

In the High Court of Punjab and Haryana at Chandigarh

**C.M. No. 2-E of 2017 in/and
Election Petition No. 1 of 2016
Reserved on: 15.03.2017**

Date of Decision: March 23, 2017

R.K. Anand

... Petitioner

Versus

Subhash Chandra and another

... Respondents

CORAM: HON'BLE MR. JUSTICE P.B. BAJANTHRI

Present: Mr. Mohan Jain, Sr. Advocate with
Mr. Vikram Jain, Mr. Arastu Chopra,
Mr. Fateh Saini and Mr. Anoop Mishra, Advocates,
for the applicant / respondent No.1.

Mr. M.L. Saggar, Sr. Advocate with
Mr. Armaan Saggar, Advocate,
for the non-applicant/petitioner.

Mr. Satya Pal Jain, Sr. Advocate with
Mr. Dheeraj Jain, Advocate,
for respondent No.2.

P.B. Bajanthri, J.

1. For the purpose of identifying the parties, it is referred as Election Petitioner and respondent No.1. Respondent no.1 presented the above civil misc. application under Section 151, Order VI Rule 15 and Order VII Rule 11 of the Code of Civil Procedure, 1908 (for short 'CPC') read with Section 83 of the Representation of People Act, 1951 (for short 'Act, 1951'), Rule 94-A of the Conduct of Election Rules, 1961 (for short 'Rules, 1961') and Form 25 to dismiss the election petition No.1 of 2016.

2. Two seats allocated to the State of Haryana in the Rajya Sabha were to fall vacant on 02.08.2016. Thus, a notification was issued on

24.05.2016 under Section 12 of the Representation of the People Act, 1951 (for short "Act 1951") by the President of India. The Election Commission of India also issued a notification on 24.05.2016 under Section 39 of the Act 1951 while laying down the schedule of the election. On 11.06.2016 date of poll was fixed during the time 9.00 A.M. To 4.00 P.M. at Old Committee Room, Haryana Vidhan Sabha Secretariat, Chandigarh. The election petitioner, respondents no.1 and 2 are the candidates for two seats of the members of the Rajya Sabha. Respondents no.1 and 2 were elected. The election petitioner, who was the candidate for one of the Rajya Sabha seat filed election petition under Section 81 of the Act, 1951 calling in question the election of respondents no.1 and 2 as members of the Rajya Sabha from the Haryana State and to conduct a fresh election to elect two members from the State of Haryana or in the alternative questioned the election of respondent no.1 and to declare the election petitioner as duly elected member of the Rajya Sabha from Haryana State under Section 101 of the Act, 1951, on the allegations that election was conducted in a fraudulent manner in violation of the basic principle of the conduct of elections in a just, fair and transparent manner. It was further alleged that applicant - respondent no.3 – returning officer whose name has been deleted vide order dated 14.02.2017, had formed an unholy alliance with respondents no.1 and 2, the returned candidates, in order to defeat the election petitioner. The applicant/returning officer misconduct himself in furtherance of the modus operandi of swapping the original violet ink sketch pen during the polling on 11.06.2016 by respondents no.1 and 2, the returned candidates, by arranging a deceptively similarly royal blue ink sketch pen in order to

manipulate the rejection of valid first preference votes of the election petitioner.

3. First respondent has filed statement of objections to the election petition no.1 of 2016. Before commencement of trial, respondent no.1 submitted the present civil misc. application for dismissal of the election petition for non-compliance of various provisions cited supra.

4. Learned counsel for respondent no.1 submitted that proviso to Section 83 of Act, 1951 read with Rule 94-A of Rules, 1961 and Form 25 have not been complied in filing the election petition. Consequently, under Order VII, Rule 11(d) of CPC, election petition is liable to be rejected.

5. Learned counsel for respondent no.1 relied on decision of the Apex Court in ***R.K. Roja vs. U.S. Rayudu and another***, reported in **2016 AIR (SC) 3282 (Para Nos. 2 and 5)** to contend that petition falls under Order VII, Rule 11(d) of CPC.

6. Further learned counsel for respondent no.1 submitted that Section 123(2), (7) (a) read with definition under Section 2(c) of Act, 1951 is attracted in the present petition, whereas election petitioner has not complied the aforesaid provisions while presenting the election petition. It was also contended that reading of paragraph nos. 10, 11, 13, 14, 16, 22 and 30 of the election petition, wherein allegations have been made insofar as election process. Para nos. 10, 11, 13, 14, 16, 22 and 30 of the election petition reads as under:-

“10. That the rejection of 12 first preference votes of the election petitioner by the Returning Officer was not only a matter of anguish but also shocked the election petitioner as well as the 12 M.L.As., member of the electoral college,

who had cast their first preference vote in favour of the election petitioner. The election petitioner made complaints dated 12.06.2016 and 13.06.2016 to the Election Commission of India complaining that the election has been conducted in a fraudulent manner by respondent no.3, the Returning Officer in connivance with respondent No.1 and 2, the returned candidates had been manipulated to defeat the election petitioner in a clandestine manner facilitating the rejection of 12 valid first preference votes of the election petitioner. The casting of the votes had been video-graphed by the Returning Officer which later on revealed the modus operandi of manipulation of the election to be conducted in a fraudulent manner. The election petitioner also made a complaint dated 14.06.2016 to the Inspector General of Police, Chandigarh and Station House Officer, Police Station Sector 3, Chandigarh.

11. That the election of respondent no.1 and 2, the returned candidates is liable to be set aside under Section 100 (1)(d) (iii) & (iv) of the Act as the election was conducted in a fraudulent manner in violation of the basic principle of the conduct of elections in a just, fair and transparent manner. The respondent no.3, the Returning Officer had formed an unholy alliance with respondent No.1 and 2, the returned candidates, in order to defeat the election petitioner in a preconceived, predesigned and meticulously planned modus operandi to be adopted during the casting of the votes to reject the first preference votes of the election petitioner with an ulterior motive so that respondent no.1 and 2, the returned candidates are elected. During the counting of votes, the 12 valid first preference votes of the election petitioner were wrongly rejected by respondent no.3, the Returning Officer, who had connived with respondents No.1 and 2 and violated the mandate of the Constitution, the provisions of the Act and the Rules to

conduct the elections in a just, fair and transparent manner. The rejection of 12 first preference votes in a clandestine manner has materially polluted the entire democratic process of conducting the elections in just, fair and transparent manner. Therefore, the election of respondents no.1 and 2, the returned candidates, is liable to be held for election of two members of the Rajya Sabha from the State of Haryana.

13. That on the directions of the Election Commission of India, an enquiry was conducted by Shri B.S. Dahiya, Chief Electoral Officer, Haryana. During the hearing on 25.06.2016 by him, the videography of the polling was displayed in the presence of respondent no.3, the Returning Officer. However, respondent No.1 and 2, the returning candidates did not attend the hearing. The viewing of the video clinches that the elections were conducted in a fraudulent manner by respondent no.3, the returning officer, in connivance with respondent No.1 and 2, the returned candidates. During the hearing, the respondent No.3, the returning officer, stated that he had received the violet ink sketch pen to be used during the polling on 11.06.2016 by the members of the electoral college to respondent No.1 and 2, the returned candidates. The respondent No.3, Returning Officer thus mis-conducted himself in furtherance of the modus operandi of swapping the original violet ink sketch pen during the polling on 11.06.2016 by respondents no.1 and 2, the returned candidates, by arranging a deceptively similarly royal blue ink sketch pen in order to manipulate the rejection of valid first preference votes of the election petitioner. The respondent No.3, the Returning Officer facilitated the photography of the violet ink sketch pen and the marking of the same on a paper so that the sinister purpose of rejection of the valid votes of the election petitioner is

meticulously given effect to by arranging a deceptively similar royal blue ink sketch pen also similarly resembling the violet colour ink sketch pen in shape. However, the election petitioner was kept in dark by respondent no.3, the Returning Officer. The minutes of the meeting held on 25.06.2016 were also videographed.

14. *That viewing of the videography of the polling held on 11.06.2016 establishes beyond any shadow of doubt that there has been a preconceived, preplanned, predesigned unholy alliance among respondent No.3, the Returning Officer, the respondent No.1 and 2, the returned candidates, the election agent Shri Avindra Mohan of respondent no.1, one of the returned candidates, Shri Aseem Goyal an M.L.A. of BJP and Bhai Jai Parkash an independent M.L.A. of the Haryana Legislative Assembly.*

16. *That the respondent No.3, the Returning Officer should have suspended the voting when Sh. Barwala was found with one of sketch pens from the voting compartment and should have informed the Election Commission of India and got instructions for the conduct of the election. However, the respondent No.3, the Returning Officer without enquiring into how the sketch pen had reached the voting compartment though not supplied by the respondent No.3, the Returning Officer, clearly establishes his complicity and connivance with respondent No.1 and 2, the returned candidates.*

22. *That during the counting of the votes, the respondent No.1, one of the two returned candidates, who had the knowledge of the use of the fraudulently replaced royal blue ink sketch pen during the polling started objecting to each and every ballot paper, which was cast in favour of the election petitioner on the ground that ink sketch pen of a different colour has been used to mark the first preference vote in favour of the election petitioner. Initially*

only four ballot papers were found by respondent No.3, the Returning Officer of a different colour out of 33 valid votes of the election petitioner and were rejected. The 29 ballot papers were found to be valid. The respondent No.1 one of the returned candidates again raised objections that the votes of the election petitioner should be again scrutinized. The respondent No.3, the Returning Officer made a further scrutiny with the help of additional light from his mobile phone and found that 8 more ballot papers had been marked with the sketch pen having royal blue ink instead of the sketch pen having violet colour ink and rejected the same. However, in all the 12 ballot papers, the first preference had been cast in favour of the election petitioners. The respondent No.3, the Returning Officer erroneously rejected the 12 ballot papers on the ground that preferences were marked upon by the voters by a different colour sketch pen.

30. That the election petitioner has come to know that the respondent No.1, one of the two returned candidates had come to Chandigarh through a Chartered Aircraft on 10.06.2016 at 12.05 p.m. noon and had met the Returning Officer. The Returning Officer admitted during the hearing on 25.06.2016 that he had shown the violet ink sketch pens to respondent no.1 and 2, the returned candidates, which were to be provided to the voters for marking the preferences on the ballot papers to be issued to them during the course of election on 11.06.2016. Thus, respondent No.3, the returning officer, had thus facilitated the procurement of a similarly shaped sketch pen of royal blue ink deceptively resembling with the violet ink sketch pen to be misused during the voting on 11.06.2016, by permitting the marking of violet sketch pen on a paper and its photographs on mobile phone. The respondent no.1, one of the returned candidates left Chandigarh on 10.06.2016

at 07.35 PM for Delhi. It is thus clearly established that the sinister purpose of the respondent no.1, one of the returned candidates to visit Chandigarh on 10.06.2016 was to visit respondent no.3, the Returning Officer and to seek for himself the violet ink sketch pen(s) which was received by the returning officer on 09.06.2016 afternoon not to leave any chance for arranging a similarly shaped royal blue ink sketch pen. The respondent No.1, one of the returned candidates reached Chandigarh on 11.06.2016 from Delhi at 06.25 AM. Thus, it is abundantly clear that the clandestine exercise was meticulously planned and executed so that respondent no.1 and 2, the Returned Candidates are made to win the elections by making the mockery of the just, fair and transparent election process in a democracy.”

Contents of the above paragraphs show that there is non-compliance of Section 123(2)(7)(d) of Act, 1951 (allegations have been made against MLAs and Returning Candidate which fall under Section 123(7)(d) of Act, 1951). Thus, election petition is liable to be rejected. Section 83 of Act 1951, Rule 94A and Form 25 of Rules 1961 are required to be complied by the election petitioner.

7. Learned counsel for first respondent relied on the following decisions in support of CM No.2-E of 2017 to dismiss the election petition:-

1) (2000) 2 SCC 294 – V. Narayanaswamy vs. C.P. Thirunavukkarasu, Supreme Court in para no.23 held as under:-

“23. It will be thus seen that an election petition is based on the rights, which are purely the creature of statute, and if the statute renders any particular requirement mandatory, the court cannot exercise dispensing powers to waive non-

compliance. For the purpose of considering a preliminary objection as to the maintainability of the election petition the averments in the petition should be assumed to be true and the court has to find out whether these averments disclose a cause of action or a triable issue as such. Sections 81, 83(1)(c) and 86 read with Rule 94-A of the Rules and Form 25 are to be read conjointly as an integral scheme. When so read if the court finds non-compliance it has to uphold the preliminary objection and has no option except to dismiss the petition. There is difference between "material facts" and "material particulars". While the failure to plead material facts is fatal to the election petition the absence of material particulars can be cured at a later stage by an appropriate amendment. "Material facts" mean the entire bundle of facts, which would constitute a complete cause of action and these must be concisely stated in the election petition, i.e., clause (a) of sub-section (1) of Section 83. Then under clause (b) of sub-section (1) of Section 83 the election petition must contain full particulars of any corrupt practice. These particulars are obviously different from material facts on which the petition is founded. A petition levelling a charge of corrupt practice is required by law to be supported by an affidavit and the election petitioner is obliged to disclose his source of information in respect of the commission of corrupt practice. He must state which of the allegations are true to his knowledge and which to his belief on information received and believed by him to be true. It is not the form of the affidavit but its substance that matters. To plead corrupt practice as contemplated by law it has to be specifically alleged that the corrupt practices were committed with the consent of the candidate and that a particular electoral right of a person was affected. It cannot be left to time, chance or conjecture for the court to draw inference by

adopting an involved process of reasoning. Where the alleged corrupt practice is open to two equal possible inferences the pleadings of corrupt practice must fail. Where several paragraphs of the election petition alleging corrupt practices remain unaffirmed under the verification clause as well as the affidavit, the unsworn allegation could have no legal existence and the Court could not take cognizance thereof. Charge of corrupt practice being quasi-criminal in nature the court must always insist on strict compliance with the provisions of law. In such a case it is equally essential that the particulars of the charge of allegations are clearly and precisely stated in the petition. It is the violation of the provisions of Section 81 of the Act which can attract the application of the doctrine of substantial compliance. The defect of the type provided in Section 83 of the Act on the other hand can be dealt with under the doctrine of curability, on the principles contained in the Code of Civil Procedure. Non-compliance with the provisions of Section 83 may lead to dismissal of the petition if the matter falls within the scope of Order 6, Rule 16 and Order 7, Rule 11 of the Code of Civil Procedure. Where neither the verification in the petition nor the affidavit gives any indication of the sources of information of the petitioner as to the facts stated in the petition which are not to his knowledge and the petitioner persists that the verification is correct and affidavit in the form prescribed does not suffer from any defect the allegations of corrupt practices cannot be inquired and tried at all. In such a case petition has to be rejected on the threshold for non-compliance with the mandatory provisions of law as to pleadings. It is no part of duty of the court suo moto even to direct furnishing of better particulars when objection is raised by other side. Where the petition does not disclose any cause of action it has to be rejected. Court, however,

cannot dissect the pleadings into several parts and consider whether each one of them discloses a cause of action. Petition has to be considered as a whole. There cannot be a partial rejection of the petition.”

- 2) **(2015) 11 SCC 628 – Tata Chemicals Limited vs. Commissioner of Customs (Preventive) Jamnagar**, Supreme Court in para no. 18 held as under:-

“18, The Tribunal’s judgment has proceeded on the basis that even though the samples were drawn contrary to law, the appellants would be estopped because their representative was present when the samples were drawn and they did not object immediately. This is a completely perverse finding both on fact and law. On fact, it has been more than amply proved that no representative of the appellant was, in fact, present at the time the Customs Inspector took the samples. Shri K.M. Jani who was allegedly present not only stated that he did not represent the Clearing Agent of the appellants in that he was not their employee but also stated that he was not present when the samples were taken. In fact, therefore, there was no representative of the appellants when the samples were taken. In law equally the Tribunal ought to have realized that there can be no estoppel against law. If the law requires that something be done in a particular manner, it must be done in that manner, and if not done in that manner has no existence in the eye of law at all. The Customs Authorities are not absolved from following the law depending upon the acts of a particular assessee. Something that is illegal cannot convert itself into something legal by the act of a third person.”

- 3) **(2000) 1 SCC 481 – R.P. Moidutty vs. P.T. Kunju Mohammad and another**, Supreme Court in para no.14 held as under:-

“14. It is basic to the law of elections and election petitions that in a democracy, the mandate of the people as expressed at the hustings must prevail and be respected by the Courts and that is why the election of a successful candidate is not to be set aside lightly. Heavy onus lies on the election petitioner seeking setting aside of the election of a successful candidate to make out a clear case for such relief both in the pleadings and at the trial. The mandate of the people is one as has been truly, freely and purely expressed. The electoral process in a democracy such as ours is too sacrosanct to be permitted to be polluted by corrupt practices. If the court arrives at a finding of commission of corrupt practice by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent then the election of the returned candidate shall be declared to be void. The underlying principle is that corrupt practice having been committed, the result of the election does not echo the true voice of the people. As the consequences flowing from the proof of corrupt practice at the election are serious, the onus of establishing commission of corrupt practice lies heavily on the person who alleges the same. The onus of proof is not discharged merely on preponderance of probabilities; the standard of proof required is akin to that of proving a criminal or a quasi-criminal charge. Clear cut evidence, wholly credible and reliable, is needed to prove beyond doubt the charge of corrupt practice. [See: Ram Chandra Rai vs. State of Madhya Pradesh & Ors. (1970) 3 SCC 647; Manphul Singh vs. Surinder Singh AIR 1973 SC 2158; Rahim Khan vs. Khurshid Ahmed and others AIR 1975 SC 290; Bir Chandra Barman vs. Shri Anil Sarkar and others AIR 1976 SC 603; Lakshmi Raman Acharya vs. Chandan Singh and others AIR 1977 SC 587; Amolak Chand Chhazad vs.

Bhagwandas Arya (Dead) and anr. AIR 1977 SC 813]. The legislature has taken extra care to make special provision for pleadings in an election petition alleging corrupt practice. Under Section 83 of the Act ordinarily it would suffice if the election petition contains a concise statement of the material facts relied on by the petitioner, but in the case of corrupt practice the election petition must set forth full particulars thereof including as full a statement as possible of (i) the names of the parties alleged to have committed such corrupt practice, (ii) the date, and (iii) place of the commission of each such practice. An election petition is required to be signed and verified in the same manner as is laid down in the Code of Civil Procedure, 1908 for the verification of pleadings. However, if the petition alleges any corrupt practice then the petition has additionally to be accompanied by an affidavit in Form No. 25 prescribed by rule 94A of the Conduct of Elections Rules, 1961 in support of the allegations of such corrupt practice and the particulars thereof. Thus, an election petition alleging commission of corrupt practice has to satisfy some additional requirements, mandatory in nature, in the matter of raising of the pleadings and verifying the averments at the stage of filing of the election petition and then in the matter of discharging the onus of proof at the stage of the trial.”

- 4) (1986) (Supp) SCC 315 – Azhar Hussain vs. Rajiv Gandhi, Supreme Court in para no. 14 held as under:-

“14. Before we deal with these grounds seriatim, we consider it appropriate to restate the settled position of law as it emerges from the numerous decisions of this Court which have been cited before us in regard to the question as to what exactly is the content of the expression ‘material facts and particulars’, which the election petitioner shall incorporate in his petition by virtue of

Section 83(1) of the Act.

(1) What are material facts and particulars ? Material facts are facts which if established would give the petitioner the relief asked for. The test required to be answered is whether the Court could have given a direct verdict in favour of the election petitioner in case the returned candidate had not appeared to oppose the election petition on the basis of the facts pleaded in the petition. Manubhai Nandlal Amarsey v. Popatlal Manilal Joshi & Ors., [1969] 3 S.C.R. 217.

(2) In regard to the alleged corrupt practice pertaining to the assistance obtained from a Government servant, the following facts are essential to clothe the petition with a cause of action which will call for an answer from the returned candidate and must therefore be pleaded. Hardwari Lal v. Kanwal Singh, [1972] 2 S.C.R. 742:

- a) mode of assistance;*
- b) measure of assistance; and*
- c) all various forms of facts pertaining to the assistance.*

(3) In the context of an allegation as regards procuring, obtaining, abetting or attempting to obtain or procure the assistance of Government servants in election it is absolutely essential to plead the following :

- a) kind or form of assistance obtained or procured;*
- b) in what manner the assistance was obtained or procured or attempted to be obtained or procured by the election-candidate for promoting the prospects of*

his election Hardwari Lal v. Kanwal Singh.

(supra)

(4) *The returned candidate must be told as to what assistance he was supposed to have sought, the type of assistance, the manner of assistance, the time of assistance, the persons from whom the actual and specific assistance was procured Hardwari Lal v. Kanwal Singh (supra)*

(5) *There must also be a statement in the election petition describing the manner in which the prospects of the election was furthered and the way in which the assistance was rendered. Hardwari Lal v. Kanwal Singh(supra).*

(6) *The election petitioner must state with exactness the time of assistance, the manner of assistance, the persons from whom assistance was obtained or procured, the time and date of the same, all these will have to be set out in the particulars Hardwari Lal v. Kanwal Singh (supra).”*

- 5) (2013) 4 SCC 776 – G.M. Siddeshwar vs. Prasanna Kumar, Supreme Court in paragraphs no. 35, 36, 37, 48 to 52 held as under:-

“Defenctive affidavit

35. *What exactly are the contents of an affidavit in Form No.25 as prescribed by Rule 94-A of the Rules? The format reads as follows:*

“Form 25

(see Rule 94A)

AFFIDAVIT

xxx xxx xxxx xxx xxxx

36. *Prasanna Kumar’s affidavit accompanying the election petition reads as follows:*

“Form 25

(Rule 94-A)

In The High Court of Karnataka at Bangalore

(Original Jurisdiction)

Election Petition No. 2/2009

Between:

Prasanna Kumar *Petitioner*

And

Sri G.M. Siddeshwar and Ors *Respondents*

Affidavit

I, Prasanna Kumar, the petitioner in the accompanying Election petition, calling in question the election of Sri G.M. Siddeshwar (1st respondent in the said petition) make solemn and affirmation on oath and say-

(a) That I am an elector in 13 Davanagere Lok Sabha Constituency in Harihar Assembly Segment and I am fully aware and acquainted with the facts of the case and swear to this affidavit,

(b) That the statements made in paragraphs 1, 2, 3, 5, 7, 8, 11, 12 and 13 & 14 of the accompanying Election Petition about the violation of the law during the conduct of election and the particulars mentioned in the above noted paragraphs are true to my knowledge and contents of paras 18, 19, 20 and 21 are based on legal advise;

(c) That the statements made in paragraphs 3, 4, 6, 8, 9, 10, 15 and 16 of the accompanying Election Petition about the commission of electoral offence of corrupt practices and the particulars mentioned in the said paragraphs of the petition are true to my knowledge and partly on Information.

(d) That Annexures - 1 to 14 and 18, 19, 20, 22, 23, 24 are true copies and 15, 16, 17, 21 are original copies.

Sd/-

Signature of the Deponent

*Solemnly affirmed/sworn to by Sri Prasanna Kumar at
Bangalore, this 18-6-2009.*

Sd/-

Identified by me

Sd/-

corrections: (nil).

sworn to before me”

37. *A perusal of the affidavit furnished by Prasanna Kumar ex facie indicates that it was not in absolute compliance with the format affidavit. However, we endorse the view of the High Court that on a perusal of the affidavit, undoubtedly there was substantial compliance with the prescribed format. It is correct that the verification was also defective, but the defect is curable and cannot be held fatal to the maintainability of the election petition.*

48. *The broad principle laid down in Murarka was somewhat restricted by another Constitution Bench decision rendered in Ch. Subba Rao v. Member, Election Tribunal, Hyderabad [1964] 6 SCR 213. In that case, the Constitution Bench introduced two clear principles: firstly, that*

“if there is a total and complete non compliance with the provisions of Section 81(3), the election petition might not be “an election petition presented in accordance with the provisions of this part” within Section 80 of the Act” and secondly, that “if there is a substantial compliance with the requirement of Section 81(3), the election petition cannot be dismissed by the Tribunal under Section 90(3).”

49. *In T.M. Jacob v. C. Poulouse & Ors., (1999) 4 SCC 274 this Court reiterated the doctrine of substantial compliance as mentioned in Murarka Radhey Shyam Ram Kumar and Ch. Subba Rao and also introduced the doctrine of curability*

on the principles contained in the CPC. It was held that the defect in the affidavit in that case was curable and was not of such a fatal nature as to attract dismissal of the election petition at the threshold.

50. *The doctrine of substantial compliance as well as the doctrine of curability were followed in V. Narayanaswamy v. C.P. Thirunavukkarasu, (2000) 2 SCC 294. This Court held that a defect in verification of an affidavit is not fatal to the election petition and it could be cured. Following Moidutty it was held that if the election petition falls foul of Order VI Rule 16 and Order VII Rule 11 of the CPC and does not disclose a cause of action then it has to be rejected at the threshold.*

51. *Somewhat more recently, in Anil Vasudev Salgaonkar v. Naresh Kushali Shigaonkar, (2009) 9 SCC 310 this Court reiterated this position in law and held: (SCC P.324, para 50)*

“50. The position is well settled that an election petition can be summarily dismissed if it does not furnish the cause of action in exercise of the power under the Code of Civil Procedure. Appropriate orders in exercise of powers under the Code can be passed if the mandatory requirements enjoined by Section 83 of the Act to incorporate the material facts in the election petition are not complied with.”

52. *The principles emerging from these decisions are that although non-compliance with the provisions of Section 83 of the Act is a curable defect, yet there must be substantial compliance with the provisions thereof. However, if there is total and complete non-compliance with the provisions of Section 83 of the Act, then the petition cannot be described as an election petition and*

may be dismissed at the threshold.”

6) (2015) 3 SCC 467 – Krishnamoorthy vs. Sivakumar and others,
Supreme Court in para no. 58 held as under:-

“58. From the aforesaid authorities, the following principles can be culled out:-

58.1. The words “undue influence” are not to be understood or conferred a meaning in the context of English statute.

58.2 The Indian election law pays regard to the use of such influence having the tendency to bring about the result that has contemplated in the clause.

58.3 If an act which is calculated to interfere with the free exercise of electoral right, is the true and effective test whether or not a candidate is guilty of undue influence.

58.4 The words “direct or indirect” used in the provision have their significance and they are to be applied bearing in mind the factual context.

58.5. Canvassing by a Minister or an issue of a whip in the form of a request is permissible unless there is compulsion on the electorate to vote in the manner indicated.

58.6. The structure of the provisions contained in Section 171-C of IPC are to be kept in view while appreciating the expression of ‘undue influence’ used in Section 123(2) of the 1951 Act.

58.7 The two provisos added to Section 123(2) do not take away the effect of the principal or main provision.

58.8. Freedom in the exercise of judgment which engulfs a voter’s right, a free choice, in selecting the candidate whom he believes to be best fitted to represent the constituency, has to be given due weightage.

58.9. There should never be tyranny over the mind

which would put fetters and scuttle the free exercise of an electorate.

58.10 The concept of undue influence applies at both the stages, namely, pre-voting and at the time of casting of vote.

58.11 "Undue influence" is not to be equated with "proper influence" and, therefore, legitimate canvassing is permissible in a democratic set up.

58.12 Free exercise of electoral right has a nexus with direct or indirect interference or attempt to interfere."

8. It was further pointed out that election petitioner in his reply to CM No.2-E of 2017 has contended that affidavit in support of election petition was filed to avoid in a technical objection and also pointed out that there is a defect in the affidavit supporting the reply to CM No.2-E of 2017.

9. Per contra, learned counsel for the election petitioner submitted that election petition has been filed to declare election to be void under Section 100 (d) read with Section 101 of Act 1951. It was contended that third respondent has not been arrayed as a party to the election petition in his official capacity. On the other hand, he has been arrayed as a party by name, rejection of valid votes on that count under Section 100 (1) (d)(iii) and (2) of Act, 1951 that rejection of the petitioner's vote. In other words, election petition is restricted to under Section 83 (1) read with Section 100 (1)(d)(iii)(iv) and Section 101(b) of Act, 1951. He has not alleged any corruption against the respondents. His entire election petition is based on material facts which is supported by verification and affidavit under Order VI, Rule 15(4) CPC. Therefore, question of non-compliance of proviso to Section 83 and Section 123 of Act, 1951, Rule 94A and Form 25 of Rules, 1961 so as to contend that election petition is liable to be rejected under

Order VII Rule 11(d) CPC. It was also submitted that having regard to the pleadings made in the election petition would not attract Section 123 of Act, 1951 which relates to corrupt practices. Therefore, election petitioner need not comply the aforesaid provisions unless and until election petitioner seeks declaration that election to be void on the allegations of corruption, when he has not pleaded that there were corrupt practices against the respondents.

10. The election petitioner has presented election petition along with verification and affidavit only to avoid technical objection, if any. Filing of verification and affidavit do not vitiate non-compliance of any provisions of Act, 1951. Order VI Rule 16 of CPC relates to striking out pleadings which is permissible, therefore, Order VII Rule 11 - rejection of plaint is not at all applicable. Since the petitioner has not made any allegations of corruption, therefore, challenge to the election is to the extent that it is materially affected. Therefore, he has sought for declaration under Section 100(1)(d)(iii) and (iv) of Act, 1951 to declare election to be void. Learned counsel for the election petitioner cited the following decisions:-

1. (2013) 4 SCC 776 – G.M. Siddeshwar vs. Prasanna Kumar

Supreme Court in paragraphs no. 20 and 62 held as under:-

“20. The submission made by learned counsel is to the effect that in addition to an affidavit required to be filed in Form No.25 prescribed by Rule 94-A of the Rules in support of allegations made of corrupt practices by the returned candidate, an election petitioner is also required to file an affidavit in support of the election petition keeping in mind the requirement of Order VI Rule 15(4) of the CPC.

62. Applying these principles to the facts of the present

case, it seems quite clear that the affidavit filed by Prasanna Kumar in compliance with the requirements of the proviso to Section 83(1) of the Act was not an integral part of the election petition, and no such case was set up. It also seems quite clear that the affidavit was in substantial compliance with the requirements of the law. Therefore, the High Court was quite right in coming to the conclusion that the affidavit not being in the prescribed format of Form No.25 and with a defective verification were curable defects and that an opportunity ought to be granted to Prasanna Kumar to cure the defects.”

2. **(2004) 8 SCC 747 – Dr. Mahachandra Prasad Singh vs. Chairman, Bihar Legislative Council and others**, Supreme Court in para no.18 held as under:-

“18. There cannot be any dispute that sub-rules (1), (2) and (3) of Order 6 Rule 15 CPC were complied with. Learned counsel for the petitioner has, however, laid great emphasis on the fact that Shri Salman Rageev had not filed any affidavit in support of his petition and consequently the provisions of sub-rule (4) of Order VI Rule 15 CPC which provides that the person verifying the pleadings shall also furnish an affidavit in support of his pleadings were not complied with. For the reasons stated earlier, we are of the opinion that the provisions of Rules 6 and 7 are directory in nature and on account of non-filing of an affidavit as required by sub-rule (4) of Order VI Rule 15 CPC, the petition would not be rendered invalid nor the assumption of jurisdiction by the Chairman on its basis would be adversely effected or rendered bad in any manner. A similar contention was raised before a Bench presided by Venkatachaliah, C.J. in Ravi S. Naik v. Union of India, 1994 (Supp.) 2 SCC 641, but was repelled. The relevant portion of para 18 of the reports is being reproduced below :

“18.The Disqualification Rules have been framed

to regulate the procedure that is to be followed by the Speaker for exercising the power conferred on him under sub-paragraph (1) of paragraph 6 of the Tenth Schedule to the Constitution. The Disqualification Rules are, therefore, procedural in nature and any violation of the same would amount to an irregularity in procedure which is immune from judicial scrutiny in view of sub-paragraph (2) of paragraph 6 as construed by this Court in Kihoto Hollohan case 1992 (Supp) 2 SCC 651. Moreover, the field of judicial review in respect of the orders passed by the Speaker under sub-paragraph (1) of paragraph 6 as construed by this Court in Kihoto Hollohan case is confined to breaches of the constitutional mandates, mala fides, non-compliance with Rules of Natural Justice and perversity. We are unable to uphold the contention of Shri Sen that the violation of the Disqualification Rules amounts to violation of constitutional mandates. By doing so we would be elevating the rules to the status of the provisions of the Constitution which is impermissible. Since the Disqualification Rules have been framed by the Speaker in exercise of the power conferred under paragraph 8 of the Tenth Schedule they have a status subordinate to the Constitution and cannot be equated with the provisions of the Constitution. They cannot, therefore, be regarded as constitutional mandates and any violation of the Disqualification Rules does not afford a ground for judicial review of the order of the Speaker in view of the finality clause contained in sub-paragraph (1) of paragraph 6 of the Tenth Schedule as construed by this Court in Kihoto Hollohan case."

11. It was contended that having regard to the pleadings of the Election Petition read with verification and affidavit suffice to compliance of election petition, since election petitioner has not alleged corruption in the election process. Therefore, question of compliance of Sections 83 and 123 of Act, 1951 read with rule 94-A of Rules, 1961 and Form-25 do not arise. Hence, CM No.2-E of 2017 is liable to be rejected.

12. Heard learned counsel for the parties.

13. Crux of the issue in the present CM No.2-E of 2017 arising out of EP No. 01 of 2016 are:-

- i) Pleadings in the election petition falls under the purview of Section 2 (c) read with Section 123(2)(7)(d) of Act, 1951 or not?
- ii) Pleadings of the election petition are restricted to only materially affected or not?
- iii) Order VI Rule 16 read with Order VII Rule 11 CPC are available to the election petitioner or not?

14. Perusal of pleadings of the election petition in particularly para Nos. 10, 11, 13, 14, 16, 22 and 30 quoted supra, it is evident that election petitioner has taken the stand that election has been conducted in a fraudulent manner and unholy alliance by respondent no.3, returning officer in connivance with respondents no.1 and 2, the returning candidates had been manipulated to defeat the election petitioner in a clandestine manner. On 14.06.2016, the election petitioner filed a complaint before the Inspector General of Police, Chandigarh and Station House Officer, Police Station Sector 3, Chandigarh. Respondent No.3 – returning officer thus misconducted himself in furtherance of the modus operandi of swapping the

original violet ink sketch pen during the polling on 11.06.2016 by arranging a deceptively similarly royal blue ink sketch pen in order to manipulate the rejection of valid first preference votes of the election petitioner. Thus, respondent no.3 – returning officer facilitated the procurement of similarly shaped sketch pen royal ink deceptively resembling with violet colour ink sketch pen to be misused during the voting on 11.06.2016. It was further alleged that respondent No.1, one of the returning candidates visit to Chandigarh on 10.06.2016 and had a meeting with respondent No.3 for the purpose of execution of their idea to defeat the election petitioner which was meticulously planned and executed. The above allegations do fall under Section 2 (c) read with Section 123(2)(7)(a)(d) of Act, 1951 so also Rule 94-A of Rules 1961 and Form 25. The relevant provisions reads as under:-

“2(c) “corrupt practice” means any of the practices specified in section 123.”

123. Corrupt practices.—*The following shall be deemed to be corrupt practices for the purposes of this Act:—*

[(1) xxxxx

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

Provided that—

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

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

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

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

(7) The obtaining or procuring or abetting or attempting to obtain or procure by a candidate or his agent or, by any other person [with the consent of a candidate or his election agent], any assistance (other than the giving of vote) for the furtherance of the prospects of that candidate 's election, from any person in the service of the Government and belonging to any of the following classes, namely:—

(a) Gazetted Officers;

(b) stipendiary judges and magistrates;

(c) members of the armed forces of the Union;

(d) members of the police forces;

(e) excise officers;

[(f) revenue officers other than village revenue officers known as lambardars, malguzars, patels, deshmukhs or by any other name, whose duty is to collect land revenue and who are remunerated by a share of, or commission on, the amount of land revenue collected by them but who do not discharge any police functions; and]

(g) such other class of persons in the service of the Government as may be prescribed;

Provided that where any person, in the service of the Government and belonging to any of the classes aforesaid, in the discharge or purported discharge of his official duty,

makes any arrangements or provides any facilities or does any other act or thing, for, to, or in relation to, any candidate or his agent or any other person acting with the consent of the candidate or his election agent (whether by reason of the office held by the candidate or for any other reason), such arrangement, facilities or act or thing shall not be deemed to be assistance for the furtherance of the prospects of that candidate's election.]

(h) class of persons in the service of a local authority, university, government company or institution or concern or undertaking appointed or deputed by the Election Commission in connection with the conduct of elections.]”

“Rule 94-A. Form of affidavit to be filed with election petition – *The affidavit referred to in the proviso to sub-section 91) of section 83 shall be sworn before a magistrate of the first class or a notary or a commissioner of oaths and shall be in Form 25.”*

“FORM 25

(See rule 94-A)

Affidavit

I, _____ the petitioner in the accompanying election petition calling in question the election of Shri/Shrimati _____ (respondent No. _____ in the said petition) make solemn affirmation/oath and say -

(a) that the statements made in paragraphs ____ of the accompanying election petition about the commission of the corrupt practice of and the particulars of such corrupt practice mentioned in paragraphs of the same petition and in paragraphs of the Schedule annexed thereto are true to my knowledge;*

b) that the statements made in paragraphs of the said petition about the commission of the corrupt practice of and the particulars of such corrupt practice given in paragraphs of the*

said petition and in paragraphs of the
Schedule annexed thereto are true to my information:

(c)(d) etc.

Signature of deponent

Solemnly affirmed/sworn by Shri/ Shrimati before
me,..... atthis..... day of 20.....

Before me, Magistrate of the first class/
Notary/Commissioner of Oaths.”

**Here specify the name of the corrupt practice.]”*

It is necessary to reproduce the election petitioner's affidavit supporting the
election petition, as well as, verification which reads as under:-

*“IN THE HIGH COURT FOR THE STATES OF PUNJAB &
HARYANA AT CHANDIGARH
ELECTION PETITION NO.1 OF 2016*

R.K. Anand

... Petitioner

Versus

Subhash Chandra and others

... Respondents

*Affidavit of R.K. Anand son of Late Shri Roshan Lal Anand
aged about 73 years Resident of : 13, Dharbanga Farm House,
DLF Chattarpur, New Delhi.*

*I, the above named deponent do hereby solemnly affirm and
declare as under:-*

- 1. That the deponent is filing the accompanying election
petition in the Hon'ble Court.*
- 2. That the accompanying petition has been drafted as per
instructions of the deponent and the contents thereof are
correct. No part of it is false and nothing has been concealed
therein.*

Sd/- (Deponent)

Verification:

Verified that the contents of paras 1 and 2 of my above affidavit are true and correct to my knowledge. No part of it is false and nothing has been kept concealed therein.

Verified at Chandigarh.

Dated: 20.07.2016

Sd/- (Deponent) ”

Perusal of the affidavit of the election petitioner read with allegations made against respondents no.1 to 3 which falls under Section 123(2)(7)(a)(d) of Act, 1951, therefore, there is no compliance of the above provisions read with Form-25. Hence, on this count CM No.2-E of 2017 is liable to be allowed.

15. The election petitioner's contention that the election petition is filed not on the ground of corruption, it is only to the extent that materially affected and in support of election petition, the grounds urged are with reference to Section 100(1)(d)(iii) and (iv) of Act 1951, therefore, Section 123(2)(7)(a)(d) of Act, 1951 and Rule 94-A and Form 25 are not at all attracted to the election petition filed by the election petitioner is concerned. Having regard to the statement made in the election petition in para nos. 10, 11, 13, 14, 16, 22 and 30, it is crystal clear that the election petitioner is making allegations against respondents no.1 to 3 and others while conducting election, therefore, Section 123(2)(7)(a)(d) of Act, 1951 read with Rule 94-A and Form 25 are attracted.

16. Learned counsel for the petitioner submitted that Order VI Rule 16 CPC read with Order VII Rule 11 is required to be taken into consideration for the purpose of deciding the present CM No.2-E of 2017. No doubt, Rule 16 relates to striking out pleadings, at the same time, the election petitioner has not inclined to take necessary steps to rectify the

defects at the same time the contention of the election petitioner that Order VI Rule 16 would protect his contention. In the case of **H.D. Revanna vs. G. Puttaswamy Gowda and others** reported in **(1999) 2 SCC 217**, Supreme Court has held that an election petition can be dismissed for non-compliance with Sections 81, 82 and 117 of Act, 1951, but it may also be dismissed if the matter falls within the scope of Order VI Rule 16 or Order VII Rule 11 CPC. Therefore, the contention of the election petitioner and reliance on Order VI Rule 16 read with Order VII Rule 11 CPC are not available so as to reject the present CM-2-E of 2017.

17. Reading of the grounds read with affidavit which are not curable defect so as to see to the extent there is substantial compliance and it is not in the prescribed format in particularly Form-25 (affidavit). Thus, it is not a curable defect. In other words, the case in hand, the defects pointed out in the election petition as well as in the affidavit were not mere format but of a substance and, therefore ratio in **G.M. Siddeshwar's case (supra)** cited by the election petitioner is not applicable.

18. Supreme Court in the case of **C.P. John vs. Babu M. Palissery and others**, reported in **(2014) 10 SCC 547**, in para nos. 34 and 35 held as under:-

“34. Mr. Chacko, learned counsel then relied upon the decision in G.M. Siddeshwar (supra). In the said decision, it was held that if there is substantial compliance with the prescribed format of the affidavit, an Election Petition cannot be thrown out on a hyper technical ground particularly when there were some defects in the format which were curable. Paragraphs 37 and 38 are relevant for our consideration which are as under:

“37. A perusal of the affidavit furnished by Prasanna Kumar ex facie indicates that it was not in absolute compliance with the format affidavit. However, we endorse the view of the High Court that on a perusal of the affidavit, undoubtedly there was substantial compliance with the prescribed format. It is correct that the verification was also defective, but the defect is curable and cannot be held fatal to the maintainability of the election petition.

38. Recently, in *Ponnala Lakshmaiah v. Kommuri Pratap Reddy* the issue of a failure to file an affidavit in accordance with the prescribed format came up for consideration. This is what this Court had to say: (SCC p. 802, para 28)

“28. ... The format of the affidavit is at any rate not a matter of substance. What is important and at the heart of the requirement is whether the election petitioner has made averments which are testified by him on oath, no matter in a form other than the one that is stipulated in the Rules. The absence of an affidavit or an affidavit in a form other than the one stipulated by the Rules does not by itself cause any prejudice to the successful candidate so long as the deficiency is cured by the election petitioner by filing a proper affidavit when directed to do so.” We have no reason to take a different view. The contention urged by Siddeshwar is rejected.”

35. A reading of the above paragraphs themselves show that if the defect was one of format and not of substance, such defect should also be allowed to be cured. In the case on hand, we have already held that the defects pointed out in the Election Petition, as well as, in the affidavit were not of

mere format but of substance and, therefore, we are unable to apply the ratio in G.M. Siddeshwar (supra) to the case on hand.”

19. In the case of **G.M. Siddeshwar** cited supra, Supreme Court in para no. 24.1 held as under:-

“24.1 It was contended by the election petitioner that two affidavits would be necessary in an election petition only where the election petitioner wanted the election of the returned candidate to be set aside on the ground of commission of corrupt practices under Section 100(1)(b) of the Act as well as on other grounds as set out in Section 100(1) of the Act. In other words, the argument was that two affidavits were required to be filed by the election petitioner. It is important to note that it was not argued (as in the present case) that Order VI Rule 15(4) of the CPC does not require the filing of an affidavit as a part of the requirement of verifying the election petition. An alternative contention was put forward that a single affidavit, satisfying the requirement of the Act, could also be filed. The contention put forward was as follows (P.a. Mohammed Riyas Case, SCC p. 516, para 17):

“17..... The learned counsel submitted that two affidavits would be necessary only where an election petitioner wanted the election to be set aside both on grounds of commission of one or more corrupt practices under Section 100(1)(b) of the Act and other grounds as set out in Section 100 (1). In such a case, two affidavits could possibly be required, one under Order 6 Rule 15(4) CPC and another in Form 25. However, even in such a case, a single affidavit that satisfies the requirements of both the provisions could be filed. In any event, when the election petition was based

entirely on allegations of corrupt practices, filing of two affidavits over the selfsame matter would render one of them otiose, which proposition was found acceptable by the Karnataka High Court in Prasanna Kumar v. G.M. Siddeshwar[2010 (6) KarLJ 78].”

Even though, Supreme Court has held that their need not be two affidavits at the same time, if there are allegations of corrupt practice, in such case two affidavits could positively be required, one under Order VI Rule 15(4) CPC and another in Form-25. Even if single affidavit satisfies the requirements of both the provisions, in that event, one need not go into the format, whereas in the present case, a single affidavit which has been filed by the election petitioner do not covers requirement (contents of Form 25). In other words, there is no substantial compliance, hence, election petitioner do not comply provisions of Section 123 read with Rule 94-A and Form-25.

20. Supreme Court in **R.K. Roja** cited supra held that for non-compliance of certain provisions of Act 1951 attract Order VII Rule 11 (d) of CPC.

21. Supreme Court in the case of **Tata Chemicals Limited** cited supra held that if the law requires that something be done in a particular manner, it must be done in that manner, and if not done in that manner has no existence in the eyes of law at all. Supreme Court in the case of **Captain Sube Singh and others vs. Lt. Governor of Delhi and others**, reported in **(2004) 6 Supreme Court Cases 440**, held that statute is required to be read as it is. Para no. 29 reads as under:-

“29. In Anjum M.H. Ghaswala a Constitution Bench of this Court reaffirmed the general rule that when a statute

vests certain power in an authority to be exercised in a particular manner then the said authority has to exercise it only in the manner provided in the statute itself. (See also in this connection Dhanajaya Reddy v. State of Karnataka.) The statute in question requires the authority to act in accordance with the rules for variation of the conditions attached to the permit. In our view, it is not permissible to the State Government to purport to alter these conditions by issuing a notification under Section 67(1)(d) read with sub-clause (i) thereof.”

When a statute empowers of a particular things is to be done delegated authority cannot deviate from the powers entrusted. In other words, within the four corners of the law one has to act. Having regard to the above principle. It was bounden duty of the election petitioner to comply Section 123 of Act, 1951 , Rule 94-A of Rules 1961 read with Form 25. Due to non-compliance of the aforesaid provisions, election petitioner has not made out a case so as to reject CM No. 2-E of 2017, therefore, CM No.2-E of 2017 stands allowed.

22. Consequently, election petition stands dismissed.

March 23, 2017
vkd

[P.B. Bajanthri]
Judge

Whether speaking / reasoned : Yes

Whether reportable : Yes