

Sanjay Brijkishorlal Nirupam vs Gopal Chinayya Shetty And 21 Others on 30 November, 2018

Equivalent citations: AIR 2019 (NOC) 123 (BOM.), AIRONLINE 2018 BOM 1232

Author: Mridula Bhatkar

Bench: Mridula Bhatkar

Sherla V.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ELECTION PETITION No.1 OF 2014

Sanjay Brijkishorlal Nirupam

Vs.

Gopal Chinayya Shetty & ors.

Mr.Harshad Bhadbhade with Mr. Saurabh Butala i/b. Ms.Swati D.
Sawant for the Petitioner

Mr.B.D. Joshi with Mr.Amarendra Mishra, Ms.Anjali Helekar for the
Respondent No.1

CORAM: Mrs.MRIDULA BHATKAR, J.

JUDGMENT RESERVED ON: OCTOBER 16, 2018

JUDGMENT DELIVERED ON: NOVEMBER 30, 2018

JUDGMENT:

1. This Election Petition is filed under section 100(1)(d)(i) and section 100(1)(d)(iv) of the Representation of the People Act, 1950 praying that the election of Respondent No.1 from 26, Mumbai North Parliamentary Constituency is to be declared as null and void and be set aside and also declaring that the petitioner has secured majority of the valid votes and he is to be declared as elected in respect of 26, Mumbai-North Parliamentary Constituency in the 16th Lok Sabha elections held on 24.11.2014.

ep.1.2014(J).doc The challenge given in brief is on the point of non-disclosure of the information regarding assets of Respondent No.1 and his spouse in the nomination form and in the affidavits resulting into wrongful acceptance of the nomination form and the affidavit of the elected candidate.

2. At the outset, Mr.Bhadbhade, the learned Counsel for the Petitioner has submitted that he is not pressing prayer clause (b) of para 66, but pressing only prayer clause 66(a). The said prayer clauses read as under:

"66. ..

(a) That this Honourable Court be pleased to declare the election of respondent no.1 from the 26 - Mumbai North Parliamentary constituency as null and void and the same be set aside.

(b) This Honourable Court be pleased to declare that the petitioner has secured majority of valid votes and be declared as elected in respect of 26 - Mumbai North Parliamentary constituency in the 16 th Lok Sabha elections, held on 24 April 2014 as the Petitioner has secured second highest votes."

The learned Counsel has pointed out that he does not want declaration that the petitioner is to be declared as elected but he limits his prayer to the declaration that the ep.1.2014(J).doc election of Respondent No.1 from 26, Mumbai-North Parliamentary Constituency, is null and void and the same to be set aside.

3. In brief, the case of the petitioner is that the respondent No.1 is the owner of the plot bearing CTS Nos.36, 36(1) to 36(12) at Borivali when he filled up the nomination form. His company, namely, Balaji Construction assigned developmental rights to his wife's company, namely, Jyoti Construction, who constructed a building on the said plot. The respondent did not mention about it and about the asses of the construction company, namely, Jyoti Construction, owned by his wife and son in the nomination form. The Election Petition is filed on 2 counts - firstly, the election officer has failed to decide the objections raised by PW2 Subodh Ranjan and secondly, on improper acceptance of nomination form of Respondent No.1 by the Returning Officer. Both the objections are based on non-disclosure of the assets of Respondent No.1 and his wife in the affidavit dated 31.3.2014 (exhibit 12) which was filed alongwith the nomination form dated 1.4.2014 (exh. 11).

4. The nomination form was filled up alongwith affidavit by Respondent No.1 on 1.4.2014. Thereafter, immediately on ep.1.2014(J).doc 7.4.2014, PW2 Subodh Ranjan raised objection about the non- disclosure of the assets by Respondent No.1. The said objection ought to have been decided before the acceptance of the nomination form by the Returning Officer. However, it was not done and, therefore, the election results are materially affected. Thus, the case was put up that if the nomination form would have been rejected on the ground of non-disclosure of the assets, the respondent would not have been elected, hence, the election is materially affected.

ARGUMENTS - SUBMISSIONS OF THE PETITIONER

5. The learned Counsel Mr. Bhadbhade by referring to the nomination form, has submitted that as per the requirement, no column in the nomination form is to be left blank, but it is to be filled in even if it is not applicable. He has submitted that if the petitioner is successful in proving the two facts that there is a property other than the property disclosed in the name of Respondent No.1 or his wife and secondly, the said property is not disclosed, then, the petition should be through. On the point of wrongful acceptance of nomination form, the learned Counsel relied on the judgment of the Supreme Court in the case of *Madiraju Venkata Ramana Raju vs. Peddireddygarip.1.2014(J).doc Ramachandra Reddy & Ors.1*

6. The learned Counsel further argued that Respondent No.1 had knowledge of non-disclosure of the assets and he could have rectified the said objection by furnishing the detail of his property i.e., CTS Nos.36, 36(1) to 36(12) at Poisar, Kandivali, Mumbai. In support of the point on consequences of non-disclosure, he relied on the judgment of the Supreme Court in the case of *Kisan Shankar Kathore vs. Arun Dattatray Sawant & Ors. 2* The learned Counsel has submitted that for the building standing on the said plot, there is no conveyance and the respondent has admittedly purchased the said property in 2007 by a Deed of Conveyance dated 7.6.2007. This Deed of Conveyance was executed with the power of attorney holder of Laxmi Raut, who was dead. He pointed out that the value of the said property in the sale deed is shown Rs.1 lakh and, therefore, the stand taken by Respondent No.1 that the value of the property in the sale deed was zero and, therefore, he did not disclose anything, is not sustainable. He submitted that no Occupation Certificate was granted by the Municipal Corporation to the building due to number 1 2018 SCC Online SC 258 2 (2014) 14 SCC 162 ep.1.2014(J).doc of irregularities. He further submitted that exhibit 28 dated 23.6.2008 is a document of indemnity bond cum declaration at the time of surrendering some portion of the said building for DP road to the Corporation. Respondent No.1 has after surrendering the road, has constructed three flats on the top floor and is a beneficiary of this asset. He argued that exhibits 53, 54 and 55 which are the photocopies of the agreement of sale i.e., exhibit 53 from Glorious Constructions of Hemendra Mehta to M/s.Balaji Construction dated 24.5.2000. thereafter, the assignment of development rights was given by Respondent No.1 to M/s.Jyoti Construction i.e., exhibit 54 dated 16.9.2002. These two documents cannot be said as proved strictly under section 63 of the Indian Evidence Act. He pointed out the cross-examination of Respondent No.1 on these documents wherein he has admitted that these are photocopies of the photocopies where stamps of 2 - 3 notaries are seen. Such secondary evidence is not permissible under section 63 of the Evidence Act and it is not to be read. The learned Counsel further argued that if this is so, then, it is a questionable transaction that how the property i.e., plot bearing CTS Nos.36, 36(1) to 36(12) came to be transferred from one hand to other and finally, today, it vests with Respondent No.1 ep.1.2014(J).doc and his name appears as an owner on the property card. Thus, the respondent No.1 has avoided stamp duty which is a revenue to the Government when these two transactions had taken place. Thus, the transfer of the immovable property is not as per the Transfer of Property Act.

7. He further submitted that it only reflects the intention of the transfer but it is not actual transfer. The learned Counsel has submitted that it only shows how Respondent No.1 has abused his power and authority to get illegal things regularised and has constructed the building. He further relied on exhibit 48 i.e., the Letter of Intent dated 25.6.2009 and exhibit 49 which is the further Commencement Certificate dated 17.3.2010 and both the documents stand in the name of

M/s.Balaji Construction which is the sole proprietary firm of Respondent No.1. He further submitted that Laxmi Raut was dead before the year 2001, which can be seen from exhibit 39, the letter dated 10.4.2001 written by the Executive Engineer III to M/s.Balaji Construction regarding starting of the project. In the said letter, in para 30 and 33, there is a reference of the will of Laxmi Raut. Thus, Laxmibai was dead. So the transactions by her power of attorney thereafter are bad in law ep.1.2014(J).doc and void.

8. Mr.Bhadbhade made four important submissions:

FIRST - The effect of non-registration of the agreement is immovable property can be transferred only by registered deed of conveyance;

SECOND - Though the documents referred to by respondent No.1 are admitted, they are not properly proved and, therefore, cannot be read in evidence.

THIRD - The petitioner need not prove that election is materially affected and without proving this issue, his petition can be allowed on other three counts.

FOURTH - Non-disclosure of assets or suppression of the assets in the affidavit which is required to be presented in Form 26 of the Representation of the People Act, 1950 amounts to corrupt practice.

9. On the second submission i.e., on proof of secondary evidence, the learned Counsel relied on the case of Siddiqui vs. A. Ramlingam³, especially section 63 of the Indian Evidence Act. 3 (2011) 4 SCC 240 ep.1.2014(J).doc

10. The learned Counsel pointed out that the documents in respect of sale agreements of the plot which are produced by Respondent No.1, though are taken on record, they are not the true copies of the original but they are notarised copies of the notarised documents of the originals and so, such documents have no evidentiary value.

11. The learned Counsel further relied on the case of Rakesh Mohindra vs. Anita Beria & Ors.⁴ wherein it was held that it is equally well settled that neither mere admission of a document in evidence amounts to its proof nor mere making of an exhibit of a document dispense with its proof, which is otherwise required to be done in accordance with law.

12. On the second submission, the learned Counsel further submitted that if his argument on the point of secondary evidence is not found convincing, he has other leg of argument that the documents which are not notarised are also to be proved by following proper legal procedure. On this point, he relied on the judgment in H.K. Taneja & ors. vs. Bipin Ganatra & anr. 5. In the 4 (2016) 6 SCC 483 5 2009(2) Mh.L.J. 855 ep.1.2014(J).doc said judgment, the learned Single Judge of this Court has discussed the rules framed under the Notaries Rules 1956 under the Notaries Act, 1952. As per those Rules, the notaries are required to maintain a notarial register in a prescribed format and all the entries are to be made serially with requisite details. If such notarial register is

not produced, the document being unregistered, is inadmissible in evidence, and therefore, as it is not even prima facie shown to be notarised.

13. On the third submission, the learned Counsel relied on the case of Ghanshyam Sarda vs. Sashikant Jha, Director, M/s.J.K. Jute Mills Company Ltd. & Ors. 6. In the said case, the ratio laid down in the case of Suraj Lamp and Industries Private Ltd. (2) through Director vs. State of Haryana & anr. (supra), is relied and it was held that transfer of any tangible immovable property can be made only by registered document.

14. In support of the first submission, he relied on the judgment in the case of Kisan Shankar Kathore vs. Arun Dattatray Sawant & Ors⁷. He also relied on the judgment of the Bombay High Court (Nagpur Bench) in Satish Mahadeorao Uke vs. 6 (2017) 1 SCC 599 7 (2014) 14 SCC 162 ep.1.2014(J).doc Devendra Gangadhar Phadnis⁸.

15. On the point whether election is materially affected or not, the learned Counsel relied on the judgment in Madiraju Venkata Ramana Raju vs. Peddireddygar Ramachandra Reddy & Ors. (supra).

16. On the fourth submission, the learned Counsel relied on the case of Krishnamoorthy vs. Sivakumar & Ors. 9. In the said case, the Supreme court explained the concept of undue influence contemplated under section 123(2) of the Representation of the People Act, 1950. The learned Counsel argued that though the petition is filed under section 100(1)(d)(i) and section 100(1)(d)(iv) of the Representation of the People Act, 1950, he has also made out the case of corrupt practices under section 100 (1)(b). Mr.Bhadbhade relied on the affidavit of the petitioner (exhibit 30). The learned Counsel submitted that whether the petitioner has complied with the requirement to file such election petition, is positively answered if the petitioner's affidavit filed under Rule 94A of the Representation of the People Act, 1950, is read. He relied on the said affidavit filed by the petitioner. The learned Counsel 8 2016(2) Mh.L.J.613 9 (2015) 3 SCC 467 ep.1.2014(J).doc submitted that in the affidavit contentions regarding improper acceptance of the form and non-disclosure of the assets amount to undue influence leading to corrupt practice, are specifically raised. Thus, the petition falls under section 100(1)(d)(i) and 100 (1)(d)(iv) read with section section 100(1)(b) and 123(2) of the Representation of the People Act, 1950.

17. In the case of Krishnamoorthy vs. Sivakumar & Ors. (supra), 8 criminal cases were pending against the candidate, out of which one was disclosed. The Supreme Court held that the non-disclosure would tantamount to undue influence which is a facet of corrupt practice as per section 123(2) of the Representation of the People Act, 1950.

18. Further, the learned Counsel relied on the case of Lok Prahari through its General Secretary S.N. Shukla vs. Union of India & Ors.¹⁰.

19. Mr.Bhadbhade has argued that it is mandatory on the part of the candidate to disclose all the material information. What is material information is not to be decided by the candidate but the information which is required to be disclosed under Form No.26 of 10 (2018) 4 SCC 699

ep.1.2014(J).doc the Representation of the People Act, 1950 and as per the directions by the Election Commission, is a material information.

20. The learned Counsel further submitted that there is a violation of Article 19(1)(a) of the Constitution of India; so also under section 33A of the Representation of the People Act, 1950. The learned Counsel further argued that Chapter on corrupt practices where section 123(2) is mentioned, was enacted in 1956. Thus, the Legislature has considered certain acts of undue influence, to be covered under corrupt practice. The learned Counsel further submitted that the Supreme Court has now explained further as to what is meant by undue influence and corrupt practice as the right to vote is not only statutory but it is held as to be fundamental right under Article 19(1)(a). He lastly submitted that in his form, the respondent has not disclosed his assets but has also maintained eloquent silence in respect of the assets of M/s.Jyoti Construction which is a partnership firm of his wife and his son. He has submitted that when the plot was developed by M/s.Jyoti Construction, and after giving rehabilitated tenements, 25 flats were sold in sale component, M/s.Jyoti Construction has definitely earned substantial profit. Even though ep.1.2014(J).doc it would have been spent from 2003-2004 till 2014 i.e., during the span of 10 - 12 years, still, the property stands in the name of Respondent No.1 as no Occupation Certificate is obtained and no conveyance has taken place and, therefore, it was mandatory on the part of Respondent No.1 to disclose the said property even though according to him, the value of the property is zero. He, therefore, prays that the petition be allowed. ARGUMENTS OF LEARNED COUNSEL FOR RESPONDENT NO.1:

21. Mr.Joshi, learned Counsel for Respondent No.1, has submitted that the petition should fail mainly on the ground that the petitioner could not prove that non-disclosure of the property would have been materially affected the election. He submitted that section 33A states only about the disclosure in respect of the criminal cases and there is no provision in respect of disclosure of the property or consequences of the failure to disclose the same. U/s 36, the Returning Officer has to carry out the scrutiny of the nomination form and under section 36(6), if the nomination form is rejected, then, the reasons are required to be recorded. Filing of this petition against the Returning Officer, who is made Respondent No.22, was a deliberate step taken by the petitioner to unnecessarily harass the Returning Officer. In fact, no relief is ep.1.2014(J).doc claimed against the Returning Officer. U/s 81 states about the presentation of the petition and has contemplated u/s 81(3) of the Act, the procedure of the presentation is prescribed.

22. Mr.Joshi, the learned Counsel for Respondent No.1, has submitted that the Supreme court has in the absence of registered sale deed, regularised the transactions based on agreement of sale and General power of attorney in the case of Suraj Lamp and Industries Private Ltd. (2) through Director vs. State of Haryana & anr.11.

23. He has submitted that the petition is filed under section 100, more specifically under sections 100(1)(d)(i) and 100(1)(d)iv) of the Representation of the People Act, 1950. So, no case is made out of the election being materially affected and in view of the language of section 100(1)(d)(i) and 100(1)(d)iv), it is mandatory for the petitioner to prove its case. He cannot take stand that though the election is materially affected, he is not pressing the prayer of setting aside the election and

disqualification of Respondent No.1. The petition is contrary to the Representation of the People Act, 1950. It is necessary for the petitioner to aver first 11 (2012) 1 SCC 656 ep.1.2014(J).doc and then, prove how the election is materially affected. The learned Counsel on this point relied on the case of Lok Prahari through its General Secretary S.N. Shukla vs. Union of India & Ors. (supra), (Para 63).

24. He has submitted that it is next to impossible for the petitioner to prove that election was materially affected because the petitioner has lost the election by a margin of 4,50,000 and, therefore, cleverly this point is given up by the petitioner during the petition. He has submitted that under such circumstances, disqualification cannot be proved in isolation but it is always coupled with proof of election being materially affected.

25. The learned Counsel while meeting the charges of corrupt practice, has submitted that there is no evidence to show that the respondent has indulged into corrupt practice. He pointed out the relevant paras 35, 37, 43 of the petition and has submitted that there are no substantial pleadings about the corrupt practice. Rather, the law is contrary to the submissions made by the learned Counsel for the petitioner on the point of proof of getting election materially affected.

ep.1.2014(J).doc

26. He further argued that the learned Counsel while arguing the facts has pointed out that the property card (exh. 26) pertains to CTS Nos.36/2 to 36/12. After receiving the nomination forms, the Returning Officer is required to upload all the nominations so the nominations are brought in public domain and if the objection is raised, it may not be rectified after the scrutiny starts. The verification can be done only and only before the scrutiny and not after that.

27. He pointed out that the plot bearing CTS Nos.36, 36(1) to 36(12) in fact was not owned validly by this petitioner at the time of filing of nomination form. He submitted that he relied on the meaning of ownership and he submitted that right to own includes right to own, right to sell, right to deal, right to transfer and even right to destroy the property.

28. He relied on exhibit 55 i.e., agreement dated 1.3.1989. He submitted that initially the property was owned by Laxmibai Raut. Thereafter, irrevocable power of attorney in favour of Mahesh Dadarkar was executed. Thereafter, it was transferred to Hemendra Mehta of Glorius Constructions on 5.2.1993. Then, from Hemendra Mehta to M/s.Balaji Construction of Respondent ep.1.2014(J).doc No.1 purchased all the development rights including the irrevocable power of attorney in 24 th May, 2000 by exh. 53 and by exh. 54, to M/s.Jyoti Construction, which the partnership firm owned by the wife and son of Respondent No.1 on 16.10.2002 by notarised agreement of sale. Thereafter, M/s.Jyoti Construction constructed the entire building and the flats in 2005. The learned Counsel pointed out that the LOI, IOD, CC were granted in 2001 - 2003 and thereafter, in the year 2005, the society was formed which is marked certificate of registration exh. 46 on 21.5.2005. The society was formed under the Maharashtra Registration Act and the certificate was issued. Thereafter, all the flats of sale component were sold in the year 2004-2010. Thus, when the respondent filled up the nomination form, he was not the owner of the said property when all

the flats are sold before 2010 and the society is registered. All the assessment and other taxes are paid by the society to the Corporation. Under such circumstances, he had no right, title or interest in the said plot and the value of the said plot was zero. If he would have disclosed this property in his name, then, that would have been considered as a false statement made by him as the process of development was complete.

ep.1.2014(J).doc

29. The learned Counsel pointed out that exh. 55 to 79 are the agreements of sale from 2002 to 2010. All the recitals mentioned in all these agreements of sale disclose the real nature of the transaction from Laxmi Raut to M/s.Jyoti Construction. Under such circumstances, the submissions of the learned Counsel for the petitioner that the documents which are produced before this Court are not readable and they are not proved, is to be rejected, especially in view of section 93 of the Act.

30. The learned Counsel has submitted that the petitioner has not come to the Court with clean hands if the averments in the petition are examined and the evidence and cross-examination of PW2 Subodh Ranjan are seen. He pointed out the relevant portion in the cross-examination of the PW2 wherein he has stated that he derived knowledge of the ownership of the property of the plot by Respondent No.1 from the government website. The theory placed by Subodh Ranjan is on the finding on this website is cooked up story and Subodh Ranjan is a planted person by the petitioner. The petitioner is lying that he was not aware of the sale of the property and he never visited the site.

ep.1.2014(J).doc

31. The learned Counsel also pointed out all the relevant clauses in the agreements entered into with the flat owners by M/s.Jyoti Construction. He has submitted that all the agreements are consistent with the provisions of the MOFA wherein the period of conveyance is specifically mentioned and also the definition of Promoter is mentioned in section 2 and under section 11 process of transfer of plot in the name of the society is mentioned and it is done within the stipulated period.

32. In support of his submissions on MOFA, Mr.Joshi relied on the judgment of a learned Single Judge of the Bombay High Court in the case of Madhuvihar Cooperative Housing vs. Jayantilal Investments & Ors.¹² In the said case, the learned Single Judge has discussed sections 10, 11 and also sections 7 and 7A about statutory obligations of the promoter-builder and the rights of flat purchasers. It was binding on a promoter not to take a blanket consent but express consent in respect of further development of the society and while discussing section 10, 11, 7 and 7A of MOFA, it was held that the promoter was statutorily obliged to execute conveyance in favour of society within a period of four months. Thus, once the building is complete, possession is 12 2010 6 Bom.C.R. 517 ep.1.2014(J).doc handed over and the prescribed period for registration of the society and conveyance accompanying land of the society is over, then, the promoter is legally precluded from putting up further construction without consent.

33. On the point of handing over possession, Mr.Joshi relied on the evidence of RW2 R.S. Maurya, who has deposed about taking possession of the flats, formation of the society. Mr.Joshi thus argued

that the plot was not the property of Respondent No.1 when he filled up the nomination form and the affidavit.

34. Mr.Joshi has relied on the recent judgment of the Supreme Court in the case of Public Interest Foundation vs. Union of India¹³ and argued that the Supreme court has held the Courts cannot themselves add disqualification to the returned candidate and accordingly, the directions are also given by the Supreme Court to the Legislature to amend the law. He vehemently submitted that the petitioner should fail on the sole ground that the petitioner could not prove the case that the election is materially affected. The petition is filed under section 100(1)(d)(i) and 100(1)

(d)(iv) and not under section 100 (1)(b). There is no scope for the 13 Writ Petition (Civil) No.536 of 2011.

ep.1.2014(J).doc petitioner to argue his case on corrupt practice which is for disqualification under section 100(1)(b). The learned Counsel submitted that election proceeding is of a quasi criminal nature and so, as the charge is explained to the accused, the respondent should have a clear idea about the allegations made by the petitioner and to what he is to reply. He argued that the submissions of the learned Counsel for the petitioner of attracting the law laid down in Lok Prahari (supra) are illegal because the judgment in Lok Prahari (supra) and the directions given by the Supreme Court in it were not in existence in the year 2014 when the nomination form and the affidavit in the election which is the issue in the present petition were filed. The law laid down by the Supreme Court in the case of Lok Prahari (supra) is in 2017 and thus, it cannot apply to the present set of facts as it was not a law erstwhile. He submitted that section 123(2) in respect of undue influence, thus, cannot be attracted to the present case. In the case of Krishnamoorthy vs. Sivakumar & Ors. (supra), the Supreme Court for the first time, held that the criminal antecedents, if not disclosed by the candidates at the time of filing of nomination forms, then, it will amount to violation of the Constitution i.e., the violation of the fundamental right under Article ep.1.2014(J).doc 19(1)(a) of the Constitution of India.

35. Mr.Joshi relied on the affidavit of evidence of RW2 Ramashankar S. Maurya (exhibit 81) and referred to it on the point of disqualification. He referred to the written statement (exh. 2) filed by Respondent No.1 Shri Gopal Shetty, wherein he has denied all the allegations in respect of corrupt practice in his written statement.

36. While replying on the point of non-disclosure of the assets of M/s.Jyoti Construction, which is a partnership firm of the wife of Respondent No.1, he pointed out the averments made in paragraphs 23 to 25 of his written statement. He argued that M/s.Jyoti Construction has carried out only one construction of Kandivali Siddheshwar CHS Ltd. On CTS Nos.36, 36(1) to 36(12) at Poisar, Kandivali, Mumbai and the said project was complete in 2005 and thereafter, no scheme of development or construction was taken up by M/s.Jyoti Construction. In the year 2014, the said partnership was not in existence. Thus, M/s.Jyoti Construction was not having any asset in its name, at the relevant time. He pointed out exhibit 50 and exhibit 51 and has submitted that exh. 51 is the affidavit of evidence of Respondent No.1. He pointed out ep.1.2014(J).doc that alongwith his affidavit in chief, he has produced annexure 1, which is also read as part of his evidence.

37. Mr.Bhadbhade in reply to the point of attracting section 100(1)(b) and bringing the petition under section 100(1)(b) and applying the same, has argued that once the Court accepts that the case is made out under section 100(1)(d)(iv), then, by way of necessary corollary, section 100(1)(b) has to be attracted. The learned Counsel has further submitted that if in the petition, a case is pleaded for disqualification under corrupt practice, then only, as per the requirement under Rule 94A of the Representation of the People Act, 1950, an affidavit is required to be filed and that is filed by the petitioner, it shows he has claimed relief u/s 100(1)(b) of the Act.

38. Mr.Bhadbhade in respect of disclosure of the assets of M/s.Jyoti Construction, has pointed out exh. 50 and exh. 50/2, which is the income and expenditure statement of the year from 1.4.2013 to 31.3.2014 of Kandivali Siddheshwar SRA Cooperative Housing Society Ltd. Alongwith the said statement, the statement of the names of the defaulters who are liable to pay the maintainance amount is also produced. Mr.Bhadbhade pointed ep.1.2014(J).doc out that flat No.104 stands in the name of M/s.Jyoti Construction and the maintainance amount, which is recoverable, is shown as Rs.125,433/-. Mr.Bhadbhade argued that thus, on 31.3.2014, M/s.Jyoti Construction was a Member of the society holding one flat No.104 in its name and was liable to pay the amount of maintainance to the society. The price of the said tenement was definitely not zero as pleaded by Respondent No.1. It was necessary for Respondent No.1 to disclose this asset.

39. Mr.Joshi while replying to this point, drew my attention to the affidavit in chief (exgh.51) and annexure 1 to the said affidavit. Mr.Joshi has submitted that Respondent No.1 has furnished a list of all the members in respect of all the flats and where the status of some flats are shown as PAP and M/s.Jyoti Construction is not a member of any such tenement.

ASSESSMENT

40. In the present case, Respondent No.1 had filed application for dismissal of the Election Petition under section 86 of the Representation of People Act r/w Order 7 Rule 11 of CPC. The respondent No.1 has made allegations that the petitioner has not averred the material facts. On the point of disclosure of material ep.1.2014(J).doc fact, the pleadings were not complete and there were lapses. The petition did not disclose the connection between any declaration of assets and its effect on the election result and hence, it was prayed that for want of cause of action, the petition is to be dismissed. After hearing the arguments of both the parties, by order dated 5.7.2016, this Court held that the petitioner has broadly pleaded the details of non-disclosure of assets by Respondent No.1 and, therefore, the challenge under section 86 of the Representation of People Act and under Order 7 Rule 11 of Code of Civil Procedure did not sustain. The said order was tested before the Supreme Court by Special Leave Petition being Special Leave to Appeal (S) No.25782 of 2016. The Supreme Court granted interim stay by order dated 26.9.2016. Thereafter, by order dated 6.3.2018 in the Appeal, the Supreme Court has dismissed the Appeal and directed this Court to decide the pending election as expeditiously as possible. Thereafter, Respondent No.1 filed written statement alongwith documents.

41. After admission and denial by both the parties, the issues were settled on 19.4.2018. The issues are as under:

ep.1.2014(J).doc "i) Whether the petitioner proves that the Returning Officer has improperly accepted the nomination form of respondent No.1?

ii) Does the petitioner prove that respondent no.1 has deliberately suppressed the material information in the affidavit filed along with nomination form or in the nomination form and has not disclosed the property or assets, which is required as per the Representation of People Act, 1950?

iii) Whether the petitioner proves that the election of respondent no.1 is in violation of Section 100 (1)(d)(i) or 100 (1) (d)(iv) and also under Section 36(2) of the Representation of People Act, 1950 and outcome of the election is materially affected?

iv) Whether the election of respondent no.1 is liable to be held void?

v) Whether the petitioner is entitled to get reliefs sought for in the Election Petition?

vi) What order?"

42. The first three issues are the main issues. The issue No.(iv) and (v) are consequential. The Election Petition is in the nature of quasi criminal proceeding, though it is conducted as trying a suit.

The burden therefore, is saddled on the petitioner to prove his case, allegations and also the breach of the legal provisions under the Representation of People Act by either the Returning Officer or Respondent No.1. In the election petition, the fundamental democratic process of legal and fair election is put to the test and ep.1.2014(J).doc so, the consequences of the petition are very serious, therefore, though it is tried like a suit, high degree of standard of proof is required to be placed on the petitioner to prove the factual matrix and violation of election law. If the petitioner establishes initially his facts, then burden will shift on the respondent to explain by way of his defence.

43. Unless the facts regarding which property was not disclosed, whether it was required to be disclosed and whether non-disclosure is of substantive nature are scrutinized, issue No. I cannot be answered. Issue no. I cannot be decided independently because it is interlinked with issue No. II, so they need to be discussed together. Issue no. III invites discussion on legal pronouncements and the law laid down on election is 'materially affected'; It is also mixed with issue nos. I and II. Therefore, in between, discussion of issue no. III is necessary for the purpose of continuity and clarity of settled principles of law.

44. Issue Nos. I and II :- The nomination form the subject matter of this issue, marked exhibit 11 was filed alongwith the affidavit in form No.26. In the petition, the petitioner has asked for the ep.1.2014(J).doc following reliefs:

"(a) That this Honourable Court be pleased to declare the election of respondent no.1 from the 26 - Mumbai North Parliamentary constituency as null and void and the same be set aside.

(b) This Honourable Court be pleased to declare that the petitioner has secured majority of valid votes and be declared as elected in respect of 26 - Mumbai North Parliamentary constituency in the 16 th Lok Sabha elections, held on 24 April 2014 as the Petitioner has secured second highest votes."

(c) That this hon'ble court may be pleased to take action against the Respondent no.1 under section.125A of the Representation of Peoples Act for filing false affidavit along with nomination;

(d) . . .
(e) . . ."

45. As pointed out in the opening of the Judgement, the petitioner maintains prayer clause (a). However, he relinquishes prayer clause (b) and does not press relief prayer (c).

46. The petition is filed against 22 respondents. Respondent No.1, being the returned candidate, is the main contesting party. Respondent Nos.2 to 20 are the other candidates who had contested the said election but did not succeed. Some of them represent various political parties and some have contested ep.1.2014(J).doc independently. Respondent No.21 is the Chief Election Commissioner of India and Respondent No.22 is the Returning Officer. The petitioner did not seek any relief against respondent No.21. There are specific allegations against respondent No.22. The Returning Officer, though served, neither appeared nor did he contest the petition. The petitioner did not call him as witness or was not called as court witness. The relief sought was not directly against or affecting these two respondents, so after going through the petition, it is found that the petitioner has specifically averred in para 3 of the petition that the nomination form of Respondent No.1 was wrongly accepted by respondent No.22, i.e., Returning Officer and that amounts to improper acceptance of the nomination papers and due to this wrong acceptance, the outcome of the election was materially affected. The allegations of improper acceptance of the nomination form is on the ground that Respondent No.1 did not disclose the details of his one property.

47. In the case of Madiraju Venkata Ramana Raju vs. Peddireddygari Ramachandra Reddy & Ors. (supra), the appellant had filed objection in the Parliamentary election for acceptance of nomination form of Respondent No.1 that he failed ep.1.2014(J).doc to sign every page of affidavits in support of his nomination form and also failed to fill all the columns in the form which is contrary to the rules prescribed in this regard. The Returning Officer had rejected the objection on the ground that the objection needed no consideration. While dealing with the said issue, the Supreme Court relied on the ratio laid down in the case of Mairambam Prithviraj vs. Pukhrem Sharathchandra Singh 14, wherein the exposition in the case of Durai Muthuswami vs. N. Nachiappan & Ors.¹⁵ Is analysed. In the said judgment of Madiraju Venkata Ramana Raju vs. Peddireddygari Ramachandra Reddy & Ors. (supra), the Supreme Court reproduced para 23 of the judgment in the case of Durai

Muthuswami (supra) as under:

"39. ..

23. It is clear from the above judgment in *Durai Muthuswami* that there is a difference between the improper acceptance of a nomination of a returned candidate and the improper acceptance of nomination of any other candidate. There is also a difference between cases where there are only two candidates in the fray and a situation where there are more than two candidates contesting the election. If the nomination of a candidate other than the returned candidate is found to have been improperly accepted, it is essential that the election petitioner has to plead and prove that the votes polled in favour of such candidate would have been polled in his favour. On the other hand, if the improper acceptance of nomination is of the returned candidate, there is no necessity of proof that the election has been materially 14 (2017) 2 SCC 487 15 (1973) 2 SCC 45 ep.1.2014(J).doc affected as the returned candidate would not have been able to contest the election if his nomination was not accepted. It is not necessary for the respondent to prove that result of the election insofar as it concerns the returned candidate has been materially affected by the improper acceptance of his nomination as there were only two candidates contesting the election and if the appellant's nomination is declared to have been improperly accepted, his election would have to be set aside without any further enquiry and the only candidate left in the fray is entitled to be declared elected. (emphasis supplied)."

48. In the case of *Mairembam Prithviraj vs. Pukhrem Sharathchandra Singh* (supra), there were only two candidates, out of which one was the returned candidate. In the said case, the Supreme Court formulated two issues - firstly, whether a false declaration relating to the educational qualification is a defect of substantive character warranting rejection of a nomination? Secondly, whether it is necessary to plead and prove that the result was materially affected when the nomination of the returned candidate is found to have been improperly accepted? While answering the said issues, the Court held that it cannot be disputed that the election cannot be set aside on the ground of improper acceptance of a nomination form without a pleading and proving that the result of the returned candidate was materially affected. The Supreme Court held that there is a difference ep.1.2014(J).doc between the improper acceptance of nomination of a returned candidate and an improper acceptance of nomination of any other candidate. If the improper acceptance of nomination is of the returned candidate, there is no necessity of proof that the election has been materially affected as the returned candidate would not have been able to contest the election if his nomination was not accepted.

49. This ratio is not applicable to the present case. Along with respondent No.1 the returned candidate, there were other candidates also. Therefore, the voters did not have only two options but more choices. So far as acceptance of the form of returned candidate is concerned, the ratio is applicable to that extent only. In the present case, there is no false declaration but there is elimination details of one property, i.e., non-disclosure of one property. Whether this

non-disclosure would amount to intentional suppression and substantive in nature, can be ascertained after sifting the evidence. Thus, it is necessary to look into the evidence whether the acceptance of form (exh. 11) in the absence of disclosure of the property i.e., plot bearing CTS Nos.36, 36(1) to 36(12) at Borivali, is improper acceptance?

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50. The objection was raised by PW2 Subodh Ranjan about validity of the nomination form of Respondent No.1 and the Returning Officer should have decided the objection at that stage only. However, if the objection is not decided by the Returning Officer because the issue is complicated and it requires some evidence and nomination form is accepted, then, the said point if raised in Election Petition, it is to be decided by the Court dealing with the petition. Thus, that issue cannot be said to be doused because it was not decided by the Returning Officer.

51. In the case of Kisan Shankar Kathore vs. Arun Dattatray Sawant & Ors. (supra), the Supreme Court has referred to the order of the High Court wherein the High Court had accepted the non-disclosure of liability in respect of outstanding electricity bills payable to the government undertaking i.e., MSEB and held that non-disclosure is substantive defect in the affidavit filed alongwith nomination form. The High Court held that -

"....The test to hold that the defect is substantive, in my opinion, is not the amount involved, but the conscious act of non-disclosure and suppression of that fact."

52. The Supreme Court has further held thus:

ep.1.2014(J).doc "43. When the information is given by a candidate in the affidavit filed along with the nomination paper and objections are raised thereto questioning the correctness of the information or alleging that there is non-questioning the correctness of the information or alleging that there is non-

disclosure of certain important information it may not be possible for the Returning Officer at that time to conduct a detailed examination. Summary enquiry may not suffice. The present case is itself an example which loudly demonstrates this. At the same time, it would not be possible for the Returning Officer to reject the nomination for want of verification about the allegations made by the objector. In such a case, when ultimately it is proved that it was a case of non-disclosure and either the affidavit was false or it did not contain complete information leading to suppression, it can be held at that stage that the nomination was improperly accepted."

53. In the case of Satish Mahadeorao Uke (supra), the respondent did not give the details of some criminal cases pending against him. The High Court while stating that though as per the requirement of Form No.26, the respondent has disclosed all the material information and the offences, held that the criminal cases of which the Court can take cognisance i.e., cases where the punishment is more than two years, are to be disclosed alongwith the nomination form under section 33A(2) of the Representation of the People Act, 1950. It was further held that any

suppression of concealment or non-disclosure of material information, which is within the special knowledge, may be treated as a defect of ep.1.2014(J).doc substantive character.

54. In the case of Krishnamoorthy (supra), it is held that the Returning Officer can compel to furnish relevant information. Even, no column can be kept blank in the form and if it is pointed out by the Returning Officer, it can be rectified before the Returning Officer as the citizen has fundamental right to know about the candidate.

55. Mr. Bhadbhade relied on the case of Jeet Mohinder Singh vs. Harinder Singh Jassi¹⁶ on the point of interpretation of section 36(6) of Representation of People Act. Section 36(6) is a relevant section on the point of scrutiny of nomination. Hence, while scrutinising the legality of the acceptance of the nomination form, it is necessary to verify whether the procedure laid down under section 36(6) of the Act was followed or not? Section 36(6) of the Act says, "Returning Officer shall endorse on each nomination paper his decision accepting or rejecting the same and if the nomination paper is rejected, shall record in writing a brief statement of his reasons for such rejection." Subsection (4) is also to be considered while dealing with subsection (6). 16 (1999) ep.1.2014(J).doc Subsection (4) states that - "The returning officer shall not reject any nomination paper on the ground of any defect which is not of a substantial character." It is to be noted that after by Act of 27 of 1956, w.e.f. 28.8.1956, in subsection (4), the word "defect" was inserted in place of the word "technically". It shows that the defect need not to be of technical nature but the defect should be of specific/substantive character. Then only, the rejection of the application is justified. On the form No.26, (exhibit 11), the endorsement of the Returning Officer as "accepted" is seen. Thus, there is a compliance of subsection (6) of section 36 of the Representation of People Act. However, the objection was raised by Subodh Ranjan at the time of scrutiny of the form and admittedly, the Returning Officer has not decided the said objection at that stage. Such situation is meted with by the Supreme Court in the case of Kisan Shankar Kathore vs. Arun Dattatray Sawant & Ors. (supra) Thus, if the objection is not decided by the Returning Officer, then, it can be raised as a ground by filing the petition challenging the election. It is made clear in the said judgment that it may not be possible for the Returning Officer to take a decision on the objection then and there because it may involve some debatable or legal issues for which evidence is ep.1.2014(J).doc required and which can be decided by the Court itself. Acceptance or rejection of the nomination form is time bound process. The lengthy fact finding process, if required, then, it is not possible for the Returning Officer to deal with it and give reasons for rejection of the same. It is to be noted that for acceptance, the Returning Officer is not expected to give reasons for acceptance but for rejection, he is required to give reasons. Thus, a plain reading of subsection (6) of section 36 as held in the case of Jeet Mohinder Singh vs. Harinder Singh Jassi (supra), it is clear that Parliament has chosen to treat a case of acceptance of the nomination papers differently from the case of rejection. In the present case, at the time of scrutiny of the nomination form, neither the petitioner nor the Respondent No.1 were present.

56. While discussing issue nos. I and II, at this juncture, I advert to the law laid down by the hon'ble Supreme Court on the point of undue influence and election is materially affected, which is related to issue no. III.

57. Issue No.III is reproduced herein for convenience.

iii) Whether the petitioner proves that the election of ep.1.2014(J).doc respondent no.1 is in violation of Section 100 (1)(d)(i) or 100 (1) (d)(iv) and also under Section 36(2) of the Representation of People Act, 1950 and outcome of the election is materially affected?

58. The arguments are advanced by the learned counsel for the petitioner that though there is no specific mention of section 131(b) of Representation of People Act, the election is challenged on the ground of corrupt procedure and use of undue influence. Let me advert to the relevant law.

59. U/s 100(1)(b) of the Representation of the People Act, 1950, election of the candidates can be declared void on the ground of corrupt practice if committed by the returned candidate or his election agent or any other person with the consent of the returned candidate or his agent. What is a corrupt practice is defined under section 123 of the Representation of the People Act, 1950. This section of corrupt practice was amended by the Act 27 of 1956 w.e.f. 28.8.1956. Section 123 is divided into 8 subsections. The relevant provision is Undue influence under sub-section (2) of section 123 which is defined as follows:

"(2) Undue influence, that is to say, any direct or indirect interference or attempt to interfere on the part of the ep.1.2014(J).doc candidate or his agent, or of any other person with the consent of the candidate or his election agent, with the free exercise of any electoral right:

Provided that--

(a) without prejudice to the generality of the provisions of this clause any such person as is referred to therein who--

(i) threatens any candidate or any elector, or any person in whom a candidate or an elector interested, with injury of any kind including social ostracism and ex-communication or expulsion from any caste or community; or

(ii) induces or attempts to induce a candidate or an elector to believe that he, or any person in whom he is interested, will become or will be rendered an object of divine displeasure or spiritual censure, shall be deemed to interfere with the free exercise of the electoral right of such candidate or elector within the meaning of this clause;

(b) a declaration of public policy, or a promise of publication, or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this clause."

(emphasis applied) The proviso to the above section states that a person threatens a candidate or any electorate or any person with injury of any kind including social ostracism and ex-communication or expulsion from any caste or community. Section 123(2)(b) is an exception.

Thus, undue influence requires a direct or indirect interference on the part of the candidate with the free exercise of any electoral right. Right to vote is an electoral right though not a fundamental right.

ep.1.2014(J).doc This electoral right always walks hand in hand with fundamental right guaranteed under Article 19(1)(a) of the Constitution of India. Article 19(1)(a) is about freedom of speech and expression. A citizen enjoys freedom of expression if he is informed fully. Then, he should be informed fully about all details of the electoral process. Thus, it also includes right to vote, which includes right to know. Right to know is a kangaroo baby right under the right to freedom of expression. The expression 'of a citizen' can be free if he is fully informed and is in a position to use the freedom of choice between various options based on a true and factual information. Thus, if true, genuine and effective enforcement of right to vote; rights to information, right to have choice are also to be respected and are to be facilitated. In other words, unless the citizen is fully informed about all the true and detailed disclosures about the criminal antecedents, so also the assets and details of the property owned by him and his family members, a voter cannot be said to be well informed and thus, his right to know is scuttled. The right to have option is fractured and with this, he cannot enforce his electoral right to vote in true spirit and thus, his expression is affected adversely and he is deprived of enjoying his right to freedom of expression.

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60. The term 'undue influence' is used as an offence under the Representation of the People Act, 1950. It contemplates necessarily an interference which may be direct or indirect. Under the Contract Act, undue influence is defined under section 60. In Indian Penal Code, the term 'undue influence' is not defined. However, Chapter XI-A of the Indian Penal Code pertains to offences relating to elections. The Representation of the People Act, 1950 is a special statute. Section 171C of the Indian Penal Code states about using undue influence at elections is an offence. The said section is as under:

"171C. Undue influence at elections.--

(1) Whoever voluntarily interferes or attempts to interfere with the free exercise of any electoral right commits the offence of undue influence at an election.

(2) Without prejudice to the generality of the provisions of sub-section (1), whoever--

(a) threatens any candidate or voter, or any person in whom a candidate or voter is interested, with injury of any kind, or

(b) induces or attempts to induce a candidate or voter to believe that he or any person in whom he is interested will become or will be rendered an object of Divine displeasure or of spiritual censure, shall be deemed to interfere with the free exercise of the electoral right of such candidate or voter, within the meaning of sub-section (1).

(3) A declaration of public policy or a promise of public action, or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this section."

Thus, section 123(2) is largely adopted from Section 171 of Indian Penal Code. Though the entire petition is under section 100(1)(d)

(iv) as the petitioner has given up the challenge under section 36(2) r/w 100(1)(d)(i) of the R.P. Act, it was argued that the petition is impliedly also under section 100(1)(b) of the Act. This challenge is also taken into account.

61. On the point of non-disclosure of assets, the affidavit in chief of Respondent No.1 (exh. 51) is required to be seen. I rely on the judgment dated 23.3.2018 in Election Petition No.7 of 2014 (Balram D. Patil vs. Prashant - Ram Thakur) decided by Single Judge of this Court. In the said case, a similar issue of non-disclosure of the assets in the nomination form and the corrupt practice as defined under section 123 of the Representation of the People Act, 1950 was dealt with by the learned Single Judge and the learned Judge has held that considering the facts of the case, it was a fair and proper disclosure of the financial status of the respondent and dismissed the petition.

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62. The learned Counsel Mr. Joshi for the respondent No.1 has vehemently argued that the judgment in the case of Lok Prahari (supra) relied on by the learned Counsel is not applicable to the present case. The learned Counsel has submitted that the judgment was delivered in the year 2018 and the present case is of 2014, hence is not applicable. Moreover, if it mentions to do a thing in a particular manner, then, it is to be done in that way only irrespective of hurdles or problems faced by the person. He further argued in the case of Lok Prahari (supra), whatever directions are given by the Supreme Court cannot be implemented in view of the recent Full Bench judgment in Public Interest Foundation vs. Union of India¹⁷.

63. Mr. Joshi, on application of the judgment in Lok Prahari (supra), has submitted that all the observations made by the Supreme Court cannot be considered as precedent and binding on the Courts and authority and, therefore, the observation made by the Supreme Court wherein the Supreme Court has not given specific directions in respect of the disclosure of the assets and source of income or assets while filling up the nomination form, cannot be said a law laid down by the Supreme Court. In support 17 Writ Petition (Civil) No.536 of 2011.

ep.1.2014(J).doc of his submissions, he relied on the Supreme Court in the case of Bharat Petroleum Corporation Ltd. & Anr. vs. N.R. Vairamanii & Anr.¹⁸.

64. On the point of retrospective effect or prospective application of law laid down by the Supreme Court, the case of Lily Thomas vs. Union of India¹⁹ is very clear. In the said judgment, the Supreme Court has held thus:

"59. We are not impressed by the arguments to accept the contention that the law declared in Sarla Mudgal's case cannot be applied to persons who have solemnised marriages in violation of the mandate of law prior to the date of judgment. This Court had not laid down any new law but only interpreted the existing law which was in force. It is settled principle that the interpretation of a provision of law relates back to the date of the law itself and cannot be prospective from the date of the judgment because concededly the Court does not legislate but only give an interpretation to an existing law. We do not agree with the arguments that the second marriage by a convert male muslim has been made offence only by judicial pronouncement. The judgment has only interpreted the existing law after taking into consideration various aspects argued at length before the Bench which pronounced the judgment. The review petition alleging violation of Article 20(1) of the Constitution is without any substance and is liable to be dismissed on this ground alone."

(emphasis added) Thus, the submissions of Mr.Joshi that law laid down by the 18 (2004) 8 SCC 579 19 AIR 2000 SC 224 ep.1.2014(J).doc Supreme Court has no retrospective effect but only prospective effect is not correct.

65. In the case of Madiraju Venkata Ramana Raju (supra), the Supreme Court referred to and culled out the ratio in the case of L.R. Shivaramagowda vs. T.M. Chandrashekhar (dear) by LR.20 and held in para 43 as under:

43. wherein the Court observed that in order to declare an election to be void under section 100(1)(d)

(iv) it is absolutely necessary for the election petitioner to plead that the result of the election insofar as it concerns the returned candidate has been materially affected. In the present case, the election petition is in reference to the ground of improper acceptance of nomination form of respondent No.1 - the returned candidate under Section 100(1)(d)(i). Thus, if that plea is accepted and the election of respondent No.1 is declared to be void, it would necessarily follow that the election result of the returned candidate has been materially affected."

66. In the case of Balram D. Patil vs. Prashant - Ram Thakur (supra), a challenge was given on the ground of improper acceptance of the respondent's nomination form by the Returning Officer and corrupt practice as defined under section 123 of the Representation of the People Act, 1950, committed by the 20 (1999) 1 SCC 666 ep.1.2014(J).doc respondent. The election under challenge was election to Maharashtra Legislative Assembly of Panvel constituency which was held on 15.10.2014. At the time of election propaganda, the vehicle owned by the company of the family of the respondent was used in the election propaganda and the agent is found with 500 envelopes containing Rs.500/- each together with election pamphlets, voters' list. So, the respondent faced the charge of offering gratification to the voters. The learned Judge has dealt with the bribery charges and so also, the non-disclosure of the assets and has observed as follows:

"26 The purpose of disclosure of assets and liabilities of the candidate is to educate the voters about the financial status of the candidate. It also facilitates the voters to estimate whether assets declared by the candidate have been procured by him out of legitimate or known sources of income. Based on this estimate, the voters have to form a decision on whether or not to elect the candidate. It is this fundamental right of the voter, which casts a corresponding fundamental duty on the candidate to disclose fully and truthfully information regarding his assets and liabilities. This is more a matter of substance than form. If in substance the candidate properly, fully and bonafide discloses a true financial picture, which enables the voters to take an informed decision, merely on some technical error or incidental non- disclosure, the nomination form cannot be rejected or the election cannot be set aside on the ground of improper acceptance of the nomination form."

67. Thus, it is not sufficient for the petitioner to allege why the assets of M/s. Jyoti Construction and the spouse and dependants ep.1.2014(J).doc of respondent no. 1 were not disclosed. But it is necessary for the petitioner to state and specify which are those assets so that the opposite party should have a knowledge of what challenge he has to meet in respect of non-disclosure of the assets. In the present case, only one property was alleged to be suppressed and no other details are stated in the petition.

68. Chapter I of the Representation of People Act states about the nomination of candidates. Under Section 33, the nomination papers are presented as per the requirement for valid nomination. Section 36 states about the scrutiny of nomination. Section 33A was introduced by the Act 72 of 2002 w.e.f. 24.08.2002. Under section 33A, the voters right to information is acknowledged and protected. Section 33A makes obligatory for the candidates to disclose his criminal record about pending cases against him and so also if at all he is convicted, the record of conviction where he is sentenced to imprisonment for one year or more. There is no such specific provision like Section 33A in respect of disclosure of assets. It is mandatory on the part of the candidate to disclose the property and assets as per Form 96 prescribed under the Act. In the case of Lok Prahari (supra) the Supreme Court has ep.1.2014(J).doc considered this aspect and the disclosure of the assets is made mandatory. However, there are no specific directions or special provision like Section 33A in the Act.

69. In the recent Full Bench judgment in Public Interest Foundation vs. Union of India (supra), the Supreme Court has considered the issue whether disqualification for membership can be laid down by the Court beyond Article 102(a) to (d) of the Constitution of India and the law made by the Parliament under Article 102(e). The said issue was further expounded in the course of hearing and the Court further gave directions about the decriminalisation of politics. The Supreme Court has extensively considered the law laid down in the case of Union of India vs. Association for Democratic Reforms 21 wherein for the first time, it was clearly observed that freedom of speech and expression includes right to impart and receive information which includes freedom to hold opinions. It referred to the case of Resurgence India vs. Election Commission of India 22, wherein the Supreme court while summarising the directions has mentioned that 'filing of affidavit with blank particulars will render the affidavit nugatory'. 21 (2002) 5 SCC 294 22 (2014) 14 SCC 189

ep.1.2014(J).doc That means the candidate should not leave the particulars blank but must take minimum efforts to explicitly mark as NIL or NOT APPLICABLE. A similar principle was voiced by the Supreme Court in the case of Madiraju Venkata Ramana Raju vs. Peddireddygar Ramachandra Reddy & Ors. (supra).

70. In the judgment of Public Interest Foundation (supra), the Supreme Court has not considered the case of Lok Prahari (supra) and the directions given in the said case and thus, as on today, the judgment in Lok Prahari (supra) holds the field. In the said judgment, a group of conscience senior citizens came together; registered their association and with their genuine concern for the democracy of the country, sought directions for a clean and fair electoral process, which is a foundation of the democracy. Prayer (ii) of their petition was to 'declare that the non-disclosure of assets and sources of income of self, spouse and dependents by a candidate would amount to undue influence and thereby corruption and as such election of such a candidate can be declared null and void u/s 100(1)(b) of the 1951 the Representation of the People Act, in terms of the judgment in Krishnamoorthy vs. Sivakumar & Ors. (supra). While ep.1.2014(J).doc concluding, the Supreme Court referred to the ratio laid down in Krishnamoorthy vs. Sivakumar & Ors. (supra), wherein it is held that while filing the nomination form, if the requisite information relating to criminal antecedents is not given, then, it amounts to attempt of suppression, misguiding and keeping the people in dark. This attempt undeniably and undisputedly is undue influence and, therefore, amounts to corrupt practice. In the case of Lok Prahari (supra), the Supreme Court has dealt with section 123 (2) of the Representation of the People Act, 1950. i.e., corrupt practice of undue influence. While explaining what is meant by undue influence, the Court held as follows: It is held that -

"for the very same logic as adopted by this Court in Krishnamoorthy vs. Sivakumar & Ors. (supra), we are also of the opinion that the non-disclosure of the assets and sources of income of the candidates and their associates, would constitute a corrupt practice falling under the heading undue influence as defined under section 123(2) of the 1951 the Representation of the People Act. We, therefore, allow prayer (ii)." (Emphasis added)."

In fact, all the 6 prayers made in the said petition were allowed.

71. In the case of Bharat Petroleum Corporation Ltd. & Anr. vs. N.R. Vairamanii & Anr. (supra), the Supreme Court while analysing the application of precedent to the facts of the case has ep.1.2014(J).doc held that the judgments of the Courts are not to be construed as statutes and the observations must be read in the context in which they appear to have been stated. In the said case, it was held that

- "it may become necessary for Judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgements. They interpret words of statutes; their words are not to be interpreted as statutes". It also relied on the finding given in the case of British Railway Board vs. Herrington 23 and held as follows:

"There is always peril in treating the words of a speech or a judgment as though they were words in a legislative enactment and it is to be remembered that judicial utterances made in the setting of the facts of a particular case."

In view of this, it is to be noted in the judgment of Lok Prahari (supra), the Supreme court has granted prayer (ii) but has not given specific directions in respect of implementing the prayer (2) and thus, there are no further rules till today in respect of disclosure of source of assets or income of the candidate while filling up the nomination form unlike Section 33A of Representation of People Act. The relevant Form 26 requires or expects filling up 23 (1972) 2 WLR 537 ep.1.2014(J).doc of all the assets and it is mandatory as per the law laid down by the Supreme Court.

72. In the case of Mangni Lal Mandal vs. Bishnu Deo Bhandari,²⁴ which is on the point of the proof of section 100 (1)(d)

(i) to (iv), the returned candidate Mangani Lal had challenged the judgment of the Patna High Court setting aside his election to the 15th Lok Sabha elections. One voter has challenged the election on the ground that the returned candidate has suppressed the facts in the affidavit filed alongwith the nomination form that he had 2 wives and dependent children and also did not disclose the assets and liabilities of his first wife. The challenge was given under section 100 (1)(d)(iv) of the Act. The said appeal was allowed by the Supreme Court by setting aside the judgment of the High Court. In the said judgment, the Supreme Court held that even though there is a breach or violation of the Rules or provisions of the Act, there should be specific averments that the election has been materially affected by such breach or non-observance. Mere non-compliance or breach of Constitutional or statutory provision by itself does not result in invalidating the election of the returned candidate under section 100 (1)(d) (iv).

24 (2012) 3 SCC ep.1.2014(J).doc

73. The Supreme Court has given the finding that in the judgment of the High Court, it does not reflect any consideration whether non-disclosure of information concerning the appellant's first wife and children and their assets and liabilities has materially affected the result of the election insofar as it concerned the returned candidate. Thereafter it held that -

".... 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. In other words, the violation or breach or non-observation or non-compliance of the provisions of the Constitution or the 1951 Act or the rules or the orders made thereunder, by itself, does not render the election of a returned candidate void Section 100(1)(d)

(iv). ..."

74. In *Shambhu Prasad Sharma vs. Charandas Mahant* 25, the Supreme Court has held that it was necessary to point out that the petitioner is required not only to aver / allege material facts relevant to such improper acceptance but to assert further that the election of the returned candidate had been materially affected by such acceptance and in the absence of such assertions in the election petition, the charge cannot be said to be proved against the returned candidate.

25 (2012) 11 SCC 390 ep.1.2014(J).doc

75. In the case of *Kameng Dolo vs. Atum Welly* 26, the Supreme Court has drawn distinction between improper acceptance of nomination for such improper acceptance of nomination to materially affect the result of the election and a case of improper rejection of a nomination which itself is sufficient ground for invalidating the election that can further the requirement of proof or material effect of such rejection on the result of the election. The improper acceptance falls under section 100 (1)(d) and the improper rejection falls under section 100 (1)(c). In the case of improper acceptance, it must also be established that the election has been materially affected by the claimed defect. The evidence on issue no. I and II

76. Now I will deal with the evidence of witnesses in respect of issue nos. I and II. The petitioner has contended that Respondent No.1 has intentionally and deliberately suppressed the immovable asset i.e., the land bearing No.CTS No.36/1 to 36/12 admeasuring 522.3 sq.mtrs. from the village Kandivali, Taluka Borivali, District Mumbai Suburban. The respondent has purchased the said property vide Deed of Conveyance dated 7.6.2007 by a registered sale deed which was registered with the office of Sub-Registrar at 26 (2017) 7 SCC 512 ep.1.2014(J).doc Serial No.BDR-6-4737/2007. So, it was pleaded that non- disclosure of property owned by Respondent No.1 is a violation of the provisions of Representation of People Act and the Rules thereunder. So also, it is contrary to the ratio laid down by the hon'ble Supreme Court in various judgments as discussed above. Thus, let me address to and assess those disputed documents alongwith the nomination form (exh. 11) and the affidavit (exh.12).

77. The nomination form (exh.11) was filled in by the candidate i.e., respondent No.1 and presented before the Returning Officer of 26, Mumbai North Parliamentary Constituency on 1.4.2014. He has filled in all the clauses. The said form was accepted as a valid nomination on 7.4.2014 by the Returning Officer. This nomination form is alongwith Form A. The form is addressed to the Chief Electoral Officer requesting the allotment of symbol and authorisation of the candidate and communication by the political party about the candidature. There is form No.26 as per rule 4 of the Representation of People Act. The affidavit is to be filled in by the candidate alongwith the nomination paper before the Returning Officer. This is the disputed and important document in this election petition. Respondent No.1 has made an affidavit of his ep.1.2014(J).doc movable properties. In this affidavit, the candidate is required to give personal details in respect of his Income Tax returns, pending criminal cases and the proceedings where he is convicted and also the details of movable and immovable assets. The above information is part of Part A of the form. Similar details and description of the property - movable as well as immovable, owned by the spouse and dependents are required to be mentioned in the form Part A. Part B is an extract of the details given in clauses Part 1 to 10 of Part A. At the end, the deponent of this affidavit is required to make

verification. Respondent No.1 has given all the details in part A and filled up part B and also made verification that the contents of the affidavit are true and correct to the best of his knowledge, belief and no part of it is false and no material has been concealed therefrom. He made further declaration about no pendency of or conviction in any criminal case as mentioned in part A and B. Further in clause B of the verification, he made a statement on oath as follows:

"My spouse or my dependents did not have any asset or liability, other than those mentioned in Item 7 and 8 of Part A and item 8, 9 and 10 of part B above"

ep.1.2014(J).doc

78. This affidavit was sworn in before a Notary on 31.3.2014. Thus, chronologically, the affidavit was sworn first and then, it was presented alongwith the nomination form on 1.4.2014. After presentation of the said nomination form and the affidavit, one of the candidates i.e., PW2 Subodh Ranjan, i.e., respondent No.20, took objection on the same day i.e., 7.4.2014. As per the record, the Returning Officer accepted the nomination form and affidavit of Respondent No.1 as valid and did not consider the written objection of Subodh Ranjan. The said written objection dated 7.4.2014 is marked at exh. 33. Respondent No.1 thereafter gave written explanation dated 10.4.2014 (exh.13) in the matter of allegations made by Subodh Ranjan dated 10.4.2014. It was addressed to Dr.Avinash Dhakne, Returning Officer, 26, Mumbai North Parliamentary Constituency, where he has stated that the allegation of non-disclosure of one immovable property in his affidavit is totally incorrect and it has been alleged without verifying the true and correct facts. He explained that the land was purchased by M/s.Balaji Construction, his sole proprietary concern by unregistered agreement dated 24.5.2000 from M/s.Glorius Construction Company and then, by unregistered agreement of sale, in the year 2002, sold the said land to M/s.Jyoti Construction ep.1.2014(J).doc and he has applied for the development of the said plot under SRA scheme and the property was developed by M/s.Jyoti Construction. The said land is fully developed and he is neither an owner nor has share in the said property and, therefore, he did not disclose the said land in his affidavit as the value of the said land is zero.

79. Before discussing the fact of non-disclosure, it is necessary for the petitioner to prove first that the property is owned by Respondent No.1. If the property is owned by him, then, the issue of disclosure or non-disclosure will arise. The petitioner in order to prove the fact of ownership of the plot by Respondent No.1 has produced certain documents and tendered oral evidence. Respondent No.1 also in his defence has produced number of documents to prove that he is not the real owner of the said property; the property vests with the society, namely, Kandivali Siddheshwar CHS Ltd. and the value of the said property qua him is zero.

80. On this property issue, certain facts are admitted and they can be summarised as follows:

The material property is survey No.128, Hissa No.1, CTS ep.1.2014(J).doc Nos.36 and 36/1 to 36/12, village Kandivali, Taluka Borivali.

Respondent No.1 admitted his transaction in respect of the said property. Thereafter, his affidavit in lieu of examination in chief on behalf of Respondent No.1 (exh. 51) is filed by him. In exhibit 51, he has stated that initially, the said property belonged to late Jagannath G. Raut. After his demise, the plot was transferred to his wife i.e., in the name of Laxmi J. Raut. Her name is reflected in the P.R. Card of the said plot. Laxmi Raut executed an irrevocable power of attorney in favour of one Mahesh G. Dadarkar by unregistered agreement of sale dated 4.2.1993 sold the plot to M/s.Glorius Construction Company (exh. 52 - the signature of Mahesh Dadarkar). Then, M/s.Glorius Construction Company transferred the right, title and interest in the said plot by an unregistered agreement of sale dated 24.5.2000 to M/s.Balaji Construction which is the sole proprietary concern of Respondent No.1. One Hemendra Mehta of M/s.Glorius Construction Company sold the plot to M/s.Balaji Construction. The said unregistered agreement is exhibit 53. Thereafter, by an unregistered agreement of sale dated 16.9.2009, Respondent No.1 transferred the right, title and interest of the said plot in favour of M/s.Jyoti Construction, a partnership firm of which his ep.1.2014(J).doc wife was a partner. It is marked exh. 54. He has deposed that initially, the plot was owned by Jagannath G. Raut was transferred in the name of his wife Laxmibai in the year 1978. Thereafter, the said plot was declared as a 'slum' by the Government vide Notification dated 6.4.1978 by the Collector under section 4 of the Slum Act.

81. M/s.Balaji Construction had submitted a proposal for development of the plot under SRA scheme. The Letter of Intent (LOI) was issued in the name of M/s.Balaji Construction on 10.4.2001. The IOD was issued on 1.6.2001 in favour of M/s.Balaji Construction. Then, it was deposed by Respondent No.1 that he sold his right, title and interest in the said plot by agreement of sale dated 16.9.2000 in favour of M/s.Jyoti Construction and commencement certificate was issued on 5.2.2003 by SRA. The construction work was carried out by M/s.Jyoti Construction which constructed 7 floors of the building with rehab. component and sale component and some flats for Project Affected Persons with a breakup that 14 flats and one shop were allotted to rehab. component; 6 flats were constructed for PAPs and handed over to the concerned authorities; and as per ep.1.2014(J).doc the approved plan, 25 flats were of sale component flats which includes 19 flats and 6 shops. Thus, altogether, 46 tenements/flats were constructed in the building. The proposed slum society was registered under the Maharashtra Cooperative Housing Societies Act and Certificate of Registration dated 21.5.2005 was issued in favour of Kandivali Siddheshwar CHS Ltd., marked exhibit 46. The petitioner has produced assessment bill exhibits 47, 47A and 47B issued in favour of the society. He relied on the certified copies of the agreement of sale between the partner of M/s.Jyoti Construction in favour of the respective flat/shop purchasers. All these agreements of sale are taken on record and they are marked exhibits 55 to 79 respectively.

82. The society's secretary R.S. Maurya, who is respondent's Witness No.2, provided the maintainance bills of the said building which are marked exhibits 82 (1) to 82 (24) in respect of all saleable flats and shops. He has further deposed that because of the sale of the flats, neither M/s.Balaji Construction nor M/s.Jyoti Construction are holding any direct or otherwise right, interest in the said property. He further submitted that as per the directions of the SRA, as it was

directed by the SRA, some portion of the plot ep.1.2014(J).doc was set off for the Corporation for the purpose of widening of the road and in lieu of the set-off, some FSI was given to the owner. Three flats were constructed on the top floor. However, all those three flats i.e., 701, 702, 703 are reserved for PAPs and allotted to the Corporation. However, as per the requirement of the Corporation, while giving set-off, it was necessary for the respondent to have a registered sale deed of the said plot and, therefore, respondent No.1 alongwith Mahesh Dadarkar, the power of attorney holder of the original owner, entered into a registered sale deed dated 4.2.1993 in respect of the said plot.

83. This examination in chief is compared with the affidavit (exh. 13 dated 10.4.2014) filed by Respondent No.1 by way of explanation before the Returning Officer and to be verified. In the said affidavit, he has stated the same facts and has stated that there is creation of a registered cooperative society of all the tenements. He purchased the said land from the original owner Laxmibai through the Power of Attorney holder by a registered deed of conveyance dated 7.6.2007 (exh. 27) and thereafter, he handed over the part of the land to the Municipal Corporation by registered deed of indemnity bond in respect of that portion of land ep.1.2014(J).doc on 23.6.2008 (exh. 28). He has stated that thus, as on the date of filling up the nomination form, though that plot stood in his name, he had no right, interest in the said property as the entire building is constructed and the registered society is formed. He has further stated that he is bound by the provisions of Maharashtra Ownership of Flats Act and he is legally bound to clear the title and transfer of the land in favour of the Kandivali Siddheshwar CHS Ltd. However, for some other reasons, the completion certificate could not be obtained and, therefore, the issue of transfer of the land is pending but for all practical purposes, the said society is the owner of the said land and the building constructed thereupon. He has further stated that the process of obtaining the occupation certificate is going on and, therefore, he did not disclose the said land as owned by him because the market value was zero. This explanation given by him corroborates his evidence.

84. A point was raised by the learned Counsel for the petitioner about the continuous possession and ownership of the tenements after completion of the building and handing over of the possession to the society by the Promoter builder. It is an admitted fact that M/s.Jyoti Construction has completed building in ep.1.2014(J).doc the year 2005 and has handed over the SRA project. Thus, the building being an SRA project, the members of the building can be divided into three categories, as per the requirements and conditions of the Corporation / SRA: - one is SRA / rehabilitation component, second is as sale component and the third is for PAP. It appears that in all there are, as per the affidavit, 46 premises constructed in the said building consisting of 15 rehab. tenements, 25 sale tenements and 6 PAP tenements. Thus, some flats are reserved as rehab. tenements, some are to be reserved for Project Affected Persons and the remaining is for sale i.e., sale tenements. The Builder Promoter enjoys a margin of profit in the amount received on the sale of flats under the sale component but he has to comply with the rules by keeping reserved the tenements as per the given number for the category of rehab. components and PAP. If there is a dispute in respect of occupation in some members in respect of rehab. tenements of PAPs, then, the tenements cannot be sold by the builder promoter on the ground that they are allotted by the Corporation or got occupied. He cannot claim any profit in such rehab. or PAP tenements. In the present case, as submitted by Mr.Bhadbhade, I exhibit 51 i.e., the yearly statement of the society of 31.3.2014, for the flat No.104, the member's name is ep.1.2014(J).doc shown as M/s.Jyoti Construction and the amount due is

shown as Rs.125,000/-.

85. In the list, which is a part of the examination in chief of Respondent No.1 i.e., exh. 51, plot No.104, the name of the Member is shown as PAP and the status is shown as reserved for PAP. The names and the status of all the 46 flats is also shown. Shop NO.7 stands in the name of RW2 Maurya. His status is shown as rehab. which corroborates the evidence that other shops are from sale component. Alongwith flat No.104, 103, 204, and the 3 new flats on 7th floor i.e., flat Nos.701, 702 and 703 are shown as PAP. Thus, in this project, in all 6 flats are shown as PAPs, which corroborates with the evidence of Maurya. As per the evidence of RW2 Maurya 6 are PAP tenements, 15 are rehab.- Tenements and 25 are sale tenements. The list shows that all rehab. tenements and sale tenements are occupied. All the 6 PAP tenements are not occupied. In exh. 50/2, flat No.104 is of PAP, the name of M/s.Jyoti Construction was shown and the name of M/s.Jyoti Construction as a member was not shown in the other remaining 5 tenements of PAP. it was explained by Mr.Joshi that as a routine, the maintenance of PAP flats to be paid by the builder till those flats ep.1.2014(J).doc are allotted. It does not mean that the said flat is owned by respondent No.1 or Jyoti Construction. It is to be noted that no share certificate is produced to prove ownership which could have been produced by the petitioner. A party cannot prove negative fact. The respondent no. 1 has denied the ownership. The explanation is acceptable because it is the responsibility and duty of the officers of the Corporation to allot the flats reserved for the Project Affected Persons. As averred by the petitioner, if in absence of allotment, the flat is owned by the respondent no. 1, the petitioner has to prove the said fact and if it would have been proved, then it would have been undoubtedly suppression of material information. However, the said burden is not discharged by the petitioner.

86. Now I will consider the objections raised by Mr. Bhadbhade on admissibility of the secondary evidence.

87. In the case of Siddiqui vs. A. Ramlingam (supra), It is held that even though the secondary evidence is adduced by laying foundation, it is also to be proved that it is a true copy of the original. Mere admission of document in evidence does not amount to the proof of secondary evidence. In the said case, the Supreme Court referred to the observations made by it in the State ep.1.2014(J).doc of Bihar vs. Radha Krishna Singh²⁷ wherein it was held that -

"40 ... Admissibility of a document is one thing and its probative value quite another - these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and weight or its probative value may be nil."

In the present case, the documents especially agreements with flat holders, the maintenance receipts and registered sale deeds are all proved by respondent No.1 and RW- Maurya.

88. Respondent No.1 executed an unregistered agreement of sale dated 16.9.2002 transferring the right, title and interest in favour of M/s.Jyoti Construction, a partnership firm and the said agreement of sale was notarised. It is marked exhibit 54. Respondent No.1 has produced the original copy of the application for registration of Kandivali Siddheshwar CHS Ltd., which is marked at exh. 44 dated 19.4.2005 and, thereafter, the Assistant Registrar of Cooperative Societies issued a letter of

registration dated 2.2.2005 (exh. 45). A copy of the certificate of registration is marked 46 dated 21.5.2005. He also produced three assessment 27 (1983) 3 SCC 118 ep.1.2014(J).doc bills of the society which were issued in favour of Kandivali Siddheshwar CHS Ltd. Which are dated 28.2.2011, 21.3.2011 and 1.3.2011, which are marked at exhibits 47, 47A, 47B respectively. He produced original copy of the revised LOI dated 25.6.2009, which is marked at exh.48. A copy of the further Commencement Certificate dated 17.3.2010 is produced and marked at exhibit 49.

89. Respondent No.1 had executed the registered sale deed of the said plot, i.e., the Deed of Conveyance dated 7.6.2007 (exh.

27) with one Mahesh Dadarkar, who was the power of attorney holder of Laxmibai. Thereafter, he executed a Deed of Indemnity (exh. 28) dated 23.6.2008 and Articles of agreement on 21.6.2009 with the Corporation, which is marked at exh. 25.

90. Mr.Bhadbhade has taken objection for these exhibited documents, especially original sale agreements, development agreements and the agreements of the flat and shop purchasers with M/s.Jyoti Construction. Mr.Bhadbhade has rightly pointed out that the agreements which are produced before the Court disclose 2 to 3 remarks of different notaries and, therefore, the submission that they are the photocopies of the photocopies of the original ep.1.2014(J).doc documents are correct. It appears that while arranging, the papers of these documents got mixed up and in many agreements, the sequence is missed and some papers are changed. However, it can be seen from the evidence of Respondent No.1 and his cross- examination that he has identified the signature of Mahesh Dadarkar so also Hemendra Mehta and his signatures appearing on the documents. He being the sole proprietor of M/s.Balaji Construction, which was involved in the development and construction project on the said plot was fully aware of the process and the transactions or the transfers of the tenements taken in respect of the said plot and the building and had knowledge of contents of the documents. It is true that on the basis of unregistered agreement of sale, no immovable property can be transferred or no title can be created in respect of that property in favour of the purchaser.

91. In the case of Suraj Lamp and Industries Private Ltd. (2) through Director vs. State of Haryana & anr. (supra), the Supreme Court laid down law about proper mode of transfer and conveyance and held that a transfer of immovable property by way of sale can only be by a deed of conveyance (sale deed) and ep.1.2014(J).doc specifically mentioned that no right, title or interest in an immovable property can be transferred in the absence of deed of conveyance. However, it granted certain protection to the transactions under the sale agreement and general power of attorney which were entered into prior to the date of the judgment. Hence, the transfer by registered sale deed only is a valid transfer of the immovable property.

92. The transfers of the plot from Mahesh Dadarkar to M/s.Glorius Construction Company; M/s.Glorius Construction Company to M/s.Balaji Construction; M/s.Balaji Construction to M/s.Jyoti Construction, are all unregistered agreements. However, the property was developed; shops and flats were sold; people occupied their respective tenements; registered society was also formed. However, the conveyance could not be executed for want of legal and proper title in respect

of the said plot. The registered Deed of Conveyance dated 7.6.2007 also creates question mark because Laxmibai who had executed power of attorney in favour of Mahesh Dadarkar had expired long back. Therefore, the execution of the said sale deed by him in capacity of power of attorney holder of the deceased, is questionable. The reason ep.1.2014(J).doc given by Respondent No.1 that it was executed for the purpose of clearing the process of handing over the set-off portion of the plot to the Corporation, cannot be doubted because further construction of three flats I.e, 701, 702 and 703 on the 7 th floor has taken place and he has in fact entered into the agreement of Deed of Indemnity Exhibit 28 on 23.6.2008 and Article of agreement Exhibit 25 on 19.6.2009. Thus, it can be said that the earlier transaction between M/s.Glorius Construction Company and M/s.Balaji Construction may be legally defective under the Transfer of Property Act and in violation of Registration Act and the subsequent sale deed with the power of attorney is also illegal. However, that is an altogether different issue. Whether the respondent has constructed the building without title and his certain acts were illegal, is not the issue in this election petition.

93. Representation of People Act is a special provision to conduct Election Petitions, so while taking documentary evidence on record, it is necessary to consider Section 93 of The Representation of the People Act along with Section 63 of the Evidence Act. Section 93 of the R.P. Act states as follows:

"Documentary evidence.--Notwithstanding anything in any ep.1.2014(J).doc enactment to the contrary, no document shall be inadmissible in evidence at the trial of an election petition on the ground that it is not duly stamped or registered."

94. It is true that Section 93 of R.P. Act facilitates the admissibility of the documents which are required to be duly stamped or registered. Under section 63 of the Evidence Act, the copies prepared from the original by the mechanical processes compared from the original copies, are permitted. The Section permits oral account of the contents of a document given by some person who has himself seen it. The purpose of allowing secondary evidence is not to close the entry of the evidence which is otherwise available and can be seen, relied and necessary to decide the issue. The allowance of secondary evidence facilitates the process of proving or disproving a fact in the absence of original documents, so it is a pragmatic provision.

95. In the present case, the contents and purpose of the documents is deposed by respondent no. 1 and witness Maurya. Paradoxically, the entire petition stands on a footing that the plot is owned by respondent no. 1. Whether the transaction is clear or it ep.1.2014(J).doc is defective, is not the issue before the Court. Under such circumstance, I am not inclined to appreciate the submissions of the learned counsel on the point of secondary evidence. So also, considering the oral evidence of the witness respondent nos. 1 and RW-3, it can be safely said that the creation of Siddeshwar Housing Society, construction of the flats and transfer of the flats with Agreement to respective flat owners, these facts are proved by the respondent.

96. The building is constructed as per the approved plan and, therefore, at this stage, the construction as such cannot be said to be illegal but the right, title and interest of Respondent No.1 may be questionable in view of the legal status of Mahesh Dadarkar. If at all respondent has committed any wrong while constructing, it is upto the concerned authorities like Corporation to

take action. Whether Respondent No.1 is the owner of the plot when he filled up the nomination form and what was the value of the said plot is the key question. By virtue of the sale deed of conveyance (exh.

27), according to him, he became the owner and so his name is shown on the property card (exh. 14) which is not disputed.

ep.1.2014(J).doc

97. The respondent no. 1 has admitted that after handing over the set back area of the land to the Corporation, the balance portion of the said land stood in his name. He has admitted that he has not mentioned anything about M/s.Jyoti Construction in his affidavit. In the cross-examination, he has deposed that he did not think it was necessary to make a reference of M/s.Jyoti Construction in his affidavit and he did not make any disclosure of the property and he has stated that the value of the property was zero and therefore, he has not mentioned in the property card. Some questions were recorded in question and answer format as per the request made by the learned Counsel. The stamps of 2 notaries i.e., one of Mr.Dongardive and another of Mr.M.V. Shinde are seen on some agreements. The witness also admitted the stamp of SEO Mr.Ranjit Vora alongwith the stamp of notary and then, he answered that he was unable to state anything whether the stamp of notary Shinde is appearing partly on some pages and no such stamp is seen on the other pages. However, the witness has further volunteered and clarified the position that after taking out photocopies of the documents while stapling the documents, 2 agreements got mixed.

ep.1.2014(J).doc

98. It was submitted on the point of actual assets that whatever profit M/s.Jyoti Construction has earned, is used or spent and at the time of filing of the application, M/s.Jyoti Construction was not in existence and the value of the property was zero. Thus, it can be inferred that though the property stands in the name of Respondent No.1 de jure, its de facto value was zero at the time of filing of the nomination form. Thus, the non-disclosure of the property, whose value is nil, would not affect the election materially. Hence the issue no. I and II are answered negative.

99. After considering this evidence, I am of the view that the property as per the evidence was of no value qua Respondent No.1 and therefore, he did not disclose it. There is substance in the explanation of the respondent that as the Cooperative Society in SRA Project was already formed, then he claiming the plot as an asset would not have been a correct statement and would have amounted to grabbing property.

100. It is worth to refer to the ratio laid down by the Supreme court on the voters mindset. On the point of improper acceptance, in the case of Shivcharan Singh vs. Chandra Bhan Singh 28, it 28 (1988) 2 SCC 12 ep.1.2014(J).doc was held that it is not permissible to set aside the election of the returned candidate under section 100 (1)(d)(i) on mere surmises and conjectures if the improperly nominated candidate had not been elected in the election contest, it is difficult to apprehend or predicate with any amount or reasonable certainty, the manner and the preparation in which the

voters who exercise their choice in favour of improperly nominated candidate would have exercised their votes. The Courts are ill equipped to speculate as to how the voters would have exercised their right to vote in absence of improperly nominated candidate especially in the case where margin of votes is very wide between the returned candidate and other candidates.. I am of the view that in this Petition, considering the facts and nature of the property, non-mentioning the said property in the nomination form and in the affidavit as an asset is not a substantive defect.

101. Thus, I give finding as follows:

Issue no. I	-	negative
Issue no. II	-	negative
Issue no. III	-	negative
Issue no. IV	-	negative
Issue no. V	-	negative
Issue no. VI	-	Election Petition is dismissed.

(MRIDULA BHATKAR, J.)