a concurrent finding by which the election of the petitioner has been set aside and considering the balance tenure left, it would not be appropriate to continue the interim relief.

63. Mr. Apte, the learned Senior counsel for the respondent No.6 has left it to the discretion of the Court.

64. Having regard to the fact that the interim relief is operating from 15 April 2019, the same is extended for a period of six weeks from today.

**C.V. BHADANG, J.**