

Narayan Gunaji Sawant vs Deepak Vasant Kesarkar on 17 February, 2011

Author: R.M.Savant

Bench: R.M.Savant

1 Application No.26/10 in EP No

Lgc

IN THE HIGH COURT JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPLICATION NO.26 OF 2010

IN
ELECTION PETITION NO.16 OF 2009

Narayan Gunaji Sawant]

Aged 42 years]
Residing at Bavlat,]
Post - Danoli, Tal - Sawantwadi,]
District Sindhudurga].... Petitioner.

versus

Deepak Vasant Kesarkar
Residing at House No.B-307, ig]
Vaishyawada, Shivramraje Road]... Applicant.

B-Ward, Sawantwaid, District Sindhudurga] (Ori.Respondent)

Mr. M M Vashi with Mr. Sean Wassoodew i/by M.P.Vashi and Associates for the Petitioner.

Mr.V.C.Kotwal, senior counsel with Mr.Sachindra B Shetye and Mr.S V Gavand for

the Applicant- original Respondent.

CORAM : R.M.SAVANT, J.

Reserved on : 16th December 2010

Pronounced on : 17th February 2011

JUDGMENT :

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1 The above Application has been filed by the original Respondent in Election Petition No.16 of 2009, who is the elected candidate and whose election is challenged in the above Election Petition, inter alia claiming the following reliefs :-

"(a) That this Hon'ble Court may be pleased to dismiss the election Petition filed by the Petitioner;

(b) That the pleadings in Paragraphs No.12 to 18 of the Election Petition be struck off."

2 The Petitioner is a voter of the Sawantwadi Legislative Assembly Constituency who has challenged the election of the Applicant/Respondent on the following grounds :-

i) The Applicant has not disclosed two immovable properties standing in his name (vide paragraph No.14, 14-a, 15, 15-a, 15-b, 15-c, 15-d of the Election Petition)

(ii) The Applicant has not disclosed the Government dues/liabilities (vide paragraph No.15-e of the Election Petition)

(iii) The Applicant has left blank, the column in respect of the income of his spouse and dependent (vide paragraph No.15-f of the Election Petition).

(iv) The Applicant has not disclosed the properties of his wife at Vengurla and Belgaum (vide paragraph No.15-f of the Election Petition).

(v) The Applicant has suppressed information in respect of pending criminal cases in the two affidavits filed along with nomination in terms of Section 33-A r/w, rule 4A of the Conduct of Election Rules 1961 r/w the directions/order dated 27th March 2003 issued by the Election Commission of India.

The said grounds, according to the Petitioner, fall within the ambit of Section 100(1)(d)(i) and (iv) of the Representation of People Act 1951 (for brevities sake herein after referred to as "the said Act").

It is required to be noted that in so far as the aspect of criminal cases is concerned, the Applicant/Respondent has filed a separate Application being Application No.24 of 2010 for striking off the pleadings in the Election Petition concerning the said aspect. The said Application No.24 of 2010 has been dealt with separately.

3 The Applicant/Respondent has filed the above Application inter alia on the ground that in terms of Order 6 Rule 16 of the Code of Civil Procedure, this Court is empowered to direct striking off the pleadings at any stage which may be unnecessary, scandalous, frivolous or vexatious or which tend to prejudice, embarrass or delay the fair trial of the suit or which is otherwise an abuse of the process of the Court. The Applicant has also invoked Section 86 of the said Act under which this Court is empowered to dismiss an Election Petition which does not comply with the requirements of Section 81 r/w Section 100(1) of the said Act. The Applicant has also invoked Order 7 Rule 11 of the Code of Civil Procedure as, according to him, the Election Petition filed does not disclose a cause of action.

It is the case of the Applicant in the above Application that assuming for the sake of arguments that the candidate in question has not disclosed his income or disclosed income incorrectly, such non-disclosure of income or incorrect disclosure of income can be an offence punishable under the Act but cannot be treated as disqualification under Section 100 or corrupt practice under Section 123 and if that be so, the Petitioner, who has relied upon the said ground in the present case, has no cause of action to file the present Election Petition. It is further the case of the Applicant in the above Application that the validity of an election can be challenged only in terms of the statutory provisions and the fundamental right of a voter to know the bio-data/credentials of the candidate is independent of the statutory rights under the election law. It is the case of the Applicant that Sections 75 and 125A provide that any false information which is given by the candidate can be an offence punishable under the provisions of Section 125A but cannot be treated as disqualification under Section 100 or corrupt practice under Section 123.

Therefore, considering the said settled legal position, even if the averments made by the Petitioner in Paragraph Nos.12 to 18 of the Election Petition are accepted as true, the Election Petitioner on the said basis cannot seek a relief of setting aside the election of the Applicant. The Applicant has, therefore, prayed for the reliefs which have been reproduced herein in above.

In the light of the above Application, it would be apposite to reproduce Paragraphs 12 to 18 of the Election Petition.

Para-12 The Petitioner states that as the Respondent has not filed affidavit in prescribed form along with the nomination form on or before 3 p.m. on the last date of filing nomination i.e. 25th September, 2009, the returning officer ought to have rejected the nomination of the Respondent straight away without holding any further enquiry and without any objections being raised by any candidates. The directions given by the Election Commission of India dated 27th March 2003 are issued under Article 324 of the Constitution of India. Therefore, they have a statutory force. The Petitioner states that therefore, the nomination of the Respondent is improperly accepted. (In any case, the acceptance of the nomination of the Respondent is in violation of section 33-A of the said Act r/w Rule 4A of the Conduct of Election Rules, 1961 r/w directions given by the election commission of India.) Therefore, the election of the Respondent is liable to be set aside u/s. 100(1)(d)(i) and 100(1)(d)(iv) of the said Act.

Para 13 - The Petitioner states that the Petitioner has cast his vote in the election in question. However, before voting, the Petitioner went to the office of the Sub Division Officer i.e. the Returning Officer and saw the affidavit of the Respondent displayed by the Sub Division Officer on the notice board, which gave details about the criminal cases pending against the Respondent and the movable, immovable properties etc. of the Respondent. (After perusing the said affidavit, the Petitioner and other voters of the said constituency got an impression that no criminal cases are pending against the Respondent. Thus, the Respondent has secured highest votes by deliberately filing two false affidavits. The election of the Respondent is also in violation of the law laid down by Supreme Court.) Para 14 - Without prejudice to the Petitioner's contention that the Respondent has not filed affidavit in the prescribed form, the Petitioner states that the affidavit filed by the Respondent purportedly disclosing movable, immovable properties etc. also does not comply with Section 33-A of the said Act r/w the said order dated 27th March 2003 for the reasons set out hereinbelow.

(a) On page 8 of the said affidavit, the Respondent has written description of immovable properties jointly and individually held by Respondent. However, instead of giving details in the affidavit such as location, survey No., measurement, market value etc., the Respondent has purportedly given the said details in annexures. However, there are no annexures to the said affidavit.

Para 15 - The Petitioner states that apart from the aforesaid defects, the Respondent was also owner of two properties on the date of filing of his nomination. However, the Respondent has not disclosed the same in the affidavit filed along with the nomination form. The details of which are as under :-

a. Land bearing survey No.101, Hissa No.1A, admeasuring area bout 24 Acres out of the total area under the said 7/12 extract situates at village Talekarwadi, Post & Tal. Vengurla, Dist. Sindhudurg under the Registration and Sub-Registration District Sindhudurg. The said property has been acquired by the Respondent vide an indenture of Sale Deed dated 22-05-2008 and the said Sale Deed has been registered with the office of Assistant Registrar Class I, Vengurla under serial No.350 of 2008 dated 22-05-2008. As per the said Sale Deed the Respondent has paid total consideration of Rs.

80,00,000/- (Rs. Eighty Lacs only) to the Sellers. The Petitioner has got the said information from the Assistant Registrar, Vengurla, who has supplied the certified copy of the Sale Deed and the Registration Receipt. The certified copy of the said Sale Deed along with Registration Receipt without annexures is enclosed and marked as Exhibits E1 to E4 are the said documents in Marathi and English translation thereof respectively.

b. The Petitioner further says and submits that in order to establish that the said property is standing as of today in the name of the Respondent, the Petitioner has also obtained a 7/12 extract and Pher Far (i.e. Extract of Form No.6) in respect of the said property i.e. The Survey No.101 and Hissa No.1A/1, admeasuring area about 24 Acres situates at Village Talekarwadi, Tal Vengurla, Dist. Sindhudurg. Thus the Respondent has suppressed the said property while declaring his assets by way of sworn affidavit filed before the Returning Officer. The certified copy of the said 7/12 extract and the Pher Far are enclosed and marked as Exhibit F1 to F4 in Marathi and English translation thereof, respectively.

c. The Petitioner states that, there is another property of the Respondent, which has also not been declared by the Respondent i.e. a property bearing Survey No.90, Hissa No.1, admeasuring area about 1 Acre and 13 Gunthas alongwith the dwelling house admeasuring area about 32' X 24' = 768 sq. ft of carpet area situates within Grampanchayat Waingani, Village Talekarwadi, Post & Tal. Vengurla, Dist. Sindhudurg under the Registration and Sub-Registration District Sindhudurg. The said property has been acquired by the Respondent vide an indenture of Sale Deed dated 07-11-2007 and the said Sale Deed has been registered with the office of Assistant Registrar Class I, Vengurla under Registration Serial No.684 of 2007 dated 07-11-2007. As per the said Sale Deed, the Respondent has paid a total consideration Rs.

7,00,000/- (Rs. Seven Lac only) to the Sellers. The Petitioner has got the said information from the Assistant Registrar, Vengurla, who has supplied the certified copy of the Sale Deed and the Registration Receipt. The certified copy of the said Sale Deed alongwith Registration Receipt without annexures is enclosed and marked as Exhibit G1 to G4 are the said documents in Marathi and English translation thereof respectively.

d. The Petitioner further says and submits that, in order to establish that the said property is standing as of today in the name of the Respondent, the Petitioner has also obtained a 7/12 extract and Pher Far (i.e. extract of Form No.6) in respect of the said property i.e. Survey No.90 and Hissa No.1 admeasuring area about 1 Acre and 13 Gunthas alongwith the dwelling house admeasuring area about 32'x24'=768 sq.ft of carpet area situates in Grampanchayat Waingani, Village Talekarwadi, Post and Tal. Vengurla, Dist. Sindhudurg. This property is also standing in the name of the Respondent on the date of filing his nomination. Thus, the Respondent has suppressed the said property while declaring his assets by way of sworn affidavit filed before the Returning Officer. The certified copy of the said 7/12 extract and the Pher Far are enclosed and marked as Exhibit H1 to H4 are the said documents in Marathi and English translation thereof respectively.

e. The Petitioner says and submits that the Respondent has also not disclosed the Government dues as per Serial No.(a)(iii) and also Serial No.(b)(i)(ii)(iii) and

(iv) at Page No.10 of the said affidavit.

f. It is submitted that the affidavit having sworn by the Respondent is incomplete as the material column in respect of the income of spouse and the dependent has been left blank. In fact, the wife is having properties in Vengurla and Belgaun (Karnataka). Thus it is a misinformation or disinformation caused on account of disclosure made by the candidate on affidavit.

Para 16 - The Petitioner states that in view of the aforesaid facts, it is clear that the election of respondent is liable to be set aside u/s.100(1)(d)(i) r/w 100(1)(d)(iv) of the Representation of People Act, 1951.

Para 17 - The Petitioner states that as stated hereinabove by filing separate and/or incomplete affidavits the Respondent has suppressed material facts from the voter like Petitioner. Such suppression and/or misinformation has resulted in the Respondent securing more than 30,000 votes. (The Petitioner states that voters of the said constituency are mainly farmers, fishermen and small traders. The voters vote for candidate against whom no criminal cases are pending and who is honest in disclosing his true assets and liabilities. The Respondent has filed affidavit in form No.26 by showing that no criminal cases are pending against Respondent.) The Respondent has also filed affidavit in prescribed form without showing all the properties and without showing all the liabilities. This has resulted in the Respondent getting the majority of votes. Thus, the result of the respondent is materially affected due to the breaches of the Respondent pointed out by the Petitioner hereinabove."

Para 18 - The Petitioner states that the result of the election in question was declared on 22nd October 2009. The present election petition is filed within 45 days from the date of declaration of the result. Therefore, the present petition is filed within time"

5 The genesis of the requirement for a candidate to file affidavits lies in the judgment of the Apex Court in the case of Union of India v/s Association for Democratic Reforms and Another, in Civil Appeal No.7178 of 2001. In terms of the directions issued by the Apex Court, the Election Commission of India had issued an order in exercise of power under Section 324 of the Constitution of India on 28 th June 2002 making it incumbent upon the candidate to file an affidavit mentioning five factual details which included disclosure of assets. Thereafter the R P Act came to be amended by the inclusion of Sections 33A, 33B, 124A and 125A.

The validity of the amended provisions came to be challenged before the Apex Court and the Apex Court in the case of People's Union for Civil Liberties (PUCL) and anr. v/s Union of India reported in AIR 2003 SC 2363 upheld the constitutional validity of Section 33A however Section 33B was declared as unconstitutional. Apex Court directed the Election Commission to modify/amend the said order. Thereafter the Election Commission issued a fresh order on 13th March 2003. In terms of sub-clause (4) of clause-5 it was provided that rejection of nomination paper containing wrong or incomplete information or suppression of material information

was considered to be a defect of substantial character may result in rejection of his nomination paper. By another order dated 27 th March 2003, the Election Commission directed that the direction No.4, as contained in the order dated 13th March 2003, in so far as verification of assets and liabilities by means of summary enquiry and rejection of nomination paper on the ground of furnishing wrong information or suppressing material information should not be enforced.

Thereafter the Election Commission issued a further order dated 17.01.2006 by virtue of which filing of affidavits by the last date and hour fixed for filing of nomination papers was made permissible and the failure to submit the affidavits by the aforesaid date and time would be considered as a defect of substantial nature entailing rejection of the nomination paper at the time of scrutiny.

This order was issued by the Election Commission following the judgment of the Madras High Court dated 2-8-2005 in Election Petition Nos.1 and 2 of 2004.

Hence, as can be seen from the orders issued by the Election Commission, what was sought to be done by the order dated 17.1.2006 was to permit the candidate to file affidavits in question by the last date and hour fixed for filing of nomination paper. The purport of the earlier order dated 27.3.2003 that the nomination could not be rejected on the ground of furnishing wrong information or incomplete information or suppression of material information was kept intact.

6 As can be seen from the averments made in the aforesaid Paras 12 to 18 of the Election Petition, it is the case of the Petitioner that the Respondent has failed to mention the properties owned by his wife as the said column, according to the Petitioner, is kept blank. It is the case of the Petitioner that the wife of the Respondent owns properties in Vengurla and Belgaum. It is also the case of the Petitioner that the extent of the properties owned by the Respondent have not been correctly disclosed as some properties have been left out by him. Though there is no specific averment in the Petition as regards the column of income tax in the said affidavit. The learned counsel for the Petitioner on the basis of the copy of the affidavit which was produced by the learned counsel for the Applicant at the hearing of the above Application, contended that the income tax paid by the Applicant has also not be disclosed. The learned counsel also contended that the column regarding government dues has also been kept blank.

7 Per contra, it is submitted by the learned senior counsel for the Respondent that the Respondent had given details of the information sought by the affidavit in the annexures to the said affidavit, however, in so far as the agricultural properties owned by the Applicant/Respondent are concerned, the total value of the said agricultural properties has been mentioned. It is fairly conceded by the learned senior counsel for the Applicant/Respondent that the individual agricultural properties have not been mentioned in the affidavit. In so far as the properties of the wife of the Applicant/Respondent are concerned, it is the case of the Respondent that the said column has not been kept blank but since the wife does not own any property, the said column is crossed by "hyphen" thereby signifying that she does not own any property. Similar is the case with the Government dues. In so far as income tax is concerned, the learned senior counsel for the Applicant/Respondent submitted that though the income tax paid in the preceding assessment year

i.e. 2007-08 has not been mentioned, the return filed for the previous assessment year i.e. 2006-07 has been mentioned, as also the PAN number has been given. In any event, according to the learned senior counsel for the Applicant/Respondent, the said lacuna, if any, in the affidavit is not a ground for disqualification which comes within the ambit of Section 100 (1)(d)(i) or (iv) of the said Act.

8 I find merit in the submission of the learned senior counsel for the Respondent that in so far as Section 100(1)(d)(i) is concerned, since the power to reject the nomination form by the conduct of the summary inquiry by the Returning Officer has been made unenforceable by the order of the Election Commission dated 27th March 2003, no ground under the said Section is made out. However, the learned counsel Mr.Vashi appearing for the Petitioner contended that non compliance of the order of the Election Commission would come within the ambit of Section 100(1)(d)(iv) and since in the instant case, affidavit of the Respondent suffers from the lacuna mentioned in the Petition, the Respondent has fallen foul of the directions of the Election Commission and, therefore, the ground under Section 100(1)(d)(iv) has been made out by the Petitioner. The learned counsel Mr.Vashi appearing for the Petitioner would contend that till the law is suitably amended, the directions of the Election Commission as contained in the orders can be said to fill in the gap in law. In so far as disqualification on account of non-compliance of the orders of Election Commission are concerned, the learned counsel for the Petitioner laid much store on a judgment of a learned Single Judge of this Court in Election Petition No.10 of 2004 dated 16th August 2007 in the case of Shri Arun Dattatray Sawant v/s. Shri Kisan Shankar Kathore. The efficacy of the order of the Election Commission vis-a-vis the ground for setting aside the election under Section 100(1)

(d)(iv) was in contention in the said Election Petition. The judgment in the said case was rendered after a full trial. According to the learned counsel appearing for the Petitioner, Paragraphs 35, 38 and 39 of the said Judgment are relevant in the context of the challenge in the present Petition. The said paras are, therefore, reproduced herein under :-

35. Reverting to the facts of the case on hand, it is not a case of non-filing of affidavits along with the nomination forms as such. Had it been a case of "non filing of the requisite affidavits", the Returning Officer, at the scrutiny stage itself, would be within his right to straightaway reject the nomination paper, not accompanied by the mandatory affidavits which are now integral part of the nomination paper. To put it differently, nomination will be treated as validly accepted only if it were to be accompanied by the requisite affidavits of the candidate making necessary disclosures as provided in the prescribed affidavit. The disclosures to be made in such affidavit are expected to be truthful and complete on the specified matters, which information will be then in public domain, if the person is desirous of offering himself to be the representative of the people. Insofar as his prospective voters are concerned, they have a "fundamental right" to receive complete and truthful information to enable them to make an informed choice of the candidate, so as to then exercise their statutory right to vote.

Whereas, the right of the candidate to contest an election is "only his statutory right". The candidate is obliged to fulfil the constitutional aspirations of the voters and to uphold the constitutional

mandate of conduct of free and fair election, to become eligible to contest the election.

That is essential for the survival of democracy. Indeed, by virtue of the revised directions and the later decision of the Apex Court, the "Returning Officer" cannot reject the nomination form at the scrutiny stage by resorting to summary enquiry in respect of ground that the information furnished in the affidavits filed along with the nomination form is wrong or incomplete or amounts to suppression of any material information by the candidate to be a defect of substantial character. That does not mean that the nomination of the candidate who has filed wrong or incomplete information or suppressed any material information in the affidavits accompanying the nomination form, which is a defect of substantive character, in law, would still be a properly accepted nomination. In a given case, the candidate may succeed in hoodwinking the Returning Officer by making a farce of having filed affidavits to comply with the direction of the Election Commission. The fact that the Returning Officer cannot go into the correctness of the claim of wrong or incomplete information or suppression of any material information in a summary manner, does not mean that a case of improper acceptance of nomination within the meaning of Section 100(1)(d)(i) of the Act, becomes unavailable to such a situation. Adjudication on those matters are deferred, to be considered in an Election Petition challenging the validity of the election of the concerned candidate on that ground. In such a Petition, the questions to be considered will be, whether there is any defect in the affidavits of the candidate accompanying the nomination paper and if so, whether the defect is of substantive character resulting in misinformation and disinformation caused to the voters. If the finding on those issues were to be against the candidate, it will necessarily follow that it was a case of improper acceptance of his nomination. While considering those issues, it may give rise to contentious issues. Those matters which are not describable ex-facie and could be disclosed only upon an enquiry and upon taking evidence on the relevant facts, will therefore have to wait, to be decided by the Court in the Election Petition while considering the challenge to the election of the concerned candidate on that ground.

38. A priori, the expression 'prescribed form' referred to in Section 33 of the Act of 1951 will have to be construed as an inclusive term which would not only encompass the forms prescribed in the Rules of 1961 (Forms 2A to 2E), but also the affidavits to be filed by the candidate as per the law declared by the Apex Court which is binding in terms of Article 141 of the Constitution, as also the directions issued by the Election Commission in exercise of powers under Article

324. In the same manner, the expression "prescribed form"

in Section 33 would obviously now include the information to be disclosed by the candidate in terms of amended Section 33A of the Act of 1951 which has come into force with effect from 24th August 2002. In fact, information in that regard is already provided in the prescribed affidavits of the candidate to be accompanied with the nomination paper.

The Law declared by the Apex Court in Association for Democratic Reforms (supra) as well as PUCL's case (supra) would prevail, having attained finality; the Election Commission, in compliance of the decisions of the Apex Court has issued directions

in exercise of powers under Article 324(1) of the Constitution, which directions have been issued to fill the void in absence of suitable legislation to cover the field to effectuate the fundamental right to information of the voters in the Constituency to know the background and the complete antecedents of the candidate on relevant matters so as to take an informed decision and for upholding the constitutional mandate of conduct of free and fair elections. If it were to be held, as is contended by the Respondent, that filing of affidavits replete with wrong or incomplete information or suppression of any material information, even if it is a defect of a substantive character in the affidavit, cannot render the nomination form invalid, it will inevitably result in negating the Law expounded by the Apex Court on the basis of which directions have been issued by the Election Commission. In that, the candidates will then be free to file "any affidavits" they want, so as to continue to disrobe the voters in their Constituency of getting complete and truthful information about them which inevitably affects their fundamental right to receive full and complete information of their candidates. The affidavit replete with misinformation or disinformation will be antithesis to free and fair election and only a mirage created by the candidate of namesake compliance of the directions of the Election Commission and the Law. That act of commission and omission would also result in non-compliance of the provisions of the Constitution or the Act or any Rules or Orders made under the Act.

39. It was then argued on behalf of the Respondent that the order issued by the Election Commission is in exercise of powers under Article 324 (1) of the Constitution and not an order issued under the Act of 1951. This submission proceeds on the basis of narrow construction of sub-clause (iv) of Clause (d) of Section 100(1). The expression "Orders made under this Act" occurring therein, will have to be given its natural meaning, so as to include orders passed by the Election Commission in exercise of powers under Article 324(1) of the Constitution. Giving narrow construction to the said expression "this Act", to limit the orders issued only under the Act of 1951, would be a pedantic approach. Moreover, taking that argument to its logical end, would also mean that the Law declared by the Apex Court though breached, will be without any remedy. As noted earlier, by interpretative process, the affidavits to be filed by the candidate along with the nomination paper, by virtue of the Law expounded by the Apex Court as also the direction issued by the Election Commission in exercise of powers under Article 324(1) of the Constitution which is founded on the statement of law of the Apex Court, form integral part of the nomination form prescribed by the Rules. Thus understood, it will be a case of non-compliance of the provisions of the Act and the Rules. Besides, as the stated order passed by the Election Commission emanates from the duty to conduct free and fair elections envisaged by Article 324 of the Constitution, non-compliance of such an order would in that sense result in non-compliance of the provisions of the Constitution. Keeping in mind the avowed purpose of disclosure of complete information of the candidate on affidavit, to be accompanied with the nomination form, is to effectuate the fundamental right of the voters in the Constituency, who are

expected to elect their representative; there is corresponding constitutional obligation or duty of the candidate to make truthful and complete disclosure of information about himself in relation to his, his spouse's and dependants' assets, liabilities and criminal cases to enable the voters to make an informed choice of the right candidate in their assessment. A person who offers himself to become a public servant or representative of the public, has a constitutional duty to make truthful and complete disclosures of the specified matters. In a case of misinformation or disinformation caused on account of disclosures made by the candidate on affidavit, it can be nothing short of non-compliance of his constitutional obligation. The concomitant is that, such act of commission and omission would be covered by the sweep of Section 100(1)(d)(iv) of the Act as well, besides being a case of improper acceptance of his nomination within the meaning of Section 100(1)(d)(i) of the Act. For, such act has significant bearing on the process of free and fair election and cascading effect on the survival of democracy. Accordingly, Issue No. 4 will have to be answered in the affirmative.

9 The Learned Counsel for the Petitioner relying upon the Judgment of the Learned Single Judge in Election Petition No.10 of 2004 would contend that the consequences for furnishing of any wrong or incomplete information or suppression of any material information by the candidate in the Affidavit would have to be determined by the Court in the Election Petition. The Learned Counsel would contend that in the Election Petition, the Election Petitioner would be entitled to adduce such material so as to prove the fact that the candidate has given incomplete or wrong information or suppressed material information. The Learned Counsel would further contend that the Affidavit in question forms an integral part of the nomination and hence if the affidavit is suffering from any lacuna or infirmity the ground available in section 100(1)(d)(i) is attracted.

10 In view of the fact that the Learned Counsel has laid much store on the Judgment in Election Petition 10 of 2004. It would be relevant to note the facts of the said case. In the said Election Petition, the Petitioner therein had given specific information/details of the criminal case pending against the respondent elected candidate, being Criminal Case No.12 of 1997 under Sections 143, 147, 149, 325, 336, 504, 506 of the Indian Penal Code and under Section 3(1) of the Atrocities Act pending in the Court of the Judicial Magistrate, First Class, Ulhasnagar, which was not disclosed and in fact the contradictory stand taken by the respondent was pointed out.

The Petitioner had given the details of the dues owed by the Respondent to the Maharashtra State Electricity Board on account of two unpaid bills for Rs.

79,200/- and Rs.66,250/- which the Respondent had not disclosed in the affidavit.

The Petitioner had given details of the properties owned by the wife of the respondent which were not disclosed, being Bungalow No.866/4, situated in the limits of the Kulgaon Badlapur Municipal Council and the property at Bhilkhede, Taluka Jamner, Dist. Jalgaon.

The Petitioner had given details of the vehicle owned by his wife being Motor Vehicle No.MH-05-AC-555 of Mahendra Scorpio make as also the loan from Thane District Central Co-operative Bank, which the Respondent had not disclosed in the affidavit.

The Petitioner had also given details of the property being Survey No.48, Hissa No.9, Plot No.3 at Mauje Kulgaon, District Thane purchased in the name of M/s.Padmavati Developers of which the Respondent was a partner and which was not disclosed by the Respondent in the affidavit.

In so far as the property in the name of the wife of the respondent at Bihilkhede, Dist. Jalgaon is concerned, the joint purchaser of the said property was one Vimal Gokul Patil, wife of Gokul Patil, who was a Senior Inspector of Police who was arrested in what is known as the Telgi scam. It was therefore the case of the Petitioner therein, that it was for the said reason that the property in the name of the wife of the respondent was not disclosed.

The learned Judge, on an appreciation of the evidence which was adduced at the trial of the said Election Petition, came to a conclusion that the allegation in respect of the wife of the respondent in respect of the purchase of the property at Bhilkhede could not be said to be proved. However, in so far as the other allegations were concerned, the learned Judge held that the non-

disclosure of the assets, liabilities was a defect of a substantial nature as the Respondent by the said non-disclosure, incomplete disclosure and failure to disclose had thereby violated the orders issued by the Election Commission, and the said fact would therefore amount to wrongful acceptance of the nomination of the respondent.

In so far as present Election Petition is concerned, the Petitioner has given details of only two agricultural properties which, according to him, have not been disclosed by the respondent in the affidavit. However, in so far as the properties allegedly owned by the wife of the Respondent are concerned, the Petitioner has made a bald statement that the wife of the Respondent owns properties in Vengurla and Belgaum, so also is the case as regards the government dues. The Respondent in his written statement has stated that the valuation of the said two agricultural lands i.e. Rs.1,30,50,000/- has been mentioned in the Affidavit, however, the other details regarding the said properties have not been mentioned.

In so far as the government dues are concerned, it is the case of the Respondent that since he doesn't owe any government dues the said column for the same has been

crossed by "hyphen" so as to indicate that there are no government dues.

Hence save and except the details of the said two properties, the Petitioner has not given any material particulars in respect of the other alleged lacunae/infirmities in the Affidavit. In the absence of the said material particulars, this Court in an Election Petition, cannot embark upon a roving and fishing enquiry.

In my view the aforesaid aspect is one of the most distinguishing factors between Election Petition 10 of 2004 and the present Election Petition.

It would also be relevant to consider two other Judgments one of which is by the same Learned Single Judge, Khanwilkar J, in Election Petition No.7 of 2004, which can be conveniently referred to as Pednekar's Case reported in (2006) 4 Bom.

C.R. Page 392 and the Order of another Learned Single Judge, Kanade J. in Chamber Summons No.1341 of 2005 in Election Petition No.17 of 2004. In so far as Pednekar's case is concerned, the substratum of the case of the Petitioner was founded on the grounds available under Section 100(1)(d)(i) and 100(1)(d)(iv) of the said Act. Similar grounds as urged in the present Petition were the foundation of the said Election petition. The Respondent-elected candidate had taken a plea that since the material facts to sustain ground, 100(1)(d)(i) and 100(1)(d)(iv) were not pleaded, the Election Petition was liable to be rejected in exercise of the powers under Section 86 of the said Act. The said plea of the elected candidate was sustained by the Learned Single Judge and the Election Petition came to be dismissed. From the point of view of the present Application, paragraphs 11, 12 and 19 of the said Judgment are material and are reproduced here in under:

"11. In the first place, I shall analyse the Election Petition parawise to discern whether all the relevant material facts to disclose cause of action so as to declare the election of Respondent No.1 as void on the stated ground is made out. On reading each of the above para independently or all the paragraphs as a whole, it is not possible to take the view that the ground provided in Section 100(1)(a) has been invoked by the Election Petition. The said ground provides that on the date of election of the returned candidate, he was not qualified or was disqualified to be chosen to fill the seat under the Constitution or the Act of 1951 or the Government of Union Territories Act, 1963. The qualification to be elected as member of the Legislative Assembly of the State is provided by the Constitution under Article 173. It is not the case of the Election Petitioner that the Respondent No.1 was a person not qualified to be chosen to fill a seat in the Legislature of a State, having failed to fulfill any of the qualifications referred to in Article 173 of the Constitution. Insofar as Act of 1951 is concerned, Section 5 provides for qualifications of membership of a Legislative Assembly. Once again, nowhere in the Petition, it is even remotely suggested that the Respondent No.1 was not qualified within the meaning of the said provision. Similarly, in the entire Petition, it is nowhere the case of the Petitioner that the

Respondent No.1 was disqualified to be chosen to fill the seat under any of the provisions of the Constitution or the Act of 1951. The provision regarding disqualification can be culled out from Chapter III and Chapter IV of Act of 1951. Section 8 of the Act of 1951 provides for disqualification on conviction for certain offences. It is not the case of the Petitioner that the Respondent No.1 has been convicted for any of the specified offences under that provision. From the averments in paragraphs 15 and 16 referred to above, it can at best be assumed that the Petitioner asserts that criminal case for offence punishable under Section 125A of the Act has been registered against the Respondent No.1. That, however, is not sufficient to disqualify Respondent No.1 on the date of his election on which he was declared a returned candidate. The disqualification, if at all, will be incurred after the criminal case ends in conviction. Interestingly, Section 125A of the Act is not part of the several specified offences under Section 8. Section 8(1)(a) refers to offence under Section 153A or 171E or 171F or sub-section (1) or sub-section (2) of Section 376 or Section 376A or Section 376B or Section 376C or Section 376D or Section 498A or Section 505(2) and (3) all of Indian Penal Code. On careful analysis of Section 8 of the Act of 1951, it is seen that the offences under the Act of 1951 which are specified in clause (i) of Section 8(1) are only Section 125, 135, 135A and 136(2)

(a). In other words, Section 125A which deals with penalty for filing false affidavit has not been specified as offence for the purpose of disqualification. Suffice it to observe that ground under Section 100(1)(a) has not been pressed into service.

12. The only other ground which can be ascribable to the contents of paragraphs referred to above is Section 100(1)(d)(i) or (iv). Insofar as Section 100(1)(d) whether clause (i) or clause (iv) is concerned, the same can be invoked only if the result of the election insofar as it concerns the returned candidate has been materially affected by the improper acceptance of any nomination or by any non-compliance of the provisions of the Constitution or of the Act of 1951 or any rules or orders made under the Act. The material facts to disclose cause of action for invoking these grounds would also require allegation of filing of false affidavit with "intent to " materially affect the result of the election. One of the ingredients of offence under Section 125A is that the false affidavit has been filed with intent to be elected in the election, the candidate gives false information in such affidavit which he knows or has reason to believe to be false or conceals any information. Besides, the election of such returned candidate can be declared void in terms of Section 100(1)(d) only if it were to be asserted that, in fact, because of the false affidavit filed by the returned candidate, the result of his election is materially affected; and provide for material facts as to in what manner the election has been materially affected.

19. In Paragraph 15, it is averred that the Petitioner learnt that Respondent No.1 had furnished incorrect information or had concealed the material particulars, for which reason, the Petitioner addressed letter to the appropriate authority to ascertain the correctness of the information furnished by the Respondent No.1. In response to that query, the Petitioner has been informed that

the Respondent No.1 was in arrears in the sum of Rs.9,196/- (Rupees Nine Thousand One Hundred Ninety-six) payable to the Sub-Divisional Officer, Maharashtra Jeevan Pradhikaran, Deogad as on 19th October 2004. The Petitioner thereafter filed complaint before the Election Officer and the Election Officer has held that the Respondent No.1 was guilty of suppression of material facts and therefore directed the Assistant District Election Officer to register the offence as per law. It is then mentioned that the said act of Respondent No.1 falls squarely into the grounds for declaring the election to be void under Section 100 of the Act. It is stated that if the affidavit filed by the Respondent No.1 suffers from any defect of substantial character, the nomination filed by the Respondent No.1 is deemed to be defective and the same should have been rejected. In substance, the Petitioner alleges that the election of Respondent No.1 be declared void and invalid on account of defective nomination. In the first place, the question of improper acceptance of any nomination within the meaning of Section 100(1)(d)(i) will arise only if the candidate was not qualified to be chosen to fill that seat under the provisions of the Constitution and the Act of 1951 or under the provisions of the Government of Union Territories Act, 1963, as is required by Section 32 read with Section 33 of the Act. Be that as it may, it is not necessary for me to go into the correctness of the stand taken by the Petitioner whether the nomination was defective and therefore resulted in improper acceptance to be a ground for declaring election of Respondent No.1 void. For the present, what is to be noted is: whether the Election Petition discloses all the relevant material facts necessary to invoke the subject ground so as to make out cause of action to proceed with the Petition? As has been observed earlier, even in this Paragraph, none of the relevant material facts have been stated to the effect that the false affidavit was filed by the Respondent No.1 with intent to be elected in the election and had given false information which he knew or had reason to believe to be false and further, that the result of the election insofar as Respondent No.1 is concerned being the returned candidate has been materially affected by such defect in the affidavit. "

As can be seen from the above, the Learned Single Judge has held that the filing of a false affidavit would at the highest tantamount to an offence under Section 125 of the said Act, but, cannot be a ground for the purposes of disqualification of the candidate under Section 100(1)(d)(i) and (iv).

In so far as Chamber Summons No.1341 of 2005 in Election Petition No. 17 of 2004 is concerned, the said Chamber Summons was filed by the returned candidate seeking dismissal of the Petition on the ground that the ground urged for setting aside the election was not available to the Petitioner in the said Election Petition. The factual position in the said Election Petition was similar to the one in the present Petition. It was the case of the Petitioner in the said Election Petition that, the affidavit which was filed by the returned candidate who was the Respondent, did not disclose the correct assets which are owned by him and his wife.

The Petitioner ventured to give the assets which were owned by the Respondent, which according to him were suppressed by him. It was further the case of the Petitioner that, he was entitled to lead evidence to prove that a false affidavit had been filed by the returned candidate. The Learned Single Judge, Kanade J., upheld the objection of the elected candidate and allowed the Chamber Summons filed by

him thereby dismissing the Election Petition. Paragraphs 7 and 9 of the said Order are material and are reproduced herein under:

"7. In this Context, it will be relevant to consider the provisions of section 100 and 123 f the Act. The election of a returned candidate can be set aside only if it is established that the returned candidate is disqualified either under section 100 or has committed corrupt practice as laid down under Section 123. The Representation of the People Act, 1950 was amended and the provisions of Sections 33A, 33B and Section 75A and 125A were inserted. Section 33B was struck down by the Supreme Court as unconstitutional in the case of People's Union for Civil Liberties (PUCL) and Anr. Vs Union of India (UOI) and Anr. Reported in AIR 2003 SC 2363. Section 75 and 125A provide that any false information which is given by the candidate would be an offence punishable under the provisions of Section 125A. These provisions therefore, indicate that non-disclosure of income or incorrect disclosure of income of the candidate can be an offence which is punishable under the Act but has not been treated as disqualification under Section 100 or corrupt practice under Section 123. This being the legal position, even if averments in the said paragraphs are accepted as true, on that basis the petitioner in the Election Petition cannot seek relief or setting aside the election of a returned candidate.

9. The submission of the learned Counsel for the petitioner in the Election Petition that the non-disclosure of correct assets has resulted in improper acceptance of nomination paper and, therefore, it was a ground for setting aside the election under section 100 cannot be accepted."

11 A reading of the said order discloses that, the Learned Single Judge has relied upon PUCL's case reported in AIR 2003 SC Page 2363 and has come to the conclusion that non disclosure of income or incorrect disclosure of the income of the candidate can be an offence punishable under the Act, but has not been treated as a disqualification under Section 100 or a corrupt practice under Section 123. The Learned Judge, therefore, concluded that even assuming the averments made in the Petition are accepted as true, the Election Petitioner could not seek the relief of setting aside of the election of the returned candidate. It is the submission of the Learned Senior Counsel for the Applicant/Respondent that since the Learned Single Judge in Election Petition No.10 of 2004 has not referred to the Judgment in Pednekars case or the order in Chamber Summons No.1341 of 2005, the Judgment in Election Petition No.10 of 2004 is per incuriam.

12 It is also contended on behalf of the Petitioner whilst opposing the above application for dismissal of the Petition, that the issue whether the right to be informed which is a concomittant of the right to vote, is a fundamental right or not, is referred to a larger bench of the Apex Court by a Judgment of a two Judge Bench of the Apex Court in Writ Petition No.161 of 2004. The Learned Counsel for the Petitioner also pointed out that the challenge to the Judgment of the Learned Single Judge in Election Petition No.10 of 2004 is also referred to a larger bench of the Apex Court, and, therefore, this Court should proceed on the basis of the law enunciated by the Learned Single Judge in Election Petition No.10 of 2004.

Per contra, it is the submission of the Learned Senior Counsel for the Applicant/Respondent that though the issue is referred to a larger Bench, the law laid down by the Apex Court in PUCL's case and Association for Democratic Reforms still holds the field. In the context of the said submissions, it would be apposite to reproduce the defining paragraph in PUCL's case which is paragraph 81(d).

"81(D) The contention that as there is no specific fundamental right conferred on a voter by any statutory provision to know the antecedents of a candidate, the directions given by this Court are against the statutory provisions are, on the face of it, without any substance. In an election petition challenging the validity of an election of a particular candidate the statutory provision would govern respective rights of the parties. However, voters fundamental right to know antecedents of a candidate is independent of statutory rights under the election law. A voter is first citizen of this country and apart from statutory rights, he is having fundamental rights conferred by the Constitution. Members of a democratic society should be sufficiently informed so that they may cast their votes intelligently in favour of persons who are to govern them.

Right to vote would be meaningless unless the citizens are well informed about the antecedents of a candidate. There can be little doubt that exposure to public gaze and scrutiny is one of the surest means to cleanse our democratic governing system and to have competent legislatures."

(Emphasis supplied) It would be also apposite to refer to the Judgment in Writ Petition (civil) No.161 of 2004 of the Apex Court. The said Writ Petition was filed by the People's Union for Civil Liberties seeking to add another dimension to the sovereign right to express his choice for the candidate at an election by contending that the right to vote in secrecy includes the right of negative vote. It was prayed that Rules 41(2) and 49-O of the Rules be struck down and that directions be issued to the Commission to make appropriate provisions in the ballot papers and electronic voting machines, so as to enable the voters to exercise their right of negative voting and also ensure that exercise of this right is kept secret. The Judgment in Union of India Vs. Association for Democratic Reforms reported in (2002) 5 SCC 294 and in the case of PUCL Vs. Union of India and ors reported in AIR 2003 SC 2363 were relied upon by the Petitioner therein in support of its contention that in PUCL (supra), the Apex Court by a majority view has held that right to vote is a constitutional right beside that it is also a facet of fundamental right under Article 19(1)(a) of the Constitution. The Judgment in Kuldip Nayar Vs Union of India was also pressed into service by the Petitioner and paragraphs 361, 362, 363 and 364 of the said Judgment were relied upon in support of its contention which are reproduced hereinunder:

"361. The argument of the petitioners is that the majority view in People's Union for Civil Liberties, therefore, was that a right to vote is a constitutional right besides that it is also a facet of fundamental right under Article 19(1)(a) of the Constitution.

We do not agree with the above submission.

It is clear that a fine distinction was drawn between the right to vote and the freedom of voting as a species of freedom of expression, while reiterating the view in *Jyoti Basu v. Debi Ghosal* that a right to elect, fundamental though it is to democracy, is neither a fundamental right nor a common law right, but pure and simple, a statutory right.

363. Even otherwise, there is no basis to contend that the right to vote and elect representatives of the State in the Council of States is a constitutional right. Article 80(4) merely deals with the manner of election of the representatives in the Council of States as an aspect of the composition of the Council of States. There is nothing in the constitutional provisions declaring the right to vote in such election as an absolute right under the Constitution.

364. Be that as it may, the moot contention that has been raised by the petitioners is that the election of Members of the Council of States is provided for in the Constitution and, therefore, is a part of the Constitution and that it is an inherent requirement of the principle of free and fair election that the right to vote be invariably accompanied by the right of secrecy of vote so as to ensure that the freedom of expression through vote is real."

The two Judge Bench of the Apex Court thereafter in paragraph 20 of the said Judgment concluded as under:

"20. We have carefully read paragraphs 349 to 364 of the aforesaid judgment, which are found under the head Right to Vote - A Constitutional / Fundamental Right and find that even though the Constitution Bench did not overrule or discard the ratio of the two three-Judges Bench Judgments in *Union of India V. Association for Democratic Reforms* (supra) and *People's Union for Civil Liberties V. Union of India* (supra), the opening line of para 362 tend to create a doubt whether the right of voter to exercise his choice for the candidate is a necessary concomitant of the voter's freedom of expression guaranteed under Article 19(1)(a) of the Constitution. Therefore, this issue needs a clear exposition of law by a larger Bench. We are further of the view that width and amplitude of the power of the Commission under Article 324 needs further consideration by a larger Bench in the light of the judgments of this Court whereby the elector's right to be informed about the assets and antecedents of the persons seeking election to the legislature has been duly recognized."

(Emphasis supplied) The two Judge Bench of the Apex Court has, therefore, in terms observed that the Constitution bench in *Kuldip Nayar's case* has not overruled or discarded the ratio of the two-three Judges Bench Judgment in *Union Of India Vs. Association for Democratic Reforms and PUCL Vs. Union of India*. However, since the opening line of paragraph 362 creates a doubt whether the right of voter to exercise his choice for the candidate is a necessary concomitant of the voters of freedom of expression guaranteed under Article 19(1)(a) of the Constitution and since that issue

according to the Apex Court required a clear exposition as also the power of the commission under Article 324, needed further consideration by a larger bench, the said issues were referred to a larger bench by the two Judge bench of the Apex Court, therefore, by the Judgment in Writ Petition No.161 of 2004, the Apex Court has in terms explained that the Constitution Bench in Kuldeep Nayar's case has not overruled or discarded the ratio of the two-three Judges Bench Judgments in Association for Democratic Reforms (supra) and PUCL (supra). Therefore, in so far as this Court is concerned, the law laid down by the two-three Judges Bench of the Apex Court in the said two Judgments still governs the field, namely that the validity of an election of a particular candidate would depend on statutory provisions and that the fundamental right of a voter is independent of the statutory rights under the Election Law. In the light of the law laid down by the Apex Court in the aforesaid two Judgments, I deem it appropriate to decide the above application on the touch stone of the said two Judgments of the Apex Court and resultantly non compliance of the directions of the Election Commission would not come within the mischief of Section 100(1)(d)(iv) of the said Act. I find considerable merit in the submissions of the Learned Senior Counsel for the Applicant/Respondent that this Court whilst trying the Election Petition is akin to a Tribunal of limited jurisdiction and, therefore, the issues which are out of the purview of the grounds available in Section 100 cannot be entertained. In my view, considering the statutory regime under which the Election Petition is to be tried, the dispute as regards title to the properties etc., cannot be gone into at the trial of the Election Petition. The Election Petition would have to be confined to the grounds which are available under Section 100 of the said Act and the scope of the Election Petition cannot be enlarged unless there is an amendment in the legislation to that effect.

13 In so far as, the lacuna in the affidavit of the Applicant are concerned, the Applicant/Respondent has fairly conceded the fact that the Applicant/Respondent has not mentioned the details of his individual agricultural properties but has however, given the total value of the said properties in the annexure to the affidavit. It is contended by the Learned Senior Counsel appearing for the Applicant/Respondent that since his wife does not own any property, the column has been filled by putting "hyphen" in the column in respect of the properties of the wife. In so far as the Income Tax Returns are concerned, the return filed for the year 2006-07 which was the previous assessment year was mentioned, as also the PAN number was given, however, he fairly conceded that the tax paid for the assessment year 2007-08 was not mentioned. It is well settled that the affidavits in which the assets etc. are to be disclosed, have been made a condition pursuant to the directions issued by the Apex Court in the Association for Democratic Reforms case (supra). The object being to disseminate information about the candidate to the voters. The said affidavits, I am informed, are also put up on notice board much in advance and are also on the official website. If the Petitioner was aggrieved by the non disclosure of the information by the Applicant/Respondent, the Petitioner could have filed an affidavit before the returning officer disclosing the details of the properties owned by the wife of the Applicant/Respondent or could have brought to the notice of the voters any wrong or incomplete information given by the Applicant/Respondent. It is significant to note that the Petitioner has not till the filing of the above Petition taken any exception to the information furnished by the Respondent in the affidavits. As indicated herein above the Petition is bereft of any material particulars. Now an excuse is sought to be given for the inaction by questioning as to whether the information is on the official website and whether the Petitioner could have taken objection to the information furnished by the Applicant/Respondent in the said affidavits. In my

view, in the absence of any statutory backing that furnishing of false or incorrect information or suppressing information would amount to a disqualification as contemplated in Section 100(1)

(d)(i), even assuming that what has been stated by the Petitioner is accepted as true, the same would not entail the disqualification of the Applicant/Respondent. The grounds mentioned in paragraphs 12 to 18, therefore, do not spell out a cause of action for setting aside the election of the Respondent. In my view, since the Applicant/Respondent has mentioned the total worth of his agricultural properties which would be one of the material aspect with which a voter would be concerned.

Therefore assuming that there are any lacunae/infirmities in the affidavit, the same cannot be said to be of a substantial nature so as to unseat a returned candidate.

14 The above Application is therefore required to be allowed and is accordingly allowed. Resultantly, the pleadings in Paragraphs Nos.12 to 18 are liable to be struck off and the above Election Petition is required to be dismissed and is accordingly dismissed. No order as to costs.

(R.M.SAVANT, J)