

(2011) 07 KAR CK 0220

In the Karnataka High Court

Case No : Misc. Cvl. No's. 3206 and 3207 of 2010 in Election Petition No. 5 of 2008

Sri. D.T. Sridhar

APPELLANT

Vs

Sri. B.K. Sangameshwar Merchant and Others

RESPONDENT

Date of Decision : 13-07-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 16, Order 7 Rule 11A
Representation of the Peoples Act, 1951 — Section 87

Citation : (2011) 07 KAR CK 0220

Hon'ble Judges : Ram Mohan Reddy, J

Bench : Single Bench

Advocate : P.S. Manjunath, for the Appellant; Nanjunda Reddy, for the Respondent

Judgement

Ram Mohan Reddy, J.—The first of these applications filed on 15/2/2010 by the 1st Respondent is u/s 87 of the Representation of People's Act, for short the "Act", read with Order VI Rule 16 of Code of Civil Procedure, 1908, for short "Code of Code of Civil Procedure, to strike out the pleadings in the Election Petition as unnecessary, frivolous and vexatious, while the second is under Order VII Rule 11(a) of CPC R/w Section 87 of the Act to reject the Election Petition as not disclosing a cause of action.

2. Before examining material facts and particulars in the election petition, reference may be made to the relevant provisions of the Act and Conduct of Election Rules, 1961, for short "Rules".

3. Section 83 of the Act provides for contents of Election Petition. Sub-Section 1(a) mandates statement of material facts, while Sub-Section 1(b) requires the setting forth all full particulars of any corrupt practice that the Petitioner alleges including as full a statement as possible of the names of parties alleged to have committed such a corrupt practice and the date and place of commission of each such practice. The proviso thereto states that when 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 particulars thereon. The prescription is Form No. 25, an affidavit under Rule 94A of the "Rules". A perusal of the contents of Form No. 25, being an affidavit, requiring the Election Petitioner to state on oath that the statements in the relevant paragraphs of the accompanying Election Petition about the commission of the corrupt practice and particulars of such corrupt practice mentioned in the paragraphs of the said petition and also the schedule annexed thereto are true to his knowledge/information.

4. Material facts and particulars set out in the memorandum of Election Petition, briefly stated, are:

(a) In paragraph 4, it is alleged that initially after the completion of the counting of votes on 25/5/2008, the 2nd Respondent was said to have been duly declared elected by a slender majority, whence the counting agent of the 2nd Respondent came out of the counting hall and announced that the 2nd Respondent had won the election, which was also carried out on "E" TV Kannada and broadcast over AIR as also other media and when the 2nd Respondent came to the counting center, surprisingly was informed that it was the applicant who was declared elected, as a mistake had occurred in calculating the number of postal ballot papers polled and on a re-calculation of the postal ballots, the applicant was found to have polled 53,257 votes as against 52,770 votes polled by the 2nd Respondent. It is alleged that the re-calculation without written application by the applicant and in the absence of the counting agents of the 2nd Respondent, tantamount to a manipulation in favour of the applicant with ulterior motive and a fraud practiced by the Returning Officer.

(b) In paragraphs 5 to 10, it is alleged that the number of postal ballots sent and received by the Returning Officer ought to have been counted first and thereafter the counting of votes as recorded in the Electronic Voting Machine (EVM) in accordance with Rule 54A of the "Rules" and further that the total voters fall short by 15 numbers since according to the Returning Officer, the total number of votes polled were 1,24,876 as per Schedule-9 while the number of votes polled was 1,25,391 as declared in Form No. 20, Schedule-10. It is the further allegation of the Election Petitioner that the Returning Officer and the Asst. Returning Officer, in collusion with the applicant, manipulated the figures so as to tilt the election in favour of the applicant.

(c) In paragraphs 11 to 17, it is alleged that the 1st Respondent having caused advertisements in the newspapers, on televisions i.e., E TV and Udaya TV, printed pamphlets, coupled with the Election Observer's remarks in the register for election expenses maintained by the applicant, having not furnished the true and correct statement of election expenses, in other words, suppressed the exact amount spent/incurred, if calculated on the fixed tariff basis, for such advertisements, totals to excess of the maximum prescribed limit of Rs. 10,00,000/- (Rupees Ten Lakhs only) as election expenses.

(d) In paragraphs 18 to 20, it is stated that cheques of even date 31/3/2008 for Rs. 2,000/- (Rupees Two Thousand only) to each of 3,500 Stree Shakthi Swasahayaka Sangha (SSS Sangha) totaling to Rs. 70,00,000/- (Rupees Seventy Lakhs only), issued by the 1st Respondent at a public meeting held on 31/3/2008 promising to construct buildings, extend financial assistance to the SSS Sanghas, Samajas, Societies, including grant of sites in consideration of the office bearers of the caste Associations, voting, canvassing and persuading their caste and community men to vote in favour of the applicant, tantamount to bribery.

5. In the affidavits accompanying the applications, the deponent contends that all the allegations noticed supra in the Election Petition are vague, unnecessary, vexatious, frivolous and do not tantamount to corrupt practices, neither discloses any cause of action to fall u/s 100 of the Act, nor triable issues. The allegations of bribery, it is stated, was on 31/3/2008, anterior to the issue of calendar of events, as also whence the applicant submitted his nomination paper, as a candidate, on 25/4/2008.

6. The 1st application is opposed by filing a counter affidavit dt. 18/3/2010 of the Election Petitioner inter alia contending that the allegations in the Election Petition containing material facts and material particulars are neither vague, vexatious or in the nature of surmises and conjectures, much less imaginary. It is further stated that in the trial, Petitioner would have a chance of success in establishing the allegations and therefore the Election Petition cannot be rejected summarily. The applicant having held out to be a candidate and in order to improve his prospects in the election having not denied the fact of payment of Rs. 2,000/- to each of the 3,500 SSS Sanghas by way of cheques dt. 31/3/2008, much before the filing of nomination by the applicant, would not take away the fact of bribery for votes in view of Section 123(1)(A) of the Act, as observed by the Apex Court in C. Narayanaswamy Vs. C.K. Jaffer Sharief and Others, .

7. The 2nd application to reject the Election Petition as it does not disclose a cause of action, is accompanied by an affidavit of the applicant stating that the entire pleadings in the Election Petition are liable to be struck off as being unnecessary, vexatious and frivolous, in the absence of disclosure of a cause of action and as no triable issue arise.

8. This application is resisted by filing counter affidavit of the Election Petitioner reiterating the averments set out in the Election Petition and that Order VII Rule 11 CPC has no applicability to the Election Petition. It is further stated that in view of issues framed, based upon the pleadings of the parties, it cannot be said that triable issues do not arise.

9. The first of the contentions advanced by the learned Sr. Counsel for the applicant is that, assuming without concealing, that 256 postal ballots were issued to "Seva Matadararu" and 107 postal ballots to "Home Guards", totaling to 363 ballots if assumed to be converted into votes cast in favour of the unsuccessful candidate, Respondent No. 2 (votes which were not properly

accounted for), nevertheless, the difference in total votes polled as between the applicant and the unsuccessful candidate is 487 votes and therefore cannot result in declaring as void, the election of the applicant. The non-compliance with Rule 54A of the Rules in not counting the postal ballots before counting the votes polled, as recorded in the EVMs", being a mere irregularity, it is contended, does not vitiate the elections so as to conclude that the declaration of the elections is void.

10. Per contra, Sri. P.S. Manjunath, Learned Counsel for the Election Petitioner, contends that failure of the Returning Officer to comply with Rule 54A of the Rules mandating the counting of postal ballots first and thereafter the ballots registered in the EVMs", was with an ulterior motive to tilt the Election in favour of the applicant and hence a ground to declare as void the Election of the applicant, u/s 100(l)(d)(iv) of the Act. Learned Counsel hastens to add that, one ballot box was kept in Sri. Veerabhadreshwara Theatre, Bhadravathy, where election personnel were trained, so as to enable 1,138 voters, drafted for election duty to cast their votes, nevertheless, only 525 ballots were counted, the material facts and particulars of which are more fully pleaded in paragraphs 5 to 10 of the Election Petition. In addition Learned Counsel contends that in paragraph 4 of the Election Petition, it is alleged that recalculation of the postal ballots by the Returning Officer on the oral instruction of the applicant, without a written application, and in the absence of the 2nd Respondent's polling agents, much after the 2nd Respondent was informed of having secured the highest number of votes, there was a manipulation by the Returning Officer to favor the applicant, which the Petitioner has a fair chance to establish at a trial.

11. Learned Sr. Counsel for the applicant next contends that there being no dispute that 1,24,891 votes in total were polled and recorded in the EVMs" as well as postal ballots, in conformity with the entries recorded by the Returning Officer in Part I and II of Form No. 17C issued under Rules 49S and 56C(2) of the "Rules", accounting for the total number of votes recorded, the mere wrong mentioning in the document Schedule-9 to the Election Petition, of the total number of voters as 1,24,866, having exercised their franchise issued by the Returning Officer, not being a statutory form under the Act or Rules, is neither credible evidence nor a formidable ground to contend that there has been an Election malpractice or a triable case made out by the Election Petitioner.

12. This contention is opposed by Sri. P.S. Manjunath on the premise that what is required in law is to plead material facts and material particulars and not the evidence, since in a trial, the truth would emanate and therefore the court cannot summarily reject the petition. According to the Learned Counsel, Schedule-9 to the Election Petition, a document issued under the hands of the Returning Officer, prima facie cannot be rejected in the absence of a full fledged trial and on obtaining/summoning Form No. 17C of the "Rules". Learned Counsel hastens to add that Section 83(1)(a) of the Act requires the making of concise statement of material facts of which the Election Petitioner relies upon, while

Clause (b) requires setting forth full particulars of corrupt practices.

13. Sri. D.N. Nanjunda Reddy, learned Sr. Counsel for the applicant, contends that the pleadings in paragraphs 11 to 17, are in the nature of imagination and do not disclose allegations over expenditure incurred by the applicant or his authorized agent in excess of the prescribed limit. Elaborating on the said contention, it is submitted that the advertisements in the newspapers, printed pamphlets and the TV coverage, allegedly at low tariffs and not at the standard tariffs, as set out in the Election Petition, cannot constitute a cause of action for a roving enquiry into the expenses, in the absence of the applicant having incurred the same. In addition, it is contended that allegations of failure on the part of the applicant to maintain accounts as required by Section 77(I) and (2) of the Act, even if proved, will not materially affect the election result, since what can be brought u/s 123(6) of the Act, is the corrupt practice under Sub-section (3) of Section 77 of the Act, i.e., incurring or authorizing expenditure in excess of the amount prescribed. Even otherwise, it is contended that the averments merely state that non-maintaining of true and correct accounts by the applicant is a violation of Section 77 of the Act and no averment is made that the result of the Election, in so far as the applicant is concerned, is materially affected due to the alleged corrupt practice, so as to fall within Section 100(I)(d)(iv) of the Act.

14. Sri. P.S. Manjunath, Learned Counsel, contends that the non-disclosure of the true and correct amounts and expenditure incurred by the applicant, is in violation of Section 77 of the Act and hence falls u/s 100(I)(d)(iv) of the Act, being a corrupt practice, is a ground to declare the election void. The material facts and material particulars of the corrupt practice, according to Learned Counsel, is elaborately pleaded in paragraphs 11 to 17, which when proved in evidence, would establish the corrupt practice and hence a triable case is made out.

15. Learned Counsel hastens to add that the advertisements carried out in the newspapers and the TV channels as well as printed pamphlets are not denied by the applicant.

16. The last of the contentions advanced by the learned Sr. Counsel for the applicant is that the allegations set out in paragraphs 18 to 20 over acts of bribery by issuing cheques dt. 31/3/2008 for Rs. 2,000/- to each of the 3,500 SSS Sanghas, at the threshold is unsustainable as the applicant was not a candidate on 31/3/2008 while nomination was filed, as a candidate, on 24/5/2008 and hence anterior in point of time. According to the learned Sr. Counsel, Section 79(b) of the Act, as amended, excludes the acts done by a candidate up to the date he is nominated as a candidate and therefore the allegation, if proved, would not amount to bribery by the applicant. It is further contended that the allegation by itself and nothing more does not constitute an inducement to a voter to cast his vote in favour of the applicant for a consideration, as the SSS Sanghas and other institutions are not voters.

17. In contrast, Learned Counsel for the Election Petitioner contends that though the act of bribery is prior to 25/4/2008, the date of filing of nomination by the applicant as a candidate, nevertheless, was a Member of the Legislative Assembly immediately preceding the Elections (since the previous Assembly was dissolved) and acted with the prospects of garnering votes of the members of the SSS Sanghas and other caste and community leaders, on promise of sites, construction of buildings, extension of financial benefits for their communities.

18. Having heard the learned Sr. Counsel for the applicant and the Learned Counsel for the Election Petitioner, perused the pleadings, the question for decision making is,

Whether the averments in the Election Petition are vague, frivolous, unnecessary and vexatious, not disclosing a cause of action, hence deserves to be struck off and consequently reject the Election Petition, as contended by the learned Sr. Counsel for the applicant?

19. In order to better appreciate the rival contentions of the parties, it is useful to refer to the observations of the Apex Court in the following reported opinions relied upon by the Learned Counsel for the parties:

(1) In Dhartipakar Madan Lal Agarwal Vs. Rajiv Gandhi, , the Apex Court at paragraph 8 (page 103) observed, thus:

The first question which falls for our determination is whether the High Court had jurisdiction to strike out pleadings under Order VI Rule 16 of the CPC and to reject the election petition under Order VII Rule 11 of the Code at the preliminary stage even though no written statement had been filed by the Respondent. Section 80 provides that no election is to be called in question except by an election petition presented in accordance with the provisions of Part VI of the Act before the High Court. Section 81 provides that an election petition may be presented on one or more of the grounds specified in Section 100 by an elector or by a candidate questioning the election of a returned, candidate. Section 83 provides that an election petition shall contain a concise statement of material facts on which the Petitioner relies and he shall set forth full particulars of any corrupt practice that he may allege including full statement 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. Section 86 confers power on the High Court to dismiss an election petition which does not comply with the provisions of Sections 81 and 82 or Section 117. Section 87 deals with the procedure to be followed in the trial of the election petition and it lays down that subject to the provisions of the Act and of any rules made there under, every election petition shall be tried by the High Court as nearly as may be in accordance with the procedure applicable to the trial of suits under the Code of Civil Procedure, 1908. Since provisions of CPC apply to the trial of an election petition, Order VI Rule 16 and Order VI Rule 17 are applicable to the proceedings relating to the trial of an election petition subject to the provisions of the Act. On

a combined reading of Sections 81, 83, 86 and 87 of the Act, it is apparent that those paragraphs of a petition which do not disclose any cause of action, are liable to be struck off under Order VI Rule 16, as the Court is empowered at any stage of the proceedings to strike out or delete pleading which is unnecessary, scandalous, frivolous or vexatious or which may tend to prejudice, embarrass or delay the fair trial of the petition or suit. 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 on examination of the plaint or the election petition finds that it does not disclose any cause of action it would be justified in striking out the pleadings. Order VI Rule 16 itself empowers the Court to strike out pleadings at any stage of proceedings which may even be before the filing of the written statement by the Respondent or commencement of the trial. If the Court is satisfied that the election petition does not make out any cause of action and that the trial would prejudice, embarrass and delay the proceedings, the Court need not wait for the filing of the written statement, instead it can proceed to hear the preliminary objections and strike out the pleadings. If after striking out the pleadings the Court finds that no triable issues remain to be considered, it has power to reject the election petition under Order VII Rule 11.

Further at paragraph 14 (page 107) observed thus:

Before we consider various paragraphs of the election petition to determine the correctness of the High Court order we think it necessary to bear in mind the nature of the right to elect, the right to be elected and the right to dispute election and the trial of the election petition. Right to contest election or to question the election by means of an election petition is neither common law nor fundamental right instead it is a statutory right regulated by the statutory provisions of the Representation of the People Act, 1951. There is no fundamental or common law right in these matters. This is well-settled by catena of decisions of this Court in *N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others*, ; *Jagan Nath Vs. Jaswant Singh and Others*, and *Jyoti Basu and Others Vs. Debi Ghosal and Others*, These decisions have settled the legal position that outside the statutory provisions there is no right to dispute an election. The Representation of the People 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 provisions of the CPC are applicable to the extent as permissible by Section 87 of the Act. The scheme of the Act as noticed earlier would show that an election can be questioned under the statute as provided by Section 80 on the grounds as contained in Section 100 of the Act. Section 83 lays down a mandatory provision in providing 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 it 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 u/s 100 of the Act it must fail at the threshold. Allegations of corrupt practice are in the nature of criminal charges, it is necessary that there should be

no vagueness in the allegations so that the returned candidate may know the case he has to meet. If the allegations are vague and general and the particulars of corrupt practice are not stated in the pleadings, the trial of the election petition cannot proceed for want of cause of action. The emphasis of law is to avoid fishing and roving inquiry. It is therefore necessary for the Court to scrutinize the pleadings relating to corrupt practice in a strict manner.

Further at paragraph 20 (page 111) observed thus:

Section 77 requires a candidate to keep a separate and correct account of all expenditure "in connection with the election incurred or authorized by him or by his election agent" between the date of his nomination and the date of declaration of the result of the election. The candidate is required to maintain account of only that expenditure which he or his election agent may have authorized before the expenditure was actually incurred, which would imply that the candidate or his election agent undertook to reimburse the expenses which may have been authorized by him or his election agent to be spent at the election. In order to constitute a corrupt practice as contemplated by Sections 77 and 123(6) it is necessary to plead requisite facts showing authorization, or undertaking of reimbursement by the candidate or his election agent. A mere vague and general statement that the candidate and his workers with his consent spent money in election in excess of the permissible ceiling would not be sufficient to constitute corrupt practice.

(2) In *Harkirat Singh Vs. Amrinder Singh*, , the Apex Court at paragraph 45 (page 722) observed thus:

From the above provisions, 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.

(3) In *A. Neelalohithadasan Nadar Vs. George Mascrene and Others*, , the Apex Court at paragraph 11 (page 186) observed thus:

11. In view of the above it is the settled position that out of the two competing principles, the purity of election principle must have its way. Section 94 of the Act cannot be pressed into service to suppress a wrong coming to light and to protect a fraud on the election process.

(4) In *Subhash Desai Vs. Sharad J. Rao and Others*, , the Apex Court at paragraph 18 (page 456) observed thus:

On behalf of the Appellant, it was then pointed out that in election petition, while alleging corrupt practices, reference has been made in respect of the speeches and publications, of period prior to 31-1-1990, which was the date when nomination papers were filed. The publications and speeches alleged to have been made prior to 31-1-1990 have to be ignored because the framers of the Act, required the High Court to judge the conduct of the candidate, his agent or persons with the consent of the candidate or his election agent only after a person becomes a candidate for the particular election. A person becomes a candidate for the election in question only after filing the nomination paper. In this connection, reference may be made to Section 79(b) of the Act which defines "candidate" to mean a person, who has been or claims to have been duly nominated as a candidate at any election. Section 34 of the Act says that a candidate shall not be deemed to be duly nominated for election from a constituency unless he deposits or causes to be deposited the amounts prescribed in the said section. When a person becomes a candidate, was examined by this Court in the well-known case of Indira Nehru Gandhi v. Raj Narain 195 Supp SCC 1 and it was held: (SCC p. 64, para 146)

The 1951 Act uses the expression "candidate" in relation to several offences for the purpose of affixing liability with reference to a person being a candidate. If no time be fixed with regard to a person being a candidate it can be said that from the moment a person is elected he can be said to hold himself out as a candidate for the next election.

Recently, this Court in the case of Mohan Rawale Vs. Damodar Tatyaba alias Dadasaheb and Others, has said:

We hold that all the averments in paragraphs 1 to 20 of the memorandum of election petition insofar as they refer to a period prior to 23-4-1991 cannot amount to allegations of corrupt practice.

This cut-off date 23-4-1991 was fixed with reference to the date when nomination papers were filed by the Appellant concerned, because since that date the Appellant will be deemed to have legally acquired the status of a candidate. According to us, any allegation of corrupt practice against the Appellant, made by the Respondent in respect of the period prior to the filing of nomination by the Appellant on 31-1-1990, cannot be taken into consideration for judging the legality or validity of his election.

(5) In Dhartipakar Madan Lal Agarwal Vs. Rajiv Gandhi, , the Apex Court at paragraphs 17, 18 and 19 observed thus:

17. Learned Counsel for the first Respondent made an attempt to show that the pleading contains the relevant material facts. According to him, paragraph 39 of the election petition sets out the expenses incurred by the Appellant per vehicle per day and the total number of vehicles used by him It was also contended that the price of the newspaper Nagamangala Mitra per copy was mentioned and the total number of copies purchased for distribution to the voters was also

mentioned. It was argued that those were the material facts and by themselves they proved that the Appellant had incurred an expenditure exceeding the prescribed limit. We are unable to accept this contention. After setting out those figures, the averment found in the election petition is only to the effect that said cost incurred by the Appellant had not been furnished in his statement of account. The fact that in the last part of the said sentence, it was alleged that there was contravention of Section 123(6) of the Act, would not come to the aid of the first Respondent to contend that the relevant material fact of excessive expenditure over and above the prescribed limit had been pleaded. We must also refer to the fact that for the purpose of Section 100(1)(d)(iv), it is necessary to aver specifically that the result of the election insofar as it concerns a returned candidate has been materially affected due to the said corrupt practice. Such averment is absent in the petition.

18. We shall now proceed to the second limb of the argument of the Appellants counsel. The High Court has held that the Appellant had not maintained true and correct account of expenditure incurred or authorized and the same amounted to corrupt practice. "Corrupt practices" have been set out in Section 123 of the Act. According to the first Respondent, the Appellant is guilty of a corrupt practice described in Sub-section (6) of Section 123. Under that Sub-section the incurring or authorizing of expenditure in contravention of Section 77 of the Act is a corrupt practice. Section 77 provides that every candidate at an election shall keep a separate and correct account of all expenditure in connection with the election incurred or authorized by him or by his election agent and that the accounts shall contain such particulars as may be prescribed. Rule 86 of the Conduct of Election Rules, 1961 sets out the particulars to be contained in the account of election expenses. Sub-sections (1) and (2) of Section 77 deal only with the maintenance of account Sub-section (3) of Section 77 provides that the total of the election expenses referred to in Sub-section (1) shall not exceed such amount as may be prescribed. Rule 90 of the Conduct of Election Rules prescribes the maximum limit for any Assembly Constituency. In order to declare an election to be void, the grounds were set out in Section 100 of the Act. Sub-section (1)(b) of Section 100 relates to any corrupt practice committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent. In order to bring a matter within the scope of Sub-section (1)(b), the corrupt practice has to be one defined in Section 123. What is referred to in Sub-section (6) of Section 123 as corrupt practice is only the incurring or authorizing of expenditure in contravention of Section 77. Sub-section (6) of Section 123 does not take into its fold, the failure to maintain true and correct accounts. The language of Sub-section (6) is so clear that the corrupt practice defined therein can relate only to Sub-Section 3 of Section 77 i.e. the incurring or authorizing of expenditure in excess of the amount prescribed. It cannot by any stretch of imagination be said that non-compliance with Section 77(1) and (2) would also fall within the scope of Section 123(6). Consequently, it cannot fall u/s 100(1)(b). The attempt here by the first

Respondent is to bring it within Section 100(1)(d)(iv). The essential requirement under that Sub-section is that the result of the election insofar as it concerns that returned candidate has been materially affected. It is needless to point out that failure on the part of the returned candidate to maintain accounts as required by Section 77(1) and (2) will in no case affect, and much less materially, the result of the election.

19. This view has been expressed by this Court in *Dalchand Jain v. Narayan Shankar Trivedi and Anr.*, A Bench of three Judges held that it is only Sub-Section 3 of Section 77 which can be invoked for a corrupt practice u/s 123(6) and the contravention of Section 77 Sub-section (1) and (2) or the failure to maintain correct accounts with the prescribed particulars does not fall u/s 123(6). The Bench has referred to several earlier decisions of the High Court and the decision of this Court in C.A. No. 1321 of 1967 dated 22.3.1968.

20. Keeping in mind the aforesaid settled legal principles, an examination of paragraphs 4 to 10 of the Election Petition, noticed supra, prima facie contain material facts as also particulars of allegations over violation of Rule 54A of the Rules in the matter of counting of votes received by post, in other words, postal ballots, and in that view of the matter it cannot be said are unnecessary, frivolous, vexatious or not to constitute a cause of action, much less a triable issue. The averments are concise statements of material facts and do not call for striking down the said paragraphs, much less reject the petition. Though it is contended that adding up of the number of postal ballots allegedly not accounted for, and assuming those votes to be in favour of the 2nd Respondent, would not materially affect the declaration of the election, is unacceptable, since it is at a trial that the number of ballots both postal and recorded in EVMs", as well as violation of Rule 54A and total number of voters, could be brought to fore and therefore a chance to succeed in establishing a ground u/s 100(1)(d)(iv) of the Act. In that view of the matter, the 1st contention must necessarily fail.

21. The 2nd contention over material facts and material particulars set out in paragraphs 11 to 17 could be dissected into two parts. One, the allegations of non-compliance with Section 77 of the Act, a corrupt practice falling u/s 123(6) and as a consequence u/s 100(1)(d)(iv) of the Act and the other is, failure of the applicant to maintain accounts as required by Section 77(1) and (2) of the Act.

(i) The 1st part that certain advertisements in newspapers, TV channels and printed pamphlets were not accounted for and those accounted were short accounted, coupled with the Election Observer's remarks on the register of accounts maintained by the applicant towards election expenses, it is argued, are material facts and particulars, which when proved would establish incurring of expenses by the applicant in excess of the prescribed limit of Rs. 10,00,000/- (Rupees Ten Lakhs only), in other words, if the calculation of expenses is worked out on the basis of the tariff alleged in the petition, it would exceed the prescribed limit. The mere contention that there is violation of Section 77 of the Act, does not by itself and nothing more come to the aid of the election Petitioner

though material facts of expenditure in excess of the prescribed limit is, in fact, pleaded. Sub-section (3) of Section 77, as rightly pointed out by the learned Sr. Counsel for the applicant, calls forth allegations of material particulars and facts over expenses actually incurred or authorized by the applicant and not mere statements over possibility of the applicant to have expended moneys towards the advertisements, etc., in accordance with the tariff as shown in the Election Petition. In addition, in order to fall u/s 100(l)(d)(iv), it must be averred that the result of the election in so far as it concerns the applicant, the returned candidate, is materially affected due to the said corrupt practice. Such an averment is not forthcoming in the Election Petition.

(ii) Yet again, Section 83 of the Act provides for contents of an Election Petition and the proviso states that where Petitioner alleges 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. Rule 94A of the Rules require an affidavit referred to in Sub-section (l) of Section 83 of the Act to be sworn to before a Magistrate or a Notary Public and shall be in Form No. 25. A perusal of the affidavit dt. 8/7/2008 accompanying the Election Petition sworn to before the Oath Commissioner, is not in the prescribed Form No. 25, since the words "corrupt practice" and "particulars of such corrupt practice" are not forthcoming, except to state that particulars in all the paragraphs in the Election Petition are true to the deponent's knowledge.

(iii) The submission as regards violation of Subsections (1) and (2) of Section 77 of the Act in not maintaining a true and correct account of the election expenses to fall within the scope of Sub-section (6) of Section 123 is but a specious plea. Under Sub-section (6) of Section 123 of the Act, the incurring or authorizing of expenditure in contravention of Section 77 of the Act, is a corrupt practice, in other words, what is contemplated by Sub-section (6) of Section 123 is corrupt practice in incurring or authorizing expenditure in contravention of Sub-section (3) of Section 77 of the Act and does not take into fold failure to maintain true and correct accounts. In that view of the matter, the material facts and material particulars in paragraphs 11 to 17, even if proved in a trial, do not materially affect the result of the election and therefore deserves to be struck off.

22. The last of the contentions need not detain the court for long. The applicant having filed nomination as a candidate on 25/4/2008 meaning thereby a person who has been or claims to have been duly nominated as a candidate at an election u/s 79(b) and for the purpose u/s 34 of the Act. The petition averments relating to accusation of bribery said to have been committed on 31/3/2008 was much anterior to the date of filing of nomination on 25/4/2008, whence the applicant was deemed to have legally acquired the status of a candidate. In that view of the matter and in the light of the observations of the Apex Court *supra*, it is impermissible to take into consideration any allegation of corrupt practice against the applicant having occurred antecedent to 24/5/2008 i.e., prior to the nomination, for judging the legality and validity of his election. The mere

encashment of the cheques issued to the SSS Sanghas after the declaration of results, by itself and nothing more cannot materially affect the validity of the applicant's election. In that view of the matter, the pleadings contained in paragraphs 18 to 20 require to be struck of.

In the result, the 1st application is allowed in part and the 2nd application dismissed. Pleadings in paragraphs 11 to 17 and 18 to 20 of the Election Petition are struck of and as a consequence, Issue Nos. 3, 4 and 5 stand deleted.

In the peculiar facts of the case, there shall be no order as to costs.