

(2011) 09 AHC CK 0167

In the Allahabad High Court

Case No : Civil Miscellaneous Application No. 48545 of 2010, Paper No. A15,
Civil Misc Application No. 48541 of 2010, Paper No. A14 and Civil Misc
Application No. 48548 of 2010, Paper No. A16

Sharad Tripathi

APPELLANT

Vs

Bhishm Shanker Alias Kushal Tiwari and Others

RESPONDENT

Date of Decision : 21-09-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 16, Order 7 Rule 11
Evidence Act, 1872 — Section 151
Representation of the People Act, 1951 — Section 100(1), 101, 117, 25, 29

Citation : (2011) 9 ADJ 390

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Sudhir Agarwal, J.—Heard Sri U.N. Sharma, learned Senior Advocate assisted by Sri Ravi Shankar Prasad and Sri Chandan Sharma for the applicant respondent and Sri K.R. Singh for the Petitioner.

2. These are three applications filed on behalf of Respondent Bhishma Shankar in Election Petition No. 11 of 2009.

3. Application No. 48541 of 2010, Paper No. A14 dated 15.2.2010 is under Order VI Rule 16 of CPC (in short "Code of Code of Civil Procedure") for striking off paragraphs No. 5, 7 to 10, 21 to 23 and 25 to 34 of election petition being irrelevant, vague and fictitious.

4. Second Application No. 48548 of 2010, Paper No. A16 dated 15.2.2010 is under Order VII Rule 11 CPC praying for dismissal of election petition for non disclosure of cause of action.

5. The third application No. 48545 of 2010, Paper No. A15, is u/s 86(1) of Representation of People Act, 1951 (hereinafter referred to as " 1951 Act") for

dismissal of election petition for noncompliance of Sections 81(3) and 86(1) of 1951 Act.

6. Petitioner Sharad Tripathi contested 15th Lok Sabha General Election from Lok Sabha Constituency No. 62, Sant Kabir Nagar, State of U.P. In the aforesaid election, Respondent Bhishma Shankar alias Kushal Tiwari was returned elected having secured 2,11,043 votes while the Petitioner was polled 1,81,547 votes. The Petitioner lost election by 29,496 votes.

7. The Petitioner contested election on the symbol of "lotus" having a ticket from Bhartiya Janta Party while Respondent No. 1 contested election on the ticket of Bahujan Samaj Party with the symbol of "elephant".

8. The election petition runs in 50 paragraphs. The first three paragraphs relate to election notification in the Parliamentary Constituency Sant Kabir Nagar (U.P.), and the election schedule. Paragraph contains the averments of self acclaimed good reputation of Petitioner and his confidence of winning election. Para 5 in general alleges that there was improper refusal and reception of votes and noncompliance of provisions of 1951 Act, Rules and orders made thereunder including directions issued by Election Commission resulting in illegal declaration of election result in favour of Respondent No. 1. Para 6 refers to number of votes polled in favour of Petitioner and Respondent No. 1 and that there was a margin of only 29,496 votes. Para 7 contains grounds of challenge to election and three grounds mentioned therein are:

A. Because the result of the election, in so far as it concerns the Respondent No. 1, has been materially affected by improper reception of votes in favour of Respondent No. 1, and other candidates and improper refusal of the votes of the Petitioner.

B. Because the result of the election, in so far as it concerns the Respondent No. 1, has been materially affected due to non compliance of the provisions of the Act aforesaid and the rules and Orders made thereunder and the directions issued by the Election Commission.

C. Because it is, in fact, the Petitioner who has received the majority of valid votes in the election in question and is entitle to be declared elected as a member of the Lok Sabha.

9. Para 8 of election petition states concise statement of material facts with regard to grounds A, B and C and thereafter upto para 46 averments alleging to be material facts and particulars for challenging the election of Respondent No. 1 have been given.

10. The applicant respondent has contended that paragraphs 5, 7, 8, 9, 10, 21, 22, 23, 25 to 34 in the election petition are vague, fictitious, irrelevant and be struck off under Order VI Rule 16 CPC Hence, it would be relevant to reproduce the above paragraphs except 7:

5. That as detailed in this election petition subsequently there was improper refusal and reception of votes and non 4 compliance of the provisions of the aforesaid Act and the rules and orders made there under and the directions issued by the Election Commission as a result of which the Respondent No. 1 was illegally declared elected in the election.

8. That a concise statement of material facts and particulars with regard to grounds "A", "B" and "C" are given herein below.

9. That the Petitioner is a social and political worker and he is always available to public all the times for social service and is serving this constituency in particular since long. It is his soft spoken words, good behavior and all time availability for public service which has made the Petitioner popular in the entire constituency. The Respondent No. 1 was the Member of the Lok Sabha from this constituency and the public at large was annoyed by the rude behavior and non availability of Respondent No. 1. Thus it was almost sure from very beginning that the Respondent No. 1 was not going to win the election.

10. That looking upon the Petitioner's popularity in the entire area and constituency and the Respondent No. 1 being an unpopular sitting Member of the Lok Sabha, the Respondent No. 1 knew it very well that he (the Respondent No. 1) could not win the election except by adopting unfair means.

21. That thereafter the EVM was put to "ON" condition so as to show the number of votes received by each candidate. The counting staff thereafter showed the EVM to the counting agents and allowed to note down the number of votes received by the respective candidates. The counting staff thereafter dictated the number of votes received by respective candidates so that the counting agents may tally and confirm the number of votes received by respective candidates which was noted down by them.

22. That as the counting of votes of 3 Assembly segments was being done at Khalilabad (Sant Kabir Nagar), the Petitioner remained at Khalilabad to watch the process of counting of votes. The Petitioner frequently visited the counting halls of all the 3 Assembly segments at Khalilabad.

23. That since very beginning of the counting it transpired that the margin of votes between the candidates was very narrow and as such the counting agents of Petitioner were very vigilant in the counting process. The counting agents used to confirm from the counting staff of the concerned counting table the number of votes received by respective candidates.

25. That the Petitioner has provided to his counting agents a proforma of counting chart containing the names of all the candidates with the instruction to note down the number of votes received by each candidate as it contained in the EVM of the polling stations.

26. That the counting agents of Petitioner were thus very vigilant and particular to note down the votes of all the candidates as contained in the EVM. The

Petitioner's counting agents noted down the votes received by the different candidates including the Petitioner and the Respondent No. 1.

The counting agents noted down the votes correctly as contained in the EVM of each polling station. The Petitioner is filing the copies of counting charts prepared by the counting agents of table numbers 1, 4, 8, 11, 13 and 14 of Mehdawal Assembly and table numbers 1, 3, 5 and 14 of Khalilabad Assembly and table numbers 9 and 11 of Dhanghata Assembly segments as ANNEXURE1 to this election petition.

27. That the number of votes received and got recorded in the EVM by respective candidates in the aforesaid Assembly segments at the aforesaid counting tables were not correctly incorporated in final tabulation chart in Form20 which was being prepared at the central table. The Petitioner is filing the Photostat copies of final tabulation chart in Form20 of 312Mehdawal, 313Khalilabad and 314Dhanghata Assembly segments as ANNEXURE2 to this election petition.

28. That by the aforesaid incorrect incorporation of votes in Form20 the number of votes, in fact, received by Petitioner were reduced at different polling stations and were improperly added in the votes of Respondent No. 1 and other candidates.

These votes which were wrongly added in the votes of Respondent No. 1 and other candidates were not the votes, in fact, received by them but were the votes of Petitioner but they were wrongly added and shown for Respondent No. 1 and other candidates while preparing the Form20.

This was purposely done by the Returning Officer only in order to declare the Respondent No. 1 elected in the election who was a candidate of the ruling party in the State. The said irregularity was committed in Mehdawal, Khalilabad and Dhanghate Assembly segments in the manner as detailed below.

29. That in the aforesaid 3 Assembly segments at least 25540 votes of Petitioner were reduced in different polling stations while preparing the final result sheet Form20.

The Petitioner has in fact received 2,07,087 votes. The particulars and details of such votes are contained in a schedule and the Petitioner is filing the same as SCHEDULE1 to this election petition which forms an integral part of it.

30. That the Respondent No. 1 has in fact received much less votes than shown in Form20 by the Returning Officer. He has in fact received 1, 96,476 votes but while preparing Form20, 14567 votes has been illegally added to his account and he has been shown to have received 2,11,043 votes. The particulars and details of votes which were improperly added in the votes of Respondent No. 1 are contained in a schedule and the Petitioner is filing the same as SCHEDULE2 to this election petition which forms an integral part of it.

31. That similarly 5087 votes of Petitioner were added in the vote account of

Respondent No. 4 while preparing Form20.

The particulars and details of such votes are contained in a schedule and the Petitioner is filing the same as SCHEDULE3 to this election petition which forms an integral part of it.

32. That 670 votes of Petitioner were added in the vote account of Respondent No. 3 while preparing Form20.

The particulars and details of such votes are contained in a schedule and the Petitioner is filing the same as SCHEDULE4 to this election petition which forms an integral part of it.

33. That in the like manner 4550 votes of Petitioner were added in the vote account of Respondent No. 10 while preparing Form20.

The particulars and details of such votes are contained in a schedule and the Petitioner is filing the same as SCHEDULE5 to this election petition which has been formed as integral part of it.

34. That, thus, it is the Petitioner who has in fact received a majority of valid votes but while preparing the final result sheet in Form20 the Returning Officer improperly added a large number of votes in the vote account of Respondent No. 1,3, 4 and 10. As such there was improper reception of votes in their favour. The votes were actually cast in favour of Petitioner were not correctly shown in the final result sheet and instead lesser number of votes were shown. Therefore there is improper refusal to count the actual number of votes polled in favour of Petitioner.

11. The election in question has been challenged on the ground of improper reception, refusal or rejection of votes and for noncompliance of provisions of the Act, Rules etc. i.e., violation of Section 100(1)(d)(iii) and (iv).

12. To appreciate the rival submissions it would be useful to have a bird eye view of relevant provisions and binding precedent thereon.

13. An election can be challenged u/s 81 of 1951 Act by filing election petition within 35 days on the ground specified in Sub-section (1) of Section 100 and Section 101 of 1951 Act. In this case I am not concerned with Section 101 but is confined to Section 100(1)(d)(iii) and (iv) which reads as under:

100. Grounds for declaring election to be void (1) Subject to the provisions of Sub-section (2) if the High Court is of opinion....

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected--...

(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void; or...

(iv) by any noncompliance with the provisions of the constitution of of this Act or

of any rules or orders made under this Act, the High Court shall declare the election of the returned candidate to be void.

(Emphasis supplied)

14. Section 83 of 1951 Act requires that the petition must contain concise statement of material facts on which the Petitioner relies. This Court is concerned at this stage with Sub-section (1)(a) which reads as under:

83. Contents of petition:(1) An election petition(a) Shall contain a concise statement of the material facts on which the Petitioner relies

15. Section 86(1) of 1951 Act talks of dismissal of election petition which does not comply with Sections 81, 82 or 117 and reads as under:

86. Trial of election petition(1) The High Court shall dismiss an election petition which does not comply with the provisions of Section 81 or Section 82 or Section 117.

16. The applicant respondent has also alleged noncompliance of Section 81(1) and (3) of 1951 Act and has sought rejection of election petition u/s 86(1) of 1951 Act. It reads as under:

81. Presentation of petitions.(1) An election petition calling in question any election may be presented on one or more of the grounds specified in Sub-section (1) of Section 100 and Section 101 to the High Court by any candidate at such election or any elector within forty-five days from, but not earlier than the date of election of the returned candidate, or if there are more than one returned candidate at the election and the dates of their election are different, the later of those two dates.

Explanation. In this subsection, "elector" means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.

(2) xxxx(Omitted)

(3) Every election petition shall be accompanied by as many copies thereof as there are Respondents mentioned in the petition and every such copy shall be attested by the Petitioner under his own signature to be a true copy of the petition.

17. Sri U.N. Sharma learned Senior Advocate contended that a bare reading of paragraphs mentioned in application Paper No. A14 show that requirement of Section 83(1)(a) has not been met by the Petitioner and no cause of action is shown therein except of making scandalous, vague and vexatious allegations and, therefore, not only the pleadings in these paragraphs deserve to be struck off but the petition deserves to be rejected for noncompliance of the requirement of Section 83(1)(a) of Act, 1951 read with Order VII, Rule 11 Code of Civil Procedure.

18. Learned Counsel appearing on behalf of the Petitioner however, contended that the averments contained in the election petition give sufficient details and meet the requirement of "material facts and particulars" and further specific details can be added by means of evidence and not by pleadings in the election petition itself. Hence, the applications are misconceived and deserve to be rejected.

19. I have heard learned Counsel for the parties at length and perused the record.

20. An election is the essence of democratic system and purity of election must be maintained to ensure fair election. Election petition is a statutory process to hold inquiry into purity of election. However, public interest requires that sword of Damocles should not remain hanging over the head of returned candidate for indefinite period. He should be free to discharge his public duties and functions relating to his constituency.

21. It is now well settled that right to contest election or to question the election by means of election petition is neither a common law nor fundamental right. Instead, it is statutory right regulated by statutory provisions namely, in the present case, 1951 Act. There is no fundamental or common law rights in these matters.

22. In *N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others*, , the apex Court in paragraph 12, has said:

12. It is now well recognized that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes J. in *Wolver Hampton New Water Works Company v. Hawkesford* (1859) 6 C.B. (N.S.) 336 356 in the following passage:

There are three classes of cases in which a liability may be established founded upon statute. One is, where there was a liability existing at common law and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that, or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy; there, the party can only proceed by action at People's Union for Civil Liberties v. Union of India 7 common law. But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.

23. Similarly in *Jagan Nath Vs. Jaswant Singh and Others*, the Apex Court observed in para 7 as under:

The general rule is well settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and that the court possesses no common law power. It is also well settled that it is a sound principle of natural justice that the success of a candidate who has won at an election should not be lightly interfered with and any petition seeking such interference must strictly conform to the requirements of the law. None of these propositions however have any application if the special law itself confers authority on a tribunal to proceed with a 14 petition in accordance with certain procedure and when it does not state the consequences of noncompliance with certain procedural requirements laid down by it.

It is always to be borne in mind that though the election of a successful candidate is not to be lightly interfered with, one of the essentials of that law is also to safeguard the purity of the election process and also to see that people do not get elected by flagrant breaches of that law or by corrupt practices. In cases where the election law does not prescribe the consequence, or does not lay down penalty for noncompliance with certain procedural requirements of that law, the jurisdiction of the tribunal entrusted with the trial of the case is not affected.

(Emphasis added)

24. In *Ch. Subbarao Vs. Member, Election Tribunal, Hyderabad*, the Court Said:

an election petition was not to be equated to an action at law or in equity, but that as the rights were purely the creature of statute, if the statute rendered any particular requirement mandatory, the courts possessed and could exercise no dispensing power to waive noncompliance.

25. Following *Jagannath (supra)*, the Court in *Samant N. Balkrishna and Another Vs. V. George Fernandez and Others*, observed:

an election contest is not an action at law or a suit in equity but a purely statutory proceeding unknown to common law and that the court possesses no common law power.

26. In *Jyoti Basu and Others Vs. Debi Ghosal and Others*, the Apex Court held as under:

8. A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a common law right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. An election petition is not an action at common

law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statutory creating it. Concepts familiar to common law and equity must remain strangers to Election Law unless statutorily embodied. A court has no right to resort to them on considerations of alleged policy because policy in such matters as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, court is put in a straightjacket....

(Emphasis added)

27. In F.A. Sapa Etc., Etc., Vs. Singora and others, the Court said:

It is fairly well settled that our election law being statutory in character must be strictly complied with since an election petition is not guided by ever changing common law principles of justice and notions of equity. Being statutory in character it is essential that it must conform to the requirements of our election law. But at the same time the purity of election process must be maintained at all costs and those who violate the statutory norms must suffer for such violation.

28. In Mr. V. Narayanaswamy Vs. Mr. C.P. Thirunavukkarasu, the Court observed:

an election petition is based on the rights, which are purely the creature of statute, and if the statute renders any particular requirement mandatory, the Court cannot exercise dispensing powers to waive noncompliance.

29. This has been followed consistently and referred to in recent decisions in Dr. K. Krishna Murthy and Others Vs. Union of India (UOI) and Another, and Kalyan Singh Chouhan Vs. C.P. Joshi,

30. In Dharti Pakar Madan Lal Agarwal Vs. Rajiv Gandhi, the Court while reiterating the above proposition said that 1951 Act is a complete and self contained code within which any rights claimed in relation to an election or an election dispute must be found. The scheme of the Act shows that an election can be questioned under the statute as provided by Section 81 on the grounds as contained in Section 100 of the Act. Section 83 lays down a mandatory provision that an election petition shall contain a concise statement of material facts and set forth full particulars of corrupt practice. The pleadings are regulated by Section 83 and makes it obligatory on the election Petitioner to give the requisite facts, details and particulars of each corrupt practice with exactitude. If the election petition fails to make out a ground, it must fail at the threshold. The CPC as such in its entirety may not be applicable but applies to the extent permitted by Section 87 of the Act. The purpose is that in the garb of election petition one should not be allowed to put in motion a judicial institution so as to make a fishing and roving inquiry. The allegations of corrupt practice are in the nature of a criminal charge. It is incumbent and of utmost importance that the allegations should not be vague and general so as to make it difficult to the returned

candidate to know the case he has to meet.

31. It is in this context that in *Dhartipakar Madan Lal Agarwal (Supra)* the Court said that if an election petition does not disclose cause of action, i.e., the pleadings in various paragraphs are so vague and general and lack material facts and particulars so as to disclose the cause of action under 1951 Act, such paragraphs of the petition are liable to be struck down under Order 6 Rule 16 CPC at any stage of the proceedings. It is the duty of the Court to examine the plaint and it need not wait till the Defendant files written statement and points out the defects. If the court is satisfied that the election petition does not make out any cause of action and the trial would prejudice, embarrass and delay the proceedings, the court need not wait for the filing of the written statement but can proceed. If after striking out the pleadings it finds that no triable issues remain to be considered, it has power to reject the election petition under Order VII Rule 11 Code of Civil Procedure.

32. In *K. Kamaraja Nadar Vs. Kunju Thevar and Others*, Court said that the preliminary objections regarding lack of cause of action, nondisclosure of material facts and particulars etc. ought to be considered at the earliest by the Election Tribunal so as to avoid heavy expenses, loss of time and diversion of the returned candidate from his public duty in the various fields of activity including those in the House of the People.

33. Same is the view reiterated in *Shri Udhav Singh Vs. Madhav Rao Scindia*, and *Charan Lal Sahu and Others Vs. Giani Zail Singh and Another*,

34. In *Azhar Hussain Vs. Rajiv Gandhi*, the Court said that the whole purpose of conferment of power under Order VI Rule 16 CPC to strike off the pleadings is either to dismiss the election petition in limine or striking out of unnecessary scandalous, frivolous or vexatious. This is to ensure that a litigation which is meaningless and bound to prove abortive should not be permitted to occupy the time of the court and does not embarrass the returned candidate. The sword of Damocle need not be kept hanging over his head unnecessarily without point or purpose. The Court also observed that hanging sword of election petition on the returned candidate would not keep him sufficiently free to devote his wholehearted attention to matters of public importance which clamour for his attention in his capacity as an elected representative of the concerned constituency. The precious time and attention demanded by his elected office would be diverted to matters pertaining to the contest of the election petition. Instead of being engaged in a campaign to relieve the distress of the people in general and of the residents of his constituency who voted him into office in particular, and instead of resolving their problems, he would be engaged in devoting himself in the litigation pending against him. The fact that an election petition calling into question his election is pending may, in a given case, act as a psychological fetter and may not permit him to act with full freedom.

35. In *Bhagwati Prasad Dixit "Ghorewala" Vs. Rajeev Gandhi*, the Apex Court

again reiterated that in an election petition pleadings have to be precise, specific and unambiguous and if the election petition does not disclose a cause of action it should be rejected in limine.

36. In *Dhartipakar Madan Lal Agarwal (Supra)* the Apex Court also said that these authorities have settled the legal position that an election petition is liable to be dismissed in limine at the initial stage if it does not disclose any cause of action. Cause of action in questioning the validity of election must relate to the grounds specified in Section 100 of the Act. If the allegations contained in the petition do not set out grounds of challenge as contemplated by Section 100 of the Act and if the allegations do not conform to the requirement of Sections 81 and 83 of the Act, the pleadings are liable to be struck off and the election petition is liable to be rejected under Order VII Rule 11. It further says that the inference of corrupt practice cannot be drawn reading one sentence here and the other sentence there. It must be clearly specifically pleaded and should be complete in itself.

37. In the light of above discussion, now in order to consider the Application No. 48541 of 2010, Paper No. A14 seeking striking off Paragraphs No. 5, 7 to 10, 21 to 23 and 25 to 34 under Order 6 Rule 16 CPC it would be appropriate to consider what the provision actually require.

38. Order 6 Rule 16 provides that the Court may at any stage of proceedings order to be struck out or amended any matter in any pleading--

- (a) which may be unnecessary, scandalous, frivolous, vexatious or
- (b) which may tend to prejudice, embarrass or delay the fair trial of the suit, or
- (c) which is otherwise an abuse of the process of the Court.

39. This rule empowers the Court to strike out the pleadings whenever certain contingencies contemplated therein exist. A perusal of entire provisions makes it clear that it may not be necessary to dismiss a plaint in its entirety, even if certain parts of the pleadings are ordered to be struck out or amended, inasmuch as, despite such order, cause of action may survive and therefore, proceedings may continue. The result of an order under Order VI Rule 16 necessarily may not be in rejection or cession of the proceedings.

40. To attract order VI Rule 16 (a), the Court must come to a conclusion that the pleadings must be:

- (i) unnecessary
- (ii) scandalous
- (iii) frivolous
- (iv) vexatious

41. The other conditions are if the pleadings are such as may tend to prejudice

the fair trial of the suit, embarrass the fair trial of the suit or delay the fair trial of the suit.

42. The last condition is that the pleadings otherwise constitute an abuse of the process of the Court.

43. In P Ramanatha Aiyar's Law Lexicon, The Encyclopaedic Law Dictionary (2nd Edition Reprint 2007) published by Wadhwa and Company Nagpur, the word "unnecessary" means:

Unnecessary. Not required under certain circumstances. Not necessary.

44. In Henry Campbell Black's Law Dictionary, Fifth Edition by St. Paul Minn. West Publishing Company 1979 it defines:

Unnecessary. Not required by the circumstances of the case.

45. The pleadings, which is necessary to establish the case of the party concerned should only be allowed and not which has nothing to do with the case set up by the parties concerned. In order to find out whether pleadings is necessary or not, the entire document of the pleading has to be read and not a sentence or a word in isolation. To determine the relevancy, one must consider the nature of the suit and whether any relief is sought in respect of the allegations made in the defence. In deciding the question whether the allegations, which are objected to, are relevant on any of the issues, the correct test is whether the controversial allegations should be spoken to by the Defendants in their evidence for the purpose of establishing his defence, which if established, would nonsuit the Plaintiff, and that with reference to that matter, it would be inadmissible in evidence with reference to the relief that prayed.

46. The pleadings, which are scandalous are more serious and have to be struck out before it may cause any damage to someone. The Court has a duty to discharge towards the public and the suitors, in taking care that its records are kept free from irrelevant and scandalous matter. Scandal is calculated to do great and permanent injury to all persons, whom it affects, by making the records of the court the means of perpetuating libellous and malignant slanders. The court, in aid of the public morals, is bound to interfere to suppress such indecencies, which may stain the reputation and wound the feelings of the parties and their relatives and friends. However, one must always remember that nothing can be scandalous which is relevant. If the facts pleaded are relevant and necessary, no objection on the count of being scandalous can be accepted.

47. In P Ramanatha Aiyar's Law Lexicon, The Encyclopaedic Law Dictionary (2nd Edition Reprint 2007) published by Wadhwa and Company Nagpur, the word "scandalous" means:

Scandalous. A pleading is said to be "Scandalous", if it alleges anything unbecoming the dignity of the Court to hear, or is contrary to good manners, or which charges a crime immaterial to the issue. But the statement of a scandalous

fact that is material to the issue is not a scandalous pleading. (Millington v. Loring 50 LJ QB 214 ; 6 QBD 190).

Of the nature of a scandal, containing defamatory information (Section 151, Indian Evidence Act).

Facts not material to the decision are impertinent, and, if reproachful, are scandalous.

The term "scandalous", as applied to the pleading of scandalous matter, cannot be applied to any matter which is not also impertinent and unnecessary.

48. Now come to the next category i.e. tend to prejudice, embarrass or delay the fair trial of the suit. An allegation, which does not offer any defence to an action and which, if not struck out, would unnecessarily delay the suit, must be struck out. An allegation made to embarrass the Defendant having no correlation with the relief sought in the suit, cannot be permitted. A pleading is embarrassing if it is so drawn that it is not clear what case the opposite party has to meet at the trial.

49. Then last comes the abuse of the process. Whenever the process of the Court appears to be abused, the Court can direct for striking out the pleadings at any stage.

50. This Court has to consider this application in the light of specific statutory provision as to whether pleadings in the abovementioned paragraphs satisfy any of the conditions or part thereof so as to justify striking out all or any of the paragraphs referred to above.

51. Generally, what is to be pleaded, how it is to be pleaded is all within the domain of the party who has drafted and filed petition. of course when something is specially required to be mentioned therein by the statute, the same has to be complied. Normally, the Court would not direct or dictate the party what should be their pleadings and how should they prepare their pleadings. If there is no violation of statutory provision in making the pleadings, the parties have freedom to make appropriate averments and raise arguable issues. The authority of the Court to strike of the pleadings is therefore circumscribed with the conditions that it would be justified only when it is satisfied that the pleadings are unnecessary, scandalous, frivolous or vexatious or tend to prejudice, embarrass or delay the fair trial of suit or the suit is an abuse of the process of the Court.

52. The striking off pleading bear serious adverse impact on the rights of the concerned party. The power, therefore, to do so ought to be exercised with care and caution. An oft quoted passage of Boven, L.J. in Knowles v. Roberts (1888) 38 Ch.D 263 referred to in various authorities of the Apex Court would be useful to refer hereat:

It seems to me that the rule that the Court is not to dictate to parties how they

should frame their case, is one that ought always to be preserved sacred. But that rule is, of course, subject to this modification and limitation, that the parties must not offend against the rules of pleading which have been laid down by the law; and if a party introduces a pleading which is unnecessary, and it tends to prejudice, embarrass and delay the trial of the action, it then becomes a pleading which is beyond his right. It is a recognized principle that a Defendant may claim *ex debito justitiae* to have the Plaintiff's claim presented in an intelligible form, so that he may not be embarrassed in meeting it; and the Court ought to be strict even to severity in taking care to prevent pleadings from degenerating into the old oppressive pleadings of the Court of Chancery.

53. In *Sathi Vijay Kumar v. Tota Singh and Ors.* (2006) 13 SCC 353, the Apex Court in para 31 of the judgment said:

Since the general principles as to pleadings in civil suits apply to election petitions as well, the pleadings which are required to be struck off under Rule 16 of order 6 in a suit can also be ordered to be struck off in an election petition. In appropriate causes, therefore, an election Tribunal (High Court) may invoke the power under Order 6 Rule 16 of the Code.

54. In Para 34 of the judgment in *Sathi Vijay Kumar* (Supra) the Apex Court quoted with approval the passage referred above in *Knowles v. Roberts* (supra).

55. In *Abdul Razak (D) through L.Rs. and Others Vs. Mangesh Rajaram Wagle and Others*, after referring to Boven, L.J.'s observation in *Knowles v. Roberts* (supra) the Court said that power to strike down pleadings is extraordinary in nature. It must be exercised sparingly and with extreme care, caution and circumspection. The above observations were made following earlier decisions in *Roop Lal Sathi Vs. Nachhattar Singh*, *K.K. Modi Vs. K.N. Modi and Others*, and *United Bank of India Vs. Naresh Kumar and others*,

56. Thus the whole purpose of conferment of power under Order VI Rule 16 CPC to strike off the pleadings is either to dismiss the election petition in limine or striking out of unnecessary scandalous, frivolous or vexatious. This is to ensure that a litigation which is meaningless and bound to prove abortive should not be permitted to occupy time of the court and does not embarrass the returned candidate. The sword of Damocles need not be kept hanging over his head unnecessarily without point or purpose. The Court also observed that hanging sword of election petition on the returned candidate would not keep him sufficiently free to devote his wholehearted attention to matters of public importance which clamour for his attention in his capacity as an elected representative of the concerned constituency. The precious time and attention demanded by his elected office would be diverted to matters pertaining to the contest of the election petition. Instead of being engaged in a campaign to relieve the distress of the people in general and of the residents of his constituency who voted him into office in particular, and instead of resolving their problems, he would be engaged in devoting himself in the litigation pending

against him. The fact that an election petition calling into question his election is pending may, in a given case, act as a psychological fetter and may not permit him to act with full freedom.

57. Obligation on a Petitioner filing election petition is to give concise statement of material facts on which he relies. This is mandatory and violation thereof would be fatal. This provision has been considered in a catena of decisions and general consensus therein is that while an election petition must necessarily contain a statement of material facts, deficiency, if any, in providing particulars of corrupt practice could be made up by the Petitioner at any later stage. It has been held that where a petition does not disclose material fact it can be dismissed as one that does not disclose a cause of action but where it does disclose a cause of action, dismissal on the ground of deficiency or non disclosure of particulars of corrupt practice may be justified only if an election Petitioner does not despite opportunity given by the Court supply particulars and thereby cure the defects.

58. The words "material facts" were considered in Samant N. Balkrishna and Another Vs. V. George Fernandez and Others, wherein the Court held that Section 83 is mandatory. The election petition requires first a concise statement of material facts and the fullest possible particulars of corrupt practices, if any alleged. The use of word "material" shows that the facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact could consequently lead to incomplete cause of action. The function of "particulars" is to present a full picture of the cause of action with such further information in detail as to make the opposite party understand the case he is called upon to meet. There may be some overlapping between material facts and particulars but the two are quite distinct. Thus the material facts will show the ground of corrupt practice and the complete cause of action and the particulars will give the necessary information to present a full picture of the same.

59. In Raj Narain Vs. Indira Nehru Gandhi and Another, it was observed that if a pleading on a reasonable construction could sustain the action, the court should accept that construction and be slow in dismissing election petition lest it frustrates the cause of action only on technical grounds. The Court further observed:

While a corrupt practice has got to be strictly proved but from that it does not follow that a pleading in an election preceding should receive a strict construction. This Court has held that even a defective charge does not vitiate a criminal trial unless it is proved that the same has prejudiced the accused. If a pleading on a reasonable construction could sustain the action, the court should accept that construction. The courts are reluctant to frustrate an action on technical grounds.

60. In Hari Shankar Jain Vs. Sonia Gandhi, the Court said that "material facts" are those facts which can be considered as material supporting the allegations

made. In other words, they must be such facts as would afford a basis for the allegations made in the petition and would constitute the cause of action as understood in Code of Civil Procedure, 1908. The Court further says that the expression "cause of action" mean every fact which it would be necessary for the Plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad. Merely quoting the words like chanting of a mantra does not amount to stating material facts. Material facts would include positive statement of facts as also positive averment of a negative fact, if necessary. To attract Order VII, Rule 11, the Court should look at the plaint and nothing else.

61. In V.S. Achuthanandan Vs. P.J. Francis and Another, the Court said that material facts are such primary facts which must be proved at the trial by a party to establish existence of a cause of action. Failure to plead "material facts" is fatal to the election petition and no amendment of the pleading is permissible to introduce such material facts after the time limit prescribed for filing the election petition.

62. In v. Narayanaswamy (supra) the Court said "material facts" means the entire bundle of facts which constitute a complete cause of action and these must be concisely stated in an election petition. Material facts are those facts which constitute "cause of action".

63. In Harkirat Singh Vs. Amrinder Singh, the Apex Court held, while "material facts" and "primary or basic facts" which must be pleaded by the Plaintiff, "particulars" or details in support of such "material facts" pleaded by the party.

They simply amplify, refine and embellish material facts by giving distinctive touch to the basic contours of a picture already drawn so as to make it full, more clear and more informative.

"Particulars" thus ensure conduct of fair trial so that the opposite party is not taken by surprise.

64. In Virender Nath Gautam Vs. Satpal Singh and Others, the Court said:

50. There is distinction between *facta probanda* (the facts required to be proved i.e. material facts) and *facta probantia* (the facts by means of which they are proved i.e. particulars or evidence). It is settled law that pleadings must contain only *facta probanda* and not *facta probantia*. The material facts on which the party relies for his claim are called *facta probanda* and they must be stated in the pleadings. But the facts or facts by means of which *facta probanda* (material facts) are proved and which are in the nature of *facta probantia* (particulars or evidence) need not be set out in the pleadings. They are not facts in issue, but only relevant facts required to be proved at the trial in order to establish the fact in issue.

(Emphasis added)

65. The expression "material facts" though has not been defined in the Act or in the CPC but it has been understood by the Courts in general term to mean the entire bundle of facts which would constitute a complete cause of action. In *Ram Sukh Vs. Dinesh Aggarwal*, the Court observed that material facts are facts upon which the Plaintiff's cause of action or the Defendant's defence depends. Broadly speaking primary or basic facts which are necessary either to prove cause of action by the Plaintiff or defence by the Defendants are the material facts. Material facts are facts which if established would give the Petitioner relief prayed for but again what could be said to the material facts would be dependant upon the facts of each case and no rule of universal application can be laid down.

66. In *Samant N. Balkrishna (Supra)* the Court also observed that while stating material facts it will not be sufficient merely to quote the words of Section since efficacy of material fact in that event would be lost. This has been reiterated by a three Judge Bench in *Mahadeorao Sukaji Shivankar Vs. Ramaratan Bapu and Others*, and *Govind Singh Vs. Harchand Kaur*,

67. In this backdrop, this Court proceeds to consider whether paragraphs No. 5, 7 to 10, 21 to 23 and 25 to 34 of election petition come within the mischief of Order VI, Rule 16 CPC justifying striking out. I shall consider firstly whether paragraphs, objected to by the applicant respondent, are such which require this Court for striking off all or some of them or none of them and whether the averments contained in election petition lacks material facts, as contemplated u/s 83(1)(a) of 1951 Act.

68. Paras 5, 7 and 8 of the election petition are general and refers to the facts stated in the subsequent paragraphs to show that election of returned candidate has been materially affected due to non compliance of 1951 Act, Rules and order and he has received majority of votes in violation of the said provisions. Para 9 is in two parts. The first part deals with social status of the Petitioner and the second part makes an insinuation on Respondent No. 1 without giving any particulars and details about his rude behaviour and non availability. In the subsequent paragraphs also nothing has been said to specify as to in what manner one finds behaviour of Respondent No. 1 rude, at what time he was not present in his constituency. These allegations are evidently vague and general.

69. In my view, the part of para 9 to the following extent suffers the vice of order VI Rule 16(a) as it is unnecessary, scandalous and vexatious and deserve to be struck off:-

The Respondent No. 1 was the Member of the Lok Sabha from this constituency and the public at large was annoyed by the rude behavior and non availability of Respondent No. 1. Thus it was almost sure from very beginning that the Respondent No. 1 was not going to with the election.

70. Para 10 again is imaginary and frivolous makes insinuation on Respondent No. 1 without giving any details thereof. It is sworn by the Petitioner on his personal knowledge though the mental status of Respondent No. 1 could not

have been within the personal knowledge of the Petitioners.

Therefore, para 10 is also unnecessary, frivolous, vexatious and liable to be struck out.

71. Before discussing paras 21 to 23 and 25 to 34, which try to challenge reception of votes at the time of counting from Electronic Voting Machine (hereinafter referred to as "EVM"), it would be appropriate to have an idea of procedure prescribed for counting of votes through EVM.

72. For availability of EVMs an enabling provision was made by inserting Section 61A in Act 1951 vide Act 1 of 1989 w.e.f. 15th March, 1989 authorising Election Commission to adopt the said machines in such constituency or constituencies as the Election Commission having regard to the circumstances of each case, specify and in such manner as may be prescribed. Section 61A reads as under:

61 A. Voting machines at elections. Notwithstanding anything contained in this Act or the rules made thereunder, the giving and recording of votes by voting machines in such manner as may be prescribed, may be adopted in such constituency or constituencies as the Election Commission may, having regard to the circumstances of each case, specify.

Explanation. For the purpose of this section, "voting machine" means any machine or apparatus whether operated electronically or otherwise used for giving or recording of votes and any reference to a ballot box or ballot-paper in this Act or the rules made thereunder shall, save as otherwise provided, be construed as including a reference to such voting machine wherever such voting machine is used at any election.

73. Chapter v. of Act 1951 deals with "Counting of Votes". For the purpose of present case, Sections 64, 66 and 67 are relevant which reproduced as under:

64. Counting of votes.- At every election where a poll is taken, votes shall be counted by or under the (supervision and direction) of the Returning Officer, and each (contesting candidate), his election agent and his (counting agents), shall have a right to be present at the time of counting.

66. Declaration of results. When the counting of the votes has been completed, the Returning Officer (shall, in the absence of any direction by the Election Commission to the contrary, forthwith declare) the result of the election in the manner provided by this Act or the rules made thereunder.

67. Report of the result. As soon as may be after the result of an election has been declared, the Returning Officer shall report the result to the appropriate authority and the Election Commission, and in the case of an election to a House of Parliament or of the Legislature of a State also to the Secretary of that House, and the appropriate authority shall cause to be published in the official Gazette the declarations containing the names of the elected candidates.

74. The Rules have also been framed namely Conduct of Elections Rules, 1961

(hereinafter referred to as "Rules 1961"

and Part IV, Chapter II thereof deals with "Voting by Electronic Voting Machines". The relevant Rules 49A, 49B, 49C, 49E, 49T and 49V are reproduced as under:

49-A. Design of Electronic Voting Machines. Every electronic voting machine (hereinafter referred to as the voting machine) shall have a control unit and a balloting unit and shall be of such designs as may be approved by the Election Commission.

49-B. Preparation of voting machine by the Returning Officer.

(1) The balloting unit of the voting machine shall contain such particulars and in such language or languages as the Election Commission may specify.

(2) The names of the candidates shall be arranged on the balloting unit in the same order in which they appear in the list of the contesting candidates.

(3) If two or more candidates bear the same name, they shall be distinguished by the addition of their occupation or residence or in some other manner.

(4) Subject to the foregoing provisions of this rule, the returning officer shall,

(a) fix the label containing the names and symbol of the contesting candidates in the balloting unit and secure that unit with his seal and the seals of such of the contesting candidates or their election agents present as are desirous of affixing the same;

(b) set the number of contesting candidates and close the candidate set section in the control unit and secure it with his seal and the seals of such of the contesting candidates or their election agents present as are desirous of affixing the same.49C. Arrangements at the polling stations.(1) Outside each polling station there shall be displayed prominently

(a) a notice specifying the polling area, the electors of which are entitled to vote at the polling station and, when the polling area has more than one polling station, the particulars of the electors so entitled; and

(b) a copy of the list of contesting candidates.

(2) At each polling station there shall be set up one or more voting compartments in which the electors can record their votes free from observation.

(3) The returning officer shall provide at each polling station one voting machine and copies of relevant part of the electoral roll and such other election material as may be necessary for taking the poll.

(4) Without prejudice to the provisions of Sub-rule

(3), the returning officer may, with the previous approval of the Election Commission, provide one common voting machine for two or more polling stations located in the same premises.

75. Part v. of Rules 1961 deals with "Counting of Votes" and for the present purpose Rule 66A is reproduced as under:

66A. Counting of votes where electronic voting machines have been used. In relation to the counting of votes at a polling station, where voting machine has been used,

(i) the provisions of Rules 50 to 54 and in lieu of Rules 55, 56 and 57, the following rules shall respectively apply, namely:-

55C. Scrutiny and inspection of voting machines.-(1) The returning officer may have the control units of the voting machines used at more than one polling station taken up for scrutiny and inspection and votes recorded in such units counted simultaneously.

(2) Before the votes recorded in any control unit of voting machine are counted under Sub-rule (1), the candidate or his election agent or his counting agent present at the counting table shall be allowed to inspect the paper seal and such other vital seals as might have been affixed on the unit and to satisfy themselves that the seals are intact.

(3) The returning officer shall satisfy himself that none of the voting machines has in fact been tampered with.

(4) If the returning officer is satisfied that any voting machine has in fact been tampered with, he shall not count the votes recorded in that machine and shall follow the procedure laid down in Section 58, or Section 58A or Section 64A, as may be applicable in respect of the polling station or stations where that machine was used.

56C. Counting of votes.-(1) After the returning officer is satisfied that a voting machine has in fact not been tampered with, he shall have the votes recorded therein counted by pressing the appropriate button marked "Result"

provided in the control unit whereby the total votes polled and votes polled by each candidate shall be displayed in respect of each such candidate on the display panel provided for the purpose in the unit.

(2) As the votes polled by each candidate are displayed on the control unit, the returning officer shall have,

(a) the number of such votes recorded separately in respect of each candidate in Part II on Form 17C,

(b) Part II of Form 17C completed in other respects and signed by the counting supervisor and also by the candidates or their election agents or their counting agents present; and

(c) corresponding entries made in a result sheet in Form 20 and the particulars so entered in the result sheet announced.

57C. Sealing of voting machines.-(1) After the result of voting recorded in a control unit has been ascertained candidate-wise and entered in Part II of Form 17C and Form 20 under Rule 56C, the returning officer shall reseal the unit with his seal and the seals of such of the candidates or their election agents present who may desire to affix the seals thereon so however that the result of voting recorded in the unit is not obliterated and the unit retains the memory of such result.

(2) The control unit so sealed shall be kept in specially prepared boxes on which the returning officer shall record the following particulars, namely:

(a) the name of the constituency;

(b) the particulars of polling station or stations where the control unit has been used;

(c) serial number of the control unit;

(d) date of poll; and

(e) date of counting.

(ii) the provisions of Rules 60 to 66 shall, so far as may be, apply in relation to voting by voting machines and any reference in those rules to,

(a) ballot paper shall be construed as including a reference to such voting machine;

(b) any rule shall be construed as a reference to the corresponding rule in Chapter II of Part IV or, as the case may be, to Rule 55C or 56C or 57C.

76. The format of Form 17C and 20 need not be given in details except of mentioning the fact that in Form 17C, there are two columns requiring signature of polling agents and signature of presiding officer. The term "polling agent" has been defined in Rule 28(c) which reproduced as under:

polling agent", in relation to a polling station, means a polling agent of a candidate duly appointed u/s 46 for the polling station and includes a candidate and the election agent of a candidate when present at the polling station.

77. The appointment of polling agent is provided in Section 46 of Act 1951 which reads:

46. Appointment of polling agents.- A contesting candidate or his election agent may appoint in the prescribed manner such number of agents and relief agents as may be prescribed to act as polling agents of such candidate at each polling station provided u/s 25 or at the place fixed under Sub-section (1) of Section 29 for the poll.

78. In the present case it is not in dispute that at the time of counting of votes Petitioner's polling agent were present, EVMs were opened in their present, the

display unit was switched on in their presence and entries in para 2 of Form 17C were made in the presence of polling agents of the Petitioner. It is also not stated anywhere in the entire election petition that the polling agents did not sign Form 17C, as required or raised any dispute regarding entries made therein.

79. For operating recording of votes in EVM, Election Commission of India has also issued certain guidelines contained in "Handbook of Returning Officers at Elections where EVMs are used" (published in 2009). Chapter XIV thereof deals with the counting of votes. Para 1.2 thereof says:

The EVM records correctly each vote cast by a voter and keeps an exact and up-to-date account candidate-wise of each vote so cast. All votes cast by means of voting machines are valid votes and as such there will be no invalid or rejected vote. Thus, the process of counting has become very simple, easier and quicker. Nonetheless, you must follow the instructions given in the following paragraphs to the minutest details so that the counting of votes takes place perfectly and there is no doubt in the minds of any candidate or his agent with regard to the result of the election.

80. The Petitioner has not disputed the stage upto checking of seals of EVM and opening of seal of machine and therefore, I would refer to only those provisions which deal with the stage after removal of seals of EVM and opening thereof. Paras 22.1 to 24.3 reads as under:

22.1 After satisfying that the paper seal is intact, the control unit is the same as was supplied at the polling station and there is no tampering with the same, the votes recorded therein shall be counted. For counting of votes recorded in the machine, the following procedure should be followed:

i. Switch "on" the control unit by pushing the power switch provided in the rear compartment to "on" position. The On" lamp in the Display Section of the control unit will then glow green.

ii. Pierce the paper seal over the Result I Button provided below the upper aperture of the inner cover of Result Section.

iii. Press the Result I Button.

iv. At the Result I Button being so pressed, the total number of votes recorded for each candidate the polling station shall be displayed automatically in the Display Panels of the control unit. Supposing, there are nine contesting candidates and the total number of votes polled at the polling station is 758, the votes secured by each candidate will be displayed on the Display Panels in the following sequences:

cd

9

to

758

01

109

02

59

03

77

04

263

05

38

06

02

(This is only an example) (N.B. Result II Button is not used as for a simultaneous poll a separate CU is used.)

v. The counting supervisor shall note down, carefully, the above result as displayed sequentially candidatewise in "Part II Result of Counting" of Form 17C.

22.2 If required, press the Result I Button again to enable the candidates and/or their agents to note down the above result.

22.3 After the result has been noted, close the cover of Result Section and switch "OFF" the control unit.

Completion of Part II-Result of Counting of Form 17C

23.1 As the votes secured by each candidate are displayed on the Display Panels of the control unit, the counting supervisor should record the number of such votes separately in respect of each candidate in "Part II-Result of Counting" of Form 17C. He should also note down in the said Part II of Form 17 C whether the total number of votes as shown in that Part tallies with the total number of votes shown against item 5 of Part I of that Form or any discrepancy has been noticed between these two totals. After completing that form in all respects, the counting supervisors should sign it. He should also get it signed by the candidates or their agents present at the counting table.

23.2 After the counting supervisor has duly filled-in-Part II of Form 17 C, signed it and got it signed by the candidates or their agents, he should handover that Form to the Returning Officer. You should countersign the Form after satisfying yourself that the same has been properly filled and completed in all respects.

The Form so countersigned by the Returning Officer should be sent to the officer who is compiling the final result and preparing the Final Result Sheet in Form 20.

23.3 Further, you should either announce or cause the entries of votes pooled by each candidate polling station wise as entered in Form 20 to be written on a black board to be put up conspicuously so that each counting agent can see and note down / cross check the entries.

This will enable to proceed uninterruptedly with the counting of votes at other polling stations.

23.4 It is possible that a particular CU used at a polling station does not display result due to technical malfunctioning of the same, then technicians of BEI/ECIL, as the case may be, be called to retrieve data. If they also are not able to do so, then that EVM shall be sealed and kept aside and be counted. It must, without fail, be brought to notice of Election Commission of India and CEO of your state/UT, for further directions. The counting of remaining machines will continue unabated. If any machine has been kept apart and not counted for this reason or for being found tampered with, then Commission's written prior approval will be needed before declaring the result of the election from that constituency.

Preparation /Compilation Of Final Result Sheet-from 20 Preparation

24.1 The officer in charge of compiling the final result and preparing the Final Result Sheet in Form 20 should make entries on that Form showing the votes polled by each candidate polling station wise strictly in accordance with the entries made in "Part II Result of Counting" of Form 17C in respect of each polling station. The number of tendered votes polled, if any, at a polling station should also be noted in the appropriate column in form 20 against the polling station concerned. Tendered votes are not counted.

Cross Checking

24.2. In addition to above, on the basis Form 17C duly completed by counting supervisors, you shall get prepared a round wise statement in the following Proforma.

Annexure for tabulating Trends/Results

Number & Name of Constituency _____ Round Number _____ Date _____

Table No.

- 1
- 2
- 3
- 4

5

6

Total

Brought t from Previou

s Round

Cumulative Total

Polling Booth No.

Rejected Vote

Total Vote

Initial of RO

Initial of RO

Initial of RO

Initial of RO

Initial of RO

Initial of RO

Initial of RO

Initial of Observer

Initial of Observer

Initial of Observer

Initial of Observer

Initial of Observer

Initial of Observer

Initial of Observer

Important: 1. All Over writings/cutting should be certified by observer.

2. Polling station Number whose votes are counted should be indicated below the table Number.

3. A copy of this is to be kept by observer in a separate folder for cross checking later Both you and the observers should get satisfied after due checking that the number of votes posted against the name of each candidate in respect of every counting table tally with the figures as shown in PartII of Form 17C (result of counting) pertaining to that counting table. Then it should be signed by you and observer. Thereafter you should announce the result of that round loudly or using

loudspeaker for every body's information. The total etc. done manually may be tallied by entering all the counting data in an Excel sheet and computing the total.

24.3. As a measure to cross check the correctness of counting, the Commission has directed the observers to randomly select two EVMs counted in a round and with the help of additional counting staff provided to them to assist in this regard ascertain once again count of votes polled by each candidate and after getting satisfied, then only countersign the relevant column of above referred statement. The Additional Counting staff shall prepare the result of two randomly selected EVMs in following format-

Proforma For Recording of Votes By Additional Counting Staff

No and Name of A.C.-

Round No.-

Table No.-

C U Number:

Polling Station Number:

SN.

Name of Candidate (Pre-Printed)

No. of Votes recorded

Date: Signature of Addl. Counting staff (With full name) *To be handed over to the Observer only.

81. There are two stages. The result disclosed by EVM Display Panel, candidatewise, shall be mentioned in Form 17C by Counting Supervisor. The said Form 17C shall be signed by the candidate or their agents as well as Counting Supervisors and it shall be handed over to the Returning Officer. After being satisfied that Form 17C has been properly filled and completed in all respect, Form 17C shall be counter signed by Returning Officer and shall be sent to the officer compiling the final result and preparing the Final Result Sheet in Form 20.

82. Form 20 is to be prepared by officer incharge compiling final result by taking entries from Form 17C in respect to each polling station. Besides, the round wise statement shall also be prepared which shall be signed by the Returning Officer as well as Observers after being satisfied that number of votes posted against the name of each candidate in respect of every counting table, tally with the figures shown in Part II of Form 17C pertaining to that counting table.

83. What borne out from the above procedure is that a candidate or his election agent check the mentioning of number of votes polled to the candidates recorded in Form 17C which should tally with the display of votes candidatewise in EVM. The candidate or his election agent as also the Counter Supervisor shall sign

Form 17C. The officer in charge of election shall prepare Form 20 for the purpose of final result based on entry contained in Form 17C. If there is no allegation that Form 17C did not contain correct entries, as displayed in EVM and further that form 20 did not mention the entries as mentioned in Form 17C, the election based on the final result as borne out from Form 20 cannot be said to be in violation of Section 100(1)(d)(iii) and (iv) of 1951 Act.

84. From the averments contained in paras 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 33 and 34 there is not even a whisper that votes polled to respective candidates, as displayed in the electronic display of EVM, were not correctly entered into Form 17C by Counting Supervisor or and that such Form 17C was not signed by the agents of the Petitioner and the supervisor or that they ever disputed the entries made in Part II of Form 17C.

There is no averment at all that form 17C was not correctly prepared and did not mention number of votes as displayed in EVM in respect to different candidates. There is no challenge that the Petitioner's counting agent raised any objection with respect to preparation of Form 17C or that his agent did not sign Form 17C prepared by the Accounting Supervisors, as contemplated in para 23.2.

85. In order to hold anything wrong in Form 20, there are two aspects, firstly; that entries in Para II of Form 17C with respect to votes polled to various candidates were not correctly made, and, secondly; Form 17C was correctly prepared but those entries as such were not taken in Form 20 and in fact the entries 49 contained in Form 20 are imaginary and not based on the entries contained in Form 17C. The individual's separate chart prepared by any election agent has no recognition in law and there is no provision which gives any legal identity to these charts. The reason being that counting agents may make chart but it has no recognition in law. The statutory document is Form 17C which is prepared by making entries on the basis of figures of votes polled as displayed by EVM electronic panel and thus Form 17C is signed by Counting Supervisor as also by the candidates or their agents.

86. There is no averment in the entire election petition that Form 17C was not correctly prepared and was not signed by Agents of the Petitioner who were present at the relevant time, as is admitted by Petitioner himself in paras 25 and 26 of election petition. A vague assertion has been made in para 27 that number of votes received and got received in EVM were not correctly incorporated in final tabulation chart in Form 20, which was being prepared at the central table. But it is not the case of the Petitioner that entries made in Form 20 did not conform to the entries made in Form 17C. If Form 20 contained the entries made in Form 17C and both tally, it cannot be said that votes have been received or taken into account contrary to any provision of statute for the reason that Form 17C is duly checked, verified and signed by candidate or his agent also.

87. If the entries on Form 17C are the basis of making entries in Form 20, no valid objection can be raised on the basis of some private non statutory

document allegedly prepared by candidate's election agent who has not disputed to have signed Form 17C and there is no such averment at all in the entire election petition including the paras objected by the applicant respondent. The averments therefore contained in para 27 of the election petition to the extent that Form 20 was not prepared correctly is extremely vague.

88. Similarly in paras 28 and 29, allegation that votes mentioned in Form 20 were reduced or added to another candidates illegally by the Returning Officer is also vague and general particularly in absence of a "material fact" about the position of Form 17C. All these allegations become frivolous and vexatious. The documents, which have been filed by the Petitioner i.e. copies of Form 20 as such would not make any difference to the challenge in case the Petitioner does not dispute that the entries made in Form 20 did not tally with the entries made in Form 17C.

89. Unfortunately, in the entire election petition nothing has been said about this fact which, in my view, considering the nature of the dispute raised by the Petitioner, is a "material fact" and absence thereof makes the election petition defective by contravening Section 83(1)(a) of 1951 Act.

90. In fact in absence of anything said about the entries made in Form 17C, and, that the entries made in Form 20 are not tallying with Form 17C, the averments made in paragraphs 21 to 23 and 25 to 34 becomes frivolous and vexatious for the reason that Returning Officer was not supposed to make entries on the basis of what was allegedly noted by the counting agents of the candidate but he was under the liability and obliged to prepare Form 20 on the basis of entries contained in Form 17C.

Once there is no pleading as above, the entire edifice tally to the ground rendering the pleadings in the offending paragraphs vague, frivolous and vexatious. They also lacks a material fact.

91. So far as the averments contained in paras 21, 22, 23 and 25 to 34 are concerned even if Petitioner's agent may have acted in a particular manner for preparing his own document, that would not make any difference so long as the Petitioner has not pleaded/disputed the fact that Form 17C was not correctly prepared and that his agents have not signed the said Form 17C verifying entries contained therein. Therefore paragraphs 21, 22, 23 and 25 would make no difference to the matter. The averments made in paras 26, 27, 28, 29, 30, 31, 32, 33 and 34 are however liable to be struck out for the reasons abovesaid.

92. Considering the striking out of certain paragraphs, as above, and also the fact that "material facts" with respect to Form 17C has not been stated in the entire election petition without which it cannot be said that entries contained in Form 20 are not correct, in my view, election petition contravenes requirement of Section 83(1)(a) having the effect of disclosing no cause of action to the Petitioner and therefore application under Order VII Rule 11 also deserves to be allowed.

93. The election petition could have been worth consideration only if there would have been pleading that either Forms 17C and 20 both were not correctly prepared or that Form 17C, which contains signatures of candidate or his agents, contain correct entries with respect to votes polled to various candidates 52 but the same were not correctly reflected in Form 20. Reliance placed on privately prepared document and challenging Form 20 on the basis of such documents cannot be considered since it cannot be in violation of any provision of 1951 Act, Rules or statutory orders issued thereunder. Hence, it cannot be said that there is any violation of Section 100(1)(d)(iii) and (iv) of 1951 Act. In other words, no cause of action has been shown in the entire election petition.

94. Coming to the third application u/s 86(1) of 1951 Act, Sri Sharma contended that charts were not signed by the Petitioner and the names of agents have also not been given.

He says that copy supplied to him is not the true copy and therefore there is violation of Section 81(3) of 1951 Act.

95. However, the aforesaid argument could not be substantiated. In fact Sri Sharma himself reluctantly referred to the said application without much stress. I, therefore, find no irregularity showing any violation of Sections 81, 82 or 117 of 1951 Act warranting dismissal of election petition u/s 86(1) of 1951 Act.

96. In the result application No. 48541 of 2010 (Paper No. A14) is allowed partly. Paragraph No. 9 to the extent as mentioned in para 69 of the judgment and paragraphs No. 10, 26, 27, 28, 29, 30, 31, 32, 33 and 34 are struck off from the election petition.

97. Application No. 48545 of 2010 (Paper No. A15) is hereby rejected.

98. In view of the fact that "material facts" have not been 53 stated in election petition, as discussed above, and also after striking off paragraphs, as directed above, from election petition, whatever remained therein, do not disclose any cause of action whatsoever, the election petition cannot survive. The application No. 48548 of 2010, Paper No. A16, is accordingly allowed. The election petition, in the result, is dismissed lacking cause of action.

99. The Petitioner shall be liable to pay cost, which I quantify to Rs. 5,000/only.