

Sh. Nand Ram Bagri vs Sh. Jai Kishan & Ors on 7 May, 2013

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Author: Rajiv Sahai Endlaw

Bench: Rajiv Sahai Endlaw

*IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 7th May, 2013

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EL. PET. 14/2009

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SH. NAND RAM BAGRI

..... Petitioner

Through : Mr. Jayant K. Sud and Mr. Harendra
Singh, Adv.

Versus

SH. JAI KISHAN & ORS

..... Respondents

Through: Mr. K.C. Mittal, Adv with
Ms. Anjali Nehra, Adv for R-1.
Mr. D.R. Chaudhary Samsoodhan Khan,
Adv for R-8.
Ms. Neha Jain for Mr. Mohit Gupta,
Adv. for R-10.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. This petition questions the election of the respondent no.1 as the Member (from the Sultanpur Majra Constituency) of the Legislative Assembly of Delhi in the election held on 29 th November, 2008.

2. The un-rebutted facts are, i) that the Notification for the election was issued on 4th November, 2008; ii) that the Sultanpur Majra Constituency is reserved for the Scheduled Caste candidates; iii) that the Nominations were to be filed by 1500 hrs. on 11th November, 2008 and were scrutinized on 12th November, 2008; iv) that out of the total number of 1,32,421 electors, only 82,047 valid votes were polled; iv) that in the result of the election declared on 8th December, 2008, the respondent no.1 was found to have secured 39542 votes and the petitioner found to have secured 20867 votes,

with the remaining votes distributed between the respondents no. 2-10 contestants; v) that the respondent no.1 was accordingly declared elected on 8th December, 2008.

3. The petitioner questions the election pleading that-

i. On 5th December, 2008, the petitioner, in response to a query under the Right to Information Act, 2005, received information of the following criminal cases registered against the respondent no.1 at various Police Stations at Delhi;

S. No.	FIR Nos.	Date	Under Section	P.S.
1.	162/83	21.9.83	147, 148, 149, 186, 353, 332, 333, 427, 307, 436 IPC	Sultanpuri
2.	115/94	29.9.94	160, 323 IPC	Civil Line
3.	1034/97	14.11.97	186, 332, 353, 34 IPC	Sultanpuri
4.	677/01	4.6.2001	186, 332, 353, 34 IPC	Sultanpuri
5.	1647/06	14.10.06	323, 506, 34 IPC	Sultanpuri
6.	538/07	1.4.07	323, 427, 452, 506, 34 IPC	Sultanpuri
7.	464/99		186, 353, 332, 506, 34 IPC	Mangolpuri
8.	1984	23.10.84	307, 333, 436 IPC	Sultanpuri

ii. that the petitioner, in response to another query under the

RTI Act, received information on 1 st January, 2009 that the respondent no.1 was not the student of C.R.Z. Senior Secondary School, Sonapat, Haryana from which the respondent no.1 as per information given by him in his Election Nomination Form claimed to have matriculated in the year 1981;

iii. that the respondent no.1, in the affidavit submitted by him alongwith his Nomination Form (and which affidavit is available online on the website of Election Commission Office), a) had suppressed the material facts regarding criminal cases aforesaid registered against him; and, b) had falsely claimed himself to be educated upto class 12th and having Matriculation from C.R.Z. Senior Secondary School, Sonapat, Haryana.

4. It is further the plea of the petitioner,

- a) that furnishing false or wrong information in the affidavit filed alongwith the nomination and as per the direction dated 28th June, 2002 of the Election Commission of India amounts to corrupt practice under Section 123(4) of the Representation of People Act, 1951;
- b) that the wrong information about his personal character so furnished by the respondent no.1 was calculated to prejudice the election of the petitioner;
- c) that the respondent no.1 was accused in case FIRs 250/1984 and 251/1984 of Police Station Sultanpuri under Sections 147,148,149,395,396, 397,303,496,427 and 201 of the IPC registered on 31st October, 1984 after assassination of Prime Minister Smt. Indira Gandhi;
- d) that there are near about 47000 Sikh voters residing in the Sultanpuri Majra Constituency;
- e) that 25% of the voters in the Constituency are from the age group of 18-22 years and these cases having been registered against the respondent no.1 before their birth, are not aware of the accusation against the respondent no.1;
- f) that the petitioner in his affidavit filed alongwith his Nomination Form had declared himself uneducated;
- g) that the respondent no.1 falsely published himself as educated upto 12th class to attract the prospect of majority of electors;
- h) this was the main arm for strategy of election adopted by respondent no.1 through out the canvassing during election to impress the voter and to prejudice their mind against the petitioner;
- i) that the petitioner and the respondent no.1 were nearest rivals in this election and educational qualification was the main feature for inducement of electors to cast their vote in favour of respondent no.1;
- j) that if voters of the constituency would have learnt about false information of education, they might not have preferred to elect the respondent no.1 as a law maker for themselves;
- k) that concealment of fact of accusation and furnishing false and wrong information regarding the education in order to induce electors to cast vote in favour of inducer comes within the definition of cheating the voters, children and public at large;
- l) the nomination of the respondent no.1 was improperly accepted;
- m) that the respondent no.1 was under statutory obligation to declare in his affidavit Annexure-I of Nomination Form about his discharge, conviction and acquittal in past criminal cases and this fact related to the substantial character of the candidate and subject to easy verification of the Returning Officer;

n) that the affidavit filed by the respondent no.1 was not in the form prescribed vide direction dated 28.06.2002 of Election Commission of India;

o) that the respondent no.1 has adopted corrupt practice within the meaning of Section 123(4) by intentionally furnishing false and wrong information claiming himself to be matriculate and to prejudice prospect of petitioner's election;

p) that the voter has a right to know the bio-data and antecedents of a candidate to decide in whose favour to cast his vote;

q) voters right to know antecedents including the criminal past of candidate contesting election is fundamental and basic for survival of democracy;

r) that the respondent no.1 suppressed material information of his lesser education than matriculation and accusation of criminal cases aforesaid;

s) that these false, wrong and suppressed information are defects of substantial character of respondent no.1 and were subject to easy verification of Returning Officer by documentary evidence;

t) that the valid votes obtained by respondent no.1 by adopting such corrupt practice, would have been polled for the petitioner had the respondent no.1 not adopted such corrupt practice and the petitioner would then have been declared elected; and, u) that the result of the respondent no.1 as the returned candidate has been materially affected by improper acceptance of nomination by Returning Officer and display by the Returning Officer in his office and on the website of affidavit aforesaid of respondent no.1 containing incomplete, suppressed, false, wrong information--if the voters of constituency would have known of false information of education, they might not have preferred the respondent no.1 to be elected as law maker for themselves.

5. The petitioner thus, while seeking a declaration of the election of the respondent no.1 as void, seeks to be declared elected for filling up the seat in the Legislative Assembly of the said Constituency.

6. Notice of the petition was issued; the respondent no.1 filed a written statement and which was subsequently permitted to be amended; besides him only the respondent no.10 has filed a written statement and none of the other respondents have filed written statement.

7. The respondent no.1 in his amended written statement has pleaded,

i) that the election petition does not contain any material in support of the allegations levelled; ii) that the allegation of corrupt practice in an election, within the meaning of Section 123 of the Act, is quasi criminal in nature requiring a strict proof because the consequences are not only serious but also penal since a finding of commission of corrupt practice is punishable under Section 125A of the Act; it is for this reason only that the Courts insist upon a strict proof in such allegation of corrupt practice and the same is not to be decided on preponderance of probability; iv) that the respondent

no.1 was not required to furnish information of the FIRs registered against him--the affidavit required him only to furnish details of those cases where cognizance had been taken or cases where charges were framed and information of which cases was furnished; v) that the FIRs mentioned by the petitioner and set out in para 3(i) hereinabove are not covered under the requisite categories of Annexure-I and Form-26 and the plea of the petitioner is thus frivolous; vi) that the respondent no.1 had been unnecessarily dragged in the election petition with an ulterior motive;

vii) that even if it were to be assumed that the respondent no.1 had given false information in the affidavit submitted alongwith the nomination, the only penalty therefor is for filing a false affidavit and does not give any right to the petitioner to file an election petition under Section 80; viii) that the FIRs for various offences as mentioned in the petition are wrong and denied and if any typing error is there that cannot be a ground for challenging the election which is conducted by the Election Commission of India, a constitutional body; ix) that there is no condition in the Representation of People (R.P.) Act regarding qualification of a candidate for contesting any election and therefore there is no need to mention about the education qualification and if at all the respondent no.1 has mentioned his qualification, in that case also the petitioner cannot take the benefit under the umbrella of corrupt practice; x) that no ground under Section 123(4) of the Act had been made out and the averments regarding the filing of affidavit alongwith the nomination paper has no relevance or connection with Section 123(4) of the Act; xi) the law requires that the publication of false statement is in relation to the personal conduct / character of the other candidate and the statement is material so as to prejudice complainant's prospect in the election - the petitioner in this petition has not alleged any allegation regarding any statement being made by the respondent no.1 against his candidature which is false and believed to be false by the respondent no.1 which relates to the personal character or conduct of the petitioner so as to cause and make the statement reasonably calculated to prejudice the prospects of the petitioner in the election; it is denied that the respondent no.1 had falsely claimed himself to be 12 th Class pass; xiii) education is not a mandatory requirement to contest election; and, xiv) that rather the election petition is liable to be rejected under Order 7 Rule 11 of the CPC.

8. On the pleadings aforesaid of the parties, the following issues were framed on 6th October, 2009.

1. Whether the petition is not maintainable due to want of cause of action. OPP

2. Whether the petitioner does not have a Locus Standi to file present petition. OPD

3. Whether the respondent no.1 has not furnished information in terms of the rules framed by Election Commission of India and the Hon'ble Supreme Court and its effect. OPP

4. Whether the corrupt practice and filing of false affidavit constitutes an electoral offence only. OPP

5. Whether the respondent no.1 returned candidate has published a statement of fact which is false and which he either believes to be false or does not believe to be true in relation to his personal character being a statement reasonably calculated to prejudice the prospect of his election which amounts to corrupt practice. OPP

6. Whether the nomination of respondent no.1 has been accepted improperly. OPP
7. Whether non disclosure of correct educational qualification constitute corrupt practice as per section 123(2) & 123(4) of the R.P. Act. OPP
8. Whether the said corrupt practice has resulted in inducement and thwarted the free exercise of an Electoral Right of the voter. OPP
9. Whether the election of returned candidate is free in all respects of corrupt practice, to decide that election of respondent no.1 is not void. OPD
10. Whether the respondent no.1 has furnished the complete facts of acquittal, discharge, conviction and pendency of his past criminal cases in his Annexure 1 of the nomination.
11. Whether the election of returned candidate is liable to be declared null and void. OPP
12. Whether the petitioner is entitled to be declared elected.
13. Relief. Vide order of the same day, the contention of the respondent no.1 to treat the issue no.4 aforesaid as a preliminary issue was rejected and the election petition was put to trial. On 15th January, 2010 it was clarified that the onus of proving issue no.1 was on the respondent/defendant and that the onus of proving issue no.12 was on the petitioner and issue no.10 aforesaid was recast as under:

□Whether the respondent No.1 has not furnished the complete facts of acquittal, discharge, conviction and pendency of his past criminal cases in Annexure-1 on his nomination? OPP

9. The petitioner, besides himself has examined -

- a. Amit Singhla working as Deputy Commissioner cum District Election Commissioner, North West District, Kanjawala as PW1;
- b. Mr. Ranjeet Singh, Returning Officer of the Sultanpur Majra Legislative Constituency as PW3;
- c. Shri Raj Kumar Principal CRZ, Senior Secondary School, Sonipat, Haryana as PW5;
- d. Inspector Indraj Kumar working in the RTI Cell of North West District of the Delhi Police as PW6;
- e. Mr. Umesh Singh Rawat working as Judicial Assistant in Criminal Branch of this Court as PW7;
- f. Shri Subhash as PW 8;
- g. Shri Sumit Singh as PW9.

- h. Shri Jagjit Kumar as PW10;
- i. Sub-Inspector R.K. Mann working in the RTI Cell of the Outer District of Delhi Police as PW12.

10. The respondent no.1 besides himself has examined Shri Balbir Aggarwal as RW2 and Shri O.N. Asthana as RW3.

11. The respondent no.10 herein has also led his evidence in support of the respondent no.1.

12. None of the other respondents have led any evidence.

13. The counsels have been heard.

14. I now proceed to discuss the evidence led:

(i) The petitioner (appearing as PW1) in his examination-in-chief repeated the contents of the petition and has inter alia proved:

(a) The response dated 05.12.2008 of the Public Information Officer of the Office of the Commissioner of Police in response to the RTI query of the petitioner giving particulars of the criminal cases against the respondent no.1 as Ex.PW1/2.

(b) The affidavits of the respondent no.1 in the form of Annexure-I of Nomination Form as Ex.PW1/3 and Ex.PW1/5.

(c) The judgments dated 23.12.2002 in FIR No.250/1984 of Police Station Sultanpuri of acquittal of the respondent no.1 accused therein as Ex.PW1/4.

(d) Copy of the Gazette of Haryana School Education Board, Bhiwani, Haryana for the year 1981 pertaining to C.R.Z. Senior Secondary School, Sonapat, Haryana of acquittal of the respondent no.1 accused therein as Ex.PW1/6.

Though the admission into evidence of Ex.PW1/2, Ex.PW1/3, Ex.PW1/5 and Ex.PW1/6 was subject to the objection of the counsel for the respondent no.1 as to the mode of proof on the ground of the same being computer generated copies downloaded from the website but no merit is found in the said objections as the respondent no.1 in his written statement has not denied the factum of the FIRs and the defence of the respondent no.1 is of the FIRs not disclosed in the Nomination Form / affidavit accompanying the Nomination Form being not required to be so disclosed. The objection to Ex.PW1/6 which has been furnished to the petitioner through the medium of the Right to Information Act, 2005 is even otherwise misconceived. The said documents in any case have been

proved by other witnesses also.

I have perused the cross examination by the counsel for the respondent no.1 of PW1. Though the same is voluminous but most of it is found to be vexatious, frivolous and irrelevant and no dent is found to have been put on the material testimony aforesaid of the petitioner save to the effect that the petitioner admitted having lost to the respondent no.1 in election on an earlier occasion also. Though the counsel for the respondent no.10 also cross examined the petitioner but again to no avail. It is also significant to note that though the cross examination by the counsels for the respondent no.1 and the respondent no.10 of the petitioner stretched for several days but the counsels during the arguments did not even feel the need to refer to the cross examination. The same also confirms the frivolous and vexatious nature of the cross examination.

(ii) PW3 Ranjeet Singh was the Returning Officer of the said constituency in the subject election and has proved the affidavits submitted by the respondent no.1 as Ex.PW1/3 and Ex.PW1/5 and in his cross examination deposed that he as Returning Officer scrutinized the nomination papers of the candidates and found the nomination papers of the respondent no.1 to be in order as per the rules and thus accepted the same. He has further deposed that there were no objections raised at the time of scrutiny of the nomination paper of the respondent no.1 and neither the petitioner nor any other contesting candidate had disputed, challenged or controverted the affidavits filed by the respondent no.1 along with his nomination paper. He has further admitted the suggestion in his cross examination that the said affidavits were put on the office Notice Board as well as on the internet and that as per the judgment of the Supreme Court requiring the filing of such affidavits, other candidates have a right to file a counter affidavit if they dispute or find the affidavit filed by any other candidate to be false. He has reiterated that the petitioner did not, in accordance with the said judgment, file any affidavit in opposition to the affidavit of the respondent no.1. He has further stated that the Returning Officers do not go into the contents of the affidavit and only verify whether it has been duly signed by the candidate or not or attested by the attesting authority or not.

(iii) PW5 Sh. Raj Kumar working as Principal C.R.Z. Senior Secondary School, Sonapat, Haryana produced the original Gazette of the year 1981 of the said School and copy whereof is proved as Ex.PW1/6. In his cross examination he stated that the 10th class is the Board Examination; the students who had obtained admission in school and are enrolled in the School are regular students of the school and are eligible to appear in 10th class Board Examination; though the private students can also appear in 10th class Board Examination but they have no concern with the school; that the Gazette Notification Ex.PW1/6 contains the names of all the students who appear as regular students from the school including the compartment candidates and also the candidates whose admission has been cancelled and the candidates who did not appear in the examination; that the Board Examinations in the year 1981 used to be held twice; that the Gazette Ex.PW1/6 was of the Board Examination held in March, 1981 which pertained to enrolled candidates and not of the Board Examination held in September, 1981 of other candidates including compartment candidates. He has further deposed that the private students can appear in the Board Examination both in the month of March as well as in the month of September and that the school does not get the Gazette of the candidates who appear as private students. He could not admit or deny the suggestion that the respondent no.1 appeared as a private candidate in the 10th Board Examination in September,

1981.

(iv) PW6 Inspector Indraj Singh has proved the RTI application of the petitioner as Ex.PW6/A, the report of the concerned Police Station as Ex.PW6/3 and the RTI reply given to the petitioner as Ex.PW6/C. Though he was also cross examined exhaustively but significantly no suggestion to the effect that the information furnished in RTI response Ex.PW6/C being false or incorrect was given.

(v) PW7 Sh. Umesh Singh Rawat working as Judicial Assistant in Criminal Branch, High Court of Delhi proved the amended memo of appeal in Criminal Appeal No.146/2007 and the orders therein as Ex.PW1/4. The said document was admitted into evidence subject to the objection of the counsel for the respondent no.1 of the same having not been filed along with the petition but having been filed along with the replication. It was the contention of the counsel for the petitioner and which is found to be correct that the same was permitted to be filed in terms of order dated 26.05.2009. Needless to state that there was no cross examination of the said witness.

(vi) PW8 Sh. Subhash is a voter of the subject constituency and has in his affidavit by way of examination-in-chief deposed that the respondent no.1 in his election campaign was giving emphasis on his educational qualification as disclosed in his nomination paper and on the petitioner being illiterate and thus being not in a position to help the people at all. He has further deposed that had the respondent no.1 not given false information in his Nomination Form and not suppressed his criminal record, the petitioner would have been the returned candidate. He however in his cross examination could not show the newspapers or give particulars as to where the Nomination Form were published and could not even give the names of all the contestants in the 2008 election or give any particulars of the disclosures by the other candidates in their Nomination Forms. He also denied the suggestion that the respondent no.1 had won the election of the year 2008 for the good work done by him in the past and not on the basis of his educational qualification.

(vii) PW9 Sh. Sumit Singh, a voter in the subject constituency who had cast his vote, has in his affidavit of examination-in-chief stated that the facts and information given by the contesting candidates in their Nomination Form were being displayed on television through various news channels and he and his friends residing in the same constituency had formed an opinion that the respondent no.1 would be a good MLA of the constituency on the basis of the information so published by all the candidates. He has further deposed that the majority of the constituency was affected by the respondent no.1 being qualified upto 12th Class and there thus being more chances of his becoming a minister in Delhi Government and which would be beneficial to the constituency. He has further deposed that on learning that the respondent no.1 had suppressed information of the criminal cases against him and the falsity of the information regarding the educational qualification of the respondent no.1, he felt cheated. The said witnesses in his cross examination by the counsel for the respondent no.1 however could not tell the particulars of the information disclosed by the other candidates including the petitioner. The cross examination of the said witness by the counsel for the respondent no.10 further demonstrated that the said witness at the time of his cross examination on 08.03.2010 did not even remember the names of the other contestants in the election held in 2008.

(viii) PW10 Jagjeet Kumar is similarly a resident voter of the said constituency and has also deposed that if people of the constituency had known that the respondent no.1 is an illiterate person they would not have voted for him and would have voted for the petitioner who has no criminal history. His cross examination also is on the same lines.

(ix) PW12 Sub Inspector R.K. Maan has proved the RTI application as Ex.PW12/A and the information collected in pursuance thereto and the reply given to the RTI query as Ex.PW12/B, Ex.PW12/C & Ex.PW12/D. In his cross examination also there is no suggestion of the contents of any of the documents being incorrect

(x) PW1 (repeat) Sh. Amit Singhla working as Deputy Commissioner-cum-District Election Officer, North-West District, Kanjhawla has proved the record of the total number of electors in the constituency in the 2008 election, the total votes polled, the score of votes of contested candidates, total number of electors between the age group of 18 to 25 years and the percentage of Sikh and Punjabi electors residing in the constituency as Ex.PW4/A. The admission into evidence of the same also was subject to the objection of the respondent no.1 of no such record / information having been relied upon by the petitioner in the pleadings. Though the said witness was cross examined but to no effect.

(xi) Respondent No.1 (appearing as RW1) in his affidavit by way of examination-in-chief has deposed having won the election for the post of Member Legislative Assembly (MLA) from the subject constituency in the year 1993; his wife Smt. Sushila Devi having won the election for the post of MLA from the subject constituency in the year 1998 defeating the petitioner herein; having yet again won the election from the subject constituency in the year 2003 defeating the petitioner; having yet again in the year 2008 won the election with a margin of 19000 votes defeating the petitioner; that apart from the cases mentioned in the affidavits filed with the Nomination Form in the year 2008, no other cases were pending at the time of filing affidavits in which either cognizance had been taken by the Court or Charge had been framed; having passed 10th class from C.R.Z. Senior Secondary School, Sonapat, Haryana as a private candidate and having passed 12th class from the Open School; that his education qualification is not so high or not of much importance so as to be mentionable to win an election. In the cross examination, he denied knowledge of FIR No.1647/2006 on the complaint of Mr. Dinesh Gupta at Police Station Sultanpuri against him, he also denied knowledge of a case under Sections 323,506 and 34 of IPC having been registered against him on the basis of the said FIR; he however admitted being on bail in the said FIR but clarified that he received the summons from the Court in the year 2010 only and obtained bail in the year 2010 and that in the year 2008 there was no case against him and there was no necessity for him to obtain any bail. He denied knowledge of registration of a case against him on the basis of FIR No.1451 dated 01.10.2007 of Police station Sultanpuri under Sections 354 & 506 of the IPC on the complaint of Smt. Veena Joshi. He deposed having obtained his roll number for the 10 th class examination from the Haryana Board but did not recollect having passed the said examination in the Arts stream with English; the centre of examination being C.R.Z. Senior Secondary School, Sonapat, Haryana. He stated that he had not brought the 10th class examination mark sheet with him having already filed it with the Election Commission office with the Nomination Form at the time of filing thereof. He denied the suggestion that the same had not been filed. He denied the

suggestion that the 10th class document was a sham document. He further claimed having obtained bail in the 1984 riot cases in the year 1995 and having been acquitted therein in the year 2002 but denied any knowledge of any appeal thereagainst and stated that he had not been summoned in the appeal. He further denied having obtained bail in the appeal in the Criminal Appeal in March, 2007. He also denied that revision petitions pertaining to the 1984 riot cases where he was a party and had been noticed were pending in the Delhi High Court.

(xii) RW2 Balbir Aggarwal, a resident voter of the subject constituency, in his affidavit by way of examination-in-chief has exhorted the virtues of the respondent no.1 and deposed having voted for the respondent no.1 because of the work done by the respondent no.1 in the constituency. He has further deposed that no publication of the respondent no.1 claiming himself to be better qualified than the petitioner had come to his knowledge. He has also denied having read any information published by the candidates.

(xiii) RW3 Mr. O.N. Asthana, has deposed to the same effect.

(xiv) Respondent No.10 (appearing as R10W1) in his affidavit by way of examination-in-chief dealt with the various FIRs against the respondent no.1 and has deposed that FIR No.162/1983 of Police Station Sultanpuri and FIR No.115/1994 of Police Station Civil Lines were not required to be mentioned in the Nomination Form as the respondent no.1 already stood acquitted therein; that FIR No.538/2007 of Police Station Sultanpuri was not required to be mentioned as no charges had been framed therein; FIR No.464/1999 of Police Station Mangol Puri was not required to be mentioned because it did not relate to the respondent no.1. He has further deposed that voters of the said constituency were well aware of the accusations and acquittal of the respondent no.1 in such cases and elected the respondent no.1 for the works for the betterment of the public done by him.

15. The respondent no.1 in his affidavit Ex.PW1/3 verified on 10.11.2008 submitted before the Returning Officer, qua his educational qualification stated as under:

"(4). My education qualifications are as under:-

Name of School / University and the year in which the course as completed should also be given) (1) C R Z Higher Secondary School, Sonapat, Haryana X 1981 (2) National Open School XII 2002"

16. The respondent no.1 in the affidavit Ex.PW1/3 supra gave the information of the following cases pending against him in which cognizance had been taken by the Court:

(a) Case No.346/1998 of the Court of Sh. M.K. Nagpal, M.M., Tis Hazari, Delhi under Sections 147, 148, 149, 353, 186 & 332 of the IPC.

(b) Case No.1034/1999 also of the Court of Sh. M.K. Nagpal, M.M., Tis Hazari, Delhi under Sections 186, 353 & 332 of the IPC.

(c) Case No.667/2002 of the court of Ms. Sugandha Aggarwal, M.M. Rohini, Delhi under Sections 186, 353 & 34 IPC.

17. The respondent no.1 in his affidavit in Form 26 under Rule 4A and proved as Ex.PW1/5 gave information of the following cases in which he was accused of offences punishable with imprisonment for two years or more and in which charges had been framed by the Court of competent jurisdiction:

(A) FIR No.346/1998 of Police Station Sultanpuri under Sections 147, 148, 149, 186, 332 & 353 IPC pending in the Court of Sh. M.K. Nagpal, M.M., Tis Hazari, Delhi. (B) FIR No.1034/1994 of Police Station Sultanpuri under Sections 186, 353 & 332 IPC pending in the Court of Sh. M.K. Nagpal, M.M., Tis Hazari, Delhi.

(C) FIR No.677/2002 of Police Station Sultanpuri under Sections 136, 353 & 34 IPC pending in the court of Sh. Manish Gupta, M.M., Rohini, Delhi.

18. The memo of parties of Criminal Appeal No.146/2007 of this Court proved as Ex.PW1/4 shows the respondent no.1 as respondent no.8 in that appeal. However the orders dated 19.03.2008, 01.07.2008, 31.07.2008 and 25.11.2008 of the said appeal do not show the appearance on behalf of the respondent no.8 or any direction having been issued against the respondent no.8. From the said document, it cannot be said that notice of the said appeal stood served on the respondent no.1 prior to his filing the affidavits aforesaid. Besides Ex.PW1/4 there is no other evidence that the respondent no.1 otherwise knew of the said appeal.

19. The arguments of the counsels for the parties revolved around the interpretation of Section 100(1)(b), (d)(i) & (iv) read with Section 123(2) & (4) of the Act, with the counsel for the petitioner submitting that false information / suppression of information in the affidavits required to be filed as per the judgment of the Supreme Court in Union of India Vs. Association for Democratic Reforms AIR 2002 SC 2112 and the consequent Press Note dated 28.06.2006 and Notification dated 27.03.2003 amounts to corrupt practices leading to the declaration of the election of the Returned Candidate as void and the counsel for the respondent no.1 and the counsel for the respondent no.10 contending to the contrary.

20. The relevant portions of Section 100(1)(b), (d) (i)&(iv) and Section 123(2)&(4) of the R.P. Act are set out herein below for reference:

"100. Grounds for declaring election to be void. - [(1) Subject to the provisions of sub-section (2) if [the High court] is of opinion -

(a)

(b) that any corrupt practice has been 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; or

(c)

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

- (i) by the improper acceptance or any nomination, or
- (ii)
- (iii)
- (iv) by any non-compliance with the provisions of the

Constitution or of his Act or of any rules or orders made under this Act.

123. Corrupt practices. - The following shall be deemed to be corrupt practices for the purpose of this Act:-

(2) Undue influence, that is to say, any direct or indirect interference or attempt to interfere on the part of the candidate or his agent, or of any other person with the free exercise of any electoral right.

(4) The publication by a candidate or his agent or by any other person of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate or in relation to the candidature, or withdrawal of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate's election."

21. The counsel for the respondent no.1 argued:

(i) That Section 123(4) applies only to statements made during an election campaign.

(ii) That the petitioner has been unable to establish that anyone was so influenced.

(ii) That the objection if any ought to have been raised at the time of scrutiny of nominations and if the objection had been raised, the Returning Officer was duty bound to decide the same summarily - no objection was raised at that time and it is not open to the petitioner to now raise an objection to the statement / declaration in the Nomination Form in the affidavit filed therewith.

(iv) That the affidavit filed is in terms of the form prescribed therefor and there is no falsity therein.

(v) Even if the contents of the affidavit are false, it is not a ground for setting aside of the election and can only be a ground for prosecution.

(vi) That the filing of the false affidavit does not affect the outcome of the election.

(vii) That the statements referred to in Section 123(4) relate to statements made qua opponents only and the same does not apply to the statement made by a candidate about his own self.

(viii) That mere registration of FIR is not to be disclosed in the nomination and / or the affidavit accompanying the same and only those FIRs of which cognizance has been taken and in which Charges have been framed are to be disclosed.

(ix) That the petitioner has not proved that of the FIRs which are stated to have been not disclosed, cognizance had been taken or Charges had been framed.

(x) Cognizance is taken when summoning takes place i.e. when charge sheet is filed.

(xi). Reliance is placed on:

(I) Sheopat Singh Vs. Ram Pratap AIR 1965 SC 677 in support of the contention that the false statement referred to in Section 123(4) of the Act is to be in relation to the personal character or conduct of a rival candidate;

(II) Dr. Jagjit Singh Vs. Giani Kartar Singh AIR 1966 SC 773, the false statement within the meaning of Section 123(4) of the Act in which case also was against a rival candidate. (III) Baburao Bagaji Karemore Vs. Govind AIR 1974 SC 405 enunciating the law on burden of proof and appreciation of evidence in an election petition.

(IV) Gadakh Yashwantrao Kankarrao Vs. E.V. alias Balasaheb Vikhe Patil AIR 1994 SC 678 but which is found to be of no applicability to the present controversy. (V) Subhash Desai Vs. Sharad J. Rao AIR 1994 SC 2277 but which is concerned with omission of giving full particulars in election petitions.

(VI) Kumara Nand Vs. Brijmohan Lal Sharma AIR 1967 SC 808 but which also is found to be of no applicability in the present case.

(xii) That the Supreme Court in People's Union for Civil Liberties (PUCL) Vs. Union of India AIR 2003 SC 2363 held that power given to Returning Officer in earlier order dated 28.06.2002 of the Election Commission of India to reject nomination for furnishing wrong information to the public servant or for suppression of material facts in the affidavit was prima facie unjustified. Reliance in this regard is placed on paras no.75 and 76 of the judgment.

(xiii). Attention is invited to the Notification dated 27.03.2003 of the Election Commission of India and it is contended that if the affidavit as required therein is filed along with the Nomination Form, nomination cannot be rejected.

(xiv) That in Section 100 of the Act dealing with setting aside of an election, false affidavit has not been made a ground for setting aside of the election and the only consequence of filing a false affidavit is prosecution under Section 125A of the Act. Reliance is placed on Mani C. Kappan Vs. K.M. Mani MANU/KE/0531/2006 laying down that non compliance of the direction contained in the Notification dated 27.03.2003 cannot be treated as non compliance of the provisions of the Constitution to set aside an election under Section 100(1)(d)(iv) of the R.P. Act.

(xv) Reference is also made to Narayan Gunaji Sawant Vs. Deepak Vasant Kesarkar MANU/MH/1523/2011 where a Single Judge of the Bombay High Court also held that non compliance of a direction of the Election Commission contained in the Notification dated 27.03.2003 cannot be a ground for setting aside of an election.

(xvi) That unless the Legislature amends the Act, notwithstanding the directions of the Supreme Court and the Notification aforesaid, non compliance thereof cannot be a ground for setting aside of the election.

(xvii) It is contended that the judgment dated 25.11.2011 of the Patna High Court in Election Petition No.4/2009 titled Bishnudeo Bhandari Vs. Mangani Lal Mandal holding otherwise was set aside by the Supreme Court in Mangani Lal Mandal Vs. Bishnu Deo Bhandari (2012) 3 SCC 314.

(xviii) That the proforma of affidavit has been prescribed by the Election Commission and a candidate cannot subtract or add thereto and the said proforma requires particulars only of those cases to be given in the affidavit in which cognizance had been taken. It is contended that the RTI information of registration of cases against the respondent no.1 is not of cognizance having been taken and in fact the election petition based on the said information is without the requisite particulars.

(xix) That the respondent no.1 in the affidavit had described his educational qualification as 12th Class passed; the petitioner is not disputing the statement of the respondent no.1 of being 12th class pass and is disputing only the statement of the respondent no.1 of being 10th pass.

(xx) That the respondent no.1 was not a regular student of the C.R.Z. Senior Secondary School, Sonapat, Haryana and no records are maintained of private students.

22. Per contra, the counsel for the petitioner has contended:

(i) That the respondent no.1 has not furnished any evidence of his educational qualification.

(ii) That once it is contended that the respondent no.1 is not 10th pass and the claim in that regard is false, the question of his being 12th pass does not arise.

(iii) Reliance is placed on judgment dated 19.02.2008 of a Single Judge of this court in Election Petition No.1/2004 titled Jaspal Singh Vs. O.P. Babbar holding that a nomination not in compliance of Section 33(a) of the Act is not a nomination in law.

(iv) That the furnishing of false information in the affidavit per se amounts to unduly influencing the voter because of the right of the voter to know; the principle of *res ipsa loquitur* is invoked.

(v) That the petitioner has also examined three voters from the constituency who have claimed to have been so influenced by the educational qualification of the respondent no.1.

Reference is made to *Krishnamoorthy Vs. Siva Kumar* 2009 Law Suit Madras 2319 laying down that a person who fails to make a disclosure of full and complete information as required by the Election Commission cannot contend that no consequence could befall on him of such act of omission and commission on his part and amounts to undue influence within the meaning of Section 123 of the Act. Reference is made to *Chhedi Ram Vs. Jhilmil Ram* AIR 1984 SC 146 holding that if nomination of one of the candidates is improperly accepted, the votes secured by such candidates can affect the election and invite setting aside thereof.

(vi) That the onus was on the respondent no.1 to prove the contents of his affidavit. Reliance in this regard is placed on para 32 of *Sushil Kumar Vs. Rakesh Kumar* AIR 2004 SC

(vii) That it is not the case of the respondent no.1 that he is not in possession of any document of having passed the Class 10 examination; rather he has pleaded that it was submitted with the Returning Officer; but neither has the same been produced before this court nor any effort was made to prove the document submitted with the Returning Officer and only inference can be that there is no such document.

(viii) That Mark R10W1/PX1 being the Certificate of the National Institute of Open Schooling Examinations 2002 shows that the respondent no.1 to have taken the class 10 examination in the year 2010 and thus the argument, of because of having done class 12th, the need to prove having done Class 10 th, is meaningless.

(ix) Relying on *Chhedi Ram* supra AIR 1984 SC 146, it is argued that the election is void because of incorrect acceptance of Nomination Form because of written particulars given therein.

23. As the lengthy narrative aforesaid of the proceedings would make it obvious, the controversy can be discussed in two heads i.e.:

A. Whether the respondent no.1 furnished false or wrong information pertaining to his education and the accusations of any offence against him and his convictions; and, B. If so, whether the same can be a ground for setting aside the election of the respondent no.1.

24. The Supreme Court in *Association for Democratic Reforms* supra directed the Election Commission to call for information on affidavit, by issuing necessary order in exercise of its power under Article 324 of the Constitution of India, from each candidate seeking election to Parliament or

State Legislature, as a necessary part of Nomination Paper, furnishing therein information inter alia on the following aspects in relation to his / her candidature:

- (i) Whether the candidate is convicted/acquitted/discharged of any criminal offence in the past-if any, whether he is punished with imprisonment or fine?
- (ii) Prior to six months of filing of nomination, whether the candidate is accused in any pending case, of any offence punishable with imprisonment for two years or more, and in which charge is framed or cognizance is taken by the Court of law. If so, the details thereof.
- (iii) The educational qualifications of the candidate.

25. In pursuance to the aforesaid judgment, the Election Commission of India vide Press Note dated 28.06.2002 prescribed the form of the affidavit to be furnished by candidate along with Nomination Paper before the Returning Officer disclosing:

- (a) Conviction/s in the past of a criminal offence.
- (b) Discharge / acquittal in the past in charges of criminal offences.
- (c) Details of the appeals, revisions, reviews if any pending against conviction / discharge.
- (d) Accusations, in the period ending six months prior to the date of filing of the nomination, of offences punishable with imprisonment with two years or more and in which a charge has been framed or cognizance taken by the Court.
- (e) Educational qualifications giving details of school and university education including name of the school / university and the year in which the course was completed.

26. Thereafter the RP Act was amended with effect from 24.08.2002 incorporating therein inter alia Section 33A requiring a candidate to furnish information as to whether:

- (i) he is accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed by Court of competent jurisdiction;
- (ii) he has been convicted of an offence and sentenced to imprisonment for one year or more.

27. The Conduct of Election Rules, 1961 were also amended with effect from 03.09.2002 inter alia adding Rule 4A prescribing the form of affidavit, to be filed at the time of delivering the nomination

paper, in Form 26 to the said Rules. Form 26 requires the candidate to inter alia disclose:

(I) Whether he / she is accused of any offences punishable with imprisonment for two or more years in a pending case in which charges have been framed by the Court of competent jurisdiction and the particulars of such cases. (II) Whether he has been convicted of an offence and sentenced to imprisonment for one year or more and if so, the particulars of such cases.

(III) His / her educational qualifications giving details of highest school / university education mentioning the full form of the Certificate / Diploma / Degree course, name of the school / college / university and the year in which the course was completed.

28. It would thus be noticed that Section 33A and Form 26 prescribed in Rule 4A did away with the requirement as prescribed by the Supreme Court and the Press Note supra, i) of giving all educational qualifications, giving details of [School and university education and confined it to details of [highest school / university education; and; iii) of giving particulars of even those cases in which the candidate though had been charged with a criminal offence but had been acquitted. The said aspect was considered by the Supreme Court in PUCL supra and it was observed that the information of acquittals will not be of much relevance inasmuch as acquittal prima facie implies that the accused is not connected with the crime or the prosecution has no legs to stand and therefore as regards past criminal record, what the Parliament has provided for is fairly adequate.

29. To complete the chronology, mention may also be made of the order dated 27.03.2003 of the Election Commission pursuant to PUCL, revising the earlier instruction / Press Note dated 28.06.2002. However need is not felt to elaborate further on the same.

30. I will now proceed to examine the affidavit filed by the respondent no.1 to gauge whether the same suffers from any falsehood, suppression and mis-declaration.

31. I will take up the disclosure with respect to the educational qualification first. The respondent no.1 was as per Form 26 supra required to make disclosure only of the [highest school / university education . As per the disclosure made by the respondent no.1 in his affidavit Ex.PW1/3, the [highest' school education disclosed was of having passed Class XII from National Open School in the year 2002. Though the respondent no.1, as aforesaid was required to disclose only the [highest school / university education' but he also disclosed that he had passed Class X in the year 1981 from C.R.Z. Senior Secondary School, Sonapat, Haryana. The challenge made by the petitioner in the petition is not to the [highest' educational qualification of the respondent no.1 but to the educational qualification preceding the said [highest education qualification' and which as per Form 26 was not required to be disclosed. The question which thus arises for consideration is whether there can at all be said to be a defect in the affidavit or falsehood qua disclosure of matters which were not required to be disclosed.

32. The reason, for the directions issued by the Supreme Court in Association for Democratic Reforms, was that for health of democracy and fair election disclosure inter alia of the candidate's qualification is necessary to enable the voters to decide intelligently for whom to vote and to enable the voters to make a choice. It was held that voters are required to be educated and well informed about the contesting candidates.

33. I have checked on the website of the National Institute of Open Schooling (NIOS) formerly known as National Open School (NOS) to find out whether for a candidate to appear in a Class XII examination, eligibility of having passed the Class X examination is essential. The revised syllabus effective from 2008-2009 of the NIOS as available on its website, provides that for a candidate to be eligible for admission at Senior Secondary level, should have passed Secondary Class (Class X) from any recognized Board. The respondent no.1 in his affidavit has claimed to have passed Class XII examination from the NIOS in the year 2002. Though the Rules of the NIOS for the year 2002 are not available on the website but I have no reason to not reasonably presume that the eligibility condition even then must have been the same. In any case, it is not the case of the petitioner also that the respondent no.1 could have taken the Class XII examination from NIOS without passing the Class X examination.

34. Be that as it may, even if it were to be the case that the NIOS wrongly allowed the respondent no.1 to take the Class XII examination, without being eligible therefor, this petition cannot take the form of a challenge to the highest school qualification of the respondent no.1.

35. The purpose as aforesaid, for disclosure of educational qualification is to enable the electorate to make a choice between a candidate with a higher educational qualification and another with a lesser qualification. It is well-nigh possible that the electorate in their wisdom may prefer a candidate with a lesser educational qualification. The respondent no.1 in this context is right to the extent that his qualification of 12 th pass is not such a high qualification in comparison to the educational qualification of the petitioner so as to influence the voter. However that is not for this Court to decide. The fact remains that the 'highest' school qualification disclosed of the respondent no.1 is not under challenge. The challenge as made in this petition to eligibility qualification for such 'highest' qualification, is irrelevant. It was for the NIOS to, at the time of allowing the respondent no.1 to appear in the Class XII examination, satisfy itself that the respondent no.1 was eligible therefor. Mention at this stage may also be made of Mark R10W1/PX1 which was shown for the first time to respondent no.10 appearing as R10W1 in his cross examination. The same is purportedly a download from the website of NIOS of Class X examination hall ticket issued in April, 2010 to one Jai Kishan. On the basis thereof it is argued that the respondent No.1 has taken the Class X examination in April, 2010 only. However the said document has not been proved. R10W1 did not accept it to be pertaining to respondent no.1. No such case was in any case built up. Merely because of Mark R10W1/PX1 being in the same name does not prove that it is respondent no.1 who took the Class X examination in 2010. Jai Kishan is a fairly common name. The said argument of counsel for petitioner is meritless.

36. Thus the challenge to the election of the respondent no.1 for the reason of falsity in declaration of educational qualification fails. Need is not felt to render any finding on the genuineness or

otherwise of the lesser qualification of Class X claimed by the respondent no.1, the same being not relevant for the matter in controversy.

37. That brings me to the challenge to the election of the respondent no.1 on the ground of falsity in disclosure of criminal cases pending against him.

38. Here again, the requirement as per Form 26 supra is only for disclosure of 'pending cases' in which 'charges have been framed' for offences punishable with imprisonment for two years or more and all pending cases in which 'cognizance has been taken by the Court' and of the past convictions. Though in pursuance to the direction in Association for Democratic Reforms, the direction of the Election Commission was also for disclosure of acquittals but the same was done away with in Form 26 and the challenge thereto in PUCL failed.

39. It is not as if the respondent no.1 in the affidavit represented himself to be having no criminal past; he disclosed three cases pending against him. The case of the petitioner is of non disclosure of certain other cases. However all that the petitioner has been able to prove is, the information furnished by the Police Authorities under the RTI Act and the pendency of appeals against acquittal in some cases. However the requirement under Form 26 is not of disclosure of all FIRs against the candidate but disclosure only of those FIRs in which 'charges have been framed' by the Court or in which 'cognizance has been taken by the Court'. The petitioner has failed to prove that in the cases pertaining to the FIRs disclosed in response to the RTI query and which the respondent no.1 has not disclosed in his affidavit, charges have been framed and / or cognizance had been taken. As far as the pendency of the appeals is concerned, the same are admittedly against the acquittals and which though were under the Press Note dated 28.06.2002 required to be disclosed but are under Rule 4A or Form 26 supra, not required to be disclosed. The petitioner has also failed to prove that the notice of the said appeals had been served on the respondent no.1 prior to the submission of the Nomination Form. Thus, I do not find the petitioner to have proved any falsity, misrepresentation or suppression on this account also.

40. It is significant that the requirement is for disclosure of only those cases in which charge is framed or cognizance is taken by the Court of law and not of a mere FIR on the basis whereof no charge has been framed or cognizance taken. This position has remained the same since the directions in Association for Democratic Reforms.

41. In view of my above findings:

(i) Issue No.2 i.e. "Whether the petitioner does not have a Locus Standi to file present petition." is in favour of the petitioner and against the respondent no.1. The respondent no.1 has been unable to show that the petitioner has no locus standi to file the present petition. In fact, no arguments whatsoever were addressed by the counsel for the respondent no.1 on the said aspect.

(ii) Issue No.3 i.e. "Whether the respondent no.1 has not furnished information in terms of the rules framed by Election Commission of India and the Hon'ble Supreme

Court and its effect." is decided against the petitioner and in favour of the respondent no.1.

(iii) Issue No.5 i.e. □Whether the respondent no.1 returned candidate has published a statement of fact which is false and which he either believes to be false or does not believe to be true in relation to his personal character being a statement reasonably calculated to prejudice the prospect of his election which amounts to corrupt practice. is decided against the petitioner and in favour of the respondent no.1.

(iv) Issue No.6 i.e. □Whether the nomination of respondent no.1 has been accepted improperly. has become infructuous in view of the finding of there being no falsehood or suppression or misrepresentation in the affidavit of the respondent no.1 accompanying the Nomination Form.

(v) Issue No.8 i.e. □Whether the said corrupt practice has resulted in inducement and thwarted the free exercise of an Electoral Right of the voter. has also become infructuous in the light of the finding that there was no false declaration by the respondent no.1.

(vi) With respect to issue No.10 i.e. □Whether the respondent no.1 has furnished the complete facts of acquittal, discharge, conviction and pendency of his past criminal cases in his annexure 1 of the nomination. it is held that the facts of acquittal, discharge and pendency of past criminal cases are not required to be disclosed and the facts required to be disclosed have been truthfully disclosed.

42. Though in view of the aforesaid finding there is no need to answer the legal question whether falsehood, misrepresentation and suppression in the affidavit accompanying the Nomination Form can constitute a ground for setting aside of the election but for the sake of completeness and in accordance with the requirements of CPC, the said question is also required to be answered.

43. I am unable to digest that the only consequence of falsehood, misrepresentation and suppression in the affidavit in Form 26 along with the Nomination Form can be under Section 125A i.e. attracting punishment with imprisonment as provided therein. The reasons which prevailed with the Supreme Court in Association for Democratic Reforms for requiring such disclosure were not to punish a candidate for wrong disclosure but to vest the voters with a right to elect on the basis of antecedents, past performance, educational qualifications etc. of a candidate and all which was held to be essential for the health of democracy and fair election and to maintain purity of elections. Logically, if the disclosure is false, the election in pursuance thereto would be a impure one. Without entering into the nitty-gritty of law, I find it hard to sustain that the only consequence of an impure election is to punish the elected candidate with imprisonment, while allowing him to continue as the elected representative; to hold so would, again applying the reasoning given by the Supreme Court, be bad for the health of democracy and fair elections.

44. The common theme running in Section 123 of the Act defining corrupt practices on commission whereof by a returned candidate an election under Section 100(1)(b) of the Act becomes void, is of interference with the fair choice to be made by the electorate. It is for this reason that bribery and exercise of undue influence have been deemed to be corrupt practice. I have wondered whether furnishing of wrong information would not *res ipsa loquitur* be undue influence within the meaning of Section 123(2) of the RP Act. The argument of the counsel for the respondent no.1 that there being no corresponding change in Section 100 or Section 123 of the Act pursuant to the amendments of the year 2002 in the RP Act and the Conduct of Elections Rules, the violations of the said amendments would not be a ground for declaration of a election to be void, in my view is to be noted to be rejected. I may record that the contention before the Supreme court in Association for Democratic Reforms also was that till suitable amendments are made in the Act and the Rules, directions should not have been issued and that it is for the political parties to decide whether such amendments should be brought and carried out in the Act and the Rules which nowhere disqualified a candidate for non disclosure and thus the directions would be of no consequence. However the said argument was negatived by the Supreme Court and it was held that the Supreme Court has ample powers to make orders which have the effect of law and if need be by issuing necessary directions to fill the vacuum till such time the Legislature steps in to cover the gap. It was further held that the members of a democratic society should be sufficiently informed so that they may take intelligently the decisions which may affect themselves and this would include their decision of casting votes in favour of a particular candidate and that disclosure by the candidate of such information would strengthen the voters in taking appropriate decision of casting their votes.

45. In my opinion, the argument that a falsity, suppression or misrepresentation in the disclosure would not affect the outcome / result of a election would defeat the very purpose of the vital change brought about by Association for Democratic Reforms and would render the said judgment otiose and hollow.

46. I have intentionally observed above that the disclosure which is false, suppresses material facts or misrepresents, *res ipsa loquitur* amounts to unduly influencing the voters inasmuch as it is found that it is virtually impossible to adjudicate the effect of such falsehood/misrepresentation/suppression. In the present case also, both parties have examined voters supporting their own case, with voters examined by the petitioner stating that they were influenced and would not have cast their votes in favour of the respondent no.1 had they known that he was not Xth class pass and the voters examined by the respondent no.1 and respondent no.10 stating that the said factor would not have influenced their vote. I am also of the view that unless the effect of falsehood is read into Section 100 and Section 123, the amendment to the Act and the Rules would remain impotent. The amendment by incorporation of Section 125A in my view is not intended to exclude the filing of a false affidavit from the domain of corrupt practice and / or from being a ground for setting aside of the election. Rather I feel that the remedy of prosecution for filing of a false affidavit, was in any case, even in the absence of Section 125A, available. There may of course be cases where the falsehood / suppression / misrepresentation which may be bona fide or inconsequential or may be such which requires proof of having prejudiced the prospect of election and in which case the Court may require evidence to be led. I may also observe that though the judgments on Section 123(4) of a pre Association for Democratic Reforms era may have been in

relation to statement of facts in relation to personal character or conduct of a 'rival' candidate but I do not find any limitation in the language thereof to restrict its scope to statements made by one candidate against his rivals/ other candidate/s only and to make it inapplicable to false statements made by a candidate in relation to his own personal character or conduct, if it is reasonable calculated to prejudice the prospects of 'other' candidate/s election. We cannot be unmindful of the fact that pre Association for Democratic Reforms, there was no requirement for the candidate to publish any statement of fact relating to his / her own personal character or conduct and hence the question of falsity thereof did not arise and thus the use in Section 123(4) of the words 'that candidate's election'. However now when the law requires the candidate to publish statements concerning his own personal character and conduct, the purposive interpretation of Section 123(4) would make it applicable to those statements also.

47. Having on facts held against the petitioner, I do not intend to delve any further on the legal aspect, save for noticing the judgments cited at the bar.

48. Jaspal Singh supra was concerned with rejection by the Returning Officer of a nomination for the reason of the affidavit in Form 26 being not attested and also being not complete. The argument that the same were not grounds provided for rejection of nomination was negated holding that in view of the legislative history leading to incorporation of Section 33A and Rule 4A, notwithstanding there being no consequential amendment to Section 36 prescribing for rejection of nomination for non compliance of Section 33A, the same has to necessarily constitute and be read as a ground for rejection of nomination.

49. Krishnamoorthy supra takes the same view as taken by me hereinabove, that, to hold furnishing of false information cannot dethrone an elected member, is to make the very prescription, a mockery and that any incorrect, wrong, incomplete or false information would certainly interfere with the free exercise of the electoral right of the voter in as much as his choice of candidate will be influenced greatly by the information so furnished or withheld.

50. The High Court of Kerala in Mani C. Kappan supra however took a contrary view and held that non disclosure in the affidavit accompanying the nomination is not a ground for setting aside of the election. The reason which prevailed with the Kerala High Court to hold so was that non furnishing of all details in the affidavit has not been made a ground in Section 36 of the RP Act for rejection of the nomination and that an election petition is based on rights which are purely the creature of a statute and without the statute i.e. the RP Act making the non disclosure of information a ground for rejection, the acceptance of such a nomination cannot be treated as improper for setting aside the election under Section 100(1)(d)(i) of the Act. It was further held that any non compliance of the Election Commission's order cannot be treated as non compliance with the provisions of the Constitution, to set aside an election under sub-Section 1(d)(iv) of Section 100 of the Act. The matter was however not tested on the anvil of Section 100(1)(b) or Section 123(4) of the Act. It is also worth mentioning that the non disclosure in that case was of the debt owed to the Tourism Department and what prevailed with the Court was also the fact that the affidavit in Form 26 is not required to contain any disclosure by the candidate regarding the debts or any matter in excess of what is required to be disclosed under Section 33A. It cannot really thus be said that the said view is in

conflict with what has been held hereinabove.

50. The Bombay High Court also in Narayan Gunaji Sawant (supra) held that non compliance of directions of the Election Commission would not come within the mischief of Section 100(1)(d)(iv) of the Act as the election petition has to be confined to the grounds which are available under Section 100 and the scope of the election petition cannot be enlarged unless there is an amendment in the legislation to that effect. Again the matter was not tested on the anvil of Section 100(1)(b) and Section 123(4) of the Act.

51. The High Court of Patna in Bishnudeo Bhandari supra set aside the election for the reason of the elected candidate having withheld information about the existence of his first wife and children from her and their assets and liabilities, holding that the word 'Constitution' in Section 100(1)(d)(iv) is generic, performance oriented and cannot be controlled by the provisions of the Constitution enumerated in Section 36 of the Act. The Supreme Court in appeal reported in (2012) 3 SCC 314 supra observed that a mere non compliance or breach of the Constitution or the statutory provisions by itself does not result in invalidating the election of a returned candidate under Section 100(1)(d)(iv); the sine qua non for declaring election of a returned candidate to be void on the ground under clause (iv) of Section 100(1)(d), is further proof of the fact that such breach or non-observance has resulted in materially affecting the result of the returned candidate. It was further held that for the election petitioner to succeed on such ground viz., Section 100(1)(d)(iv), he has not only to plead and prove the ground but also that the result of the election insofar as it concerned the returned candidate has been materially affected. Finding the judgment of the High Court to have not considered this aspect, i.e. whether the non disclosure of information concerning the first wife and the dependant children born from that wedlock, their assets and liabilities has materially affected the result of the election insofar as it concerned the returned candidate and further finding no pleading to the said effect, the appeal preferred by the returned candidate was allowed. I may respectfully state that the said judgment does not come in the way of the view taken hereinabove.

52. In T. Malaravan Vs. A.S. Maheswari MANU/TN/9469/2007 the election petition was dismissed for the reason of lacking any pleading to the effect that because of the false affidavit filed by the returned candidate, the result of the election was materially affected. It was held that the ground of filing false affidavit by the returned candidate itself is not a corrupt practice within the meaning of Section 123 of the Act and to invoke the same ground, what is required to be alleged is that the result of the election has been materially affected by such false affidavit. This judgment also thus cannot be said to be contrary to the reasoning which has prevailed above with the undersigned.

53. I may mention that the Bombay High Court in Arjunadada Dashrath Bhuse Vs. Dadaji Dagadu Bhuse MANU/MH/0249/2011 held the election as member of Legislature to be void for the reason of non disclosure of description of offences the elected candidate was accused of.

54. In the light of the above, I proceed to answer the remaining issues as under:

(i) Issue no.1 i.e. ☐Whether the petition is not maintainable due to want of cause of action is decided in favour of the petitioner and against the respondent no.1 in as much as it has been held that falsity of information in the affidavit accompanying the nomination furnishes a cause of action for setting aside of the election.

(ii) Issue no.4 i.e. ☐Whether the corrupt practice and filing of false affidavit constitutes an electoral offence only is decided in favour of the petitioner and against the respondent no.1 as it has been held that filing of a false affidavit is not merely an electoral offence but also a ground for setting aside of the election.

(iii) Issue no.7 i.e. "Whether non disclosure of correct educational qualification constitute corrupt practice as per section 123(2) & 123(4) of the R.P. Act." is decided in favour of the petitioner and against the respondent no.1 as it has been held that non disclosure of educational qualification as required in Form 26 can constitute a corrupt practice within the meaning of Section 123 of the RP Act.

(iv) Issue no.9 i.e. "Whether the election of returned candidate is free in all respects of corrupt practice, to decide that election of respondent no.1 is not void is decided in favour of the respondent no.1 and against the petitioner inasmuch as it has been held that there was no falsity or misrepresentation or suppression in the affidavit accompanying the Nomination Form of the respondent no.1 and thus the respondent no.1 is not found to be guilty of any corrupt practice.

(v) Issue no.11 i.e. ☐Whether the election of returned candidate is liable to be declared null and void" is decided in favour of the respondent no.1 and against the petitioner.

(vi) Issue no.12 i.e. "Whether the petitioner is entitled to be declared elected in view of the findings hereinabove is infructuous.

55. Resultantly, the election petition is dismissed, however no costs.

RAJIV SAHAI ENDLAW, J MAY 07, 2013 'M/gsr'