

Court No. - 25**Case :-** ELECTION PETITION No. - 14 of 2022**Petitioner :-** Satyavir Tyagi**Respondent :-** Shahid Manzoor**Counsel for Petitioner :-** In Person, Bharat Singh Pal, Satyavir Tyagi**Counsel for Respondent :-** Tawwab Ahmed Khan, Syed Khursheed Anwar Alvi**Hon'ble Rajnish Kumar, J.**

1. This Election Petition has been filed under Sections 80, 80A/81 of the Representation of the People Act, 1951 (hereinafter referred as the Act) by the petitioner, namely Satyavir Tyagi challenging the election of the sole respondent Shri Shahid Manzoor (the returned candidate) as a Member of the State Legislative Assembly from 46-Kithore Constituency (hereinafter referred as the Constituency) as a Member of the U.P. State Legislative Assembly.

2. The General Elections for constituting new house of Legislative Assembly of U.P. State Legislative Assembly was notified by the Governor of the Uttar Pradesh. As per Notification with respect to the Constituency the following election schedule was declared by the Election Commission of India:-

- A. Last date of nomination21.01.2022
- B. Date for scrutiny of nomination papers.....24.01.2022
- C. Date for withdrawal of candidature.....27.01.2022
- D. Date for poll.....10.02.2022
- E. Date for counting of votes.....10.03.2022
- F. Date of declaration of result.....10.03.2022

3. In the aforesaid election for the 46-Kithore Constituency, 13 candidates had filed nomination papers including the petitioner and the respondent. The petitioner had filed the nomination papers as a candidate of the Bhartiya Janta Party and he was allotted the symbol

'Lotus' (Kamal). The respondent had filed the nomination as a candidate of the Samajwadi Party and he was allotted the symbol of 'Bicycle'. The voting of the election in question took place by two modes; one by postal ballot papers and second voting by Electronic Voting Machines (E.V.M.). After election and counting of votes, the result was declared by the Returning Officer. The petitioner received 104924 votes and the respondent received 107104 votes. Accordingly the respondent was declared as elected/returned candidate from the Constituency.

4. The present Election Petition challenging the election of the respondent was presented before this court on 23.04.2022. Shri Bharat Singh Pal, Advocate filed 'Vakalatnama' on behalf of Petitioner on 23.05.2022. The notices were issued to the respondent vide order dated 23.05.2022. In response to that the respondent appeared and filed the written statement on 12.07.2022. After filing of the written statement the respondent filed an application under Order VI Rule 16 and Order VII Rule 11 of the Code of Civil Procedure (hereinafter referred as CPC) praying for striking out paragraphs 8 to 13 and paragraphs 15 to 21 of the petition and reject/dismiss the petition under Order VII Rule 11(a) of CPC with a prayer to pass such other and further order or direction as this Court may deem fit and proper in the circumstances of the case. The petitioner filed the counter affidavit to the said application and replication to the written statement filed by the respondent/applicant. The respondent filed the rejoinder affidavit to the counter affidavit filed by the petitioner against the application under Order VI Rule 16 and Order VII rule 11 CPC.

5. Learned counsel for the respondent/applicant submitted that the Election Petition has been filed with unnecessary, frivolous and vexatious pleadings without disclosing the material facts and particulars of corrupt practices alleged to have been committed by the respondent/applicant. The Petition does not contain material facts and

particulars of alleged corrupt practices committed by the respondent/applicant as provided under Section 83(b) of the Act. The pleadings are vague and based on surmises and conjectures, which are liable to be struck out under Order VI Rule 16 CPC. On striking out the said pleadings, the plaint does not contain any cause of action, therefore it is liable to be rejected.

6. He further submitted that particulars of persons as to who have captured the booth with time and place etc. of booth capturing have not been disclosed. The complaints made to the officers has also not been disclosed. Whereas the particulars are required to be given in the plaint because the evidence can be adduced in support thereof. Only general allegations have been made, which does not form the 'material facts' and 'particulars'. He further submitted that the names of witnesses have not been disclosed in whose presence the booths were captured. The specific names of the dead voters, election agents etc. have not been given. The names of the officers/officials, who have not allowed to vote have not been disclosed.

7. He further submitted that only vague averments have been made that wrong persons have been included in the voter list, whereas this plea cannot be taken in the Election Petition and opportunity of appeal is provided for it under Section 24 of the Act. If the names of the wrong persons were included in the voter list the appropriate course was either to seek correction or file an appeal, which remedy has not been availed. The electoral roll once published is final. The petitioner should have shown particular voters and the same should have been challenged but it has not been done.

8. On the basis of above learned counsel for the respondent/applicant submitted that the Election Petition has been filed on the basis of vague pleas, unnecessary and vexatious allegation, conjectures and surmises, which are liable to be struck out under Order VI Rule 16. Consequently no cause of action would survive to file the Election Petition. Therefore

the application is liable to be allowed and the Petition is liable to be rejected at the threshold under Order VII Rule 11 CPC. Learned counsel for the respondent/applicant relied on **Azhar Hussain Versus Rajiv Gandhi; AIR1986 SC 1253, Rajasthan State TPT Corporation and others Versus Bajrang Lal; AIR SCW 2058/(2014) 4 SCC 693, D.M.Deshpande and others Versus Janardhan Kashinath Kadam (Dead) by Lrs. And others; (1998) 8 SCC 315, Bondar Singh and others Versus Nihal Singh and others; (2003) 4 SCC 161, Dhartipakar Madan Lal Agarwal Versus Shri Rajiv Gandhi; AIR 1987 SC 1577, Ajay Rai and another Versus Narendra Modi; 2017 (1) ADJ 338, Rampakavi Rayappa Belagali Versus D.B.Jatti and others; AIR 1971 SC 1348/1970 3 SCC 147, Shreewant Kumar Choudhary Versus Baidyanath Panjiar; AIR 1973 SC 717/(1973) 1 SCC 95, Pramod Kumar Mishra Versus Chet Narain Singh; 2017 Law Suit All.1677/MANU/UP/2383/2017 AND Laxmi Kant Bajpai Versus Hazi Yaqoob and others; (2010) 4 SCC 81.**

9. Learned counsel for the petitioner submitted that the application has been filed on misconceived and baseless grounds. There is no address on the application and no ground under Order VI Rule 16 CPC has been shown. The Petition has been filed with 'material facts' necessary for filing of the Election Petition. The petitioner has complied the provisions of Section 81, 82 and 117 of the Act as well as Rule 5 of Chapter 15-A of the Allahabad High Court Rules. The provisions of Section 86 have also been complied, the compliance of which can be seen at the stage of pre-issuance of notice and once the notice was issued on 23.05.2022 the compliance of Section 86 does not arise. He further submitted that the application has been filed under Order VII Rule 11 CPC, but it has not been filed under Section 83(1) of the Act. The grounds of surmises and conjectures taken for striking out the pleadings are not the grounds mentioned under Order VI Rule 16 CPC, therefore the pleadings cannot be struck out.

10. He further submitted that Order VII Rule 11 CPC is the substantive provision. The application moved under the said provision, without referring any provision of the Act, is not maintainable and is liable to be rejected. The Petition has been filed under Section 80, 80A and 81 of the Act. The Election Petition can be filed by the candidate or elector. The petitioner was indisputably a candidate under Section 79(b) of the Act and Rule 28 (a) of the Conduct of Election Rules 1961 in the election in question, therefore he has locus to file the Election Petition and he has a right to sue/challenge the election, thus there is a cause of action to him to challenge election under Section 100 of the Act. The grounds No.(A) and (B) are covered under Section 100(1)(b) of the Act and the ground No.(C) is covered under Section 100(1)(d)(iii) of the Act. He further submitted that concise statement of material facts in regard to the ground Nos.(A) and (B) regarding corrupt practices have been given in paragraphs 7 to 13 of the petition and in regard to the ground No.(C) and (D) in paragraphs 14 to 21 of petition.

11. He further submitted that the election of the respondent is also vitiated on account of improper reception of votes and reception of votes, which are void as disclosed in paragraphs 14 and 15 and particular names have been given in schedule-I. He further submitted that the petitioner and his agents had informed to the Returning Officer about the corrupt practices which were being committed by the respondent and his agents, but he failed to take any action on it.

12. On the basis of above, learned counsel for the petitioner submitted that the petitioner has given the material facts in the Petition clearly disclosing the cause of action. The particulars, if any, required for those material facts can be supplied subsequently, therefore the pleas taken by the respondent/applicant are misconceived and not tenable. He also submitted that the respondent/applicant has relied some cases of the Tenancy Law, which are not applicable on the present case because Election Petition is governed by the statutory provisions and concise

statement of the material facts as required under Section 83(1)(a) of the Act have been given in the Petition. Thus the application filed by the respondent/applicant is misconceived and not tenable and is liable to be dismissed and the Election Petition is liable to put on trial. Learned counsel for the petitioner relied on **Manohar Joshi Versus Nitin Bhaurao Patil and another; (1996) 1 SCC 169, Saritha S. Nair Versus Hibi Eden; 2020 SCC OnLine SC 1006, Neelam Sonkar Versus Dr.Bali Ram; 2011 (11) ADJ 341, Virendra Nath Gautam Versus Satpal Singh and others; (2007) 3 SCC 617 AND Samant N. Balkrishna and another Versus George Fernandez and others; 1969 (3) SCC 238.**

13. In the rejoinder, learned counsel for the respondent/applicant submitted that the petitioner or his agents have never informed to the Returning Officer about the alleged corrupt practices. He has also not filed copy of any application or complaint and no details have been given in the petition. He further submitted that all the candidates have got votes as is being reflected in the schedule filed by the petitioner and if there was booth capturing the NOTA would not have been exercised by the voters. There were 1000 and odd Polling Stations and the petitioner has failed to give the details of the specific Polling Stations. He also submits that merely on the basis of the higher number of votes in favour of the respondent cannot be a ground of booth capturing because in some Polling Stations the petitioner has also got the higher number of votes, it is only because of the followers of the candidate concerned in the concerned Polling Station. He also submitted that the details of the voters with proof of their being in the foreign country or out on account of marriage etc. have not been furnished. Therefore the material facts have not been given in the Petition, which may disclose the cause of action. Thus the application is liable to be allowed and the Petition is liable to be rejected.

14. Heard, Shri Anil Kishore Sharma, learned Senior Advocate assisted by Shri Syed Khursheed Anwar Alvi, learned counsel for the respondent/applicant and Shri Bharat Singh Pal, learned counsel for the Petitioner and perused the material placed before me on record.

15. The application under Order VI Rule 16 and Order VII Rule 11 CPC has been filed on the following grounds:-

(i) The Election Petition does not contain any material facts or particulars and the allegations made in the petition are vague and general and are lacking requisite facts, details and particulars of the corrupt practices as alleged.

(ii) The Election Petition does not set forth any particulars of the alleged corrupt practices committed by the applicant as provided under Section 83(1)(b) of the Act and the pleas are unnecessary and vexatious and based on surmises and conjectures and are liable to be struck out in accordance with Order VI Rule 16 CPC because the contents of the Election Petition are unnecessarily scandalizes and do not provide any particulars of corrupt practices alleged to be committed by the applicant.

(iii) The contents of Election Petition are not in accordance with the mandatory provisions contained in Section 83 of the Act, therefore, they are liable to be struck out and if such paragraphs are struck out from the Petition no cause of action survives for continuation of Election Petition and Petition deserves to be rejected in accordance with Order VII Rule 11 (a) CPC read with Section 86 of the Act.

16. The Election Petition has been filed under Section 80, 80A and 81 of the Act. Section 80 provides that no election shall be called in question except by an election petition presented in accordance with the provisions of this part. Section 80A provides about the trial of the Election Petition by the High Court by a Single Bench and nomination of Bench by Hon'ble the Chief Justice. Section 81 provides presentation of the petitions, which is extracted here-in-below:-

“81. Presentation of petitions.—(1) An election petition calling in question any election may be presented on one or more of the grounds specified in 3 [sub-section (1)] of section 100 and section 101 to the 4 [High Court] by any candidate at such election or any elector 5 [within forty-five days from, but not earlier than the date of election of the returned candidate, or if there are more than one returned candidate at the election and the dates of their election are different, the later of those two dates].

Explanation.—In this sub-section, "elector" means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.

[.....]

[(3) Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition, and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition.”

17. Section 87 of the Act provides the procedure before the High Court. Sub Section (1) lays down that subject to the provisions of the Act and of any rules made thereunder, every election petition shall be tried by the High Court, as nearly as may be, in accordance with the procedure applicable under the CPC to the trial of suits. Sub Section (2) provides the provisions of the Indian Evidence Act 1872 (1 of 1872), shall subject to the provisions of the Act, be deemed to apply in all respects to the trial of an election petition.

18. Order VI, Rule 16, and its other sub- rules deal with the pleadings generally. The relevant Rules 2, 4, 6 and 16, relevant for the present case, are reproduced here-in-below:-

“2. Pleading to state material facts and not evidence.—(1) Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved.

(2) Every pleading shall, when necessary, be divided into paragraphs, numbered consecutively, each allegation being, so far as is convenient, contained in a separate paragraph.

(3) Dates, sums and numbers shall be expressed in a pleading in figures as well as in words.

4. Particulars to be given where necessary.—In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond

such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading.

6. Condition precedent.—Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be; and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading.

16. Striking out pleadings.—The Court may at any stage of the proceedings order to be struck out or amended any matter in any pleading— (a) which may be unnecessary, scandalous, frivolous or vexatious, of (b) which may tend to prejudice, embarrass or delay the fair trial of the suit, or (c) which is otherwise an abuse of the process of the Court.]”

19. The Act lays down similar provisions, regarding facts to be pleaded, under Section 83 of the Act, which reads as under:-

“83. Contents of petition.—(1) An election petition—

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

(b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and

(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:

[Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.]

(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition.]”

20. Section 86 of the Act provides trial of election petition. Sub-section (1) provides dismissal of election petition on account of non compliance of the provisions of Section 81 or Section 82 or Section 117. Sub-section (5) provides that ‘the High Court may, upon such terms as to costs and otherwise as it may deem fit, allow the particulars of any corrupt practice alleged in the petition to be amended or amplified in such manner as may in its opinion be necessary for ensuring a fair and effective trial of the petition, but shall not allow any amendment of the petition which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition.’

21. Learned counsel for the petitioner has relied on the judgment of Hon'ble Supreme Court in the case of **Manohar Joshi Versus Nitin Bhaurao Patil and another (Supra)** in which the Supreme Court has held that the compliance of Sections 81, 82 and 117 is to be seen with reference to the evident facts found in the election petition and the documents filed along with it at the time of its presentation. This is a ministerial act. There is no scope for any further inquiry for the purpose of Section 86 to ascertain the deficiency, if any, in the election petition found with reference to the requirements of Section 83 of the Act which is a judicial function. For this reason, the non-compliance of Section 83, is not specified as a ground for dismissal of the election petition under Section 86. Similar view has been taken by the Supreme Court in the case of **Saritha S.Nair Versus Hibi Eden (Supra)** and it has been held that the reference in the Explanation under Section 86(1) to Section 98(a), makes it clear that the power of the High Court to dismiss an election petition which does not comply with the provisions of Section 81 or Section 82 or Section 117, is available at the pre-trial stage.

22. Section 83 of the Act also provides that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegations of such corrupt practice and the particulars thereof.

23. Order VII Rule 11 CPC provides that the plaint shall be rejected in the given cases. In the instant case the first is relevant, which provides 'where it does not disclose a cause of action'. The cause of action has not been defined anywhere, but it has been interpreted in a number of decisions as bundle of facts which if proved would entitle a party to the relief claimed.

24. The Hon'ble Supreme Court in the case of **A.B.C.Laminart Pvt. Ltd. and Ors. Versus A.P. Agencies, Salem; (1989) 2 SCC 163/MANU/SC/0001/1989** has explained the meaning of "cause of action" in paragraph 12, which is as follows:-

“12. A cause of action means every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a fight to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved would give the defendant a fight to immediate judgment must be part of the cause of action. But it has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff.”

25. The main grounds of filing the application under Order VI Rule 16 and Order VII Rule 11 CPC read with Section 86 of the Act is that the Election Petition does not contain any ‘material facts’ or ‘particulars’ and the allegations made in the Petition are vague and general regarding corrupt practices and based on surmises and conjectures, therefore, they are unnecessary and vexatious and liable to be struck out and if the said pleadings are struck out, no cause of action survives for continuation of election petition and it is liable to be rejected Under Order VII Rule 11(a) CPC.

26. A bare reading of the aforesaid provisions in regard to the pleadings shows that the requirement under the Act as well as CPC is that the Petition must contain the concise statement of the ‘material facts’ on which the reliance is being placed and full particulars of any corrupt practice including statements and as far as possible names of the parties who have committed corrupt practices and date, place and commission of such corrupt practice. However the particulars of any corrupt practice alleged in the petition may be amended or amplified for a fair and effective trial. The meaning of concise as defined in Oxford Dictionary is ‘giving a lot of information in a few words; brief’. The words ‘material facts’ have not been defined either under the Act or in CPC. However the same has been subject matter of scrutiny in large number of decisions of various High Courts including this High Court and the Supreme Court. The words ‘material facts’ may be said to be those facts upon which the plaintiff’s cause of action or the defendant’s

defence depends. The particulars which may be said to be the 'material facts' would depend upon the facts of each case and no rule of universal application can be laid down. However it would be essential that all basic and primary facts which must be proved at the trial by the parties to establish the existence of a cause of action or defence must be stated in the pleadings. The word 'particulars' has also been considered and interpreted by this court as well as by the Supreme Court in various decisions. All the details which are necessary to amplify, rely and embellish the material facts are 'particulars'. However the particulars in support of material facts given in the petition can be amended and amplified subsequently also.

27. The Hon'ble Supreme Court, in the case of **Dhartipakar Madan Lal Agarwal Versus Shri Rajiv Gandhi (Supra)**, has held that right to contest election or to question the election by means of Election Petition is neither common law nor fundamental right instead it is statutory right related to the statutory provisions of the Act. Thus the legal position is that outside the statutory provisions, there is no right to dispute the election. The Act is a complete and self contained Code within which rights claimed in relation to an election or an election dispute must be found and the provisions of CPC are applicable to the extent as permissible by Section 87 of the Act. It has also been held that the trial of the election petition can not proceed for want of cause of action. The relevant paragraph 14 is extracted here-in-below:-

“14. Before we consider various paragraphs of the election petition to determine the correctness of the High Court order we think it necessary to bear in mind the nature of the right to elect, the right to be elected and the right to dispute election and the trial of the election petition. Right to contest election or to question the election by means of an election petition is neither common law nor fundamental right, instead it is a statutory right regulated by the statutory provisions of the Representation of People Act, 1951. There is no fundamental or common law right in these matters. This is well settled by a catena of decisions of this Court in *N.P. Ponnuswami v. Returning Officer* [(1952) 1 SCC 94 : AIR 1952 SC 64 : 1952 SCR 218 : 1 ELR 133] , *Jagan Nath v. Jaswant Singh* [AIR 1954 SC 210 : 1954 SCR 892 : 9 ELR 231] , *Jyoti Basu v. Debi Ghosal* [(1982) 1 SCC 691 : AIR 1982 SC 983 : (1982) 3 SCR 318] . These decisions have settled the legal position that outside the statutory provisions there is no right to dispute an election. The Representation of People Act is a complete and self-contained

Code within which any rights claimed in relation to an election or an election dispute must be found. The provisions of the Civil Procedure Code are applicable to the extent as permissible by Section 87 of the Act. The scheme of the Act as noticed earlier would show that an election can be questioned under the statute as provided by Section 80 on the grounds as contained in Section 100 of the Act. Section 83 lays down a mandatory provision in providing that an election petition shall contain a concise statement of material facts and set forth full particulars of corrupt practice. The pleadings are regulated by Section 83 and it makes it obligatory on the election petitioner to give the requisite facts, details and particulars of each corrupt practice with exactitude. If the election petition fails to make out a ground under Section 100 of the Act it must fail at the threshold. Allegations of corrupt practice are in the nature of criminal charges, it is necessary that there should be no vagueness in the allegations so that the returned candidate may know the case he has to meet. If the allegations are vague and general and the particulars of corrupt practice are not stated in the pleadings, the trial of the election petition cannot proceed for want of cause of action. The emphasis of law is to avoid a fishing and roving inquiry. It is therefore necessary for the Court to scrutinise the pleadings relating to corrupt practice in a strict manner”

28. The Hon’ble Supreme Court, in the case of **Azhar Hussain Versus Rajiv Gandhi (Supra)**, has held that all the primary facts which must be proved by a party to establish the cause of action or defence are material facts and failure to plead even a single material fact would amount to disobedience of the mandate to Section 83(1)(a) of the Act.

The relevant paragraph 11 is extracted here-in-below:-

“11. In view of this pronouncement there is no escape from the conclusion that an election petition can be summarily dismissed if it does not furnish cause of action in exercise of the powers under the Code of Civil Procedure. So also it emerges from the aforesaid decision that appropriate orders in exercise of powers under the Code of Civil Procedure 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. This Court in *Samant case* [*Samant N. Balkrishna v. George Fernandez*(1969) 3 SCC 238] has expressed itself in no unclear terms that the omission of a single material fact would lead to an incomplete cause of action and that an election petition without the material facts relating to a corrupt practice is not an election petition at all. So also in *Udhav Singh case* [*Udhav Singh v. Madhav Rao Scindia*(1977) 1 SCC 511] the law has been enunciated that all the primary facts which must be proved by a party to establish a cause of action or his defence are material facts. In the context of a charge of corrupt practice it would mean that the basic facts which constitute the ingredients of the particular corrupt practice alleged by the petitioner must be specified in order to succeed on the charge. Whether in an election petition a particular fact is material or not and as such required to be pleaded is dependent on the nature of the charge levelled and the circumstances of the case. All the facts which are essential to clothe the petition with complete cause of action must be pleaded and failure to plead even a single material fact would amount to disobedience of the mandate of Section 83(1)(a). An election petition therefore can be and must be dismissed if it suffers from any such vice. The first ground of challenge must therefore fail.”

29. A three Judges Bench of Hon'ble Supreme Court, in the case of **V.S.Achuthanandan Versus PJ.Francis and another; (1999) 3 SCC 737**, has considered the effect of non disclosure of the "material facts and full particulars" in the petition and held that failure to plead a material fact is fatal to the Election Petition but the absence of material particulars can be cured at later stage by an appropriate amendment and the Election Petition is not liable to be dismissed in limine merely because full particulars of corrupt practices alleged were not set out. The relevant paragraph 15 is extracted here-in-below:-

"15. It would thus appear that the election petition was rejected mainly on the ground that it did not disclose the cause of action as according to the learned trial Judge the allegations regarding corrupt practice were vague and did not disclose "material facts and full particulars" of the corrupt practice alleged. It is evident that the learned trial Judge did not distinguish between the "material facts" and the "material particulars" of allegations regarding corrupt practices as defined under Section 123 of the Act. The law on the point is well settled which appears to have not been taken note of or appreciated by the learned trial Judge. After referring to various pronouncements of this Court including cases in *Balwan Singh v. Lakshmi Narain* [AIR 1960 SC 770 : (1960) 3 SCR 91] , *Samant N. Balkrishna v. George Fernandez* [(1969) 3 SCC 238] , *Virendra Kumar Saklecha v. Jagjiwan* [(1972) 1 SCC 826] , *Udhav Singh v. Madhav Rao Scindia* [(1977) 1 SCC 511] , *F.A. Sapa v. Singora* [(1991) 3 SCC 375] and *Gajanan Krishnaji Bapat v. Dattaji Raghobaji Meghe* [(1995) 5 SCC 347] and a host of other authorities, this Court in *L.R. Shivaramagowda v. T.M. Chandrashekar* [(1999) 1 SCC 666 : (1998) 6 Scale 361] held that while failure to plead "material facts" is fatal to the election petition and no amendment of the pleading is permissible to introduce such material facts after the time-limit prescribed for filing the election petition, the absence of "material particulars" can be cured at a later stage by an appropriate amendment. An election petition was not liable to be dismissed in limine merely because full particulars of corrupt practice alleged were not set out. It is, therefore, evident that material facts are such primary facts which must be proved at the trial by a party to establish existence of a cause of action. Whether in an election petition a particular fact is a material fact or not, and as such, required to be pleaded is a question which depends on the nature of the charge levelled, the ground relied upon, and in the light of the special circumstances of the case. In *Udhav Singh case* [(1977) 1 SCC 511] the Court held: (SCC p. 523, paras 42-43)

"In short, all those facts which are essential to clothe the petitioner with a complete cause of action, are 'material facts' which must be pleaded, and failure to plead even a single material fact amounts to disobedience of the mandate of Section 83(1)(a).

'Particulars', on the other hand, are 'the details of the case set up by the party'. 'Material particulars' within the contemplation of clause (b) of Section 83(1) would therefore mean all the details which are necessary to amplify, refine and embellish the material facts already pleaded in the petition in compliance with the requirements of clause (a). 'Particulars' serve the purpose of finishing touches to the basic contours of a picture already drawn, to make it full, more detailed and more informative."

30. Another three Judges Bench of the Hon'ble Supreme Court, in the case of **L.R. Shivaramagowda and others Versus T.M. Chandrashekar (dead) By Lrs and others; (1999) 1 SCC 666**, has taken a similar view and held that while failure to plead the material facts is fatal to the Election Petition and no amendment of the pleadings can be allowed to introduce such material facts after a time limit prescribed for filing of the Election Petition, however absence of material particulars can be cured at a later stage by an appropriate amendment.

31. The Hon'ble Supreme Court, in the case of **Virendra Nath Gautam Versus Satpal Singh and others (Supra)**, after considering the findings recorded by the High Court on the basis of what has been said and what has not been said in the Election Petition, the Hon'ble Supreme Court observed that the considerations which weighed with the High Court were in the nature of "evidence" which is a matter to be considered and proved at the time of trial. The High Court was also not right in virtually invoking the doctrine of estoppel and in dismissing the petition on that ground. The Supreme Court has further observed that the view of High Court was not in consonance with law and the High Court entered into prohibited area of considering the correctness of the allegations which is to be considered and adjudicated at the time of trial. The Supreme Court has further held that there is distinction between *facta probanda* (the facts required to be proved i.e. material facts) and *facta probantia* (the facts by means of which they are proved i.e. particulars or evidence). It is settled law that pleadings must contain only *facta probanda* and not *facta probantia*. The relevant paragraphs 39 to 46, 50 and 53 are reproduced here-in-below:-

"39. The High Court, dealing with the allegation in para 8(i) has observed that there was nothing to show and not a word as to how many of those 37 votes were cast in favour of the returned candidate and who cast those votes. It was also observed that the defeated candidate never raised any objection at the time of polling and at the stage of filing Election Petition, it was not open to raise an objection. It was further observed that it was not the case of the election-petitioner that he was not aware of death of those persons at the time of polling and it was a case of personation of

electors within the meaning of Section 61 of the Act. There was also not a whisper, observed the High Court that the polling agent had challenged the identity of the persons who allegedly voted for the dead electors. The High Court also stated that it was not stated in the Election Petition that the returned candidate or his supporters or election agent managed to have votes cast by impersonation. All these facts, according to the High Court, were material facts and since they were not stated in the Election Petition, the petition was defective.

40. We are unable to agree with the High Court. In our opinion, the considerations which weighed with the High Court were in the nature of 'evidence' which is a matter to be considered and proved at the time of trial. The High Court was also not right in virtually invoking the doctrine of estoppel and in dismissing the petition on that ground.

41. Regarding allegations in para 8(ii) of the Election Petition, the election-petitioner has alleged that there was double voting by 60 voters which was in violation of Section 62(4) of the Act. The details of those voters have been mentioned in the petition. It was also stated that out of 120 votes (instead of 60) 104 votes were cast at booth Nos. 48 and 49 which were in the native village of the first respondent.

42. The High Court almost for the same reasons on which it ordered deletion of para 8(i), has also ordered to delete para 8(ii). It observed that the petition was significantly silent as to when and how the election-petitioner came to know about the persons having cast their votes twice in two different booths in the same constituency. He also did not say who impersonated for those persons in the other booth. Nothing was stated as to when the petitioner precisely came to know about the fact that 60 persons had cast their votes twice in different booths and no reasons was put forward as to why no objection was raised at the relevant time. All these facts, according to the High Court, were material facts and since they were not stated, the petition was defective.

43. With respect, the High Court is not right. When the law prevents a person from exercising right of vote more than once and it is alleged that there was double voting in respect of certain persons, the 'allegation' can be said to be complete. Whether or not the election-petitioner is able to prove the said allegation is a matter of evidence which can be considered only at the stage of trial. By no stretch of imagination, however, it can be said that the material fact, that is, allegation regarding double voting had not been stated in the Election Petition which required Election Petition to be dismissed on that ground.

44. As to para 8(iii), the case of the election-petitioner was that 19 void votes had been cast. The said votes being void since 19 persons had exercised their right to vote in two constituencies, i.e. in Una 32 Constituency as also in booth No 76 and 63 of Kutlehar 33 Constituency. The details of those voters have been mentioned in the Election Petition.

45. The High Court held that material facts had not been stated and observed that it was not shown as to how the petitioner came to know about the persons listed having voted in two different constituencies and who impersonated them.

46. As already observed earlier, the approach of the High Court was not in consonance with law and the High Court entered into prohibited area of considering the correctness of the allegation which is to be considered and adjudicated at the time of trial.

50. There is distinction between *facta probanda* (the facts required to be proved, i.e. material facts) and *facta probantia* (the facts by means of which they are proved, i.e. particulars or evidence). It is settled law that pleadings must contain only *facta probanda* and not *facta probantia*. The material facts on which the party relies for his claim are called *facta probanda* and they must be stated in the pleadings. But the facts or facts by means of which *facta probanda* (material facts) are proved and

which are in the nature of facta probantia (particulars or evidence) need not be set out in the pleadings. They are not facts in issue, but only relevant facts required to be proved at the trial in order to establish the fact in issue.

53. On an additional ground also, the order of the High Court is liable to be set aside. All allegations in Para 8 of the Election Petition, as also sub-paras (i) to (iv) of para 8 relate to improper and illegal reception and acceptance of votes and the election petitioner has challenged the election of the returned candidate on that ground and not on the ground of 'corrupt practice'. He was, therefore, required to state material facts in the Election Petition under Section 83(1)(a) of the Act. It was, however, not necessary to 'set forth full particulars', which is the requirement of Section 83(1)(b) of 'any corrupt practice'."

32. This Court, in the case of **Ajay Rai and another Versus Narendra Modi (Supra)**, has held that the material facts may be said to be those facts upon which a party relies for his claim or defence. In other words, material facts are facts upon which the plaintiff's cause of action or the defendant's defence depends. What particulars could be said to be material facts would depend upon the facts of each case and no rule of universal application can be laid down. However it would be absolutely essential that all the basic and primary facts which must be proved at the trial by the party to establish the existence of a cause of action or defence are material facts and must be stated in the pleadings by the party.

33. In view of above, disclosure of 'material facts' in the Election Petition is necessary and it's non disclosure is fatal, whereas non disclosure of 'material particulars' can be cured at a later stage and the Petition cannot be dismissed at pre-trial stage on account of non disclosure of material particulars in the petition. This court, at this stage, has also neither to see the 'evidence' in support of 'material facts' nor as to what evidence may be adduced.

34. Adverting to the facts of present case, four grounds have been pleaded in the Election Petition i.e. (A) to (D). Ground (A) is that the respondent, his agents and other persons have committed the corrupt practice of booth capturing as defined under Section 123(8) of Act. The ground (B) is that the respondent, his agents and other persons have

resorted to booth capturing within the meaning of Section 135A of the Act. The concise statement of material facts, in regard to Ground (A) and (B), as alleged have been given in paragraphs 8 to 13. Section 123 deals with the corrupt practices and sub-section (8); is 'booth capturing by a candidate or his agent or other person'. As per the explanation, the expression "agent" in the Section includes an election agent, a polling agent and any person who is held to have acted as an agent in connection with the election with the consent of the candidate. Section 135A provides that the booth capturing is an offence and provides punishment for the same and some of the activities of booth capturing in Explanation but these are not the only activities. Section 135A is extracted here-in-below:-

“[135A. Offence of booth capturing- (1) Whoever commits an offence of booth capturing shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to three years and with fine, and where such offence is committed by a person in the service of the Government, he shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to five years and with fine].”

Explanation- For the purposes of [this sub-section and section 20B], “booth capturing” includes, among other things, all or any of the following activities, namely:-

- (a) seizure of a polling station or a place fixed for the poll by any person or persons, making polling authorities surrender the ballot papers or voting machines and doing of any other act which affect the orderly conduct of election;
- (b) taking possession of a polling station or a place fixed for the poll by any person or persons and allowing only his or their own supporters to exercise their right to vote and [prevent others from free exercise of their right to vote];
- (c) [coercing or intimidating or threatening directly or indirectly] any elector and preventing him from going to the polling station or a place fixed for the poll to cast his vote;
- (d) seizure of a place for counting of votes by any person or persons making the counting authorities surrender the ballot papers or voting machines and the doing of anything which affects the orderly counting of votes;
- (e) doing by any persons in the service of Government, of all or an of the aforesaid activities or aiding or conniving at, any such activity in the furtherance of the prospects of the election of a candidate.]

[(2) An offence punishable under sub-section (1) shall be cognizable]”

35. It has been stated in paragraph 9 of the Election Petition that on 10.02.2022, the polling of the election started as per the notification/schedule. The respondent himself and his Election Agent

and other persons with the consent of respondent or his Election Agent captured the polling booth of villages Jai (Booth No.11), Radhna Inayatpur (Booth No.80, 82, 83), Kithore (Booth No.93, 94, 97,98, 99, 100, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 114, 122, 123, 124), Ichauli (Booth No.153, 154, 155), Rasoolpur Aurangabad (Booth No.188), Aad (Booth No.327), Pipali Kheda (Booth No.332, 333), Uldhan (booth No.370) and Shafiabad Lauti (Booth No.417) and allowed their own supporters to exercise their right to vote and prevented others from free exercise of their right to vote. The Election Agent of the respondent and other persons with the consent of respondent cast the votes of others in favour of respondent. The electors could not cast vote independently.

It has been stated in paragraph 10 that the number of votes cast in favour of respondent in several polling booths exceeded 90% of total votes polled. This clearly indicates the booth capturing by the respondent, his Election Agents or other persons with the consent of the respondent has taken place. The respondent himself took round of some of the polling booths and asked his polling agents and other persons to ensure that not less than 95% of the polled votes should be in his favour.

It has been stated in paragraph 11 that the petitioner and his polling agents of the concerned polling station made complaints to the Returning Officer regarding the booth capturing by the respondent, his election agents and other persons but neither the Returning Officer nor any other official took any action to stop the booth capturing at the said polling stations.

Accordingly it has been stated in paragraph 12 of the Petition that the corrupt practices have been committed by the respondent, his election agents and other persons with the consent of the respondent. Thus the election of the respondent is vitiated.

36. The ground No.(C) is that the result of election, in so far as it concerns Shahid Manzoor/the respondent, has been materially affected due to improper reception of votes and reception of votes which is void. The ground No.(D) is that even otherwise the Election of the respondent is liable to be declared null and void. The concise statement of material facts with regard to ground Nos. (C) and (D), on which the petitioner relies, have been given in paragraphs 15 to 20.

37. It has been stated in paragraph 15 that 550 votes were polled, of the dead persons whose names are in voter list, to the respondent by his agents or other persons with the consent of the respondent at booth Nos.26, 27, 75, 77, 78, 79, 80, 81, 82, 83, 93, 95, 101, 104, 110, 112, 113, 140, 176, 177, 178, 188, 189, 190, 191, 192, 193, 308, 309, 311, 339, 403, 410 and 411. The particular and details of such 550 votes of dead persons are contained in Schedule-I containing the name of the villages, name of the booth, booth number, voter serial number, names, father's name and current status of the elector which forms integral part of it.

It has been stated in paragraph 16 that a large number of voters, who were either absentees or missing or lodged in jail (particulars have been provided in Schedule-I) have been impersonated by Election Agent of the respondent and by other persons with the consent of respondent or his Election Agents and cast their votes in favour of respondent. It may further be added that respondent had arranged some machines for making of forged Adhar Cards. Forged Aadhar Cards were used by the impersonators in casting the votes of dead voters or absent voters.

It has been stated in paragraph 17 that a large number of Government Servants, mainly in Military/Army and police, who were not present in their respective villages and did not come to cast their votes at respective polling stations have been impersonated and their votes have been polled in favour of the respondent. They have been denied the opportunity of casting votes by postal ballots.

It has been stated in paragraph 18 that the respondent got same votes registered in two or more different places in 46-Kithore Legislative Assembly (particulars have been provided in Schedule-I). The said persons are near or distant relatives or friends of the respondent. The said voters polled their votes at two or more different places in the same constituency. It may further be added that respondent had arranged some chemicals by which the indelible ink used for identity of a voter on the first finger, that he had already cast his vote had been evaporated and in this manner several of the voters exercised their votes multiple time in the said constituency in favour of respondent.

It has been stated in paragraph 19 that there is a margin of 2180 votes between the respondent and the petitioner and in case there had been a free and fair election the petitioner would have certainly been declared elected. However no prayer has been made for declaring him as elected.

38. The petitioner has annexed Schedule-I disclosing the names, parentage with the name of booth number and serial in the electoral roll of the voters with voter I.D. number of some of the voters, whose votes have been polled by impersonation. The petitioner has also filed an affidavit of corrupt practices. The petitioner has also filed a list of documents, according to which he places reliance upon the final counting chart in Form-20 of the 46 Kithore Legislative Assembly of the election and copy of the complaints made to the Returning Officer and to the police by agents and other persons to prove his case, which learned counsel for the petitioner states will be filed once the election petition is put on trial because evidence need not be produced at pre-trial stage.

39. Section 123(8) of the Act provides booth capturing by a candidate, his agents or other persons. As per explanation (4) appended to Section 123 of the Act for the purpose of clause 8 “booth capturing” shall have

the same meaning as in Section 135A. As per explanation appended to Section 135A booth capturing includes among other things, all or any of the activities given in sub-clauses (a) to (e). Therefore the booth capturing is not limited to the activities given in paragraph (a) to (e). The grounds taken by the respondent-applicant for striking out the pleadings as the same are unnecessary, vexatious and scandalizing and the full particulars have not been provided is not made out because if any particulars are lacking they may be amended or amplified subsequently. The grounds taken by the respondent/applicant for striking out the pleadings in regard to the grounds are not tenable and learned counsel for the respondent/applicant also failed to show as to how they are unnecessary and vexatious and covered under Rule 16 of Order VI CPC, therefore it cannot be struck out. Thus in view of the material facts and particulars given in the petition, the Election Petition cannot be rejected at the pre-trial stage under Order VII Rule 11 CPC.

40. In view of the disclosures made in the petition, as disclosed above, in support of the grounds taken for challenging the election of the respondent, it cannot be said that the material facts with certain particulars regarding corrupt practices made by the respondent and his agents in the election have not been disclosed and proof of one single corrupt practice may be fatal to election.

41. The Hon'ble Supreme Court, in the case of **Samant N.Balkrishna and another Versus George Fernandez and others (Supra)**, has held that a single corrupt practice committed by the candidate, by his election agent or by another person with the consent of the candidate or his election agent is fatal to the election, the case must be specifically pleaded and strictly proved.

42. The Hon'ble Supreme Court, in the case of **D.M.Deshpande and others Versus Janardan Kashinath Kadam (Dead) by LRs. and others (Supra)**, has directed that the court must ascertain the substance of the pleading and not the form in order to determine the case.

43. The Hon'ble Supreme Court, in the case of **Rajasthan State TPT Corporation and others Versus Bajranj Lal (Supra)**, has held that it is settled proposition of law that a party has to plead the case and produce/adduce sufficient evidence to substantiate his submissions made in the plaint and in case the pleadings are not complete, the court is under no obligation to entertain the pleas.

44. The Hon'ble Supreme Court, in the case of **Rampakavi Rayappa Belagali Versus B.D.Jatti and other (Supra)**, has held that the grounds on which the election can be declared to be void under the Act are set out in Section 100 of the Act. Clause (d) is "that the result of the election, in so far as it concerns a returned candidate, has been materially affected; (i)...(ii)...(iii)...(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act." Nothing could be clearer than the ambit of this provision. It does not entitle the court in an election petition to set aside any election on the ground of non-compliance with the provisions of the Act of 1950 or of any rules made there under, with the exception of Section 16.

45. The Hon'ble Supreme Court, in the case of **Shreewant Kumar Choudhary Versus Baidyanath Panjiar (Supra)**, has held that in a petition to set aside an election, it is not open to the High Court to go into the question whether the names entered in the electoral roll were entered therein illegally. However the court can examine all evidence being adduced as to whether the polling has been made by the persons who were not the voters which will amount to the corrupt practices.

46. The Hon'ble Supreme Court, in the case of **Pramod Kumar Mishra Versus Chet Narain Singh (Supra)**, has held that correctness of a final electoral roll cannot be judged by this court in an election petition challenging election of a returned candidate. The Supreme Court has further held that it is now well established as also requirement of procedural law that an election petition must disclose all material facts

on which Election Petitioner relies to establish existence of a cause of action. "Material facts" essentially referred to all relevant facts which an election-petitioner relies upon during course of trial.

47. The Hon'ble Supreme Court, in the case of **Laxmi Kant Bajpai Versus Hazi Yaqoob and others (Supra)**, has held that the election has to be held on the basis of the electoral roll which is in force on the last date for making nominations. The Supreme Court has also held that to see whether material facts have been duly disclosed or whether a cause of action arises, we need to look at the averment and pleadings taken up by the party.

48. This court, in the case of **Neelam Sonkar Versus Dr.Bali Ram (Supra)**, has held that one has to make out a distinction between the phrase that there was no cause of action for the suit and that the plaint does not disclose a cause of action. It is a later category in which plaint can be rejected under Order VII Rule 11 CPC and not the former one. For the purpose of determining whether the plaint is wiped out under Order VII Rule 11 (a) or not, the averments in the plaint are only to be looked into. It has further been observed that generally speaking, as recognized in various authorities, a cause of action is a bundle of facts which taken with the law applicable, gives plaintiff a right to relief against the defendants. This court has further observed that Order VII Rule 11(a) CPC operates on its own and is not dependent either on an application under Order VI Rule 16 or otherwise.

49. The judgment in the case of **Bondar Singh and others Versus Nihal Singh and others (Supra)**, relied by learned counsel for the respondent/applicant is distinguishable on the facts of the present case as it is in regard to the Tenancy Law and non disclosure of material regarding tenancy, whereas present is the election dispute and material facts in regard to the cause of action have been disclosed.

50. In view of above, the pleadings made in the petition as referred above discloses the material facts in accordance with the provisions made under the Act and CPC and law applicable on it as held by this court as well by Hon'ble the Supreme Court and certain particulars have also been given. However if certain particulars are lacking that cannot be a ground for rejecting the petition at the pre-trial stage because it can always be supplemented/amended in the petition by the petitioner. The validity of the electoral roll may not be examined in these proceedings but the corrupt practices as pleaded in the petition including that certain votes have been polled by impersonation can be examined in these proceedings. It is also settled that even if one incident of corrupt practice is proved the same is fatal for election of the returned candidate. Therefore this court is of the view that the material facts disclosed by the petitioner can not be struck out merely because of non disclosure of certain particulars under Rule 16 Order VI CPC. Even otherwise as pleaded by respondent-applicant if unnecessary and vexatious paragraphs are struck out from the petition no cause of action survives for the continuation of election petition, therefore, admittedly the cause of action to file the petition has been disclosed in the petition and merely non disclosure of certain particulars cannot be a ground for striking out the pleadings, resulting into rejection of the petition. Thus the application filed by the respondent-applicant Under Order VI Rule 16 and Order VII Rule 11 CPC is misconceived and not tenable and is liable to be dismissed.

51. Civil Misc. Application No.5 of 2022 Under Order VI Rule 16 and Order VII Rule 11 CPC filed by the respondent/applicant is hereby **dismissed.**

(Rajnish Kumar,J.)

Order Date :- 06.04.2023

Banswar

In Re; Election Petition

This case has been taken up through Video Conferencing from Lucknow as per order of Hon'ble the Chief Justice.

Order on Civil Misc. Application No.5 of 2022 Under Order VI Rule 16 and Order VII Rule 11 CPC delivered through Video Conferencing.

As prayed by learned counsel for the parties list on 2nd May, 2023 at 3.30 p.m. for framing of issues.

(Rajnish Kumar,J.)

Order Date :- 06.04.2023

Banswar