

Isup Khan vs Narsingh Dewangan on 14 December, 2018

Author: Sanjay K. Agrawal

Bench: Sanjay K. Agrawal

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AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Civil Revision No. 10 of 2017

Order reserved on: 31-10-2018

Order delivered on: 14-12-2018

Isup Khan, S/o Peer Khan, aged about 27 years, R/o Village
Panchayat Bilaigarh, P.S. and Tahsil Bilaigarh, District Baloda Bazar
- Bhatapara (C.G.)

(Respondent No. 1 in election petition)

--- Applicant

Versus

1. Narsingh Dewangan, S/o Panchram Dewangan, aged about 51
years, R/o Village Panchayat Bilaigarh, P.S. and Tahsil Bilaigarh,
District Baloda Bazar - Bhatapara (C.G.)
(Petitioner in election petition)

2. Kailashnath Kahar, S/o Bhagwan Prasad Kahar, aged about 34
years.

3. Naresh Kumar, S/o Ishwari Prasad Dewangan, aged about 29
years.

The respondent No.2 and 3 are R/o Village Panchayat Bilaigarh,
P.S. and Tahsil Bilaigarh, District Baloda Bazar - Bhatapara (C.G.)
(Respondent No. 2 and 3 in election petition)

4. Returning Officer, Nagar Panchayat Bilaigarh, District Baloda Bazar
- Bhatapara (C.G.)

(Respondent No.4 in election petition)

--- Respondents

For Applicant: Mr. Sandeep Dubey, Advocate.

For Respondent No.1: Dr. N.K. Shukla, Senior Advocate with Mr. Anil
Singh Rajput, Advocate.

For Respondent No.4 / State: -

Mr. Arun Sao, Dy. Advocate General.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V Order

1. Invoking revisional jurisdiction of this Court under Section 26(2) of the Chhattisgarh Municipalities Act, 1961 (for short, 'the Act of 1961') and calling in question legality and validity of the impugned
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order dated 24-1-2017, this revision petition has been filed by which the learned District Judge has set aside the petitioner's election on the post of President, Nagar Panchayat, Bilaigarh held on 4-1-2015 and further declared respondent No.1 herein to be elected candidate on the said post by granting that election petition filed by him.

2. Essential facts necessary for the adjudication of this revision petition are as under:-

2.1) In an election held on 4-1-2015 for the post of Nagar Panchayat Bilaigarh, the petitioner as well as respondents No.1 to 3 contested the election and the petitioner herein was declared elected for the said post. Respondent No.1 herein questioned the said election of the petitioner on the said post by filing election petition under Section 20 of the Act of 1961 read with the Chhattisgarh Nagar Palika Election Rules, 1994. It was pleaded by respondent No.1 herein that counting of votes in the said election was not done in accordance with law. It was further pleaded that against the petitioner/returned candidate, in Police Station, Bilaigarh, Crime No.324/13 for offences under Sections 186, 353, 332, 294, 323, 506, 427 read with Section 34 of the IPC and offence under Section 4 of the Chhattisgarh Chikitsa Sansthan

Adhiniyam, 2010 has been registered and charge-sheet has been filed, in the court of Judicial Magistrate First Class, Bilaigarh which is pending consideration and out of which in offences under Sections 353, 332, 506 & 427 of the IPC, punishment of two years and more than two years is prescribed, and the said criminal case is pending consideration before the said court prior to six months from

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the date of filing nomination paper by respondent No.1/returned candidate and respondent No.1, knowing full well has not disclosed the said fact in his nomination paper and therefore his nomination paper has wrongly / improperly been accepted by which result of election of Nagar Panchayat has affected, which is liable to be declared void as respondent No.1 was obliged to declare the pendency of said criminal case in Form-3, paragraph-4 as per Rule 25-A of the Rules of 1994 and the petitioner could not take the said objection of pendency of criminal case against the petitioner at the time of filing of nomination paper, as he came to know about the said fact only on 13-1-2015. It was also pleaded that the post of President, Nagar Panchayat, Bilaigarh was reserved for OBC candidate and the petitioner belongs to General Category as such, he was not entitled to contest the election for the post of President so reserved for OBC candidate. It was finally pleaded that due to improper acceptance of nomination paper of the petitioner, his election result has affected and he has received less number of votes, otherwise all the votes thrown/cast in favour of the petitioner must have cast in his favour, therefore he also be declared elected candidate by declaring the election of the petitioner to be void.

2.2) The petitioner herein filed his written statement opposing and denying the allegations made in the election petition and submitted that his nomination paper was rightly accepted by the returning officer and election petition deserves to be dismissed with cost.

2.3) The learned District Judge, on the basis of pleadings of the parties framed following three issues:

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2.4) After appreciating oral and documentary evidence on record, the learned District Judge allowed the election petition holding that the petitioner/returned candidate failed to mention pendency of criminal case in the nomination paper submitted before the returning officer for the post of President - Nagar Panchayat, Bilaigarh, and thereby committed corrupt practice (undue influence) by which the result of election has materially affected, and declared the election of the petitioner on post of President void and further declared respondent No.1/election petitioner to be elected candidate for the remaining period of the said post of President, Nagar Panchayat, Bilaigarh.

3. Feeling dissatisfied and aggrieved by the said declaration of setting aside his election, the petitioner herein has preferred this revision petition questioning the order passed by the learned District Judge, in which cross objection has also been preferred by respondent No.1/returned candidate.

4. Mr. Sandeep Dubey, learned counsel appearing for the petitioner / returned candidate, would submit as under:-

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(i) That the learned District Judge was absolutely unjustified in holding that the petitioner has committed corrupt practice in non-disclosing the pendency of criminal case against him as required by Rule 25-A of the Rules of 1994. Elaborating his submission, he would submit that the election petitioner / respondent No.1 did not even allege by pleading the material fact that in the alleged case, charge/charges were framed against the petitioner six months prior to the date of delivery of nomination paper as per rule in respect of offence/offences alleged against him along with specific date of framing of charge/charges by the court of competent jurisdiction and the petitioner failed to disclose or conceal the above-stated material fact in his affidavit in Form-3 delivered along with nomination paper under the Act of 1961 read with the Rules of 1994 to the returning officer. Even otherwise, at the time of election, there was no provision either in the Act of 1961 or rules made thereunder mandating disclosure of criminal case pending against a candidate.

(ii) That the election petitioner/respondent No.1 has failed to plead and establish that due to alleged improper acceptance of nomination paper of the petitioner, the election of the returned candidate has been materially affected.

(iii) That, the learned District Judge is absolutely unjustified in declaring the election petitioner to be elected in breach of
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law laid down by the Supreme Court in this regard in the matter of Prakash Khandre v. Dr Vijay Kumar Khandre and others 1.

(iv) That the learned District Judge has made-out a new case, by holding the petitioner guilty of corrupt practice, as there is no pleading of corrupt practice in the election petition filed by the election petitioner and consequently no issue was framed in that regard, and thereby no issue of corrupt practice was tried and no evidence was led, therefore, the finding recorded that the petitioner is guilty of corrupt practice, is absolutely without jurisdiction and without authority of law.

5. Dr. N.K. Shukla, learned Senior Counsel ably assisted by Mr. Anil Singh Rajput, learned counsel appearing on behalf of respondent No.1, would support the impugned order declaring the election of the petitioner to be void and declaring respondent No.1 to be elected candidate for the remaining period. He would further submit that cross-objection preferred by respondent No.1 be allowed. He would reply upon the decision of the Supreme Court

in the matter of Sri Mairembam Prithviraj alias Prithviraj
Singh v. Sri. Pukhrem Sharatchandra Singh 2.

6. I have heard learned counsel for the parties and considered their
rival submissions made herein-above and went through the
record with utmost circumspection.

7. In order to adjudicate the plea raised at the Bar, it would be
1 (2002) 5 SCC 568
2 AIR 2016 SC 5087

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appropriate to notice the provisions contained in sub-sections (4)
and (5) of Section 20 of the Act of 1961, which state as under:-

"20. Election petition.- (1) to (3) *** *** ***

(4) A petitioner shall join as respondents to his
petition:

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

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

(5) An election petition shall:

(a) contain a concise statement of the material facts
on which the petitioner relies;

(b) set forth with sufficient particulars, the ground or
grounds on which the election or [nomination] called in
question;

(c) be signed by the petitioner and verified in the
manner prescribed in the Code of Civil Procedure,
1908 (V of 1908), for the verification of pleadings."

8. Section 22 of the Act of 1961 provides for grounds for declaring
election to be void, which states as under:-

"22. Grounds for declaring election or [nomination] to be void.- (1) Subject to the provisions of sub-section (2) if the Judge is of the opinion -

(a) *** **

(b) that any corrupt practice has been committed by a returned candidate or his agent or by any other person with the consent of a returned candidate or his agent;

(c) *** **

(d) that the result of the election or [nomination], in so far as it concerns a returned candidate, has been

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materially affected -

(i) by the improper acceptance of any nomination; or

(ii) *** **

(iii) by the non-compliance with the provisions of this Act or of any rules or orders made thereunder save the rules framed under (section 32) insofar as they relate to preparation and revision of list of voters;

he shall declare the election or [nomination] of the returned candidate to be void.

(2) *** **"

9. Section 28(ii) provides for corrupt practice (undue influence),

which states as under:-

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

(i) *** **

(ii) Undue influence as defined in clause (2) of Section 123 of the Representation of the People Act, 1951 (43 of 1951);"

10. The Rules of 1994 was amended with effect from 17-8-2004 and

Rule 25-A was inserted which states as under:-

Rule 25-A "Under the provision of sub-rule (1) of Rule 25, every candidate who is submitting his

nomination for the election of Councillor of Chairperson of Nagar Panchayat before the returning officer shall necessarily enclose a self-declaration in form 3 'A' and every candidate who is submitting his nomination before the returning officer for the election of Mayor of Councillor of any Municipal Corporation or for President of Councillor of any Municipal Council shall necessarily enclose an affidavit sworn before a Magistrate of the first class or a Notary in form 3'B' "

11. Rule 24 of the Rules of 1994 provides for nomination of candidates. Sub-rule (1) of Rule 24 provides that any person may be nominated as a candidate to fill a seat if he is qualified to be elected to fill that seat under the provisions of the Act. Sub-
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rule (2) provides that every nomination paper presented under Rule 25 shall be in Form-3.

12. Rule 25 of the Rules of 1994 relates to presentation of nomination paper and requirement for valid nomination which states as under:-

"25. Presentation of nomination papers.- (1) On or before the date appointed under clause (a) of Rule 21 each candidate shall either in person or by his proposer deliver to the Returning Officer of Asstt. Returning Officer so authorised by the Returning Officer for that purpose, during the time and at the place specified in the notice issued under Rule 21, a duly completed nomination paper in the prescribed form and signed by the candidate and [in the case of election of Mayor or President, by a voter of any ward, by a voter of that ward] as proposer:

Provided that any person who is subject to any disqualifications as voter under the Act shall not be eligible to sign any nomination paper as proposer."

(2) *** **

13. Rule 28 of the Rules of 1994 provides for scrutiny of nomination paper, which states as under:-

"28. Scrutiny of nomination papers. - (1) On the

date fixed for the scrutiny of nomination papers received under Rule 25 the candidates, their election agents, one proposer of each candidate, and one other person duly authorised in writing by the candidate but no other person, may attend at the time and place appointed in this behalf under Rule 21 and the Returning Officer shall give them all reasonable facilities for examining the nomination papers of all candidates which have been delivered as required by Rule 25.

(2) The Returning Officer shall then examine the nomination papers and shall decide all objections which may be made with regard to any nomination and may either on such objections or on his own motion, alter such summary inquiry if any, as he deems necessary, reject any nomination paper on any of the following grounds, that is to say-

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(a) that the candidate is disqualified for being elected to fill the seat by or under the Act;

(b) that the proposer is disqualified from subscribing a nomination paper;

(c) that there has been a failure to comply with any of the provisions of Rules 24, [24-A], 25, 26; and

(d) that the signature of the candidate or the proposer on the nomination paper is not genuine.

(3) Nothing contained in clause (c) or (d) of sub-rule (2) shall be deemed to authorise the rejection of the nomination of any candidate on the ground of any irregularity in respect of a nomination paper, if the candidate has been duly nominated by means of another nomination paper in respect of which no irregularity has been committed.

(4) The Returning Officer shall not reject any nomination paper on the ground of mere clerical or printing error or any defect which is not of a substantial nature.

(5) The Returning Officer shall hold the scrutiny on the date appointed in this behalf under clause (b) of Rule 21 and shall not allow any adjournment of the proceedings except when such proceedings are interrupted or obstructed by riot or open violence or by causes beyond his control :

Provided that in case any objection is raised by

the Returning Officer or is made by any other person, the candidate may be allowed time to rebut it not later than the next day but one following the date fixed for scrutiny and the Returning Officer shall record his decision on the date to which the proceedings have been adjourned.

(5-A) If nomination of a candidate has been accepted by the Returning Officer for more than one ward through oversight or for want of objection or for any other reason whatsoever, the Returning Officer shall after giving an opportunity to such candidate or his election agent, ignore the nomination paper tendered later in point of time and record this fact on such nomination paper and shall delete or cause to be deleted from the list of validly nominated candidate in Form 5, the name of such candidate from the ward in question. The Returning Officer shall also affix a copy of the revised list in Form 5 on the notice board in his office, duly recording the date and time of such

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affixture below his signature.

(6) The Returning Officer shall endorse on each nomination paper his decision regarding 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. The order passed by the Returning Officer shall be final.

(7) For the purposes of this rule the production of a certified copy of an entry made in the voters' list of the relevant Municipality shall be conclusive evidence of the right of any voter named in that entry' to stand for election, unless it is proved that the candidate is disqualified.

(8) Immediately after all the nomination papers have been scrutinised and decision accepting or rejecting the same have been recorded, the Returning Officer shall prepare a list of validly nominated candidates in Form 5 and affix it on the notice board in his office, duly recording the date and time of such affixture, below his signatures."

14. A nomination filed by candidate can be rejected on the grounds enumerated in Rule 28(2) (a) to (d) of the Rules of 1994. Sub-rule (4) of Rule 28 provides that the Returning Officer shall not reject any nomination paper on the ground of mere clerical or

printing error or any defect which is not of a substantial nature.

15. The election petition filed by respondent No.1 questioning the election petition was mainly on the ground enumerated under Section 22(1)(d)(i) of the Act of 1961 that the nomination of the petitioner has improperly been accepted and thereby the result of the election insofar as it concerns to respondent No.1 / election petitioner has been materially affected and therefore the election of the returned candidate/petitioner deserves to be declared void and he be declared as returned candidate.

16. Respondent No.1/election petitioner in paragraph 12 and 13 of
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his election petition has averred that against the petitioner offences under Sections 186, 353, 332, 494, 506, 427 read with Section 34 of the IPC and offence under Section 4 of the Chhattisgarh Chikitsa Sansthan Adhiniyam, 2010 has been registered in Police Station Bilaigarh and charge-sheet has been filed in the court of Judicial Magistrate First Class, Bilaigarh on 18-9-2013 and Criminal Case No.244/2013 is pending consideration before that court and the petitioner being fully aware of that pendency of criminal case, did not disclose the said fact in the nomination paper filed before the Returning Officer and his nomination has improperly been accepted by the Returning Officer and thus, result of the election has been affected by said improper acceptance of nomination paper of the petitioner, as such the election of the petitioner is liable to be declared void. Paragraphs 12 and 13 of the election petition are extracted herein for the sake of convenience:-

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fo:) vkj{kh dsUnz fcykbZx<+ }kjk vij/k dzekad 324@13
esa Hkk-n-lafgrk dh /kkjk 186] 353] 332] 294] 323] 506]
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ftldk nk-iz-dz- 244@13 gS tks fd orZeku esa fopkjk/khu
gSA

13- ;g fd mRrjoknh dza- 01 ds fo:) mDr iathc)
vij/k esa ls Hkk-n-lafgrk dh /kkjk 353] 332] 506 rFkk 427
esa 2 o"kZ rFkk 2 o"kZ ls vf/kd rd dh dkjokl dh ltk
dk izko/kku gS rFkk mRrjoknh blqi [kku }kjk izLrqr uke

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funsZ'ku i= fnukad 15-12-2014 ds Ng ekg ds iwoZ ls mDr
nkf.Md izdj.k U;kf;d eftLV^{as}V izFke Js.kh fcykbZx<+
ftyk & cykSnkcktkj&HkkVvikjk (N-x-) ds le{k fopkjk/khu
gS ftldk Kku gksrs gq, Hkh blqi [kku }kjk vius ?kks"k.kk
i= esa mDr rF; dks izxV ugha fd;k gSA izR;FkhZ dz- 01
dk ukekadu xyr :i ls Lohdkj fd;k x;k gS ftlesa
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dk fuokZpu 'kwU;or ?kksf"kr fd;k tkuk vko';d gSA"

17. The affidavit filed by the petitioner along with his nomination

paper in accordance with Rule 25-A of the Rules of 1994 states

as under:-

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(2) lacaf/kr vf/kfu;e-----x-----dh /kkjk-----x-----

(3) vij/k dk laf{kIr fooj.k ftlesa ltk gqbZ gS-----

x-----

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x 3- dqy jdck -----

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- 2- xSj d`f"k Hkwfe
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 - 1- ftyk&----- x
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VI. esjh 'kkldh; ,oa lkoZtfud foRrh; laLFkvvksa dh nsunkfj;kWa fuEukuqlkj gS%& dzedad fooj.k 'kkldh; foHkkx cdk;k jkf'k @cSad rFkk fnukad-----

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18. Respondent No.1/election petitioner had filed the election petition stating that the petitioner/returned candidate failed to disclose pending criminal case under Crime No.324/2013 for offence under Sections 186, 353, 332, 294, 323, 506 & 427 read with Section 34 of the IPC and Section 4 of the Act of 2010 stating that offence under Sections 353, 332, 506 & 427 of the IPC are punishable with sentence of imprisonment for two years or more than two years and which was pending consideration on the date of filing nomination paper and in which the petitioner / returned candidate was standing as an accused in respect of the offences and that he was required to be disclosed in the nomination paper in Form-III as per Rule 25-A of the Rules of 1994 and as such, non-disclosure of certain material information as required in Form-III, column (iv) of the affidavit results in failure to comply with the Rules of 1994 and therefore the nomination paper of the petitioner has improperly been accepted by which the result of election has been materially affected.

19. The Supreme Court in the matter of Union of India v. Assn. for Democratic Reforms ³ has held that it was incumbent upon every candidate to give information about his assets and other affairs, as every voter has a right to know about the details of the candidate and such a requirement is also covered by Article 19(1)(a) of the Constitution of India.

20. The Supreme Court in the matter of Krishnamoorthy v. Sivakumar and others ⁴ while dealing with the provisions of Section 33-A read with Column (5)(i) in Form No.26 of the Representation of the People Act, 1951, considered the question as to whether non-furnishing of the information while filing an affidavit pertaining to the criminal cases, especially cases involving heinous or serious crimes or relating to corruption or moral turpitude would tantamount to corrupt practice, and held as under: -

3 (2002) 5 SCC 294 4 (2015) 3 SCC 467 "82. But the question is when an election petition is filed before an Election Tribunal or the High Court, as the case may be, questioning the election on the ground of practising corrupt practice by the elected candidate on the foundation that he has not fully disclosed the criminal cases pending against him, as required under the Act and the Rules and the affidavit that has been filed before the Returning Officer is false and reflects total suppression, whether such a ground would be sustainable on the foundation of undue influence. We may give an example at this stage. A candidate filing his nomination paper while giving information swears an affidavit and produces before the Returning Officer stating that he has been involved in a case under Section 354 Indian Penal Code and does not say anything else though cognizance has been taken or charges have been framed for the offences under the Prevention of Corruption Act, 1988 or offences pertaining to rape, murder, dacoity, smuggling, land grabbing, local enactments like the Maharashtra Control of Organised Crime Act, 1999, U.P. Control of Goondas Act, 1970, embezzlement, attempt to murder or any other offence which may come within the compartment of serious or heinous offences or corruption or moral turpitude. It is apt to note here that when an FIR is filed a person filing a nomination paper may not be aware of lodgement of the FIR but when cognizance is taken or charge is framed, he is definitely aware of the said situation. It is within his special knowledge. If the offences are not disclosed in entirety, the electorate remain in total darkness about such information. It can be stated with certitude that this can definitely be called antecedents for the limited purpose, that is, disclosure of information to be chosen as a representative to an elected body."

21. The Supreme Court in the aforesaid judgment Krishnamoorthy (supra) has further clearly held that when the FIR is filed, a person filing a nomination paper may not be aware of lodgment of the FIR, but when the cognizance is taken or charge is framed, he is definitely aware of the said situation of cognizance of offence having been taken or framing of charges for offences against him. It is further held that it is within the special knowledge of the accused and if the offences are not disclosed in entirety, the electorate remain in total darkness about such information. It is further held that it can be stated with certitude that this can definitely be called antecedents for the limited purpose, that is, disclosure of information to be chosen as a representative to an elected body. In

para 86 of the aforesaid decision, it was held that the requirement of a disclosure especially the criminal antecedents, enables a voter to have an informed and instructed choice. If a voter is denied of the acquaintance to the information and deprived of the condition to be apprised of the entire gamut of criminal antecedents relating to heinous or serious offences or offences of corruption or moral turpitude, the exercise of electoral right would not be an advised one. He will be exercising his franchise with the misinformed mind and his fundamental right to know also gets nullified. The Supreme Court has also held that while filing the nomination form, if the requisite information, as has been highlighted, relating to criminal antecedents, is not given, indubitably, there is an attempt to suppress, effort to misguide, and keep the people in dark and this attempt undeniably and undisputedly is undue influence and would amount to corrupt practice and the election is liable to be declared as null and void under Section 100(1)(b) of the Representation of the People Act, 1951.

22. This would bring me to the grounds raised in the election petition filed by respondent No.1 herein / election petitioner before the learned District Judge. The election petition curiously did not indicate under which of the grounds the election petition has been filed questioning the election of the returned candidate. It simply states that since criminal case pertaining to the offences as indicated in the aforesaid paragraphs punishable for two years or more than two years of imprisonment is pending six months prior to the date of nomination i.e. 16-12-2014 before the Judicial Magistrate First Class, Bilaigarh and that was not disclosed by the petitioner herein in his nomination paper and his nomination paper has improperly been accepted and thus, result of the election has been affected, therefore, the election be declared void and he be declared as returned candidate. This averment in the election petition has been found favour with by the learned District Judge by holding that non-disclosure of pending criminal case amounts to undue influence which is corrupt practice committed by the petitioner / returned candidate under Section 22(1)(b) read with Section 28(ii) of the Act of 1961 and therefore declared the election of the petitioner to be void.

23. The election petition was not filed on the ground mentioned in Section 22(1)(b) of the Act of 1961 that the petitioner is guilty of corrupt practice of undue influence as defined in Section 28(i) of the Act of 1961, as there is no allegation or whisper of undue influence (corrupt practice) in the entire election petition so filed before the Court. It appears from the perusal of the election petition that improper acceptance of nomination paper as envisaged in Section 22(1)(d)(i) of the Act of 1961 is a ground raised by the election petitioner before the Tribunal and it can also be said that Section 22(1)(d)(iii) i.e. by non-compliance with Rule 25-A of the Rules of 1994, is the ground raised in the election petition for declaring the election of the returned candidate to be void. Rule 25-A of the Rules of 1994 only mandates submission of affidavit in the prescribed form. It nowhere mandates disclosure of pendency of criminal case at the time of filing nomination paper by candidate(s) contesting election in which either cognizance has been taken or charges have been framed, only Form III-B prescribed by Rule 25-A has a column requiring a candidate to disclose information regarding criminal case.

24. Now, the question would be, whether the petitioner has made a concise statement of the material fact on which he relies as per clauses (a) and (b) of sub-section (5) of Section 20 of the Act of 1961?

25. The law is well settled that the election of returned candidate cannot be set aside on flimsy, vague and uncertain pleading more so in the context of vagueness of the allegations made in the election petition.

26. The petitioner has to make out a clear case in the pleading that the nomination paper of respondent No.1 suffers from a defect of substantial character and therefore it was required to be rejected under Rule 28(4) of the Rules of 1994.

27. Respondent No.1 herein / election petitioner had come with a case of failure to disclose or non-disclosure or concealment or suppression in his nomination by the petitioner herein in column 4 of Form-III B framed under Rule 25-A. The election petition must contain the following material facts based upon the information, called, viz. -

(i) the fact that the petitioner is an accused in the offences under specific section(s) of specific Act(s) with short description of such offence/offences together with Cases/FIR number with the details of the concerned Police Station;

(ii) the fact that the offence/offences alleged against the petitioner is/are punishable with imprisonment for a period of two years or more;

(iii) the fact that such case/cases were pending against the petitioner on the date of delivery of nomination paper under Rule 25 of the Rules of 1994 along with the Case No./Nos. and the name of the Court, where the matter is pending;

(iv) the fact that the charge/charges were framed against the petitioner prior to the date of delivery of nomination paper under Rule 25 of the Rules of 1994 in respect of the offence/offences alleged against him along with the specific date of framing of charge/charges by the Court of competent jurisdiction or cognizance of the offences has been taken; and

(v) the fact that there is a failure to disclose or non-disclosure or concealment or suppression of the aforesaid material facts by the petitioner in his affidavit in Form III-B delivered along with the nomination form under Rule 25 of the Rules of 1994 to the Returning Officer.

28. If all the aforesaid facts are pleaded or found in the petition, it can be said that a cause of action is made out to attract the provisions of the Rules of 1994 and to claim rejection of the nomination paper under Rule 28(2)(c) of the Rules of 1994.

29. Reverting to the election petition in light of the aforesaid material facts which are required to be pleaded in the election petition, it has clearly been pleaded in the election petition (see paras 12 and 13) that the petitioner herein was an accused in Crime No.324/2013 for offence under Sections 186, 353, 332, 294, 323, 506 & 427 read with Section 34 of the IPC and Section 4 of the Act of 2010 registered by Police Station Bilaigarh out of which offence under Sections 353, 332, 506 & 427 of the IPC are punishable with sentence of two years' imprisonment or of more than two years and criminal case was pending against the petitioner herein on the date of delivery of nomination paper

under Rule 25 of the Rules of 1994 and the matter was pending consideration before the Court of Judicial Magistrate First Class, Bilaigarh. Thus, the aforesaid three requirements are clearly pleaded in the election petition filed by respondent No.1 herein.

30. Coming to requirement / item No.(iv), it was necessary for the election petitioner / respondent No.1 herein to plead material fact that prior to the date of delivery of nomination paper under the Rules of 1994, charges were framed or cognizance of offences was taken by the criminal court against the petitioner herein in respect of the offences which are not disclosed in the affidavit filed in Form III-B, by the Court of competent jurisdiction. The date of framing of charge / charges and the date of taking cognizance of offences become a material fact. Such pleading is required to make out a case for non-disclosure of material fact, but surprisingly, neither the specific date of framing charge is pleaded nor it is pleaded that charges were framed against the petitioner / returned candidate prior to the date of delivery of nomination paper. Such pleadings are completely and blissfully absent in the petition. As such, specific pleading with regard to framing of charges or taking cognizance of the offence against the returned candidate on the date of delivery of nomination paper is completely missing in the election petition. In absence of pleading, no amount of evidence can be permitted to be led. Lack of pleading of such material facts becomes fatal and it is difficult for the Court to try the election petition and grant the election petition, if any. The date of taking cognizance or the date of taking charge is a material fact which is required to be pleaded and established as it raises a presumption about the knowledge of the pending cases to the returned candidate. Neither a specific date of framing charges for offences is pleaded nor the pleading is that the cognizance was taken prior to the date of delivery of nomination paper by the petitioner. Lack of pleading regarding such material facts becomes fatal for election petition and for the Court to proceed on the trial of the election petition.

31. The learned District Judge in the impugned order has recorded a finding that the returned candidate / petitioner was arrested on 18- 9-2013 and charge-sheet was filed on the same date before the Judicial Magistrate First Class, Bilaigarh and matter was taken cognizance of and thereafter, the accused was released on bail on furnishing bail bonds and for offence under Sections 353 & 427 of the IPC, sentence of imprisonment prescribed is two years and for offence under Section 332 of the IPC, sentence of imprisonment prescribed is three years. The learned District Judge reached to a finding that on the date of delivery of nomination paper i.e. 15-12- 2014, the returned candidate / petitioner herein was aware about the pendency of criminal case, but, as noticed herein-above, he failed to disclose the same in the affidavit filed as per Rule 25-A of the Rules of 1994 which he was obliged to disclose in Ex.P-1, which is a copy of nomination paper filed by him and in which cognizance has already been taken by the Court, which is corrupt practice within the meaning of Section 22(2) of the Act of 1961. The finding recorded by the learned District Judge in paragraphs 21 & 24 in this regard is pertinent and same has been extracted herein-below for the sake of convenience: -

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32. The aforesaid findings indicate that the learned District Judge has recorded a finding that criminal case was pending against the petitioner/returned candidate on the date of delivery of nomination paper in which the petitioner stood as accused for offences punishable with imprisonment either for two years or more than two years. In paragraph 24, the learned District Judge recorded a finding that cognizance of offences has been taken.

33. A careful perusal of the entire election petition would show that it has only been pleaded in the election petition that criminal case against the returned candidate for the above stated offences punishable with imprisonment either for two years or more than two years, is pending consideration before the Court of Judicial Magistrate First Class, Bilaigarh, and it has neither been pleaded that either the court has taken cognizance or charges have been framed nor it has been whispered in the election petition. As already held herein-above, in order to put the election petition to trial, pleading of material facts particularly that charges have been framed or cognizance has been taken is sine qua non which have neither been pleaded nor it has been whispered as such, the finding of the learned District Judge holding that offence has been taken cognizance of by such court is perverse and contrary to record, particularly in view of the fact that it has not been pleaded in the election petition and in absence of such pleading no amount of evidence, as already held, can be taken into consideration and therefore it is not a case of non-disclosure of information required under the Rules of 1994. There is no pleading that the defect was of a substantial character and, therefore, the Returning Officer was required to reject the nomination paper under the Rules of 1994 on that ground.

34. Thus, from what has been held herein-above, it is apparent that it is a case of failure of pleading material facts of non-disclosure of information in Form-IIIB framed under Rule 25-A, column (iv), of the affidavit delivered under Rule 25-A of the Rules of 1994 that prior to the date of delivery of nomination paper, (i) charges were framed against the petitioner in a case pending in respect of any offence punishable with imprisonment for a period of two years or more and

(ii) he was an accused in a pending case in which cognizance was taken in respect of any offence punishable with imprisonment for less than three years and such defect was of a substantial character requiring the rejection of nomination paper by the Returning Officer under Rule 28(2) of the Rules of 1994. As such, the learned District Judge is absolutely unjustified in holding that the petitioner is guilty of corrupt practice under Section 22(1)(b) read with Section 22(1)(a) of the Act of

1961 and in further declaring the election to be void.

35. Yet, there is one more additional reason for holding so. The election for the post of President, Nagar Panchayat is governed by the Act of 1961 read with the Chhattisgarh Nirvachan Niyam, 1994. As noticed, Rule 25-A of the Rules of 1994 was amended with effect from 17-8-2004. Rule 25-A of the Rules of 1994 states as under: -

Rule 25-A "Under the provision of sub-rule (1) of Rule 25, every candidate who is submitting his nomination for the election of Councillor or Chairperson of Nagar Panchayat before the returning officer shall necessarily enclose a self-declaration in form 3 'A' and every candidate who is submitting his nomination before the returning officer for the election of Mayor or Councillor of any Municipal Corporation or for President or Councillor of any Municipal Council shall necessarily enclose an affidavit sworn before a Magistrate of the first class or a Notary in form 3'B' "

The above-stated inserted Rule obliges the candidate submitting his nomination paper for the election of Councillor or Chairperson of Nagar Panchayat to enclose a self-declaration in Form 3A and also to submit an affidavit sworn before a Magistrate of First Class or a Notary in Form III-B. Clause (iv) of Form III-B as per rules newly inserted states as under: -

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36. Thus, Rule 25-A of the Rules of 1994 only requires filing of an affidavit in Form III-B. The Rule itself does not require disclosure of criminal cases in which either charges have been framed or cognizance of offence has been taken, it is only prescribed in Form III-B envisaged by Rule 25-A of the Rules of 1994. As such, neither the Act of 1961 nor the Rules of 1994 governing the election specifically provides for disclosure of criminal cases in which charges have been framed / or cognizance of offences has been taken.

37. The Act of 1961 has not been amended inserting the provision akin to or similar to Section 33A(1)(i) of the Representation of the People Act, 1951 which obliges the candidate to furnish information in his nomination paper delivered under sub-section (1) of Section 33 of the said Act of 1951, as to whether he is accused of any offence punishable with imprisonment for two years or more in a pending case in which charges have been framed by the court of competent jurisdiction. Section 33A(1) of the Representation of the People Act, 1951 provides as under: -

"33A. Right to information.--(1) A candidate shall, apart from any information which he is required to furnish, under this Act or the rules made thereunder, in his nomination paper delivered under sub-section (1) or Section 33, also furnish the information as to whether--

(i) he is accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed by the court of competent jurisdiction;

(ii) xxx xxx xxx"

38. The consequence of not complying with the provision contained in Section 33A(1)(i) of the Representation of the People Act, 1951 has been provided in Section 125A of the said Act of 1951 which states as under: -

"125A. Penalty for filing false affidavit, etc.--A candidate who himself or through his proposer, with intent to be elected in an election,--

(i) fails to furnish information relating to sub-section (1) of Section 33A; or

(ii) give false information which he knows or has reason to believe to be false; or

(iii) conceals any information, in his nomination paper delivered under sub-section (1) of Section 33 or in his affidavit which is required to be delivered under sub-section (2) of Section 33A, as the case may be, shall, notwithstanding anything contained in any other law for the time being in force, be punishable with imprisonment for a term which may extend to six months, or with fine, or with both."

39. As such, there was no such enabling provision mandated by competent legislature either under the Act of 1961 or under the Rules of 1994 obliging the candidate submitting nomination paper for the post of President, Nagar Panchayat to disclose the pendency of criminal cases in which charges have been framed as prescribed in Section 33-A(1)(i) of the Representation of the People Act, 1951 except in Form III-B prescribed under Rule 25-A of the Rules of 1994, as the candidate is only required to disclose or furnish information in shape of affidavit under the Act of 1961 and the rules made thereunder governing election. Therefore, at the time of filing nomination paper under the Rules of 1994, the petitioner was not obliged to disclose the said information of pendency of criminal cases in which charges have been framed against him or cognizance has been taken for the offences prescribing punishment for two years or more, in absence of legislative sanction mandating disclosure of such information in the Act of 1961 and the rules made thereunder.

40. The election petitioner / respondent No.1 has also failed to plead and establish that result of returned candidate has been materially affected due to such improper acceptance of nomination paper as prescribed in Section 22(1)(d) of the Act of 1961 in order to establish the ground either by improper acceptance of nomination paper or by non-compliance with the provisions of this Act or of any rules made thereunder. (See Vashist Narain Sharma v. Dev Chandra and others 5, Paokai Haokip v. Rishang and others 6, Tek Chand v. Dile Ram 7, Santosh Yadav v. Narender Singh 8, Mangani Lal Mandal v. Bishnu Deo Bhandari 9, Rajendra Kumar Meshram v. Vanshmani Prasad Verma and another 10 and Sri. Mairembam Prithviraj alias Prithviraj Singh v. Sri. Pukhrem Sharatchandra Singh 11.)

41. As such, the election petitioner / respondent No.1 herein has failed to plead and establish non-compliance by the returned candidate with the provisions of the Act of 1961 or the rules made under the Act of 1961 as ground enumerated under Section 22(1)(d)(iii) of the Act of 1961 for declaring election to be void.

42. The above-stated fact is clear from the fact that competent 5 AIR 1954 SC 513 6 AIR 1969 SC 663 7 AIR 2001 SC 905 8 AIR 2002 SC 241 9 AIR 2012 SC 1094 10 AIR 2016 SC 4700 11 AIR 2016 SC 5087 legislature noticed the above-stated lacuna in the Rules of 1994 and amended the Rules with effect from 26-3-2018. Amended Rule 25-A of the Rules of 1994 provides as under: -

"25-A. Affidavit to be filed along with nomination paper.--(1) Under the provisions of sub-rule (1) of rule 25, every candidate (and concerned mayor/president in case of recall from his post), who is submitting his nomination for election of Mayor or Councilor of Municipal Corporation or President or Councilor of Municipal Council or President or Councilor of Nagar Panchayat before the returning officer shall, necessarily enclose an affidavit sworn before Magistrate of first class or notary in Form 3-A. (2) Every candidate shall declare information relating to,

--

(i) Whether he is convicted/discharged/acquitted in any criminal case in the past or he is accused in any pending criminal case? If so, the details thereof;

(ii) The assets (immovable, movable, bank balance etc.) of a candidate and of his/her spouse and that of dependants, which he and his/her spouse and dependent children are jointly or separately owns or his beneficiary;

(iii) Liabilities, if any, towards any public financial institution;

(iv) Dues, if any, towards the Central Government or State Government;

(v) The educational qualifications of the candidate;

in an affidavit, in such format and in such manner, as may be prescribed by the State Election Commission, while filing his nomination paper before Returning Officer. (3) If affidavit is not enclosed then nomination paper shall be rejected.

(4) to (6) xxx xxx xxx"

43. Thus, the learned District Judge is absolutely unjustified in setting aside the election of the petitioner / returned candidate.

44. This brings me to the next point that the learned District Judge is further justified in declaring respondent No.1 to be elected candidate.

45. Section 24(2) of the Act of 1961 provides the procedure for declaring the petitioner or other candidate to be elected candidate. Section 24(2) provides as under: -

"24. Decision on election petition.--(1) xxx xxx xxx (2) If any person who has filed an election petition has, in addition to calling in question the election or nomination of the returned candidate, claimed declaration that he himself or any other candidate has been duly elected or nominated and the Judge is of opinion--

(a) that in fact the petitioner or such candidate received a majority of the valid votes;
or

(b) that but for the votes obtained by the returned candidate the petitioner or such other candidate would have obtained a majority of the valid votes;

the Judge shall, after declaring the election or nomination of the returned candidate, to be void, declare the petitioner or such other candidate, as the case may be, to have been duly elected or nominated."

46. Section 24(2) of the Act of 1961 is a replica of the provision contained in Section 101 of the Representation of the People Act, 1951.

47. The question that the petitioner or other candidate can be declared elected after declaring the election of the returned candidate to be void came to be considered before the Supreme Court in the matter of Prakash Khandre (supra) in which following question was framed by Their Lordships: -

"1. In an election petition under the Representation of the People Act, 1951 (hereinafter referred to as "the Act"), when contest for election to the post of MLA is by more than two candidates for one seat and a candidate, who was disqualified to contest the election, is elected - whether the court can declare a candidate who has secured next higher votes as elected? and"

48. The Supreme Court further considered the question, if there are more than two candidates for one seat and the elected candidate is subsequently found to be disqualified, whether the candidate who has secured more votes than the remaining candidates should be declared as elected or not, and it was held as under: -

"12. Therefore, the first ingredient for declaring the election petitioner or other candidate to have been duly elected depends upon error for various reasons in counting of valid votes and if it is found that in fact the petitioner or such other candidate received a majority of valid votes, he is to be declared elected.

13. The second ingredient provides for establishing that the votes obtained by the returned candidate were obtained by corrupt practices and but for such votes the petitioner or such other candidate would have obtained a majority of valid votes. Say

as in the present case, the difference between the elected candidate and the election petitioner is of 10,327 votes and if it is established that elected candidate obtained more than 10,327 votes by corrupt practices then the petitioner or such other candidate who has obtained majority of valid votes could be declared as elected.

14. However, in an election where the elected candidate is declared to be disqualified to contest election and there are more than two candidates contesting election, there is no specific provision under the Act under which the person who has secured the next highest number of votes could be declared as elected. The Act is silent on this point. Further, it cannot be presumed that the votes secured by the disqualified elected candidates would have been wasted or would have been secured by the next candidate who has secured more votes. If disqualified candidate was not permitted to contest the election then how the voters would have voted in favour of the candidate who has secured more votes than other remaining candidates would be a question in the realm of speculation and unpredictability. In such a situation, declaring the election of the returned candidate on the ground of his initial disqualification to contest the election by itself would not entitle the election petitioner or any other candidate to be declared elected."

49. Finally, in paragraph 24, the Supreme Court revisiting the entire law on the point held that where there is more than one candidate for one seat, it would be impossible to predict or guess in whose favour the voters would have voted if they were aware that the elected candidate was disqualified to contest election and observed as under: -

"24. In view of the aforesaid settled legal position, in our view, the impugned order passed by the High Court declaring the election petitioner as elected on the ground that the votes cast in favour of elected candidate (appellant) are thrown away was totally erroneous and cannot be justified. As held by the Constitution Bench in Konappa case¹² that some general rule of election law prevailing in the United Kingdom that the votes cast in favour of a person who is found disqualified for election may be regarded as "thrown away" only if the voters had noticed before the poll the disqualification of the candidate, has no application in our country and has only merit of antiquity. We would observe that the question of sending such notice to all voters appears to us alien to the Act and the Rules. But that question is not required to be dealt with in this matter. As stated earlier, in the present case, for one seat, there were five candidates and it would be impossible to predict or guess in whose favour the voters would have voted if they were aware that the elected candidate was disqualified to contest election or if he was not permitted to contest the election by rejecting his nomination paper on the ground of disqualification to contest the election and what would have been the voting pattern. Therefore, order passed by the High Court declaring the election petitioner Dr. Vijay Kumar Khandre as elected requires to be set aside."

50. Reverting to the facts of the present case, it is quite vivid that in the present case, for one seat of President, Nagar Panchayat there were four candidates in the election and the election petitioner has failed to plead and establish in whose favour the voters would have voted if they were aware that the elected candidate was disqualified to contest the election or if he was not permitted to contest the election by rejecting his nomination paper on the ground of disqualification to contest the election and what would have been the voting pattern. In that view of the matter, the learned District 12 AIR 1969 SC 604 sub nom Vishwanatha Reddy v. Konappa Rudrappa Nadgouda Judge is absolutely unjustified in holding that the respondent No.1 herein is entitled to be declared elected. Therefore, the order passed by the learned District Judge declaring the election of the petitioner herein to be void and further declaring respondent No.1 herein to be declared as elected deserves to be and is hereby set aside and it is declared that the petitioner herein is entitled to continue as President of Nagar Panchayat, Bilaigarh.

51. Cross-objection has been filed on behalf of respondent No.1 herein to support the impugned order. Serious question has been raised as to whether the cross-objection is maintainable. There is no provision in the Act of 1961 to file cross-objection if revision is preferred under Section 26(2) of the Act of 1961. Cross-objection is like an appeal. It has all the trappings of an appeal. (See Hari Shankar Rastogi v. Sham Manohar and others 13.)

52. It is well settled law that right of appeal is a creature of statute. It cannot be conferred or inferred by the courts. The Constitution Bench of the Supreme Court in the matter of U.P. Awasthi v. Vikas Parishad v. Gyan Devi (Dead) by LRs. and others 14 has held that right to appeal is statutory right and the courts cannot confer or infer it. It has further been held that what is legislatively not permitted cannot be read by implication, not in respect of right of appeal, as it "is a creature of statute". Relying upon the matter of Shankar Kerba Jadhav v. State of Maharashtra 15, it was held as under: -

"A right of appeal is conferred by statute or equivalent 13 (2005) 3 SCC 761 14 (1995) 2 SCC 326 15 (1969) 2 SCC 793 legislative authority; it is not a mere matter of practice or procedure, and neither the superior nor the inferior court or Tribunal nor both combined can create or take away such a right."16

53. Similarly, the Supreme Court in the matter of Kamla Devi v. Kushal Kanwar and another 17 held as under: -

"11. A right of appeal under the Code is statutory. Such right of appeal is also conferred under the letters patent of the High Court or the statutes creating the High Court.

12. An appeal, as is well known, is the right of entering a superior court invoking its aid and interposition to redress an error of the court below. The central idea behind filing of an appeal revolves round the right as contradistinguished from the procedure laid down therefor."

54. It is equally well settled that power to create or enlarge jurisdiction of the court is legislative function. A Constitution Bench (seven Judges) of the Supreme Court in the matter of A.R. Antulay v. R.S. Nayak and another 18 has held that the power to create or enlarge jurisdiction is legislative in character, so also the power to confer a right of appeal or to take away a right of appeal. Parliament alone can do it by law and no court, whether superior or inferior or both combined, can enlarge the jurisdiction of a court or divest a person of his rights of revision and appeal.

55. As held herein-above, since cross-objection is like an appeal and right of appeal is a creature of statute, it must be conferred by the appropriate legislature and it cannot be interfered by the court. In absence of specific legislative sanction enabling the respondents to 16 Halsbury's Laws of England, Vol. 37, para 677 17 (2006) 13 SCC 295 18 (1988) 2 SCC 602 prefer cross-objection and appeal, the cross-objection is not maintainable and it is held accordingly. Resultantly, the cross-objection is dismissed as not maintainable in law, as lacking legislative sanction.

56. As a fallout and consequence of the aforesaid discussion, the impugned order passed by the District Judge setting aside the election of the petitioner and consequently, declaring respondent No.1 to be elected candidate, is hereby set aside and the petitioner is eligible to assume the office and function as President of Nagar Panchayat, Bilaigarh, forthwith.

57. The revision petition is allowed to the extent sketched herein- above. No order as to cost(s).

Sd/-

(Sanjay K. Agrawal) Judge Soma HIGH COURT OF CHHATTISGARH, BILASPUR Isup Khan Versus Narsingh Dewangan and others Head Note In order to set aside the election of President, Nagar Panchayat, material fact regarding criminal case that charges have been framed or cognizance has been taken, has to be specifically pleaded. uxj iapk;r v/;{k ds pquko dks vikLr djus gsrq vkijkf/kd izdj.k ls lacaf/kr rkfRod rF; fd] vkjksi fojfpr fd;s x;s gS ;k laKku fy;k x;k gS] dks fo'ks"kr% vfHkofpr fd;k tkuk pkfg,A