

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

ELECTION PETITION NO. 6 OF 2014
WITH
APPLICATIONS IN EP NOS. 57, 66, 72, 82 AND 85 OF 2016

Kailash Kishanrao Gorantyal,
Age 49 years, Occu. Business,
R/o. Plot No. 77, Pritisudha Nagar,
Mantha Road, Jalna,
Taluka and District Jalna.

....Petitioner.

Versus

Arjun Panditrao Khotkar,
Age 52 years, Occu. Business,
R/o. Darshana, Bhagyanagar,
Old Jalna, Taluka & District Jalna.

....Respondent.

Mr. P.M. Shah, Senior Advocate i/b. Mr. Aditya Sikchi, Advocate for petitioner.

Mr. A.B. Kale, Mr. P.R. Katneshwarkar and Mr. H.D. Zol, Advocates for respondent.

WITH
ELECTION PETITION NO. 9 OF 2014
WITH
APPLICATION IN EP NO. 65 OF 2016

Vijay s/o. Shamlal Chaudhary,
Age 46 years, Occu. Agriculturist,
R/o. Mahatma Gandhi Road,
Jalna, Tq. and Dist. Jalna.

....Petitioner.

Versus

1. Arjun s/o. Panditrao Khotkar,
Age 52 years, Occu. Business,
R/o. "Darshana", Bhagya Nagar,
Old Jalna, Tq. & Dist. Jalna.

2. Abdul s/o. Rashid Aziz,
Age Major, Occu. Business,
R/o. Rahemanganj, Jalna,
Tq. & Dist. Jalna.
3. Arvind s/o. Bajirao Chavan,
Age 52 years, Occu. Agricultural &
Business, R/o. Manegaon Kha,
Tq. & Dist. Jalna.
4. Gorantyal Kailash s/o. Kishanrao,
Age 49 years, Occu. Business,
R/o. Plot No. 77, Priti Sudha Nagar,
Mantha Road, Jalna,
Tq. & Dist. Jalna.
5. Thakur Kushalsinh s/o. Nandkishorsinh,
Age 57 years, Occu. Business,
R/o. 29, Chatrapati Colony,
Old Jalna, Tq. & Dist. Jalna.
6. Ravi s/o. Haribhau Raut,
Age 38 years, Occu. Business,
R/o. 48-1, in front of Pandurang
Temple, Pirpimpalgaon, at post
Pirpimpalgaon, Tq. & Dist. Jalna.
7. Kolate Baliram s/o. Ankushrao,
Age Major, Occu. Agriculture,
R/o. At post Pirpampalgaon,
Tq. and Dist. Jalna.
8. Khaled Bin Naser Chau,
Age Major, Occu. Business,
R/o. Itwara Galli, Kacheri Road,
Old Jalna, Tq. & Dist. Jalna.
9. Dhansingh s/o. Pratapsingh Suryawanshi,
Age Major, Occu. Agriculture,
R/o. Near Indewadi Water Tank,
Ambad Road, Indewadi,
Tq. & Dist. Jalna.
10. Feroz Khan Samad Khan,
Age Major, Occu. Nil,
R/o. Bedpura, In front of Masque,
Sadar Bazar, Jalna,

Tq. & Dist. Jalna.

11. Bansode Sudam s/o. Shankarrao,
Age 36 years, Occu. Nil,
R/o. 548, Zopadpatti, Building of
Beg Sir, Above Post Office Badnapur,
Tq. Badnapur, Dist. Jalna.
12. Kailas s/o. Kisanrao Ghorpade,
Age Major, Occu. Nil,
R/o. At post Gondegaon,
Tq. & Dist. Jalna.
13. Farukh Ilahi Khan,
Age Major, Occu. Nil,
R/o. Old Jalna, Tq. & Dist. Jalna.
14. Lahane Dadarao s/o. Vitthalrao,
Age Major, Occu. Nil,
R/o. Vanjar Umrade, Post Gondegaon,
Tq. & Dist. Jalna.
15. Sandip s/o. Uttamrao Kharat,
Age Major, Occu. Nil,
R/o. Civil Hospital Quarter,
Old Jalna, Tq. & Dist. Jalna.
16. Dnyaneshwar Nade,
Age Major, Occu. Nil,
R/o. Priyadarshani Colony,
Sambhaji Nagar, Tq. & Dist. Jalna.
17. Adv. Dnyaneshwar s/o. Manikrao Wagh,
Age Major, Occu. Nil,
R/o. Plot No. 20, Datta Nagar,
Adjacent to New Mondha,
Tq. & Dist. Jalna.
18. The Returning Officer,
101, Jalna Assembly Constituency,
At Office of Sub-Divisional Officer,
Near Bachat Bhavan, Old Jalna,
Tq. & Dist. Jalna.

....Respondents.

Mr. N.L. Choudhary and Mr. A.R. Vaidya, Advocate for petitioner.

Mr. A.B. Kale, Mr. P.R. Katneshwarkar, Mr. H.D. Zol, Mr. A.M. Hazare, Advocates for respondent No. 1.

Mr. A.M. Hajare, Advocate for respondent No. 2.

Mr. P.M. Shah, Senior Advocate i/b. Mr. Aditya Sikchi, Advocate for respondent No. 4.

Mr. Kiran D. Jadhav, Advocate for respondent No. 6.

Mr. R.S. Dhamangaonkar and Gajanan Jakkalwar, Advocates for respondent No. 9.

Mr. M.V. Thorat, Advocate for respondent No. 11.

Mr. T.M. Tandale, Advocate for respondent No. 12.

No written statement order is passed against all respondents except respondent Nos. 1, and 4, 9 vide order dated 22.1.2016.

Respondent No. 18 is deleted vide Court's order dated 1.7.2016.

CORAM : T.V. NALAWADE, J.

RESERVED ON : 13/10/2017

PRONOUNCED ON : 24/11/2017

JUDGMENT :

1) Both the petitions are filed under sections 80 and 81 of the Representation of People Act, 1951 (hereinafter referred to as 'the Act' for short) to challenge the election of respondent - Arjun Panditrao Khotkar, who is Returned Candidate (hereinafter referred to as 'RC' for short) from 101-Jalna Legislative Assembly Constituency. It was general election to the State Legislative Assembly for the term commencing from November 2014. The

petitioner from Election Petition No. 6/2014 contested this election as a candidate of Congress I party and the petitioner of the other proceeding is the electoral member of this constituency.

2) The programme of the election was as follows :-

20th September 2014 to 27th September 2014 (Saturday)	The period prescribed for filing of the nominations
27th September, 2014	Till 3 p.m. the time to deliver the nomination paper
29th September 2014 (Monday)	The date fixed for scrutiny of nominations
15th October 2014 (Wednesday)	The date of polling
19th October 2014 (Sunday)	The date of counting of votes and declaration of the results.

The RC secured 45078 votes and the candidate of the Congress I party secured 44782 votes and so, the victory margin is 296 votes.

3) It is the case of petitioners that the RC had filed four sets of nomination papers, but each set suffered from defects of substantial nature and all the four sets of nomination papers were liable to be rejected. The specific case of both the petitioners is as under :-

(i) Two nomination papers filed by the RC on 26.9.2014 (which are given numbers 9 and 10 by Returning Officer (hereinafter referred to as 'RO' for short) were not in

prescribed format, they were incomplete and they were not accompanied by Forms A and B, as contemplated by Clauses (b) and (c) of para No. 13 of the Election Symbol (Reservation and Allotment) Order 1968.

(ii) With nomination form No. 9, there was no complete copy of prescribed form of Form No. 26. Form No. 26 was not as per requirement of law and RC had evolved new form as per his own idea. When in Form No. 26 information in respect of five persons, who include three dependents, other than spouse is required to be given, the RC had given information in respect of only four persons.

(iii) Nomination form No. 10 was not accompanied by original copy of Form No. 26 and zerox copy of such form was produced with nomination papers when law requires affidavit notarized before Notary Public in respect of contents of Form No. 26. Zerox copy of Form No. 26 was filed and so, there was no affidavit to the contents of Form No. 26. Further, this zerox copy was also not complete and it was not in prescribed format and the contents were like Form No. 26 which was filed with nomination paper No. 9.

(iv) The RC filed two nomination forms bearing Nos. 43 and 44 on 27.9.2014, but these forms were presented before the RO after 3.00 p.m. It is also the contention that

zerox copy of Form No. 26 was produced along with nomination form No. 44 and so, nomination form No. 44 was not complete.

(v) It is the contention of the petitioners that A, B forms were not handed over to RO prior to 3.00 p.m. of 27.9.2014 and they were handed over after 3.00 p.m. of 27.9.2014 by RC and so, nomination papers which were given Nos. 9, 10, 43 and 44 could not have been accepted and they were liable to be rejected.

4) It is the contention of petitioners that the late presentation of nomination form Nos. 43 and 44 by the RC was witnessed by many persons including candidates and their proposers, who were waiting in the building where the office of RO is situated. It is contended that just before 3 p.m. of 27.9.2014, Assistant Returning Officer (hereinafer referred to as 'ARO' for short) Shri. Rewannath Labade came to the place, passage where the intending candidates and their proposers were standing in queue and he announced that the prescribed time was running out and so, the intending candidates and their proposers should hand over nomination papers to him. It is the contention of present petitioners that accordingly many intending candidates and proposers, handed over the nomination papers to Shri. Labade. It is contended that RC

Shri. Arjun Khotkar was not present there and nobody handed over his nomination papers to Shri. Labade at that time.

5) It is contention of petitioners that the candidates who handed over nomination papers to Shri. Labade at the aforesaid place were allowed by RO to enter her office for completing formalities one by one. But, at that time also the RC was not present. It is the contention of petitioners that those candidates who had entered the office of RO for completing formalities were entering empty handed as their nomination papers were already collected by Shri. Labade.

6) It is the contention of petitioners that arrangement of video camera was made inside of the office of RO to record the incidents of delivery of nomination papers to RO, their acceptance by RO and handing over the check list to the candidates by RO.

7) It is contended that RC - Arjun Khotkar entered the office of RO with it's supporters like Shivaji Gonte, Atmanand Bhagat, Janardan Khotkar and Santosh Sambre after 3.00 p.m. i.e. at 3.53 p.m. and such time was appearing in the wall clock fixed in the office of RO. It is contended by petitioners that when RC proceeded to table of RO, Janardhan Khotkar was behind RC and

Janardhan physically handed over one set of nomination form from his docket to RC and this set was then physically handed over by the RC to RO. It is contended by petitioners that the second set of nomination form was supplied to RC by his other supporter Shivaji Gonte and this set was handed over by RC to the staff of RO. It is contended that the staff did not hand over any set of nomination papers to RO as sets were in the custody of the aforesaid person, the man of the RC and they were not handed over to Shri.Labade or anybody from the staff of RO before 3.00 p.m.

8) It is the contention of petitioners that the check lists in respect of nomination form Nos. 43 and 44 were handed over to RC at 4.05 p.m. and such time was shown in the aforesaid wall clock of the office of RO. It is contended by petitioners that though check list was handed over at 4.05 p.m. the RC intentionally mentioned the time as 2.20 p.m. on the check list to acknowledge the receipt of check list given by the RO. It is contended that this incident was also videographed.

9) It is the contention of petitioners that intending candidate Shri. Arvind Bajirao Chavan was present before RO from 2.15 to 2.30 p.m to submit his nomination papers and his nomination forms were given numbers as 33, 34 and 35. It is the

contention of petitioners that this circumstance shows that the RC falsely showed the time of receipt of check list as 2.20 p.m. and that was done to create a show that he had presented his nomination papers prior to 3.00 p.m. It is the contention of petitioners that Mr. Arjun Dadapatil Bhandagare also noticed that RC was not present in the office of RO prior to 3.00 p.m. It is contended that said Arjun Bhandagare then filed complaint to RO in respect of this incident against the RC.

10) It is the case of petitioner from Election Petition No. 6/2014 that he learnt about the late filing of nomination papers by RC on 27.9.2014 itself and then he gave complaint before RO. It is the contention of this petitioner that he was asked to substantiate the allegations and he informed that Arjun Dadapati Bhandagare was present to witness the incident and incident was also recorded in video shooting in the office of Election Commission itself. It is his contention that it was informed to RO that the other persons like Vinod Yadav, Santosh Madhavle, Meghraj Choudhary, Vijay Choudhary had also witnessed the incident and RO ought to have made inquiry with these persons and RO ought to have seen the video shooting of the incident done by her office. It is the contention of this petitioner that he also gave specific complaint on 28.9.2014 at 11.00 a.m. and requested for rejection of nomination forms of RC

on the aforesaid ground. It is contended by this petitioner that without making any inquiry and without seeing any record, RO rejected his objection.

11) It is the case of petitioners that the defects were pointed out to RC in his nomination form Nos. 9 and 10 at the time of preliminary inspection, but the defects in these two forms were not removed by RC. It is the contention of petitioners that the RC preferred to file nomination form Nos. 43 and 44 on 27.9.2014, but they were filed after 3.00 p.m. and so, all the nomination papers of RC ought to have been rejected, but they are improperly and illegally accepted.

12) It is the case of petitioners that RC was not able to get A, B forms in time as his political party Shivsena was having talk with other political party B.J.P. to have alliance, but the alliance did not take place and talks were going on till late hours of 25.9.2014 and due to that, his political party could not send A, B forms to RC. It is contended that the A, B forms were sent on 26.9.2014, but they were sent in respect of other constituency, Ghansavangi Constituency and that also caused delay in reaching the forms to RC and due to that RC could not hand over his nomination papers and A, B forms before 3.00 p.m. of 27.9.2014.

13) In Election Petition No. 9/2014 the petitioner has made one more contention that RO is guilty of corrupt practice and she acted in collusion with RC. It is his contention that he had collected the copy of video recording done by the office of Election Commission of the aforesaid incident. This copy was produced along with the said election petition.

14) Both the petitions were filed within the prescribed period of limitation. In both the petitions, relief of declaration that the election of RC is void, is claimed. In Election Petition No. 9/2014 additional declaratory relief that the other eligible candidate is elected, is claimed.

15) The RC has filed written statement in both the petitions. He has denied that his nomination form Nos. 9, 10, 43 and 44 were not complete. He has denied that zerox copies of Form No. 26 were filed along with nomination form Nos. 10 and 44. He has denied that nomination form Nos. 43 and 44 were not presented before RO before 3.00 p.m. of 27.9.2014. He has come with specific case that he handed over nomination papers to RO well before 3.00 p.m. and endorsement was made on his nomination forms to show such time.

16) The RC has specifically contended that the petitioners need to prove that just before 3.00 p.m. of 27.9.2014, ARO made announcement that the time was running out and ARO asked the intending candidates and/or their proposers to hand over the nomination papers to him. However, at other place in the pleading, RC has admitted that Shri. Labade collected the nomination forms from intending candidates prior to 3.00 p.m. The RC has not come with specific case that he and his proposers handed over the nomination form Nos. 43 and 44 to Shri. Labade prior to 3.00 p.m.

17) The RC has denied that the video shooting of handing over and acceptance of nomination papers was done in the office of RO. The RC has specifically contended that the videography produced with the petitions is fabricated, bogus and false. The RC has specifically contended that CDs (VCDs) supplied by RO are not correct and they are not true CDs (VCDs).

18) The RC has denied that he entered the office of RO on 27.9.2014 with his supporters Shivaji Gonte, Atmanand Bhagat, Janardan Khotkar and Santosh Sambre. He has denied that when he entered the office of RO, the wall clock fixed in the office of RO was showing time as 3.53 p.m. on 27.9.2014. The RC has denied that at the relevant time, his proposers had handed over the forms to him

and then he presented those form Nos. 43 and 44 to RO or staff of the RO. He has denied that he had noted the time of receipt of check list as 2.20 p.m. on the record of election office. He has denied that when the check list was handed over to him by RO, the wall clock in her office was showing time of 4.05 p.m.

19) It is the case of RC that objections raised against him of aforesaid nature to his nomination were rejected by RO and that was done after making proper inquiry. It is the contention of RC that aforesaid pleadings made by the petitioners is not sufficient to make out the case that his election is 'materially affected' due to aforesaid circumstances.

20) In respect of CDs (VCDs), it is the case of RC that handy, movable cameras were used, but all incidents were not recorded. He has specifically contended that the videography produced in the Court is not of the incident when he presented his nomination papers on 27.9.2014. The RC has contended that if the entire videography is available, it will be possible for him to file complete written statement.

21) In view of nature of dispute, this Court made order to Election Commission and the concerned officers to produce the

entire record of election of this constituency including the original record of video recording. This Court had expected from the Election Commission to produce the record in respect of the aforesaid incident and specific order was made that electronic record needs to be produced along with necessary certificates. The record came to be produced by Election Commission to comply this order. But, there is dispute on nature of certificate issued by the Election Commission with regard to CDs (VCDs) in which there is recording of the aforesaid incidents.

22) With the Election Petitions, two CDs (VCDs) were produced by the petitioners as copies of video recording supplied by the Election Commission. There was no transcript of the contents of these CDs (VCDs). There was no transcript with the Election Commission also and so, this Court prepared transcript of the contents of the copy supplied by the Election Commission in the presence of counsels of both the sides. This Court then prepared the transcript of the contents of all the CDs (VCDs) produced by Election Commission as original record in the presence of both the sides. Copies of all those transcripts were supplied to both the sides. A copy was supplied to Smt. Mutha, RO also.

23) After aforesaid exercise was over, the RC filed

applications under Order VII, Rule 11 of Civil Procedure Code ('CPC' for short) in the present two proceedings and also in third proceeding filed against him (Election Petition No. 4/2014) and prayed for rejection of petitions on various grounds including the ground of absence of material particulars in the pleading. These applications came to be rejected by this Court. The order of this Court was taken to Hon'ble Apex Court in challenge by RC, but the Apex Court dismissed all those proceedings filed by the RC.

24) This Court had given opportunity to both the sides to suggest the issues and both the sides were allowed to make submissions on the points of framing issues. In the writing both the sides proposed the issues and after hearing their arguments, the issues were framed by this Court on the basis of submissions and rival pleadings. In view of grounds, challenges raised in Election Petition Nos. 6/2014 and 9/2014, this Court made order to club the two proceedings and directed to lead the evidence in one proceeding. After passing of this order, opportunity was given to both the sides to lead the evidence.

25) The issues are at Exh. 28 for both the matters and they are as under :-

Issues

Findings

- 1 Whether the Election Petition suffers on the count of non compliance of Sections 81,82 and 83 of the Representation of People's Act ? - Negative
- 2 Whether the Election Petition suffers due to absence of particulars of the grounds given for declaring the election as null and void ? - Negative
- 3 Whether the petitioner proves that the nomination papers at Sr.Nos. 9 and 10 were not with the original Form 'A' and Form 'B' ? - Affirmative
- 4 Whether the petitioner proves that the so called computer generated form No. 26 submitted with nomination papers at Sr.No. 10 by the Returned candidate was xerox copy ? If yes, what is its consequence ? - Affirmative (consequence - form invalid)
- 5 Whether the petitioner proves that the so called computer generated form No. 26 submitted with nomination papers at Sr.Nos. 9 and 10 were not in conformity with the form as prescribed under the provisions of Representation of People's Act? If it is proved, then what is the consequence of it ? - Form No. 26 filed with nomination form No. 9 was in conformity, but form No. 26 filed along with nomination form No. 10 was not in conformity with the form prescribed under the provisions of the Act.
- 6 Whether the petitioner proves that the nomination papers at Sr.Nos. 43 and 44 were not presented by respondent/ Returned candidate before 3.00 p.m. on 27/09/2014 ? - Affirmative. (nomination papers at Sr. Nos. 43 and 44 were not presented by RC before 3.00 p.m. of 27.9.2014.)
- 7 Whether the petitioner proves that the respondent /Returned candidate submitted original forms A and B along with nomination paper only on 27/09/2014 after 3.00 p.m. and along with nomination paper at Sr.No. 44 ? - Affirmative. (A, B forms were presented after 3.00 p.m. of 27.9.2014)

- 8 Whether the petitioner proves that the photo copy and not the original of affidavit in form No. 26 was filed by the respondent/Returned candidate along with nomination paper at Sr.No. 44 ? - Affirmative
- 9 Whether the petitioner proves that the requirement of Article 173 (a) read with Schedule III making and subscribing both for affirmation mandated therein was not fulfilled by the Returned candidate ? If it is proved, what is consequence of it ? Does not survive.
- 10 Whether the petitioner proves that acceptance of nomination paper at Sr.Nos. 9,10,43 and 44 of the Returned candidate by the Returning Officer was wrong and illegal ? Affirmative.
- 11 Whether the petitioner proves that so far as returned candidate is concerned, his election is materially affected by improper acceptance of nomination form of the respondent/Returned candidate ? Affirmative.
- 12 Whether the petitioner is entitled to compensatory costs ? Negative.

REASONS

Issue Nos. 3, 4 and 8 :-

26) It is not disputed that the RO had given serial numbers to the nomination papers filed by the candidates. To the nomination papers filed by RC, serial numbers were given as 9, 10, 43 and 44. Nomination form Nos. 9 and 10 were filed before 27.7.1994 and there is no dispute that they were filed within the time fixed by the

provision of section 33 (1) of the Act. Admittedly, nomination form Nos. 43 and 44 were filed on 27.9.2014. It is not disputed that with nomination form No. 10 there was only zerox copy of Form No. 26 and it was not original copy containing affidavit in support of contents of Form No. 26. Similarly, with nomination form No. 44 there was zerox copy of Form No. 26 and it was not having affidavit in respect of contents of Form No. 26. It is also not disputed that nomination forms Nos. 9 and 10 were not accompanied by A, B forms to be issued by political party. It is not disputed that A, B forms were filed first time on 27.9.2014, though there is dispute about the time of filing these forms. The RO has given evidence that A, B forms were filed with nomination form No. 43. The entire original record was before this Court and in view of the original record also, the aforesaid circumstances cannot be disputed. In view of these admitted facts and to that extent, issue Nos. 3, 4 and 8 mentioned above need to be answered in affirmative. However, the effect of not producing original notarized Form No. 26 with nomination papers needs to be discussed by considering the provisions of law and then this issue needs to be decided. Admittedly, RC was candidate of registered political party Shivsena. So, it was necessary for RC to file A, B forms within time i.e. up to 3.00 p.m. of 27.9.2014 to make his nomination form valid. Single electoral was used as proposer by the RC showing that he is

intending to contest the election as candidate of registered political party.

Issue Nos. 1 and 2 :-

27) These issues involve compliance of provisions of sections 81 to 83 of the Act. This Court while deciding the applications filed under Order VII, Rule 11 of CPC had an occasion to consider the requirements of provisions of sections 81 and 82. This Court has held that in view of the grounds given in section 100 (c), (d)(i) of the Act, which are mentioned in the present petitions that the objections of absence of grounds was not tenable. Some observations with regard to necessary particulars were also made to reject the contention that necessary particulars were not there in the petitions. Now, the issues are framed on the basis of rival pleadings. The pleadings disclose cause of action and the particulars, which can be called as 'material facts' and they are there in the pleadings. They are already quoted. For the purpose of provisions of Order VI, Rule 2 and Rule 9 of CPC, these particulars are sufficient and these particulars do give RC the reasonable opportunity to defend the charge/allegations. In view of the nature of charge levelled and the grounds mentioned, this Court has no hesitation to observe again in the present proceedings that the 'material facts' are there in the petitions. The improper acceptance of nomination forms of RC himself is involved in the matter and so, no further pleadings and

particulars on the effect of election viz. whether election is materially affected are required. This point is being again discussed with reference to the law settled on this point at later stage while deciding issue No. 11. So, issue Nos. 1 and 2 are answered in negative, in favour of petitioners.

Issue Nos. 5 to 7 and 9 to 12 :-

28) The main contention of the petitioners is that the RC has filed A, B forms on 27.9.2014 after 3.00 p.m. and as all the nomination forms were having signature of only one electoral, the forms were filed as a candidate of registered political party, all the four nomination forms could not have been accepted as valid forms by the RO. Other contentions regarding incomplete Form No. 26 can be considered separately if the petitioners fail to prove the aforesaid main contention. Let us see first, whether on the aforesaid main ground the election can be declared as void.

29) In section 33 of the Act, the requirements of valid nomination are given. For the present purpose, the portion relevant is section 33 (1) and proviso (1) and (2) of this sub-section. This portion runs as under :-

"33. Presentation of nomination paper and requirements for a valid nomination.- (1) On or

before the date appointed under clause (a) of section 30 each candidate shall, either in person or by his proposer, between the hours of eleven O'clock in the forenoon and three O'clock in the afternoon deliver to the returning officer at the place specified in this behalf in the notice issued under section 31 a nomination paper completed in the prescribed form and signed by the candidate and by an elector of the constituency as proposer:

Provided that a candidate not set up by a recognised political party, shall not be deemed to be duly nominated for election from a constituency unless the nomination paper is subscribed by ten proposers being electors of the constituency:

Provided further that no nomination paper shall be delivered to the returning officer on a day which is a public holiday:

30) In the case reported as **(1980) 1 SCC 713 [Harjit Singh Mann Vs. S. Umrao Singh and Ors.]**, the Apex Court has laid down that the requirements of section 33 (1) of the Act, of delivery of nomination form between 11.00 a.m. and 3.00 p.m. is mandatory in nature. It is further laid down that the defect of filing nomination form after the time fixed in section is of substantial character for the purpose of section 36 (4) of the Act and such nomination form needs to be rejected in view of provision of section 36 (2) (b) of the Act. The provision of section 36 (2) (b) of the Act runs as under :-

"36. Scrutiny of nominations.- (1)

(2) The returning officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination, and may, either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary, reject any nomination on any of the following grounds:-

(a)

(b) that there has been a failure to comply with any of the provisions of section 33 or section 34;"

While deciding the case of **Harjit Singh Mann** cited supra, the Apex Court referred the case reported as **40 TLR 395 [Cutting Vs. Windsor]**. In this case, the observations are made that RO has no power to extend the time for delivery and these observations are used by the Apex Court.

31) The learned Senior Counsel for petitioner placed reliance on some observations made by the Apex Court in the case reported as **(2012) 1 SCC 762 [Ramesh Rout Vs. Rabindra Nath Rout]**. The Apex Court has considered para 13 (b) of Election Symbol Order, 1968. The Apex Court has also considered para 9.6 of Chapter VI of the Hand Book issued by Election Commission for reference, for the use of RO. Para 13 (b) of Election Symbol Order, 1968 is as under :-

"13. When a candidate shall be deemed to be

set up by a political party.- For the purposes of an election from any Parliamentary or Assembly Constituency to which this Order applies, a candidate shall be deemed to be set up by a political party in any such Parliamentary or Assembly Constituency, if, and only if-

(a)

(b) a notice by the political party in writing in Form B, to that effect has, not later than 3 p.m. on the last date for making nominations, been delivered to the Returning Officer of the constituency;"

The observations with regard to para 9.6 of Hand Book are at para No. 26 of the reported case and they are as under :-

"26. Para 9.6 sets out some of the defects which may be treated by the Returning Officer as defects of substantial nature. It, inter alia, provides that failure to submit written authorisation form from the political Party, within the prescribed time and in the prescribed form, where a candidate claims to have been set up by a national or State party, is a defect of substantial nature. Para 10.3 says that the nomination paper filed by a candidate claiming to have been set up by a recognised national/State party subscribed by only an elector as proposer is liable to be rejected, if a notice in writing to that effect has not been delivered to the Returning Officer of the constituency by an authorised office-bearer of that political party by 3 p.m. on the last date for making nominations in Forms

A and B devised by the Commission for the purpose under Para 13 of the 1968 Order."

The Apex Court has laid down that non compliance of provision of para 13 of Election Symbol Order 1968 is defect of substantial character and nomination paper of candidate of political party, having such defect, is liable to be rejected in view of provision of section 36 (2) (b) of the Act. The Apex Court has laid down that such non compliance tantamounts to non compliance of provision of section 33 of the Act viz. the nomination papers, having not been completed in the prescribed form.

32) On the aforesaid point, the learned counsel of RC placed reliance on some observations made by the Apex Court in various cases like **AIR 1954 SC 513 [Vashist Narian Sharma Vs. Dev Chandra and Ors.]** and submissions were made that the meaning of the term 'materially affected' used in section 100 (1) (c) of the Act given in these cases need to be used and the petitioners need to further prove that the result of the election has been materially affected due to aforesaid non compliance. The other cases referred are as as under :-

(i) 1957 SCR 179 [Surendra Nath Khosla and Anr. Vs. Dev Chandra and Anr.]

(ii) 1968 DGLS (Soft.) 191 [Paokai Haokip Vs.

Rishang]

(iii) 1992 DGLS (Soft.) 855 [J. Chandrasekhara Rao Vs. V. Jagapathi Rao]

(iv) 1999 DGLS (Soft.) 228 [Uma Ballav Rath Vs. Maheshwar Mohanty]

(v) (2001) 3 SCC 290 [Tek Chand Vs. Dile Ram]

(vi) (2016) 10 SCC 715 [Rejendra Kumar Mesharam Vs. Vanshmani Prasad Verma and Anr.]

(vii) MANU/SC/1361/2016 [Mairembam Prithviraj and Ors. Vs. Pukhrem Sharatchandra Singh and Ors.]

In all the aforesaid cases cited for the RC, the meaning of the term 'result materially affected' is given and circumstances of those cases are discussed. The point like filing nomination paper beyond fixed time, breach of provision of section 33 (1) of the Act was not involved in those cases and further, not filing A, B forms within the fixed time was also not squarely involved. Thus, on this point, the aforesaid cases cannot be of help to RC.

33) In view of the wording of provision of section 33 (1) of the Act and the object behind this provision, which is discussed by the Apex Court in the cases cited supra, this Court holds that if the petitioners are able to prove that A, B forms were not filed before 3.00 p.m. of 27.9.2014, the election of RC - Arjun Khotkar needs to

be declared as void. For considering the rival contentions in this regard, the Court is expected to keep in mind that the RC has admitted that A, B forms were presented by him along with nomination form Nos. 43 and 44.

34) For proving the aforesaid contention, the petitioner from Election Petition No. 6/2014 is relying on his evidence, the evidence of ARO Shri. Labade and other circumstances. The circumstances are like giving of complaints by him and other candidates about the incident of acceptance of nomination forms of RC on 27.9.2014 after 3.00 p.m. and also the record of other nomination forms and record of video recording of the incidents done at the instance of Election Commission.

35) Petitioner - Kailash Gorantyal has given evidence at Exh. 36. This evidence is mostly as per the contentions made in the petition which are already quoted. He has deposed that nomination form Nos. 43 and 44 were delivered by RC to RO after 3.00 p.m. of 27.9.2014 and A, B forms were also filed by RC after 3.00 p.m. and probably, they were filed with nomination form No. 44. RO has given evidence that A, B forms were filed along with nomination paper No. 43. As both nomination paper Nos. 43 and 44 were filed together, it is not that material as to whether the A, B forms were filed with

nomination form No. 43 or nomination form No. 44.

36) Petitioner Gorantyal has given evidence that just prior to 3.00 p.m. of 27.9.2014 ARO Shri. Labade collected nomination forms from intending candidates and proposers when those persons were standing in queue in the passage situated outside of the office of RO. He has deposed that nomination forms of RC were not handed over to Shri. Labade and RC was not present there at the relevant time.

37) Petitioner Gorantyal has then given evidence that the RC handed over the nomination forms to RO at 3.53 p.m. on 27.9.2014. He has deposed that the forms were handed over by the proposers of RC to him in the office of RO and then the RC handed over the first set to RO and second set to the staff of RO. Gorantyal has deposed that the incident of presentation of nomination forms by RC was over at 4.05 pm. of 27.9.2017. Gorantyal has deposed that though the nomination forms (Sr. Nos. 43 and 44) were handed over at 3.53 p.m, the RC intentionally mentioned the time as 2.20 p.m. on the check list, record of the RO. Gorantyal has deposed that on the basis of the time shown in the wall clock fixed in the office of RO, it was clear that the RC had entered the office at 3.53 p.m. and had left the office at 4.05 p.m. Gorantyal has given evidence that video

recording of this incident was done in the office of RO.

38) Gorantyal has given evidence on the basis of other record that it was not possible for RC to remain present before RO at 2.20 p.m. for handing over the nomination forms or for collecting the check list. He has given evidence that as per the record, candidate Arvind Chavan was present before RO between 2.15 p.m. and 2.30 p.m. Gorantyal has given evidence that candidate Arjun Dadapatil Bhandagare gave complaint after the aforesaid incident on the same day. He has deposed that he had also given complaint on 27.9.2014 in respect of this incident and when RO asked him to substantiate the allegations, he informed that the allegations can be substantiated on the basis of video recording done at the instance of Election Commission. Gorantyal has deposed that video CDs were shown to him after making of complaint by him, by the officers of Election Commission in the same campus on 28.9.2014 and from that recording he confirmed that the RC had entered the office of RO at 3.50 p.m. He has deposed that after confirmation, he gave objection to the nomination of RC on 29.9.2014 at 11.00 a.m., but without giving reasons, the RO rejected that objection.

39) For corroboration, the petitioner from Election Petition No. 6/2014 has placed reliance on the record and objections filed by

him before RO.

40) In the cross examination of Gorantyal, only political rivalry between him and the RC is brought on the record. It is also suggested that the witness Bhandagare mentioned in the petition was worker of Congress I party.

41) ARO Labade (PW 2) is examined by petitioner from Election Petition No. 6/2014 and Labade has given evidence on the incident of collecting nomination forms by him in aforesaid passage just before 3 p.m. of 27.9.2014. His evidence shows that all the nomination forms which were tendered by intending candidates or their proposers were collected by him and he handed over those forms to RO. In his evidence, the check list given to RC in respect of form No. 43 is proved as Exh. 58 as the contents of check list were filled by him.

42) In the cross examination of Labade, it is not specifically suggested to him on behalf of RC that RC had handed over the nomination form Nos. 43 and 44 to him in aforesaid incident. It is only suggested to Labade that when Labade was collecting nomination forms in passage, the RO was accepting the nomination forms, which were presented before her directly by the candidates.

This suggestion is admitted by the Labade.

43) In the cross examination, surprisingly Labade has tried to say that he has no knowledge about the use of movable video cameras by the office of Election Commission for recording the incidents of presentation of nomination forms and its acceptance by RO. The information recorded in VCDs, which is being discussed afterwards shows that for most of the time, Labade used to remain present in the office of RO and he used to sit by the side of RO. There is specific evidence of RO that Shri. Labade was assigned the work of supervision of the video recording. He has tried to say that CC TVs were fixed in the office. There is no such record and the RO has not given evidence that CC TVs were fixed in the office. This Court has also perused the entire record to ascertain as to whether CC TVs were fixed in the office of RO, but the record does not show that CC TVs were used.

44) In Election Petition No. 9/2014, petitioner - Vijay Chaudhary has given evidence which is similar to the evidence of Gorantyal. In the cross examination of this petitioner, it is brought on the record that he witnessed the incident of collection of nomination forms which was going on in the passage through grill gate of the office and he was present in the campus at the relevant

time, from 1.45 p.m. to 5 to 5.15 p.m. on 27.9.2014. He has admitted that on the basis of video recording done at the instance of Election Commission, he is saying that the RC actually handed over the nomination forms after 3.00 p.m. of 27.9.2014 to RO. Thus, to the some extent, in the cross examination of Vijay Choudhary, it is brought on the record that he was present in the vicinity of the office of RO.

45) In the cross examination of Vijay Choudhary, it is brought on the record that he has been working for Congress I party, the party of which Gorantyal was candidate. It is suggested to Choudhary that most portion of his petition is copy of petition of Gorantyal. Though he has denied that suggestion, if the contents of the two petitions are compared, it is very easy to infer that most of the portions from the petition of Gorantyal are copied in the petition of Choudhary. However, in the petition filed by Gorantyal, there is specific pleading that Vijay Choudhary was witness to the incident.

46) In Election Petition No. 9/2014, RO Smt. Manjusha Mutha is examined by Vijay Choudhary. After bringing some evidence on record in examination in chief, Smt. Mutha was cross examined by learned counsel for Vijay Choudhary in Election Petition No. 9/2014 (Permissin was given for that by this Court in view of the

nature of replies given by Smt. Mutha). In the chief examination, RO had started giving evasive answers when learned counsel started asking her questions with regard to the relevant incident, incident of video recording, incident of handing over and acceptance of nomination papers of RC. The demeanor of RO is noted by this Court in her evidence. The learned Senior Counsel for Gorantyal, petitioner from the other proceeding was also allowed to cross examine this witness by this Court. This lady admitted virtually everything suggested to her by the learned counsel of RC in the cross examination.

47) In the cross examination of Smt. Mutha, RO, it is brought on the record that entries of nomination forms received by her were made in the register of nomination forms and time was also mentioned about the acceptance of the nomination forms. It is brought on the record that she used to make preliminary examination of the forms and then she used to inform the discrepancies appearing in the nomination forms in writing by giving check list to the candidates.

48) The evidence in cross examination of Smt. Mutha shows that when Labade was sent to the passage for collecting nomination forms, she continued to accept the nomination forms directly from

intending candidates and their proposers in her office. Her evidence shows that on 27.9.2014 the last nomination form which was directly presented to her was form No. 38 of Anand Mhaske. The time of receipt of this form was mentioned in the register of nomination forms as 2.55 p.m. In respect of subsequent nomination forms from Sr. Nos. 39 to 64, the time of acceptance is mentioned as 3.00 p.m. Smt. Mutha admits that the candidates of nomination form Nos. 39 to 64 (form No. 64 was the last form filed) were not present before her physically at 3.00 p.m. At the cost of repetition, it needs to be mentioned here that form numbers of RC are 43 and 44. The oral evidence and the record like register of nomination forms does not show that form Nos. 43 and 44 were presented to RO at 2.20 p.m. of 27.9.2014. As per the evidence of Smt. Mutha and the record, one Arvind Chavan, a candidate having form Nos. 33, 34 and 35 was present before her between 2.15 p.m. and 2.30 p.m. In nomination form register, there is no entry showing that any nomination form was received at 2.20 p.m. Form Nos. 36 and 37 of Sunil Khare were entered in the register at 2.40 p.m. Thus, according to Smt. Mutha, form No. 38, which was accepted by her directly from the candidate was tendered to her at 2.55 p.m. of 27.9.2014 and after that she had done preliminary examination of form No. 38 and check list was given by her to that candidate. Thus, it is not possible that form Nos. 43 and 44 were directly handed over

to Smt. Mutha by RC at 2.20 p.m. or even at 3.00 p.m. of 27.9.2014.

49) Smt. Mutha (PW 2) did not show the time as 2.20 p.m. of handing over the check list to RC and she showed the time as 3.00 p.m., but this time was shown in respect of all forms starting from Sr. Nos. 39 to 64. Thus, substantive evidence of Smt. Mutha and the aforesaid record falsifies the contention of the RC made in the pleading that he had handed over the nomination forms (form Nos. 43 and 44) directly to RO prior to 3.00 p.m., at 2.20 p.m.

50) This Court has prepared the transcript of the video CDs produced by Election Commission as the original record of the incidents of presentation of the nomination forms and acceptance of nomination forms by the RO. This record was produced as original record by Election Commission and there was such order made by this Court. This Court had also made an order to see that necessary certificate as required under the Evidence Act is produced along with the record. The Election Commission has produced VCDs as original record before this Court with one certificate, the contents of which will be quoted at later place. The VCDs produced were marked for identification by the office of Election Commission and in the evidence of RO Smt. Mutha, it is brought on the record that under

her instructions the VCDs were marked. Though Smt. Mutha tried to avoid her responsibility by saying that she had appointed a team to do the video recording and it was their responsibility to take care of the video recording, as Controlling Officer and as per the responsibility fixed on her by Election Commission, she was expected to oversee the video recording and preserve the record of that incident. In view of guidelines given to RO by Election Commission, this Court is expected to go with the presumption that this record was created and preserved as per the instructions of RO and she had control over this record.

51) The transcript of video recording appearing in the VCDs was prepared by this Court in the presence of the learned counsels of both the sides. Other persons including the parties were allowed to remain present with the counsels as the information was to be supplied to identify the persons appearing in the video recording. Such information was supplied by both the sides. It is already observed that copies of transcripts were supplied to the RO. She was confronted with the transcript by the learned counsel of one petitioner during the cross examination and it was open to her to again view the contents of VCDs and refresh her memory. In view of nature of duty of RO, it needs to be presumed that she had viewed the video recording regularly. The evidence on record shows that

Gorantyal was allowed to view the contents by RO when he had come with the complaint. There are copies which were supplied by Election Commission to the petitioners and as they were produced along with the petitions. This Court prepared transcript of those CDs also. Transcript was not prepared by the petitioners or even by the Election Commission prior to that and no such transcript was made available. It appears that the time of leaving office of RO by the RC on 27.9.2014 is mentioned as 5.04 p.m. in transcript of copy supplied to petitioner due to oversight, when the correct time is 4.05 p.m. The time is recorded as 4.05 p.m. in the transcript of the VCDs produced as original record by the Election Commission. The objections to the admissibility of this record are discussed at later place.

52) The video recording appearing in VCDs which is in respect of the incidents in question was done at two places. The video recording was done outside of the office of the RO, in the passage situated outside of this office where there was queue of intending candidates and their proposers, who were waiting for their turn to hand over the nomination papers to RO. In other VCDs, there is video recording of actual incidents of handing over the nomination forms by various candidates to the RO. The VCDs produced by the Election Commission do not show that there was inbuilt facility in the

video cameras of showing time of recording.

53) The video recording done in the passage before 3.00 p.m. of 27.9.2014 as per the aforesaid oral evidence shows that in the crowd there were persons like Anirudha Khotkar, brother of the RC, Arjun Bhandarge etc. Adjacent to this passage, there was room of P.A. of RO and video shooting of that room was also done at the same time. This video shooting shows that Janardan Khotkar, proposer of RC and Shivaji Gonte, (man of RC) were present in room of P.A. One Dnyaneshwar Dongare, relative of RC was also present in the said room. As per the video shooting, there was nothing in the hands of all four persons of RC. The video shooting shows that RC was not there. Then the video shooting shows that ARO, Labade collected nomination forms from the persons standing in queue. Video shooting shows that nobody from aforesaid four persons, four men of RC, handed over anything to Labade, at that time. Thus, there is no information in VCDs that just before 3.00 p.m. when Labade collected nomination forms of persons who had come to the office prior to 3.00 p.m. to show that either the RC or his proposers or his other men had handed over his nomination forms (form Nos. 43 and 44) to Labade. The evidence of Labade, on the other hand, shows that the nomination forms collected by him were handed over by him to RO. This record shows that RC had not presented the

forms through Labade. The VCDs produced in the Court as original record show that one separate CD was prepared in respect of incident in question. There were other VCDs also, like 91/1 and 91/2 and in those VCDs there is relevant video shooting of the incident including the incident appearing in VCD No. 86.

54) The video shooting appearing in the VCDs shows that from 11.23 a.m. the candidates started presenting their nomination forms on 27.9.2014. The video shooting shows that the persons doing the video shooting were taking care to see that wall clock fixed on the wall of Office of RO was covered when they were recording the incident of handing over the nomination forms by the candidates to RO. The video recording contains the incidents starting from 11.23 a.m. The video recording shows that up to 2.00 p.m. the wife of Kailash Gorantyal, petitioner was before RO and she had also filed nomination form.

55) The video recording shows that at 2.10 p.m. candidate Deepak Babanrao Borde filed nomination form. The nomination papers were in his custody and he handed over those nomination forms to RO. After him, at 2.20 p.m. candidate Arvind Chavan came with his nomination papers and handed over the nomination papers to RO. Candidate Chaus filed nomination form at 2.35 p.m.

Candidate Khare handed over his nomination papers at 2.39 p.m. and they were form Nos. 36 and 37. One candidate (name not mentioned in the transcript) filed nomination form at 2.55 p.m. before RO directly. The last candidate who directly handed over nomination form to RO did it at 2.58 p.m. (name of that candidate is also not mentioned in the transcript). This last candidate was before RO till 3.04 p.m. Thus, the video shooting of the incident also does not show that the RC was present before RO at 2.20 p.m. or at 3.00 p.m. or at any time before 3.00 p.m. for handing over his nomination forms (form Nos. 43 and 44) directly to RO. If this video recording is accepted in evidence, it falsifies the case of RC that he had handed over the nomination forms to RO directly prior to 3.00 p.m. of 27.9.2017.

56) After 3.00 p.m. one candidate filed nomination form, that was at 3.20 p.m. At this time, Labade was in his chair in the hall of RO. After this, candidate Wagh handed over his papers and at that time, Labade was not seen in his chair in the hall of RO. Thus, Labade left the hall of RO at about 3.20 p.m. and as per the video recording, he returned with bunch of papers, nomination forms to the hall of RO at 3.30 p.m. At 3.30 p.m. candidate Wagh, one Advocate (candidate of form No. 40), Arvind Chavan (candidate of form Nos. 33 to 35) and Khushalsing (candidate of form No. 41)

were present in the hall of RO. The video shooting shows that Khushalsingh was there up to 3.50 p.m. The video recording shows that at 3.20 p.m. RO was talking on her mobile hand set. It shows that at 3.35 p.m. Labade was having talk with somebody on his mobile hand set. The video recording shows that at 3.37 p.m. RO was having talk with somebody on her mobile hand set.

57) The video recording appearing in VCD No. 92/2 shows that the RC entered in the hall of RO at 3.53 p.m. The video shooting shows that the nomination papers were with his proposers. The first set of papers was handed over to RC by his proposer and that set was handed over by RC to RO. The second set was then handed over to RC by his proposer and this set was handed over to the staff of RO by RC. It is clear in the video recording that after that RC asked RO as to whether only one set of A, B forms was sufficient. This video recording shows that both the nomination forms (form Nos. 43 and 44) were handed over to RO by RC after 3.53 p.m. of 27.9.2014 and A, B forms were also handed over after 3.53 p.m. of 27.9.2014. The video recording shows that the two check lists were supplied to the RC and he signed on that before RO after 3.53 p.m. and he left the office of RO at 4.05 p.m. The transcript of VCD No. 86, which was supplied to petitioner by the office of Election Commission is similar in respect of this incident.

58) Thus, the record in respect of video recording of incident done at the instance of Election Commission shows that neither RC nor his proposers had handed over the nomination forms (form Nos. 43 and 44) and forms A, B to Labade nor to RO prior to 3.00 p.m. The video recording shows that prior to 3.00 p.m. RC was not present in the passage where the intending candidates and proposers were waiting. He was also not present in the room of P.A. of RO. The video recording shows that RC entered the office of RO first time at 3.53 p.m. of 27.9.2014 and after that, he handed over the nomination forms which were with him (with his proposers). If the forms were already handed over to Labade, the proposers could not have handed over the forms to RC for presenting them before RO. Thus, only inference possible is that nomination forms and A, B forms were in custody of RC till 3.53 p.m.

59) During cross examination of RO Smt. Mutha, she was shown the record like register of nomination forms and the forms and the check list bearing endorsement with regard to time. She was also confronted with the transcript of video recording showing that the time of incident of handing over of the nomination forms to RO by the candidates. Surprisingly, Smt. Mutha, RO tried to say that the time was mentioned by her was on the basis of the time shown by

her mobile hand set and not the time shown by wall clock. To ascertain as to whether there is such possibility, the video recording and the aforesaid record was together confronted and it showed that time mentioned on record like register of nomination forms and check list tallies with the time appearing in the wall clock. This was with regard to the forms which were directly presented to the RO. It is already observed that the RO mentioned the same time as 3.00 p.m. as the time of presentation of nomination forms No. 39 to 64 and so, the time is mentioned accordingly, on the nomination forms starting from Sr. No. 39 and also in the register. The video recording shows that the candidates in respect of whom the time of receipt is shown as 3.00 p.m. were brought before her after 3.00 p.m. They mentioned the time as 3.00 p.m. The defence of the RC that he had filed the nomination forms (form Nos. 43 and 44) prior to 3.00 p.m. could have been considered if it was specific defence that RC had handed over the forms through proposers to Labade prior to 3.00 p.m. There is no such specific defence and further, the video recording shows that the forms were not handed over to Labade and even at 3.53 p.m. nomination forms with A, B forms were with RC. These circumstances are sufficient to prove that A, B forms were not handed over to RO prior to 3.00 p.m. by RC. These circumstances further show that neither Labade nor Smt. Mutha acted fairly during the process on that day. They tried to hide material information even

from this Court when aforesaid record was before this Court and it was confronted to them. It is clear that they did not act honestly. Such Officers cause damage to the democratic set up and due to conduct of such officers, the persons like RC get encouraged and they show courage to influence the officers involved in the work of election.

60) Many applications were given by the petitioner of Election Petition No. 6/2014 to get the copies of electronic record in respect of aforesaid incidents with certificate as provided in section 65-B of the Evidence Act. The correspondence made with them show that even after leaving of the office by Smt. Mutha, the Government machinery, incharge of the record, intentionally avoided to give certificate as mentioned in section 65-B of the Evidence Act. After production of the record in the Court in this regard, this Court had allowed to Election Commission by order to give copies of such record to applicants, but after that also the authority avoided to give copies by giving lame excuses. It needs to be kept in mind that the RC is from political party which has alliance with ruling party, BJP, not only in the State, but also at the center. It is unfortunate that the machinery which is expected to be fair did not act fairly in the present matter. The circumstances of the present matter show that the aforesaid two officers tried to cover up their mischief. However,

the material gives only one inference that nomination forms Nos. 43 and 44 with A, B forms were presented before the RO by RC after 3.00 p.m. of 27.9.2014 and they were not handed over prior to 3.00 p.m. In view of objection of the learned counsels of the RC to using the information contained in aforesaid VCDs, marked as Article A1 to A6, this Court had made order on 11.7.2017 that the objections will be considered in the judgment itself. This VCDs are already exhibited by this Court as Exhs. 70 to 75. Thus, if the contents of the aforesaid VCDs can be used in the evidence, then the petitioners are bound to succeed in the present matters.

61) Challenge to the evidence of electronic record, VCD Nos. A1 to A6 is mainly on the procedure which is given under section 65-B of the Evidence Act. The relevant provisions are as under :-

"65-A. Special provisions as to evidence relating to electronic record.- The contents of electronic records may be proved in accordance with the provisions of section 65-B.

65-B Admissibility of electronic records. -(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions

mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely:-

(a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the

said activities.

(3)

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,-

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate,

and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it."

62) The wording of section 65-B quoted above shows that the provision is about the copy of information produced by the computer (computer out put). Such copy of information contains

facts, of which direct evidence would be available. In the present matter, RO and ARO have avoided to give direct evidence and other persons available are the RC and his proposers. RC has avoided to step in to witness box and no defence witness is examined by RC. Thus, the petitioners are required to place reliance to much extent on the contents of aforesaid VCDs.

63) RO has given evasive answers to many questions and even the record produced by the Election Commission does not show the kind of video camera or it's make, used for the video recording in question. It is brought on the record that it was handy movable camera. Though it is contended in the correspondence made by the Election Commission with this Court that VCDs A-1 to A-6 produced in the Court are original record of video shooting, it is necessary for this Court to ascertain as to whether this record can really be treated as original record. It appears that on the basis of VCDs, (marked as 91/1 and 92/2), copies were supplied to petitioners by giving them number like CD No. 86. The covering letter filed with electronic record by Election Commission bears following certificate.

"प्रमाणपत्र

प्रमाणीत करण्यात येते की, दिनांक २६/०९/२०१४ रोजीची व दिनांक २७/०९/२०१४ रोजी नामनिर्देशनपत्र दाखल केलेल्या दिवसाची निवडणुक निर्णय अधिकारी यांच्या चेंबर मधील व तसेच बाहेरील व्हिडीओ रेकॉर्डची सी.डी. कार्यालयातील

उपलब्ध असलेल्या अभिलेखातुन देण्यात आलेल्या आहेत.

सही / —
सहा.निवडणुक निर्णय अधिकारी
१०१ जालना विधानसभा मतदार संघ
तथा तहसिलदार जालना

सही / —
निवडणुक निर्णय अधिकारी
१०१ जालना विधानसभा मतदार संघ
तथा तहसिलदार जालना"

"Certificate

This is to certify that the CDs in respect of video recording done on two days of filing nomination forms of dated 26.9.2014 and 27.9.2014 which were present in the record are produced.

Sd/-
Asst. Returning Officer
101 Jalna Legislative Assembly
Constituency/Tahsildar
Jalna

Sd/-
Returning Officer
101 Jalna Legislative Assembly
Constituency/Tahsildar
Jalna"

64) The pleadings in the written statement of RC shows that he has contended that it is not correct record and it is fabricated record. The allegation is made directly even against Election Commission. It is true that while preparing the transcript, this Court also noticed that there was no apparent continuity, however, every incident of handing over nomination paper and it's acceptance by RO was completely recorded and the incident in question in respect of RC was also complete, without any break. It is also true that this Court noticed that one old VCD was used and on that VCD, in the past, there was recording of incident of one marriage. This circumstance shows the carelessness on the part of RO, the failure of that officer in discharge of proper duty assigned to her. Whether the benefit of this circumstance can be given to RC is a question and

that needs to be considered in the present matters. It can be said that due to aforesaid circumstances, to save the skin, to cover up the mischief, there was no other alternative before RO and ARO than to give the evidence of aforesaid nature.

65) The learned Senior Counsel for petitioner Gorantyal has placed reliance on observations made by the Apex Court in the case reported as **(2014) 10 SCC 473 [Anvar P.V. Vs. P.K. Basheer and Ors.]**. It is observed by the Apex Court in this case that if the original electronic record itself is produced in the Court under section 62 of the Evidence Act, then the same is admissible in evidence without compliance of the conditions mentioned in section 65-B of the Evidence Act. However, at para No. 22 of the judgment, the Apex Court has observed that in case of CD or VCD, the same needs to be accompanied by the certificate in terms of section 65-B of the Evidence Act. The facts of the reported case show that it was not the CD, VCD of the record of Election Commission or the information collected by Election Commission. The Apex Court has laid down that in view of the provisions of sections 59 and 65-B of the Evidence Act, the provisions of section 63 and 65 of the Evidence Act are not applicable to electronic record and the same is wholly governed by provisions of section 65-A and 65-B of the Evidence Act. Thus, in the present case also, it can be said that the certificate as required under section 65-B of the Evidence Act was necessary. The original

record of CDs shows that CDs which are marked as A-1, A-3, A-4, A-5 and A-6 by Election Commission do not have the description as to whether they are only recordable or rewriting of the matter is possible on the CDs. Only the name of company is there. The CDs which are material in the present matters are 91/1 and 91/2 and the contents are already discussed. In all these CDs, only the CD which is marked as A-2 is having description, which is of Soni Company compact disk and it is recordable and it is shown as CD-R. Due to these circumstances and the aforesaid position of law, this Court holds that these C.Ds. cannot be treated as original record though Election Commission has contended that it is original record of the Election Commission.

66) It is already observed that Election Commission has not given certificate as envisaged under section 65-B of the Evidence Act along with the aforesaid record. In view of the duties assigned to RO, it was RO, who was expected to create the record as envisaged under section 65-B of the Evidence Act. When public authorities hire services on contract basis for doing video shooting, it becomes duty of such officers to create the record as required by section 65-B of the Evidence Act. If RO is satisfied about the compliance of conditions mentioned in section 65-B already quoted, then in view of the provisions of the same section, she becomes entitle to issue certificate mentioned in section 65-B of the Evidence Act.

67) The learned counsel for RC has brought on record during cross examination of RO that there are instructions issued by the Election Commission (16.7) to the effect that the Election Commission is not expected to verify the authenticity or veracity of the contents of CDs and CDs can be made available on "as is basis". The learned counsel for RC submitted that due to this circumstance, the provision of section 65-B of the Evidence Act cannot be used in respect of electronic record. This submission is not at all acceptable.

68) At Exh. 35, there is the compendium (Volume II) and instruction No. 92 (para No. 7), which show that in the year 2007 instruction was issued that video recording of these incidents need to be made showing the time. At para 10.4 of Chapter No. 5 of Hand Book, Exh. 65 also there is such instruction. In the recent instructions issued in the year 2015 also, the ROs are directed that the videography of nomination filing process should run uninterruptedly during last hour even if no candidate is inside of the room. It can be said that all this procedure is prescribed by the Election Commission only to see that the provision of section 33(1) is strictly complied with. The aforesaid rider that the record can be supplied on "as is basis" cannot be read against the directions given to have videography of the incident to see that there is strict compliance of provision of section 33(1) of the Act. So, this Court holds that this rider cannot be used by the Election Commission and

it is bound to supply certified copies as provided under section 65-B of the Evidence Act of this electronic record also. Unless that is done the officers involved in the process will not feel that the mischief of aforesaid nature will be exposed and they will not dare to do such mischief. This Court has already observed that positive attempt was made by both RO and ARO to suppress the mischief in the present matters. This electronic record needs to be treated as the record of Election Commission prepared for compliance of the provisions of the Act which are mandatory in nature and the officers cannot refuse to issue certificate as required under section 65-B of the Evidence Act. If the provisions are read this way, then only officers will take care to see that the record is properly prepared and is maintained properly.

69) In substantive evidence, in the cross examination of Smt. Mutha, it is brought on the record that there was no complaint with regard to working of video cameras used by the office. She has admitted that the video cameras were regularly used in the office for recording the aforesaid incidents and daily VCDs were collected of the recording by her office. This record was created as the record of the activities of the Election Commission. It is brought on the record that on the first floor of the building, arrangement was made by keeping electronic gazettes like VCR players etc. and arrangement

was made for viewing the recording. It is already observed that under her instructions, the VCDs were marked of this recording. Thus, on the basis of her substantive evidence, it can be said that the conditions mentioned in section 65-B of the Evidence Act are fulfilled and she is certifying the electronic record as required by section 65-B (4) of the Evidence Act. It can be said that Election Commission, the machinery avoided to give certificate in writing as required by section 65-B (4) of the Evidence Act. But, substantive evidence is brought on record of competent officer in that regard. When the certificate expected is required to be issued on the basis of best of knowledge and belief, there is evidence on oath about it of Smt. Mutha. Thus, there is something more than the contents of certificate mentioned in section 65-B (4) of the Evidence Act in the present matters. Such evidence is not barred by the provisions of section 65-B of the Evidence Act as that evidence is only on certification made by the responsible official position like RO. She was incharge of the management of the relevant activities and so, her evidence can be used and needs to be used as the compliance of the provision of section 65-B of the Evidence Act. This Court holds that there is compliance of the provision of section 65-B of the Evidence Act in the present matter in respect of aforesaid electronic record and so, the information contained in the record can be used in the evidence.

70) The learned Senior Counsel for petitioner Gorantyal placed reliance on some observations made by the Madras High Court in the case reported as **2016 CRI.L.J. 1542 [K. Ramajayam Vs. The Inspector of Police] decided on 27.1.2016**. The Division Bench of Madras High Court referred the case of **Anvar** cited supra and it is further observed that if the certificate is not obtained at the time of collection of evidence, at the time of trial, the evidence of such person, who could have issued such certificate can be given. This Court holds that the observations made by the Division Bench of Madras High Court needs to be used in the present matters in view of the peculiar situation created by the officers of Election Commission. If that is not done, it will not be possible to uphold the truth and the officers will continue to use such modus operandi in future also. Further, the provision of section 114 of the Evidence Act is available and adverse inference becomes available due to the aforesaid conduct of the officers of Election Commission and the conduct of the RC, who has avoided to enter witness box.

71) Due to existence of aforesaid circumstances, it was necessary for RC to step in witness box and explain the things. The RC has only contended that Election Commission has created false record against him, there is manipulation. When the record is

accepted by the Court by marking it as exhibit and there are aforesaid circumstances, it was necessary for the RC to give evidence in rebuttal. He could have taken steps to give expert evidence as provided under section 45 of the Evidence Act as he had come with the case that there was fabrication, manipulation. This was not done by RC. Due to the specific contentions of RC that Election Commission has manipulated the record, it was necessary for RC to prove the said manipulation or fabrication. That is not done and so the aforesaid evidence needs to be used against RC.

72) The other ground of challenge to the nomination forms of RC is that the nomination forms filed by RC were not in accordance with the provisions of law and they were not complete. It is specific contention that nomination form Nos. 10 and 44 were not accompanied with affidavits in Form No. 26 and only zerox copy of such form was annexed with these nomination forms. It is the contention of petitioners that the affidavits in Form No. 26 annexed to form Nos. 9 and 43 are not complete as they were not in prescribed format.

73) The provisions of law, which are relevant on aforesaid point can be found in section 33 and 33-A of the Act, Rule 4-A of the Conduct of Election Rules 1961 and Form No. 26 prepare under Rule

4-A of those Rules. On this point, both the sides have placed reliance on some reported cases which include the landmark case reported as **2002 CJ (SC) 1227 [Union of India Vs. Association For Democratic Reforms]** and the other cases, reported as **2003 CJ (SC) 792 [People's Union For Civil Liberties (Delhi) Vs. Union of India]**, **(2014) 14 SCC 162 [Kisan Shankar Kathore Vs. Arun Dattatray Sawant and Orss]**, **(2014) 14 SCC 189 [Resurgence India Vs. Election Commission of India and Anr.]** and **(2017) 2 SCC 487 [Mairembam Prithviraj alias Prithviraj Singh Vs. Pukhrem Sharatchandra Singh]**.

74) In the first case of **Association for Democratic Reforms** cited supra, which is landmark case, a direction was given by the Hon'ble Apex Court to Election Commission to call information in the form of affidavits on the assets, qualifications, involvement in offences of the candidates for judging their suitability. Rights of the electorals were considered by the Election Commission. In view of the directions given by the Apex Court, the provision of section 33-A was added in the Act. The second case of **People's Union For Civil Liberties** need not be discussed in the present matters. In the case of **Kisan Kothore** cited supra the aforesaid landmark decision was referred by the Apex Court and observations are made that it would depend upon facts and circumstances of the each case as to whether

the non disclosure of the information called by the Election Commission would amount to material lapse or not. If the non disclosure of material information as to his assets, and assets of spouse is there, the order of setting aside the election can be made as in view of the Article 19 (1) (a) of the Constitution of India voters have right to know assets and liabilities of contesting candidates. The Apex Court has discussed the guidelines of 2006, and also the provisions of sections 33 to 36 of the Act and section 100(1)(d) (i) (iv) and section 116-A of the Act for making these observations. It is made clear by the Apex Court that at the stage of scrutiny of the nomination itself, the RO can reject the nomination on any of the grounds stated in section 36 (2) of the Act and likewise nomination can be rejected where blanks are left in the affidavit (Form No. 26) by the candidate. The Apex Court has, however, expressed that the RO, at the stage of scrutiny of nominations, may not be able to conduct detailed examination on objections as to misinformation or suppression of material information in nomination and it is not permitted. It is observed that when election petition is filed, the detailed inquiry on such objections can be made by High Court and it can be determined whether nomination was properly accepted by Returning Officer or it was case of improper acceptance. It is laid down that the required information as per the format has to be given by the candidate. Similar observations are made in the case of

Resurgence India cited supra.

75) In view of the observations made in the cases cited supra, it becomes duty of RO to find out whether information required is furnished, though the RO is not entitled to make detailed inquiry at this stage. The observations show that the blank affidavit renders the affidavit nugatory. If blanks are left, that gives power to RO to reject the nomination itself as such omission, blanks will make it impossible for RO to exercise powers given under the Act. However, at that time, if the RO is satisfied that the necessary information as required by the aforesaid provision is supplied, he may not reject the nomination.

76) If the aforesaid position of law is kept in mind and the law is applied to the present matters, it can be said that nomination form Nos. 10 and 44 of RC, which were accompanied by zerox copies of Form No. 26, there was no original affidavit with these nomination forms, could not have been accepted by the RO. They were not complete as they were not accompanied by the information as required by the provisions of section 33-A of the Act and the Rules already mentioned.

77) With the nomination form Nos. 9 and 43, there was Form

No. 26. In Form No. 26, there was no column for supplying information in respect of dependent No. 3. In the form given under the Rules in particular at Sr. No. 4 of Part A, five column are shown and they are for self, spouse, dependent No. 1, dependent No. 2 and dependent No. 3. The RC filed the Form No. 26 along with nomination form Nos. 9 and 43, having the names of self, spouse, dependent No. 1 and dependent No. 2. Thus, there was no column prepared for dependent No. 3. Such information is again required to be filled in Part B of Form No. 26 at particular column No. 8. There also the column for dependent No. 3 is absent in Form No. 26 affidavit filed by the RC.

78) The learned counsels for petitioners submitted that as column for dependent No. 3 in Form No. 26 is absent, it needs to be presumed that the necessary information is not supplied by the RC. They submitted that after showing the column in form, the RC would have filled the column by using the word 'nil' and that was the requirement of law. On the other hand, the learned counsel for RC submitted that when the RC is not having dependent No. 3, there was no question of supplying such information by the RC and it cannot be said that the RC had suppressed information with regard to dependent No. 3. The learned counsel for RC submitted that in view of the position of law, which is given in the cases cited supra,

during trial it needs to be shown to the Court that information was really suppressed. The learned counsel submitted that there is no specific case in both the election petitions that any person, who can be called as dependent and whose information is not filled in Form No. 26 is in existence. There is force in this submission made by the learned counsel for RC. This Court holds that so far as information required in aforesaid particulars of Form No. 26 is concerned, it cannot be said that the form was not complete because one column for one dependent was not shown by the candidate. The Apex Court has laid down that detail inquiry is not possible from RO on few points and this point can be said to be such point. The point is now before this Court and this Court has no hesitation to hold that the RC has not suppressed information which was expected in particulars at the serial numbers given above in Form No. 26. No evidence is given by the petitioners to substantiate this contention of suppression. Thus, nomination form Nos. 9 and 43 could not have been rejected if they were filed within time and if there was no other circumstance for rejecting these nomination forms.

79) One more circumstance was argued like RO has pointed out some discrepancies at the time of preliminary examination. It was submitted that even when direction was given by RO to remove the discrepancies as mentioned above, the discrepancies were not

removed, and the candidate filed new, additional forms and so, nomination form No. 9 ought to have been rejected. This submission is also not acceptable. It is open to RO to point out the discrepancies noticed by him during preliminary examination done at the time of acceptance of nomination forms presented by the intending candidates and point out the deficiencies in check list. But that does not mean that the RO is bound to reject the nomination form due to the circumstance that such discrepancies were not removed before the date fixed for filing nomination form. This point remains open and at the time of scrutiny, the RO is expected to consider this circumstance. The RO is then expected to consider the requirements as quoted above and then to take decision as to whether the nomination form needs to be rejected during scrutiny. The discrepancy of the aforesaid nature was not such that on the basis of it nomination form could have been rejected by RO. So, this Court holds that there is no force in the second ground taken by the petitioners in both the petitions.

80) In view of the discussion made above, I answer issue No. 5 that as Form No. 26 filed with nomination form No. 9 was in conformity with the form as prescribed under the provisions of the Act, but form No. 26 filed along with nomination form No. 10 was not in conformity with the form prescribed under the provisions of

the Act. Issue No. 6 is answered in affirmative as nomination papers at Sr. Nos. 43 and 44 were not presented by RC before 3.00 p.m. of 27.9.2014. Issue No. 7 is answered in affirmative viz. A, B forms were presented after 3.00 p.m. of 27.9.2014. Issue No. 9 is answered as does not survive. Issue Nos. 10 and 11 are answered in affirmative .

Issue No. 12 :-

81) There was no separate issue on corrupt practice in both the matters. In view of the answers given to aforesaid issues against the RC, the relief of declaration that the election of RC is void needs to be given. The last relief like compensatory cost claimed in Election Petition No. 6/2014 need not be given due to peculiar circumstances of the matters. In Election Petition No. 9/2014, other relief of declaration that any other candidate be declared as duly elected is claimed. This Court holds that in view of the facts and circumstances of the present matters and as the provision of section 101 (b) shows that for getting such second relief, it is required to be proved that the RC obtained votes by corrupt practice, no such relief can be granted. So, issue No. 12 is answered in negative.

82) For the same reasons, in view of the provisions of section 99 of the Act and as the procedure given in section 99 of the Act was

not followed in the present matters, this Court holds that the names of the persons who were involved in corrupt practice cannot be mentioned under section 99 of the Act in the present order. In the result, following order is made.

ORDER

(I) Election Petition No. 6/2014 is allowed and Election Petition No. 9/2014 is partly allowed. The election of RC - Arjun Panditrao Khotkar from 101-Jalna Legislative Assembly Constituency is hereby declared as void. The costs shall be cost in cause. All Applications are disposed of accordingly.

(II) Registrar Judicial of this Court is to comply the provision of section 103 of the Act and communicate the decision as provided in section 103 of the Act to the authorities mentioned in the section.

[T.V. NALAWADE, J.]

After declaring the decision of these two election petitions, the learned counsels for RC filed separate applications at Exhs. 116 and 79 in Election Petition Nos. 6 and 9 of 2014, respectively for stay. Both the sides are heard.

Under the provision of section 116-B of the Act, there is discretionary power to this Court to grant stay. In view of the facts

of the present matters and as the discretionary power is vested in this Court, this Court holds that operation of this order can be stayed subject to some conditions to enable the RC to file appropriate proceeding for challenging the decision of this Court.

So, the operation of this order is stayed for 30 days, subject to condition that the RC will not be entitled to vote as Member of Legislative Assembly in any election and the RC will not be entitled to vote on any resolution in any body.

[T.V. NALWADE, J.]

ssc/