

(1999) 08 BOM CK 0082

In the Bombay High Court

Case No : Election Petition No. 1 of 1998

Dr. Bharat Pandurang Dhokane

APPELLANT

Vs

Yeshwantrao Kankarrao Gadakh and another

RESPONDENT

Date of Decision : 18-08-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1, Order 47 Rule 2, Order 7 Rule 11, 11

Constitution of India, 1950 — Article 226, 32

Evidence Act, 1872 — Section 114, 35

Representation of the People Act, 1950 — Section 16, 23(3), 24

Representation of the People Act, 1951 — Section 103, 111, 123, 16, 2

Citation : (1999) 4 ALLMR 632 : (2000) 3 BomCR 107

Hon'ble Judges : R.G. Deshpande, J

Bench : Single Bench

**Advocate : K.N. Bhatt, C., Pradeep Rajgopal and A.B. Naik, for the Appellant;
V.R. Manohar, Sr.C. and S.B. Deshmukh, for the Respondent**

Judgement

R.G. Deshpande, J.—The present election petition is filed challenging the election of the respondent No. 1 as a member of the Legislative Council from Ahmednagar; District Ahmednagar in the election held on 29th December, 1997, the result of which was declared on 31st December, 1997. The present respondent No. 1 contested the Legislative Council election of the Maharashtra Legislative Council from Ahmednagar, District Ahmednagar constituency (hereinafter referred to as "the Constituency" for the purposes of brevity). The petitioner also contested the said election and was sponsored by Shiv Sena party. The present respondent No. 1 was a candidate of Indian National Congress (I). There was a third candidate, namely, Dilip Kumar Gandhi, who was fielded by Bharatiya Janata Party (B.J.P.). Thus, in the fray, there were in all three candidates. The elections were held on 29th December 1997; whereas counting of votes was conducted on 31st December, 1997 and, on the same day, the results were declared. The respondent No. 1 was declared elected as he had secured 220 votes out of 320; whereas the petitioners secured 91 votes. -

2. This case has got a bit chequered history. The respondent No. 1 in the year 1991 was elected in Parliamentary elections from 39, Ahmednagar (South) constituency. However, the said election of the respondent No. 1 was set aside by this Court in Election Petition No. 2/91 vide its judgment dated 30th March 1993, on the ground that the present respondent No. 1 was found guilty of corrupt practices u/s 123 of the Representation of the People Act, 1951 (hereinafter referred to as "the Act of 1951"). The present respondent No. 1 had challenged that judgment and order of the High Court before the Supreme Court vide Appeal No. 2115/1993 which was partly allowed by the Supreme Court by its judgment dated 19-11-1993. However the decision of the High Court as regards the corrupt practices was upheld by the Supreme Court. In view of the judgment of the Supreme Court, referred to above, the present respondent No. 1 was disqualified under the provisions of section 8-A of the Act of 1951.

3. In pursuance of the above-said judgment of the Supreme Court, a notification dated 10-6-1994 was issued by the Honourable President of India, whereby the respondent No. 1 was declared disqualified for a period of four years from 19-11-1993 that is the date of the judgment of the Supreme Court. Needless to mention that the Honourable President of India, in accordance with the provisions of sub-section (3) of section 8-A of the Act of 1951, had sought the necessary opinion from the Election Commission. The respondent No- 1 moved necessary applications to various authorities i.e. District Election Officer, the Chairman, Election Commission of India and the Chief Electoral Officer on 19-9-1997 informing them that his disqualification was to expire on 18-11-1997, and that his name be reinstated in the electoral roll, then existing, immediately on the said expiry of disqualification. However, the petitioner contends, in this petition, that respondent No. 1 did not move any application before the Electoral Registration Officer which, according to the petitioner, was mandatory, in accordance with the provisions of section 24 of the Representation of the People Act, 1950 (which is hereinafter referred to as "the Act of 1950"). According to the petitioner in pursuance of the provisions of section 6(1) of the Act of 1951, the name of the respondent No. 1 could not have been included in the final electoral roll on or before 1-1-1998 and such non-inclusion, therefore, according to the petitioner, was correct.

4. Since the name of the respondent No. 1 was not included in the final electoral roll of the constituency, it became a subject-matter of challenge under Article 226 of the Constitution of India, at the instance of the respondent No. 1, vide Writ Petition No. 5205/97. The contention of the present respondent No. 1 in that petition was that, his name should have been included in the electoral roll of the said constituency forthwith, the moment his disqualification expired. In the said petition, along with the State of Maharashtra, the Chief Electoral Officer, the Under Secretary and Deputy Chief Election Commissioner, Bombay and District Collector were the parties. However, there was no question of the present petitioner being a party to that petition. In the said petition, this Court on 9-12-1997 by its judgment ordered the Collector, Ahmednagar to supply to the

present respondent No. 1 (petitioner in that petition) a copy of the electoral roll containing the name of this respondent No. 1 after reinstatement of his name in the electoral roll of 230, Ahmednagar (North) assembly constituency, village Sonai, Tq. Newasa. While delivering the above-said judgment dated 9-12-1997, the Division Bench of this Court, in the above-said Writ Petition No. 5205/97 observed that in accordance with the provisions of section 6(2), the name of the petitioner therein was liable to be reinstated forthwith on expiry of the disqualification, in the electoral roll which was in force on the date of disqualification. The Division Bench of this Court, therefore, observed that the name of the petitioner ought to have been reinstated forthwith in the electoral roll of 230, Ahmednagar (North) assembly constituency, which was valid and in force up to 31st December, 1997.

5. The Chief Electoral Officer, Maharashtra who was dissatisfied with the judgment of the High Court in the above-said Writ Petition No. 5205/97 filed a Review Petition bearing No. 6062/97 contending that the earlier order passed by the High Court was an ex-parte order as it was without hearing all the parties therein. However, the said Review Application at the instance of the Chief Electoral Officer, after hearing all the parties therein, was rejected by the Division Bench by a reasoned order dated 23rd December, 1997.

6. Thus, in view of the rejection of the Review Petition, the judgment and order dated 9th December 1997 in Writ Petition No. 5205/97 had become final, conclusive and binding on all the parties concerned.

7. An important aspect which needs consideration at this stage itself, is that the judgment and order of this Court in Writ Petition No. 5205/97 and in Review Application No. 6062/97 i.e. orders dated 9-12-1997 and 23-12-1997 respectively happened to be a subject-matter of challenge before the Supreme Court at the instance of the present petitioner vide Special Leave to Appeal (Civil) C.C. Nos. 2547-2548/98 and their Lordship of the Supreme Court vide their order dated 6-3-1998 rejected the Spl. Leave Petition and dismissed the S.L.Ps. as per the order below:-

"Permission to file S.L.Ps. is refused. S.L.Ps. are dismissed."

Thus, the judgment and order of the High Court in Writ Petition No. 5205/97 became final and conclusive in every respect so far as it related to the inclusion of the name of the present respondent respondent No. 1 in the final electoral roll of the concerned constituency.

8. In the present Election Petition No. 1/98 the only one challenge is as regards inclusion of the name of the present respondent No. 1 in the electoral roll of 230, Ahmednagar (North) Assembly Constituency and, the other challenges are i.e. such as, whether a disqualification u/s 8-A of the Act of 1951 could be removed under the provisions of section 111 of the said Act of 1951. According to the petitioner, that was not possible, as according to the petitioner, certain exceptions are carved out in that section so far as regards disqualification u/s 8-

A is concerned. The other challenge is regarding the acceptance of the nomination paper of the petitioner for election of Legislative Council from Ahmednagar District Ahmednagar constituency.

9. The respondent No. 1 filed his written statement, denying all the allegations made in the petition as totally false. In the written statement, it is specifically averred that prior to the election of 1991 which was a mid-term poll in the year 1984 and also in the year 1989, he was elected as a Member of Parliament from 39, Ahmednagar (South) Parliamentary constituency. However, his election for the third time in the year 1991 was challenged wherein he was disqualified for having alleged to have indulged in corrupt practices u/s 123 of the Act of 1951. The respondent No. 1 further specifically contended that the judgment of the High Court was challenged by him in a Civil Appeal No. 21995 before the Supreme Court which was decided on 19-11-1993, and he was disqualified for a period of four years commencing from 19th November 1993, which expired on 18-11-1997. In view of the above-said decision, his name was struck off from the electoral roll of 230, Ahmednagar (North) assembly constituency. He, therefore, by his letter dated 19-9-1997 brought it to the notice of the District Election Officer that his disqualification was to expire on 18-11-1997 and hence his name be reinstated in the Electoral Roll of the said constituency immediately on cessation of that disqualification. The Copies of the same were also forwarded to the Chairman, Election Commission of India and also the Chief Electoral Officer, MS. Mumbai. According to the respondent No. 1, the Election Commission of India by its letter dated 27th October 1997 directed the Chief Electoral Officer MS Mumbai to immediately take necessary action in the matter with necessary intimation to this respondent No. 1. In pursuance of the abovesaid action, the Under Secretary and Deputy Chief Election Officer, MS. Mumbai by his letter dated 11-11-1997 directed the District Collector & District Returning Officer, Ahmednagar to take necessary steps regarding the representation of the respondent No. 1 with necessary intimation to the respondent No. 1. According to the respondent No. 1 despite the above-said direction, the District Collector and the District Returning Officer who was then Incharge of the Electoral Registration matters in the District failed to take prompt action in the matter and hence the respondent No. 1 was compelled to initiate Writ Petition No. 5205/1997 in the High Court of Bombay, Bench at Aurangabad which is allowed vide judgment dated 9-12-1997. Review application against that also came to be rejected by the High Court. The same is maintained by the Supreme Court in Special Leave petition. During the intervening period the name of the respondent No. 1 stood reinstated in the electoral roll on 10-12-1997 of the concerned constituency at Sr. No. 592 and a certified copy of the same was given to the respondent No. 1 which shows the details as regards the name of the constituency, sub-division, name of the village, Tahsil, polling booth or centres, name of the respondent No. 1 and Sr. No. etc.

10. On the basis of the above-said inclusion in the list, the petitioner on 11-12-1997 submitted his nomination paper to the Returning Officer for the

election to Legislative Council from the said Constituency. In his nomination paper, he had given all the details which are required as per law and as per the form including that of his Sr. No. and Part No. of the electoral roll. The nomination form having been found in due compliance with the provisions of law and the rules applicable, and it being complete in every respect, the same was accepted. It would be necessary to observe at this stage itself that the present petitioner did not raise any objection to the nomination of the present respondent No. 1 at the time of scrutiny. In the meantime, a review petition which was filed by the present petitioner also came to be rejected by the High Court by its judgment and order dated 23rd December, 1997. The date of polling for the election to the Legislative Council of the State of Maharashtra for the concerned constituency was 29th December 1997. The SLP to which a reference is already made above, was also dismissed by the Supreme Court by refusing leave to appeal vide its order dated 6-3-1998. Thus, the judgment of the High Court in Writ Petition No. 5205/97 was conclusive in every respect.

11. The respondent No. 1 further contended that since the SLP was filed by the petitioner himself, it was not open for the petitioner to contend that he was not a party in the earlier proceedings and that, the decision in those proceedings, was not binding on him. According to the respondent No. 1, the fact remains that his name stood reinstated in the voters' list of the concerned constituency on 10-12-1997 and only thereafter this respondent No. 1 submitted his nomination paper to the Returning Officer. The respondent No. 1, therefore, contended that, in fact, there is no cause of action for the petitioner to initiate the present election petition on the said same grounds against the present respondents. The respondent No. 1, therefore, contended that this Court is not having jurisdiction and power to entertain the present petition on the same challenges which are once rejected by the Supreme Court in SLP and that too at the instance of the petitioner. The respondent No. 1, therefore, sought for dismissal of the election petition. According to the respondent No. 1, the other contentions of the petitioner do not have any substance and hence contended that the petitioner was not entitled for any of the relief he has sought for in the petition.

12. Before filing the written statement, the respondent No. 1 filed Exh. 11, an application raising preliminary objection to the Election Petition No. 1/98 as regards the maintainability of the petition itself and for dismissal of the petition on preliminary objection by framing necessary issues. This application was taken on the record. However, this Court on 5-11-1998 passed an order that the point as regards maintainability of the petition by way of preliminary point will be considered only after the written statement is filed by the respondent No. 1 which he filed on 19-11-1998. An order to proceed without written statement as against the respondent No. 2 was already passed by this Court. After filing of the necessary written statement of the respondent No. 1, issues were framed on 11-2-1999 vide Exh. 23. Issue Nos. 1, 2 and 3 were directed to be heard as preliminary issues. Issue Nos. 1, 2 and 3 are as under:-

(1) Whether the judgment and order rendered by the High Court in Writ Petition No. 5205/1997 and the judgment rendered by the High Court of Bombay, Bench at Aurangabad in Review Application No. 6062/97 in Writ Petition No. 5205/97 acts as res judicata in the present matter or what is the impact of this judgment and the judgment of the Supreme Court in SLP No. 2547-48/1998 on the present petition?

(2) Whether the petitioner proves that there is any cause of action to file the present petition?

(3) Whether this Court has jurisdiction to entertain this election petition?

13. Shri. V.R. Manohar, learned Senior Counsel with Shri S.B. Deshmukh, Advocate argued the matter on behalf of the respondent No. 1; Shri K.N. Bhatt, the learned Senior Counsel with Shri A.B. Naik, Advocate represented the petitioner.

14. Shri Manohar, the learned Counsel vehemently urged that in view of the judgment in Writ Petition No. 5205/97 which has been maintained in the Review Application No. 6062/97 and, further both the orders having been confirmed by the Supreme Court vide SLP No. 2547-4548/98, concluded the point, that the respondent No. 1's name stood reinstated in the voters list of the constituency on 10-12-1997 and hence the nomination paper submitted by the respondent No. 1 was a valid nomination paper which was rightly received and accepted. The election of the respondent No. 1, according to Shri Manohar, cannot be labelled bad by any stretch of imagination on any count. He, therefore, argued that there is no cause of action for the present petitioner to initiate the present petition. Shri Manohar, further, argued that it was not open for the present petitioner to contend that the decision in Writ Petition No. 5205/97 could not be said to be binding on him as he was not a party to the said petition particularly when it was the petitioner himself who had initiated SLP before the Supreme Court, wherein the petitioner was even refused leave to appeal and the appeal stood dismissed. According to Shri Manohar, filing of the present petition by the petitioner is nothing but a frivolous and unnecessary litigation. He, therefore, argued that the petitioner has unnecessarily set in motion the process of law again for the said same cause. Shri Manohar, further, argued that it is a case wherein there is no necessity to lead any evidence on any point and the preliminary point itself would be nothing but dismissal of the election petition on preliminary points itself. Shri Manohar, contended that the factual position so far as it relates to inclusion of the name of the respondent No. 1 in the voters list of the concerned constituency can very well be demonstrated on the basis of the documents produced on the record which do not require any type of evidence at all in the instant matter and these documents can also very well be accepted and relied upon as a piece of evidence for the purpose of deciding preliminary issue. According to Shri Manohar, the certified copy which was issued and which is on the record indicates the induction or reinstatement of the name of the respondent No. 1 in the electoral roll of the concerned constituency would show it beyond any doubt that

definitely on or before the date of filling in the nomination paper by the respondent No. 1, the name of the respondent No. 1 was already reinstated or reinducted in the voters list and in any case on 10th December, 1997. He, therefore, argued that no more proof is required, further to show that the respondent No. 1's name was in the electoral roll on the date of submission of the nomination paper. According to him, acceptance of the nomination paper after the due scrutiny is the proof of there being no shortcomings whatsoever in the same.

15. As against the arguments of Shri. V.R. Manohar, Shri K.N. Bhatt, the learned Senior Counsel appearing on behalf of the petitioner, contended that it is a matter which needs evidence and according to him, it cannot be decided on the basis of preliminary issue.

16. It is necessary to make a mention of an important aspect here at this stage itself that even till the completion of the arguments by the parties, no application was moved by the parties either expressing their desire and intention to lead any evidence on preliminary point or even did not move an application to that effect. This aspect in the present matter do definitely carry an importance. The affidavits and the counter affidavits on the record, in the opinion of this Court, along with documents produced are quite sufficient to give a finding on preliminary issues.

17. Shri Bhatt, contended that since the name of the respondent No. 1 could not be there in the voters' list on the date on which the respondent No. 1 submitted his nomination paper, Shri Bhatt argued that, acceptance of the nomination paper of the respondent No. 1 by the Returning Officer also was, illegal and, therefore, according to Shri Bhatt, the necessary conclusion would be to declare the election of the respondent No. 1 as void.

18. In support of their contentions, the learned Counsel appearing on behalf of both the parties, took this Court through various documents on the record.

19. To find out as to whether this petition can be disposed of on the preliminary issues, it will be necessary to find out as to whether the objection raised by the returned candidate really requires to go into the preliminary question and, in case if the Court does not uphold the same, the need to conduct the trial would arise, else the petition would result into its dismissal at the threshold as the Court will be left with no option except to dismiss the same. The decision in the present case totally hinges on the factual position so far as it relates to the date of inclusion of the name of the present respondent No. 1 in the voters' list.

20. This Court has gone through the contentions raised in the petition and its rebuttal in the written statement along with the relevant documents produced by the parties. However, before referring to the relevant documents, it would be necessary to observe that section 8-A of the Act of 1951 deals with the point of disqualification on the ground of commission of corrupt practices. Sub-section (1) read with sub-section (3) of section 8-A directs that the case of every such

member found guilty of corrupt practices shall be as soon as possible be submitted to the President for determination of the question as to whether such a Member shall be disqualified and if so, the period thereof. An outer limit is fixed of six years from the date on which the order made in relation to the person concerned u/s 99 of the Act of 1951 takes effect. Before passing any order of disqualification for a particular period, the President is supposed to have obtained the opinion of the Election Commission on the question. Suffice it to say that the respondent No. 1 was disqualified for four years from the date of decision of the Supreme Court. Accordingly, by notification dated 10th June 1994, the name of the respondent No. 1 stood struck off from the electoral roll of the concerned constituency. The mathematical calculation would show that the period of disqualification in the case of respondent No. 1 expired on 18-11-1997. The dates in the matter as regards various steps taken either by the respondent No. 1 or by the authorities under the Act, no doubt, gather importance which have a direct effect on the result of this petition.

21. The respondent No. 1 made a representation dated 19-9-1997, the copy of which is on the record and not disputed by the petitioner. This representation was forwarded to the District Electoral Registration Officer, the Chief Election Commissioner, New Delhi and the Chief Electoral Officer and the State Election Commission, Mumbai. Through this document, he requested the authorities concerned that immediately on expiry of the period of his disqualification i.e. 18-11-1997, his name be reinstated in the electoral roll of the concerned constituency. The Collector, Ahmednagar vide his letter dated 23-9-1997 informed the respondent No. 1 that his representation dated 19-9-1997 was received by the Collector, Ahmednagar on 22-9-1997 and the same was forwarded by him to the Chief Electoral Officer, Mumbai. In the same way, the Under Secretary to the Election Commission of India by his letter dated 17-10-1997 forwarded the representation received by that office to the Chief Electoral Officer M.S. Mumbai directing him to take necessary action in the matter. The Under Secretary who was the respondent No. 3 in Writ Petition No. 5205/97 by his letter dated 11-11-1997, also forwarded the copies of the representations made by the respondent No. 1 to the Collector, Ahmednagar for necessary and immediate action and also directed the Collector to submit a report regarding action taken by him on the representation of the respondent No. 1. The record, no doubt, indicates an additional application dated 24-11-1997 was made by the respondent No. 1, inviting the attention to the fact that his disqualification period expired on 18-11-1997 and that his name ought to have been inducted or reinstated in the electoral roll of the concerned constituency. Since there appear to be no action taken by the authorities concerned and since the respondent No. 1 wanted to contest the then ensuing election to the Maharashtra Legislative Council from Local Bodies constituency which was scheduled to be held on 29th December 1997, the respondent No. 1 had approached this Court through Writ Petition No. 5205/97 as the last date for submission of the nomination paper was then fixed as 11th December 1997. This

Court in its decision in the above-mentioned petition, observed that the name of the respondent No. 1 stood removed from the voters list solely on account of the order of disqualification passed u/s 8-A of the Act of 1951 and that he must be deemed to have been reinstated in the voters list then in existence forthwith on expiry of the period of disqualification. This Court observed that the right of the respondent No. 1 as a voter was taken away by an order u/s 8-A of the Act of 1951 and the same is and must be deemed to have been restored immediately the period of disqualification came to an end i.e. on 18-11-1997. Thus the name of the respondent No. 1 is supposed to have been included in the list of voters on 19-11-1997. The case of the respondent No. 1 in Writ Petition No. 5205/97 that the petitioner (i.e. present respondent No. 1) should have waited till 31-12-1997 till his representation was considered and till a fresh Electoral Roll was published on 1-1-1998, this Court observed, that the arguments in that petition, were far-fetched which would have resulted into defeating the very purpose of section 16(2) of the Act of 1950. The words "such roll in force" should mean the roll from which the name was struck off and which was then in existence. This judgment of the High Court having been virtually upheld by the Supreme Court by rejecting the SLP needs no further clarification and, the point raised in the present petition by the petitioner is without any merit. The other challenge that the nomination of the respondent No. 1 has been wrongly accepted, also cannot be accepted. Both the points are virtually concluded by the judgment of the High Court in Writ Petition No. 5205/97 and by the Supreme Court in SLP and there is no further scope to agitate the same again in the present petition.

22. As per Clause (e) of section 2 of the Act of 1951 an elector in relation to a constituency means a person whose name is entered in the Electoral Roll of that constituency for the time being in force and who is not subject to any of the disqualifications mentioned in section 16 of the Act of 1950. It will be necessary to refer to section 16(c) of the Act of 1950. Section 16 deals with the disqualifications for registration in an electoral roll and the relevant provision is Clause (c) of sub-section (1) of section 16 which directs that a person shall be disqualified for registration in an electoral roll if he :

(a)

(b)

(c) is for the time being disqualified for voting under the provisions of any law relating to corrupt practices and other offences in connection with elections.

If a person is found to be disqualified as per this section then in accordance with section (2) of section 16 the name of such a person who has become so disqualified after registration, his name has to be struck off the electoral roll in which it is included. However, the proviso is there which says that if the name of any person struck off the electoral roll of a constituency by reason of a disqualification under Clause (c) of sub-section (1) of section 16 shall forthwith be reinstated in that roll if such disqualification is during the period such roll is in

force, removed under any law authorising such removal. It is not disputed in the present case that before disqualification the name of the respondent No. 1 was already there in the then existing roll, when he came to be disqualified by the decision of the Court u/s 99 of the Act of 1951.

23. The question that arises for consideration is as to whether was there any illegality in reinstatement of the name of the respondent No. 1 in the roll. This Court from the record finds it not difficult to come to the conclusion that the name of the respondent No. 1 stood reinstated in the electoral roll on 10-12-97.

24. Shri. Bhatt, learned Senior Counsel appearing for the petitioner argued that the judgment of the High Court in Writ Petition No. 5205/97 does not operate as *res judicata*, at least, as against the petitioner as he was not a party to that petition. He, further, argued that dismissal of the SLP or rejection thereof is of no consequence as in the High Court the present petitioner was not a party. He further argued that dismissal of the S.L.Ps. in limine does not amount to decision by the Supreme Court on all the points. Shri Bhatt, argued that what has been held by the judgment of the High Court is only as regards the entitlement of the respondent No. 1 of being included in the Electoral Roll and nothing more. If the contentions of Shri Bhatt are considered, the sum and substance of his argument is that the judgment of the High Court in Writ Petition No. 5205/97 which can be said to have been confirmed by the Supreme Court by refusing the leave to appeal against the judgment, is in no way binding on the present petitioner and it was still open for him to challenge the same so far as regards the election in question was concerned. This argument of Shri Bhatt is totally in contravention of the doctrine of merger. The judgment of the High Court has merged in to that of the Supreme Court to which the petitioner was a party.

25. Shri Bhatt in support of his contentions relied on the decision reported in 1998(3) S.C.C. 119 in the matter of *Workmen of Cochin Port Trust v. Board of Trustees of the Cochin* and another.

26. In the opinion of this Court, the abovesaid decision would not govern the present case so far as regards the question of *res judicata* is concerned. In this case (cited *supra*), it is clear that the petitioner who had approached the High Court, had earlier challenged the award of the Tribunal directly under Article 32 of the Constitution of India. It was rejected by the Supreme Court with a non-speaking order. Thereafter, the employer therein approached the High Court, again, under Article 226 of the Constitution of India and the High Court set aside the award passed. By filing SLP wherein it was contended that the High Court committed an error by overlooking the principle of *res judicata* as the matter, according to the employees, was already dismissed by the Supreme Court, in limine. It is to be noted that in the case in hand, the Supreme Court was dealing with a well reasoned and speaking order of the High Court and after considering the same, the Supreme Court refused to grant leave to the petitioners and dismissed the special leave petition. The presumption, therefore by necessary implication, is that the Supreme Court did take into consideration all those points

which are decided by the High Court while giving a well-reasoned order and thereafter the Supreme Court thought it fit not to grant special leave to appeal. This also would amount to Supreme Court having taken into consideration the merits of the case and it can be concluded that whatever could have been decided expressly, implicitly or even constructively while dismissing the SLP could not be, now, reopened through the present petition and hence the order of the High Court having been merged in the order of the Supreme Court applying the wholesome rule of *res judicata*, this Court has to observe that now it is not open for the present petitioner to agitate the same point again.

26-A. I would like to add one thing more in the circumstances of the present case in relation to the decision (cited *supra*) that in the case in hand the only point which was raised by the present petitioner in the Supreme Court was as regards the very inclusion of the name of the respondent No. 1 in the electoral roll and acceptance of his nomination paper. The SLP was against a well-reasoned decision of the High Court. In the present petition also, the very same point is raised and there is no question of any findings of any other point as the same did not crop up even for consideration either before the High Court or the Supreme Court. From this point of view also, this Court is of the opinion that the decision cited by Shri Bhatt referred to above, cannot be said to be of any help to him in the present matter.

27. Shri Bhatt also cited another decision reported in *Indian Oil Corporation Ltd. Vs. State of Bihar and others*, . However, this case also, in the opinion of this Court, is not applicable to the present case as the facts in that case, clearly show that there were other various grounds raised in SLP and since the order of refusal to grant S.L.Ps. was without reasons, that argument was available there as it was not clear on which ground the leave was refused or that the Supreme Court might have thought it not a fit case at all for granting leave to appeal on a particular ground. Such a scope is not available in the present petition.

28. Shri Bhatt, further, brought to my notice a decision reported in *Sree Narayana Dharmasanghom Trust Vs. Swami Prakasananda and Others*, . On the basis of this judgment Shri Bhatt tried to argue that dismissal of the petition under Article 32 has been held not to operate as *res judicata* and stretching the same analogy, Shri Bhatt argued that since in the earlier decision of the High Court the present petitioner was not in any way concerned, the same could not be said to be binding on him and naturally rejection of S.L.Ps. would not debar him from raising the said point through the present petition. I am not in a position to accept the argument of Shri Bhatt as the basic difference that is to be seen is that the S.L.Ps. were preferred by the present petitioner himself. Since the S.L.Ps. were rejected there is no point in petitioner's contending that it was still open for him to agitate the same point, again, by way of present petition. Granting relief by the High Court by its earlier decision in Writ Petition No. 5205/97 and dismissal of the Review Application against that, has virtually concluded the point and it is not now open for this Court to reconsider the same

through the present petition as the S.L.Ps. are also rejected by the Supreme Court. This Court is of the considered view that this point is not now open for re-agitation through the present petition.

29. Shri V.R. Manohar, Counsel appearing on behalf of the respondent No. 1, in support of his arguments also relied on *Sree Narayana Dharmasanghom Trust Vs. Swami Prakasananda and Others*, , and *Abbai Maligai Partnership Firm and Another Vs. K. Santhakumaran and Others*, , and *K.K. Modi Vs. K.N. Modi and Others*, . With the help of the learned Counsel, I have gone through the said judgments and I find that the Supreme Court while dealing with those cases relating to Order 47, Rules 1 and 2 of CPC observed that, filing of the review petition after dismissal of the SLP by the Supreme Court, again, the self-same revisional order amounted to abuse of the process of the Court and entertainment of the review petition in the circumstances was an affront to the order of the Supreme Court. Supreme Court observed that it would be against the judicial propriety if the High Court hears the review petition after dismissal of the SLP and it would be against the judicial discipline. Shri Manohar, also relied on *K.K. Modi's* case cited supra to show that the SLP once having been rejected, filing of the petition for the said same reason again or challenging the said same order which was the subject-matter of SLP is virtually an abuse of the process of the Court and contrary to the justice and public policy for a party to re-agitate the same issue which has already been tried and decided earlier against him. Though in the original petition the present petitioner was not a party, however, as stated earlier, since he himself had preferred SLP before the Supreme Court, there is no point in his agitating now that the said decision is totally foreign to him and he is in no way concerned with the same. This Court is of the opinion that the petitioner cannot now agitate the same point again in the present petition which virtually is concluded in every respect by the earlier decisions of the High Court and the Supreme Court of India. In view of what is observed above, it is clear that the decision of the Division Bench of the High Court in Writ Petition No. 5205/97, decision on review application and confirmation of both the judgments by the Supreme Court in S.L.Ps., in any case, amounts to constructive res judicata and oust the jurisdiction of this Court to entertain the petition on the same points again.

30. Shri Manohar, in support of his contention, that there is no cause of action whatsoever for the petitioner to file the present petition, brought to the notice of this Court two decisions of reported in *Samar Singh Vs. Kedar Nath alias K.N. Singh and Others*, , and *B.M. Ramaswamy Vs. B.M. Krishnamurthy and Others*, Shri Manohar relied on these two decisions to point out that non-disclosure of the cause of action entitles the Court to exercise the powers under Order 7, Rule 11 of the CPC and the Court can reject the Election Petition even after settlement of issues. There cannot be two opinions that if there is no cause of action disclosed in the petition, there is no question of further trying the petition and such a petition can conveniently be dismissed at the threshold. In the present petition also, this Court is of the opinion that the present petitioner virtually is trying to

re-agitate the said same point which is concluded by the High Court and further so sealed by rejection of the Special Leave Petition.

31. Even otherwise, it is also, now, established law that the names in the Electoral Roll if wrongly continued or inducted and if the same is not corrected till the last date of submission of the nomination paper then there hardly remains any scope to say that the participation of that person in the election would render the election itself illegal. Such an election may be challenged on any other ground, but acceptance of the nomination paper of such a person or receiving of the nomination paper of such a person cannot be said to be illegal. Identical is the view in *Kunwar Nripendra Bahadur Singh Vs. Jai Ram Verma and Others*, .

32. The learned Counsel Shri V.R. Manohar also referred to various other provisions of the Act, so far as regards the disqualifications are concerned or as regards the preparation of the Electoral Roll is concerned. This Court finds it not necessary to go into all these details as this Court has come to the conclusion that after the dismissal of the S.L.Ps. or rejection of the S.L.Ps. by the Supreme Court, there hardly remain any scope for this Court to hear and decide the same point again.

33. As regards the argument of Shri Bhatt, the learned Sr. Counsel for the petitioner, that the very inclusion of the name of the respondent No. 1 in electoral roll was illegal and that the name could not be said to have been reinstated on or before the date of submission of the nomination paper by that respondent No. 1 and further that it was permissible for the petitioner to challenge the said inclusion of the name in electoral roll in a petition u/s 80 of the Act of 1951, in the opinion of this Court, would not sound correct as it would be totally contrary to section 36(7) of the Act of 1951. For this purpose, necessary reliance can be placed on a decision of the Supreme Court reported in 1963 S.C.R. 479 (supra) to which a reference is already made above. The decision relied upon by Shri Bhatt in support of his contention i.e. *Kabul Singh Vs. Kundan Singh and Others*, , in the opinion of this Court, is not applicable in the present type of case, particularly when in that decision the inclusion of the name of the elector was after the last date of making of the nomination forms. In the instant matter, when the name of the respondent No. 1 was included on 10-12-1997 i.e. before the date of nomination, then there would be hardly any scope to question the same either in the Civil Court or before Tribunal considering the validity of an election.

34. For the just and fair decision, the respondent No. 1 produced before this Court a complete copy of the voters list along with the supplements which clearly shows that in Supplement II, the name of the respondent No. 1 is included at Sr. No. 592 and, again on the basis of the application of the respondent No. 1 at Sr. No. 598. This is strictly in consonance with the practice of updating the electoral roll every year and this conclusively proves that the name of the respondent No. 1 was included in the year 1997 itself and not in the subsequent year thereof. A certified copy in proof thereof has been produced before this Court which is

dated 10-10-1997 which conclusively establishes that the name of the respondent No. 1 was on the electoral roll on 10-12-1997. No doubt, the petitioner also produced certain documents which include the list filed by the petitioner indicating the list as on 5-1-1998. However that list does not suggest that the name of the respondent No. 1 was not there prior to that date. On the other hand the document produced by the respondent No. 1 establishes beyond doubt that his name was included in the electoral roll on 10-12-1997 itself. It is also pertinent to note that in his pleading in the petition, the petitioner tried to aver that the relevant entry was not filed along with the nomination paper by the respondent No. 1. A bare look at section 114(e) of the Evidence Act would clearly demonstrate that this Court can conveniently presume as regards the act to be performed by the concerned officials and the same was so performed. As the same this Court can conveniently presume relying on the above-mentioned provision of section 114(e) of the Evidence Act that the Returning Officer who was entrusted with the job of scrutiny of the nomination papers, has conducted himself strictly in accordance with law and only after having been satisfied, accepted the nomination paper as a valid one and that too after having satisfied himself on the basis of the electoral roll. Necessary application (Exh. 35) was made by the respondents before this Court for production of documents along with the list thereof. After having gone through the same and the same being a certified copy, this Court relies on the same overlooking the objection of the petitioner that evidence in support thereof should have been adduced by the respondent No. 1 to prove the said document. This Court is not much impressed with the objection nor is inclined to sustain the same. This Court can read section 35 of the Evidence Act for the purpose of relying on the certified copy of the electoral roll produced on behalf of the respondent No. 1. In pursuance of the provisions of section 35 of the Evidence Act, it is absolutely clear that an entry in public or other official book, register or record stating fact in issue or relevant fact and made by the public servant in discharge of his official duties or by any other person in performance of a duty specifically enjoined by the law of the country in which such a book, registry or record is kept is itself a relevant fact. It is not the case of the petitioner that the certified copy produced by the respondent No. 1 cannot be relied upon or it is not a certified copy at all of the electoral roll. Even otherwise, in view of the above-mentioned provisions of law, there hardly remains any scope for rejecting the said certified copy. Sections 74 and 76 of the Evidence Act deal with the public document and the certified copies of the public documents. This Court can rely on this document particularly when the same is the certified copy issued by the Competent Authority indicating the correct picture as regards inclusion of the name of the respondent No. 1 in the electoral roll on 10-12-1997. The respondent No. 1 has produced the certified copies of all the relevant documents and since the certified copies are the public documents to which there was no objection taken during the course of arguments by the petitioner, the same can be conveniently considered for the decision of the present petition. Thus, the respondent No. 1 has produced on record the certified copy of the judgment of the High Court in Writ Petition No.

5205/97 as also in Review Application No. 6062/97 and also the certified copy of the order passed by the Supreme Court in S.L.Ps. against the above said orders. He has also produced the certified copies of the voters list dated 10-12-1997 of 230, Ahmednagar (North) Assembly constituency, District Ahmednagar, Poll Centre No. 193 of village Sonai, Tq. Newasa, District, Ahmednagar. He has also produced the attested copies of the nomination dated 11-12-1997. The respondent No. 1 has also produced certificate in original issued by the Assistant Electoral Registration Officer for 230, Ahmednagar (North) Assembly constituency dated 26-4-1999 as also the copy of Letter No. Nivadnuk/Karya 12/1878/97 dated 10-12-1997 in original signed and issued by the District Election Officer, Ahmednagar addressed to the Electoral Registration officer. He has also produced on record the receipt in original signed by the Personal Assistant to the district Collector in respect of the orders in terms of Writ Petition, bearing No. DD/13550/97 dated 9-12-1997 passed in Writ Petition No. 5205/97 dated 9-12-1997 and certified copy of the voters list also published on 5-1-1998 in respect of village Sonai, Booth No. 193, from 230, Ahmednagar (North) Assemble constituency.

35. As regards the contention of Shri Bhatt, that the petitioner could challenge the question of inclusion or non-inclusion of the name of the present respondent No. 1 in a petition u/s 80 of the Act of 1951, is a question which will have to be tested on the basis of provisions of section 36(7) of the Act of 1951. Section 36(7) of the Act reads as under:-

"36(7) : For the purposes of this section, a certified copy of an entry in the electoral roll for the time being in force of a constituency shall be conclusive evidence of the fact that the person referred to in that entry is an elector for that constituency unless it is proved that he is subjected to disqualification mentioned in section 16 of the Representation of the People Act, 1950 (43 of 1950)."

36. From the above-said reproduction of section 36(7) and on the basis of the judgment reported in 1963 S.C.R. 479 this point can be said to have been concluded as the name once having been enrolled by the Competent Officer, before the last date of the submission of nomination paper, then there hardly remains any scope to challenge the same as the list already gets finality and question stands concluded. Two decisions on which Shri Bhatt relied in support of his contention i.e. Ramji Prasad Singh Vs. Ram Bilas Jha and Others, , and Baidyanath Panjiar Vs. Sitaram Mahto and Others, , in the opinion of this Court, cannot be of any help and the said decision in the opinion of this Court would not be applicable in the facts and circumstances of the present case. This can be conveniently stated as in both these cases, the inclusion of the name of the electors appears to have been made after the last date of submission of the nomination papers. A help also can be taken for the decision of this point from the provision of section 62(1) of the Act of 1951 which is as under:-

"62(1): Right to Vote : No person who is not, and except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll

of any constituency shall be entitled to vote in that constituency."

37. In pursuance of this provision if read with section 36(7) of the said Act, it would be clear that the name once having been entered into the electoral roll before the last date of submission of nomination paper virtually gets finality and the same would not be open for challenge. From the decisions cited supra, it can clearly be seen that the electoral roll referred to in section 62(1) of the Act of 1951 is strictly referable to an electoral roll that was in force on the last day of making the nomination at the election. In the background of these provisions and the decisions cited above if the facts of the case in hand are seen, it would be clear that the name of the present respondent No. 1 stood included on 10-12-1997 itself even before the date of nomination and hence in the opinion of this Court, it would not be permissible in view of the settled position of law, to question the inclusion and it cannot be said to be still open for challenge either in any Civil Court or in a Tribunal considering the validity of that election.

38. One additional aspect as regards the point as to whether the concerned officer had wrongly accepted the nomination paper of the respondent No. 1 or not, also needs to be seen in the background of the provisions of section 33(5) and section 36(2)(b) of the Act of 1951. If the respondent No. 1 would not have submitted a certified copy of the relevant part of the electoral roll along with his nomination paper, then, in any case and in any eventuality the concerned officer would not have accepted the very nomination paper of this respondent No. 1 and the same would have been objected to at the time of scrutiny either by the officer concerned himself or even by the petitioner. I have already pointed out that no such objection was ever raised at the time of scrutiny of the nomination paper either by the petitioner or anyone else.

39. It is pertinent to note that if the respondent No. 1 would have asked for inclusion of his name either after the last date of submission of nomination and before any date or on any other date before completion of the election then the Electoral Registration Officer would have definitely rejected the said request and he would have been justified to do the same in accordance with the provisions of section 23(3) of the Act of 1950 which empowers him to not to allow any tampering either by way of amendment or deletion in the list.

40. In view of what has been observed above, it is absolutely clear that so far as regards the issues are concerned, the Issue No. 1 will have to be answered in the affirmative holding that the confirmation of the High Court's judgment by the Supreme Court by rejecting SLP and dismissing the appeals would affect as res judicata and hence the question of reconsideration of the same point in this petition will amount acting against the decision of the Supreme Court and also against the decision of the Division Bench of this Court in Writ Petition No. 5205/97.

41. The above-said observation naturally leads to the conclusion that there is no cause of action for the petitioner to initiate the petition and the election petition

is liable to be rejected on that count as, at least, in the facts and circumstances of the present case, it would virtually prevent this Court from going into the same again thereby ousting the jurisdiction of this Court to that extent.

42. In view of what has been observed above, the election petition has to be dismissed on the preliminary points itself and the same is accordingly dismissed. Since the petition is being disposed of on preliminary points, there would be no order as to costs and the petitioner is entitled for refund of the security deposit he has made in this Court.

43. The Registry of the High Court of Bombay, Bench at Aurangabad, shall take immediate steps in accordance with the provisions of section 103 of the Representation of the People Act, 1951.

44. Election Petition dismissed