

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**APPLICATION (LODGING) NO.7000 OF 2021
IN
ELECTION PETITION NO.32 OF 2019**

Chandrakant Patil .. Applicant/
Org. Respondent No.3
In the matter between:
Kishor Nana Shinde ..Petitioner
Versus
The State Election Commissioner
and others ..Respondents

.....
**WITH
ELECTION PETITION NO.32 OF 2019**

Kishor Nana Shinde ..Petitioner
Versus
The State Election Commissioner
and others ..Respondents

.....
**WITH
APPLICATION (LODGING) NO.3976 OF 2021
IN
ELECTION PETITION NO.32 OF 2019**

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Mr. Pralhad Paranjape, Advocate a/w. Manish Kelkar and Druti
Datar, for the Applicant/orig.Respondent No.3.

Mr. Shekhar Jagtap, Advocate a/w Sairuchita Chowdhary, Rhea
Francis & Mayuresh Ingale, for Respondent No.1/Orig.Petitioner.

Mr.K.B. Dighe, AGP for the State.

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CORAM :SARANG V. KOTWAL, J.

**RESERVED ON : 21st FEBRUARY, 2022
PRONOUNCED ON : 26th FEBRUARY, 2022**

ORDER :

1. This is an application under Order VII Rule 11 of the Code of Civil Procedure, 1908 (for short, 'the Code') in Election Petition No.32/2019. For the sake of convenience, the parties are referred to by their status in the main election petition. The present application is filed by the original Respondent No.3 in the petition. The Election Petition is filed by the Petitioner and there are 26 respondents. However, Respondent No.3 is the contesting respondent.

2. It is mentioned in the petition that on 21.9.2019, the Respondent No.1-the State Election Commissioner declared the election programme for the Maharashtra State Legislative Assembly Elections and the notification was issued in the official gazette on 27.9.2021. The candidates were called upon to submit their nominations on or before 4.10.2019. The scrutiny was made by the Respondent No.1 and the Respondent No.2 the Returning Officer. On 21.10.2019, the polling took place in the State of Maharashtra. On 24.10.2019 the results of the State Elections were declared. The Respondent No.3 was declared as the returned candidate. He had secured total 1,05,246 votes.

The Petitioner had secured a total number of 79,751 votes. He got votes less than the Respondent No.3 but more than other candidates. In the first week of October, 2019, the Petitioner and the Respondent No.3 submitted their nomination papers along with the affidavit in Form-26 for contesting the election from 210-Kothrud Constituency.

3. The main contention in the petition was that the Respondent No.3 had not disclosed all the information pertaining to his income sources in the affidavit in Form-26. He was inducted as a Director of Maharashtra State Farming Corporation Limited in 2016 and, in 2018, he became a Director of the Maharashtra Agro Industries Development Corporation Limited (hereinafter these two companies are referred to as 'the said two companies'). According to the Petitioner, the Respondent No.3 had not willfully disclosed his entire source of income in Form-26 and, therefore, his election was liable to be declared void.

4. The Respondent No.3 was served with the copy of the petition and he has filed his written statement. The Respondent No.3 has also filed the present Application (L) No.7000/2021 under Order VII Rule 11 of the Code praying for dismissal of the

Election Petition claiming failure on the part of the Petitioner to disclose cause of action and for being barred by law.

5. The application referred to the pleadings in the petition including the grounds. The Petitioner, in turn, has filed affidavit-in-reply to this application.

6. Heard Shri Pralhad Paranjape, learned counsel for the Respondent No.3, Shri Shekhar Jagtap, learned counsel for the Petitioner and Shri K.B. Dighe, learned AGP for the State.

7. Shri Paranjape based his arguments on the provisions of Order VII Rule 11(a) as well as (d) of the Code. He made following submissions:

[a] According to him the plaint did not disclose cause of action and the petition appears on the statements in the plaint to be barred by certain provisions.

[b] Article 191(1)(a) of the Constitution of India mentions that a person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State if he holds any office of profit under the Government of India or the Government of any State specified

in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder.

Shri Paranjape relied on this Article and in particular on the provision that such person holding office of profit is disqualified unless the Legislature of the State by law declares that the holder of a particular office of profit shall not be disqualified.

[c] Shri Paranjape relied on the Act brought in force by the State Legislature in the year 1956. The Act is known as the Maharashtra Legislature Members (Removal of Disqualification) Act, 1956 (hereinafter referred to as the “State Act”). Section 2 of the State Act reads thus :

“2. Removal of certain disqualifications.--- A person shall not be disqualified for being chosen as, or for being, a member of, the Maharashtra Legislative Assembly or the Maharashtra Legislative Council merely by reason of the fact that he holds any of the offices specified in Schedule I appended hereto.”

The Schedule I gives list of many such offices. Significantly, item No.19 in that Schedule adds to the list the office of the Chairman, Vice-Chairman or any other member of the Board of Directors (by whatever name called) of any other

Corporation, owned or controlled by the State Government, which is not mentioned in any of the other entries in that Schedule and to which appointment is made by the State Government.

[d] Shri Paranjape submitted that the said two companies mentioned in the Petition are owned and controlled by the State Government and the Respondent No.3 was made a Director by virtue of the fact that he was the Agriculture Minister for the State and the post of Director was occupied by him as being such Minister. The Directorship of the Respondent No.3 was related to his being the Agriculture Minister for the State of Maharashtra. Therefore, according to Shri Paranjape there was no disqualification for the Respondent No.3 merely on the ground that he was holding offices of the said two companies.

[e] Shri Paranjape submitted that in any case the Respondent No.3 had not accepted any remuneration or other monetary benefits while he was holding the post of Director in the said two companies.

[f] According to Shri Paranjape the Petitioner has not referred to

this particular State Act as it was inconvenient to him. Even when the Respondent No.3 has specifically referred to this Act in his application under Order VII Rule 11 of the Code, in the reply the Petitioner has not touched this aspect.

[g] The next submission of Shri Paranjape was that at the time of filing nomination form the Respondent No.3 was not holding that post of Director in the said two companies as he had resigned as the Agriculture Minister on 16.6.2019 i.e. much prior to filing of the nomination form in October, 2019.

[h] Section 83 of the Representation of the People Act, 1951 (for short, 'Act of 1951) provides as to what should be the contents of an Election Petition. Section 83(1)(a) provides that an election petition should contain a concise statement of the material facts on which the Petitioner relies. The Petitioner's case is based on two major grounds; first is that the Respondent No.3 was holding office of profit; and second was that he had not disclosed source of income as per Rules 4 and 4-A of the Conduct of Elections Rules, 1961 and there were violations in submitting Form-26 with correct facts. Section 83 reads thus:

“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.”

[i] Shri Paranjape invited my attention to paragraph-5 of the election petition. The pleadings therein are important.

Paragraph-5 reads thus :

“5. The Petitioner states that as per section 33 of the Act of 1951 read with Rule 4 and 4-A of the Conduct of Election Rules, 1961, the Respondent No. 3 has not disclosed all the information pertaining to his income sources in his Affidavit in Form 26. The Respondent No. 3 holds Director Identification Number-01502437 (hereinafter referred to as “the DIN”) and is a director on the Board of Directors of the companies viz. Maharashtra State farming Corporation

Limited and The Maharashtra Agro Industries Development Corporation Limited (hereinafter referred to as "the said Companies") since the year 2016 and 2018, respectively. Hereto annexed and marked as "Exhibit C & C-1 is the copy of the details of the DIN held by the Respondent No. 3 and the details of the Board of Directors of the aforesaid companies obtained from the official website of the Ministry of Corporate Affairs."

[j] The grounds taken in the Petition with reference to this important paragraph-5 are as follows:

- [i] Ground-I mentions that the Respondent No.3 had willfully abstained from disclosing that he holds the office of profit and he should be disqualified as Member of Legislative Assembly by declaring his election as void.
- [ii] Ground-II mentions that the Respondent No.3 had intentionally failed to disclose his Director Identification Number [DIN]. Thus, there was breach of non-compliance of the provisions of the Act of 1951 and Rules made thereunder.
- [iii] Ground-III mentions that the Respondent No.3 had willfully not disclosed his entire source of income as required in the Form-26 and thereby willfully not complied with Section 33 of the Act of 1951 read with Rule 4 and 4-A of the Conduct of Elections Rules, 1961 and, therefore, his election was liable to be void.
- [iv] Ground-IV mentions that the Respondent No.3 had failed to disclose his actual income for the financial years from 2016 till 2019.

- [v] Ground-V mentions that his statement pertaining to the loss in the financial year 2016-17 appears to be doubtful as he was already inducted as a Director in Maharashtra State Farming Corporation Limited in 2016 itself.
- [vi] The contention of the Petitioner in ground-VIII was that the Respondent No.2 had not thoroughly scrutinized the nomination papers of the Respondent No.3.
- [vii] Ground-X again refers to the Respondent No.3's disqualification for holding the office of profit.
- [viii] Ground-XII mentions that since the Respondent No.3 has not complied with the provisions of the Act of 1951 and Rules made thereunder, his election should be declared void.
- [k] Shri Paranjape submitted that none of these pleadings including the grounds make out a case for maintainability of the election petition in light of the provisions of Section 100 of the Act of 1951.
- [l] Shri Paranjape submitted that he had taken specific ground of the aforementioned State Act removing the disqualification for holding office of profit in the said two companies. But, there was no reply given by the Petitioner to this particular ground.

[m] Shri Paranjape invited my attention to Form-26 submitted by the Respondent No.3. A copy of the same is annexed to the Election Petition at Exhibit-B. According to Shri Paranjape there was no column in that form requiring the candidate to give the DIN. According to the Petitioner the Respondent No.3 had not disclosed his true income. Shri Paranjape submitted that said form mentions the income for five financial years. These figures are based on Income Tax Returns which were duly certified by the Income Tax Authorities.

[n] The Respondent No.3 had disclosed everything. Shri Paranjape submitted that the required pleadings as to how the Rules or provisions of the Act of 1951 were violated, are absent in the Petition.

[o] In support of his contentions, Shri Paranjape relied on the judgment of the Hon'ble Supreme Court in the case of **Anil Vasudev Salgaonkar Vs. Naresh Kushali Shigaonkar**¹, which deals with the necessity to plead the material facts.

1 (2009) 9 SCC 310

8. Learned counsel for the Petitioner made following submissions:

- [a] As far as the scope of Order VII Rule 11 of the Code is concerned, the application under this provision must be restricted to the pleadings in the plaint. The defence of the Respondent is immaterial. Enquiry, at this stage, should be restricted only to see whether the facts, as pleaded, disclose any cause of action. The possibility of succeeding or failing at the end of the trial is immaterial.
- [b] The State Act being a statute, is neither required to be referred in the pleading nor it is relevant for the facts of the case to adjudicate the question of disqualification of the Respondent No.3.
- [c] The plea that the improper acceptance of nomination form has materially affected the result; is not required to be pleaded. Improper acceptance of nomination causes impurity in the entire election process. Concealment of material fact itself invites disqualification as this conduct is a breach of confidence of electorates.

- [d] Section 83 of the Act of 1951 requires “material facts” to be pleaded and it is not essential to plead “particulars”. The particulars could be brought on record by leading evidence during the trial.
- [e] The reference to Article 191(1)(a) of the Constitution of India is misconceived as it is not an issue in the present Petition. The question is not whether the Respondent No.3 was disqualified for holding office of profit but the issue is about his willful concealment of this material fact while submitting his nomination form.
- [f] Shri Shekhar Jagtap invited my attention to form 2-E Part II(2) of the Conduct of Elections Rules, 1961. According to him, paragraph-5 read with grounds-I, II, III, X, XI and XII are sufficiently establishing the Petitioner’s case through these pleadings as required under Section 83 of the Act of 1951.
- [g] Remuneration is immaterial. Holding of office of profit is important and it has to be disclosed in the nomination form.

- [h] In support of his case, Shri Shekhar Jagtap relied on the judgment of the Hon'ble Supreme Court in the case of **Harkirat Singh Vs. Amrinder Singh**² and also on the judgment of the Hon'ble Supreme Court in the case of **Madiraju Venkata Ramana Raju Vs. Peddireddigari Ramachandra Reddy and others**³.

9. Rebuttal by Shri Paranjape :

- [i] In rebuttal, Shri Paranjape submitted that Rule 4 & 4-A with reference to paragraph-5 of the Petition refers only to disclosure of income. Form 2-E is nowhere mentioned in the Petition. It was necessary to plead violation of the Rules mandating disclosure under Form 2-E. The concentration and basis of the petition is on the source of income of the Respondent No.3 and not on the non-disclosure of holding office of profit as was claimed during the arguments.

10. The rival contentions give rise to the following issue :

Whether the Election Petition is liable to be rejected under the provisions of Order VII Rule 11(a) of the Code.

2 (2005) 13 SCC 511

3 (2018) 14 SCC 1

Reasons :

11. Before discussing the facts of the case with reference to the rival contentions, it is necessary to consider the settled principles of law which are enunciated in the judgments cited by both learned counsel.

12. The Hon'ble Supreme Court in **Harkirat Singh's** case (supra) has observed in paragraphs-51 and 52 that there is a distinction between "material facts" and "particulars". "Material facts" are primary or basic facts which must be pleaded by the plaintiff or by the defendant in support of their case either to prove his cause of action or defence. "Particulars", on the other hand, are details in support of material facts pleaded by the party. They make the picture already drawn more clear, full and more informative. All "material facts" must be pleaded by the party. Failure to state even a single material fact will entail dismissal of the petition. Particulars, on the other hand, are the details of the case which is in the nature of evidence a party would be leading at the time of trial.

13. In the case of **Madiraju Raju** (supra), the Hon'ble Supreme Court, with reference to the earlier judgments of the

Hon'ble Supreme Court which are quoted in paragraph-53; has approved the ratio that, if the improper acceptance of nomination is of the returned candidate, there is no necessity of proof that the election has been materially affected as the returned candidate would not have been able to contest the election if his nomination was not accepted.

14. In **Anil Salgaonkar's** case (supra) referred to by Shri Paranjape, the Hon'ble Supreme Court has held that all the "material facts" must be pleaded by the party in support of his case. In the absence of pleading, a party cannot be allowed to lead evidence. Failure to state even a single material fact will entail dismissal of the election petition. The election petition must contain a concise statement of "material facts" on which the Petitioner relies.

15. Thus, the law laid down by the Hon'ble Supreme Court is clear. The Petitioner is required to plead the "material facts". The particulars can be supplied while leading evidence. The present application will have to be decided keeping in mind these principles. In the context of this case, the provisions of the Act of 1951 will have to be seen. Section 100 of Act of 1951 is

relevant in that context. Section 100(1) reads thus :

“100. Grounds for declaring election to be void. – (1) Subject to the provisions of sub-section (2), if the High court is of opinion--

- (a) that on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution or this Act or the Government of Union Territories Act, 1963; or
 - (b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent; or
 - (c) that any nomination has been improperly rejected; or
 - (d) that the result of the election, insofar as it concerns a returned candidate, has been materially affected--
 - (i) by the improper acceptance or any nomination, or
 - (ii) by any corrupt practice committed in the interests of the returned candidate by an agent other than his election agent, or
 - (iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or
 - (iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act,
- the High Court shall declare the election of the returned candidate to be void.”

16. Shri Paranjape had referred to Article 191(1) of the Constitution of India and also to the State Act to contend that the disqualification imposed by the said Article was removed by the

provision of that Article itself in view of the State Act as the Respondent No.3 was a Director of the State owned companies.

17. Shri Shekhar Jagtap has not offered any serious comments about applicability or the efficacy of the State Act removing qualification. In fact it is his contention that qualification or disqualification of the Respondent No.3 was not an issue at all. The real issue was about non-disclosure of his holding office of profit, as was required under Form 2-E. The Petition is not alleging any corrupt practices by the Respondent No.3 or his election agent. The main contention was that the result was materially affected by non-compliance of the provisions of Act of 1951 or Rules or Orders made under that Act.

18. Shri Shekhar Jagtap's main contention was that the Conduct of Elections Rules, 1961 were framed under the Act of 1951. He is alleging violation of Rules 4 and 4-A of those Rules. Those rules read thus :

“4. Nomination paper.-- Every nomination paper presented under sub-section (1) of section 33 shall be completed in such one of the Forms 2-A to 2-E as may be appropriate:

Provided that a failure to complete or defect in completing, the declaration as to symbols in a

nomination paper in Form 2-A or Form 2-B shall not be deemed to be a defect of a substantial character within the meaning of sub-section (4) of section 36.

4-A. Form of affidavit to be filed at the time of delivering nomination paper.--- The candidate or his proposer, as the case may be, shall, at the time of delivering to the returning officer the nomination paper under sub-section (1) of section 33 of the Act, also deliver to him an affidavit sworn by the candidate before a Magistrate of the first class or a Notary in Form 26.”

19. The memo of the Petition has specifically referred to Form-26 in connection with Rules 4 and 4-A of those Rules. Copy of the affidavit in the nature of Form-26 executed by the Respondent No.3 is specifically annexed to the memo of the petition. In that form and the affidavit, there is no column for declaration as to whether the Respondent No.3 was holding any office of profit. There is no requirement to mention DIN. The income for the past five years from 2014 to 2019 was required to be mentioned.

20. As rightly submitted by Shri Paranjape there is no specific pleading as to why there is any violation of any Rule and in filing Form-26. The grounds (III) & (IV) vaguely mention that the Respondent No.3 has willfully not disclosed his entire source

of income as required in Form-26. According to Shri Paranjape this income is in consonance with his Income Tax Returns accepted by the authorities. The pleadings in the nature of allegations in that behalf are vague and do not show violation of any Rule in filing form-26. In ground (V), it is pleaded that the Respondent No.3's statement pertaining to the losses for the financial year 2016-17 is doubtful as he was holding a post of Director of Maharashtra State Farming Corporation Limited in the year 2016. This pleading is vague and does not show as to which Rule or provision was violated. All these grounds and pleadings are with reference to the possible concealment of source of income by virtue of his holding office of profit in the said two companies. The emphasis was nowhere on the violation of not filing Form 2-E properly.

21. The language of Section 100(1)(d) of the Act of 1951 requires that for setting aside the election this Court should be of the opinion that, the result of the election has been "materially affected" by improper acceptance of nomination or by non-compliance of any Rule or Order under the Act. There are no allegations of corrupt practices as provided under Section 123 of

the Act of 1951. Therefore, that need not be considered. The words “materially affected” govern entire Section 100(1)(d) i.e. it governs clauses (i) to (iv) of that section. The State Act has removed the disqualification on the Respondent No.3, and he was not disqualified for being elected only on the ground that he was holding a post of Director in those two state owned companies. Therefore, the result cannot be said to be ‘materially affected’ because of his holding that post.

22. As mentioned earlier, non-compliance of filing form 2-E with correct disclosure is not pleaded. Only that form requires disclosure as to whether the candidate was holding any office of profit under the Government of India or the State Government. This material fact is not pleaded in the entire petition. The entire petition infact revolves around violations in filling form-26. The Petitioner has chosen to rely form-26 to contend that there is violation of the rules thereby the result of the election was materially affected. Thus by relying on the principles laid down by the Hon’ble Supreme Court, the Petitioner has failed to plead the material fact and, therefore, the application under Order VII Rule 11 of the Code will have to be

allowed and the Election Petition is liable to be rejected.

23. The issue as framed, therefore, is answered by holding that the Election petition is liable to be rejected under the provisions of Order VII Rule 11(a) of the Code as there is absence of complete cause of action for declaring the election of the Respondent No.3 to be void under Section 100(1)(d)(iv) of the Act of 1951. Application (Lodging) No.7000/2021 is allowed. Accordingly, under Section 98(a) of the Act, Election Petition No.32/2019 stands dismissed. In terms of Section 119 of the Act of 1951, the Respondent No.3 is entitled to costs incurred by him in contesting the election petition. The costs be accordingly paid to the Respondent No.3-returned candidate by adopting the course prescribed under Section 121 of the Act of 1951. Other pending applications in the election petition do not survive and are disposed of as such.

(SARANG V. KOTWAL, J.)

Deshmane (PS)

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