
(2013) 12 SHI CK 0029
In the High Court Of Himachal Pradesh
Case No : Election Petition No. 1 of 2013

Shri Gangu Ram Musafir

APPELLANT

Vs

Shri Suresh Kashyap and Others

RESPONDENT

Date of Decision : 06-12-2013

Acts Referred:

Citation : (2013) 12 SHI CK 0029

Hon'ble Judges : V.K. Sharma, J

Bench : Single Bench

Advocate : M.L. Saggar and Mr. Rupinder Singh Thakur and Mr. Bhupinder Singh Thakur, for the Appellant; Satya Pal Jain and Mr. R.K. Sharma s and Mr. Anshul Bansal and Ms. Anita Parmar, Advocates for Respondent No. 1, Respondents No. 2 and 5 Ex-parte and Mr. N.K. Tomar, Advocate, for the Respondent

Judgement

V.K. Sharma, J.—This order shall dispose of issue No. 4, extracted below, which has been treated as preliminary issue, in the election petition u/s 80 of the Representation of People Act, 1951 (in short "1951 Act"), filed by the petitioner, the runner up candidate, calling in question the election of respondent No. 1, the returned candidate, from 55-Pachhad (SC) Assembly Constituency of Himachal Pradesh Legislative Assembly, held in 2012:-

Whether in view of preliminary objection No. 1, petition is not maintainable? OPR Nos. 1, 3 & 4.

Preliminary objection No. 1 raised on behalf of respondent No. 1 is as follows:-

That the present election petition is not maintainable as the allegations in the petition are vague and petitioner did not disclose the concise statement of material facts and particulars as required under law. In absence of the material pleadings and facts of alleged corrupt practice, cannot be tried.

2. On 3.10.2012, general election for the Himachal Pradesh Legislative Assembly was announced by the Election Commission of India alongwith general election to the Legislative Assembly of Gujarat. The requisite notification u/s 15 of the 1951

Act was issued on 10.10.2012, with the following election schedule:-

3. In the election, whereas the petitioner, Shri Gangu Ram Musafir, was set up as a candidate by Indian National Congress (in short "Congress"), respondent No. 1, Shri Suresh Kashyap, who won the election, was candidate of Bharatiya Janta Party (BJP), respondent No. 2 Shri Rangi Ram, was sponsored by All India Trinamool Congress (TMC), respondent No. 3, Shri Desh Raj by Himachal Lok Hit Party (HLP), respondent No. 4, Shri Ram Rattan represented Nationalist Congress Party (NCP) and respondent No. 5, Smt. Shanti Devi was put up by Bhaujan Samaj Party (BSP). It is stated that as usual, the main contest was between Congress and BJP represented by the petitioner and respondent No. 1, who out of the total 50865 votes polled, scored 22863 and 25488 votes, respectively, the margin being 2625 votes. Rest of the votes were shared by the remaining candidates, whose score was in hundreds, the maximum being 668.

4. According to the petitioner, respondent No. 1, the returned candidate "had adopted all illegal and unlawful means to win the election. The local administration which was at his command did not take notice of his illegal and unlawful activities during the election. Shri Pankaj Sharma, SDM Rajgarh, was got appointed (sic. posted) by him and was the Returning Officer as well as the Electoral Registration Officer of the constituency". The instances of "illegal and unlawful means" have been enumerated as follows:

5.1. As many as 989 voters at Sr. Nos. 401 to 408 and 410 to 1390 of polling station No. 55/52-Lana Machher, who belong to the State of Punjab, were got enrolled by respondent No. 1 with the help of Mr. Pankaj Sharma, SDM to vote for him, albeit the fact that they had voted in the election to the Punjab Legislative Assembly. It is alleged that they were "bogus" voters and were permitted to cast votes by Mr. Pankaj Sharma, SDM-cum-R.O., to help respondent No. 1 win the election.

5.2. Respondent No. 1 was openly distributing liquor through his supporters in the constituency. The police had to register a case when the supporters of the petitioner nabbed vehicle No. HP-16-4323, Hyundai, on the road near village Dhar-Pajera distributing a case of liquor to Partap Singh S/o. Jalam Singh, resident of village Talia-Bohal. The supporters of respondent No. 1 ran away leaving the vehicle. Resultantly, the supporters of the petitioner staged a dharna and raised slogans against respondent No. 1 for his illegal and unlawful activities. The police finding no alternative had to register FIR No. 97, dated 02.11.2012, at Police Station, Rajgarh, District Sirmour, against Partap Singh and others u/s 61 of the Punjab Excise (H.P. Amendment) Act, 1965 and Section 34 of the Indian Penal Code (in short "IPC"). Both the cartons containing bottles of whisky, Officer's Choice, were taken into possession by the police.

5.3. "The Respondent No. 1, also appealed to Koli caste voters to exercise vote being a candidate of Koli caste for him and not to vote for the petitioner who belongs to Chamar caste. It also resulted in undue influence and prevented the

voters of Koli caste to exercise their vote with a free mind."

5.4. "The respondent No. 1 also indulged in tempering with the EVMs with the connivance of the local administration."

5.5. "The respondent No. 1, the returned candidate also distributed money to bribe the voters of the constituency apart from distributing the liquor. However, the petitioner is only confining to the corrupt practices committed by respondent No. 1, the returned candidate, as envisaged u/s. 123(3) and 123(2) of the Act as well as tempering the EVMs and casting of bogus votes.

5. It is alleged that respondent No. 1 during his election meetings between 20.10.2012 to 02.11.2012 criticized the people and voters of Koli caste for not supporting and casting their votes in his favour during the 2007 general election, which was the main cause for his defeat. He exhorted them not to commit the same blunder during the present (2012) election. He also cursed them that in case during the current election they vote for the petitioner, who is Chamar by caste then "they are not born of a legal marriage". He also asked the Koli caste population and voters to support and vote for him, as he belongs to their own Koli caste and is one of them. They should prefer to vote for him being of their own caste and defeat the petitioner, who belongs to Chamar caste. Respondent No. 1 appealed to the population and voters of Koli caste that "they are in a majority in Pachhad Assembly Constituency. The population and voters of the Chamar caste is about 1/3rd as compared to them. How could the petitioner who belongs to a Chamar caste, can be permitted to represent the majority Koli caste in the Assembly?".

6. It is further alleged that respondent No. 1 during his public meetings "openly challenged the population and voters of Koli caste that if they have conscious (sic. conscience) then they should vote and support for him. The voters of the Koli caste whose conscious (sic. conscience) is dead can vote for the petitioner who belongs to Chamar caste". Respondent No. 1 further claimed that "there are about 13000 voters of the Koli caste in the Assembly Constituency, whereas the number of voters of Chamar caste is around 4900, therefore, it is their moral duty to vote for him to win the election". It was allegedly done by respondent No. 1 in order to further his prospectus (sic. prospects) in the election and to defeat the petitioner, "thus, prejudicially affecting the prospectus (sic. prospects) of the success of the petitioner during the elections."

7. On the strength of these averments the petitioner concludes vide para 8 of the petition in the end that "the appeal of respondent no. 1, the returned candidate, resulted in undue influence on the minds of the voters of Koli caste and depriving them of exercise of their right to vote with a free mind. It was for the first time that respondent no. 1, the returned candidate, had exploited Koli caste voters during the elections violating the basic essentials of a secular democratic republic. Thus, the election of respondent no. 1, the returned candidate, is liable to be set aside, having committed the corrupt practices as envisaged u/s. 123(3)

and 123(2) of the Act."

8. An account of the public meetings held by respondent No. 1 during the election campaign, in which, after the usual criticism for corruption, lack of development etc. of Indian National Congress, he had committed the alleged corrupt practices, has been given by the petitioner in paras 9 to 14, which are extracted below in a tabular form:

9. The pleadings regarding tampering of EVMs by respondent No. 1 in connivance with the local administration are to the effect that a Government College was to be established at Sarahan due to the efforts of the petitioner, which was sabotaged by respondent No. 1, for which the parents and students of the area nursed serious grudge against him. Mainly the people and voters, who were the most sufferers were of the adjoining areas of Sarahan, namely villages Jhandenwa Tikkeri, Shadia, Mahlog Lal Tikker, Jaihar, Chanyana Bakyori, Bhailan, Kangar Dharyar, Nichala Panwas Sandna, Naili Gusan (Kathanji), Chukhar Dhyangiyar, Khalog, Kathar, Mehandobag, Surla Janot, Katli, Durang, Rajyon Malana, Johana, Mandi Khadana, Banah Ki Ser, Shampur Chhandog, Gagal Shikor, Chyola Bohal and Baghar Shekhra. They were very much annoyed with respondent No. 1, who was fully aware about it and had realized that he was likely to be defeated in the election by the voters of the area. The local administration was out and out to help him to win the election by hook and crook. The EVMs had been stored at Kisan Bhawan, Rajgarh, which was not a secure place for storing the same. The forces guarding the Kisan Bhawan were under the command of the local administration. Although CCTV cameras had been installed, but there was no provision of any back up in the event of power failure.

10. Reiterating the allegation that Shri Pankaj Sharma, SDM Rajgarh, was got appointed (posted) by respondent No. 1, it was further pleaded that the latter in connivance with the former and the local administration got the electricity supply to the Kisan Bhawan switched off for about eight hours during the night intervening 13/14-12-2012 from 11.00 PM to 7.00 AM. The CCTV cameras were thus rendered useless. During this period respondent No. 1 in connivance with his accomplices tampered with the EVMs, particularly those of the aforementioned villages. According to the petitioner, tampering of EVMs stands established, as at the time of counting of votes on 20.12.2012, the EVM of Booth No. 55/58 of village Jhandenwa Tikkeri revealed polling of 702 votes, when in fact 701 votes were polled. The counting agent of the petitioner Shri Chander Shekhar pointed out the discrepancy, but the objection was overlooked. He had also noticed that the EVM of Booth No. 55/101 of Mandi Khadana had been tampered with. However, the Supervisor and the Returning Officer were reluctant to take note of the same. Thereafter, Shri Chander Shekhar made a written complaint to the Returning Officer in this respect. The petitioner also objected to the same and immediately sent a complaint by fax through Shri Bhupinder Singh Thakur, Advocate, on 20.12.2012 at 17.34 PM to the Chief Electoral Officer,

Himachal Pradesh, Shimla that the EVMs have been tampered with and the Returning Officer was reluctant to stop the counting and report the matter to Election Commission of India for re-poll in the constituency despite the instances have been brought to his notice. However, the Returning Officer, who was helping respondent No. 1, had informed the Chief Electoral Officer, Himachal Pradesh that there was a mistake on the part of the Presiding Officer regarding EVM of Booth No. 55/101, Mandi Khadana. Thus, the Returning Officer was instrumental in getting the result declared.

11. It is further averred that in the tampered EVM of Booth No. 55/101, Mandi Khadana, 299 votes have been cast. Tempering of EVMs resulted in unusual lead of 3701 votes in favour of respondent No. 1 in the area of Sarahan. Thus, the result of the election has been materially affected so far as respondent No. 1 is concerned. According to the petitioner, Shri Sanjiv Sharma, S/o. late Shri Sohan Dass Sharma, r/o UCO Bank Building, Near Old Bus Stand, Rajgarh and Smt. Vijay Laxmi Thakur, w/o Ravinder Nath, r/o Vijay Niwas, Ward No. 3, Opposite Kisan Bhawan, Rajgarh, had heard unusual sounds and creaks from the building of Kisan Bhawan during the night intervening 13/14-12-2012, who also noticed in the early morning (on that day) that respondent No. 1 alongwith "some other persons" was leaving the Kisan Bhawan. Thus, in the estimation of the petitioner, it is abundantly proved that the EVMs had been tampered with by respondent No. 1 and his "accomplices" during the night intervening 13/14-12-2012.

12. According to the petitioner "the tempering of the EVMs and the unusual lead of 3701 votes, the tempering of EVM of Booth No. 55/101 having 299 polled votes, Booth No. 55/58 where only 701 votes were polled and the casting of 989 bogus votes thus in all reception of 5400 void votes leave no manner of doubt that the result of the election has been materially affected in so far as the respondent No. 1, the returned candidate, is concerned. Thus, the election of respondent no. 1, the returned candidate, is liable to be declared void u/s. 101(d) (III) and (IV) of the Act requiring re-polling in the constituency". The following averments have also been set up by the petitioner vide para 16 of the petition:- "Due to the advancement of technology, the tempering of the EVMs has become convenient. It is the constitutional obligation of Election Commission of India to conduct free and fair elections being the main spring of a healthy democratic life and a barometer of its strength and vitality. Purity of elections is the prime pillar of the Parliamentary Democracy envisioned in the Constitution. The procedure for polling should be through ballot papers as was the procedure prior to the amendment of the Act in 1989 when Section 61(A) was added. The casting of votes by EVMs is doubtful and has outlived its utility. The true will of the voters should be known so that only the deserving candidate is elected to represent the Constituency."

13. On the above pleadings, the following prayers have been made:-

It is, therefore, prayed that the election petition may kindly be accepted and the election of respondent No. 1, the returned candidate, from 55 Pachhad (SC)

Constituency of Legislative Assembly of Himachal Pradesh may kindly be declared void. The Hon"ble Court may kindly order re-poll of the Assembly Constituency by the use of ballot papers as was the procedure prior to the use of EVMs vide Section 61(A) of the Act in 1989. The election petition be allowed with costs.

14. Respondent No. 1 has contested the petition on preliminary objections regarding maintainability, lack of cause of action and verification and affidavit being vague.

15. On merits, the averments regarding holding of election and outcome thereof have been admitted. It is not denied that from the perspective of development the constituency falls in the backward area. The averments regarding service background, qualifications and contribution of the petitioner to the constituency have been disputed. As regards contesting election and holding positions as Minister and Speaker of the Assembly etc. etc., the same are stated to be matter of record requiring no reply. It is stated that the controversy regarding opening of a College at Sarahan has no relevance to the case. It is alleged that the present State Government, which belongs to the same political party, to which the petitioner also belongs, has recently issued a notification de-notifying the College at Sarahan. The petitioner has done nothing "to save the college", rather a Civil Writ Petition (PIL) stands filed in this Court, in which interim directions have been issued against the decision of the Government headed by petitioner"s own party. The questions raised by the petitioner in the State Legislative Assembly regarding de-notification of the college at Sarahan have no connection with the election petition. It is further stated that the petitioner had levelled altogether false and baseless allegations against Prof. Prem Kumar Dhumal, former Chief Minister, Himachal Pradesh, without impleading him as a party to the petition.

16. As regards the posting of Mr. Pankaj Sharma, as SDM Rajgarh, at the behest of the replying respondent and the allegations that he was instrumental in his success in the election allegedly achieved by "hook and crook" and "illegal and unlawful means", are emphatically denied as totally wrong, misconceived and defamatory against the replying respondent and more so when Shri Pankaj Sharma has not been impleaded as a party to the petition. He being a candidate in the election did not exercise any control over the Government to post a particular person at a particular place. The allegations regarding enrolment of voters from Punjab have also been denied in toto. The allegations regarding nabbing of vehicle carrying liquor for distribution to the voters are also denied for want of knowledge and it is stated that the replying respondent is in no way connected with the alleged incident and has nothing to do with the same and it is only imagination of the petitioner that those persons were supporters of the replying respondent. The allegations regarding tampering of EVMs are also denied being wrong and instead it is stated that the petitioner has crossed all limits of imagination while making such false and frivolous allegations. According

to the replying respondent the petitioner does not have any respect or regard for truth. According to the replying respondent he never appealed to any voter in the name of any caste, creed or region, much less Koli caste. The allegations to this effect are stated to be baseless, unfounded and without any proof to substantiate the same. The petitioner is indulging in mud slinging by way of present petition, which is nothing, but a bundle of lies and total misuse of process of law and hence requires dismissal with exemplary costs. It is stated that in none of his public meetings, the replying respondent provoked the voters on caste basis and the allegations in that regard are creation of the thinking of the petitioner himself and canvassing of votes on caste basis is denied. Population figures given in para 8 of the petition are also denied for want of knowledge. According to the answering respondent he did not commit any alleged corrupt practice during the election as alleged by the petitioner.

17. According to the replying respondent, he did not address any meeting on 20.10.2012 at 11.30 AM at village Nichala Panwa and Bhadi Bhun-Pandahan, in which 300 persons had allegedly participated. The names of persons mentioned in para 9 of the petition are stated to be in fact petitioner's own men. The allegations regarding seeking votes on caste basis are denied and instead it is stated that the replying respondent is a person of progressive thinking and wants to see development in the area irrespective of caste and "any type of-ism". According to the replying respondent people of all castes have voted for him out of their free will and that he "supports eradication of corruption from the area, which is nowadays a burning issue".

18. It is also denied that during the election campaign the replying respondent addressed a gathering of about 200 persons and voters to canvass support on 25.10.2012 around 12.30 PM at village Bohal Talia and Faggu of polling station Kalath. It is also denied that he cautioned the people not to vote for the petitioner. The allegations regarding "not born out of legal marriage etc. etc." are stated to be un-parliamentary and the replying respondent can never think of using such words. According to him, "it is the worst creation of the perverse thinking of the petitioner". The replying respondent believes in parliamentary democracy adopted by the nation. He can in no way cause any threat to the democracy, the people and voters of this country. The people are free to use their right to vote and the replying respondent has never coerced or threatened them. The people have voted for him on their own free will keeping in view the development and welfare of the constituency.

19. Holding of public meeting at Rajgarh on 27.10.2012 is not denied. It is stated that this public meeting had good gathering from all areas and sections of the constituency. Smt. Sushma Swaraj did address the rally and the answering respondent did not appeal to the voters in the name of any caste or religion. All the allegations to the contrary are absolutely false, baseless and scandalous.

20. Public meeting at Sarahan on 29.10.2012 is also not denied. It is stated that this meeting had also good gathering from all areas and sections of the

constituency, which was addressed by Shri Raj Nath Singh. It is denied that the replying respondent made any appeal to the voters to vote for him on caste basis. As regards the averments contained in para 13 of the petition qua the election meeting at village Daron Deoria attended by 200 persons and voters on 30.10.2012, at around 3.00 PM and at village Lana Baka comprising of 350 persons on 01.11.2012 around 3.00 PM, it is stated that the allegations to this effect are mere repetition of earlier paras of the petition and do not call for specific reply in view of reply to those paras. However, the same are denied being wrong and incorrect. It is stated that "the petitioner is just beating around the bush and it seems that he is unable to take his defeat manly hence; in frustration has filed the present election petition". It is stated that the allegations levelled by the petitioner do not fall within the purview of "corrupt practices".

21. On the allegation that the replying respondent had sabotaged opening of college at Sarahan and the voters of the area being annoyed with him on that count, it is stated that in case the residents of the area had nursed any grudge against him, they would not have voted for him in the election. It is reiterated that "in any case, the said Government Degree College has been de-notified by the very Government of the petitioner for which he has no answer". The allegations regarding tampering with EVMs have been replied as under:-

It is specifically denied that replying respondent has done any sabotage to the EVMs and the petitioner has made false and unfounded allegations against the replying respondent and one Shri Pankaj Sharma without any proof. The replying respondent is not aware of any electricity failure in the premises where EVMs were kept and neither it is the duty of the replying respondent ensure safe keeping of EVMs, however, it is submitted that the petitioner is making these allegations just to find a justification for his election petition which otherwise is not maintainable by him.

That the contents of this para are wrong hence denied. It is wrong to say that EVMs were tampered with, it is not possible to tamper with the EVMs as they are designed to be proofed against such tampering otherwise, it would not have been possible to conduct free and fair elections. Further these allegations directly involve the Election Commission of India, which has not been made party in the election petition, as such the election petition is not maintainable at all. The petitioner is questioning the utility of the EVMs when he has been voted out of the seat and when he was elected, he did not question its utility and vulnerability to tampering, as such the election petition is a bundle of lies, full of repetitions without any merits or strengths and has been filed just for the sake of filing, hence, same is liable to be rejected.

22. Reply filed by respondent No. 1 has also been adopted on behalf of respondents No. 3 and 4.

23. While admitting the facts relating to holding of the election, offering no comments regarding "personal data" of the petitioner, denying some of the

averments for want of knowledge and the rest as requiring no comments/no reply, respondent No. 5 has taken the following stand vide para 16 of the reply filed by her:-

That the contents of para 16 of the petition indicates the tempering of EVMs. I paid visit to the site on 30-10-2012 where EVMs were lying under the tight security. I found no such error/deficiency in the EVMs. If this has happened, as alleged in the petition, I with due respect, the support the cause and demand repoll in the constituency. Tempering of EVMs is against the procedure for polling which should be condemned. I support the demand of re-polling, if it is found correct.

24. In replication to the written statement filed by respondent No. 1, the petitioner has refuted the averments set up by him and instead reiterated his own case.

25. On the pleadings on behalf of the contesting parties the following issues have been settled, out of which, issue No. 4 regarding maintainability has been ordered to be treated as a preliminary issue, as already noticed:-

1. Whether respondent No. 1, who belongs to Koli caste, had appealed to the voters of his caste for furtherance of his prospects in the election and is thus guilty of commission of a corrupt practice within the meaning of subsection (3) of Section 123 of the Representation of People Act, 1951? OPP

2. In case issue No. 1 is proved in affirmative, whether respondent No. 1 is guilty of exercising undue influence on the voters, which is a corrupt practice within the meaning of sub-section (2) of Section 123 of the Representation of People Act, 1951? OPP

3. Whether result of the election in which respondent No. 1 has been elected was materially affected by reception of void votes, as alleged? OPP

4. Whether in view of preliminary objection No. 1, petition is not maintainable? OPR Nos. 1, 3 & 4.

5. Whether the petitioner has no cause of action to file the present petition? OPR Nos. 1, 3 & 4.

6. Whether the petition has not been properly verified and the affidavit in support thereof is also vague and if so its effect? OPR Nos. 1, 3 & 4.

7. Whether copy of the petition supplied to respondent No. 1 is not a true copy of the election petition and has also not been properly verified, as required u/s 123 of the Representation of People Act, 1951 and if so its effect? OPR Nos. 1, 3 & 4.

8. Relief.

26. I have heard the learned Senior Counsel/Counsel for the contesting/appearing parties and gone through the records.

27. Plethora of case law has been cited on behalf of respondent No. 1 and the petitioner as follows:-

RESPONDENT NO. 1

1. Roop Lal Mehta Vs. Dhan Singh and Others,
2. Lakhi Prasad Agarwal Vs. Nathmal Dokania,
3. Parkash Chand v. State of Punjab and others, 1977 PAR 84;
4. Azhar Hussain Vs. Rajiv Gandhi,
5. Dhartipakar Madan Lal Agarwal Vs. Rajiv Gandhi,
6. Satyanarain Dudhani Vs. Uday Kumar Singh and Others,
7. Narain Chand Prashar Vs. Prem Kumar Dhumal and Others,
8. Smt. Mewa Devi Vs. The Civil Judge (Junior Division) and Others,
9. Smt. Vimla Devi Vs. State of Himachal Pradesh and Others,
10. Mr. V. Narayanaswamy Vs. Mr. C.P. Thirunavukkarasu,
11. Shyamdeo Pd. Singh Vs. Nawal Kishore Yadav,
12. Vadivelu Vs. Sundaram and Others,
13. Mahendra Pal Vs. Shri Ram Dass Malanger and Others,
14. Ajay Kumar Poeia Vs. Shyam and Others,
15. Borgaram Deuri Vs. Premodhar Bora and Another,
16. Jaipal Singh Vs. Smt. Sumitra Mahajan and Another,
17. M. Chinnasamy Vs. K.C. Palanisamy and Others,
18. Harmohinder Singh Pradhan Vs. Ranjeet Singh Talwandi and Others,
19. Kattinokkula Murali Krishna Vs. Veeramalla Koteswara Rao and Others,
20. Ishwardas Rohani Vs. Alok Mishra and Others,

PETITIONER

1. Harbans Singh Jalal, Ex-MLA Vs. Union of India (UOI) and Others,
2. Ram Prasad Sarma Vs. Mani Kumar Subba and Others,
3. Saleem Bhai and Others Vs. State of Maharashtra and Others,
4. Harkirat Singh Vs. Amrinder Singh,
5. Smt. Rekha Rana Vs. Jaipal Sharma and Others,
6. K.K. Ramachandran Master Vs. M.V. Sreyamakumar and Others,

7. Govind Singh Vs. Harchand Kaur,
8. Nandiesha Reddy Vs. Mrs. Kavitha Mahesh,
9. Kalyan Singh Chouhan Vs. C.P. Joshi,

BOTH BY RESPONDENT No. 1 AND PETITIONER

1. S. Raghubir Singh Gill Vs. S. Gurcharan Singh Tohra and Others,
2. S. Harcharan Singh Vs. S. Sajjan Singh and Others,
3. Hari Shankar Jain Vs. Sonia Gandhi,
4. Ponnala Lakshmaiah Vs. Kommuri Pratap Reddy and Others,

28. I have taken into consideration the principles of law laid down in the above authorities and borne the same in mind, which shall be referred to wherever necessary.

29. Issue No. 4, which is being disposed of as preliminary issue, is essentially based on Section 83 of 1951 Act, which lays down the requirement regarding contents of petition 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;

(b) shall set forth full particulars of any corrupt practice that the petitioner alleges including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and

(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:

[Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.]

(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition.

30. The law relating to "material facts" and "full particulars of any corrupt practice" has been succinctly crystallized by the Hon"ble Apex Court in Virender Nath Gautam Vs. Satpal Singh and Others, a case arising out of the final judgment and order dated 20.12.2004 of this court in Election Petition No. 2 of 2003, laying down as under vide paras 25 to 36 and 50:-

25. Before we deal with the contentions of the parties, it would be appropriate if we refer to the relevant provisions of the Act. The Preamble of the Act declares that the Act has been enacted

to provide for the conduct of elections of the Houses of Parliament and to the House or Houses of the Legislature of each State, the qualifications and disqualifications for membership of those Houses, the corrupt practices and other offences at or in connection with such elections and the decision of doubts and disputes arising out of or in connection with such elections.

26. Part I is Preliminary. Part II deals with qualifications and disqualifications for membership of Parliament and of State Legislatures. While Part III provides for issuance of notifications for elections, Part IV relates to administrative machinery for the conduct of elections. Sections 59 and 60 lay down manner and procedure of voting. Section 61 prescribes special procedure for preventing personation of electors. Section 62 relates to right to vote. It is a material provision and may be quoted in extenso;

62. Right to vote.-(1) No person who is not, and except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll of any constituency shall be entitled to vote in that constituency.

(2) No person shall vote at an election in any constituency if he is subject to any of the disqualifications referred to in section 16 of the Representation of the People Act, 1950 (43 of 1950).

(3) No person shall vote at a general election in more than one constituency of the same class, and if a person votes in more than one such constituency, his votes in all such constituencies shall be void.

(4) No person shall at any election vote in the same constituency more than once, notwithstanding that his name may have been registered in the electoral roll for the constituency more than once, and if he does so vote, all his votes in that constituency shall be void.

(5) No person shall vote at any election if he is confined in a prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police;

Provided that nothing in this sub-section shall apply to a person subjected to preventive detention under any law for the time being in force.

(6) Nothing contained in sub-sections (3) and (4) shall apply to a person who has been authorized to vote as proxy for an elector under this Act in so far as he votes as a proxy for such elector.

27. Conduct of elections has been dealt with in Part V. Part VI relates to "Disputes regarding elections". Section 80 requires any election to be questioned only by way of Election Petition. u/s 80A, it is the High Court which can try election petitions. Section 81 provides for presentation of election petition and prescribes the period of limitation. Section 82 declares as to who shall be joined as respondents to such Election Petition. Section 83 deals with contents of petition and reads thus-

83. Contents of petition-(1) An Election petition-

(a) shall contain a concise statement of the material facts on which the petitioner relies;

(b) shall set forth full particulars of any corrupt practice that the petitioner alleges including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and

(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:

Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.

(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition.

28. Section 100 enumerates grounds for declaring election to be void which inter alia includes improper reception, refusal or ejection of any vote or the reception of any vote which is void or there is non-compliance with the provisions of the Constitution or of the Act or Rules or orders made under the Act. Section 101 empowers the High Court to declare a candidate other than the returned candidate to have been elected. Section 123 declares certain practices as "deemed to be corrupt practices".

29. From the relevant provisions of the Act reproduced hereinabove, it is clear that an election petition must contain a concise statement of "material facts" on which the petitioner relies. It should also contain "full particulars" of any corrupt practice that the petitioner alleges including a full statement of names of the parties alleged to have committed such corrupt practice and the date and place of commission of such practice. Such election petition shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code") for the verification of pleadings. It should be accompanied by an affidavit in the prescribed form in support of allegation of such practice and particulars thereof.

30. All material facts, therefore, in accordance with the provisions of the Act, have to be set out in the election petition. If the material facts are not stated in a petition, it is liable to be dismissed on that ground as the case would be covered by clause (a) of sub-section (1) of Section 83 of the Act read with clause (a) of Rule 11 of Order 7 of the Code.

31. The expression "material facts" has neither been defined in the Act nor in the Code. According to the dictionary meaning, "material" means "fundamental", "vital", "basic", "cardinal", "central", "crucial", "decisive", "essential", "pivotal", indispensable", "elementary" or "primary". [Burton's Legal Thesaurus, (Third

edn.); p.349]. The phrase "material facts", therefore, may be said to be those facts upon which a party relies for his claim or defence. In other words, "material facts" are facts upon which the plaintiff's cause of action or the defendant's defence depends. What particulars could be said to be "material facts" would depend upon the facts of each case and no rule of universal application can be laid down. It is, however, absolutely essential that all basic and primary facts which must be proved at the trial by the party to establish the existence of a cause of action or defence are material facts and must be stated in the pleading by the party.

32. In the leading case of *Phillips v. Phillips*, (1878)4 QBD 127: 48 LJ QB 135, Cotton, L.J. stated:

What particulars are to be stated must depend on the facts of each case. But in my opinion it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard and tell them what they have to meet when the case comes on for trial.

33. In *Bruce v. Odhams Press Ltd.*, (1936)1 KB 697: (1936)1 All ER 287, Scott, L.J. referring to *Phillips v. Phillips* observed: (ALL ER p.294)

The cardinal provision in Rule 4 is that the statement of claim must state the material facts. The word "material" means necessary for the purpose of formulating a complete cause of action; and if any one "material" statement is omitted, the statement of claim is bad; it is "demurrable" in the old phraseology, and in the new is liable to be "struck out" under R.S.C. Order 25 Rule 4 (see *Phillips v. Phillips*); or "a further and better statement of claim" may be ordered under Rule 7.

34. A distinction between "material facts" and "particulars", however, must not be overlooked. "Material facts" are primary or basic facts which must be pleaded by the plaintiff or by the defendant in support of the case set up by him either to prove his cause of action or defence. "Particulars", on the other hand, are details in support of material facts pleaded by the party. They amplify, refine and embellish material facts by giving distinctive touch to the basic contours of a picture already drawn so as to make it full, more clear and more informative. "Particulars" thus ensure conduct of fair trial and would not take the opposite party by surprise.

35. All "material facts" must be pleaded by the party in support of the case set up by him. Since the object and purpose is to enable the opposite party to know the case he has to meet with, in the absence of pleading, a party cannot be allowed to lead evidence. Failure to state even a single material fact, hence, will entail dismissal of the suit or petition. Particulars, on the other hand, are the details of the case which is in the nature of evidence a party would be leading at the time of trial.

36. In *Halsbury's Laws of England*, (4th edn.); Vol. 36; para 38, it has been

stated;

38. The function of particulars is to carry into operation the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly and without surprises, and incidentally to reduce costs. This function has been variously stated, namely either to limit the generality of the allegations in the pleadings, or to define the issues which have to be tried and for which discovery is required. Each party is entitled to know the case that is intended to be made against him at the trial, and to have such particulars of his opponent's case as will prevent him from being taken by surprise. Particulars enable the other party to decide what evidence he ought to be prepared with and to prepare for the trial. A party is bound by the facts included in the particulars, and he may not rely on any other facts at the trial without obtaining the leave of the court.

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.

31. The above interpretation of "material facts" and "full particulars of any corrupt practice" referred to in clauses (a) and (b) of sub section (1) of Section 83 of 1951 Act, has also been reiterated in later judgments rendered by the Hon'ble Supreme Court in (1) Anil Vasudev Salgaonkar Vs. Naresh Kushali Shigaonkar, (2) K.K. Ramachandran Master Vs. M.V. Sreyamakumar and Others, (3) Nandiesha Reddy Vs. Mrs. Kavitha Mahesh, and (4) Ponnala Lakshmaiah Vs. Kommuri Pratap Reddy and Others,

32. For consideration and decision on the preliminary issue the instances of corrupt practices, nomenclatured by the petitioner as "illegal and unlawful means", detailed in sub paras 5.1 to 5.5 of this judgment shall be taken up one by one. I proceed to undertake the exercise.

5.1. As many as 989 (in fact 988) voters at Sr. Nos. 401 to 408, 410 to 1390 of polling station No. 55/52 of Lana Machher, who belong to State of Punjab, were got enrolled by respondent No. 1 with the help of Mr. Pankaj Sharma, SDM to vote for him, albeit the fact that they had voted in the election to the Punjab Legislative Assembly. It is alleged that they were "bogus" voters and were permitted to cast votes by Mr. Pankaj Sharma, SDM-cum-R.O., to help respondent No. 1 win election.

33. The averments regarding enrolment of 989 voters from Punjab have been set

up vide para 7 of the petition. Though, it is stated that these voters were got enrolled by respondent No. 1 with the help of Shri Pankaj Sharma, the then SDM Rajgarh, yet neither their names and addresses have been given nor copies of voter lists have been filed along with the petition. It is also not pleaded as to which constituency in the State of Punjab those voters belong. It is also not mentioned as to in which legislative constituency or constituencies of Punjab they had exercised their right of franchise and in which election. According to the petitioner "in fact they were bogus voters and were permitted to cast votes by Shri Pankaj Sharma, SDM cum RO to help respondent No. 1 to win the election", as if Shri Pankaj Sharma was physically present at Polling Booth No. 55/52 of Lana Machher to ensure that those voters were permitted to cast their votes to help respondent No. 1 to win the election, but without making even a demur about it at the time of voting and further pleading that they had in fact voted for respondent No. 1. The allegation on the face of it appears to be without any basis as copy of the final result sheet annexed with the petition would go to show that only 873 votes were polled at Polling Booth No. 55/52-Lana Machher. It being so, how could as many as 989 voters en-block vote for respondent No. 1.

34. Even otherwise voter lists are prepared under the provisions of the Representation of the People Act, 1950 (in short "1950 Act"), which is a complete code in itself laying down the procedure for filing of objections at the time of preparation of voter lists. However, it is neither pleaded nor shown that any such objection was raised by any one, including the petitioner, at the relevant time. It being so, an objection in that regard cannot be raised by way of election petition, as has been held by the Hon'ble Supreme Court in Shyamdeo Pd. Singh (para 24) and Vadivelu (para 18) supra, and by the Hon'ble Punjab and Haryana High Court in Roop Lal Mehta, (head note A), supra. Thus, the petition to this extent lacks in material facts within the meaning of clause (a) of sub section (1) of Section 83 of 1951 Act and is liable to be struck off under Order VI Rule 16 of the Code of Civil Procedure, 1908 (in short "CPC"), as laid down by the Hon'ble Supreme Court in para 8 in the case of Dharti Pakar, supra.

5.2. Respondent No. 1 was openly distributing liquor through the supporters in the constituency. The police had to register a case when the supporters of the petitioner nabbed a vehicle No. HP-16-4323, Hyundai, on road near village Dhar-Pajera distributing a case of liquor to Partap Singh S/o. Jalam Singh resident of village Talia-Bohal. The supporters of respondent No. 1 ran away leaving the vehicle. Resultantly, the supporters of the petitioner staged a dharna and raised slogans against respondent No. 1 for his illegal and unlawful activities. The police finding no alternative had to register FIR No. 97 dated 02.11.2012, at Police Station, Rajgarh, District Sirmour, against Partap Singh and others u/s 61 of the Punjab Excise (Amendment) Act, 1965 and Section 34 IPC. Both the cartons containing bottles of whisky, Officer's Choice, were taken into custody by the police.

35. The averments regarding distribution of liquor in the constituency by

respondent No. 1 through his "supporters" on the face of it appears to be a mere afterthought. The reasons to arrive at this inference are that in support of these averments the petitioner has filed copy of FIR dated 2.11.2012, u/s 61 of the Punjab Excise (H.P. Amendment) Act, 1965 and Section 34 IPC registered against one Partap Singh, son of Jalam Singh, resident of village Talia, Tehsil Rajgarh and another unknown person. On a bare perusal of the FIR, which is in Hindi, and its English translation, it is apparent that neither there is any mention about respondent No. 1 therein, nor there is any allegation that said Partap Singh and his unknown accomplice are supporters of respondent No. 1 or were in any way connected with him. Even there is no reference in the FIR that the liquor found in the vehicle was meant for distribution in the constituency in connection with on going election. Accordingly, the averments to this effect contained in para 7 of the petition, which do not disclose any cause of action are liable to be struck off under Order VI, Rule 16 CPC on the analogy of Dharti Pakar's case, supra.

5.3. The Respondent No. 1, also appealed to Koli caste voters to exercise vote being a candidate of Koli caste for him and not to vote for the petitioner who belongs to Chamar caste. It also resulted in undue influence and prevented the voters of Koli caste to exercise their vote with a free mind.

36. The mainstay of the attack led on behalf of respondent No. 1 against the petition on the ground of lack of material facts and full particulars is with regard to the appeal for votes in his favour and against the petitioner on the basis of caste allegedly made by respondent No. 1 during the election meetings, details whereof have been given in paras 8 to 14 of the petition as tabulated in para 9 of this judgment. It is contended that not even a single voter belonging to Koli caste has been named in these paras of the petition forming part of the audience attending those meetings. It is further argued that the allegations in these paras are based on oral appeals for votes in his favour and against the petitioner on caste basis and no documentary evidence in the form of audio-video CDs, cassettes and newspaper reports has been brought on record in support of these allegations. It is also not mentioned as to how many persons present in the election meetings were voters and from which caste. It is lastly urged that any appeal for votes on caste basis can be made only in secret meetings and not in open election meetings, as alleged by the petitioner and as such the allegations to this effect are liable to be struck off straightway.

37. Per contra, it is submitted on behalf of the petitioner that the material facts along with full particulars in support of the averments regarding appeal for votes on caste basis by respondent No. 1 for himself and against the petitioner have been pleaded in the petition, which can be established only by leading evidence in support thereof. It being so, the petition cannot be thrown out at the very threshold on flimsy preliminary objection raised on behalf of respondent No. 1 and instead is required to be put to trial.

38. On a bare reading of the averments set up vide paras 8 to 14 of the petition, what is culled out is tabulated in para 9 of this judgment. It contains the

respective dates and time, places, number of audience, names of some of the persons who formed part of the audience and the main speaker, who addressed the audience, which in itself are material facts.

39. It is settled that the material facts are primary facts, in absence whereof the petition would be rendered without disclosing any cause of action and thus liable to be struck off under Order VI, Rule 16 CPC. It is also settled that if full particulars are lacking the petition can be amended and amplified, but cannot be dismissed.

40. On a combined and harmonious reading of the petition as a whole except those portions thereof, which have already been found to be lacking in material facts and full particulars of the alleged corrupt practices and those which may be found so in latter part of this judgment, it is manifest that the averments regarding appeal for votes on caste basis attributed against respondent No. 1 fulfills the pre-requisite u/s 83 of 1951 Act, regarding disclosure of material facts and full particulars of the corrupt practice within the meaning of sub section (3) of Section 123 of 1951 Act based on the appeal by a candidate, as alleged in this case, to vote or refrain from voting for any person on the ground of caste etc. etc. These facts and particulars can be established only by way of adducing evidence during trial.

41. The contentions raised on behalf of respondent No. 1 as noticed hereinabove in para 37 of this judgment are in the nature of objections on merits and the same cannot be made basis for non-suiting the petitioner at the preliminary stage without putting the petition to trial for adjudging veracity or otherwise of the averments set up therein regarding appeal for votes in his favour and against the petitioner, on caste basis, which can be put to test only on the touchstone of established legal principles during trial.

5.4. The respondent No. 1 also indulged in tempering with the EVMs with the connivance of the local administration.

42. The averments regarding tampering with EVMs appear to be based on a cock and bull story. The averments detailed in para 15 of the petition that respondent No. 1 in connivance with the local administration got the electricity supply to Kisan Bhawan, Rajgarh, where EVMs were stored after polling till counting of votes, switched off during the night intervening 13/14-12-2012 from 11.00 PM to 7.00 AM and thereby tampered with the EVMs in connivance with his "accomplices" and that Shri Sanjiv Sharma and Smt. Vijay Laxmi Thakur had heard "unusual sounds and creaks" from the building of Kisan Bhawan during the night intervening 13/14-12-2012, who had also noticed in the early morning (on that day) that respondent No. 1 along with "some other persons" was leaving the Kisan Bhawan, also appear to be a mere afterthought for the reason that neither the petitioner nor his counting agent, Shri Chander Shekhar or the said Shri Sanjiv Sharma and Smt. Vijay Laxmi Thakur or any other person on behalf of the petitioner had lodged any report against the alleged happenings during the night

intervening 13/14-12-2012, when the EVMs were allegedly tampered with by the petitioner and his accomplices, till as late as 20.12.2012 and that too after declaration of the result leading to the defeat of the petitioner, when a legal notice of even date, photocopy of which has been brought on record, is said to have been sent to the Chief Electoral Officer, Himachal Pradesh, Shimla, by way of a fax message through Shri Bhupender Singh Thakur, Advocate, which does not contain any mention about failure of electricity supply to Kisan Bhawan, Rajgarh or hearing of sounds and creaks from the said Bhawan by Shri Sanjiv Sharma and Smt. Vijay Laxmi Thakur and their noticing respondent No. 1 along with some other persons leaving the Kisan Bhawan in the early morning on 14.12.2012. Strangely enough the allegation in the fax message is with regard to "a seal of the Electoral Box/Machine" having been found broken and "large scale tempering in other Electoral Voting Machines" "with the connivance of Security officials".

43. Copy of the representation said to have been submitted by the petitioner to the Returning Officer regarding seal of an EVM having been found broken during counting has also not been brought on record, which also lends credence to the inference that the allegation regarding tampering with EVMs is an afterthought.

44. The allegation that during counting 702 votes were found in the EVM at Booth No. 55/58-Jhandenwa Tikkeri, whereas in fact only 700 votes were polled in that booth is not borne out of the records as the final result sheet shows that in fact 702 votes were polled at the said booth.

45. The allegation regarding tampering with EVMs is of very serious nature and verges on commission of cognizable offences. Furthermore the prayer for scrapping of the system of holding election through EVMs, besides being beyond the scope of adjudication of the present petition and instead falling within the domain of the Election Commission of India and the Parliament and also having stood scrutiny of the highest court in the country, cannot be reversed on the mere asking of the petitioner.

5.5. The respondent No. 1, the returned candidate also distributed money to bribe the voters of the constituency apart from distributing the liquor. However, the petitioner is only confining to the corrupt practices committed by respondent No. 1, the returned candidate, as envisaged u/s. 123(3) and 123(2) of the Act as well as tempering the EVMs and casting of bogus votes.

46. Whereas the petitioner has himself abandoned the allegation of distribution of money by respondent No. 1 to bribe the voters in the constituency during election, the averments regarding distribution of liquor have already been held liable to be struck off being a mere afterthought. The above discussion brings me to hold that the election petition except the corrupt practice under sub section (3) of Section 123 of 1951 Act regarding the alleged appeal by respondent No. 1 to vote for him and against the petitioner on caste basis, lacks in material facts within the meaning of clause (a) of sub section (1) of Section 83 of 1951 Act and

is as such liable to be struck of to that extent and put to trial only for the corrupt practice under sub section (3) of Section 123 of 1951 Act. Ordered accordingly.