

(1994) 08 BOM CK 0073
In the Bombay High Court
Case No : Election Petition No. 20 of 1990

Vijay Baburao Kamble

APPELLANT

Vs

Madhukar Sarpotdar and Others

RESPONDENT

Date of Decision : 09-08-1994

Acts Referred:

Representation of the People Act, 1951 — Section 79, 82, 86

Citation : (1995) 2 BomCR 53 : (1995) 97 BOMLR 867

Hon'ble Judges : M.S. Rane, J

Bench : Single Bench

Advocate : M.P. Vashi and M.M. Vashi, for the Appellant; Jai Chinai, Erach H. Kotwal and Balkrishna Joshi, instructed by Vilas Joshi of Apte and Co. for the Respondents No. 1, for the Respondent

Final Decision : Dismissed

Judgement

M.S. Rane, J.—This petition is being disposed of on an application submitted by and on behalf of the 1st respondent u/s 86(1) of the Representation of the People Act, 1951, (hereinafter for the sake of brevity referred to as "the said Act") for non-joinder of the necessary party, namely Subhash Martand Parkar, one of the duly nominated candidates for the constituency in question and who was later on appointed as Election Agent, after he withdrew his nomination, by returned candidate, - the 1st respondent herein, and who acted as an Election Agent for the 1st respondent, as mandated by the provisions of section 82(2) of the said Act.

2. This petition is filed in the year 1990. Recording of the evidence is over. The application in terms aforesaid is moved at the stage of its arguments.

3. Although a detailed reference in respect of factual aspects may not be necessary for the purpose of disposal of this application, certain facts as are considered relevant and necessary have been adverted to.

4. The General Elections for Maharashtra Legislative Assembly were held on 27th

February, 1990. The petitioner and respondent Nos. 1 to 11 herein were the contesting candidates from 37-Kherwadi Constituency in Greater Bombay, (hereinafter referred to as the "said constituency" for the sake of brevity). Counting was done on 1st March, 1994. The 1st respondent secured 42,742 votes which was the highest and the petitioner secured 41,948 votes. The votes secured by the other candidates were much smaller. The 1st respondent was declared to have been elected by a narrow margin of 794 votes over his next rival - the petitioner herein, by the Returning Officer from the said constituency. Exh.-A to the petition mentions the particulars of the result of the said election containing particulars such as names of the contesting candidates from the said constituency, the votes secured by the respective contesting candidates and votes declared as invalid, etc. The petitioner was sponsored by the Indian National Congress Party while the 1st respondent was the candidate of the Shivsena put up by the alliance of Shivsena - Bhartiya Janata Party (in short "BJP"). Other candidates were either put up by the different political parties or independents.

5. The petitioner in his petition has challenged the said election of the 1st respondent alleging corrupt practices and wrongful rejection of his application for recounting of votes by the Returning Officer. In that this is what the petitioner in para 4 of his petition has stated :

"The petitioner states that the petitioner is filing this petition challenging the election of the first respondent as the first respondent and/or his election agents and/or any other person with the consent of the first respondent, have committed corrupt practices within the meaning of the provisions of the Representation of the People Act, 1951, (hereinafter referred to for the sake of brevity as "the said Act"). The petitioner is also challenging the order of the Returning Officer rejecting the application made on behalf of the petitioner by his Chief Election Agent for recounting of votes."

6. The relief of this petition claimed by the petitioner runs as under :

(a) That it be declared that the election of the first respondent to the Maharashtra Legislative Assembly held on 27-2-1990 from Constituency No. 37, Kherwadi Constituency (Greater Bombay), is null and void;

(b) That the petitioner be declared as an elected candidate to the Maharashtra Legislative Assembly from the said 37-Kherwadi Assembly Constituency, the election to which was held on 27-2-1990.

(c) That the order passed by the Returning Officer on 1-3-1990 rejecting the recount application made by the petitioner's counting agents, be quashed and set aside.

(d) That this Hon'ble Court be pleased to order and direct the recounting of the total votes cast in the said election viz., Maharashtra Assembly Election, held on 27-2-1990 from the said Constituency No. 37, Kherwadi Assembly Constituency,

and declare the petitioner as an elected candidate from the said constituency on ascertaining that the petitioner has secured higher number of valid votes than the first respondent on recounting of votes.

7. It is necessary to state at this stage that during the course of the trial, the petitioner gave up his challenge so far it is related to the rejection of his application by the Returning Officer for recounting of votes and consequentially reliefs in terms of Prayers (c) and (d) quoted above will no more survive.

8. Thus, by reading the reliefs in terms of prayers (a) and (b) claimed by the petitioner mentioned above it would be noticed that the petitioner has sought declaration to the effect that election of the 1st respondent to the said constituency be declared as null and void and vide prayer (b) he has sought further declaration that he be declared as have been duly elected candidate from the said constituency.

9. The challenge to the validity of the election of the 1st respondent is made on the ground that his election agent and others have committed corrupt practices u/s 123(3) and 123(3-A) of the said Act, which the petitioner himself summarises in para 42 of his petition as under :

"The petitioner states that as stated hereinabove, the first respondent and his agents with his consent have indulged into corrupt practices listed u/s 123(2), 123(3) and 123(3-A) of the said Act. The petitioner submits that the respondent No. 1 or his said agents or the said other persons viz., Shri Thackeray and the said various Shiv Sena leaders with the consent of the respondent No. 1 appealed to vote on the ground of the religion of the respondent No. 1 i.e. "Hinduism" for the furtherance of the prospects of the election of the respondent No. 1 or for prejudicially affecting the election of the other candidates in the said election including the petitioner and therefore, have committed and/or indulged into corrupt practices as defined u/s 123(3) of the said Act and therefore, the said election of the respondent No. 1 is liable to be declared as null and void. The petitioner submits that the respondent No. 1 and/or his said agents and/or the various Shivsena leaders including Shri Thackeray with the consent of the respondent No. 1 or his election agent, for the furtherance of the prospects of the election of the respondent No. 1 or for prejudicially affecting the election of the other candidates in the said election including the petitioner, promoted and/or attempted to promote feelings of enmity or hatred between different classes of the citizens of India, on the grounds of religion, race, caste, community or language and thus committed and/or indulged into corrupt practices as defined u/s 123(3-A) of the said Act and therefore, the election of the respondent No. 1 is liable to be declared as void, by this Hon"ble Court."

10. In support of the above challenge the petitioner in petition has averred certain facts which can be broadly summarised as under.

In para 5(a) to (o) the petitioner has taken survey of certain events and happenings in this country over a decade. In particular he refers to certain issues

and events having implication and ramification on National level and which have cropped up in some parts of this country, like States of Jammu and Kashmir, Punjab, the work of demolition of Babri Masjid, Ayodhya issue, etc. The petitioner highlights by making a pointed reference to the stand taken by the Shivsena and BJP alliance on the above mentioned issues and their attempts of exploiting the situation for their political gain. The petitioner avers that the said Shivsena-BJP alliance adopted the Plank of Hindutwa and monitored their election campaign on that basis. He refers to the utterances and speeches of the various leaders of the said alliance made during the election campaign in Bombay as well as various parts of the country and then proceeds to sum up the situation in para 5(o) of the petition which is reproduced as the same will speak for itself.

"The petitioner states that all the aforesaid facts show that the said two parties viz. BJP and Shiv sena have systematically exploited various unfortunate disputes set out herein above so as to seek votes during the parliamentary election and the election in question in the name of Hindutva religion."

11. On the background of the above facts, the petitioner then asserts that the said two parties namely Shivsena and BJP decided to continue to fight for the said general elections held in February, 1990 in alliance with each other and in accordance with the common stand and plank of Hindutwa. Both the said parties arrived at seat adjustments and the 1st respondent was put up as the candidate of the said alliance from the said constituency.

12. The petitioner then has mentioned the various public meetings held at various places by the said alliance as a part of its election campaign, the speeches made by the leaders of both the parties appealing and canvassing for votes in the name of Hindu religion. The petitioner then mentions the particulars with regard to the manner in which consistent with the said Plank, the election campaign was conducted by the 1st respondent and his agent in the said constituency. He i.e. the petitioner has averred that the 1st respondent during the election campaign appealed to the voters in the name of Hindu religion projecting his image as also of the leaders of the Shivsena as the only protectors of the Hindus. Certain details have been furnished to substantiate as to how the 1st respondent conducted his election campaign appealing the voters in the name of religion and also creating enmities between the two communities. A specific mention is made to the hand bill which has been produced before the Court as Exh. A, wall writings done at various places in the constituency which contain the matter consistent with the plank of the alliance of appealing the voters in the name of religion, the various corner meetings which were held by the 1st respondent in the said constituency and the gist of the speeches made by the various speakers including the 1st respondent appealing to the voters to cast their votes to the 1st respondent in the name of religion. The petitioner also mentions a Video Cassette entitled as "Avahan & Avahan" brought out by the Shivsena for the purpose of election campaign, appealing the voters to vote the candidates of the Shivsena-BJP alliance, for protecting the Hindus, the

transcription of which alongwith the Cassette has been made available before the Court and forms the part of Court record. The petitioner has asserted that all these material used by the 1st respondent during his election campaign were impermissible objectionable and contrary to the provisions of the said Act in particular section 123(3) and (3-A) of the said Act.

13. This petition was filed in this Court on 21st April, 1990 and it is noticed that soon thereafter the processes therein were served upon the respondents including the 1st respondent. The 1st respondent made an application before this Court by way of Chamber Summons bearing No. 966 of 1990 on 15th September, 1990 seeking dismissal of the petition u/s 81 and 83 of the said Act, by reason of failure on the part of the petitioner to comply with the requirements of the said Act for want of requisite particulars in support of grounds of alleged corrupt practices attributed to him and his agents etc., in the petition in the conduct of election campaign. The said application was dismissed by this Court and it is stated that the 1st respondent took up the matter before the Apex Court but without success. This is mentioned as the same will have some bearing in the disposal of this application as will be pointed out during the course of this Judgment, lateron.

14. The 1st respondent filed his 1st written statement on 7th January, 1991 in this Court which was affirmed on 1st October, 1990. By and large he has proceeded to repudiate and deny the case and claim of the petitioner and various allegations and in particular the corrupt practices attributed to him during the election campaign. He categorically denies having solicited votes by appealing the voters in the name of religion or conducted the election campaign in a manner as alleged by the petitioner.

15. In the context, one aspect will need mentioning. In petition the petitioner has also referred to certain Election Petitions filed in this Court against the candidates of the Shivsena in respect of Assembly Elections and Parliamentary Elections held in this State - wherein the allegations of corrupt practices u/s 123(3) and (3-A) of the said Act appealing the voters in the name of religion and creating enmity amongst the different communities were made. The petitioner has also given particulars of some of such petitions which were disposed of and decided by this Court setting aside the elections of some of the elected candidates of Shivsena Party of which the 1st respondent is a member. However, it was also stated that unsuccessful parties in the said petitions have approached the apex Court and matters are subjudice.

16. The record shows that the trial in this petition commenced in the year 1992. It is noticed that various Election Petitions were filed soon after the conclusion of the General Elections held in the year 1990 for Maharashtra Legislative Assembly in this Court against the returned candidates of the Shiv sena-BJP alliance, on the similar ground of corrupt practices u/s 123(3) and (3-A) of the said Act as in the instant case. The major part of the evidence relied upon by the petitioners of the various such petitions was common or to say rightly, similar, which comprises

of the proceedings of the various public meetings held and organised by the said alliance as a part of election campaign, the speeches delivered by the leaders of the said alliance in such meetings which were reported in the various Newspapers, the interviews of the supreme leader of the Shivsena Mr. Balasaheb Thackeray in some Newspapers, the Video Cassette, etc. My brother Judge Variava who was then hearing the election petitions and before whom this petition was also listed, ordered and directed that such common evidence in respect of the proceedings in the Public meetings, as recorded by the Police Agencies, News Papers reports etc. be also read as part of evidence in this petition also. My said brother Judge examined 12 witnesses who are P.W. 9 to P.W. 20 in this petition viz. 1. Hansraj Prabhakar Pawaskar, 2. Narayan Dattatraya Dange, 3. Chandrashekhar Vishnu Mathkar, 4. Deepak Pandurang Parab, 5. Prakash Jagannath Parulekar, 6. Sanjay Krishna Nalavade, 7. Makbul Abdul Mujawar, 8. Vasant Pandurang Jadhav, 9. Yogesh Vasant Trivedi, 10. Milind Tukaram Kokje, 11. Prabhakar Vishnu Rane and 12. Dilip Vasant Chawere, in Election Petition No. 10 of 1990 and it is noticed, all the said witnesses were allowed to be examined and cross-examined by the Counsel of the petitioner and the 1st respondent. However, it is noticed that the 1st respondent was not satisfied with the said order with regard to the common evidence and took up the matter before the Apex Court. However, the Apex Court did not interfere with the said order passed by my brother Judge Variava in the terms indicated above.

17. Record reveals that on 8th September, 1992 my then brother Judge Suresh settled the issues in this petition. But the trial could not proceed further since, as stated, 1st respondent's SLP was pending before the Supreme Court. The matter then placed before this Court in June, 1994 after disposal of the SLP by the Supreme Court. On behalf of the petitioner 20 witnesses (which includes the evidence of 12 common witnesses) have been examined and on behalf of the 1st respondent 5 witnesses have been examined. The voluminous documentary evidence has also been made available by the parties.

18. One witness was examined as a Court witness being the Assistant Election Officer Mr. Krishna Shankar Rane who was summoned after the 1st respondent presented an application for dismissal of this petition for non-joinder of necessary party. The said witness was summoned on the applications made by the petitioner as well as by the 1st respondent as Court Witness No. 1. It is clarified that the said Assistant Election Officer was required to be summoned and examined in view of the doubt entertained by and on behalf of the petitioner about the genuineness of the nomination of a candidate not impleaded as a party respondent in this petition and for said non-joinder dismissal of this petition is sought by the 1st respondent. The evidence of the said Court witness will be considered lateron.

19. Now, I straightway come to the application. The application is dated 4th August, 1994 in a form of affidavit of the 1st respondent presented on the same day before the Court which is now for the sake of convenience marked as Exh.

APL-A. In the said application the 1st respondent has stated that Shri Subhash Martand Parkar submitted his nomination as a candidate from the said constituency for the election held in February, 1990. On 3rd February, 1990 his nomination was accepted after scrutiny as being valid by the Returning Officer. Said Parkar then withdrew his nomination within the stipulated date as prescribed in that behalf in the Election Notification. The 1st respondent has relied upon the relevant record in support of the said nomination of Mr. Subhash Martand Parkar, namely i) receipt for nomination paper and notice of scrutiny issued by the Returning Officer of the said Constituency to Mr. Parkar produced by consent as Exh. 6, ii) the receipt dated 3rd February, 1990 issued by the Returning Officer of the said constituency evidencing the deposit made by said Mr. Parkar for his nomination (marked as Exh-CW-1) and iii) receipt for notice of withdrawal dated 7th February, 1990 issued by the Returning Officer of the said constituency to said Mr. Parkar being Exh. CW-2. It is asserted that since the said Mr. Parkar was a duly and validly nominated candidate for the election from the said constituency who was later on appointed as his Election Agent by the 1st respondent, he is a necessary and proper party to this petition and since he has not been impleaded as a party respondent as required u/s 82(b) this petition must be dismissed u/s 86(1) of the said Act.

20. Further the 1st respondent in the said application has averred that on 5th February, 1990 he appointed said Mr. Parkar as his election agent and in support he has produced a document being Form No. 8 required under Rule 12(1) of the Conduct of Election Rules 1961 issued by the Returning Officer of the said Constituency which has been produced as Exh. 18 before the Court. Referring to this, the 1st respondent contends that since said Subhash Martand Parkar was his election agent for the said constituency, he is a necessary party to this petition. Allegations of corrupt practices have also been made in this petition against the election agent of the 1st respondent.

21. To this application, the petitioner has filed his reply being dated 4th August, 1994 which is marked as Exh. APL-B opposing the said application. He asserts that the application has been made at the belated stage when the trial of the petition has reached at a conclusive stage and purpose of application is to delay the proceedings. Further the petitioner has contended that since no such plea was raised earlier and there having been no issue raised to that effect, the 1st respondent is not at this stage of the matter entitled and justified to raise the said plea of non-joinder of the necessary party. The petitioner states that in any event non-impleadment of said Mr. Parkar as party respondent will not tantamount to non-compliance of section 82(b) of the said Act requiring invocation of provisions of section 86(1) of the said Act. It is, however, pertinent to note that the said reply is silent to the specific facts as averred by the 1st respondent in his application and as mentioned above namely filing of the nomination by said Mr. Parkar to the election from the said constituency and his subsequent appointment by the 1st respondent as his election agent. More upon this at appropriate stage.

22. In view of the application of the 1st respondent, the further issue was raised as issue No. 1-A :

"Whether the petition is not maintainable and is liable to be dismissed u/s 86(1) of the Representation of People Act for non-compliance of statutory requirements as contained in section 82(b) of the said Act for non-impleading Mr. Subhash Martand Parkar duly nominated candidate and election agent of the 1st respondent as party respondent to this petition."

23. Hereinabove, I have in brief given the gist of the contents of the application of the 1st respondent and the reply thereto filed by the petitioner. As stated, the petitioner in his reply did not specifically deal with the facts as averred by the 1st respondent with regard to the nomination of said Mr. Parkar as a candidate for the said constituency and his subsequent withdrawal, across the bar the learned Counsel for the petitioner Mr. Vashi expressed doubt about the genuineness of the said nomination and therefore in order to obviate any doubt in that regard, on the applications made by the petitioner as well as by the 1st respondent, the Court issued a process to the concerned Election Officer on 6th August, 1994 and in response thereto Mr. Krishna Shankar Rane, Tahsildar-cum-Assistant Election Officer appeared before the Court who has been examined as Court Witness No. 1 and who has proved the documents such as Exh. No. 6 the receipt for nomination paper dated 3rd February, 1990 (as stated tendered and exhibited by the consent of the petitioner's counsel) issued by the Returning Officer to said Parkar, ii) Exh. CW-1, being the receipt issued by the Returning Officer for the deposit made by said Mr. Parkar and iii) Exh. CW-2, being the receipt for withdrawal of the nomination of said Mr. Parkar issued by the concerned Returning Officer on 7th February, 1990. The said witness was also allowed to be cross-examined by the counsel for the petitioner. Further on the same point, the 1st respondent who has been examined as R.W. No. 5 and who also deposed about the nomination of said Parkar was also recalled, on the application and at the instance of petitioner's counsel Mr. Vashi, for further cross-examination on the said point and petitioner's counsel has further cross-examined the 1st respondent. It is necessary to note that the evidence adduced in support of the nomination of said Mr. Parkar, as mentioned above, has remained absolutely unaffected and unimpeached.

24. In support of the said application of the 1st respondent Mr. Chinai and Mr. Kotwal the learned Counsel made submission, the gist of which may be stated as under :

(i) There is a clinching evidence to show that the said Mr. Subhash Martand Parkar filed his nomination for the General Assembly Elections held in February, 1990 from the said Constituency. A reference is made to the various documents with regard to the submission of the nomination and subsequent withdrawal referred to earlier. It is therefore contended that said Mr. Parkar being a validly nominated candidate for the said assembly election, he is a necessary party to this petition as provided u/s 82(b) of the said Act. It is asserted that in this

petition vide prayer (b), the petitioner has sought relief that he be declared as duly elected candidate from the said constituency and further the ground of challenge of the petition is the corrupt practice and therefore the presence of said Mr. Parkar as a party respondent is must in this petition.

(ii) The said Mr. Subhash Martand Parkar was appointed as an election agent and acted as such as an election agent for the 1st respondent for the said constituency.

(iii) There are averments made in the petition that the corrupt practices have also been committed by the election agent of the 1st respondent. In particular reference is made to the pleadings of the petition appearing in paras 4, 23, 24, 42 and the concise statements accompanying the petition. It is pointed out that the petitioner has charged the election agent of the 1st respondent for being responsible for the commission of corrupt practices during the election campaign.

(iv) In support, it is further stressed that there is an ample material on record to show that said Mr. Parkar has worked as an Election agent for the 1st respondent for the said election. The said Mr. Parkar has been examined as a witness for and on behalf of the 1st respondent as R.W. No. 2 and on oath he stated that he acted as an election agent, to which there is no challenge from the petitioner. Similarly, the 1st respondent in his deposition has also testified that the said Mr. Subhash Martand Parkar was appointed by him as his election agent and that prior thereto the said Mr. Parkar has also filed his nomination which was found to be valid and in order and then said Mr. Parkar withdrew the same. Even to this oral evidence of the 1st respondent, there is no challenge.

(v) In any event, it is further asserted that evidence of the Assistant Election Officer examined as CW. No. 1 clearly proves that said Mr. Parkar was a duly and validly nominated candidate for the said election from the said constituency. A pointed reference is made to the various issues framed in that behalf in September, 1990 in particular issue Nos. 3, 4, 6 and 7, which inter alia pertain to the corrupt practices attributed to the election agent.

(vi) Then various judicial authorities have been referred to and cited in support of the application by and on behalf of the 1st respondent to make good the point that non-impleadment of a duly nominated candidate u/s 82(b) of the said Act is a fatal and consequently as provided u/s 86(1) of the said Act, the petition is liable to be dismissed. It is asserted that for the purpose of this election petition, the said Mr. Parkar continued to be a duly nominated candidate as defined under Clause (b) of section 79 of the said Act. It is further emphasized that the defect of non-joinder of necessary parties to the election petition is such a fatal that the said cannot be cured by resort to the provisions of the CPC by amendment. Various authorities have been referred to by the learned Counsel for the 1st respondent, which I will refer to lateron.

25. As against this the learned Counsel for the petitioner has submitted :

(i) That the application presented is at such a belated stage that same should be dismissed as being vexatious. It is stated that recording of the evidence in this petition is over and the matter has reached to the stage of arguments which is a final stage and that such application should not be entertained at such a belated stage. It is urged that the Court should not decide the said issue as a preliminary issue arising because of the said application of the 1st respondent, but Court should consider the entire matter on merits and record findings on all the issues.

(ii) It is further contended that no specific charges of corrupt practices have been made in the petition against the election agent of the 1st respondent. There is only a reference in a remote manner in that behalf which is not adequate enough to hold that there are charges of corrupt practices against the election agent of the 1st respondent.

(iii) It is then contended that there is no convincing proof with regard to the nomination of said Mr. Parkar. Much less to indicate that his nomination was valid one.

(iv) The learned Counsel for the petitioner also cited few authorities, which will be dealt with later on in support of the point that in absence of specific allegation of corrupt practices against any person, his impleadment will not be necessary as party respondent.

26. The points for consideration that will arise are :

(i) Whether Mr. Subhash Martand Parkar was a duly nominated candidate for the General Assembly election held in February, 1990 from 37, Kherwadi Constituency accepted as valid by the Returning Officer; and

(ii) Whether said Mr. Parkar also acted as Election Agent for the 1st respondent during the election campaign.

(iii) Whether there are charges of corrupt practices made in the petition against the said Election Agent.

27. Answer to these points will resolve the fate of the application of the 1st respondent.

28. I will take up point (iii) above first, viz., whether there are averments in the petition herein concerning commission of corrupt practices by the Election Agent of the 1st respondent.

29. It will be necessary in order to thrash out the said point to look into the material or statements relevant in the context appearing in the petition. Para 4 of the petition which I have already reproduced herein above (also para 4 of this Judgment) clearly mentions that the election agent of the 1st respondent was also one who had committed corrupt practice within the meaning of provisions of said Act. This is repeated in para 42 of the said petition which paragraph has also been reproduced hereinabove (on para 8 of the this Judgment). Similar averments are to be found in paras 23 and 24 of the petition where reference is

made to the agents of the 1st respondent as having committed corrupt practices. Again in the concise statement accompanying this petition, which is a statutory requirement of section 83 of the said Act petitioner clearly states that the election agent of the 1st respondent was also responsible for the commission of corrupt practices during the election campaign.

30. Attempt in a nebulous manner was made, on behalf of the petitioner, by his counsel to contend that reference to agent may not necessarily be a reference to an election agent. However, this argument is not sustainable in view of the clear provisions and definition of the agent as appearing in section 123 itself. In as much as Explanation No. 1 to sub-section (8) of section 123 clearly provides that expression agent includes the election agent, polling agent and any person who is held to have acted as an agent in connection with the election with the consent of the candidate. This definition, in my view, leaves no manner of doubt that expression "agent" appearing in the petition in some of the paras of the petition as noticed earlier will also be applicable to an election agent. This is apart from the fact that at some places the petitioner also specifically mentions an election agent. There is one more aspect which would militate against the said contention of the petitioner to suggest that he has not made specific allegations of corrupt practices against the Election Agent. As noticed earlier issues in this petition were settled in September, 1990 by my then predecessor and as many as four specific issues have been raised therein, which are issue Nos. 3, 4, 6 and 7 which are in following terms :

Issue No. 3 : Whether the Election Agent or any other Agent of the respondent has committed any of the corrupt practices as defined in section 123(3) of the Representation of Peoples Act, 1951, as alleged in the petition?

Issue No. 4 : Whether any other persons with the consent of the First respondent or his Election Agent has committed any of the corrupt practices as defined in section 123(3) of the Representation of People Act, 1951 as alleged in the petition?

Issue No. 6 : Whether the Election Agent or any other agent of respondent has committed any of the corrupt practices as defined in section 123(3-A) of the Representation of Peoples Act, 1951 as alleged in the petition?

Issue No. 7 : Whether any other person with the consent of the first respondent or his election agent has committed any of the corrupt practices as defined in section 123(3-A) of the Representation of Peoples Act, 1951 as alleged in the petition?

(underline supplied).

If one reads the above issues, it will become crystal clear that the Court was expected to investigate even the charges of corrupt practices alleged to have been committed by the election agent of the 1st respondent. Issues have been duly framed under Order 14 of the CPC and that is on consideration of the

contentions of the parties as reflected from their respective pleadings. Indeed if the election agent of 1st respondent was not to be held responsible for the commission of various corrupt practices as now petitioner wants to suggest, then one fails to understand as to why as many as four specific issues in the aforesaid term were raised, to which record shows the petitioner never raised any objection. All these factors, which are so eloquent, have no manner of doubt that the petitioner has also charged the Election Agent of the 1st respondent for the commission of corrupt practices. In the circumstances, attempt now made to wriggle out the situation by the petition, in my view, completely exposes its futility. As noticed earlier the fact that Mr. Parkar was appointed as an election agent by the 1st respondent and in fact he so acted has been clearly established.

31. Mr. Vashi the learned Counsel for the petitioner made a reference to certain decisions namely in the case of (i) N.E. Horo Vs. Smt. Jahanara Jaipal Singh, , (ii) Daulat Ram Chauhan Vs. Anand Sharma, , (iii) Manohar Joshi Vs. Damodar Tatyaba alias Dadasaheb Rupwate and Others, and (iv) S.B. Adityan Vs. S. Kandaswami and Others, .

32. As will be pointed out all the authorities are not at all relevant and germane in the facts and circumstances as obtained in the matter herein.

In the first decision of Horo's case the question before the Supreme Court was whether the presence of particular person had influenced the Returning Officer while entertaining the objection at the time of scrutiny of the nomination. On the facts it was held that the said charge was not proved satisfactorily. Similarly in the case of Daultaram, slogans were raised against the political leader of one Party which were of a libellous nature in a public meeting in which the candidate who had withdrawn was participated. It was held by the Court that and in my view rightly so, considering the psychology and mentality of the mass in a public meeting that raising of the slogans would not amount to hold that the same was with the consent of the candidate. Similarly, in Adityan's case the question was of giving of a bribe. The Court held that the election statute only provides as a corrupt practice, as far as a person who gives the bribe and not who takes. One fails to understand as to how the ratio of Manohar Joshi's case will help the petitioner in this petition. The petitioner probably wants to suggest that for the purpose of deciding whether a particular person will be a necessary or proper party in the election petition, there must be specific charges of corrupt practices made in the petition. As noticed earlier the petitioner has made reference in his petition to the election agent at number of places. Not only that as many as four precise issues were required to be framed in this matter which I have already reproduced hereinabove upon which the trial has proceeded. Apart therefrom, the 1st respondent in his application filed being Exh. APL-A has clearly stated that the petitioner in his petition has made allegations of corrupt practices against the election agent of the 1st respondent. The petitioner although he has filed return in reply thereto has not chosen to deal with the said aspect. There is one more aspect which will need mentioning and which will also show how the

petitioner has framed his election petition, in the context of corrupt charges even against the election agent of the 1st respondent. As stated earlier soon after the service of the processes, in this election petition, the 1st respondent made an application for dismissal of the petition u/s 86(1) for non-compliance of the statutory provisions as according to the 1st respondent the requisite data and particulars about the alleged corrupt practices were not furnished in the petition. The said Chamber Summons, it is noticed from the judgment, was hotly contested and by reading the said judgment, it is noticed that contentions raised by the petitioner were quite opposite to what he has been now saying. In that petitioner asserted that his petition contained the requisite particulars of corrupt practices as also been so held in that judgment. The conspectus of the discussion as above, therefore leads to irresistible conclusion that the petition of the petitioner does contain the charges of corrupt practices even against the election agent of the 1st respondent.

33. Apart therefrom, there is cogent and credible evidence made available in support of the fact that said Mr. Parkar had in fact submitted his nomination. The 1st is Exh. No. 6 which is a receipt for nomination of paper and notice of scrutiny issued in the name of said Mr. Parkar by the Returning Officer of the said constituency. The said receipt clearly shows that on 3rd February, 1990, said Mr. Parkar had submitted his nomination before the concerned Returning Officer which was duly received by the said Returning Officer in his office. The scrutiny of his nomination was to take place on 5th February, 1990 at 11.00 a.m. in the office mentioned therein. This document was tendered by R.W. No. 5 i.e. the 1st respondent when his testimony was recorded and for its tender and exhibition on record the learned Counsel for the petitioner has accorded his consent. Thus, the said document Exh. 6 has been taken on record with the consent of the learned Counsel for the petitioner. The next important and relevant document in the context is the receipt dated 3rd February, 1990 issued by the Returning Officer of the said constituency which evidences the receipt of deposit of Rs. 250/- from said Mr. Parkar by the Returning Officer. This receipt has been duly proved by the Assistant Election Officer, Krishna Shankar Rane, C.W. 1. The 3rd document is a receipt for notice of withdrawal of nomination issued by the Returning Officer of the said constituency, on 7th February, 1990 to said Mr. Parkar, which document has also been proved by Assistant Election Officer, Mr. Rane, CW No. 1. The said receipt clearly mentions that said Mr. Parkar was a validly nominated candidate at the election to "37-Kherwadi Assembly Election Constituency". The expression "validly nominated" appearing in the said receipt is more significant and requires to be taken note of in the context of contention raised by and on behalf of the petitioner casting doubt about the genuineness of the nomination of said Mr. Parkar.

34. The witness C.W. 1, Mr. Rane, in his deposition before the Court on oath has proved the said documents and has stated that question of withdrawal of the nomination comes only when the nomination of a particular candidate submitted before the Returning Officer has been found to be valid and has been accepted.

The witness has further explained that otherwise, there is no question of withdrawal of the nomination in case the same is not accepted as a valid one. In as much as, this is what the witness has testified before the Court :

"The receipt Exh. C.W. 2 is issued to this candidate filling the nomination which is duly accepted and found to be valid and in order and who withdraws the nominations before the prescribed date".

The said part of the evidence of the witness has remained unaffected in the cross-examination made on behalf of the petitioner.

35. There is one more aspect which will require to make a mention of and that is the evidence of the 1st respondent who is R.W.No. 5, before the Court. It is 1st respondent who produced Exh. No. 6 to which the petitioner's counsel consented. The 1st respondent in his deposition has stated about the filing of the nomination by said Mr. Parkar and subsequent withdrawal thereof. It is relevant to note that the petitioner has not challenged the said evidence of the 1st respondent at all.

36. There is yet one more circumstance which also lends support to the conclusion, I have reached in this regard, namely the notification issued by the Election Commission of India, published in the Official Gazette in respect of General Assembly Elections in Maharashtra. The relevant extract of the Gazette has been made available wherefrom it is noticed that the Election Commission of India has issued a notification for holding the General Assembly Elections in Maharashtra on 27th January, 1990, stipulating 3rd February, 1990 as a last date for making nomination, 5th February, 1990 as the date of scrutiny of the nomination, 7th February, 1990 as date for withdrawal of candidatures, 27th February, 1990 as the date on which poll was to take place and 3rd March, 1990 as the date before which the election process was to be completed. If one compares the dates which are appearing on Exh. 6, C.W. 1 and C.W. 2, it will be noticed that the same are in conformity with the dates as have been prescribed in the said notification. Therefore, the bare denial on the part of the petitioner, in my view, and entertaining doubt about the genuineness of the filing of the nomination of said Mr. Parkar is devoid of any merits.

37. In the context, it would be necessary to notice the legal position on this aspect, namely filing of the nominations by the candidates. The same is contained in Part V Chapter 1 of the said Act. Section 30 provides for issuance of notification in the Official Gazette providing dates for i) filing of the Nomination papers, ii) Scrutiny, iii) Withdrawal of the Nomination, iv) for polling and v) for declaration of result, etc. Section 32 provides qualification for submitting the nomination, section 33 provides presentation of the nomination before the Returning Officer and requirements for valid nomination, section 34 provides for deposit to be made by a candidate submitting his nomination, section 35 mandates as under :

"35. Notice of nominations and the time for their scrutiny.-

The Returning Officer shall, on receiving the nomination paper (under sub-section (i) or, as the case may be, sub-section (i-A) of section 33, inform the person or persons delivering the same of the date, time and place fixed for the scrutiny of nominations and shall enter on the nomination paper its serial number, and shall sign thereon a certificate stating the date on which and the hour at which the nomination paper has been delivered to him; and shall, as soon as may be thereafter, cause to be affixed in a some conspicuous place in his office a notice of the nomination containing description similar, to those contained in the nomination paper, both of the candidate and of (the proposer).

Section 36 provides for the scrutiny of nomination on the date so fixed and section 37, which is important, runs as :

"37. Withdrawal of candidature - (i) Any candidate may withdraw his candidature by a notice in writing which shall contain such particulars as may be prescribed and shall be subscribed by him and delivered before three o'clock in the afternoon on the day fixed under Clause (c) of section 30 to the Returning Officer either by such candidate in person or by his proposer, or election agent who has been authorised in this behalf in writing by such candidate. (2) No person who has given a notice of withdrawal of his candidature under sub-section (i) shall be allowed to cancel the notice. (3) The returning officer shall, on being satisfied as to the genuineness of a notice of withdrawal and the identity of the person delivering it, under sub-section (1), cause the notice to be affixed in some conspicuous place in his office).

38. The above mentioned legal provisions clearly provide the norms and procedure of filing of nomination, its acceptance, deposit, scrutiny, requirements of valid nomination and its withdrawal. The rules known as the Conduct of Election Rules, 1961 have also been separately framed under the said Act and Rule 3 and 4 in Part II of the said rules are corresponding provisions in that behalf.

39. The documents, namely Exh. No. 6, C.W. 1 and C.W. 2, it would be crystal clear, have been in accordance with the above provisions of law and rules made thereunder. Exh. No. 6 is issued in accordance with the provisions of section 33, Exh. No. C.W. 1, a Deposit Receipt as per section 34 and Exh. No. C.W. 2 is issued in accordance with the provisions of section 37 of the said Act.

40. Therefore reading the material made available before the Court, referred to hereinabove, in particular the documents such as Exh. No. 6, Exh. C.W. 1, Exh. C.W. 2 read with the oral testimony of C.W. No. 1 and that of 1st respondent and bearing in mind the above mentioned legal position, there remains no shadow of doubt whatsoever to hold that the said Mr. Parkar has submitted his nomination for election from the said constituency and that same was found to be valid. The evidence also further shows that said Mr. Parkar then withdrew his nomination.

41. Now the next point is whether said Mr. Parkar was appointed and acted as an election agent of the 1st respondent for the Assembly Election for the said

Constituency. The documentary evidence is the Form being No. 8 prescribed under Rule 12(i) of the Conduct of Election Rules, 1961 for the appointment of election agent and produced as Exh. 18 issued by the concerned Returning Officer, which shows that said Mr. Parkar has been appointed as election agent by the 1st respondent for his election from the said constituency. The said application bears the date as 5th February, 1990. Further said Mr. Parkar who testified before this Court as R.W. No. 2 on oath has stated that he acted as an agent of the 1st respondent and that part of the evidence has not been questioned or challenged in cross-examination by the petitioner. Respondent No. 1 has also in his deposition testified to that effect which evidence of him has also remained unimpeached.

42. The provision has also been made in the said Act in respect of appointment of the Election Agent by the contesting candidate. Section 40 provides for such appointments. Section 41 stipulates the qualification for being appointed as Election Agent and section 45 talks of the function of the Election Agent. Corresponding provision is to be found in Rule 12 of the Conduct of Election Rules, 1961, the relevant part of it which is sub-Clause (1) runs as under :

"12. Appointment of election agent.-

(i) Any appointment of an election agent u/s 40 shall be made in Form 8 and the notice of such appointment shall be given by forwarding the same in duplicate to the returning officer who shall return one copy thereof to the election agent after affixing thereon his seal and signature in token of his approval of the appointment).

If one compares Ex. No. 18, it will be evident that the same is in conformity with the above legal provisions.

43. The aforesaid material clearly shows that said Mr. Parkar was appointed as election agent by the 1st respondent for the election from the said constituency.

44. Having thus established that said Shri Parkar was the validly nominated candidate for the Assembly Election held in February, 1990 for the said constituency alongwith the parties herein and who was appointed as Election Agent by the 1st respondent, what would be the effect of his non-joinder as a party respondent in this petition, in view of the charges of corrupt practices against him and also because of relief whereby the petitioner seeks declaration that he be declared to have been duly elected from the said constituency, would require consideration.

45. Sub-section (b) of section 79 of the said Act defines "the candidate". Said section 79 forms the part of Part VI Chapter I of the said Act entitled "Disputes Regarding Elections". The candidate is defined as :

"Section 79 the definition - In this Part VII unless the context otherwise requires

(a) -----

(b) "Candidate" means a person who has been or claims to have been duly nominated as a candidate at any election.

(Underline supplied).

It is important to note that sections 82 and 86 appeared in Part VI and section 123(3), (3-A) to which we are concerned, appear in Chapter VII of the said Act with heading "Corrupt Practices and Electoral Offences". This aspect is of a crucial significance. We have to understand the definition of a "candidate" in the context of the provision of the said Act as envisaged in Parts VI and VII. Sections 80, 81, 82 and 86 appear in Part VI. Section 80 and 81 provide for filing and presentation of the Election Petition. Section 82 is relevant for our purpose, which envisages parties to such Election Petition. Said section 82 runs-

"82. Parties of the petition - A petitioner shall join as respondent to his petition-

(a) where the petitioner, in addition to claiming declaration that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates; and

(b) any other candidate against whom allegations of any corrupt practice are made in the petition)."

By plain reading the above section, it clearly implies that if the petitioning party claims relief of "further declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner" shall join all the contesting candidates as respondents to his petition. (underline portion extracted from sub-section (a) itself. It is noticed earlier that vide prayer (b) the petitioner herein has claimed the relief to that effect. Sub-section (b) makes the special provisions and mandates and makes it imperative that when allegations of corrupt practice are made in the petition, against any other candidate then, such candidate must also be made as party respondent.

46. The Apex Court in its various pronouncements on the very point have laid down the principles and interpreted and construed sub-clause (2) of section 82, in particular expression "any other candidate" appearing therein. It would suffice if reference is made to one of such decisions in the case of Har Swarup v. Brij Bhushan Saram and others, reported in AIR 1967 S.C 836, which sets down the legal principle luminously in para 6.

"But the same in our opinion cannot be said of the words "any other candidate" used in Clause (b) of section 82. There is no indication in Clause (b) to suggest that "any other candidate" only refers to a candidate who has not withdrawn his candidature u/s 37. The use of the words "any other candidate" in Clause (b) is really in contrast to the candidates who are to be made parties under Clause (a). Under Clause (a) persons who are to be made parties to the petition are---

- (a) returned candidates,
- (b) contesting candidates.

depending upon the kind of declaration claimed in the petition. Where, for example, there is no claim for a further declaration in an election petition, only returned candidates would be made respondents under Clause (a).. But if there are allegations of corrupt practice against any candidate other than the returned candidate, he would have to be made a party under Clause (b) as "any other candidate". Similarly where a declaration is asked for in the petition that a particular candidate has been duly elected, all the returned candidates as well as all the contesting candidates have to be made parties under Clause (a). Even in such a case if there is allegation that any other candidate besides the returned candidates and the contesting candidates has been guilty of corrupt practice, Clause (b) requires that he should also be made a respondent. There is in our opinion no reason for cutting down the meaning of the word "candidate" as defined in section 79(b) for the purpose of section 82(b) in the manner suggested on behalf of the appellants namely, that in section 82(b) the candidate is only one who has not withdrawn his candidature u/s 87."

The aforesaid enunciations squarely apply to the facts in the instant case as noticed earlier. Mr. Parkar, the evidence clearly shows, has filed his nomination and subsequently withdrew it and his nomination was valid and so accepted.

47. Next relevant provisions are those contained in section 86 of the said Act. Sub-section (i) is as under :

"86. Trial of election petitions.---(i) The High Court shall dismiss an election petition which does not comply with the provisions of section 81 or section 82 or section 117."

The sub-clause (i) above postulates and makes it incumbent upon the Court to dismiss the election petition which does not comply with the provision of section 82 of the said Act, which uses the expression as "shall dismiss". It leaves no other alternative or option to the Court or even discretion. As soon as the plea of non-compliance with the provision of section 82(b) is raised before the Court, during the pendency of the petition the Court is bound to dismiss it in unstinted obedience to the command of section 86.

48. The said principles as laid in Govind Dattatray's case have also been reaffirmed and reiterated in various of its later decisions, from which I refer only two i.e. 1) In the case of Mohan Raj Vs. Surendra Kumar Taparia and Others, Shri Udhav Singh Vs. Madhav Rao Scindia, . It is pertinent to note that in the Udhav Singh's case (supra) the Apex Court has held that non-compliance of section 82(b) is lethal defect and its imperative mandate cannot by consent, express or tacit be waived. Even inaction, laches or delay on the part of the respondent in pointing out such lethal defect of non-joinder cannot relieve the Court of the statutory obligation cast on it by section 86. It is noticed by reading

the said Udhav Singh's case that objection for non-joinder was raised after the close of the petitioner's evidence and not at the earliest opportunity. This is also the case in the instant matter.

49. It is thus clear that the contention of the petitioner that objection for non-joinder has been raised at a belated stage has to be rejected as not tenable.

50. It is also of important to note how the Apex Court has viewed such lethal defect of non-joinder. In Mohan Raj's case (supra) it is noticed, it was urged that by recourse to the provisions of amendment of pleadings contained in CPC (Order 1, Rule 10 and Order 6, Rule 17) in the interest of justice, the said defect be permitted to be cured. The Apex Court rejected it, observing "when the Act enjoins the penalty of dismissal of the petition for non-joinder of a party the provisions of the CPC cannot be used as curative means to save the petition."

51. Further while emphasising the significance of the said statutory provisions of the said Act, which makes mandatory for joining necessary parties as respondents to the election petition, the Supreme Court in Govind Dattatray's case (supra) observed :

"We however see no reason why he could not be a candidate for the purpose of section 82(b), simply because he committed the alleged corrupt practice after his withdrawal. Purity of elections is a matter of great importance, and it is for the purpose of maintaining this purity that we have the provisions contained in section 123 of the Act. There is also no doubt that if a covering candidate (like, Raturi Vaid) is not treated as a candidate till the date of his withdrawal, he would be free to commit all kinds of corrupt practices defined in section 123 of the Act on behalf of the candidate whom he covers with impunity.

52. In the light of evidence on record, in view of clear statutory provisions as explained, construed and interpreted in various judicial pronouncements by the Apex Court referred to above and the principles laid down in the context of provisions of section 82(b) read with section 86(1), in my view the same in all force support the application presented by and on behalf of the 1st respondent. The application is well merited. Said Shri Parkar being the duly nominated candidate was a proper and necessary party to this petition. The submission of the petitioner's Counsel that the Court should render its decisions on merits and not only on the preliminary point of non-joinder of party, to say the least, will defeat and frustrate the very purpose and object of the said Act, which envisages the joinder of a candidate against whom allegation of corrupt practice are made in the election petition, as necessary Party. To accede to the request of the petitioner would mean the condemnation of a candidate, in the instant case said Shri Parkar, unheard, which is impermissible under the said Act.

53. To sum up, it is held that the application of the 1st respondent has to be granted and consequently the Election Petition herein stands dismissed u/s 86(i) of the said Act.

54. As far as cost is concerned, Mr. Kotwal, the learned Counsel for the 1st respondent stated that he has been instructed not to press for the same and leave the matter to the Court. In my view, the ends of justice would be met if each party is ordered and directed to meet its own cost.

55. Hence the following order.

(1) Petition dismissed.

(2) Each Party to bear its own cost.

(3) Office to take necessary steps as required under Rule 19 of the Rules framed by this Court in regard to the Election Petition under the provisions of the said Act.

(4) Issuance of certified copy is expedited.