

(2001) 12 KAR CK 0010
In the Karnataka High Court
Case No : E.P. No"s. 25 and 30 of 1999

Dr. Vijayakumar Khandre and etc.

APPELLANT

Vs

Prakash Khandre and others

RESPONDENT

Date of Decision : 21-12-2001

Acts Referred:

Citation : AIR 2002 Kar 145

Hon'ble Judges : A.V. Srinivasa Reddy, J

Bench : Single Bench

Advocate : Ashok B. Hinchigeri, Vijaya Kumar Majage, D.N. Nanjunda Reddy and G.V. Shantharaju, for the Appellant; P.S. Manjunath, (for No. 1) and C. Krishna Reddy, Govt. Pleader, (for No. 5), for the Respondent

Final Decision : Dismissed

Judgement

A.V. Srinivasa Reddy, J.—In Election Petition Nos. 25/1999 and 30/1999 filed under Sec. 81 of the Representation of Peoples Act, 1951, one preferred by Mr. Basavaraj D. Honna, the voter and another by the contestant Dr. Vijayakumar Khandre. the election of the returned candidate, Mr. Prakash Khandre from No. 2-Bhalki Assembly Constituency is challenged as void u/s 100(1)(a) and 100(1)(d) (i) of the Representation of the Peoples Act, 1951 (hereinafter referred to as "the Act").

2. For the sake of convenience, in the course of this order the returned candidate who is arrayed as Respondent No. 1 in both the election petitions is referred to by name and also as "election respondent".

3. The returned candidate Mr. Prakash Khandre has filed the Recrimination Petition under Sec. 97 of the Act praying that in the event of his election to the constituency being declared void, that the first respondent Dr. Vijaya Kumar Khandre should not be declared elected as he is guilty of corrupt practices as specified in Sections 123(1)(A). 123(3), 123(6) and 123(7) of the Act.

4. The issues involved in these petitions and the prayers sought for in them

being one and the same their effective adjudication necessitates taking up these petitions together for consideration.

5. The facts common to these petitions are summarised as under :

(i) The general elections to the Legislative Assembly of the Karnataka Legislature was held on 5-9-1999. The petitioner in E.P. 25/99 Dr. Vijayakumar Khandre and the Returned Candidate Mr. Prakash Khandre contested the said election as party candidates among other constants. Mr. Prakash Khandra contested under the banner of the Bharatiya Janata Party (for short the B.J.P.) whereas. Dr. Vijayakumar Khandre represented the Indian National Congress Party (for short "congress party"). The filing of nominations began on 11-8-1999 with 25-8-1999 as the last date for filing nominations. The scrutiny of the nominations was done on 25-8-1999. There were in all five contestants in the fray, some representing the political parties and some contesting as independent candidates. The poll was held on 5-9-1999. The ballot papers were counted on 6-10-1999 and the result declared on 7-10-1999, Mr. Prakash Khandre representing the B.J. P. Party was declared elected by a margin of 10.424 votes over his nearest rival Dr. Vijayakumar Khandre of the Indian National Congress Party with the rest in the fray garnering only inconsequential number of votes. The election of Mr. Prakash Khandre as the member of legislative assembly is questioned in the two election petitions.

(ii) Having briefly referred to the common facts involved in these petitions, it is also necessary to advert to the grounds urged in each of these petitions, separately, in order to have an overall understanding of the case of made out by the petitioners.

In E.P. No. 20/1999:

In this petition filed by Mr. Basavaraj D. Honna, a voter, for declaring the election of Respondent No. 1 Mr. Prakash Khandre as void, it is urged that on the date of filling of the nomination paper, the date of scrutiny and the date of his election, the Respondent No. 1 was disqualified u/s 9-A of the Representation of the People Act, 1951 as there was a subsisting contract entered into by Respondent No. 1 with the appropriate Government for execution of various Govt., contract works. The election according to the petitioner, is also void since the result of the election was materially affected by improper acceptance of his nomination.

(ii) The petitioner has also outlined the various contracts which, according to him, were subsisting between Respondent No. 1 and the appropriate Government. The Respondent No. 1, it is alleged, had. at the relevant point of time, subsisting contracts with the following three departments of the Government of Karnataka :

(A) Public Works Department;

(B) Irrigation Department and

(C) National High Ways.

(iii) Relying on these contracts that the petitioner had with the appropriate Government and claiming them to have subsisted at the time of scrutiny of nomination papers, on the date of election and on the day of declaration of the result, the petitioner prays for a declaration that the election of Respondent No. 1 from No. 2 Bhalki Constituency is void u/s 100(1)(a) and Section 100(1)(d)(i) of the Act to declare second respondent as having been elected from No. 2 Bhalki Assembly Constituency u/s 101(a) of the Act and to Grant such other reliefs or orders as deemed fit for grant in the circumstances of the case.

6.

(i) Meeting the case put forth by the petitioner, it is stated by Respondent No. 1 in the statement of objections filed by him that by letter dated 3-8-1999 addressed to the Executive Engineer, PWD, Bidar he had terminated all the contracts with the PWD and had also obtained a no due certificate. Besides, it is stated, he had even asked the Executive Engineer to cancel his registration from the list of contractors.

(ii) In respect of the works undertaken by him from the irrigation department, the defence taken is that, by letter dated 3-8-1999 addressed to the Executive Engineer, Karanja Project, he had cancelled the contract unilaterally and the work was closed and he was accordingly informed of it by the Executive Engineer, Karanja Project.

(iii) In so far as the contracts entered into by him with the State of Karnataka for widening of the single lane from Kms. 237/0 to 256/0 of Sholapur to Chitradurga Division of National Highway 13, it is submitted that the work was completed even before 3-7-1999 and, therefore, there was no subsisting contract with the Government.

(iv) With regard to the works undertaken by him for effecting repairs to the National Highway 13, he had written a letter to the Chief Engineer C and D, South, Bangalore on 6-8-1999 terminating his contract. While conceding the fact that these works were later on transferred to his brother Mr. Mallikarjun Kandre, it is stated, his brother entering into a contract in his own right in his capacity as Class I Contractor would not in any way disqualify him (Respondent No. 1) from contesting the election more so when there is no joint family status between him and his brother.

(v) On the strength of these denials, he asserts, he did not suffer from any disqualification u/s 9A of the Act.

7. The allegation in these petitions relating to the election of respondent being a partner of Saraswathi Bai and Sons which firm is said to have had running contracts with the Government for supply of asphalt at the relevant time can be disposed of at the very outset. Mr. Prakash Khandre has also met this allegation by stating that he had retired from the said firm before filing his nomination. But

it would not be required of me to examine this aspect in any great detail as this allegation by the petitioners has remained just that and not even a shred of evidence, either oral or documentary, has been produced during trial in proof of the said allegation. Saraswathi Bai & Sons according to Respondent No. 1, had completed the contract of supplying asphalt to the Government much before the date fixed for filing nomination and that the said contract was not at all subsisting on the relevant date. Relying on the answer elicited from Mr. Prakash Khandre during his cross-examination that there was another partnership firm by name C. Saraswathi Bai and Sons of which too he was a partner. Mr. Nanjunda Reddy submitted that it must be held that there was subsistence of contract between Mr. Prakash Khandre and the concerned department through the firm. But, then, when the contract itself has not been proved to exist at the relevant point of time between either of these two firms with any of the departments of the Government, the consideration of the question whether Mr. Prakash Khandre incurred the disqualification u/s 9A by being a partner in them, does not arise at all.

8.

(i) Now let me state the case as put forth by the petitioners in support of their case of subsistence of contract between Mr. Prakash Khandre and the appropriate Government on the relevant dates.

Election Petition No. 25/1999 :

(ii) E.P. No. 25/1999 is filed by Mr. Vijayakumar Khandre who had contested the election as Congress (I) candidate. The petitioner Dr. Vijayakumar Khandre has based his claim for (i) declaration of the result of the Karnataka State Legislative Assembly from 2-Bhalki Assembly Constituency as illegal and void u/s 100(1)(a), (d) and (i) of the Act and (ii) to declare him as duly elected to the said 2 Bhalki Assembly Constituency u/s 101(a) of the Act on the ground that Mr. Prakash Khandre, the successful candidate, was a contractor for, under and with the Government of Karnataka during the relevant period. The contracts which according to the petitioner were subsisting on the relevant date are adumbrated in the petition and they are extracted below :

(i) The contract for providing and fixing Shahabad Slab Lining and Cement Concrete Lining from CH-75,000 to CH-76,000 meters in KM 76 of R.B.C. Karanja Project vide Agreement No. 4/1999-2000 dated 3-5-1999.

(ii) The contract in respect of improvement to Halbarga Bawagi on to Kamathana Road from K.M.0/0 to 34/4 in Bidar Distinct vide; Agreement dated 28-8-1997.

(iii) Improvement of road from Dhanurapati to Chandapur from K.M. 4/4 to 9/50 in Bhalki Tq. Bidar, vide Agreement dated 19-11-1998.

The petition averment is that the Respondent No. 1 having had a subsisting contract with the Government on the relevant date in his capacity as Contractor, was disqualified u/s 9-A of the Act from contesting the election as a candidate

and therefore, the acceptance of his nomination papers is hit by Section 100(d) (i) of the Act. The petitioner has made out a case for himself by stating that, but for the improper acceptance of the nomination of Mr. Prakash Khandre, he would have been declared elected as the number of votes polled by him were more than the other contestants in the fray. Hence, the prayer for declaration u/s 101(c) of the Act.

9. The Respondent No. 1 has filed his detailed statement of objection denying that he had any subsisting contract with the appropriate Government on the relevant dates. He has referred to the letter written by him to the Executive Engineer, Karanja Project, KPCC Division, No. 2 Bhalki requesting the Executive Engineer to cancel the contractor's registration and to the reply received from the Executive Engineer informing that as per his instructions the tender for the said work is closed. Relating to the work of effecting improvements to Halbarga Bawgi road and Dhanurpati Chandapur road, he has taken a stand that both these contracts were terminated by him by issuing a termination notice dated 4-8-1999. Summing up his defence, it is stated by him that all the contracts entered by him with the Government having come to an end by 17-8-1999 either by performance or by express agreement or under the doctrine of frustration or by breach, the contracts were no longer subsisting on the date of filing of nomination paper, he did not suffer any disqualification u/s 9A of the Act.

Recrimination Petition :

10. Mr. Prakash Khandre, the returned candidate, has filed the recrimination petition in E.P. No. 25/99 claiming that had the petitioner in E.P. 25/99-Dr. Vijaykumar Khandre been returned as the successful candidate in the election, it would have been declared void u/s 123(1)(1A), 123 (3), 123(6) and 123(7) of the Act on account of the various corrupt practices practiced by him during the election. Advertence made in the recrimination petition to specific instances of bribery as enumerated in Section 123(1)(A) are adumbrated below :

(a) Issuing circular in Hindi language promising to advance loans to the tune of Rs. 10.00 crores through Bhalki PLD Bank for agricultural purposes.

(b) An assurance was held out to the voters that if Mr. Vijayakumar Khandre was elected as MLA, Mahatma Gandhi Sahakari Sakkare Karkhane will be established and it will provide employment to hundreds of unemployed youth.

(c) An appeal was made to Marathi voters by stating that the leaders of Maratha Samaj are with him and they fully support him which amounts to a corrupt practice u/s 123(3) of the Act.

(d) The election petitioner had participated at a meeting of Kuruba Community at the inauguration of Mahatma Bomagondeswara Samudaya Bhavan, an organisation of Kuruba Community. wherein votes were solicited from the eligible voters of that community.

In order to establish that Dr. Vijayakumar Khandre appealed to a specific

community to vote for him and to refrain from voting for any other candidate on the ground of caste, the following instance is cited :

"The Election petitioner has participated at a meeting of Kuruba Community at the inauguration of Mahatma Bomgondeshwar Samudaya Bhavan an organisation of Kuruba Community where in votes from Kuruba Community is solicited for the respondent/election petitioner in the presence of Swamiji of Kuruba Community, news in this behalf under Bhalki date line August 12th appeared in Prajavani dated 13th August. 1999."

Citing the circumstance of the Election Petitioner taking assistance of one Dr. Mallamma Wali, Doctor working in the Primary Health Center in Balki, it is claimed by the Recrimination Petitioner that even if the election petitioner had won in the election his election would have been void as obtaining assistance from a gazetted officer is deemed as a corrupt practice u/s 123(7) of the Act.

11. The recrimination petitioner also has referred in his petition to the fact that the first respondent has incurred or authorised to incur expenditure in contravention of Section 77 of the Act. The details of the expenditure incurred in excess of the sanctioned limit have been adumbrated in the petition. On the basis of these allegations it is prayed that in the event of his election being declared void and election petitioner is declared elected, the Court be pleased to declare his election void.

12. On the basis of the rival pleadings, the following issues were raised as arising for determination.

In E.P. 30/99 :

1. Whether the petitioner proves that Respondent No. 1 had a subsisting contract entered into by him with the appropriate Government for execution of works ?
2. Whether the petitioner proves that as on the date of filing of nomination papers by Respondent No. 1, the date of scrutiny and the date of his election, he was disqualified u/s 9-A of the Representation of People Act, 1951 ?
3. Alternatively, whether Respondent No. 1 proves that as on the date of filing Nomination papers, scrutiny and the date of election, there was not subsisting contract with the Government of Karnataka and therefore, he had not incurred any disqualification u/s 9A of the Representation of People Act, 1951 ?

In E.P. 25/99 :

1. Whether the petitioner proves that the contract entered into by Respondent No. 1 with the State Government was subsisting on the date of filing of the nomination papers by Respondent No. 1 for election to 2 Bhalki Assembly Constituency ?
2. Whether the petitioner proves that Respondent No. 1 had incurred disqualification u/s 9A of the Representation of People Act, 1951 for contesting

and getting elected to No. 2 Bhalki Constituency of the Karnataka Legislative Assembly?

3. Whether the petitioner proves that the election of Respondent No. 1 to the Karnataka Legislative Assembly from 2 Bhalki Assembly Constituency is materially affected by improper acceptance of this nomination papers filed by Respondent No. 1?

4. Does the petitioner prove that he is entitled to be declared as the Returned Candidate from 2 Bhalki Assembly Constituency ?

5. To what relief?

Additional Issues :

1. Whether the Recriminatory Petitioner proves that the election petitioner has issued pamphlets in Hindi language containing false promise to induce the voters of the Constituency to vote for him ?

2. Whether the Recriminatory petitioner proves that Sri. Bhimanna Khandre father of the election petitioner, had held out assurances of behalf of the election petitioner that if he is elected as M.L.A. Mahatma Gandhi Sahakara Sakkar Karkane would be established, thus inducing the electors to vote for his son and had committed corrupt practice ?

3. Whether the Recriminatory petitioner proves that the election petitioner had committed corrupt practice of appealing to the voters on the basis of language and committed corrupt practice u/s 123(3) of the Act ?

4. Whether the Recriminatory petitioner proves that the election petitioner had committed corrupt practice u/s 123(7) of the Act by utilising the service of Dr. Mallamma Wali, a Gazetted Officer of the State Government to canvass votes for him ?

5. Whether the Recriminatory petitioner proves that the election petitioner has incurred expenditure in excess of the limits prescribed in Section 77 of the Act and thus committed corrupt practice u/s 123(6) of the Act?

6. To what relief ?

13. The issues involved, the grounds urged and the prayer made in both the petitions being common, common evidence was recorded in both the petitions. In all 19 witnesses were examined on behalf of the petitioner in E.P. 30/99 with the petitioner examining himself as PW 1. A total of 69 documents (Ex. P1 to P69) were got marked by the petitioner in E.P. 30/99. The petitioner in E.P. 25/99 examined himself as PW 1 and got marked 124 documents (Exs. P1 to P124) in support of his case. The respondent examined himself as RW 1 and got marked Exs.R 1 to R. 24. besides examining RW 2 to RW 4 in support of his case.

14. I have heard arguments of the learned counsel on both sides over several dates which ultimately concluded on 4-12-2001 on which date the matter was

reserved for orders.

15. The issues raised in E.P. 30/99 and issue Nos. 1 to 3 raised in E.P. 25/99 involved identical questions both on facts and in law and, therefore, they are taken up together for consideration. Issue No. 4 in E.P. 25/99 and the additional issues 1 to 5 in the recriminatory petition involves the same questions of fact and law and are taken up together for determination.

16. Issue Nos. 1 and 3. in E.P. 30/99 and issues Nos. 1 to 3 in E.P. No. 25/99.

(1) It would be useful to refer to the provisions of law which deal with the relevant date on which the disqualifications under Chapter IV ought not to have been incurred by a candidate contesting the elections. Section 36(2) and 36(2)(a) of the Act deals with scrutiny of nominations.

-36(1)

(2) The returning officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination and may, either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary, reject any nomination on any of the following grounds :—

(a) that on the date fixed for the scrutiny of nomination the candidate either is not qualified or is disqualified for being chosen to fill the seat under any of the following provisions that may be applicable, namely:—

Articles 84, 102, 173 and 191.

Part II of this Act and Section 4 and 14 of the Government of Union Territories Act, 1963 (20 of 1963);"

(Underlining by me)

These petitions have been preferred on the ground that the election respondent had suffered the disqualification prescribed u/s 9A of the Act at the time of filing nomination, scrutiny of the nomination and the announcement of the result. In the light of Section 36(2)(a) which is referred to above it is the date of scrutiny of nomination which would be the relevant date for deciding whether or not the election respondent had suffered any disqualification. Now let me proceed to decide the points in issue.

17. The answer to all these issues depends entirely on the determination of the principal question, whether on the date of scrutiny of the nomination paper the returned candidates had subsisting contract with the appropriate Government. If the answer to this question is in the affirmative it has to be held that Election of Respondent No. 1 had, indeed, suffered the disqualification prescribed u/s 9A of the Act and, therefore, his election is void and illegal. Section 9A which disqualifies a person, having subsisting contract with appropriate Government the appointed date, from being chosen as and for being a member of either house of Parliament or of the Legislative Assembly or Legislative Council of a

State, inter alia reads :

"9-A. Disqualification for Government contracts, etc. - A person shall be disqualified if and for so long as. there subsists a contract entered into by him in the course of his trade or business with the appropriate Government for the supply of goods to. or for the execution of any works undertaken by that Government.

Explanation, - For the purposes of this Section, where a contract has been fully performed by the person by whom it has been entered into with the appropriate Government, the contract shall be deemed not to subsist by reason not only of the fact that the Government has not performed its part of the contract either wholly or in part."

This section had been considered and interpreted by the Apex Court in various decisions and reference to the dictum laid down in some of the leading cases, which have some bearing on the facts obtaining in the present case, is imperative for determining the crucial question in issue in these petitions.

18(i). In *Konappa v. Vishwanath*, AIR 1969 SC 447 the Apex Court while rejecting the plea that the section is applicable to a person whereas (he contract was with the firm, held :

"In our opinion, the High Court has taken the right view of the matter. The law requires that a candidate should not have any interest in any contract with the Government and even a partner has an interest sufficient to attract the provisions of Section 9A."

(ii) In *Aslhing alias Lhingjanong Vs. L.S. John and Others*, the returned candidate who had a running contract with the Government wrote a letter on 30-11-1979 unilaterally putting an end to the contract and informed the department concerned accordingly and also he had resigned from the contractors list of PWD Manipur. The nomination was filed on 10-12-1979. A contention was urged on behalf of the petitioner that unless such letter is accepted by the authority, the contract would continue and thus the respondent would suffer from the disqualification. Brushing aside the said contention, the Apex Court observed :

"In our opinion having regard to the contents of the letter it is not possible to accept the argument of Mr. Rangarajan that the contract was subsisting. The acceptance of the letter by the authorities was unnecessary for putting an end to the contract although the breach may give rise to a cause of action for damages."

(iii) In *Sewaram Vs. Sobaran Singh*, the Apex Court was seized of a matter in which the contract was continued by the brother after its renunciation by the returned candidate. In those circumstances the Apex Court concluded that the returned candidate never intended nor in fact put an end to the contract but continued with the contract through the proxy of his real brother.

19. The broad principles laid down by the Apex Court in its pronouncements,

referred Lo supra, can be crystalised as follows :

(i) Even a partnership interest in a contract would invite the disqualification under S. 9A of the Act.

(ii) A contract can be unilaterally renounced and the ratification of such renunciation by the authority concerned is unnecessary for the purpose of S. 9-A of the Act.

(iii) Continuation of a contract by his brother after its renunciation by the returned candidate would invite the disqualification u/s 9A if there was no intention on the part of the returned candidate to put an end to the contract.

20. The principles as laid down by the Apex Court, in the above decisions though are of binding nature, they cannot be said to apply to all cases, irrespective of facts. This is so because each case stands on its own footing and a decision is a precedent on its own facts and each case presents its own features. This is particularly so if the case is one which would turn purely on facts. In *Amar Nath Om Prakash and Others Vs. State of Punjab and Others*, the Apex Court had occasion to observe :

"Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret words of statutes : their words are not to be interpreted as statutes ."

Similar view has been expressed in *Gasket Radiators Pvt. Ltd. Vs. Employees' State Insurance Corpn. and Another*, in the following terms :

"Not can we read a judgment on a particular aspect of a question as a Holy Book covering all aspects of every question whether such questions and facets of such questions arose for consideration or not in that case."

It is therefore relevant to notice herein some of the important and undisputed features of this case before I proceed to interpret them in the light of the law of contracts and the legal pronouncements which have been extracted hereinabove. At the very outset it must be remembered that appreciation of facts for determining the question of subsistence or otherwise of the contract would have to be done in accordance with the provisions of the law relating to contract and the interpretation cannot be any different in the matter of considering the provision contained in Section 9A of the Act. Now let me state the important and at the same time undisputed facets of the case.

21. The election respondent is a licenced Class I PWD contractor who had entered into several agreements with the Government of Karnataka for execution of the works in his individual capacity. Undisputedly, he had running contracts with three departments viz. (i) Public Works Department, (ii) Irrigation Department and (iii) National High Ways. The specific works undertaken by him

with the various departments are as under:

P.W.D.

(i) Improvement and asphaltting of Halbarga-Bawagi and Kamthana road in Bidar District (Agreement Ex. P64 dated 28-8-1997)

(ii) Improvement of roads from Dhanura Patti to Chandpura vide Agreement No. 2/99 (Ex. P106) dated 1-9-1999.

Irrigation Department :

(i) The work of SS & Co Lining in KM-76 of Karanja Right Bank Canal. (Agreement Ex. P14 dated 3-5-1999)

National Highways :

(1) Agreement for widening of single lane to two lane from KM 237 to 256 of NH 13 of Sholapur Chitradurga section Ex. P79 Dated 3-4-1997.

(2) Agreement for widening and improving the reach in KM 160 to 240 Bijapur Miraj Road via Athani. Dated 3-10-1997 (Ex. P91).

(3) Agreement for periodical Renewal (PR) to NH 13 in KMs. 36 to 39 etc. Dated 4-8-1999. (Ex. P88).

(4) Agreement for PR to NH 13 in KMs, 182 to 193 Dated 4-8-1999. (Ex. P89)

(5) Agreement for PR to NH 13 in KMs. 217 to 227 Dated 4-8-1999. (Ex. P90).

22. (i) In respect of Halbarga Bawagi works the election respondent had given notice to the Executive Engineer, PWD, Bidar on 3-8-1999 of his intention to terminate the contract as he intended to contest for the election to Legislative Assembly.

(ii) In respect of Dhanura Patti to Chandpura also the election respondent issued notice on 3-8-1999 to the Executive Engineer, PWD requesting him to finalise the accounts and issue to no due certificate and also cancel the registration.

(iii) In so far as the contract work of SS and CC Lining In KM-76 of Karanja Right Bank Canal, a letter is addressed on 3-8-1999 to the Executive Engineer. Karanja Project, KPCC Division No. 3, Bhatambara requesting him to cancel the contractor's registration.

(iv) The work of periodical repairs to the National Highway No. 13 of at different chainages was terminated by letter written, to the Chief Engineer C&B, Bangalore on 6-8-1999.

23. The defence of the election respondent is built around these letters on the basis of which he claims he had repudiated the contract even prior to the appointed date and hence had not suffered the disqualification u/s 9A of the Act. The petitioners on the other hand rely on a number of documents procured from

the departments concerned to establish the subsistence of the contract. A careful examination of these documents against the backdrop of admitted facts and the oral evidence led in the case would go to reveal whether the election respondent suffered the disability u/s 9A of the Act.

Irrigation department :

24. I would first take up for consideration the works relating to irrigation department as the case relating to irrigation department stands on a different footing from the other two departments with regard to a crucial aspect of the case viz. while the subsisting works of PWD and Highways department were transferred to the brother of Mr. Prakash Khandre, in the case of irrigation department no such transfer is effected.

25. In respect of the contract for providing and fixing Shahabad slab cement and concrete lining from 75.00 KM to 76.00 in KM 76 IRBCD upto KPC, KPC, Mr. Prakash Khandre had written Ex.P39 letter on 10-8-1999 :

To, The Executive Engineer, KPC Divn. No. 2 Bhalki,

Sir,

Sub: Name of the work : Providing and fixing

Shahabad slab cement and concrete lining from 75.00 KM to 76 in KM 76 I RBCC upto KPC.

Adverting to the above. I write to state that the above works was entrusted to me on Tender basis. I am contesting for forthcoming Legislative Assembly election. So I request you to kindly issue me "No Due Certificate" and No objection Certificate. The necessary affidavit in the prescribed proforma is enclosed herewith for favour of further needful action.

Early action in the matter is highly appreciated.

Yours faithfully (Prakash C. Khandre) Class I Contractor, Bhalki.

Ex. P23 is an exact replica of Ex.P39 but for an hand written addition before the last paragraph as "otherwise close my tender."

(ii) Another letter Ex.P22 is also addressed in respect of the same contract and it reads :

"To,

The Executive Engineer, KPC. Divn. No. 2, Bhalki. Sir.

Sub : Name of the Work : Providing and fixing.

Shahabad Slab Cement and concrete lining from 75.00 KM to 76.00 KM in KM 76 IRBCD upto

RPC.

Since I am going to contest the Forthcoming Assembly elections in this regard may kindly be issued No Due Certificate from your end.

Also in this connection I write to bring to your kind notice that Sri. Mallikarjuna Khandre Class I PWD Contractor r/o. Bhalki is willing to execute all my balance works in this same cost as agreed by me for completion of the above work. His consent letter, is also enclosed, herewith for kind information.

In view of the Assembly election I request you to kindly to close my balance work at any early date, by taking my final measurement and issue the No Due Certificate at the earliest, by entrusting, my balance work to the above said agency Shri Mallikarjun Khandre Class I PWD Contractor, r/o Bhalki.

Early action in the matter is requested.

Yours Faithfully. (Prakash C. Khandre)

PWD Class I Contractor, Bhalki.

Ex. P8 is the very same as Ex. P22 but in it a hand written insertion has been made after para 2 in the body of the letter as, "otherwise close my tender." As to when and why these hand written additions were made is not clear.

26. These letters were acted upon by the department and the pending works were finalised and the contracts were treated as closed. By Ex. P22 and Ex. P8, the election respondent in no uncertain terms had sought for closing of the contract but he does not stop at merely abandoning his contract with the Government but proceeds further and recommends to the Department to give the remainder of the contract to his brother Mr. Mallikarjuna Khandre who was also a Class I Contractor.

27. The question, therefore, would be whether in the facts and circumstances of the case it could be said that the returned candidate served all his interest in the contract with the irrigation department.

28. The Apex Court in *Sewaram Vs. Sobaran Singh*, while deciding the question of subsistence of contract has referred to the different ways in which a contract can be brought to a close . It would be useful for our purpose to reproduce the same.

"The contract can come to an end by any of the following modes :?

- (1) By performance ;
- (2) By express agreement;
- (3) Under the doctrine of frustration, and
- (4) By breach."

The question of subsistence or otherwise of a contract would depend on the peculiar facts and circumstances of each case. Observations made and

conclusions reached by courts on pure questions of fact are not binding precedents to be followed in subsequent cases.

29. Now Let me examine whether the evidence produced by the petitioners establishes that the returned candidate had a subsisting contract on the relevant dates.

30. Ex. P37 is the affidavit enclosed to the letter addressed by Mr. Mallikarjuna C. Khandre to the Executive Engineer, R.P.C. Divn. No. 2, Bhalki. This affidavit is sworn to by Mr. Prakash Khandre. The last paragraph (sixth para) of the affidavit is relevant for our purpose. It reads :

"I have also requested the Executive Engineer, K.P.C. Division Bhalki to issue No. objection certificate and to terminate the subsisting contract. The Class I Contractor referred to above has also given an undertaking to undertake the remaining portion of the works on the same rate, terms and conditions.

I hereby declare in case Sri. Mallikarjuna.C. Khandre Class I Contractor fails to execute the work, I will take the full responsibilities of getting it completed on the same rate, and terms and conditions. "

(Emphasis supplied)

After termination of the work as is evidenced by the letters from Mr. Prakash Khandre to the Department and from the Department to Mr. Prakash Khandre, a surprise inspection had been done by Mr.B. Mallikarjun, Chief Engineer, ID. LP. Zone, Gulbarga on 8-11-1999. The following notings are to be seen in the said inspection report in respect of the works undertaken from Km. 75810 to 75860.3:

"From Km. 75810 to 75860.3 (60.30 M) it is seen that only bed concrete has been done with a bed width of 2.00

It is reported by the Ex. Engineer. KPD Divn. No. 2 Bhalki that the Closing Measurements have been taken and closed on 10-8-1999 and now during inspection on 8-11-1999, it is seen that bed concrete has been laid from Km. 75.810 to 75860.3. Therefore, the Ex. Engineer is hereby instructed to submit his explanation with the name of the Contractor who had laid this concrete bed and why the work has been stopped at this length only and why the work has not been carried out. Further, what procedure has been adopted for entrusting this work ?

Therefore, I was engaged in Election duty. Soon after completion of Election process I was appointed as Additional Assistant Returning Officer for counting purpose.

As there was no work in Km. 76 as well rainy season, it was not possible for me to visit the site frequently to observe who carried out the work.

It is to report that from Ch. 75810 to 75860.3 (50.3 mtrs.) in this reach the bed concrete of 2m width has been done by some agency without the knowledge of

the Department.

.....

In the circumstances complained above, it is not possible to identify who has carried out the work."

(Emphasis supplied)

Mr.B. Mallikarjuna, Chief Engineer, Irrigation Project is examined as PW 2 in the case. Portions in his evidence where he refers to the continuation of the work by some unknown Contractor after closure of the contract at the instance of Mr. Prakash Khandre, are extracted below :

"On 8-11-1999 when I made a surprise inspection, the work was in progress from KM 75.810 to 75.860.3 I am not aware who was carrying that, on that date. I Respondent No. 1 called for explanation from the Superintendent Engineer and the Executive Engineer regarding the work being carried out after the termination of the contract, in favour of the first respondent. I deny the suggestion that the work was being carried out by the first, respondent and I am aware of that fact. Since I had called for the explanation from the concerned Engineers action will be taken on receipt of explanation."

"The Executive Engineer had sought permission from me for entrustment of work to Mallikarjun Khandre. I did not grant permission. It is false to suggest that I have manipulated the records in order to help the first respondent."

After the evidence was read over to the witness, he pointed out that when he made a surprise inspection on 8-11-1999 he has not noted the concreting has already been completed as stated in Ex. P28 (in E.P. 30/99) and his statement that the work was in progress is not correct.

31. Relying on these admissions, the inspection report and the affidavit of the election respondent, it is argued by Mr. Nanjunda Reddy , learned counsel for the petitioner in E.P. 30/99, that there was no intention on the part of the election respondent to bring the contract to a close. No doubt the letters and the affidavit betray the stand now taken by the election respondent that the contract was brought to a close by breach. But. in order to show that there was subsistence of interest in the contract, the petitioners have to prove the producing positive evidence to show that the contract was persisted with by both the election respondent and the department thereby binding them to the rights and obligations arising under the contract.

32. A careful perusal of the records pertaining to this department leave no room for doubt that the request made by the election respondent to the department for transfer of the works to his brother was not acceded to and acted upon by the department. The acceptance of an offer being one of the essential ingredients of a contract, in the absence of which there can be no contract at all, it can be safely held that the contract had been determined by the irrigation department in

pursuance of the letters written by Mr. Prakash Khandre. it is irrelevant for our purpose to examine the question whether it amounted to closure of the contract by breach or by agreement. So long as the fact remains that the contract was brought to a close and it was not continued by Mr. Prakash Khandre or his brother, in whatever capacity it may be, it would be futile for the petitioners to contend that there was subsistence of contract. The fact that there is evidence to show that some work had been carried out even after the closure of the contract would not provide the necessary proof of subsistence of contract in the absence of any binding contract between the department and the election respondent, reduced into writing, either in his individual capacity or in any other capacity. For all purposes it must be held that there was no contract subsisting between Mr. Prakash Khandre and the irrigation department after its termination by Mr. Prakash Khandre.

33. Contracts with the PWD Department and the Highways :

Next, I take up for consideration the works in the other two departments. The election respondent had undertaken the following two works from the Public Works Department :

i) Improvement and asphaltting of Halbarga-Bawagi and Kamthana road in Bidar District.

ii) Improvement of roads from Dhanura Patti to Chandapura.

Both the works were subsisting just prior to the beginning of election process. On 4-8-1999 Mr. Prakash Khandre addressed the letter E. P10(also Ex. R4) to the Executive Engineer, P.W.D. Division, Bidar. The letter reads :

"Sir,

Sub : Regarding transfer of works taken up by me to Sri Mallikarjun Khandre, Contractor.

As I am going to contest the forthcoming Assembly election, I request you kindly to transfer the works on hand taken by me in your Department to Sri Mallikarjun Khandre (Class-I) who is also willing to execute the works and his consent letter is also enclosed herewith.

Early action in the matter is requested."

Ex. P24 is another letter of even date to the Executive Engineer, P.W.D. Division, Bidar requesting to cancel the contractorship. The body of the letter reads :

"I am contesting for the forthcoming Assembly Election. Hence I request you kindly to finalise the works which are entrusted to me in your department even if the works are incomplete, as per rules. I also request you to issue me the no due certificate and cancel my registration of contractorship. Further , I write to state that I am also a Managing Partner of "C. Sarsawati & Sons....."

Mr. Mallikarjuna Khandre also writes letters to the Executive Engineer PWD

Division, Bidar undertaking to execute the balance work. Acting on these letters the registration of contractor's licence is cancelled as per Ex. P23 and "no due certificate" is issued. Subsequently, in respect of both the works an agreement is executed between Mr. Mallikarjuna Khandre and the Executive Engineer, PWD, Bidar as could be seen from Ex. P.106 and P107.

National Highways.

34. Mr. Prakash Khandre had undertaken the following five works from the National Highways Department :

1) Agreement for widening of single lane to two lane from KM 237 to 256 of NH 13 of Sholapur-Chitradurga, Ex. P79 dated 3-4-1997.

2) Agreement for widening and improving the reach in KM 160 to 240 - Bijapur-Miraj road via Athani. Ex. P91 Dated 3-10-1997.

3) Agreement for periodical Renewal (Pr) to NH 13 in KMs., 36 to 39 act. Ex. P88 dated 4-8-1999.

4) agreement for PR to NH 13 in KMs., 182 to 193 Ex. P89 dated 4-8-1999.

5) Agreement for PR to NH 13 in KMS., 217 to 227 Ex. P90, dated 4-8-1999. The works at Sl. Nos. 1 and 2 are stated to be completed but the maintenance period of one year was still in force. The agreement in respect of works at Sl. Nos. 3 to 5 had been entered into by Mr. Prakash Khandre on 4-8-1999 as per Exs. P88 to P90; By his letter Ex. P-92(a) dated 9-8-1999 he requested the Executive Engineer to transfer these works in favour of his brother, the letter reads :

"To,

The Executive Engineer, National Highways, Bijapur Division, Bijapur, Dist : Bijapur.

Sub :- Regarding transfer of works taken up by me to Sri Mallikarjun Khandre, Class-I Contractor. (Cancel of my registration)

Sir, As I am going to contest the forthcoming Assembly election. I request you kindly to transfer the works taken by me in your department to Sri Mallikarjun Khandre Class I contractor, who is also wiling to execute the works and his consent is also enclosed herewith. And also I am submitting herewith the affidavit.

Early action in the matter is requested.

Thanking you,

Yours faithfully, (Prakash Khandre)

This letter was acted upon by the department and the concerned works were treated as closed.

35. the events follow an uniform pattern after writing of the letters of cancellation by Mr. Prakash Khandre. One or more letters are addressed to the Executive Engineer of the concerned department by the election respondent. The letter also invariably makes a request to let his brother Mr. Mallikarjun Khandre who is also a Class I Contractor, take up the remainder of the work and complete it. There is also an undertaking in each of the letters to the effect that in the event of his brother failing to execute the work on same terms as agreed to earlier by Mr. Prakash Khandre and the concerned department that he (Mr. Prakash Khandre) would take full responsibility of getting it completed on the same rate and terms and conditions. Both in the case of PWD and Highways department, the contract is entrusted to Mr. Mallikarjun Khandre and he executes it.

36. While Mr. P.S. Manjunath, learned counsel for Respondent No. 1, based his arguments on the letters addressed to the departments requesting them to close the contract and cancel the contractor's licence, Mr. Nanjunda Reddy, learned counsel for petitioner in E.P. 25/99, drew support from the various documents" of the departments in proof of his contention that the P.W.D. works were in fact continued by Mr. Prakash Khandre himself even after the letters were addressed and the contractor's licence was cancelled. He sought to make out a case that the letters were a mere ruse to get over the embargo under the Act and neither the election respondent nor the department had the intention to bring the contract to close and nor was it in fact brought to a close. Mr. Ashok Hinchigiri, learned counsel for the petitioner in E.P. 30/99 adopted the arguments of Mr. Nanjunda Reddy ? with regard to subsistence of contract and made his submission only on the recrimination petition.

36A. As stated earlier the subsistence or otherwise of the contract has to be determined in terms of the law pertaining to the law of contract. Mr. Mallikarjuna Khandre had consented to assume the responsibility of discharging the contract and the departments have accepted the offer made by Mr. Mallikarjuna Khandre to execute the contract. But, there is no tripartite agreement entered into between the parties in respect of the new contract between the departments, Mr. Prakash Khandre and Mr. Mallikarjuna Khandre. After the termination of the existing contract no fresh tender was called for from other contractors and the remainder of the works were allotted to Mr. Mallikarjuna Khandre under two agreements, but no earnest money is collected. Whether such an arrangement will extinguish the rights and obligations under the original contract has to be examined in the backdrop of the facts and the evidence, both oral and documentary, as also the case laws on the point, to determine the issue in question.

37. both the learned counsel relied on the decision in *Sewaram Vs. Sobaran Singh*, in support of their respective contentions. The facts in *Sewaram's* case, *supra*, are similar to the facts of the present case in many respects.

(i) In *Sewaram's* case, *supra*, the returned candidate had entered into a contract

with the Government for raising of floodable reach in K.M. 105 to 108 of A.B. road on National Highway No. 3, Gwalior. the contract was assigned to Sewaram in his individual capacity. Mr. Sewaram brother and member of joint Hindu family with Sewaram appellant. Not only that, Patiram was also an attorney holder of Sewaram during the relevant period. The correspondence even after 30-1-1990 has been made in the name of Sewaram appellant though signed by Patiram. In these circumstances, it cannot be believed that Sewaram had put an end to the contract by breach and the conduct of Sewaram and Patiram even prior to and after 30-1-1990 leads to an irresistible conclusion that the contract had not come to an end."

(emphasis supplied)

After referring to the various grounds of defence taken by the returned candidate, their Lordships conclude with the following statement :

"The facts of the present case lead us to the conclusion that the appellant never intended nor in fact put an end to the contract but continued with the contract through the proxy of his real brother, Patiram."

(emphasis supplied)

What follows from the observations made in Sewaram's case (AIR 1993 SC 213) supra is that the Court while examining the question of subsistence of contract should also look to the conduct and the Intension of the parties in order to decide whether, as of fact, there was termination of the contract.

38. In this regard I would first examine the case from the point of view of law of contracts on the basis of undisputed facts. Examined in this vein, it becomes difficult to concede the claim of the election respondent that the contracts had come to a close by breach of contract because the liability arising under the terms and conditions of the contract have been transferred by him to his brother both in the case of the PWD and National Highways works, the departments have also acted on the said request of the election respondent. Not only that, the right of reverting to the original contract is also reserved by the election respondent in these letters when he undertakes in the affidavits to execute the works on the same terms and conditions of the original contract in Mr. Mallikarjuna Khandre fails to do so. All these undisputed facts clearly point to the inevitable conclusion viz.; there was no breach at all in the eye of law, notwithstanding all those vouchments contained in the letters addressed by the election respondent to the departments. The intention not to sever his interest in the contracts is all too apparent in the manner in which the election respondent had conducted himself right from the time of filing his nomination. the contract undertaken by Mr. Mallikarjuna Khandre cannot be treated under the provisions of the Law of Contracts as a separate and distinct contract because the formalities to be followed for entrustment of the works by a Govt., department have been done away with, the contracts have been given to Mr. Mallikarjuna Khandre on the written recommendation of his brother, the election respondent, on the specific

undertaking that he would himself carry out the works on the same terms and conditions, as in the original contract, in the event of the failure on the part of his brother to do so. What has really taken place is, substitution of Mallikarjuna Khandre in place of Mr. Prakash Khandre. Substitution of original contractor by another contractor in the absence of a tripartite agreement would not amount to novation or creation of a contract anew, more so, when the terms and conditions of the original contracts are retained and the contractor for the remainder of works is none other than the real brother of original contractor. An arrangement by which a contract is altered only in regard to one aspect on the understanding between the original contractor and the department and on the unqualified undertaking of the original contractor would not create a totally new contract which would extinguish all the rights and obligations under the old contract. What is envisaged in S. 9-A of the Act is not a "substantial interest" but "any interest" however limited it may be. that Mr. Mallikarjuna Khandre is a contractor in his own right and is quite qualified to enter into a contract independently with the departments would not alter this position in law. There can be novation under S. 62 of the Indian Contract Act or there is out and out breach. Even if it is assumed that there is novation it would be subject to the unqualified undertaking that Mr. Prakash Khandre burdened himself with, to complete the works if Mr. Mallikarjuna Khandre failed to do so. Therefore, the interest that Mr. Prakash Khandre had in the original contracts and the obligations thereunder did persist all through if not substantially atleast in a limited way. till the works were actually completed by Mr. Mallikarjuna Khandre. The ease of election respondent, as pleaded by him. is that the contracts had come to a close by breach. He does not claim that the contracts came to a close by any other mode recognised in law though in his objection statement he had taken out a stand that the contracts had come to a close either by breach or by mutual agreement, the defence of contract coming to a close by mutual agreement was never pressed into service at the time of the trial.

39. Still viewing the case from the point view of law. let me examine what constitutes breach. "Breach", invariably means the refusal to perform and it must be such that an intention to repudiate the contract in entirety can be inferred from it. the breach must be total, absolute and unconditional. Where the election respondent recommended for granting the same works to his brother who was also a class 1 Contractor and undertook on himself the obligation to perform the contract, in the event of his brother Mr. Mallikarjun Khandre failing to do so. as could be evidenced from the affidavit given by him. in law there is was no repudiation of the contract at all as the intent to dump the contract is conspicuous by its absence. It makes it all the more manifest that the election respondent never ever intended to repudiate the contract totally or even substantially. It is in this context that the observations made in *Sewaram*, supra, assume importance. As observed by their Lordships, in this case too. the election respondent never intended to put an end to the contract but sought to continue the same through the proxy of his real brother.

40. The purpose of S. 9-A is to guarantee the purity of legislature and to prevent conflict between personal interest and public duty which would otherwise inevitably clash. When one is reminded of the object with which S. 9-A has been framed in the statute, it becomes impossible, in the given facts of the present case, to gloss over the evidence on record which points to the continuing interest which the election respondent evidenced in the works contracted by him with the department, even after the date of scrutiny which is the relevant date.

41. The three essential ingredients of contract viz.. offer, acceptance and consideration are all present in the present case. The offer Mr. Prakash Khandre to ensure the completion of contract if it is transferred to his brother, accepted and acted upon by the departments. The undertaking that flowed from Mr. Prakash Khandre served as the consideration for the departments to transfer the works in favour of his brother, while the transfer of the works to his brother served as the consideration in return for the promise or undertaking which Mr. Prakash Khandre made in clear and unambiguous terms in the letters. Thus, all the three essential ingredients necessary to give effect to an agreement were present in the case of PWD and National Highways works. It is also to be noticed that the undertaking given by Mr. Prakash Khandre served as the sole basis for the departments to effect the transfer in favour of his brother and so long as the contract with his brother continued, the department had the right to revert, back to Mr. Prakash Khandre on the basis of the said undertaking to get the contract executed on the same terms and conditions in the event of failure on the part of Mr. Mallikarjun Khandre. The undertaking is, therefore, not without the legal ramifications that flow from such an agreement entered into between two persons under the law of contracts. When once an offer is made with full knowledge of all the attendant legal ramifications and it was accepted and acted upon by the promises, for some consideration, it goes without saying that there was subsistence of contract between Mr. Prakash Khandre and the departments in the matter of transferring the works in favour of his brother, the role played by Mr. Mallikarjuna Khandre being purely that of a facilitator. The contract subsisted so long as the works were being carried out by Mr. Mallikarjuna Khandre and their ultimate completion. As the works were transferred to Mr. Mallikarjuna Khandre in terms of the agreement entered into between Mr. Prakash Khandre and the departments, the original contract never came to an end and it subsisted beyond the date of scrutiny, the date of election and the date of announcement of result, in a different form in pursuance of the agreement between Mr. Prakash Khandre and the departments concerned with Mr. Prakash Khandre donning the role of a guarantor to the proper execution of the contract. When the contents of the letters and the affidavits are clear and unambiguous, it should follow by logical interpretation that the subsisting interest that Mr. Prakash Khandre had in those contracts continued to exist on all those dates when the contract between Mr. Mallikarjuna Khandre and the departments was in force.

42. The term "Breach" is not defined under the Indian Contract Act. Breach can be inferred only from the conduct of the parties to the contract. If really it was

the intention of the election respondent to repudiate the contract in its entirety, there was no necessity for him to have firstly recommended that the contract be given to his brother. The contention of Mr. P.S. Manjunath, learned counsel for election respondent, that what happens after the breach is immaterial for purpose of deciding the question in issue may have been justified had the election respondent merely stopped at saying that he is no longer interested in continuing the works. But in addition to recommending to the authorities to give the contract to his brother he proceeds further and undertakes in the affidavit to carry out the works if his brother fails to do so and based on the said undertaking the works are transferred to his brother. This clearly symbolizes the intention of the election respondent to cling on to the contract through the proxy of his real brother. As stated earlier the facts in the present case are in *pari materia* with the facts in Sewaram's case *supra*. In Sewaram's case the real brother executed the contract under the power of attorney executed by the successful candidate. What is absent in the present case is the power of attorney but, then there was no need for that in the present case as Mr. Mallikarjuna Khandre also happens to be a Class-I contractor. Excepting on this aspect in every other aspect the case of Sewaram, *supra*, is on the very same footing as in the present case. Thus viewed from the point of view of law, the undisputed facts of the case unambiguously point to the subsisting interest of the election respondent in the said contracts.

43. If this be the outcome of the ease on the point of law, let me now examine it from the point of view of facts with reference to the oral and documentary evidence produced in the case. The specific case made out by Mr. Nanjunda reddy, learned counsel for the petitioner is that there was in fact no stoppage of the works and that Mr. Prakash Khandre continued to execute the works even after writing those letters. The letters, according to him, were a mere artifice to circumvent S. 9-A of the Act and these letters were not acted upon either by the election respondent or by the departments concerned. Mr. Nanjunda Reddy relied on the monthly progress reports for December, 1999 at Ex. P105 and the statement showing the progress report of Nabard works under RIDF phase II and III for the month of December. 1999 at E#x. P118 in support of his contention that the PWD work had never been stopped but was continued by Mr. Prakash Khandre himself. These exhibits relate to the improvements to Halbarga to Bawgi into Kamthana O/o to 34/40 and they clearly reveal that the work was continued on different dates even after the date of scrutiny. In Ex. P118 below the column meant for mentioning the name of the contractor the name of Mr. Prakash Khandre finds mention and below the column "likely date of completion" it is shown as "12/.99". In the column meant for showing the expenditure during the month the figures 13.58 are written. Likewise the abstracts of monthly progress reports of Nabard works under RIDF phase II & III for the months of September, October and November reveal the name of Mr. Prakash Khandre as the contractor, with a steady incerease in the cumulative expenditure from September, 1999 to December, 1999. While the cumulative expenditure shown

for the month of September, 1999 is 277.64, it is 290.68 for October, and 299.26 for the month of November. Mr. P.S. Manjunath, learned counsel for the election respondent, sought to overcome these entries by stating that the Clerk who has made these entries had not been examined to speak to the correctness of the entries. Such an argument cannot be countenanced given the nature of the documents which are official documents and considering the fact they have come from proper custody. There is always a presumption under law as to the correctness of the entries found in official documents unless they are shown to be either wrong or unworthy of acceptance by the person who disputes their correctness. There is absolutely no reason to disbelieve these entries as they were made over a period of time and as and when the works were being completed. These entries at Ex. P1 18 also tally with the notings contained in Ex.105 of the measurement book pertaining to Halbarga-Bawgi works. The details mentioned in these statements reflecting as they do the clear progression in the amount of work completed as also the cumulative expenditure incurred at different points of time mentioned in the statements, undoubtedly point to the fact that the works were being continued day-to-day even after the letters were addressed by Mr. Prakash Khandre either by himself or by some one acting on his behalf. If these works were carried out by Mr. Mallikarjuna Khandre after 1-9-1999 as claimed by him the entries under the various columns could not have borne the details of the contract as entered into by Mr. Prakash Khandre and the department. The name of the contractor also would have been mentioned as Mr. Mallikarjuna Khandre. Barring the letters and the agreements Ex. P72 and P71, there is nothing on record to show that the department closed the contract of Mr. Prakash Khandre.

44. What is most strange is the absence of any documents evidencing the execution of works by Mr. Mallikarjun Khandre. Barring the two agreements, no other documents is forthcoming to evidence the take over of the contract by Mr. Mallikarjun Khandre or its execution by him. The stage-wise execution of the contract by Mr. Mallikarjun Khandre is not reflected in any statement showing the progression of works, even in the month of December, 1999 when the case as made out both by the department and the election respondent is that it was taken over by Mr. Mallikarjun Khandre in the month of September, 1999 itself. On the contrary the progression of works as noted in Ex. P118 which relates to December, 1999 only refers to the original contract that Mr. Prakash Khandre had with the department. When such unimpeachable evidence in the form of official documents coming from proper custody had been brought out by the petitioners in support of their specific case that Mr. Prakash Khandre never parted with the contract but continued to execute despite writing the letters, the election respondent put forward an insipid defence by stating that those entries were made only by a clerk and in the absence of examination of the Clerk himself to prove these entries, no sanctity can be attached to those entries. This defence by the election respondent is in total disregard of the fact that the statement at Ex. P108 is based on Ex.P105 the measurement book maintained by the department

where the work progress is noted regularly, if not day-to-day atleast once or twice in a week. Added to that these statements and their abstracts are signed by the Executive Engineer of the concerned division thereby certifying their authenticity. Therefore, in the case of PWD works. I am absolutely certain that there exists on record, some direct material facts and circumstances from which an inference as to the subsistence of contract can be unerringly deduced. Thus, in the ultimate analysis, I hold that the work of effective improvement and asphaltting of Halbarga-Bawagi road was continued to be carried out by Mr. Prakash Khandre. the election respondent, even after the purported closure of the contract subsequent to the writing of the letters and therefore, as of fact, there was subsistence of contract between him and the PWD.

45. No convincing evidence has been produced by the petitioners with regard to the improvements to Dhanurapatti to Chandapur Road showing that the works were continued to be carried out by Mr. Prakash Khandre. So, on facts, it is difficult to accede to the argument advanced by Mr. Nanjunda Reddy that the works in respect of Dhanurapatti to Chandapur road were also continued by Mr. Prakash Khandre himself and there was no closure of the contract.

46. Even in the case of Highways, I find that the name of Mr. Mallikarjun Khandre figures in the relevant documents at Ex. P83. P-87. P-88 and P89 and in that view of the matter; it is difficult to appreciate the argument of Mr. Nanjunda Reddy that the works were continued by Mr. Prakash Khandre himself and not his brother.

47. The learned counsel Mr. Nanjunda Reddy relied on H.R.A. Mudaliar v. Devaraja Urs, AIR 1968, Mysore 140, wherein it is held:

"Even though the contract may be repudiated by one party and repudiation is accepted by the other, and there is a discharge of the contract by breach by the failure of one of the parties to perform his part of the contract, the mutual claims between the parties require to be determined under the terms of the contract which exists though for ancillary purposes, giving rise to the conflict between interest and duty and the disqualification under S. 9A attaches to the person repudiating the contract, even if it is accepted by the State resulting in termination of the contract."

The above view had been arrived at by the learned Single Judge of this Court on the premise that even after determination of the contract, the contract survives for incidental or ancillary purposes. Such interpretation of S. 9-A was quite in conformity with the provision as it stood then, prior to its amendment by which the explanation was added to S. 9-A. The principle enunciated in the said case is no longer a good law in the light of the subsequent amendment to S. 9-A by way of introduction of the explanation to the effect that the contract shall be deemed not to subsist by reason only of the fact that the Government had not performed its part of the contract either wholly or in part.

(ii) The learned counsel on both sides also relied on Konappa v. Vishwanath, AIR

1969. SC 447 and Aslhing alias Lhingjanong Vs. L.S. John and Others,

(iii) In Konappa's case supra the Apex court was dealing with the question whether an interest in any contract with Government that a candidate would have as a partner of the firm would render him disqualified under S. 9-A. In the case on hand the partnership firms in which Mr. Prakash Khandre is alleged to have been a partner are not shown to have had any running contract on the relevant dates. Therefore, this decision may not be of much help for determining the question in issue in these petitions.

(iv) In Aslhing alias Lhingjanong Vs. L.S. John and Others, supra, the question in issue was whether the acceptance of a termination is necessary for purpose of bringing a contract with Government to a close. The issue in the present case being essentially one of continuation of contract by the returned candidate and factually it was proved to have been continued albeit by the brother of Mr. Prakash Khandre, the facts in the present case are different from the case in Smt. Ashling, supra. It is also not in dispute in this case that a contract can be put an end to unilaterally by one of the parties.

48. Let me now examine the oral evidence in the case. In the cross-examination of RW2 Mr. Mallikarjuna Khandre, the following answers have been elicited :

"I know the entrustment of contract work in favour of my brother first respondent in respect of Halbarga-Bawagi Road work. It is true that after cancellation of the said work in favour of my brother. I was entrusted with the balance of the same work. The work was entrusted to me on 1-9-1999. Similarly, the work of Dhannuara Patti Chandapur was also transferred to me. In respect of these two works, I have executed Ex. P72 and Ex. P71 respectively. It is true that I have not given any Earnest Money Deposit in respect of the above said two works. I had given a representation to the Authorities concerned (Executive Engineer) that in lieu of E.M.D. the amount that I was entitled to get from the works done by me may be taken as E.M.D"

Thus, Mr. Mallikarjuna Khandre himself has conceded that no E.M.D. was collected from him for entrusting the works to him. The concerned departments on receiving the letters from Mr. Prakash Khandre indicating that the contracts be closed, do not call for fresh tenders nor do they take an E.M.D. from Mr. Mallikarjuna Khandre. It is obvious, therefore, that the departments as well as Mr. Mallikarjuna Khandre did not actually treat the works allotted to Mr. Mallikarjuna Khandre as a fresh contract. There appears to be mere substitution of Mr. Mallikarjuna Khandre in place of Mr. Prakash Khandre. Mr. Basana Gowda, PW15, Executive Engineer. Highways has also admitted in his evidence that there was not specific order made transferring the work from the election respondent to his brother. The various letters addressed by Mr. Prakash Khandre and the agreements entered into between Mallikarjuna Khandre and the department of PWD and National Highways which are relied upon by the learned counsel for the election respondent to substantiate his stand that there was breach and

subsequently there was a fresh contract between Mallikarjuna Khandre and the departments when juxtaposed against the admissions made in the evidence, the absence of EMD in respect of the new contracts, the overwhelming documentary evidence showing the continuation of the works even after the letters were sent by Mr. Prakash Khandre and the undertaking given by Mr. Prakash Khandre in the affidavit to take up and complete the work if the same is not carried out by his brother Mr. Mallikarjuna Khandre reveal that the contract was never brought to a close and it was continued by Mr. Prakash Khandre himself or by Mr. Mallikarjuna Khandre acting as a proxy of Mr. Prakash Khandre.

48-A. Much reliance has been placed by learned counsel Mr. P.S. Manjunath for the election respondent-Mr. Prakash Khandre on the letters addressed by Mr. Prakash Khandre to the various departments asking them to cancel his registration with them as contractor. The departments have also cancelled the registration of Mr. Prakash Khandre as a contractor acting on the request of Mr. Prakash Khandre. Relying on this aspect of the case it is submitted by Mr. Manjunath that when the contractor's licence itself has been cancelled there could not have any privity of contract between Mr. Prakash Khandre and the departments after cancellation of the licence.

49. Cancellation of a contractor's licence would not ipso facto bring to a close a contract if it is subsisting. The only legal effect of cancellation of registration as contractor would be that the contractor cannot take up any works for execution with the concerned departments in future. It would not extinguish the rights and obligations existing or arising under a contract if a contract was entered into prior to the cancellation of the registration and it did subsist even after the cancellation of the registration. Hence, the circumstance of Mr. Prakash Khandre canceling the registration of the contractor's licence would in no way help him to wriggle out of the obligations arising under a subsisting contract.

50. Having given my anxious consideration to the case on hand and having examined it from the point of view S. 9-A of the Act and the law of contracts, I have no hesitation in coming to the conclusion that there was subsistence of contract between Mr. Prakash Khandre and the appropriate Government and that he had at the time of scrutiny of the nomination paper incurred the disability under S. 9-A of the Act.

Re. Joint Family Status :

51. The petitioner in E.P. 30/99 has also taken the ground that Mr. Prakash Khandre and Mr. Mallikarjuna Khandre are members of a joint Hindu family and therefore any subsisting interest that Mr. Mallikarjuna Khandre had in any contract would disqualify Mr. Prakash Khandre as they were members of a joint Hindu family. The exact recitals in the petition are as under :

"The respondent No. 1 and his brother Sri Mallikarjun Khandre are members of the joint Hindu family. It is submitted that the transfer has taken place on the same amount that was deposited by Respondent No. 1 himself and without there

being cancellation of the contract entered into with the Respondent No. 1 and inviting fresh tenders. It is, therefore, clear that though the works stand transferred in favour of the brother of the Respondent No. 1. the said transfer is sham and nominal and the work has been executed by the Respondent No. 1 himself for and on behalf of his brother and as a member of joint family."

The election respondent has denied that he and his brother are members of a joint family and has taken the defence that their joint family status was disrupted under a memorandum of family settlement dated 17-9-1997, Ex. R16. The contention of Mr. P.S. Manjunath is that the division having taken place between the election respondent and his brother entrustment of any contract by Government in favour of Mr. Mallikarjuna Khandre would not enure to his benefit and. therefore, it cannot be said that he had subsisting interest in the said works even after their transfer to his brother.

52. Both sides have led evidence on this aspect of the case. PW1 (E.P. 30/99) has stated in his evidence as follows :

"One Mallikarjun Khandre in whose favour the contract was transferred as per Ex.P6 is the brother of the first-respondent. Both of them are living under the same roof in Bhalki. To show that they are residing in the same house I have produced the 1998 voters list. The said voters" list is marked as Ex. : P7."

In rebuttal, RW1 has stated as under : "Though we have divided our family properties in 1989 only in 1997 we had reduced the same into writing as per Ex. R16 and notarised the same. Only the properties that were held by us in 1989 have been reflected in Ex. R16. It is false to suggest that E. R16 was created for the purpose of this case even though myself and my brother are living in a joint family, without severance of joint status."

Mr. Mallikarjun C. Khandre who was examined as RW2 in E.P. 25/99 also speaks regarding Ex. R16 as follows :

"We are six brothers. Now we are living separately. We have divided in the year 1989. Ex. R-16 is the Family Settlement Deed. I am one of the Executants of Ex. R-16 and my signature is found at Ex. R16(a). Similarly. I have signed in all the pages. The Ex. R16 is an unregistered but Notarized Partition deed. The same was executed before the Notary at the Advocates" Association of Bhalki. After 1990 I have not done any contract with my brother-first respondent."

The family settlement deed produced at Ex. R16 is between Mr. Prakash Khandre as the 1 party and his mother and all his other brothers as II party. After listing the various immoveable and moveable properties, the liabilities of the joint family and the bills pending as on 30-8-1989, the settlement deals with the repayment of the liabilities and the division of machineries and industries between the parties. Thirteen immoveable properties are retained as joint family property and it is agreed that they will remain under the supervision of Smt. Sarawathi Bai, the mother of the other members of the joint family. One item

each of immoveable properties, other than the thirteen properties kept as joint family properties, are given to Mr. Prakash Khandre and his another brother Mr. Ashok. There is a clear division of machineries and industries between Mr. Prakash Khandre, Mallikarjun Khandre and Mr. Subash Khandre. Prima facie there is no reason to dispute the genuineness of Ex. R16 though the other side termed it as a document exclusively created for the purpose of this election petition. From Ex. R16 it is clear that there has been a partial division amongst the members of the joint family. While there has been a division in respect of machineries and industries, there is no division of immoveable property barring two properties. Under Ex. R16, therefore, a partial partition has been effected as regards the properties. While the members severed their interest in respect of machineries and industries, they have retained their status of joint family and are holding the rest of the properties as an undivided family. But what is very clear about Ex. R16 is that Mr. Prakash Khandre had chosen to separate from the family as the partition is between himself and all the other members of the joint family.

53. There is nothing in Hindu law which prevents to sever an interest in respect of a part of the joint estate while retaining their status of a joint family and holding the rest as the properties of an undivided family. In such cases it may be necessary in order to ascertain the share of the outgoing member to fix the share which the other coparceners are or would be entitled to. Having had the benefit of examining Ex. R16. the original deed of settlement, I am convinced that there has been a clear division of machineries and the business interests between Mr. Prakash Khandre and the other members of the joint family.

54. In G. Narayana Raju Vs. G. Chamaraju and Others, the Apex Court while deciding the question whether a business held in the name of one of the members of the joint family is really the business of the joint family, made the following observation : (Para 3)

"It is well established that there is no presumption under Hindu Law that a business standing in the name of any member of the joint family is a joint family business even if that member is the manager of the joint family. Unless it could be shown that the business in the hands of the coparcener grew up with the assistance of the joint family property or joint family funds or that the earnings of the businesses were blended with the joint family estate, the business remains free and separate."

The absence of a presumption in Hindu Law as to the joint nature of a business held in the name of one of the members of the family coupled with the fact that there has been a clear division among the members in respect of the business interests in the present case, the only irresistible conclusion that one could draw in the facts of the present case is that the business carried on by Mr. Prakash Khandre was not the joint family business.

55. The case putforth by the petitioner in E.P.30/1999 that Mr. Prakash Khandre

and his brother Mr. Mallikarjuna Khandre are living under the same roof would not also advance his case any further. In *Bhagwati Prasad Sah and Others Vs. Dulhin Rameshwari Kuer and Another*, it is observed : (Para 7)

"Except in case of reunion, the mere fact that separated coparceners choose to live together or act Jointly for purposes of business or trade or in their dealings with properties, would not give them the status of coparceners under the Mitakshara law."

It is not the case of the petitioners in the present case that there has been a reunion between the members after the settlement deed. While I have held that there has been continuation of the contract work by Mr. Praksah Khandre himself or through Mr. Mallikarjuna Khandre and therefore there was subsistence of contract, it must be made clear that Mr. Prakash Khandre would not suffer the disability under S. 9-A by virtue of his joint family status with his brother Mr. Mallikarjuna Khandre because of any contract that Mr. Mallikarjuna Khandre may have had with the appropriate Government in his own personal capacity on the relevant date. In the present case it is clear that the contracts that were, admittedly subsisting prior to the appointed date were contracts entered into by Mr. Prakash Khandre in his individual capacity but were later on continued by Mr. Prakash Khandre himself or by Mr. Mallikarjuna Khandre acting for and on behalf of Mr. Prakash Khandre.

56. (i) In the result, for the reasons stated above, I am of the view that the election of Mr. Prakash Khandre is void under S. 100(1)(a) as he was disqualified under S. 9-A of the Act on the date of scrutiny of the nomination papers, on the date of election and the date of declaration of the result and it is declared as such on this count.

(ii) In so far as the case falling under S. 100(1)(d)(i) of the Act namely, that the result of the election, in so far as it concerns a returned candidate, has been materially affected by the improper acceptance of any nomination, the burden is upon the election petitioner to show positively that the result of the election has been materially affected by improper acceptance of the nomination paper. But, this duty cast on the election petitioner is satisfactorily discharged if the nomination that has been improperly accepted is that of the successful candidate as held in *Vashit Narain Sharma Vs. Dev Chandra and Others*, The reason is that, if the elected candidate was disqualified, his nomination could not be said to have been "properly accepted" by the Returning Officer, thus on this ground also the election of Mr. Prakash Khandre has to be declared as void.

Before I part with this issue, I have to make a mention of the fact that several other decisions have been cited at the Bar by learned counsel on both sides but I have referred to and discussed only those which have a direct bearing on the issues involved in the present case.

57. Now, having come to the conclusion that the election of the returned candidate is void, the course open to this Court in view of sub. sec. (a) of S. 101

of the Act is to declare the election of the returned candidate, viz. the election respondent to be void and declare the election petitioner Dr. Vijayakumar Khandre as duly elected having regard to the fact that votes polled by the returned candidate had become wasted votes as he was not qualified to be chosen to fill the seat under the Act. If we remove the votes polled by the unqualified candidate from consideration, Dr. Vijayakumar Khandre who had received the next highest number of valid votes has to be declared as the returned candidate. But, then. Mr. Prakash Khandre has recriminated against any such declaration by filing the recrimination petition alleging that those votes were obtained by him by corrupt practice. Hence, it becomes necessary to decide on the recrimination petition filed by Mr. Prakash Khnadre before a declaration is made under S. 101(a) of the Act.

Recrimination Petition :

58. (i) The averments contained in the recrimination petition filed by Mr. Praksh Khandre have been referred to in the earlier part of this order. The recrimination petition is presented on the grounds available under S. 77, S. 123(1)(A), 123(3), 123(6) and 123(7) of the Act.

(ii) The burden of proving that the corrupt practices coming within S. 123 of the Act lies on the recrimination petitioner. He has to show that the corrupt practice had been committed by the candidate or his agent or by any other person with the consent of the candidate or his election agent. Therefore, it is not enough if it is shown by the recrimination petitioner that a corrupt practice had been committed during the election and the candidate had knowledge of the same, it should be further shown that it was committed by the candidate himself or by his agent or any other person with the consent of the candidate.

(ii) In respect of the corrupt practice under S. 123(3) of the Act the petitioner relies on two news items in local newspapers. In regard to the allegation under S. 123(7) he relies on his own evidence and a handbill supposedly issued by Dr. Mallamma Wall, a Doctor working in the Primary Health Center in Health Center in Bhalki Constituency.

(iii) The evidence of Mr. Prakash Khandre in respect of the allegations made under S. 123(3) is as follows :

"The 1st respondent Dr. Vijayakumar Khandre in Recrimination Petition filed in EP No.25/99 has issued a pamphlet in Hindi Language containing several promises to the voters. One of the promises made to induce the voters to vote for him is that during the last 3 years Bhalki PLD Bank was under Congress party and they have managed the bank successfully to make stand first in the Gulbarga Division.....

The respondent had also promised that in the days to come he will secure loans in a sum of Rs. 10 Crores to the agriculturists thereby improving their financial status."

59. The pamphlet is made as Ex. R17. Dr. Vijayakumar Khandre is not a signatory to it. Ex. R17 is not issued by him but by some alleged party functionaries and other persons. From the evidence of Mr. Prakash Khandre it is clear that he has no personal knowledge of the promise supposedly made by Dr. Vijaykumar Khandre to the electorate. He has no personal knowledge about the person who had issued the pamphlet and he does not state whether the said person had the consent of Dr. Vijayakumar Khandre to make such a promise. In my view a promise made by a supporter of the candidate or a party member which is not shown to have been done by the consent of the candidate would not amount to a corrupt practice within the meaning of S. 123(3) of the Act.

60. This applies equally to the promise made by Mr. Bhimanna Khandre. the father of Dr. Vijayakumar Khandre. Mr. Bhimanna Khandre was not the election agent. Any promise made by Mr. Bhimanna Khandre on his own to the electorate in his son's interest but without his consent cannot be termed as a corrupt practice within the meaning of S. 123 of the Act. It has come on record that Mr. Bhimanna Khandre was i the President of KPCC. Speeches made by" him, therefore, have to be construed as having been made in his capacity as a leader of the party. He was not the agent of the candidate and therefore he was not operating under instructions from the candidate. Therefore, one cannot impute knowledge or consent of the candidate to the speeches or promises made by Mr. Bheemanna Khandre in his capacity as a leader of the party. In Chandrakanta Goyal Vs. Sohan Singh Jodh Singh Kohli, the Apex Court had occasion to compare the acts of an agent with those of a leader during election campaign in order to bring out the distinctive treatment that they should receive at the hands of a court dealing with the question of corrupt practice. The relevant portion, reads ; (Para 9)

"Ordinarily, the agent is the understudy of the candidate and has to act under the instructions given to him being under his control. The position of a leader is different and he does not act under instructions of a candidate or under his control. The candidate is held to be bound by acts of his agent because of the authority given by the candidate to perform the act on his behalf. There is no such relationship between the candidate and the leader, in the abstract merely because he is a leader of that party. For this reason, consent of the candidate or his election agent is necessary when the act is done by any other person".

Neither the averments in the recrimination petition nor the evidence led in support of the recrimination petition speak in a clear-cut manner that the alleged corrupt practices were carried out either by Mr. Bhimanna Khandre or by any other person with the consent of Dr. Vijayakumar Khandre. In the cross-examination. Mr. Prakash Khandre has admitted that his knowledge regarding Mr. Bheemanna Khandre's assurances to the electorate was based on the pamphlet Ex. R17. He admits that he did not attend the function held on 12th August. 1999 where it is alleged that Dr. Vijayakumar Khandre appealed to the voters on the basis of community. He had come to know of it only through the newspaper

report. Even otherwise, the incident took place much prior to the date of commencement of election process.

61. Dr. Vijayakumar Khandre has examined himself as RW1 in the recrimination petition. He has denied that Ex. R17 was issued by him or by any person on his behalf. He has categorically stated in his evidence that he was in no way concerned with Mahatma Gandhi Sahakari Sakare Karkhane. He has also denied any connection with Shanthi Verdhaka Education Society which runs Akkamahadevi College. He has denied the allegation that Dr. Mallamma Vali worked for him in the election campaign. The meeting at Mahatma Bombgondeshwara Samudhaya Bhavan was held on 13-8-1999. On the said date Dr. Vijayakumar Khandre was not even a candidate in the election. Therefore, the question of holding out a promise to the electorate on the eve of election in his capacity as candidate would never arise. Dr. Vijayakumar Khandre has categorically stated that he had not appointed any agent to manage the election campaign and he managed the campaign himself.

62. The recrimination petitioner has spoken about the amount spent by Dr. Vijayakumar Khandre during his campaign being more than the limit prescribed under S. 77 of the Act in the following terms :

"On the date of filing of nomination to the election the first respondent had brought people from the neighbouring villages by hiring lorries, tractors and matador vans and in that regard he has paid Rs.50/- per head. The total gathering of people on that day of filing the nomination papers which is in contravention of S. 77 of the R.P. Act.

The first respondent and his father Bheemanna Khandre have continuously used three cars. The car bearing No. KA-49 M-95 Ambassador Car belonging to the Mahatma Gandhi Sahakare Sakare Karkhane. Ambassador Car bearing No. KA-39 M-65 belonging to Shanthi Vardhak Education Society and Jeep bearing No. 39. M-322 belonged to Haralaaih Polytechnic Bhalki which had been purchased by the polytechnic institute from out of Central Govt. Grant. These vehicles have been used by the first respondent, his agents and Bheemanna Khandre who was his spokesman throughout the election. An estimated expenditure of Rs. 1500/- on all the three vehicles per day was spent by the first respondent. Thus, he had spent Rs. 85,500/- on these vehicles from 11-8-1999 to 7-10-1999."

The recrimination petitioner has also spoken about the erecting of pandals and illuminating them by night with multicolour serial sets for the entire period of election campaign and quantifies the amount spent at Rs. 2,85,000/-.

63. Except the self serving testimony, no independent witness has been examined by Mr. Prakash Khandre in support of his claim made under Sec. 77 of the Act. The recrimination petitioner being an interested person this Court cannot in the absence of any corroborative evidence to that effect accept his say in the matter at its face value to hold that Dr. Vijayakumar Khandre had committed the corrupt practice under Sec. 123(6) of the Act. The Apex Court had held on more

than one occasion that the charge of corrupt practice is in the nature of a quasi criminal charge and it can be proved only by clear, cogent and unimpeachable evidence. In *Gajanan Krishnaji Bapat and another Vs. Dattaji Raghobaji Meghe and others*, the Apex Court observed (Para 13) :

"It is equally well settled by this Court and necessary to bear in mind that a charge of corrupt practice is in the nature of a quasi criminal charge, as its consequence is not only to render the election of the returned candidate void but in some cases even to impose on him a disqualification for contesting even the next election. The evidence led in support of the corrupt practice must therefore, not only be cogent and definite but if the election petitioner has to succeed he must establish definitely and to the satisfaction of the Court the charge of corrupt practice which he levels against the returned candidate."

This burden of proving the charge of corrupt practice against Dr. Vijayakumar Khandre by adducing cogent and definite evidence has not been discharged by the returned candidate in the present case. The evidence presented in the case is conjectural and does not answer to the strict corrupt practice. Therefore, I find no merit in the recrimination petition and it is liable to be dismissed.

64. As regards obtaining the assistance of the Govt, servant which amounts to a corrupt practice under Sec. 123(7). it is incumbent on the person alleging such corrupt practice to show that the candidate had consciously done some positive act in order to bring about the result of receiving assistance from a Govt. Servant. The words, "obtaining or procuring" with which the sub-section beings go to show that it is not the mere passive receipt of assistance but the active procurement of such assistance in order to furthering the prospects in an election that amounts to corrupt practice. Such a case has not been established by the recrimination petitioner herein.

65. Therefore. I find no merit in the recrimination petition filed by Mr. Prakash Khandre in E.P. No. 25/1999 and it is. accordingly, dismissed.

66. (i) In the result, for the reasons stated above, the Election Petition Nos. 25 and 30 of 1999 are allowed and the election of Mr. Prakash Khandre. the returned candidate, is declared void under S. 100(1)(a) of the Act.

(ii) The election of Mr. Prakash Khandre I having been declared void, the votes polled by him in the election would become wasted votes. In my opinion, Dr. Vijayakumar Khandre who has polled the next highest number of valid votes has to be declared elected under Sec. 101 of the Act. Dr. Vijayakumar Khandre the petitioner in E.P. 25 of 1999 is hereby declared elected under Sec. 101 of the Act from No. 2-Bhalki Assembly Constituency to the Eleventh Karnataka Legislative Assembly.

(iii) The Registry shall in terms of S. 103 of the Act, intimate to the Election Commission and the Speaker of the Karnataka Legislative Assembly and the Council, the substance of this decision within a week from today and shall also

send to the Election Commission an authenticated copy of the decision within two weeks from today.