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**(2006) 11 BOM CK 0087**

**In the Bombay High Court**

**Case No :** Election Petition No. 7 of 2005

Ashok Patil — APPELLANT

Vs

Dr. Gurumukh Mehrumal Jagwani, The Returning Officer, Jalgaon Local Authorities Constitutency and The Union of India (UOI) — RESPONDENT

**Date of Decision :** 08-11-2006

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 16, Order 6 Rule 17, Order 7 Rule 11
Constitution of India, 1950 — Article 348(2)
High Court Appellate Side Rules — Rule 7, 94A
Representation of the People Act, 1951 — Section 100, 107, 117, 80, 80(1)

**Citation :** (2006) 11 BOM CK 0087

**Hon'ble Judges :** M.G. Gaikwad, J

**Bench :** Single Bench

**Advocate :** S.B. Talekar, for the Appellant; P.M. Shah and P.S. Shendurnikar, for the Respondent

## Judgement

M.G. Gaikwad, J.—Heard learned Counsel, appearing for the respective parties.

2. By this petition u/s 80 of the Representation of the People Act, 1951, petitioner challenges the election of respondent No. 1 as a Member of Maharashtra Legislative Council from Jalgaon Local Authorities Constituency, Jalgaon.

3. The brief details of the election are as follows.

[a] Election programme declared - 10-11-2004

[b] Date of filing nominations - 11-11-2004

[c] Date of Polling - 30-11-2004

[d] Declaration of result - 02-12-2004

[e] Date of filing of Election - 17-01-2005 Petition

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[f] Date of filing of affidavit - 19-01-2005 in Form No. 25

The petitioner was nominated as a candidate put up by Nationalist Congress Party whereas the respondent No. 1 contested the election as an independent candidate. The election being an election from Jalgaon Local Authorities Constituency, the members of Panchayat Samitis, Zilla Parishads, Municipal Councils in Jalgaon District were the valid voters. There was alliance between Indian National Congress (I) and Nationalist Congress Party. The petitioner being a candidate put up by Nationalist Congress Party, due to alliance, he was a candidate sponsored by both major political parties. In view of this alliance between the two major parties, the alliance was in majority having regard to the electoral roll. It is alleged that respondent No. 1 was a Pakistani National as well as a citizen since partition of British India before acquisition of Indian citizenship in the year 1991. The name of respondent No. 1 was enrolled in the voters'' list of 1995 in Jalgaon Local Authorities Constituency. One Sushila Patil submitted an application to the Returning Officer to supply copies of several documents including the evidence in support of domicile and nationality of respondent No. 1 i.e. the information in respect of (1) the name of the country of which respondent No. 1 was a citizen, (2) the date on which the respondent No. 1 renounced citizenship of earlier country and (3) the date on which he has acquired citizenship of India. The Returning Officer informed that certificate of citizenship of respondent No. 1 was not available in the file and expressed inability to supply the same. The petitioner also made an inquiry as to whether the respondent No. 1 renounced his Pakistani nationality and citizenship and acquired Indian citizenship. According to the petitioner, he made attempts to secure documents, but were not supplied to him. Hence, according to him, respondent No. 1 has not renounced Pakistani nationality and citizenship and had illegally obtained Indian citizenship and as such, not eligible to contest the election.

4. In the Election Schedule, on 30-11-2004, in all 513 voters exercised their right of voting. Out of 513 ballots, 27 votes were found invalid and rejected. 486 votes were valid. The petitioner polled 240 votes whereas the respondent No. 1 polled 246, and as such, the respondent No. 1 was declared to be elected.

5. The validity of the election of respondent No. 1 is challenged by the petitioner in this petition on the following grounds.

[a] The respondent No. 1 had obtained Indian citizenship by practising a fraud, and therefore, was not eligible to be a Member of Maharashtra Legislative Council.

[b] Illegal rejection of valid votes and illegal acceptance of invalid votes as valid one.

[c] Exercise of undue influence by respondent No.1 and won over the votes of the members of Nationalist Congress Party.

[d] Respondent No. 1 secured votes on payment of bribe.

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Thus, the allegations against the respondent No. 1 made in this petition are that the respondent No. 1 has indulged in malpractices of bribery for the purpose of being elected, and on these grounds, petitioner claims declaration that the election of respondent No. 1 is null and void and to set aside the said election with further relief to declare the petitioner duly elected as Member of Maharashtra Legislative Council from Jalgaon Local Authorities Constituency, Jalgaon.

6. The summons were ordered to be issued to the respondents. Initially, in the petition, the Returning Officer as well as the Union of India i.e. respondents No. 2 and 3, respectively were made parties alongwith respondent No. 1 and the petition was pending for service of notice on respondent No.3. The respondent No. 1 filed two applications (Exhibit-14 and Exhibit-15) contending that respondents No. 2 and 3 are not the necessary parties in view of the provisions of Section 82 of the Representation of the People Act. Said applications were heard, and thereafter, the petitioner deleted the names of respondents No. 2 and 3 from the petition, and the applications (Exhibit-14 and Exhibit-15) came to be disposed of accordingly.

7. The respondent No. 1 filed written statement (Exhibit-7), denying all the allegations of corrupt practices made in the petition.

8. Application (Exhibit-9) has been filed on behalf of the respondent No. 1 alleging non-compliance of the provisions of Section 83 of the Representation of the People Act, 1951 (hereinafter referred to as "the Act") by not filing a separate affidavit in Form No. 25 as required under the Proviso to Section 83(1) of the Act, contending that the Election Petition filed by the petitioner is not coupled with statutory affidavit. Hence, it cannot be termed to be an Election Petition at all in the eye of law. Filing of such an affidavit after expiry of statutory period of limitation is of no significance. Filing of affidavit after expiry of the period of limitation would amount to introduction of new cause of action. In absence of statutory affidavit, the petition cannot be put to the trial as it amounts to absence of cause of action and the petition is liable to be rejected u/s 86 of the Act as well as under Order-VII Rule 11 of the Code of Civil Procedure. In the affidavit (Exhibit-13) also, same contentions were raised for rejection of Election Petition either u/s 86 of the Act or under Order-VII Rule 11 of the Code of Civil Procedure.

9. Petitioner filed affidavit-in-reply and objected the application (Exhibit-9) filed by the respondent No. 1, on the following grounds.

[a] Inspite of filing of Election Petition on 17-01-2005, the High Court Registry did not raise any objection that separate affidavit was required in respect of the allegations of corrupt practices and accepted the Election Petition.

[b] The objection was raised first time on 19-01-2005 requiring the petitioner to file separate affidavit in support of allegations of corrupt practices and permitted the petitioner to remove the objection by allowing separate affidavit in support of

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allegations of corrupt practices on 19-01-2005. [c] Defective affidavit or defect in affidavit would not entail dismissal in limine of the Election Petition.

10. In view of the application (Exh-9) and affidavit (Exh-13) filed by the respondent No. claiming rejection of the Election Petition at the threshold and Election Petitioner objecting the said application, this application was heard.

11. Learned Senior Counsel Shri P.M. Shah, appearing on behalf of the respondent No. 1 made following submissions.

[a] When the corrupt practices in the election is alleged by the petitioner, in view of the provisions of Proviso to Section 83(1) of the Act, the Election Petition needs to be accompanied by an affidavit in the prescribed form in support of allegations of such corrupt practices and the particulars thereof, which provision is mandatory.

[b] The petition without an affidavit can be said to be an incomplete petition.

[c] Filing of an affidavit after expiry of prescribed period of 45 days of limitation needs to be ignored and such filing of an affidavit after expiry of period of limitation is impermissible.

[d] The act of the Registry of the High Court to allow filing of an affidavit after the expiry of period of limitation will not cure the defect of non-filing of affidavit as the statutory provision will prevail over the rules framed by the High Court.

[e] Copy of the Election Petition served on respondent No. 1 was not endorsed as required under the Statute.

As such, it is contended on behalf of the respondent No. 1 that the petition which is not accompanied by a separate affidavit cannot be said to be a petition in the eye of law. Such a petition is liable to be rejected under Order-VII Rule 11 of the CPC as it did not disclose the cause of action. The affidavit being an integral part of the Election Petition and it being filed after expiry of period of limitation, the petition can be said to be barred by limitation. In support of these contentions, learned Senior Counsel Shri Shah has placed reliance on the following decisions of the Apex Court and various High Courts, which may be referred at a later stage.

[i] Shri Ramakrishna Jagannath Patil v. Chandrakant Bhaurao Khaire 2006 MCR 361

[ii] Rameshwar Dayal Arale v. Munna Singh Bhadoria and Ors. AIR 1992 M P 161

[iii] Shrikrushna Sadashiv Dhamankar Vs. The Nasik Merchants Co-operative Bank Ltd. and Others,

[iv] M. Kamalam Vs. Dr. V.A. Syed Mohammed,

[v] Lalit Kishore Chaturvedi Vs. Jagdish Prasad Thada and others,

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[vi] Harmohinder Singh Pradhan v. Ranjeet Singh Talwandi and Ors. AIR 2005 SCW 2512

[vii] Samar Singh v. Kedar Nath 1987 (Supp.) SCC 663

[viii] Dhartipakar Madan Lal Agarwal Vs. Rajiv Gandhi,

[ix] Azhar Hussain Vs. Rajiv Gandhi,

12. On behalf of the petitioner, learned advocate Shri Talekar contended that as per the High Court Appellate Side Rules, the petitioner was allowed to file an affidavit. Hence, it is not a case of filing of petition without affidavit. The petition is verified and sworn in by an affidavit at Exhibit-40. It thus complies the mandatory provisions of Section 83 of the Act. On these grounds, Shri Talekar contended that the petition being supported by an affidavit, there is no breach or non-compliance of the provisions of Section 83 of the Act. Hence, the application (Exh-9) and affidavit (Exh-13) filed by the respondent No. 1 are without any merit. Besides the above referred compliance, as alleged on behalf of the petitioner, submission is also advanced that non-compliance of the provisions of Section 83 does not attract the provisions of Section 86 of the Act and the Election Petition cannot, therefore, be dismissed in limine. The dismissal of the petition contemplated u/s 86 of the Act is the dismissal on account of non-compliance of the provisions of Sections 81, 82 or Section 117 of the Act only and non-compliance of the provisions of Section 83 of the Act does not warrant dismissal u/s 86 of the Act. In support of these submissions, Shri Talekar placed reliance on the following decisions of the Apex Court.

[i] Harkirat Singh v. Amarinder Singh AIR 2006 SCW 4

[ii] G. Mallikarjunappa and Another Vs. Shamanur Shivashankarappa and Others,

[iii] Dr. Vijay Laxmi Sadho v. Jagdish AIR 2001 S C 600

[iv] Sardar Harcharan Singh Brar Vs. Sukh Darshan Singh and Others,

13. Let us first consider as to whether there is non-compliance of requirements of Section 83 of the Representation of the People Act, 1951, because learned advocate Shri Talekar, appearing on behalf of the petitioner advanced submission that there is no breach/non-compliance of the provisions of Section 83 of the Act. According to him, the petition is verified and sworn in on 17-01-2005 and that verification dated 17-01-2005 complies the requirements of Section 83 of the Act. He also submitted that when the Election Petition was filed on 17-01-2005, the High Court Registry did not raise objection for filing separate affidavit and after scrutiny, first time on 19-01-2005, raised objection of non-filing of separate affidavit and immediately, that objection was removed and complied with on the same day. Hence, there is no breach or non-compliance of the provisions of Section 83 of the Act.

Learned Senior Counsel Shri Shah contended that the requirement of filing of separate affidavit in support of allegations of corrupt practices is a requirement

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under the Statute. Hence, that statutory provision needs to be complied with by the petitioner and whether objection was raised by the Registry or not is insignificant. According to him, compliance of objections within the prescribed period under the High Court Appellate Side Rules, does not cure the defect in filing of affidavit after statutory period of limitation as the provisions of the Representation of the People Act over-ride the provisions in the High Court Appellate Side Rules. Filing of separate affidavit in support of allegations of corrupt practices is a statutory requirement under the Proviso to Section 83(1) of the Act, besides the verification of pleadings, as required u/s 83(1)(c) of the Act. Hence, verification of the petition by the petitioner with affidavit in support of his pleadings as required under Rule 15 of Order-VI of the CPC cannot be said to be a compliance of filing of separate affidavit in support of allegation of corrupt practices as required under the Proviso to Section 83(1) of the Act. Hence, contention of learned advocate Shri Talekar that the verification of the pleadings with affidavit at page 40 is compliance of Proviso to Section 83, cannot be accepted. That verification with affidavit is compliance of Provisions of Section 83(1)(c) of the Act, the Proviso to Section 83(1) is a mandatory requirement of filing a separate affidavit in the prescribed form in support of allegations of corrupt practices. Hence, factually, the contention raised on behalf of the petitioner that there is no breach or non-compliance of Proviso to Section 83(1) of the Act is without any merit. It is thus a case of non-filing of affidavit in support of allegations of corrupt practices as required under the Proviso to Section 83(1) of the Act. What will be its effect will be considered independently at a later stage.

14. As regards filing of affidavit at subsequent stage, submission is advanced on behalf of the respondent No. 1 that said affidavit being filed after the expiry of period of limitation of forty five days, same needs to be ignored and excluding that affidavit, the petition can be said to be an incomplete petition and no petition in the eye of law. On the other hand, on behalf of the petitioner, contention is raised that the High Court office did not raise objection of non-filing of affidavit alongwith the petition. After scrutiny of the petition, first time, objection is raised on 19-01-2005 and the same is complied with on the same day. Hence, as per the High Court Appellate Side Rules, this affidavit being allowed to be filed at subsequent stage cannot be ignored. In support of this submission, learned advocate Shri Talekar tried to place reliance on Rule 7 of the Rules framed by the High Court of Judicature at Bombay in regard to the Election Petitions under the Representation of the People Act, 1951. It will be proper to quote the relevant Rules of the High Court Appellate Side Rules at this stage. The relevant Rules are Rule No. 7 and 8, which read as under.

7. After the petition is presented, the party or Advocate shall be asked to attend the office on the third day from the date of the presentation to remove objections, if any. An undertaking in writing will be obtained from the party or Advocate to remain present in the office on the date appointed.

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8. The office shall examine the petition with a view to see whether it is in conformity with the requirements of law and the rules applicable to the same, and if it is not in conformity with law and the rules, raise objections which could be removed by the party or the Advocate concerned. These objections should be brought to the notice of the party or the Advocate on the date fixed for attendance under rule 7 and such objections shall be removed subject to the orders of the Judge, if any, within two days thereafter.

On perusal of these Rules, it is clear that the office is expected to examine the petition and grant three days'' time to the party for removal of such objections. In the present case, petition was presented on 17-01-1995. Objection as to non-filing of affidavit was raised on 19-01-2005 and same was complied with on the same day by filing a separate affidavit. Question remains as to whether this can be said to be a compliance of statutory provision. The result of the election in the present case was declared on 02-12-2004. u/s 80(1) of the Act, Election Petition challenging the election needs to be filed within a period of forty-five days from the date of declaration of returned candidate. The period of forty-five days from 02-12-2004 (date of declaration of result) expired on 16th January, 2005. However, 16th January, 2005 being a holiday, the petition came to be filed on 17-01-2005 i.e. on the last date of expiry of period of limitation without accompanying a separate affidavit as required under Proviso to Section 83(1) of the Act. No doubt, the objection of non-filing of separate affidavit was raised by the office on 19-01-2005 and it is complied with on the same day, but that cannot be said to be a compliance within the prescribed period of limitation, and factually, it is clear that a separate affidavit came to be filed after expiry of the period of limitation of forty-five days. Question remains as to whether the Rules of the High Court Appellate Side Rules, quoted above saves the period of limitation. Learned Senior Counsel Shri Shah submitted that the statutory provision prevails over the Rules framed by the High Court. Hence, the Rules of the High Court Appellate Side Rules will not save the period of limitation or cure the difficulty of non-filing of affidavit by accepting the affidavit afterwords. In support of this submission, Shri Shah placed reliance on the decision of the Apex Court in the case of Satya Narain Vs. Dhuja Ram and Others, . In the said case, the Election Petition was dismissed by the High Court on the preliminary ground that it was not in conformity with Section 81(3) of the Representation of the People Act, 1951 and the said order of the High Court was challenged before the Apex Court. Before the Apex Court, submission was made that the requirement u/s 81(3) of the Act is directory and not mandatory and the compliance of said directory provision was alleged as the spare copies of the Election Petition were filed before the petition was led before the Judge. The Apex court held that in the absence of any provision under the Act or the Rules made thereunder, the High Court Rules cannot confer upon the Register or the Deputy Registrar any power to permit correction or removal of defect in an Election Petition presented in the High Court beyond the period of limitation provided for under the Act. This aspect is also considered by the Apex Court in the case of Dr. Vijay Laxmi Sadho

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v. Jagdish reported in AIR 2001 S C 800. In the said case, Election Petition was filed in Hindi language. Petition was dismissed as being violative of Rule 2 (b) of the Madhya Pradesh High Court Rules, which required that petition should be drawn up in English language. The Apex Court held that the Rules framed by the High Court relating to trial of Election Petitions are only a procedural in nature and do not constitute "substantive law". Those Rules have to be read alongwith other statutory provisions and those Rules cannot affect the import of constitutional provisions contained in Article 348(2) of the Constitution. It is further held by the Apex Court that an Election Petition may be filed in Hindi language and same cannot be dismissed for alleged non-compliance with Rule 2 (b) of the Madhya Pradesh High Court Rules.

Thus, the ratio in both the cases, referred to above, makes it clear that the Rules framed by the High Court will not prevail over the provisions of the Representation of the People Act, 1951. It was for the petitioner to present the petition as per the statutory provisions i.e. an Election Petition must be accompanied with a separate affidavit. Objection raised or not by the office is of no consequence. Acceptance of affidavit by the office within the time of three days prescribed under the High Court Appellate Side Rules will not save the period of limitation prescribed by the Statute.

As stated above, the Election Petition in the present case is filed without accompanying a separate affidavit as required under Proviso to Section 83(1) of the Act. Though the petition was verified and sworn in by the petitioner as required under the provisions of the Code of Civil Procedure, that verification does not amount to compliance of Proviso to Section 83(1) of the Act. The affidavit filed on 19-01-2005 and acceptance of the same by the High Court office on the same day will not save the period of limitation of forty-five days prescribed u/s 81 of the Act. Hence, the affidavit filed by the petitioner found filed after the period of limitation. Thus, the petition as presented by the petitioner is found to be a petition without accompanying by an affidavit as required under Proviso to Section 83(1) of the Act.

15. On behalf of the respondent No.1, contention is raised that the petition filed without accompanying a separate affidavit in support of allegation of corrupt practices is an incomplete petition and cannot be treated to be a petition in the eye of law. Hence, such an incomplete petition needs to be rejected under Order-VII Rule 11 of the CPC or u/s 86 of the Representation of the People Act, 1951.

On behalf of the petitioner, contention is raised that non-compliance of provisions of Section 83 of the Act does not warrant dismissal of Election Petition u/s 86 of the Act. Learned advocate Shri Talekar, on behalf of the petitioner also submitted that the provision for rejection of a petition under Order-VII Rule 11 of the CPC is not a mandatory provision.

On behalf of both sides, in support of their respective contentions, learned Counsel appearing on behalf of respective parties tried to place reliance on

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various decisions of the Apex Court and different High Courts. Hence, reference to the said decisions is essential to find out as to what would be the effect of non-filing of separate affidavit in support of the allegations of corrupt practices and as to whether such a petition without a separate affidavit can be said to be a petition or whether such a petition will be no petition in the eye of law and can be dismissed u/s 86 of the Act or rejected under Order-VII Rule 11 of the Code of Civil Procedure.

16. In the case of Rameshwar Dayal Arale v. Munna Singh Bhadoria and Ors. reported in AIR 1992 M P 161 Madhya Pradesh High Court held that the term "Election Petition" used in Section 81(3) is not defined in the Act. However, it is well settled that other papers also, in addition to the petition, which form integral part of the petition, are to be included in the term "election petition". It is further observed that the provisions of Section 83(1)(b) of the Act read with its Proviso makes it clear that an "affidavit", made a mandatory requirement for challenging election on the ground of corrupt practice committed during election, necessarily becomes a part of the election petition. It is further observed that the compulsion of the language used in Clause (b) and the Proviso apart, the object which is to be served by an affidavit is to be viewed as a factor of very pressing compulsion. It has been further held as under.

Without ''affidavit'', an election petition cannot be treated as a complete ''election petition'' within the meaning of the term employed in Section 81(3) because of the requirement of the ''affidavit'' contemplated u/s 83(1)(b), Proviso, being mandatory.

The Division Bench of this Court in the case of Shrikrushna Sadashiv Dhamankar Vs. The Nasik Merchants Co-operative Bank Ltd. and Others, , while deciding the Election Petition arising under the Maharashtra Cooperative Societies Act, 1960 and considering the similar provisions in the Maharashtra Cooperative Societies Act held that Election Petition alleging corrupt practices must be accompanied by an affidavit and the deficiency cannot be condoned. It is further held that if there is no compliance of mandatory provisions, the petition in law cannot be regarded as a petition at all.

In the case of M. Kamalam Vs. Dr. V.A. Syed Mohammed, , the appellant before the Apex Court had filed Election Petition challenging the election of respondent No. 1 alleging that respondent No. 1 was guilty of corrupt practices. The Election Petition was found duly signed and verified by the appellant and it was also found accompanied by requisite affidavit in support of allegations of corrupt practices. The Election Petition and affidavit were tied together as one document and two copies of that document were filed for service on the respondent. The signature of the appellant by way of authentication in the copies served on the respondent appeared at the foot of the copy of the affidavit; but there was no such signature separately appended at the foot of the copy of the election petition. The respondent, therefore, raised a preliminary objection against the maintainability of the petition on the ground that the petition did not comply with Section 81(3)

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of the Representation of the People Act, 1951. The High Court accepted the objection and dismissed the election petition on that ground. Hence, the petitioner approached the Apex Court. The decision of the High Court was set aside and the petition was remanded to the High Court to decide it on merit. In paragraph No. 5 of the judgment, the Apex Court observed as under.

The election petition is in truth and reality one document consisting of two parts - one being the election petition proper and the other being the affidavit referred to in proviso to Section 83(1) as the affidavit forms part of the election petition.

The petitioner in that case put his signature at the foot of the copy of the affidavit and the Apex Court held that it authenticated the whole copy of the election petition to be a true copy.

The ratio in the above case makes it clear that the affidavit in support of allegations of corrupt practices forms a part of the Election Petition. The Election Petition and the affidavit are held to be one document consisting of two parts, one is Election Petition proper and another is affidavit referred to in the Proviso to Section 83(1) of the Act. Thus, a separate affidavit required under Proviso to Section 83(1) of the Act which needs to be filed alongwith the Election Petition forms a part of Election Petition itself. Thus, a petition without an affidavit required under Proviso to Section 83(1) of the Act can be said to be an incomplete petition.

17. The last decision relied upon on behalf of respondent No. 1 in support of his submission that the petition without an affidavit can be said to be an incomplete petition is the decision of this Court in the case of Shri Ramakrishna Jagannath Patil v. Chandrakant Bhaurao Khaire reported in 2006 MCR 361. The facts in the present case and the facts in the case of Shri Ramakrishna are similar. In the case of Shri Ramakrishna also, the petition was filed without accompanying a separate affidavit as required under the Proviso to Section 83(1) of the Act. An application was moved to grant permission to file separate affidavit. That application was moved after expiry of the period of limitation. Said application was opposed by other side. Contention was raised that the petition presented without any affidavit supporting the allegations of corrupt practices on which petition is based is no petition in the eye of law, and on this count, petition was allegedly deserved to be dismissed at the threshold u/s 86 of the Act. On behalf of the respondent No. 1 in that petition, relying upon the decision of the Apex Court in the case of G. Mallikar Junappa v. Shamanur Shivashankarappa reported in (2001) STC 428 as well as decision of the Apex Court in the case of Dr. Vijay Laxmi Sadho v. Jagdish reported in AIR 2001 S C 600 a contention was raised that non-filing of an affidavit does not attract dismissal of the Election Petition u/s 86 of the Act. Relying upon the decision in the case of M. Kamalam Vs. Dr. V.A. Syed Mohammed, , referred to above, this Court held that an affidavit under the Proviso to Section 83(1) of the Act is an integral and inseparable part of the Election Petition and the petition presented without an affidavit as contemplated under Rule 94-A is an incomplete presentation of the petition, and therefore, no

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petition in the eye of law. It has also been held by this Court as under.

Election petition de hors affidavit in Form No. 25 is bad for non-compliance of proviso to Sub-section (1) of Section 83 and it is no election petition in the eye of law. Complete election petition in the eye of law if affidavit sought to be filed on record after expiry of period of limitation would come into existence on that day, and therefore, would be barred by limitation prescribed in Section 80(1) of the RP Act.

The petition in the above case before this Court came to be dismissed as it was filed without an affidavit and the affidavit was filed after expiry of period of limitation. In paragraph 16 of the judgment, this Court observed that although there is defect in the verification and, thus, there is non-compliance of Section 83(1)(c), the defect is curable and would not entail dismissal of the petition at threshold. However, the petition came to be dismissed as it was a incomplete petition as the affidavit required under Rule 94-A in Form No. 25 was being offered after the expiry of period of limitation.

The ratio in the above referred case thus is clear that the election petition without accompanying a separate affidavit as required under Proviso to Section 83(1) of the Act is an incomplete petition and such an incomplete petition cannot be treated to be a petition in the eye of law. Hence, the next question remains for consideration is as to whether such a petition can be dismissed or rejected at the threshold either u/s 86 of the Act or under Order-VII Rule 11 of the Code of Civil Procedure.

18. Learned advocate Shri Talekar, for the petitioner advanced submission that non-compliance of provisions of Section 83 of the Act does not warrant dismissal of the Election Petition in limine u/s 86 of the Act. In support of this submission, he has placed reliance on the decisions of the Apex Court. He also advanced submission that in view of the decision on which he has placed reliance, the decision of the Bombay High Court as well as decision of Madhya Pradesh High Court, referred to above, is no more a good law. He also made submission that the judgment in the case of Shri Ramakrishna reported in 2006 M.C.R.361 can be said to be a judgment in per incurium. However, this submission advanced by Shri Talekar that the judgment in the case of Shri Ramakrishna amounts to a judgment per incurium cannot be accepted. The learned Single Judge of this Court considered in detail the judgment of the Apex Court in the case of G. Mallikar Junappa (supra) as well as the judgment of the Apex Court in the case of Sardar Harcharan Singh Brar Vs. Sukh Darshan Singh and Others, and some other judgments of the Apex Court in detail. It is observed that in the cases before the Apex Court, the facts were totally different as the affidavits filed in those cases were found to be defective affidavits and none of the cases before the Apex Court was a case of non-filing of an affidavit at all. In the concluding para of the judgment, this Court has observed that the petition is not defective for non-compliance of Section 83(1) although there is defect in the verification. Following the observations of the Apex Court, the learned Single Judge observed

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that the said defect is curable and would not entail dismissal of the petition at threshold. However, the petition came to be dismissed on the ground that the petition was filed without affidavit and the affidavit was offered after expiry of the period of limitation and the petition was held to be a petition barred by prescribed limitation. Hence, it cannot be said that the ratio laid down by the Apex Court is not followed by the learned Single Judge of this Court. On the contrary, in paragraph 16 of the judgment, learned Single Judge clearly held that the defect in the verification of the petition is curable and would not entail dismissal of the petition at the threshold on account of non-compliance of Section 83(1)(c) of the Act. It cannot, therefore, be said that the ratio laid down by the Apex Court is not followed.

19. Let us now consider as to whether non-filing of affidavit with the election petition entails dismissal of the election petition u/s 86 of the Act. Learned advocate Shri Talekar advanced submission that non-compliance of Section 83 of the Act does not warrant dismissal of the Election Petition u/s 83 of the Act. The first decision relied upon by Shri Talekar is the decision of the Apex Court in the case of Dr. Vijay Laxmi Sadho v. Jagdish reported in AIR 2001 SC 600. The Apex Court in that case held as under. "An election petition is liable to be dismissed in limine u/s 86(1) of the Act only if the election petition does not comply with either the provisions of Section 81 or Section 82 or Section 107 of the Act. The requirement of filing an affidavit alongwith an election petition, in the prescribed fornm, in support of allegations of corrupt practice is contained in Section 83(1) of the Act. Thus, an election petition is not liable to be dismissed in limine u/s 86 of the Act, for alleged non-compliance with provisions of Section 83(1) of the Act or of its proviso."

However, the Apex Court also observed as under.

What other consequences, if any, may follow from an allegedly ''defective'' affidavit, is to be judged at the trial of an election petition but Section 86(1) of the Act in terms cannot be attracted to such a case.

Thus, the ratio in the above case is clear that election petition is liable to be dismissed in limine u/s 86(1) of the Act only if the election petition does not comply with either the provisions of Section 81 or Section 82 or Section 107 of the Act.

20. The second decision relied upon by Shri Talekar on behalf of the petitioner in support of his contention is the decision of the Apex Court in the case of Sardar Harcharan Singh Brar Vs. Sukh Darshan Singh and Others, , wherein the Apex Court held as under.

The grounds of corrupt practice and the facts necessary to formulate a complete cause of action had been stated. Even the particulars had been given. However, if the Court felt that the particulars as given in the petition were deficient in any manner the petitioner could be directed to supply the particulars and make the deficiency good. In any case, deficiency in particulars could not have been a

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ground for dismissing the petition at the threshold.

It is further observed by the Apex Court as under.

The proviso to Section 83(1) of the Act is couched in a mandatory form in as much as it provides that a petition alleging corrupt practice shall be accompanied by an affidavit in the prescribed form in support of the allegations of such corrupt practice and the particulars thereof. The form is prescribed by Rule 94-A. Non-compliance with the provisions of Section 83 of the Act, however, does not attract the consequences envisaged by Section 86(1) of the Act. Therefore, an election petition is not liable to be dismissed in limine u/s 86 of the Act, for alleged non-compliance with provisions of Section 83(1) or (2) of the Act or of its proviso. The defect in the verification and the affidavit is a curable defect. What other consequences, if any, may flow from an allegedly "defective" affidavit, is required to be judged at the trial of an election petition but Section 86(1) of the Act in terms cannot be attracted to such a case.

In the case of G. Mallikar Junappa (supra) also, the Apex Court laid down the same ratio that the election petition is liable to be dismissed in limine u/s 86(1) of the Act if the election petition does not comply with either the provisions of Section 81 or Section 82 or Section 117 of the RP Act. The requirement of filing an affidavit along with an election petition, in the prescribed form in support of allegations of corrupt practice is contained in Section 83(1) of the Act. Non-compliance with the provisions of Section 83 of the Act, however, does not attract the consequences envisaged by Section 86(1) of the Act. Therefore, an election petition is not liable to be dismissed in limine u/s 86 of the Act, for alleged non-compliance with provisions of Section 83(1) or (2) of the Act or of its proviso. The defect in the verification and the affidavit is a curable defect. What other consequences, if any, may follow from an allegedly "defective" affidavit, is required to be judged at the trial of an election petition but Section 86(1) of the Act in terms cannot be attracted to such a case.

In the case of Harkirat Singh v. Amarinder Singh reported in AIR 2006 SCW 4 the Apex Court considered the phrases "Material Facts" and "Material Particulars", and held that it is absolutely essential that all basic and primary facts which must be proved at the trial by the party to establish the existence of a cause of action or defence are material facts and must be stated in the pleading by the party. The distinction between "material facts" and "material particulars" must not be overlooked. It is also held that failure to state even a single material fact will entail dismissal of the suit or 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.

In that case, the corrupt practice alleged was of taking assistance of Government servants. Petitioner gave details as to how the assistance was given by the gazetted officers. On the said facts, rejection of petition by going into correctness of the facts is held improper as the correctness or otherwise of the facts stated

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will be a matter of merit.... Thus, the ratio in the above cases makes it clear that the material facts need to be pleaded in the petition. Material particulars shall be the matter of the merit of the case. The defects in the affidavit can be cured and such defects will not attract dismissal of the election u/s 86 of the Act. The ratio laid down by the Apex Court in the above referred cases is consistent that non-compliance of provisions of Section 83 of the Act does not attract dismissal u/s 86 of the Act, and the petition cannot be dismissed in limine therefor. However, in none of the cases, relied upon by the learned advocate for the petitioner, referred to above, the effect of non-filing of an affidavit in support of allegations of corrupt practices is considered as in the said cases, separate affidavits as required were found filed alongwith the petition, but non-compliance alleged was of defective affidavits and the Apex Court held that such defect can be cured. Considering the provisions of Section 86 of the Act, the Apex Court held that dismissal of the petition in limine u/s 86 of the Act is warranted if there is non-compliance of Section 81 or 82 or 117 of the Act. The non-compliance of Section 83 of the Act, as held, does not warrant dismissal of the petition u/s 86 of the Act. However, in none of these cases, the Apex Court considered the point of rejection of the Election Petition under Order-VII Rule 11 of the Code of Civil Procedure.

21. The respondent No. 1 raised a contention that the petition without an affidavit as required under Proviso to Section 83(1) of the Act cannot be said to be a petition in the eye of law. The ratio laid down by the Apex Court in the case of M. Kamalam v. Dr. V.A. Syed Mohammed (supra) also makes it clear that petition without an affidavit cannot be said to be a petition at all because the election petition is held to be one document, consisting of two parts i.e. election petition proper and a separate affidavit as required under Proviso to Section 83(1) of the Act. Petition in absence of one part (i.e. the affidavit) can be said to be an incomplete petition. Question thus remains as to whether such a petition which cannot be said to be a petition in the eye of law, can be dismissed or rejected by resorting to provisions of Order-VII Rule 11 of the Code of Civil Procedure. Rule 11 of Order-VII of the CPC is also in mandatory form, which prescribes that the plaint shall be rejected in the following cases.

[a] Where it does not disclose cause of action;

[b] *****

[c] *****

[d] Where the suit appears from the statement in the plaint barred by any law.

As stated above, in the present case the affidavit in support of allegations of corrupt practices has not been filed alongwith the election petition, but same came to be filed after expiry of prescribed period of limitation of forty-five days. Submission is advanced on behalf of the respondent No. 1 that though petition cannot be dismissed in limine u/s 86 of the Act, the powers of the court under the CPC can be exercised to reject the election petition under Rule 11 of Order-

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VII of the Code of Civil Procedure. In support of this submission, reliance is placed on the decision of the Apex Court in the case of Harmohinder Singh Pradhan v. Ranjeet Singh Talwandi and Ors. reported in AIR 2005 SCW 2512. In the said case, election petition was filed alleging corrupt practices. The respondent in that case was alleged to have made an appeal for casting votes in name of certain religious leaders in public meetings. No averment in the election petition was made that the said appeal was made in the name of his religion or to refrain voters from voting for petitioner on ground of his religion. The election petition was rejected by the High Court on the ground that in the election petition, necessary averments of facts constituting appeal on the ground of religion were deficient. The Apex Court upheld the order of the rejection of the election petition. In paragraph 14 of the judgment, the Apex Court observed that the petition can be rejected at the threshold on the ground of not disclosing cause of action under Clause (a) of Rule 11 of Order VII of the Code of Civil Procedure. The Apex Court in this case has observed as under.

Necessary averment of facts constituting an appeal on the ground of ''his religion'' to vote or to refrain from voting would be material facts within the meaning of Clause (a) of Sub-section (1) of Section 83 of the Act. If such material facts are missing, they cannot be supplied later on, after the expiry of period of limitation for filing the election petition and the plea being deficient, can be directed to be struck down under Order VI, Rule 16 of the Code of Civil Procedure, 1908 and if such plea be the sole ground of filing an election petition, the petition itself can be rejected as not disclosing a cause of action under Clause (a) Rule 11 of Order VII of the Code.

Thus, the ratio in this case is clear that if the material facts are not pleaded in the election petition, those cannot be substituted after expiry of the period of limitation for filing the election petition and if such a fact is a ground for filing election petition, the petition can be rejected as not disclosing the cause of action.

22. In the case of Lalit Kishore Chaturvedi v. Jagdish Prasad reported in 1990 (Supp.) SCC 248, the Apex Court held as under.

An election petition filed u/s 81 is required by Section 83(1) to contain concise statement of the material facts on which petitioner relies. Statutory compulsion visualised by Section 83(1)(b) to set forth full particulars of corrupt practice including names of persons, time and place, is to be construed strictly and absence of precise and specific pleading will render an election petition infirm. However, the submission that an election petition could be dismissed, apart from merit, only for one of the reasons mentioned in Section 86(1) is devoid of any substance. Dismissals visualised u/s 86(1) are for lack of verification or presentation of petition beyond time or for defect in joinder of parties or for non-deposit of security for costs. These are defects in frame or presentation of petition. On the other hand dismissal for failure to disclose cause of action under Order VII Rule 11 of CPC is in course of trial. The fact that Section 83 does not

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find place in Section 86 does not mean that powers under CPC cannot be exercised. If the claim on the pleadings in the election petition filed u/s 83 read with Section 100 of the Act does not raise any triable issue, then the petition is liable to be dismissed under Order VII Rule 11, Code of Civil Procedure.

In this case, it is also held by the Apex Court that pleading about allegations of corrupt practice must be based on precise material facts. Wholly vague and insufficient pleadings do not raise any adjudicatory issue. Such a petition is liable to be dismissed under Order VII Rule 11 of the Code of Civil Procedure.

In the case of Samar Singh Vs. Kedar Nath alias K.N. Singh and Others, the Apex Court held that the election petition which does not disclose any cause of action can be dismissed summarily under Order-VII Rule 11 of the CPC either at the threshold of the proceedings or at any other stage of the proceedings. In para 5 of the judgment, the Apex Court has observed as under.

Order 7 Rule 11 does not place any restriction or limitation on the exercise of court''s power; it does not either expressly or by necessary implication provide that power under Order 7 Rule 11 CPC should be exercised at a particular stage only. In the absence of any restriction placed by the statutory provision, it is open to the court to exercise that power at any stage.

In the case of Dhartipakar Madan Lal Agarwal Vs. Rajiv Gandhi, , there were allegations of corrupt practices. The Apex Court held that the petitioner failed to give material facts and other details of alleged corrupt practice. Before the Apex Court, applications were moved for amending the election petition to remove the defects and to make allegations of corrupt practice in accordance with the provisions of Section 123 of the Act. Said applications came to be rejected by the Apex Court. Considering the provisions u/s 87 of the Act as well as provisions of Order-VI Rule 17 of CPC, the Apex Court observed as under.

It must be borne in mind that the election petition was presented to the Registrar of the High Court, at Lucknow Bench on the last day of the limitation prescribed for filing the election petition. The appellant could not raise any ground of challenge after the expiry of limitation. Order VI Rule 17 no doubt permits amendment of an election petition but the same is subject to the provisions of the Act. Section 81 prescribes a period of 45 days from the date of the election for presenting election petition calling in question, the election of a returned candidate. After the expiry of that period no election petition is maintainable and the High Court or this Court has no jurisdiction to extend the period of limitation. An order of amendment permitting a new ground to be raised beyond the time specified in Section 81 would amount to contravention of those provisions and beyond the ambit of Section 87 of the Act. It necessarily follows that a new ground cannot be raised or inserted in an election petition by way of amendment after the expiry of the period of limitation.

Thus, from the above observations of the Apex Court, it is clear that no ground in the election petition can be allowed to be inserted after expiry of prescribed

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period of limitation of forty-five days, challenging the election. In the present case also, election petition came to be filed on the last day of the prescribed period of limitation without filing an affidavit as required under Proviso to Section 83(1) of the Act. Subsequent filing of affidavit on 19-01-2005 after expiry of the period of limitation is not permissible as it amounts to insertion of a ground after expiry of the period of limitation. Hence, the election petition as it is filed on the last day of expiry of the period of limitation of forty-five days is a petition without an affidavit and is an incomplete petition, which is not a petition in the eye of law at all. Hence such a petition is liable to be rejected under Order-VII Rule 11 of the Code of Civil Procedure.

23. The last decision relied upon by learned Senior Counsel Shri Shah, on behalf of respondent No. 1 is the decision in the case of Azhar Hussain Vs. Rajiv Gandhi, .

In the election petition in the said case also, the election was challenged on the ground of alleged corrupt practices. The High Court dismissed the said election petition under Order-VII Rule 11 of CPC as not disclosing any cause of action, instead of rejecting it. The petition came to be dismissed as it did not disclose cause of action for want of material particulars. Said petition was filed on the last date on which the election petition could have been presented. Under Order-VII Rule 11 of the Code of Civil Procedure, the order contemplated is rejection of election petition, instead of dismissal thereof. The Apex Court observed that the election petition being filed on the last day on which the petition could have been presented having regard to the rigid period of limitation prescribed by Sec. 81 of the Act. It could not have been presented even on the next day. Such being the admitted position, it would make little difference whether the High Court used the expression ''rejected'' or ''dismissed''. It would have had some significance if the petition was ''rejected'' instead of being ''dismissed'' before expiry of limitation in as much as fresh petition which contained material facts and was in conformity with the requirements of law and which disclosed a cause of action could have been presented ''within'' the period of limitation.

The facts in the present case are similar to those in the case of Azhar Hussain (supra). Present election petition is filed on the last day of the prescribed period of limitation without an affidavit in support of allegations of corrupt practices. The affidavit filed subsequently i.e. after expiry of period of forty-five days cannot be considered at all. Hence, this election petition is found to be an incomplete petition or no petition in the eye of law. As the facts pleaded in the petition are not supported by an affidavit, such a petition can be said to be a petition without disclosing any cause of action and it can be rejected under Order-VII Rule 11 of the Code of Civil Procedure.

24. In view of the facts and circumstances discussed above and considering the ratio laid down by the Apex Court in its various decisions rendered in various cases, referred to above, present election petition filed by the petitioner is an incomplete petition, which cannot be said to be a petition in the eye of law. As

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laid down by the Apex Court, its dismissal u/s 86 of the Representation of the People Act, 1951 is not warranted. However, this petition cannot be treated to be a petition in the eye of law. The affidavit filed in support of allegations of corrupt practices needs to be ignored as the same is filed after expiry of period of limitation. After exclusion of that affidavit, filed subsequently, this petition can be said to be a petition without disclosing cause of action. Hence, such a petition needs to be rejected exercising the powers under Order-VII Rule 11 of the Code of Civil Procedure. The application (Exhibit-9) preferred by the respondent No. 1 needs to be allowed and the election petition filed by the petitioner needs to be rejected under Order-VII Rule 11 of the Code of Civil Procedure.

25. In the result, I pass the following order.

The application (Exhibit-9) preferred by the respondent No. 1 in this election petition is allowed. The Election Petition No. 7 of 2005 is rejected under Order-VII Rule 11 of the Code of Civil Procedure. In the circumstances, petitioner to bear his own cost and to bear cost of respondent No. 1.

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