

HIGH COURT OF MADHYA PRADESH
BENCH AT INDORE

Election Petition No.23 of 2014

Balmukund Singh Gautam
Vs.
Smt. Neena Vikram Verma

Shri A.M.Mathur, Sr. Advocate assisted by Shri Abhinav Dhanodkar and Shri Vaibhav Asawa, Advocates for the petitioner.

Shri C.L.Yadav, Senior Advocate assisted by Shri Ajay Lonkar, Advocate for the respondent.

Shri Samaerjeet Singh, Advocate for the noticees – Vikram Verma and Anant Agarwal.

Shri H.Y.Mehta, Advocate for the noticees – Ashok Jain, Sanjay Vaishnav and Devendra Patel.

Shri Dharmendra Patel and Jitendra Shah, Advocates for the noticee- Vinod Soni.

Shri Prakhar Karpe, Advocate for the noticee – G.S.Baghel.

Whether approved for reporting: Yes:

Corrupt practice:

To constitute any 'statement of fact' as corrupt practice under section 123(4) of the R.P.Act, the same must reflect on personal character or conduct of the candidate. Further, an element of *mens rea* is a necessary ingredient of such alleged corrupt practice because the provision under section 123(4) of the R.P.Act does not accept the doctrine of constructive knowledge. To bring the alleged 'statement of fact' related to the personal character or conduct of any candidate within the mischief of sub-section (4) of section 123 of the R.P.Act, it has to fulfill three-fold requirement; (i) the statement of fact was false; (ii) the candidate making it either believed it to be false or does not believe it to be true; and (iii) such statement reasonably calculated to prejudice the prospects of the election of the candidate against whom it is made. The person challenging the election on the ground of corrupt practice cannot take liberty of making any vague or reckless allegation, without establishing the correctness thereof by leading cogent evidence. But before the Court proceeds to investigate such allegations, the Court must be satisfied, that the material facts have been stated alongwith the full particulars of the corrupt practice, alleged by the petitioner and duly supported by an affidavit under section 83 of the R.P.Act. The Court is also required to assess the quality of evidence led by the parties critically as standard of proof of such allegation is the same as charge of a fraud in a criminal case.

The meaning of 'fact' in the realm of jurisprudence, relevant extracts from textbooks are as under:

"There is yet a third meaning of the expression 'question or matter of fact' in which it is contrasted with a question or matter of opinion. A question of fact is one capable of being answered by way

of demonstration a question of opinion is one that cannot be so answered. The answer to it is a matter of speculation which cannot be proved by any available evidence to be right or wrong. The past history of a company's business is a matter of fact; but its prospects of successful business in the future is a matter of opinion

(Salmond on Jurisprudence,
12th Edn., at page 69)

"Secondly, fact and opinion are frequently contrasted. Whether a company has been prosperous in the past is a matter of fact, whether it will fulfil the expectations aroused by its prospectus is a matter of opinion....."

(A Textbook of Jurisprudence
by George Whitecross Paton,
4th Edn., at page 207)

(Emphasis supplied)

In Stroud's Judicial Dictionary, 4th Edn., the meaning of the expression "false statement of fact in relation to the personal character or conduct" of a candidate at a parliamentary election is given as "of fact, as distinguished from a false statement of opinion".

(Emphasis supplied)

To bring the alleged statement of fact related to the personal character or conduct of any candidate within the mischief of sub-section (4) of section 123 of the R.P. Act, it has to fulfill three-fold requirement; (i) the statement of fact was false; (ii) the candidate making it either believed it to be false or does not believe it to be true; and (iii) such statement reasonably calculated to prejudice the prospects of the election of the candidate against whom it is made. Further, an element of *mens rea* is a necessary ingredient of such alleged corrupt practice because the provision under section 123(4) of the R.P. Act does not accept the doctrine of constructive knowledge.

The alleged statement 'that he will capture the bhoot and bury it in the village Lebad where the petitioner resides.' even *prima facie* does not suggest that this statement of fact is based upon past event within the meaning of section 123(4) of the R.P. Act relating to the personal character or conduct of the petitioner. Assuming that such statement was made, it was a mere conjecture as the word 'bhoot' in fact and in effect is hypothetical in nature and not related to any event muchless, past event and if the event has not happened, the alleged 'statement of fact' cannot pass the test 'reasonably calculated to prejudice the prospects of that candidate's election' under section 123(4) of the R.P. Act. Hence, the statement cannot tantamount to corrupt practice within section 123(4) of the R.P. Act.

Admissibility of Electronic record as secondary evidence:

In *catena* of decisions, the Hon'ble Supreme Court has reiterated the law that if the statement is relevant to the matter in issue, an accurate tape-record of the statement is also relevant and the same is admissible in evidence, however, the time, place and accuracy of the recording must be proved by the competent witness and the voices must be properly identified as there is possibility of

erasing and reusing the magnetic tape recording medium, therefore, the evidence must be received with caution. The Court must be satisfied beyond reasonable doubt that the record has not been tampered with. If the tape was not sealed and was not kept in the safe authorized custody, the absence of sealing exposes the tape in the realm of admissibility and possibility of its being tampered with before it was played cannot be ruled out.

The certificates so issued by the witnesses in that behalf have to be in conformity with the provisions contained under sections 65(B) (2) and 65(B)(4) of the Evidence Act and in absence thereof, the certificates are inadmissible in evidence.

Significant paragraphs:

3 to 4 & 16 to 30

Election petition dismissed with cost

Reserved on: 08/03/2018

J U D G M E N T
(18/06/2018)

Rohit Arya, J.,

This election petition, under section 81 of the Representation of the People Act, 1951 (for short 'the R.P.Act'), has been filed calling in question the election of 201-Dhar (General) Assembly Constituency against the returned candidate with the symbol of '**Lotus**' ('**Kamal**'); a candidate of the Bhartiya Janta Party, a recognized national political party, by the defeated candidate with the symbol of 'Hand' ('**Panja**'); Indian National Congress', a recognized national political party having lost with a margin of 11,482. Out of the total votes polled i.e. 171354, the returned candidate polled 85624 votes whereas the defeated candidate polled 74142 votes as per the certificate issued by the Returning Officer in form 21-E (Annexure P/1).

2. My predecessor (Shri Justice Alok Verma) has framed six issues with sub-issues under issue Nos.(1) & (2) vide order dated 27/08/2015. Vide order dated 08/03/2018, this Court has recorded that both the parties have addressed the Court on issue Nos.2(e), 2(f) & 2(h) only as regards the corrupt practices as defined under section 123(2) & 123(4) of the R.P.Act, referable to paragraphs 9(k), 9(l) and 9(n) of the election petition and had given up other issues framed by this Court on 27/08/2015. As such, for ready reference issue Nos.2(e), 2(f) & 2(h) are reproduced below:

“(i) Whether, in a public meeting held on 13.11.13, husband of respondent Vikram Verma used derogatory language against the High Court?

(ii) Whether, in the public meeting held on 13.11.2013, Ashok Jain gave a speech to incite Hindu feeling of voters?

(iii) Whether, on 17.11.2013, a meeting was organized at BJP office at Dhar in which election agent of respondent Antu @ Anant Agrawal asked the BJP workers to use all legal and illegal means for procuring votes in favour of respondent?”

Paragraph 9(k) referable to issue 2(e):

3. Shri A.M.Mathur, learned senior counsel appearing for the petitioner referring to contents thereof contends that a public meeting was organized by the respondent at 3.00 pm on 13/11/2013 at Rajwada *Chowk*, Dhar. The President of BJP, Rajnath Singh was the chief speaker. The stage of the meeting was shared by respondent in person and her husband, the noticee Vikram Verma alongwith other persons. Vikram Verma in his public address had criticized the judgment of the Hon'ble High Court with a remark that 'Gods do not sit in the High Court' and that main points were left out. He had further spoken that he will capture 'a bhoot' and bury it in the village Lebad; a village where the petitioner resides.' According to him, the aforesaid remark was referable to the petitioner which was with a calculated mind to malign his election prospects. Besides, the former statement was contemptuous to the Majesty of Law of the High Court. A complaint (Annexure P/18) was immediately made to the observer by Gangaram Joshi (P.W.17). The comments were called from the Video Observation Team through letter annexed as P/19 and the report in that behalf was submitted as Annexure P/20. As such, this act of the respondent and her husband is a corrupt practice within the meaning of section 123(4) of the R.P.Act.

To bolster and substantiate his submission, learned senior counsel has referred to paragraph 8 of the statement of P.W.1 Balmukundsingh Gautam wherein it is stated that he had applied for obtaining certified copy of the compliant vide exhibit P/6 which

is admissible in evidence. However, an objection has been raised by the respondent that the same was not admissible in evidence for the reason that the Tahsildar was not the Returning Officer who had issued the certified copy and, therefore, not competent to issue the same. The objection so recorded has been ordered to be dealt with at the time of hearing. The report was submitted by the In-charge, Video Observation Team to the Returning Officer vide exhibit P/7. Similar objection was raised in that behalf as well.

Learned senior counsel has also referred to paragraph 4 of the statement of P.W.14 Mukesh Kumar Jaiswal wherein he has stated that he has prepared the report exhibit P/7 after viewing the CD, Article 'I'.

He has further referred to paragraphs 1 and 2 of the statement of Jitendra Singh Chouhan (P.W.16) wherein he has stated that he was working as Sub Divisional Officer cum Deputy Returning Officer and issued the certificate based on video cassette sought to be placed on record vide exhibit P/10 on 26/09/2016 under section 65B of the Evidence Act and signed from portion 'A to A'. The respondent objected to the admissibility thereof on the premise that no new document after 45 days of the date of filing of the election petition can be produced or entertained. However, the objection of respondent was ordered to be dealt with at the time of hearing of the petition and the cassette was marked as Article 'J'. The witness has further stated that from the cassette, he has prepared a DVD and marked as Article 'H' for which he has issued a certificate on 26/09/2016 (exhibit P/11) and signed from portion 'A to A'. Similar objection in respect of Article 'H' has also been raised by the respondent and the same was ordered to be decided at the time of hearing of the petition.

Learned Senior Counsel has also referred to paragraphs 1 and 2 of the statement of Gangaram Joshi (P.W.17) wherein he has stated that he was present in the public meeting on 13/11/2013 and had heard the speakers including Vikram Verma who alleged to have stated with reference to the petitioner Balmukund Singh Gautam that 'he will capture a bhoot, seal it in a bottle and bury it in the village Lebad; a village where the petitioner resides' and thereby had demeaned reputation of the

petitioner. A compliant was also made to the Observer which was marked as exhibit P/9.

He has also referred to paragraph 1 of P.W.19 Raghuveer Mandloi wherein he has stated that he had worked as Computer Operator at the relevant point of time in the office of Sub Divisional Officer, District Dhar. He has stated that Kapil Mandloi (P.W.20) had prepared DVD from the cassette and thereby he had prepared four copies from such converted DVD. The same have been produced by Jitendrasingh Chouhan (P.W.16) in the Court. He had prepared and issued the certificate, exhibit P/13.

Petitioner's last witness referred to was P.W.20 Kapil Mandloi who has stated in paragraph 1 that he runs video mixing shop situated at Nalcha Dharwaja, Dhar. P.W.16 Jitendrasingh Chouhan had come to his shop about 3-4 months ago at about 12.30 pm with a video cassette and asked him to convert it into DVD. Thereafter, he had prepared DVD. He was also made to sign on some papers by P.W.16. He stated to have proved exhibit P/14, a certificate issued under section 65B of the Evidence Act signed by him from the portion 'A to A' as regards conversion of video cassette into DVD.

Learned senior counsel has also referred to depositions of D.W .1 Smt. Neena Verma, D.W.2 Dr.Sharad Vijayvargiya and D.W.5 Kanhyalal Yadav to contend that in the public meeting held on 13/11/2013 at Rajwada *Chowk*, Dhar the noticee Vikram Verma had addressed the public from the platform shared by BJP President Rajnath Singh, respondent and others.

Paragraph 9(l) referable to issue 2(f):

4. It is alleged that the noticee – Ashok Jain had also addressed in the same meeting held on 13/11/2013 and raised an issue of the statute of goddess Saraswati presently in London and had spoken that they shall resolve the issue and install back the statue in the temple which belongs to the Hindu samaj of Dhar. Therefore, votes were solicited in the name of Devi Sarasawati addressed as Maa Wagdevi in the speech. As the said appeal was made with the consent of the respondent, the said act tantamount to corrupt practice within the scope of section 123(iii)

of the R.P. Act. It is further averred that the premises from where the deity said to be taken away, has been claimed to be a mosque by the Muslim community as well. As such, this is a vulnerable issue between the two communities touching their sentiments. Learned senior counsel has also referred to CD prepared by one Amit Verma of Dhar News Channel regarding the speech. Annexure P/21 is said to be copy of the CD with a statement that the original CD is with Amit Verma. The transcription thereof prepared by the petitioner himself is filed as Annexure P/22 and the alleged publication of the news item is news paper 'Nai Duniya', Indore edition dated 14/11/2013. The relevant part of clipping is annexed as P/23.

Paragraph 9(n) referable to issue 2(f):

5. On 17/11/2013, a meeting was organized by the respondent in the BJP office, Dhar wherein Antu alias Anant Agrawal, her election agent had addressed the party workers instigating them to resort to all sorts of legal or illegal means for procuring votes in favour of the respondent and assured them that if any complaint is made, he will see that the FIR is destroyed and nobody would be asked to attend the police station. He advised workers to resort to *sam-dam-dhand-bhed* to convince voters to vote in favour of the respondent. The said speech was published in the daily news paper 'Dhar Bhaskar' in its edition dated 23/11/2013. The videography of the same was alleged to be prepared by Amardeep Solanki (P.W.18), a press reporter at Dhar. The transfer of data from mobile video to CD through mechanical process is stated to be marked as Annexure P/25 and the transcription thereof prepared by the petitioner himself is stated to be annexed as P/26. The paper publication is annexed as P/27. The complaint lodged by the petitioner to the observer in that behalf is annexed as P/28.

6. To bolster and substantiate aforesaid allegations, learned senior counsel has referred to paragraphs 1 to 5 of the statement of Amardeep Solanki (P.W.18) and submits that the CD as prepared is Article 'JC I' and the certificate issued by him under

section 65B of the Evidence Act is proved as exhibit P/12 bearing his signature from the portion 'A to A'. He has also referred to the depositions of D.W.1 Smt. Neena Verma, D.W.2 Dr. Shard Vijayvargiya and D.W.5 Kanhyalal Yadav to submit that Antu @ Anant Agrawal had addressed the aforesaid meeting in the BJP office.

In view of the above, the alleged corrupt practice has been committed by the noticees; (1) Vikram Verma under section 123(4), (2) Ashok Jain under section 123(3) and (3) Antu @ Anant Agrawal under section 123(2)(1)(ii) of the R.P.Act.

Reply to paragraph (9k) referable to issue 2(e):

7. Shri C.L.Yadav, learned senior counsel appearing for the returned candidate has raised a preliminary objection as against maintainability of the election petition *inter alia* contending that for want of full/better particulars of the alleged corrupt practice as contemplated under sections 83(1)(b), 100(1)(d)(ii) and 123(4) of the R.P. Act, the election petition deserves to be dismissed.

Subject to the aforesaid, learned senior counsel with reference to the averments made in paragraph 9(k) of the election petition submits that the source of information of the averments made in paragraphs 9(k) and 9(l) of the petition is not disclosed, though in the affidavit filed by the petitioner, averments made are stated to be true to his personal knowledge and the averments made in paragraph 9(n) are stated to be true on the information received from his associates and workers and believed to be true.

In support of the aforesaid contention, learned senior counsel has placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Subhash Desai Vs. Sharad J. Rao and others, AIR 1994 SC 2277**, Paragraph 11 is relevant and the same is quoted below:

“11. Section 86 vests power in the High Court to dismiss an election petition which has not been properly presented as required by Section 81; or where there has been non-compliance of section 82 i.e. non-joinder of the necessary parties to the election petition; or for non-compliance of Section 117 i.e. non-deposit of the required amount as security for the costs of the election petition. Section 86 does not contemplate dismissal of the election petition for

non-compliance of the requirement of Section 83 of the Act. But Section 83 enjoins that an election petition shall contain concise statement of material facts, and shall set forth full particulars of any corrupt practice that the petitioner alleges, which should be verified and supported by affidavit, so far the allegations of corrupt practices are concerned. This provision is not only procedural, but has an object behind it; so that a person declared to have been elected, is not dragged to court to defend and support the validity of his election, on allegations of corrupt practice which are not precise and details whereof have not been supported by a proper affidavit. Apart from that, unless the material facts and full particulars of the corrupt practices are set forth properly in the election petition, the person whose election is challenged, is bound to be prejudiced in defending himself of the charges, which have been levelled against him. In view of the repeated pronouncements of this Court, that the charge of corrupt practice is quasi-criminal in nature, the person challenging an election on the ground of corrupt practice, cannot take liberty of making any vague or reckless allegation, without taking the responsibility about the correctness thereof. Before the court proceeds to investigate such allegations, the court must be satisfied, that the material facts have been stated along with the full particulars of the corrupt practice, alleged by the petitioner, which have been duly supported by an affidavit. In cases where the court finds that neither material facts have been stated, nor full particulars of the corrupt practice, as required by Section 83, have been furnished in the election petition, the election petition can be dismissed, not under Section 86 but under the provisions of the Code of Civil Procedure, which are applicable, read with Section 83(1) of the Act, saying that it does not disclose a cause of action. This aspect has been examined by this Court in detail in the cases of **Azhar Hussain v. Rajiv Gandhi, (1986) 2 SCR : (AIR 1986 SC 1253)**; **Hardwari Lal v. Kanwal Singh, (1972) 2 SCR 742:(AIR 1972 SC 515).**”

The petitioner, Balmukundsingh Gautam (P.W.1) in paragraph 39 of his deposition has categorically stated that he was not present in the meeting organized by the respondent on 13/11/2013 at Rajwada Square (*chowk*), Dhar. It is also not pleaded that P.W.17 Gangaram Joshi the complainant who had filed the complaint (exhibit P/9) was also present at the alleged meeting. That apart, even the complainant (P.W.17) in his complaint (exhibit P/9) does not state that he was present in

the meeting dated 13/11/2013 and has no answer to such relevant omission in his complaint while he deposed before the Court alleging that he attended the meeting. Besides, the alleged parts of the speech were deposed during cross-examination of P.W.1 but, there is no pleading in conformity therewith.

Even otherwise, what has been pleaded was that 'he will capture 'a bhoot', seal it in a bottle and bury it in the village Lebad; a village where the petitioner resides' by no stretch of imagination can be construed to be corrupt practice within the meaning of section 123(4) of the R.P. Act; mere conjecture.

Learned senior counsel, refers to section 100(2)(a) of the R.P.Act quoted below,:

“100. Grounds for declaring election to be void.-

(1)

(2) If in the opinion of the High Court, a returned candidate has been guilty by an agent other than his election agent, of any corrupt practice but the High Court is satisfied-

(a) that no such corrupt practice was committed at the election by the candidate or his election agent, and every such corrupt practice was committed contrary to the orders, and without the consent of the candidate or his election agent;

.....

then the High Court may decide that the election of the returned candidate is not void.

and submits that the noticee Vikram Verma is neither a candidate nor an election agent of the returned candidate, therefore, the alleged corrupt practice attributed to the said noticee unless is proved to be with the consent or knowledge of the candidate, the same shall not tantamount to corrupt practice and this Court shall not declare the election of the returned candidate as *void*.

8. In the present case, there is no consent of the returned candidate and she was not present at the time of the alleged speech of Vikram Verma. In this regard, the learned senior counsel refers to the statements of P.W.17 Gangaram Joshi and P.W.14 Mukesh Kumar Jaiswal and submits that the alleged complainant claimed to have attended the meeting has not stated

that the respondent was present at the time of alleged speech delivered by the noticee Vikram Verma on 13/11/2013 at Rajwada square (*chowk*), Dhar at 3.00 pm. Likewise, referring to paragraphs 2, 6 and 14 of the statement of P.W.14 Mukesh Kumar Jaiswal the then In-charge Video Observation Team submits that while the witness upon seeing Article 'I' in the Court has given a categorical statement that the CD was run on the laptop and he had confirmed presence of Vikram Verma in the CD in his report prepared vide exhibit P/7, but upon seeing the CD played in the Court, he had not found that the respondent and Rajnathsingh were present in the said meeting held on 13/11/2013 at Rajwada Square (*Chowk*), Dhar.

Besides, the learned senior counsel also refers to the statements of D.W.1 Smt. Neena Verma (paragraphs 8, 17, 20, 26, 27, 43, 44, 46 and 47), D.W.2 Dr. Shard Vijayvargiya (paragraphs 8, 9, 15 to 17) and D.W.5 Kanhyalal Yadav (paragraph 7) emphatically denying allegations; speeches of Vikram Verma and Anant Agrawal with consent, presence or knowledge of the respondent to which there is no cross-examination.

Reply to paragraph 9(l) referable to issue 2(f):

9. In response to the allegations of paragraph 9(l), learned senior counsel, Shri Yadav, firstly; has taken a similar objection as regards lacking of material particulars while alleging the corrupt practice. Hence, the election petition is not maintainable under sections 83, 100(1)(d)(ii) and 123 3(A) of the R.P. Act and secondly; for want of source of information as regards allegations in this paragraph, the election petition is not maintainable for the reasons detailed above inasmuch as, petitioner Balmukundsingh Gautam was not present at the public meeting. He has not deposed as regards the alleged speech of Ashok Jain in the said meeting. In the report prepared by the In-charge Video Observation Team (exhibit P/7) submitted to the Returning Officer, there is no such speech of Ashok Jain in the alleged meeting in the name of idol of Goddess Saraswati for its bringing back from London to Dhar and installing it in the temple. There is no further challenge to the report/reply submitted vide exhibit P/7.

Learned senior counsel has also referred to the statement of P.W.14 Mukesh Kumar Jaiswal who has deposed with reference to the Article 'I' - CD and has not stated to have found Ashok Jain present in the alleged meeting. He has prepared the report, exhibit P/7 after seeing the Article 'I' played in the Court on laptop.

Besides, learned senior counsel refers to paragraph 9(l) of the election petition and further submits that though the alleged CD was claimed to have been recorded on 13/11/2013 by one Amit Verma, Press Reporter of Dhar News Channel and the original CD is stated to be with him but, Amit Verma was not examined by the petitioner. The alleged CD (Annexure P/21) was not submitted with the election petition though the averment in that regard was sought to be made an integral part of pleading in the election petition. Hence, the election petition was incomplete lacking of material particulars and, therefore, liable to be dismissed on this ground alone. To further substantiate his argument, he has referred to the statements of D.W.1 Smt. Neena Verma (paragraphs 8, 19, 20, 26, 38, 43 to 47) and D.W.2 Dr. Shard Vijayvargiya (paragraphs 8, 9, 15 to 17). He has also referred to the judgments in the cases of **M.Karunanidhi Vs. H.V.Handa and others, AIR 1983 SC 558 (para 27 to 29, 41 & 42), U.S.Sasidharan Vs. K.Karunakaran and another, AIR 1990 SC 924 (para 17, 26 to 30), Subhash Desai Vs. Sharad J.Rao, AIR 1994 SC 173 (paras 56 and 57) and Manohar Joshi Vs. Nitin Bhaurao Patil and another, AIR 1996 SC 796 (para 23).**

With the aforesaid submissions, learned senior counsel submits that the corrupt practice as alleged in this paragraph cannot be attributed to the noticee, Ashok Jain. Hence, the election petition deserves to be dismissed.

Reply to paragraph 9(n) referable to issue 2(h):

10. Learned senior counsel submits that the full particulars or the better particulars of the alleged corrupt practice have not been mentioned in terms of section 83(1)(b) of the R.P. Act and the alleged threats in terms of section 123(2)(a)(i) of the R.P. Act.

Moreover, the source of information was not there in the sworn affidavit in the form of Order VI rule 15(4) CPC who has informed to the petitioner. Likewise, no source of information was disclosed in the election petition as required under section 83 of the R.P. Act. That apart, neither there is any pleading nor evidence about the alleged undue influence to the voters for exercising the voting rights in the meeting held on 17/11/2013 at the BJP office, Dhar. There was no dispute amongst the party workers or disturbance in the public. In that regard, he has referred to paragraph 47 of the statement of Balmukundsingh Gautam (P.W.1). That apart, it is also submitted that the meeting was held in the BJP office, Dhar addressing the invited party workers. It was not a public meeting. Amardeep Solanki (P.W.18) was not a member or a party worker of BJP and he was not invited in the said meeting. As such, even assuming party workers meeting was addressed by Antu @ Anant Agrawal, this by itself shall not tantamount to corrupt practice as it was not a public meeting nor press reporters were invited including P.W.18 Amardeep Solanki.

Referring to paragraph 10 of the statement of Balmukundsingh Gautam (P.W.1), it is submitted that the petitioner/complainant was not present in the said meeting and the information of the alleged meeting was obtained by him from Amardeep Solanki (P.W.18). Thereafter, he himself has transcribed the contents and annexed as P/27. The alleged video captured in mobile and transferring the data in a CD by mechanical process was prepared by P.W.18, a self-styled journalist is the basis of the averment alleging corrupt practice against the respondent. The C.D., itself is vulnerable as is well evident from the deposition of P.W.18 (paragraphs 1, 2, 7 to 11 and 13 to 15) wherein he has stated that the alleged CD (Article 'JC-1') was prepared by him from the videography of his mobile. Neither the picture is clear nor the voice is clear. This witness has affirmatively stated in paragraph 13 of the statement that the respondent Smt. Neena Verma is not present in the meeting. He has no knowledge that Anant Agarwal is an election agent of respondent or not. There is no documentary evidence placed on record in that behalf. Hence, the noticee, Anant Agarwal cannot be said to have committed the corrupt practice, as alleged in this paragraph.

Learned counsel further referring to paragraphs 12, 13, 29, 37 & 39 of the statement of respondent Smt. Neena Verma (D.W.1) submits that there is specific denial that either she has convened or attended the alleged party workers meeting held in the BJP office, Dhar on 17/11/2013. Anant Agarwal has not made any speech on 17/11/2013. He has further referred to paragraphs 5, 6, 7, 13 and 14 of the statement of Dr. Sharad Vijayvargiya (D.W.2) wherein it is stated that he had organized the party workers meeting in the BJP office, Dhar. During elections, 2/3 meetings were organized in the BJP office and few workers participated therein for guidance purpose. He never invited Amardeep Solanki (P.W.18) or for that matter, any other journalist as it was not a public meeting. Likewise, D.W.5 Kanhyalal Yadav has deposed to have remain present in the meeting held on 17/11/2013 but, denied that P.W.18 Amardeep Solnaki was invited in the meeting or any other public person except few party workers of the BJP.

With the aforesaid submissions, it is submitted that even assuming Anant Agarwal as alleged in this paragraph, has made a speech on 17/11/2013, but neither the respondent was present in the meeting nor had she consented as evident from the entire evidence placed on record. For want of admissible evidence, the alleged factum of speech is false and fabricated and does not amount to corrupt practice as alleged, therefore, cannot form basis for declaring the election of the returned candidate as *void*.

11. Shri Samaerjeet Singh, Advocate for the noticees – Vikram Verma and Anant Agarwal has adopted the submissions of the learned senior counsel Shri Yadav for the returned candidate, in respect of non-maintainability of the election petition for want of full particulars of the alleged corrupt practice, non-disclosure of the cause of action; apparent contradictions in the affidavit sworn by the petitioner under Order VI rule 14(5) CPC and deposition of the petitioner (P.W.1) and in particular paragraph 39 as well as in the light of the provisions contained under sections 83 & 100(i)(d) (ii) of the R.P. Act.

12. It is further contended that to prove the allegations of corrupt practice contained in paragraphs 9(k) and 9(n) of the

petition, the petitioner has produced the electronic record and examined 4 witnesses in support thereof who are alleged to have issued the certificates under section 65B of the Evidence Act; (i) P.W.16 Jitendrasingh Chouhan (exhibits P/10 & P/11); (ii) P.W.18 Amardeep Solanki (exhibit P/12); (iii) P.W.19 Raghuvveer Mandloi (exhibit P/13) and (iv) P.W.20 Kapil Mandloi (exhibit P/14).

According to the learned counsel, the electronic record produced is secondary evidence and since certificates allegedly issued in that behalf by the aforesaid persons are not in conformity with the provisions contained under sections 65(B)(2) and 65(B)(4) of the Evidence Act (for short, 'the Act'), the same are inadmissible in evidence.

13. P.W.16 Jitendrasingh Chouhan since was not entrusted with the record of election as Returning Officer, he was not occupying the responsible position to issue the certificates exhibits P/10 and P/11 as contemplated under section 65(B)(4) of the Act.

Likewise, P.W.19 Raghuvveer Mandloi has stated that he had signed the alleged certificate, exhibit P/13 on the instructions of Jitendrasingh Chouhan (P.W.16). He is working as Computer Operator on contract basis in the department. He has no knowledge of the Act under which the certificate is issued.

P.W.20 Kapil Mandloi who runs a video mixing shop at Dhar has also stated that he has signed the certificate (exhibit P/14) on the instructions of Jitendrasingh Chouhan (P.W.16). Jitendrasingh Chouhan had come to his shop and asked him to prepare a DVD after converting the contents of the CD. There was no official letter issued by Jitendrasingh Chouhan for the said purpose. He has no knowledge of the Act under which he has signed the certificate, exhibit P/14. The cassette given to him was neither sealed nor in a box, therefore, the possibility of tampering with the cassette cannot be ruled out.

The deposition of P.W.18 in paragraphs 6 to 9 and 16 to 21 do suggests that the alleged certificate exhibit P/12 do not fulfill the requirements of section 65(B)(4) of the Act. He has not read the provisions of section 65(B) of the Act. While referring to Article 'JC1, the CD on record, this witness in paragraphs 11, 13 and 14 has stated that the picture shown in the video is blurred

and full of noise and the same is not audible. In paragraph 13 after seeing the CD (Article 'JC-1') he had clearly stated that he is not sure that the respondent Smt. Neena Verma is seen in the video. He further states in paragraph 14 that there is no voice in the CD. In paragraph 15, he states that he has no knowledge that Anant Agrawal was appointed as an election agent of Smt. Neena Verma. He has not seen any such document.

Referring to the judgment of the Hon'ble Supreme Court in the case of **Ram Singh and others Vs. Col. Ram Singh, AIR 1986 SC 3**, learned counsel contends that even prior to incorporation of 65B of the Act, the Hon'ble Supreme Court in the *catena* of decisions has reiterated the law that if the statement is relevant to the matter in issue, an accurate tape-record of the statement is also relevant and the same is admissible in evidence, however, the time, place and accuracy of the recording must be proved by the competent witness and the voices must be properly identified as there is possibility of erasing and reusing the magnetic tape recording medium, therefore, the evidence must be received with caution. The Court must be satisfied beyond reasonable doubt that the record has not been tampered with. If the tape was not sealed and was not kept in the safe authorized custody, the absence of sealing exposes the tape in the realm of admissibility and possibility of its being tampered with before it was played cannot be ruled out.

Now under the codified mandatory requirements contained in section 65B of the Act, the recorded cassette produced for converting into DVD is not admissible as the same was not sealed and, therefore, it cannot be ruled out that it was not tampered with in any manner whatsoever. Besides, evidence on record do suggest that requirement of section 65B(2) and (4) of the Act not at all fulfilled. Accordingly, the defective certificates, Article 'H', Article 'J', Article 'JC-1' and Article 'KC-2' are not admissible as secondary evidence in support of the allegations made in paragraphs 9(k) and 9(n) of the petition. Hence, in view of section 59 of the Act, all facts except the contents of the documents (or electronic record) may be proved by oral evidence. For want of pleadings and source of information, there is no evidentiary value either of oral depositions or of the electronic

record.

In view of the above, the allegations of corrupt practice against the noticees Vikram Verma and Antu alias Anant Agarwal as contained in paragraphs 9(k) and 9(n) of the petition could not be said to be proved as the same are devoid of substance.

14. Shri H.Y.Mehta, learned counsel for the noticee – Ashok Jain has adopted the arguments of Shri C.L.Yadav learned senior counsel for the respondent/returned candidate with further submission as regards maintainability of the election petition as well as inadmissibility of the alleged speech annexed as P/21 and the certificates of Article 'H', Article 'J', Article 'JC-1' and Article 'KC-2'. Learned counsel further submits that the complaint exhibit P/9 allegedly filed by P.W.17 Gangaram does not contain allegations against the noticee Ashok Jain. The In-charge Video Observation Team (P.W.14 Mukesh Jaiswal) upon inspection of CD had submitted the report exhibit P/7 wherein he has specifically stated that it does not contain speech of Ashok Jain in the matter of religious feelings between the Hindu and muslim communities, as alleged. This report exhibit P/7 has not been further questioned. That apart, P.W.17 Gangalram Joshi has not deposed in relation to the allegations made in paragraph 9(l) of the election petition.

Learned counsel further contends that as the petitioner Balmukundsingh Gautam (P.W.1) was not present in the alleged public meeting held on 13/11/2013 and the allegations contained in paragraph 9(l) since are purportedly for the reason of complaint (exhibit P/9) to the Returning Officer but no such speech was found, as such; the averment loses its efficacy and truthfulness. Hence, no corrupt practice as alleged against Ashok Jain can be said to be proved. Therefore, the election petition deserves to be dismissed.

15. Heard.

16. Before adverting to rival submissions, it is considered apposite to quote the relevant provisions of the R.P.Act and the Evidence Act.

R.P.ACT:

“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.”

100. **Grounds for declaring election to be void.-** [(1) Subject to the provisions of sub-section (2) of [the High court] is of opinion-

(a)

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

(c)

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected—

(i)

(ii) by any corrupt practice committed in the interests of the returned candidate [by an agent other than his election agent], or

(2) If in the opinion of [the High Court], a returned candidate has been guilty by an agent, other than his election agent, of any corrupt practice [***] but [the High Court] is satisfied—

(a) that no such corrupt practice was committed at the election by the candidate or his election agent, and every such corrupt practice was committed contrary to the orders, and without the consent, of the candidate or his election agent;

.... ..
then the High Court] may decide that the election of the returned candidate is not void.

(Emphasis supplied)

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

(1)

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

Provided that-

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

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

(ii) induces or attempts to induce a candidate or an elector to believe that he, or any person in whom he is interested, will become or will be rendered an object of divine displeasure or spiritual censure,

... ..
 (4) The publication by a candidate or his agent or by any other person with the consent of a candidate or his election agent, of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate or in relation to the candidature, or withdrawal, [***] of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate s election."

(Emphasis supplied)

EVIDENCE ACT:

65. Cases in which secondary evidence relating to documents may be given:

.....

65B. 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 or 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 purpose 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.

(5) For the purposes of this section,-

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation.- For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived there from by calculation, comparison or any other process.

17. It shall also be appropriate to reiterate the law as laid down by the Hon'ble Supreme Court explaining the nature and scope of jurisdiction of this Court while trying the election petition based on corrupt practice and the quality of evidence required in support thereof as defined under section 123 of the R.P.Act.

In **Ch.Razik Ram Vs. Ch.Jaswant Singh Chouhan, (1975) 4 SCC 769 : (AIR 1975 SC 667)** the Hon'ble Apex Court laid down the following principles:

"Before considering as to whether the charges of corrupt practice were established, it is important to remember the standard of proof required in such cases. It is well settled that a charge of corrupt practice is substantially akin to a criminal charge. The commission of a corrupt practice entails serious penal consequences. It not only vitiates the election of the candidate concerned but also

disqualifies him from taking, part in elections for a considerably long time. Thus, the trial of an election petition being in the nature of an accusation, bearing the indelible stamp of quasi-criminal action, the standard of proof is the same as in a criminal trial.

Secondly, even if the nature of the trial of an election petition is not the same in all respects as that of a criminal trial, the burden of proving each and every ingredient of the charge in an election petition remains on the petitioner. If a fact constituting or relevant to such an ingredient is pre-eminently within the knowledge of the respondent, it may affect the quantum of its proof but does not relieve the petitioner of his primary burden."

In the case of **Sultan Salahuddin Owasi V. Mohd. Osman Shaheed & Ors.(AIR 1980 SC 1347**, the Hon'ble Supreme Court has observed thus:-

"It is now well settled by a large catena of the authorities of this Court that a charge of corrupt practice must be proved to the hilt, the standard of proof of such allegation is the same as a charge of fraud in a criminal case."

Similar view has been expressed by the Hon'ble Supreme Court in the case of **N.C.Zeliang Vs. Aju Newmai and others, AIR 1981 SC 8** that a charge under section 123 of the R.P. Act must be proved by clear and cogent evidence as a charge for criminal offence. A charge of corrupt practice cannot be proved by preponderance of probabilities but, the Court is required to satisfy that there is evidence to prove the charge beyond reasonable doubt. The election process in our country is an extremely expensive and while declaring the election of a candidate *null* and *void*, the entire process of election is set at naught resulting in re-election. Therefore, such a course should be adopted only when the allegations of corrupt practice are proved beyond reasonable doubt.

In **Ram Sharan Yadav v. Thakur Muneshwar Nath Singh & Ors.[1984] 4 S.C.C. 649**, the Hon'ble Supreme Court has observed thus:

"The sum and substance of these decisions is that a charge of corrupt practice has to be proved by convincing evidence and not merely by preponderance of probabilities. As the charge of a corrupt practice is in the nature of a criminal charge, it is for the party who sets up the plea of 'undue influence' to prove it to the hilt beyond

reasonable doubt and the manner of proof should be the same as for an offence in a criminal case. This is more so because once it is proved to the satisfaction of a court that a candidate has been guilty of 'undue influence' then he is likely to be disqualified for a period of six years or such other period as the authority concerned under Section 8-A of the Act may think fit.

By and large, the Court in such cases while appreciating or analysing the evidence must be guided by the following considerations:

(1) the nature, character, respectability and credibility of the evidence,

(2) the surrounding circumstances and the improbability appearing in the case,

(3) the slowness of the appellate court to disturb a finding of fact arrived at by the trial court who had the initial advantage of observing the behaviour, character and demeanour of the witnesses appearing before it, and

(4) the totality of the effect of the entire evidence which leaves a lasting impression regarding the corrupt practices alleged."

Similar view has been reiterated by the Hon'ble Supreme Court in the case of **Ram Singh and others (supra)** and **Abhiram Singh Vs. C.D.Commachen (2017) 2 SCC 629**.

18. The allegations of corrupt practice must be clearly pleaded in the petition with full particulars and to be proved by cogent and relevant evidence.

19. It is settled law that no evidence is admissible without pleading in the election petition. The Hon'ble Supreme Court in the case of **Ramakant Mayekar Vs. Smt. Celine D'Silva, AIR 1996 SC 826** has held that the corrupt practice cannot be proved by the evidence in excess to the pleadings unless, the full particulars of the corrupt practice as required under section 83(1) of the R.P. Act are provided with cogent evidence, accordingly.

CONCLUSION: Paragraph 9(k):

20. In paragraph 9(k) of the election petition, it has been

pleaded;

(i) respondent had organized a public meeting at 3.00 pm on 13/11/2013 at Rajwada Square *Chowk*, Dhar;

(ii) the President of BJP Rajnath Singh was chief speaker;

(iii) the stage of the meeting was shared by the respondent in person and her husband, Vikram Verma alongwith other persons; and

(iv) Vikram Verma addressed the meeting and stated that there were numerous mistakes in the judgment of the High Court that 'Gods do not sit in the High Court, that main points were left out, that he will capture the bhoot and bury it in the village Lebad where the petitioner resides.'

(Emphasis supplied)

21. To bring the alleged statement of fact related to the personal character or conduct of any candidate within the mischief of sub-section (4) of section 123 of the R.P. Act, it has to fulfill three-fold requirement; (i) the statement of fact was false; (ii) the candidate making it either believed it to be false or does not believe it to be true; and (iii) such statement reasonably calculated to prejudice the prospects of the election of the candidate against whom it is made. Further, an element of *mens rea* is a necessary ingredient of such alleged corrupt practice because the provision under section 123(4) of the R.P. Act does not accept the doctrine of constructive knowledge. The person challenging the election on the ground of corrupt practice cannot take liberty of making any vague or reckless allegation, without establishing the correctness thereof by leading cogent evidence. But before the Court proceeds to investigate such allegations, the Court must be satisfied, that the material facts have been stated alongwith the full particulars of the corrupt practice, alleged by the petitioner and duly supported by an affidavit under section 83 of the R.P. Act. The Court is also required to assess the quality of evidence led by the parties critically as the standard of proof of such allegation is the same as charge of fraud in a criminal case. The judgments of the Hon'ble Supreme Court in the cases of **Sheopal Singh Vs. Ram Pratap, AIR 1965 SC 677 & Subhash Desai (supra)** are relied upon.

22. It is also considered apposite to reiterate the law related to the concept, meaning and scope of the phrase 'statement of fact' as used in section 123(4) of the R.P. Act not necessarily tantamount to 'fact'; a wider concept as defined under section 3 of the Evidence Act. The 'statement of fact' is to be given contextual meaning within the provision under section 123(4) of the R.P. Act capable of satisfying the requirements of the provision as detailed above. The 'statement of fact' can be proved to be 'false' only if it relates to an event which has happened and not to a hypothetical future possibility or mere conjecture of a likelihood in future. Further, such statement of fact must also fulfill another requirement of section 123(4) of the R.P. Act, i.e., 'it should be reasonably calculated to prejudice the prospects of that candidate's election.' This further requirement cannot be satisfied merely stating likely apprehension for the future and if the event does not happen, this requirement cannot be tested. The judgment of the Hon'ble Supreme Court in the case of **Gadakh Yashwantrao Kankarrao vs. E.V. Alias Balasaheb Vikhe Patil and others, AIR 1994 SC 678** is relied upon and in paragraphs 34 & 35, the Court has reiterated the meaning of 'fact' in the realm of jurisprudence, quoted below:

"34. The view we have taken finds support from the meaning of 'fact' in the realm of jurisprudence. Relevant extracts from textbooks are as under:

"There is yet a third meaning of the expression 'question or matter of fact' in which it is contrasted with a question or matter of opinion. A question of fact is one capable of being answered by way of demonstration a question of opinion is one that cannot be so answered. The answer to it is a matter of speculation which cannot be proved by any available evidence to be right or wrong. The past history of a company's business is a matter of fact; but its prospects of successful business in the future is a matter of opinion"

(Salmond on Jurisprudence,
12th Edn., at page 69)

"Secondly, fact and opinion are frequently contrasted. Whether a company has been prosperous in the

past is a matter of fact, whether it will fulfil the expectations aroused by its prospectus is a matter of opinion.....

(A Textbook of Jurisprudence by George Whitecross Paton, 4th Edn., at page 207)

(Emphasis supplied)

In Stroud's Judicial Dictionary, 4th Edn., the meaning of the expression "false statement of fact in relation to the personal character or conduct" of a candidate at a parliamentary election is given as "of fact, as distinguished from a false statement of opinion".

(Emphasis supplied)

35. The meaning of the expression "statement of fact" in S.123(4) of the R.P.Act has to be understood in this manner."

23. First part of clause (iv) 'Gods do not sit in the High Court, that main points were left out' is concerned, mere criticism of the judgment of the High Court in public speech, in the opinion of this Court, shall not tantamount to corrupt practice as defined under section 123 of the R.P. Act;

second part 'that he will capture the bhoot and bury it in the village Lebad where the petitioner resides.' even *prima facie* does not suggest that this statement of fact is based upon past event within the meaning of section 123(4) of the R.P. Act relatable to the personal character or conduct of the petitioner. Assuming that such statement was made, it was a mere conjecture as the word 'bhoot' in fact and in effect is hypothetical in nature and not related to any past event. Besides, the alleged statement of fact; mere conjecture cannot pass the test 'reasonably calculated to prejudice the prospects of that candidate's election' under section 123(4) of the R.P. Act. Hence, the statement cannot tantamount to corrupt practice within section 123(4) of the R.P. Act.

24. Now turning to the facts of the case in hand, the pleadings are found to be totally evasive and lacking in material particulars in that behalf. As a matter of fact, for want of pleadings in conformity with the requirements of section 83 read with section 123 of the R.P. Act, while framing issue No.2(e) as regards the allegation of criticizing the High Court judgment, this Court has not framed an issue in relation to the second part of the

statement. That apart, though on one hand, the contents of this paragraph are stated to be based upon personal knowledge of the petitioner [in the affidavit submitted under Order 6 rule 15(4) CPC, the allegations of paragraphs 9(k) and 9(l) in particular amongst others] but, in paragraph 39 of his statement P.W.1 Balmukundsingh Gautam has clearly stated that he was not personally present in the public meeting held on 13/11/2013. As such, there is substantial force in the submission of Shri Yadav, learned senior counsel for the returned candidate that the source of information of facts pleaded have not been disclosed in the election petition.

Even assuming aforesaid two-fold contention on facts are referable to the complaint exhibit P/9 filed by P.W.17 Gangaram Joshi to the Returning Officer, though it was not pleaded in the petition, Gangaram Joshi (P.W.17) in his statement though claimed to be present in the meeting but in the compliant Annexure P/9, nowhere stated that he was present in the meeting. During the cross-examination, he has not given explanation for such omission in his compliant. Even otherwise, he has not been able to state clearly (i) at what time Rajnathsingh BJP president came on the stage; (ii) who came along with him; (iii) who spoke after first speech of Dr. Sharad Vijavargiya (D.W.2); (iv) how long the speech lasted; (v) who spoke thereafter; (vi) when Vikram Verma started speaking and the time of its closure; (vii) whether he spoke prior to or after Rajanathsingh, etc.,

At this stage, it is pertinent to mention that Vikram Verma is neither a candidate nor an election agent of the respondent. Therefore, for the corrupt practice alleged against a third person, the consent of the candidate or his/her election agent is mandatory. The fact that the respondent is not present in the meeting at the time of alleged speech of Vikram Verma is proved beyond reasonable doubt as deducible from evidence; Mukesh Kumar Jaiswal (P.W.14) In-charge, Video Observation Team in his report exhibit P/7 based on Article 'H' (DVD) while viewing the Article 'I' in the Court. He has stated in paragraph 4 that he has not received the CD in a sealed cover and he does not know who has viewed the CD before presenting the same before him. He further states in paragraphs 6 and 9 that neither the respondent

Smt. Neena Verma nor Rajnath Singh were present on the stage when Vikram Verma gave the alleged speech.

D.W.2 Dr. Sharad Vijavargiya who had organized the meeting on 13/11/2013 in paragraphs 8 and 9 has specifically stated that he had gone to receive Rajnathsingh. He has deposed that the respondent was not present in the meeting at the time Vikram Verma gave speech. He also denied the allegations made against Vikram Verma in respect of corrupt practice alleged in paragraph 9(k) of the petition.

D.W.5 Kanhyalal Yadav in paragraph 7 of his statement has reiterated the same over which there is no cross-examination.

Therefore, in view of the provision contained under section 100(2)(a) of the R.P. Act even if the alleged speech of Vikram Verma as stated in paragraph 9(k) of the petition is construed as corrupt practice on wild imagination, since the same is not found to be with the consent of the respondent or her election agent, the election of the respondent/returned candidate cannot be held *void*.

At this stage, it is also considered apposite to deal with the electronic record allegedly prepared recording the proceedings of the meeting and the certificates issued in that behalf by different witnesses.

P.W.16 Jitendrasingh Chouhan, Sub Divisional Officer, the then Deputy Returning Officer, Dhar while deposing in support of issuance of the certificates exhibits P/10 and P/11 has stated as follows:

“05— यह कहना सही है कि प्रदर्श पी-10 ओर प्रदर्श पी-11 में इस बात का उल्लेख नहीं है कि मुझे उप जिला निर्वाचन अधिकारी नियुक्त किया गया है ओर इस बात का भी उल्लेख नहीं है की मेरी नियुक्ति इस आदेश के द्वारा कि गई है। इस बात का भी उल्लेख नहीं है की मैं जिला निर्वाचन कार्यालय का प्रभारी अधिकारी हूँ। यह कहना सही है की वर्ष 2013 के समय मैं न तो अनुविभागीय अधिकारी धार न ही उप जिला निर्वाचन अधिकारी धार के पद पर पदस्थ था। यह कहना सही है कि आर्टिकल-जे की कैसेट जब तैयार की गई उस समय मैं धार में पदस्थ नहीं था। यह कहना सही है कि प्रदर्श पी-10 के प्रमाण पत्र में इस बात का उल्लेख नहीं है कि उपरोक्त विडियो कैसेट किस व्यक्ति द्वारा तैयार की गई है। यह कहना सही है कि प्रमाण पत्र में इस बात का उल्लेख नहीं है कि विडियो कैसेट किस तारीख को कार्यालय में जमा किया गया था ओर किसके द्वारा जमा किया गया था। यह कहना सही है कि प्रमाण पत्र में इस बात का भी उल्लेख नहीं है कि उपरोक्त कैसेट सिल्ड अभिलेख के रूप में रखा गया था या नहीं और सिल्ड अभिलेख को कब ओर किसके आदेशानुसार खोला गया था। यह कहना सही है कि प्रमाण पत्र में इस बात का उल्लेख नहीं है कि विडियो कैसेट मेरे आधिपत्य में थी। यह कहना सही है कि आर्टिकल-एच की डीवीडी मेरे द्वारा स्वयं तैयार नहीं की गई। यह कहना सही है कि मैंने प्रमाण पत्र में

कपिल मण्डोले का उल्लेख किया है जो शासकीय कर्मचारी नहीं है। श्री रघुवीर मण्डलोई अनुविभागीय अधिकारी धार के कार्यालय में पदस्थ डाटा एन्ट्री ऑपरेटर हैं। यह कहना सही है कि श्री रघुवीर मण्डलोई जिला निर्वाचन कार्यालय धार में पदस्थ नहीं है।
 06- यह कहना गलत है कि आर्टिकल-जे का विडियो कैंसेट एवं आर्टिकल-एच की डीवीडी तथा प्रदर्श पी-10 ओर प्रदर्श पी-11 के प्रमाण पत्र प्रस्तुत करने एवं जारी करने का मुझे अधिकार नहीं है। मेरी अनुविभागीय अधिकारी धार के पद पर नियुक्ति सितम्बर 2015 में हुई थी, सही दिनांक मुझे याद नहीं। यह कहना सही है कि मेरे पदस्थ होने से पूर्व निर्वाचन कार्यालय का रिकार्ड कब जमा हुआ, कैसे रखा गया ओर कब-कब खोला गया इसकी जानकारी मुझे नहीं है। मैं यह नहीं बता सकता की इस अभिलेख में कभी फेरबदल किया गया है अथवा नहीं।”

(Emphasis supplied)

A perusal of the same indicates that he himself has not prepared the Article 'H' though he has issued the certificate. He has mentioned that P.W.19 Raghuveer Mandloi is an employee working as Data Entry Operator in the office of Sub Divisional Officer, Dhar but, he is not an employee of the Election Office. As such, the aforesaid two certificates; Annexure P/10 and Annexure P/11 allegedly issued by him are not in conformity with the requirements of section 65B of the Act as the same are not fulfilling the conditions enumerated under sub-section (2) thereof. Under such circumstances, Article 'H' is not held to be admissible in evidence.

P.W.19 Raghuveer Mandloi claimed to have allegedly issued the certificate, exhibit P/13. Since 12/08/2015 he is working in the office of Sub Divisional Officer, Dhar as contract employee and at the relevant time, he has not worked in the election office. He does not know under which provisions of law, he has issued the certificate. He has no knowledge of relevant Act or provisions thereof. He has issued the certificate on the instructions of P.W.16 Jitendrasingh Chouhan. Para 4 of his statement is worth relevant:

“ 04- विडियो कैंसेट कार्यालय में मिली थी जो मेरे आने से पूर्व से उपलब्ध थी। विडियो कैंसेट किसके पास थी मुझे नहीं मालूम। जिस समय विडियो कैंसेट से डिवीडी तैयार की जा रही थी उस समय मे श्री चोहान साहब के साथ था परन्तु मे दुर बेठा था। डीवीडी श्री कपिल मण्डोले की दुकान पर तैयार हुई थी। श्री चोहान द्वारा कपिल मण्डोले को कोई पत्र इस आशय का दिया हो कि उपरोक्त विडियो बनाना है इस बात कि जानकारी मुझे नहीं। कपिल मण्डोले को डीवीडी तैयार करने का कोई भुगतान किया गया हो या कोई रसीद मिली हो मुझे इस बात का ज्ञान नहीं। कपिल मण्डोले ने डीवीडी उनके कार्यालय में उपलब्ध सिस्टम से बनाई थी। कपिल मण्डोले शासकीय सेवक नहीं है ये उनका निजी व्यवसाय है। हमारे यहा विडियो कैंसेट से डिवीडी तैयार करने का उपकरण

नहीं हैं। डीवीडी की कॉपी बनाने के लिए कम्प्यूटर का उपयोग कर बनाई जाती है। श्री चौहान ने मुझे डीवीडी की 4 कापी बनाने के लिए कोई कॉपी नहीं दी थी, मोखिक निर्देश दिए थे। मेरे द्वारा डीवीडी की 4 कॉपी बनाई थी, उसका रिकार्ड मेरे पास नहीं है। कम्प्यूटर में डीवीडी से 4 कॉपी बनाने का रिकार्ड उपलब्ध नहीं है। मेने कॉपी करने के लिए कम्प्यूटर पर फाईल बनाई थी जिसे मेने डीलिट कर दिया। डीलिट करने के लिए जहा तक मुझे याद है श्री चौहान साहब ने कहा था। 4 डीवीडी को तैयार करने का कोई रिकार्ड न मेरे पास न आफिस के पास है। यह कहना गलत है कि मेरे द्वारा 4 डीवीडी तैयार नहीं की गई। यह कहना गलत है कि प्रदर्श पी-13 का प्रमाण पत्र मेरे द्वारा नहीं बनाया गया। यह कहना गलत है कि यह प्रमाण पत्र किसी ओर के द्वारा बनाया गया। मुझे विधि के प्रावधानों से सम्बन्धित ये शब्द लिखे मुझे बात का ज्ञान नहीं है। इसलिए श्री चौहान ने मुझे कागज पर लिख कर दिया था। यह कहना गलत है कि श्री चौहान के कहने पर मैंने झूठा प्रमाण पत्र दिया था। ”

(Emphasis supplied)

Upon perusal of the same, it must be held that the certificate issued by him exhibit P/13 was not in conformity with the provisions of section 65B of the Act and accordingly, not admissible in evidence.

Similarly, P.W.20 Kapil Mandloi who runs video mixing shop situated at Dhar stated to have issued the certificate exhibit P/14 under section 65B of the Act. He does not know the requirements of section 65B of the Act. He has issued the certificate on the instructions of P.W.16 Jitendrasingh Chouhan. Paras 3 & 6 of his statement relevant:

“ 03— प्रदर्श पी-14 के प्रमाण पत्र का प्रारूप उनके द्वारा बनाकर दिया था जिस पर मैंने हस्ताक्षर कर दिये। धारा 65-बी कौन से कानून की धारा है मुझे नहीं मालूम है। मैंने कभी धारा 65-बी नहीं पढ़ी है। धारा 65-बी की अनुसार क्या क्या आवश्यकताएं है मुझे नहीं मालूम है। मैंने उनसे यह नहीं पूछा इसमें क्या लिखा है मुझे नहीं मालूम और फिर मेरे हस्ताक्षर क्यों करा रहे है।

06— मैं पिछले 07 सालों से वीडियो मिक्सिंग का कार्य कर रहा हूं। मेरे सामने जो कैंसेट आई थी सील लिफाफे में नहीं थी खुली हुई लाई गई थी। कैंसेट पर किसी तरह का कोई चिट इत्यादि नहीं लगी थी जिससे यह प्रतीत हो कि यह कैंसेट शासकीय है। श्री जितेन्द्र सिंह चौहान ने मुझे यह नहीं पूछा कि मैं कौन-से कम्प्यूटर में कार्य करता हूं और वह कम्प्यूटर सही रूप से कार्य कर रहा है कि नहीं। यह कहना सही है कि जो कैंसेट हमारे पास लाई जाती है उसमें चाहे अनुसार एडीटिंग की जा सकती है। जो भाग हटाना हो उसे हटा सकते है। ”

(Emphasis supplied)

In view of the above, it is held that the certificate Annexure P/14 is inadmissible in evidence.

P.W.18 Amardeep Solanki is alleged to have issued the certificate, exhibit P/12. He claims to be a journalist. Prior to issuance of the certificate exhibit P/12, he never had any occasion to issue such a certificate. His further submissions are contrary to the conditions provided for under section 65B(2) of the Act as well reflected in paragraphs 9, 10, 11, 13, 14, 16 and 18 of his statement. Further, he has also admitted that the CDs are not audible and blurred (paragraph 14). Besides, in paragraph 13 after seeing the video recording in the Court, he has stated that the respondent Smt. Neena Verma is not present in the meeting held on 17/11/2013 at the BJP office, Dhar. Paragraphs 13 and 14 are relevant:

“13- उपर जिस बैठक का मैंने उल्लेख किया है उसमें नीना वर्मा उपस्थित थी। जो सीडी मैंने प्रस्तुत की है उसमें नीना वर्मा नजर आ रहीं है या नहीं मैं अभी नहीं बता सकता। गवाह को सीडी आर्टिकल-जे सी-1 पुनः न्यायालय के कम्प्यूटर पर चलाकर दिखाई गई। गवाह ने पूरा वीडियो देखकर कहा कि, उसमें नीना वर्मा नहीं थी।

14- यह कहना सही है कि, मैं इस प्रकरण में दिनांक 08/03/2017 को भी उपस्थित हुआ था। उस दिन भी मेरे द्वारा सीडी पेश की गई थी। उस सीडी में आवाज नहीं थी। यह सीडी में मेने इसी मोबाईल से तैयार की थीं। गवाह ने स्वतः कहा कि, पहले कम्प्यूटर में कॉपी तैयार की जाती है फिर सीडी तैयार की जाती है। यह कहना गलत है कि, जो मैंने आज प्रस्तुत की है वह बनावटी तौर पर बनाकर प्रस्तुत की है।”

25. Hon'ble Supreme Court in the case of **Ram Singh (supra)** has summarized the conditions for admissibility of a tape recorded statement, quoted below:

“32. Thus, so far as this Court is concerned the conditions for admissibility of a tape recorded statement may be stated as follows:

(1) The voice of the speaker must be duly identified by the maker of the record or by others who recognise his voice. In other words, it manifestly follows as a logical corollary that the first condition for the admissibility of such a statement is to identify the voice of the speaker. Where the voice has been denied by the maker it will require very strick proof to determine whether or not it was really the voice of the speaker.

(2) The accuracy of the tape recorded statement has to be proved by the maker of the record by satisfactory evidence - direct or circumstantial.

(3) Every possibility of tampering with or erasure of a part of a tape recorded statement must be ruled out otherwise it may render the said statement out of con text and, therefore, inadmissible.

(4) The statement must be relevant according to the rules of Evidence Act.

(5) The recorded cassette must be carefully sealed and kept in safe or official custody.

(6) The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances.

Further reiterated by the Hon'ble Supreme Court in the case of **Anvar PV Vs. PK Basheer and others, (2015) 1 Supreme Court Cases (Cri) 24** as under:

22. The evidence relating to electronic record, as noted herein before, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. *Generalia specialibus non derogant*, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65A dealing with the admissibility of electronic record. Section 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65A and 65B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this court in case of **State (NCT of Delhi) Vs. Navjot Sandhu, (2005) 11 SCC 600** does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.

26. In the aforesaid facts and circumstances of the case, this Court is of the view that the alleged certificates of Article 'H', Article 'I', Article 'J', Article 'JC-1' and Article 'KC -2' are not admissible having not fulfilled the conditions of 65B(2) and 65 (4) of the Act.

Conclusion: Paragraph 9(I):

27. It is alleged that the noticee Ashok Jain in the presence of the respondent had raised an issue of idol of goddess Saraswati presently in London and spoke that they shall resolve the issue and install back the statue in the temple which belongs to the Hindu samaj of Dhar. Therefore, votes were solicited in the name of Devi Sarasawati addressed as Maa Wagdevi in the speech. As the said appeal was made with the consent of the respondent, the said act tantamount to corrupt practice within the scope of section 123(iii) of the R.P. Act. In the backdrop of the alleged fact that the premises from where the deity was lifted away is also claimed by the muslim community as mosque it can be assumed that the said place is always sensitive issue involving the religious sentiments of either of the community.

It is stated by the petitioner that the CD was prepared by one Amit Verma, Journalist of Dhar News Channel recording the speech on 13/11/2013 though copy of CD marked as Annexure P/21 and claimed to be integral part of the petition but was not produced alongwith the election petition. Further, Amit Verma who stated to have the original CD has also not been examined. As such, the transcription made by the petitioner vide Annexure P/22 and the alleged publication of the news item is news paper 'Nai Duniya', Indore edition dated 14/11/2013 vide Annexure P/23 are of no consequence, not only for the reason that the same cannot be said to be certificate under section 65B of the Act due to non-fulfillment of the conditions of sub-section (2) thereof but also for the reason that though the petitioner has stated in his affidavit that the contents are of his personal knowledge, yet, in paragraph 39 of his statement, he has specifically stated that he has not attended the public meeting held on 13/11/2013. Even if the compliant filed by P.W.17 Gangaram Joshi, exhibit P/9 is held to be integral part of the election petition, the contents thereof do not even whisper about the allegations made in paragraph 9(I) of the petition. Likewise, the complainant Gangaram Joshi (P.W.17) has no where even mentioned in his deposition as regards the aforesaid allegations in the said paragraph 9(I). Even in the report submitted by the In-charge, Video Observation Team (P.W.14 Mukesh Kumar Jaiswal) to the Returning Officer vide exhibit P/7,

it has been categorically stated that the CD did not contain speech of Ashok Jain. As stated earlier, the said report remained unchallenged. In paragraph 20 and 38 of the statement, the respondent Smt. Neena Verma (D.W.1) has categorically stated that Ashok Jain was neither a candidate nor an election agent of the respondent. There is no clinching evidence on record to suggest that even if it is said that Ashok Jain had made a speech on 13/11/2013 the same was with the knowledge and consent of the respondent. On the other hand, the respondent has categorically stated no speech was made by Ashok Jain in her presence or with her consent and knowledge.

Under such circumstances, it is difficult to hold that Ashok Jain has made a speech on 13/11/2013 tantamounting to corrupt practice within the meaning of section 123(iii) of the R.P. Act.

Conclusion: paragraph 9(n)

28. It is alleged that a meeting was organized by the respondent at the BJP office, Dhar on 17/11/2013 allegedly addressed by Antu alias Anant Agrawal alleged to be an election agent of respondent. It is alleged that Anant Agrawal had exhorted the workers of the BJP to resort to all legal and illegal means to secure votes in favour of the respondent and assured them that if any complaint is made, he will see that the FIR is destroyed and no party worker is required to attend the police station. He advised the party workers to resort to *sam-dam-dand-bhed* including bribe in terms of money to secure the votes in favour of respondent. The videography of the proceedings were allegedly prepared by Amardeep Solanki on a mobile, a press reporter at Dhar and the contents thereof have been transferred by mechanical process in a CD vide Annexure P/25. The transcription thereof done by the petitioner is annexed as P/26 and the news paper clipping in that behalf as Annexure P/27 and the complaint so lodged before the Observer has been marked as Annexure P/28 with the petition.

Upon perusal of the aforesaid allegations, it is apparent that there was no public meeting organized or held by the respondent. It was a meeting of the party workers of the BJP at their office organized by Dr. Sharad Vijavargiya (D.W.2) wherein few workers

have participated in the meeting. Besides, there is no pleading and evidence about undue influence to any voter in the context of exercising the voting rights. On the contrary P.W.1 Balmukundsingh Gautam in paragraph 47 has stated that the entire voting in the constituency was held in peaceful and congenial atmosphere and no untoward incident took place. That apart, P.W.18 Amardeep Solanki has admitted in paragraph 7 of his deposition that it was a meeting of BJP workers in the BJP office. In paragraph 13 thereof, upon verifying the CD – Article 'JC 1', he states that he has not seen the respondent in the said meeting. In paragraph 14, he further states that the CD is not audible and is blurred. He has no knowledge that Anant Agrawal has been appointed as an election agent of respondent (paragraph 15) and there is no documentary evidence placed on record in that regard.

D.W.1 Smt. Neena Verma (paragraphs 12, 13, 29, 37 & 39), D.W.2 Dr. Sharad Vijayvargiha (paragraphs 5, 6, 7, 13 & 14) and D.W.5 Kanhiyalal Verma (paras 8 & 10) in their depositions have categorically stated that the alleged journalist Amardeep Solanki was not present in the party workers meeting held on 17/11/2013 and no speech was delivered by Antu alias Anant Agrawal with the consent of respondent or her knowledge. It was a party workers meeting at BJP office, Dhar. neither journalists nor public were invited including P.W.18 Amardeep Solanki who is a Indian National Congress party worker but not a journalist, as claimed. There is no cross-examination on this point. D.W.5, Kanhyalal Yadav had worked in coordination with D.W.2 Dr. Sharad Vijayvargiya who had organized the BJP workers meeting on 17/11/2013 at the BJP Office, Dhar.

The contents of this paragraph in terms of the affidavit in support of the election petition is stated to be based on information received. The only witness examined by the petitioner in the context of the alleged meeting on 17/11/2013 at the BJP office is P.W.18 Amardeep Solanki.

The depositions of the witnesses discussed above do suggests that the videography of proceedings on mobile have been transferred by mechanical process in CD. The CD so prepared by him is not admissible in evidence for want of compliance in terms of sub-section (2) of section 65B of the Act.

That apart, even on seeing the CD in the Court, the witness Amardeep Solanki (P.W.18) has not seen the respondent in the meeting with further submission that the CD is blurred and not audible. Under such circumstances, the allegation, firstly; lack of material particulars and secondly for want of source of information, since they are based on the alleged CD prepared by P.W.18 Amardeep Solanki which is found to be inadmissible in evidence, hence, it is difficult to hold that the allegations in paragraph 9(n) of the petition tantamount to corrupt practice within the meaning of section 123(2)(a-i) of the R.P. Act.

29. For the detailed discussion in this judgment applying the test laid down by the Hon'ble Supreme Court in *catena* of decisions touching issues involved in the instant case, the election petition sans merit. The principle of law underlying in various cases relied upon by the petitioner are beyond any doubt but, the same are of no assistance to the petitioner in the obtaining facts and circumstances, therefore, distinguishable on facts.

30. This Court is of the view that the instant election petition filed by the petitioner, with vague or reckless allegations of corrupt practice without foundation and sought to be proved by evasive, inaccurate and inadmissible evidence, was kept pending from the year 2014 only for the political survival in the public eye, but at the cost of the precious time of the Court. Hence, the election petition is dismissed with cost of **Rs.1,00,000/- (Rupees one lakh only)** payable to the respondent within one month from today.

(Rohit Arya)
Election Judge
18/06/2018

b/-

