
(2010) 03 BOM CK 0153

In the Bombay High Court

Case No : Chamber Summons No. 1418 of 2009 in Election Petition No. 4 of 2009

Dr. Kirit Jayantilal Somaiya

APPELLANT

Vs

Sanjay Dina Patil and Others

RESPONDENT

Date of Decision : 10-03-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 16, Order 7 Rule 11
Representation of the People Act, 1951 — Section 123, 123(1), 123(2), 77, 83

Citation : (2010) 3 ALLMR 756 : (2010) 5 BomCR 289

Hon'ble Judges : J.P. Devadhar, J

Bench : Single Bench

Advocate : M.M. Vashi, Bruno Castellino and Vinay Bhanushali, instructed by Divya Shah Associates, for the Appellant; Aspi Chinoy Vijay Kumar and Prashant Kulkarni, instructed by Zohar and Co., for the Respondent

Judgement

J.P. Devadhar, J.—This Chamber Summons is taken out by the Respondent No. 1 seeking dismissal / rejection of the election petition or in the alternative striking off / deletion of paragraphs 8, 9, 10 & 11 of the Election Petition filed by the petitioner to challenge the election of the respondent No. 1 to the Lok Sabha from the Mumbai North East Constituency No. 28 ("the constituency in question" for short).

2. Parliamentary election to the Lok Sabha were held at Mumbai on 30-4-2009, wherein, the petitioner as well as the respondent Nos. 1 to 15 had contested the said election from the constituency in question. The petitioner had contested the election as a candidate nominated by the Bhartiya Janata Party ("BJP" for short), whereas the respondent No. 1 had contested the election as a candidate nominated by the Nationalist Congress Party ("NCP" for short). The results of the said election were declared on 16/5/2009 wherein, the respondent No. 1 was declared to have been elected by polling highest number of votes, namely, 2,13,505 votes and the petitioner was declared to have polled second highest votes, namely, 2,10,572 votes. Thus, the respondent No. 1 was declared elected

by a margin of 2933 votes.

3. The petitioner challenged the election of the respondent No. 1 by filing the above Election Petition within the time specified the under provisions of the Representation of the People Act, 1951 ("1951 Act" for short) on the following grounds:

(a) In para 8 of the petition, the Petitioner alleged that the respondent No. 1 had committed corrupt practice of "bribery" as defined u/s 123(1) of the 1951 Act in as much as the respondent No. 1 or his election agent or any person with the consent of the respondent No. 1 or his election agent, had distributed money to the voters seeking votes in favour of the respondent No. 1.

(b) In para 9 of the petition, the Petitioner alleged that the respondent No. 1 and / or his election agent and / or other persons with the consent of respondent No. 1 and / or his election agent had directly or indirectly interfered or attempted to interfere with the free exercise of the electoral right of the voters by distributing pamphlets / hand bills at Ghatkopar (East) and Mulund areas of the constituency in question in the name of two local BJP MLA's, namely Shri Prakash Mehta and Shri Sardar Tara Singh. The petitioner alleged that in the said pamphlets / handbills, it was falsely and mischievously stated that the aforesaid two BJP MLA's were appealing to the voters to vote in favour of the respondent No. 1 an NCP candidate (instead of the petitioner who was the BJP candidate).

(c) In para 10 of the petition, the petitioner alleged that the respondent No. 1 in his account of election expenses submitted to the Election Commission has falsely stated to have printed 5000 pamphlets each of Exhibits M1 to M11 ($5000 \times 11 = 55,000$) and 10,000 pamphlets of Exhibit M12 at a total cost of Rs. 32,500/-. According to the petitioner, the respondent No. 1 had printed 1,00,000 pamphlets each of Exhibits M1 to M12 ($1 \text{ lac} \times 12 = 12 \text{ lacs}$). These pamphlets, according to the petitioner, can be printed at a cost of Rupee 1/- to Rs. 2.50 per pamphlet and therefore, the cost of printing 12 lac pamphlets would be more than Rs. 20 lacs. Similarly, it is alleged that the respondent No. 1 has falsely stated to have spent Rs. 1,47,888/- on printing and distributing the voter's slip. According to the petitioner, the voter's slip is normally distributed by a candidate to all the voters in his constituency. There were in all 15,80,000 voters in the constituency in question. Therefore, calculated at the rate of Rs. 0.30 paise (approx) per voter's slip, the cost of printing 15,80,000 voter's slips would be Rs. 4,74,000/-. In these circumstances, the petitioner alleged that the total cost of the pamphlets, voter's slips and several other campaign expenses incurred by the respondent No. 1 would be in excess of Rs. 25 lacs whereas the maximum amount that can be spent by a candidate u/s 77 of the 1951 Act is Rs. 25 lakhs and, therefore, the respondent No. 1 is guilty of not submitting correct account of all expenditure as contemplated u/s 77 of the 1951 Act. Apart from the above, the petitioner has alleged in para 10 of the petition that the respondent No. 1 had published his name, photograph and the symbol on the voter's slip which is in violation of the guidelines issued by the Election Commission of India.

(d) Lastly, in para 11 of the petition, the petitioner has sought recounting of all the votes polled in the constituency in question on the ground that counting of votes on the counting day was done so fast that there was total chaos and that on the counting day the central observer had failed to recount two EVM machines in the presence of the election agent in each round randomly as mandated by the guidelines laid down by the Election Commission of India. It is further alleged that the election agent of the petitioner had made an application before the returning officer seeking recounting of votes but no written order has been passed by the Returning Officer on the said application till date, which is in contravention of para 26.3 of the "Handbook for returning officers" issued by the Election Commission of India. It is further alleged that the working sheet of the counting agent as well as the working sheet available with the petitioner show that in booth No. 122 at Ghatkopar, the respondent No. 2 had secured one vote and the respondent No. 1 had secured 7 votes whereas, the official vote sheet shows that in booth No. 122 at Ghatkopar, the respondent No. 2 had secured 4 votes and the respondent No. 1 had secured 75 votes. It is further alleged in para 11 of the petition that the data furnished to the petitioner by the Election Commission shows that the votes polled at the polling station No. 40 were 298, whereas, the votes counted at that polling station are 545 votes. Similarly, at polling station No. 136, the votes shown to have been polled are 319 votes, whereas, the votes counted at that polling station are 401 votes. In these circumstances, the petitioner has prayed for recounting of all the votes polled in the constituency in question.

4. On service of the above election petition, in stead of filing a written statement, the respondent No. 1 has taken out the present Chamber Summons seeking dismissal / rejection of the above election petition under Order VII Rule 11 of the Code of Civil Procedure, 1908 ("C.P.C" for short) or alternatively, the petitioner has sought an order for striking off / deletion of paragraphs 8, 9, 10 & 11 of the election petition under Order VI Rule 16 of the C.P.C.

5. u/s 83 of the 1951 Act, an election petition must contain a concise statement of the material facts on which the petitioner relies and also full particulars of any corrupt practice that the petitioner alleges. If material facts with full particulars are not set out, the election petition is liable to be dismissed / rejected under Order VII Rule 11 of the C.P.C. Similarly, the pleadings in an Election Petition can be struck off / deleted under Order VI Rule 16 of the C.P.C., if the Court finds that any pleading is unnecessary, scandalous, frivolous or vexatious or which may tend to prejudice, embarrass or delay the fair trial of the Suit or the pleading is otherwise an abuse of the process of the Court.

6. The question, therefore, to be considered in the present case is, whether the respondent No. 1 is justified in claiming that the election petition filed by the petitioner is liable to be dismissed under Order VII Rule 11 of the C.P.C., or in the alternative, paras 8, 9, 10 and 11 of the said Election Petition are liable to be struck off under Order VI Rule 16 of the C.P.C. ?

7. The Apex Court in the case of Ram Sukh Vs. Dinesh Aggarwal, has inter alia held thus:

...It is also well settled that the success of a candidate who has won at an election should not be lightly interfered with and any petition seeking such interference must strictly conform to the requirements of the law. Nevertheless; it is also to be borne in mind that one of the essentials of the election law is to safeguard the purity of the election process and, therefore, the courts must zealously ensure that people do not get elected by flagrant breaches of that law or by indulging in corrupt practices, as enumerated in the Act." (see para 8).

At this juncture, in order to appreciate the real object and purport of the phrase "material facts", particularly with reference to election law, it would be appropriate to notice the distinction between the phrases "material facts" as appearing in Clause (a) and "particulars" as appearing in Clause (b) of Sub-section (1) of Section 83. As stated above, "material facts" are primary or basic facts which have to be pleaded by the petitioner to prove his cause of action and by the defendant to prove his defence. "Particulars", on the other hand, are details in support of the material facts, pleaded by the parties. They amplify, refine and embellish material facts by giving distinctive touch to the basic contours of a picture already drawn so as to make it full, more clear and more informative. Unlike "material facts" which provide the basic foundation on which the entire edifice of the election petition is built, "particulars" are to be stated to ensure that the opposite party is not taken by surprise. (see para 15)

...Unlike "material facts" which provide the basic foundation on which the entire edifice of the election petition is built, "particulars" are to be stated to ensure that the opposite party is not taken by surprise."

Undoubtedly, by virtue of Section 87 of the Act, the provisions of the Code apply to the trial of an election petition and, therefore, in the absence of anything to the contrary in the Act, the court trying an election petition can act in exercise of its power under the Code, including Order 6 Rule 16 and Order 7 Rule 11 of the Code. The object of both the provisions is to ensure that meaningless litigation, which is otherwise bound to prove abortive, should not be permitted to occupy the judicial time of the courts. If that is so in matters pertaining to ordinary civil litigation, it must apply with greater vigour in election matters where the pendency of an election petition is likely to inhibit the elected representative of the people in discharge of his public duties for which the electorate have reposed confidence in him...(see para 18)

8. In the light of the aforesaid ratio laid down by the Apex Court, rival contentions relating to the question as to whether the Election Petition filed by the petitioner deserves to be rejected under Order VII Rule 11 or the pleadings contained in paras 8, 9, 10 and 11 of the said election petition are liable to be struck off under Order VI Rule 16 of the C.P.C. would have to be considered.

9. The first allegation of the petitioner set out in para 8 of the election petition is

that the respondent No. 1 had committed the corrupt practice of bribery as contemplated u/s 123 of the 1951 Act. According to Mr. Aspi Chinoy, learned Senior Advocate for the respondent No. 1, the above allegation is based on mere surmises or conjectures and that the allegation set out in para 8 of the election petition lacks material facts or material particulars or ingredients of the corrupt practice as required by law and as held by the Courts. Mr. Chinoy submitted that in para 8 of the petition it is alleged that at about 12.50 a.m. on 30-4-2009 NCP workers were found distributing cash to the voters at the corner of Road No. 4 and Road No. 54 at Shivaji Nagar, Govandi. It is alleged that on being informed, Mr. Anil Gajanan Thakur, Mumbai BJP Secretary visited the spot and personally witnessed the distribution of cash to voters in exchange of their votes. It is alleged that Shri Anil Thakur informed the police, who on arrival at the site arrested three persons, namely Habib Abbas Faki, Mangesh Narain Sitekar and Sanjay Babban Shedge and seized the vehicle (white Indigo Car bearing No. MH-04-DE-6284) used by those three persons along with cash amounting to Rs. 2,47,450/-. It is further alleged in the petition that F.I.R. No. 1481 of 2009 has been registered against the said three persons and the seized car and the cash has been confiscated. Subsequently, the said three persons were produced before the Court and were released on cash bail of Rs. 5,000/- each. The petitioner has alleged that the said three persons were NCP workers who were working for the respondent No. 1 and in support of that contention, the petitioner has relied upon the articles published in Times of India and Urdu Times dated 1/5/2009.

10. According to Mr. Chinoy, the petitioner has not stated in para 8 of the petition as to when the respondent No. 1 had allegedly made any gift to any voter / electoral, when and how the election agent or any other person with the purported consent of the respondent No. 1 had given gift to the voters / electors, whether such alleged gift / inducement was for voting in favour of respondent No. 1 or to refrain from voting, the name of the alleged voter / elector to whom such gift was given, how the petitioner has concluded that the alleged cash seized from the three persons were for the purposes alleged or for any other purposes ? Mr. Chinoy submitted that in the absence of any independent evidence in support of the above allegations, it must be held that the election petition lacks material facts relating to bribery and, therefore, the election petition is liable to be dismissed or in the alternative para 8 of the election petition is liable to be struck off.

11. Relying upon the decisions of the Apex Court in the case of C. Narayanaswamy Vs. C.K. Jaffer Sharief and Others, and Azhar Hussain Vs. Rajiv Gandhi, , Mr. Chinoy submitted that where the corrupt practice alleged in the election petition is vague and where there is non-disclosure of even a single material fact would lead to incomplete cause of action. He submitted that in para 8 of the petition, it is alleged that the respondent No. 1 / his agents / other persons with the consent of the respondent No. 1 and/or his election agent have committed corrupt practices of bribery. Since the petitioner has not stated the

names of the election agent or the names of other persons who had allegedly with the consent of the respondent No. 1 / his agent had distributed money, it must be held that material facts have not been set out in the election petition. Similarly, the petitioner has failed to specify which of the three alternatives he meant to plead and, therefore, it is impossible to ascertain the case which the respondent No. 1 has to meet. In these circumstances, the counsel for the respondent No. 1 submitted that the election petition is liable to be dismissed or in the alternative, para 8 of the election petition is liable to be struck off / deleted.

12. Mr. Vashi, learned Advocate for the petitioner on the other hand submitted that in para 8 of the election petition, the petitioner has specifically set out full particulars relating to the corrupt practice of bribery committed by the respondent No. 1 / his election agent / other persons with the consent of the respondent No. 1 / his agent. In para 8(k) & (l) of the petition, it is specifically alleged that money was distributed by the respondent No. 1 through the three NCP workers (who are arrested by the police) with the intention to gather votes for the respondent No. 1 and as a result of this corrupt practice the respondent No. 1 has secured 5915 votes, while the petitioner got only 378 votes in that area.

13. Relying upon the decisions of the Apex Court in the case of Virendra Nath Gautam v. Satpal Singh and Ors. reported in AIR 2007 SCW 146 and Mahadeorao Sukaji Shivankar Vs. Ramaratan Bapu and Others, , Mr. Vashi submitted that the material facts which are required to be pleaded in the election petition as required by Section 83(1) of the 1951 Act have been pleaded in the election petition and no case is made out for dismissal of the petition under Order VII Rule 11 or for striking off the pleading under Order VI Rule 16 of the C.P.C.

14. On careful consideration of the rival submissions, I find it difficult to accept the arguments advanced on behalf of the respondent No. 1 that the full particulars of material facts relating to corrupt practice of bribery have not been pleaded in the election petition. The petitioner has alleged in sub para (k) and (l) of para 8 of the petition that on 30-4-2009 at about 12.50 a.m., three NCP workers were found distributing cash seeking votes in favour of respondent No. 1 at a particular place in the constituency in question. Even the exact location where the money was allegedly distributed to the voters is set out in the petition. The petitioner has alleged that Mr. Anil Thakur, Mumbai BJP Secretary has witnessed the distribution of cash to the voters by the said three persons. The petitioner has alleged that on a complaint made by Mr. Anil Thakur, the above three persons have been arrested by the police from the spot set out in the petition and the vehicle used by the arrested persons as well as cash amounting to Rs. 2,47,450/- has been seized from the said three persons. The petitioner has alleged that in the panchanama it is recorded that the three persons arrested by the police were seeking vote in favour of respondent No. 1. Admittedly, F.I.R. No. 1481 of 2009 has been registered against the aforesaid three NCP workers

and further investigations are in progress. The allegation that the three arrested persons were NCP workers and that the said three persons were allegedly distributing money to the voters is also reported in the Times of India and Urdu Times dated 1/5/2009.

15. These facts set out in para 8 of the petition, in my view, would constitute disclosure of material facts relating to the corrupt practice of bribery as contemplated u/s 83 of the 1951 Act. Whether the three persons arrested by the police were in fact NCP workers, when and where the said three persons obtained consent of the respondent No. 1 / his agent for distributing cash in lieu of votes in favour of the respondent No. 1, whether the seized cash was meant to be distributed to the voters in lieu of votes in favour of the respondent No. 1 and who were the voters to whom the cash was distributed in lieu of votes in favour of respondent No. 1 would depend upon the evidence led by the petitioner during the trial. If the petitioner fails to conclusively establish the material facts relating to the allegation of bribery alleged in para 8, the petition would fail. Therefore, in the facts of the present case, it is clear that in para 8 of the petition concise statement of material facts relating to the allegation of bribery have been set out and the fact that the petitioner has not given the particulars which are relevant to establish the material facts cannot be a ground to dismiss / delete para 8 of the election petition.

16. Strong reliance was placed by the counsel for the respondent No. 1 on the decision of the Apex Court in the case of Azhar Hussein (supra). In that case, the allegations in the election petition was that Shri M.H. Beg, former Chief Justice of India and a close friend of Nehru family had appeared on the Government controlled news media and made a speech praising Shri Rajiv Gandhi, the respondent therein. Since Mr. Beg was the Chairman of the Minorities Commission, it was alleged in the election petition that the respondent therein or his agent or other persons with the consent of the respondent therein or his agent had engaged the services of Mr. Beg, a gazetted officer in gross violation of the election law. In the election petition, it was not stated that Mr. Beg was a person in the service of the Government as specifically required by Section 123(7) of the 1951 Act. In that context, it was held by the Apex Court that in the absence of a statement that Mr. Beg was a person in the service of the government and in the absence of the names of the election agent of the respondent No. 1 therein or the names of the persons who with the alleged consent of the respondent therein / his agent had obtained the services of Mr. Beg, the petition cannot be sustained, because, in the absence of the names of the election agent / names of other persons, the respondent would not know the specific case which he was expected to meet. In the present case, the petitioner has given the names of the persons who were distributing cash to the voters and the place where the said persons were found to be distributing cash to the voters. The petitioner has also given the name of the person who had seen the three persons distributing cash to the voters. In fact, on a complaint filed, the police have arrested the said persons who were found distributing cash to the

voters. As per the newspaper reports, out of the three arrested NCP workers one was a leader of the NCP minorities cell. Therefore, in the facts of the present case, the petitioner has given material facts relating to the allegation of bribery and hence the decision of the Apex Court in the case of Azhar Hussain (supra) would have no application to the facts of the present case.

17. Similarly, the decision of the Apex Court in the case of C. Narayanaswamy (supra) relied upon by the Counsel for the respondent No. 1 is also distinguishable on facts. In that case, the allegation in the election petition was that large scale free feeding of the electorate in the slum areas in the City and the poor localities in the villages was arranged by the 1st respondent therein / his election agent / his political party and other persons with the consent of the respondent or his election agent. In the absence of any particulars as to the names of the persons who had fed the electorate and the actual place of feeding, it was held that the allegation was vague and the nexus between the gift, offer and inducement to vote has not been established. In the present case, the persons who were found to be distributing cash to the voters have been arrested and balance cash which was to be distributed to the voters has been seized from such persons. The petitioner alleges that the three persons were distributing cash with the consent of the respondent No. 1 / his election agent. Therefore, in the facts of the present case, the ratio laid down by the Apex Court in the case of C. Narayanaswamy (supra) would have no bearing on the facts of the present case.

18. The second allegation of the petitioner contained in para 9 of the election petition is that the respondent No. 1 and / or his election agent and / or other persons with the consent of the respondent No. 1 and / or his election agent, have directly or indirectly interfered or have attempted to interfere with the free exercise of the electoral rights of the voters and thereby committed an offence of undue influence as contemplated u/s 123(2) of the 1951 Act. The particulars given in that behalf in para 9 of the petition are that at about 5.05 a.m. on 30th April, 2009 i.e. on the polling day, one Rajubhai Udayshankar Pandya, President of the Ghatkopar BJP unit received information that pamphlets / hand bills in the names of local BJP MLA's Shri Prakash Mehta and Shri Sardar Tara Singh were being distributed by inserting the said pamphlets in the newspapers at Ghatkopar railway station and Mulund area. In the said pamphlets / hand bills published in Hindi and Gujarati according to the petitioner, it was falsely and mischievously stated that Mr. Prakash Mehta and Mr. Sardar Tara Singh, the two local BJP MLA's were appealing to the voters of the said constituency to vote for the respondent No. 1, who was an NCP candidate. The petitioner has further alleged that the said Rajubhai Pandya himself rushed to the Ghatkopar railway station and was shocked to see that thousands of pamphlets / hand bills in the name of the aforesaid two BJP MLA's were being inserted in the local newspapers. The petitioner has stated that even Mr. Prakash Mehta arrived at the spot. The said Rajubhai Pandya immediately informed the police and the police on visiting the spot at about 6.45 a.m. seized thousands of pamphlets and registered an F.I.R. No. 156 of 2009. The petitioner has relied upon a newspaper report published in

"Mumbai Mirror" dated 1st May, 2009 (English edition) wherein it is reported that police have arrested two suspects, namely Banshi Korde and Anil Awati, who were allegedly distributing the above pamphlets. As per the newspaper report the police suspected that both the arrested persons belonged to NCP. Both the BJP MLA's, namely Mr. Prakash Mehta and Mr. Sardar Tara Singh have strongly protested against the false and mischievous pamphlets distributed in their name. The petitioner has stated that the Mulund police have registered a non-cognizable complaint No. 1510 of 2009 in that connection. The petitioner has relied upon a report submitted by the Additional Commissioner of Police to the Election Officer on 7th May, 2009 wherein it is stated that on 30/4/2009 two persons namely Banshi Korde and Anil Awati and on 5/5/2009 another two persons namely Dinesh Premji Chikalia and Vinod Premji Chikalia have been arrested in connection with the distribution of bogus pamphlets on 30-4-2009. The report further states that all the arrested persons were produced before the Court and the Court has ordered release of all the accused on cash surety of Rs. 3,000/- each and that further investigation is in progress.

19. According to Mr. Chinoy, learned senior Advocate for the respondent No. 1, the allegation of undue influence contained in para 9 of the petition is vague and the said allegation not only lacks in material facts but also lacks in material particulars. He submitted that the allegation in para 9 of the petition does not disclose any corrupt practice and does not disclose the names of the persons who were unduly influenced and how the respondent No. 1 or his election agent or any other person with the consent of the respondent No. 1 have directly or indirectly influenced the voters / electors. He submitted that the petitioner had not disclosed the basis on which the petitioner has surmised that the respondent No. 1 had printed and published the alleged pamphlets. Relying upon decisions of the Apex Court in the case of Azhar Hussain (supra), Dhartipakar Madan Lal Agarwal Vs. Rajiv Gandhi, and Virender Nath Gautam v. Satpal Singh reported in 2007 AIR SCW 146, Mr. Chinoy submitted that where the allegation of undue influence is lacking in material facts then no case of corrupt practice can be said to have been made out and further submitted that failure to state even a single material fact would entail dismissal of the election petition. He submitted that in paragraph 9 of the election petition, material facts, such as, who had printed the pamphlets when and where the respondent No. 1 / or his agent had consented to the printing or distributing the alleged pamphlets has not been disclosed and therefore the election petition is liable to be dismissed / para 9 of the election petition is liable to be struck off.

20. Mr. Vashi, on the other hand submitted that the allegation of undue influence set out in para 9 of the petition is clear and concise and the same cannot be said to be vague or bereft of material particulars.

21. Having heard the rival submissions, in my view, the allegation of undue influence set out in para 9 of the election petition cannot be said to be bereft of material facts. The material facts set out in the election petition are that on the

election day thousands of pamphlets in the name of two local BJP MLA's were distributed in the constituency in question by inserting the said pamphlets in the newspapers. As per the pamphlets two local BJP MLAs were appealing to the voters to vote in favour of the respondent No. 1 who was the NCP candidate. The two BJP MLA's whose names appear on the pamphlets have denied to have printed and distributed such pamphlets. The petitioner has further stated in the petition that at the instance of the BJP activists, the police have seized thousands of pamphlets and have also arrested four persons. The petitioner has alleged that the false and misleading pamphlets which are seized by the police were being distributed by the respondent No. 1 / his agent / other persons with the consent of respondent No. 1 / his agent and distribution of such pamphlets has affected the electoral prospects of the petitioner.

22. It is true that in the election petition, the petitioner has not disclosed the names of the persons who were unduly influenced by the alleged pamphlets, when and how the respondent No. 1 / his agent have given their consent, how the alleged pamphlets directly and / or indirectly unduly influenced the voters / electors and the basis on which the petitioner has arrived at the conclusion that the pamphlets in question were distributed with the consent of the respondent No. 1 and / or his agents and / or any other persons with the consent of respondent No. 1 / his agent. In my view, all these particulars are not material facts but are particulars which are required to establish the material facts by leading cogent evidence during the trial. Therefore, in the present case, all the material facts relating to the allegation of undue influence have been set out in the petition and failure to disclose particulars / evidences which go to prove the allegation cannot be a ground to hold that material facts have not been disclosed. Accordingly, in my view, the allegation of undue influence set out in para 9 of the petition cannot be said to be bereft of material facts. Consequently, the question of dismissing the election petition or striking off para 9 of the election petition does not arise at all.

23. Strong reliance was placed by the counsel for the respondent No. 1 on the decision of the Apex Court in the Lalit Kishore Chaturvedi Vs. Jagdish Prasad Thada and others, , wherein it is held that the pleadings relating to the allegation of undue influence would fall short of the requirement of law in the absence of precise facts, namely the nature of such undue influence, the persons on whom it was exercised and the time and place of such undue influence. In my view, the above decision of the Apex Court does not lay down any absolute proposition of law that in every case the names of the persons upon whom undue influence was exercised must be given, because, firstly, in that case, even after the allegation of undue influence was put to trial the petitioner could not establish that any person was unduly influenced by the pamphlet and secondly, on perusal of the pamphlet, the Apex Court held that the statement contained therein can at the most be construed as an expression of opinion and not a statement of fact and, therefore, the allegation would not constitute corrupt practice. In the present case, the statement of fact contained in the seized pamphlets is that the local

BJP MLA's were appealing to the voters to vote in favour of the NCP candidate and if it is established during the trial that the seized pamphlets were being distributed by the respondent No. 1 / his agent / other persons with the consent of respondent No. 1 / his agent then it would be a prima facie case of corrupt practice. Therefore, in the facts of the present case, the decision of the Apex Court in the case of Lalit Chaturvedi (Supra) would have no application. Similarly, other decisions relied upon by the Counsel for the respondent No. 1 would have no bearing, in view of the finding that material facts relating the allegation of undue influence has been pleaded in para 9 of the petition.

24. In para 10 of the election petition, it is alleged that the expenditure account submitted by the respondent No. 1 to the returning officer to the effect that he had spent less than Rs. 25 lakhs in the election is false and since the expenditure incurred is in excess of Rs. 25 lakhs, the respondent No. 1 has contravened Section 77 of the 1951 Act. According to the petitioner, the respondent No. 1 had printed one 1 lakh pamphlets of Exhibit M1 to M12 i.e. in all 12 lakh pamphlets and not 65,000 pamphlets as contended by the respondent No. 1. What is the basis on which the petitioner arrived at a conclusion that the respondent No. 1 had printed 1 lakh pamphlets of each of the exhibits M1 to M12 is not set out in the petition. Similarly, the basis on which the petitioner claims that the respondent No. 1 had printed and distributed voters slip equal to the number of voters in the constituency which is 15,80,000 is not set out in the petition. In the absence of any basis for making such allegations, it is clear that the petitioner has made vague and frivolous allegation that the respondent No. 1 has submitted false accounts to the Election Commission and that the allegation is solely based on conjectures and surmises without any basis.

25. Apart from the above, the allegation of the petitioner that the respondent No. 1 had spent more than Rs. 20 lakhs on printing 12 lakh pamphlets is also based on conjectures, because, the petitioner has presumed that these pamphlets can be printed at a cost of Rs. 1/- to Rs. 2.50 per pamphlet. It is not the case of the petitioner that the respondent No. 1 had in fact paid more than Rs. 20 lakhs in printing 12 lakh pamphlets and the petitioner has merely presumed that the respondent No. 1 might have incurred expenditure exceeding Rs. 20 lakhs in printing 12 lakhs pamphlets. Similarly, the petitioner has presumed that the respondent No. 1 must have incurred expenditure of Rs. 4,74,000/- in printing 15,80,000 voters slip solely based on the assumption that each voters slip can be printed at the rate of Rs. 0.30 paise. In these circumstances, as held by the Apex Court in the case of Kamalnath Vs. Sudesh Verma, , vague assertion based on conjectures cannot be said to be assertion of material facts. Therefore, in the facts of the present case, in my view the allegation contained in para 10 of the petition that the respondent No. 1 has submitted false expenditure account to the Election Commission and that the respondent No. 1 has spent more than Rs. 25 lakhs in the election and thus violated Section 77 of the 1951 Act is totally vague, frivolous and is intended to delay the fair trial of the Suit and, therefore, para 10 of the petition is liable to be struck off under Order VI Rule 11 of the

C.P.C.

26. Although it is alleged in para 10 of the petition that as per the guidelines issued by the Election Commission of India, a candidate is prohibited from publishing his name, photograph or the symbol etc on the voter's slip, neither in the election petition nor during the course of arguments, any guidelines has been brought to my notice to show that publishing the name, photo or the symbol on the voter's slip is an offense under the 1951 Act. In these circumstances, in my view, allegation contained in para 10 of the petition being vague, frivolous, bereft of material facts and intended to prolong the trial, deserves to be struck off under Order VI Rule 16 of the C.P.C.

27. In para 11 of the petition, the petitioner has sought recounting of votes polled in the constituency in question inter alia on the ground that the counting process of each round was done so fast that there was total chaos, and that the central observer failed to recount 2 EVM machines in the presence of the election agent in each round randomly as required under the guidelines laid down by the Election Commission of India. It is further alleged that the election agent of the petitioner had made an application for recounting of votes polled even before the declaration of results, but till date no order has been passed on the said application, except orally announcing before declaration of results that all data received from the respective assistant returning officers in respect of each assembly segment have been checked and found to be correct. It is further alleged that as per the working sheet of the petitioners counting sheet, the respondent No. 1 has secured 7 votes in booth No. 122 whereas the official vote sheet shows that the respondent No. 1 has secured 75 votes. It is further alleged that as per the information made available by the Election Commission to the petitioner, total votes polled at polling station No. 40 is 298 votes, while votes counted are 545 votes (difference of 247 votes). Similarly, it is alleged that at polling station No. 136 the votes polled are 319 votes while the votes counted are 401 votes (difference of 82 votes). In these circumstances, the petitioner has sought recounting of all votes polled in the constituency in question.

28. It is well established in law that recounting of votes especially after the declaration of results cannot be ordered as a matter of course. The pleadings in the election petition seeking recounting of votes must prima facie establish that errors are of such magnitude so as to materially affect the election. In the present case, the allegation that the counting of votes was done fast is a totally vague allegation and such an allegation cannot be a ground to order recounting of votes. The allegation that the central observer had failed to recount 2 EVM machines is equally vague because, admittedly the complaint made to that effect had been expressly rejected by the returning officer, even before the declaration of results. Moreover, no case is made out to show as to how such an error, if any, committed by the central observer has materially affected the election. Once a decision on the application made by the petitioner's election agent seeking recounting of votes has been orally communicated to the petitioner, there is no

reason to presume that the said decision has not been recorded by the returning officer. In any event, in the absence of any pleading as to how failure to record reasons has materially affected the election, the recounting of votes cannot be ordered.

29. Even the alleged discrepancy in votes in the working sheets lying with the petitioner and the official counting sheet cannot be a ground to seek recounting of votes because, if there was any discrepancy in the votes secured by the respondent No. 1 then, the same would have been noticed at the time of counting itself. To be specific, if in booth No. 122 the respondent No. 1 had actually secured 7 votes and not 75 seats as per the official list, then the counting agent of the petitioner would have raised an objection to that effect at the time of counting itself. Apart from that, if such discrepancy was there, then the total number of votes polled in the constituency in question would not have tallied at all. There is no allegation that on account of the alleged discrepancy at booth No. 122, there is discrepancy in the total number of votes polled in the constituency in question. Therefore, the alleged discrepancy is nothing but an after thought based on conjectures and surmises. Moreover, assuming that there is any discrepancy, the petitioner has not pointed out as to how the above discrepancy has materially affected the results of the election. Further allegation made in para 11 of the petition is that in the official counting sheet, there is difference of 247 votes between the votes polled and the votes counted at polling station No. 40 and difference of 82 votes between the votes polled and the votes counted at polling station No. 136. This allegation is equally vague and devoid of any merit because, firstly, it is not the case of the petitioner that there were bogus voting at the aforesaid two polling stations so as to hold that due to bogus voting the votes counted are more than the votes polled. Secondly, no such allegation was made by the petitioner / his agent before declaration of results that the votes counted at the above two polling stations were more than the votes polled. Thirdly, if in fact, the votes counted at the above polling stations were more than the votes polled, then obviously it would have been reflected in the final results declared. No such discrepancy in the final results is alleged in para 11 of the petition. Fourthly, assuming that the differential 329 votes (247 + 82) if any, were to be treated to have been polled by the petitioner, even then it does not affect the election of the respondent No. 1 because, the respondent No. 1 was elected by a margin of 2933 votes. Thus, in the facts of the present case, no case is made out for recounting of votes and, therefore, the reasons for seeking recounting of votes being totally vague, frivolous and are intended to delay the trial, the para 11 of the petition deserves to be deleted under Order VI Rule 16 of the Code of Civil Procedure, 1908.

30. In the result, the chamber summons is partly allowed by deleting para 10 and 11 of the election petition. There will be no order as to costs.