

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. _____ OF 2020

(UNDER STATUTORY APPEAL UNDER SECTION-116A OF
REPRESENTATION OF THE PEOPLES ACT, 1951)

(Arising out of the impugned final judgment and order dated
passed by High Court of Gujarat at Ahmedabad in R/Election
Petition No. 3 of 2018)

IN THE MATTER OF:

Bhupendrasinh Manubha Chudasama ... Appellant

VERSUS

Ashwin Kamsubhai Rathod & Ors. ... Respondents

WITH

I.A. NO. _____ OF 2020
APPLICATION FOR EXEMPTION FROM FILING
CERTIFIED COPY OF THE IMPUGNED ORDER

I.A. NO. _____ OF 2020
APPLICATION FOR AD-INTERIM EX-PARTE STAY

AND

I.A. NO. _____ OF 2020
APPLICATION FOR SEEKING EXEMPTION FROM FILING
NOTARIZED AFFIDAVITS AND VAKALATNAMA

PAPER-BOOK
[FOR INDEX KINDLY SEE INSIDE]

ADVOCATE FOR THE APPELLANT: E.C. AGRAWALA

INDEX

Sl. No.	Particulars of documents	Page No. of part to which it belongs		Remarks
		Part I (contents of Paper Book)	Part II (Contains of file alone)	
(i)	(ii)	(iii)	(iv)	(v)
1.	Court fees			
2.	Office Report on Limitation	A	A	
3.	Listing Proforma	A1 – A2	A1 – A2	
4.	Cover page of paper-book		A3	
5.	Index of Record of Proceedings		A-4	
6.	Limitation Report prepared by the Registry		A-5	
7.	Defect List			
8.	Note Sheet			
9.	Synopsis and List of Dates	B – P		
10.	Copy of impugned final judgment and order dated passed by High Court of Gujarat at Ahmedabad in R/Election Petition No. 3 of 2018.	1 – 144		
11.	Civil Appeal with affidavit.	145 – 175		
12.	<u>Appendix-1</u> : Article 226 of the Constitution of India.	176 – 177		

13.	<u>Appendix-2:</u> Sections 83, 98, 99, 100, 116A, 116B and 123 of the Representation of the People Act, 1951.	178 – 188		
14.	<u>ANNEXURE A-1:</u> A true copy of the Memo of the Election Petition No. 3 of 2018 dated 11.01.2018 filed before the High Court of Gujarat at Ahmedabad.	189 – 236		
15.	<u>ANNEXURE A-2:</u> A true copy of the Written Statement of the Returning Officer dated 24.03.2018 filed in Election Petition No. 3 of 2018 before the High Court of Gujarat at Ahmedabad.	237 – 251		
16.	<u>ANNEXURE A-3:</u> A true copy of the Written Statement dated 30.04.2018 filed by Petitioner herein in the Election Petition No. 03 of 2018 before the High Court of Gujarat at Ahmedabad.	252 – 286		
17.	<u>ANNEXURE A-4:</u> A true copy of Order dated 12.11.2018 passed by this Hon'ble Court in SLP (C) No. 28389 of 2018.	287 – 288		
18.	<u>ANNEXURE A-5:</u> A true copy of the Order dated 11.02.2019	289 – 290		

	passed by this Hon'ble Court in SLP (C) Nos. 3075-3081 of 2019.			
19.	<u>ANNEXURE A-6:</u> A true copy of the written arguments dated 10.02.2020 was filed by the Petitioner in the Election Petition No. 03 of 2018 before the High Court of Gujarat at Ahmedabad.	291 – 317		
20.	I.A. No. _____ of 2020: Application for exemption from filing certified copy of the impugned order.	318 – 320		
21.	I.A. No. _____ of 2020: Application for ad-interim ex-parte stay.	321 – 324		
22.	I.A. No. _____ of 2020: Application for seeking exemption from filing notarized affidavits and vakalatnama.	325 – 327		
23.	Filing Memo		328	
24.	Vakalatnama		329	

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. _____ OF 2020

IN THE MATTER OF:

Vishal Vijay Kalantri

... Appellant

VERSUS

DBM Geotechnics & Constructions
Pvt. Ltd. & Ors.

... Respondents

OFFICE REPORT ON LIMITATION

1. The Civil Appeal is within time
2. The Appeal is barred by time and there is delay of ____ day in filing the same against the judgment/order dated _____ and Appeal for condonation of ____ days delay has been filed.
3. There is delay of ____ days in re-filing the Appeal and Appeal for condonation of ____ days delay in re-filing has been filed.

BRANCH OFFICER

FILED ON: 12.05.2020

PROFORMA FOR FIRST LISTING**SECTION: III (Gujarat)****The case pertains to (Please tick/check the correct box):**

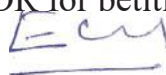
- ☐ Central Act: (Title) **Representation of the People Act, 1951**
- ☐ Section: **100**
- ☐ Central Rule: (Title) **N.A.**
- ☐ Rule No(s): **N.A.**
- ☐ State Act: (Title) **N/A**
- ☐ Section: **N/A**
- ☐ State Rule: (Title) **N/A**
- ☐ Rule No(s): **N/A**
- ☐ Impugned Interim Order: (Date) **N/A**
- ☐ Impugned Final Order/Decree: (Date) **12.05.2020**
- ☐ High Court: (Name) **High Court of Gujarat at Ahmedabad**
- ☐ Names of Judges: **Hon'ble Mr. Justice Paresh J. Upadhyay**
- ☐ Tribunal/Authority: (Name) **N/A**

-
1. Nature of matter: ☒ Civil ☐ Criminal
2. (a) Petitioner/Appellant No.1: **Bhupendrasinh Manubha Chudasama**
 (b) e-mail ID: **N/A**
 (c) Mobile phone number: **N/A**
3. (a) Respondent No.1: **Ashwin Kamsubhai Rathod & Ors.**
 (b) e-mail ID: **N/A**
 (c) Mobile phone number: **N/A**
4. (a) Main Category classification: **09 Election Matters**
 (b) Sub-classification: **0908 Others**

5. Not to be listed before: N/A
6. (a) Similar disposed of matter with citation, if any, & case details: **SLP (Civil) No. 28389/2018**
SLP (C) No. 3075/2019
(b) Similar pending matter with case details: **No similar matter is pending**
7. **Criminal Matters:**
(a) Whether accused/convict has surrendered: ☐ Yes ☐ No
(b) FIR No. N/A
(c) Police Station: N/A
(d) Sentence Awarded: N/A
(e) Period of sentence undergone including period of Detention/Custody Undergone N/A
8. **Land Acquisition Matters:**
(a) Date of Section 4 notification: N/A
(b) Date of Section 6 notification: N/A
(c) Date of Section 17 notification: N/A
9. **Tax Matters:** State the tax effect: N/A
10. Special Category (first petitioner/appellant only): N/A
- ☐ Senior citizen > 65 years ☐ SC/ST ☐ Woman/child ☐ Disabled
- ☐ Legal Aid case ☐ In custody N.A.
11. Vehicle Number (in case of Motor Accident Claim matters): N/A

Date: 12.05.2020

AOR for petitioner(s)/appellant(s)



E.C. AGRAWALA

AOR Code No. 177

48, Lawyers Chamber,

Supreme Court of India

New Delhi – 110 001

Email: chamber@aglaw.in

SYNOPSIS

The Appellant is filing the present Appeal against final judgment and order dated 12.05.2020 passed by the Hon'ble High Court of Gujarat at Ahmedabad whereby the High Court has allowed Election Petition No. 3 of 2018 preferred by the Respondent no. 1. The Hon'ble High Court was pleased to partly allow the Election Petition as and was pleased to declare the election of the appellant herein to 58-Dholka Constituency as void under S. 100 (1)(d)(iii) of the Representation of the People Act, 1951. The High Court was further pleased to hold that the procedure adopted for counting of votes for '58-Dholka Constituency' was against the orders of the Election Commission of India and the same was illegal and that the Respondent no. 1 herein/original Election Petitioner proved that the result of the election has been materially affected by non-compliance with the provisions of the Representation of the People Act, and / or Rules or Orders made under the said Act and consequently the election of the returned candidate (the Appellant herein) was declared as void under Sec. 100(1)(d)(iv) of the Representation of People Act, 1951.

The Hon'ble High Court further held that the election of the returned candidate is also void under S. 100(1)(b) of the Act and thus has declared the election void on the above three grounds.

That the High Court has failed to appreciate the proper facts of the case and has reached a completely erroneous conclusion in holding the successful election of the Petitioner as illegal and void.

Hence the present Appeal.

LIST OF DATES

- 14.12.2017 The General Elections to the Gujarat Legislative Assembly, 2017 for the '58 – Dholka Assembly Constituency' were held on 14.12.2017. Mr. Bhupendrasinh Manubha Chudasama (Appellant herein) was the candidate set up by the Bharatiya Janta Party. Mr. Ashwinbhai Kamsubhai Rathod (the Respondent no. 1 herein) was the candidate set up by the Indian National Congress Party.
- 18.12.2017 The counting and declaration of result took place on 18.12.2017. As per the said result, the Appellant herein was declared the returned candidate. The returned candidate/Appellant herein, at the relevant time, was a Member of the Council of Ministers of the Government of Gujarat, with the portfolio of Revenue Department. At present, he is a Member of the Council of Ministers of the Government of Gujarat, holding the portfolios of the Departments of Education and Law & Justice. As per the said Election Result, declared on 18.12.2017, the total number of valid votes cast in favour of the Respondent no. 1 herein were 71203 votes. Total number of valid votes cast in favour of the returned candidate – the Appellant herein were 71530 votes. The returned candidate thus got elected with the margin of 327 votes.

Total votes received by the Returning Officer through postal ballot papers were 1356. Out of 1356 postal ballots, the Returning Officer rejected 429 postal ballots.

- 12.01.2018 The election of the Appellant herein (original respondent No. 2 before the High Court) was challenged on various grounds as pleaded in memo of the petition, more particularly on the ground of corrupt practice and that since the difference in the victory margin (327 votes) was less than the total number of rejected postal ballots (429 postal ballots), the result was materially affected. It was prayed before the High Court the election of the Appellant herein should be set aside.
- 26.03.2018 The Respondent no. 13 in the Election Petition/ The Returning Officer and Prant Officer, filed his Written Statement.
- 09.04.2018 The Respondent no. 1 herein/Election Appellant filed his Rejoinder to the Written Statement filed by the Returning Officer..
- 16.04.2018 The Appellant herein filed his Written Statement with a purshish for extension of time for placing the aforesaid written statement on record of the file of the Election Petition. It was directed by the Hon'ble court to file a detailed Application instead of a purshish.

- 05.05.2018 The Appellant herein filed Election Application No. 9 of 2018 seeking permission to place the written statement on record which was filed on 18/4/2018.
- 07.05.2018 The written statement of the Appellant, came to be taken up on record by virtue of order passed by the Hon'ble High court dated 7/5/2018 in Election Application No. 9 of 2018.
- 09.05.2018 An Election Application No. 10 of 2018 came to be presented and instituted in the captioned Election Petition under the provisions of Rule 293 of the Gujarat High Court Rules 1993. In the said application, summons for issuance of directions were sought for by the Respondent no.1 herein..
- 09.05.2018 Thereafter an Election Application No. 11/2018 was preferred by the Election Commission of India and returning officer praying to be deleted as Respondents nos. 13 and 14 in the petition.
- 28.06.2018 The Appellant herein filed Election Application No. 14/2018 under the provisions of Order 7 Rule 11 of the civil procedure code 1908.

- 09.10.2018 An Order dated 09.10.2018 was passed by the High Court in Election Application No. 14/2018, whereby the aforementioned Application under Order 7 Rule 11 came to be rejected.
- Oct/Nov., 2018 A Special Leave Petition was filed before this Hon'ble Court being S.L.P (Civil) 28389/2018 by the Appellant against the aforementioned Order dated 09.10.2018.
- 12.11.2018 This Hon'ble Court was pleased to dispose off the said SLP (Civil) No. 28389/2018 by this Hon'ble court in the facts and circumstances of the case whereby this Hon'ble Court opined that the contentions with regards to improper rejection of votes require to be decided by leading evidence in the trial.
- 27.11.2018 That thereafter an Order under the provisions of Rule 293 of Gujarat High Court Rules 1993 came to be passed by the Hon'ble high court and the pleadings were completed and all the rights of respective parties for pleadings came to be closed.
- 27.11.2018 That the aforementioned Election Application No. 11 of 2018 for deletion of Election Commission of India and returning officer came to be allowed partially by deleting the Election Commission by the High Court.

- 13.12.2018 The Hon'ble court directed the parties to submit proposed issues vide Order dated 13.12.2018.
- 19.12.2018 In Election Application No. 41 of 2018 filed by the Returning Officer to be deleted as party respondent, the Hon'ble High Court allowed the same and deleted the Returning Officer as party respondent.
- 19.12.2018 Thereafter in Election Application No. 10 of 2018, the Hon'ble High Court directed the Registry to issue summons to the District Election Officer, Ahmedabad, for production of documents (videography of voting process) as prayed for in the application.
- 21.12.2018 Pursuant to the above mentioned order dated 19.12.2018 passed in Election Application No. 10 of 2018, two officers from the office of the District Election Officer, Ahmedabad remained present in court with three copies of a Hard Disc and DVD containing the videography of the counting process along with forwarding letters which were taken on record. In Election Petition No. 3 of 2018, the Hon'ble Court posted the matter for settling of issues. The Appellant seeks and craves liberty of this Hon'ble Court to produce the said Hard Disk and DVDs before this Hon'ble Court and

refer and rely on the same for during the course of hearing as and when required.

- 24.12.2018 The issues were thereafter framed by the Hon'ble High Court under Rule 296 of the Gujarat High Court Rules, 1992 read with Order XIV of the Code of Civil Procedure, 1908.
- 24.12.2018 In the above mentioned Election Application No. 10 of 2018, the Hon'ble High Court took on record further objections of the Appellant herein and listed it for further consideration on 28.12.2018.
- 28.12.2018 The Respondent no. 1 herein tendered his List of Witnesses along with a List titled "List of Original Documents as per Order 13, Rule 1 of the Code of Civil Procedure, 1908.
- 08.01.2019 The Appellant herein undertook to file his List of Witnesses within a week from the said date without prejudice to the rights and contentions of the Appellant herein in the above mentioned Election Application No. 10 of 2018.
- 09.01.2019 That the above mentioned Election Application No. 10 of 2018 came to be disposed of by the Hon'ble High Court.

09.01.2019 Thereafter Election Application No. 41 of 2018 along with note filed therein disposed of by the Hon'ble High Court.

16.01.2019 The List of Witnesses tendered by the Appellant taken on record. List of witness tendered by Respondent no. 12 in the Election Petition was also taken on record. The Respondent no. 12 stated that he will examine himself as a witness. The Hon'ble Court also noted the stand of the Respondent no. 12 that he supported the case of the Appellant herein.

List of witness tendered by Respondent no. 5 in the Election Petition was also taken on record. The Respondent no. 5 stated that he will examine himself as a witness. The Hon'ble Court also noted the stand of the Respondent no. 5 that he supported the case of the Election Appellant/Respondent no. 1 herein.

The Appellant herein raised objections against exhibiting of documents mentioned in order dated 21.12.2018, namely the Hard Disc and the DVD along with the forwarding letters. The Hon'ble High Court exhibited the said documents, keeping the question of admissibility of the said documents open and stated that the authenticity of the contents shall

be decided at an appropriate stage, during the trial, in accordance with law.

- Nil.01.2019 Appellant herein/original Respondent no. 2 filed SLP (C) Nos. 3075-3081 of 2019 before this Hon'ble Court against the aforementioned orders dated 19.12.2018, 21.12.2018, 24.12.2018, 28.12.2018, 08.01.2019, 09.01.2019 and 16.01.2019 passed by the Hon'ble High Court in Election Application No. 10 of 2018 and in Election Petition No. 3 of 2018.
- 24.01.2019 Affidavits-in-lieu of examination-in-chief of all witnesses of original Appellant exchanged and Appellant present for cross examination before the High Court.
- 30.01.2019 The Respondent No. 1 herein filed Chamber Summons 1/2019 before the High Court seeking production and inspection of ballots.
- 11.02.2019 The aforementioned SLP (C) Nos. 3075-3081 of 2019 were dismissed as withdrawn before this Hon'ble Court.
- 12.02.2019 The Election Appellant entered the witness box. His affidavit-in-lieu of Examination-in-Chief was taken on record along with the documents annexed therewith. The Hon'ble kept it open for the Appellant herein to make

legal submissions qua admissibility of the said documents (Exhibits 76 TO 86) during the course of arguments. The Appellant herein thereafter commenced the cross examination of the Election Appellant/Respondent no. 1 herein.

14.02.2019 Thereafter an objection was raised by advocate for original Respondent no. 5 to cross examination of the Appellant/witness by the original Respondent no. 12 since the original Respondent no. 12 cannot be said to be an adverse party under the Indian Evidence Act, 1872. The Hon'ble Court permitted the original Respondent no. 12 to cross-examine the original Appellant keeping the question of law raised in that regard open and in the event that the Hon'ble Court upholds the objection raised by the original Respondent no. 5, then that part of the evidence of the witness may be excluded from consideration. Cross-examination of original Appellant by original Respondent no. 12 was concluded. The second witness on behalf of the original Appellant entered the witness box and his cross examination by Respondent no. 2 and original Respondent no. 12 was also concluded.

18.02.2019 The evidence of remaining witnesses concluded.

In the Chamber Summons filed by the original Appellant, the Hon'ble Court directed the original Respondent no. 2 to file their reply if any before the next date of hearing.

22.02.2019 The original Respondent No. 2, 5 ad 12 jointly stated that they have no objection if the concerned Returning Officer is summoned as a witness. The Hon'ble Court directed the Registry to issue witness summons to the Returning Officer directing him to remain present on 28.02.2019.

28.02.2019 Thereafter pursuant to the summons, Mr. Dhaval Jani, the concerned Returning Officer, remained present before the Hon'ble Court. His examination by the Appellant commenced and during the course of recording of his evidence, two documents were shown by the learned counsel for the Appellant No. 1. Press Release issued by the Press Information Bureau , Government of India, regarding security arrangement for strong rooms and counting centers and, 2. A book titled "Handbook for Returning Officers, 2014" indicated to be in the public domain. Objection raised by the original Respondent no. 2. Above argument of learned advocate for the contesting respondent no.2 is kept open, reserving liberty to make submissions at appropriate stage of the trial. A true copy of

Press Release issued by the Press Information Bureau , Government of India, regarding security arrangement for strong rooms and counting centers and, 2.

01.03.2019 Learned senior advocate for the Appellant pointed out that, on 12.02.2019 while recording the evidence of the Appellant vide Exh.75, different documents were given exhibit numbers from Exh. Nos.76 to 86, however inadvertently, one document was missed to be pointed out to the Court in that regard. It is stated that the document - Annexure - P1 to the petition, was exhibited as Exhibit 76A and question of admissibility thereof was kept open on the same lines as per order dated 12.02.2019.

14.03.2019 In response to question nos.263 and 264 put to the witness Mr. Jani by the learned advocate for the contesting respondent no.2, the witness has shown readiness to put on record of this petition, a DVD containing complete recording of all moving cameras, which were functioning on the day of counting in the counting hall. The witness stated that, if permitted, he will be able to do the next day itself.

15.03.2019 Thereafter pursuant to the order of the Court dated 14.03.2019 (Exh.109), Mr.Dhaval Jani,

Deputy Collector, Dholka (the Returning Officer) remained present before the Court for further examination. During the course of his deposition, he tendered one DVD to the Court, the details of which are referred to, in the replies given by the witness to the question nos.265, 266 and 267 put to him. As per those details, the said DVD contains complete recording of all the moving cameras, which were used on the day of counting i.e. on 18.12.2017, so far the 58-Dholka Assembly Constituency is concerned. The said DVD was taken on record at Exh.No.110. Evidence of witness stood concluded.

- 02.04.2019 The Hon'ble Court passed an order impleading Mr. Dhaval Jani, RO, Ms, Vinita Bohra, Observer and Election Commission of India as party respondents in the Petition.
- 01.05.2019 That the Respondent no. 15 tendered an application below Exh. 120.
- 11.07.2019 Thereafter the Original Appellant was cross examined by Respondent no. 13-the Returning Officer.
- 24.07.2019 Pursuant to the above mentioned order dated 14.03.2019, advocate for Appellant requested for returning officer to be called into the

witness box. The officer objected to such request and did not enter the witness box.

- 30.07.2019 Arguments were concluded and reply of returned candidate was taken on record in Chamber Summons 1 of 2019.
- 07.08.2019 The consideration of the prayer made by the Appellant in the Chamber Summons as noted above, was deferred at that stage.
- 27.08.2019 Thereafter an Election Application No. 12 of 2019 was filed by the Appellant seeking permission from the Court to allow him to enter the witness box.
- 30.08.2019 The said Election application 12 of 2019 came to be allowed. An affidavit in lieu of examination-in-chief was tendered thereafter.
- 09.09.2019 The Appellant herein was thereafter cross examined. The said Cross examination thereafter came to be concluded on 12.09.2019.
- 17.09.2019 The Advocate for the Appellant herein gave purshis declaring that the he does not wish to examine any further witness on his behalf and was closing his evidence.
- 27.09.2019 Thereafter closing Purshis were filed on behalf of all the Respondents.

- 06.12.2019 Ld. senior advocate for the Appellant concluded his arguments. During the course of his submissions, learned senior advocate for the Appellant had requested that Exh.56 – (CCTV footage of the day of counting) be played in the Court. As per his request the same was played in the Court. Exh.110 (DVD containing recording of all the moving cameras on the date of counting), as tendered to the Court by the Returning Officer on 15.03.2019, was also played in the Court.
- 10.02.2020 The Written arguments were submitted by the parties.
- 12.05.2020 The subject Election Petition was erroneously allowed by the Hon'ble High Court whereby the election of the Appellant herein was declared invalid. The said impugned Judgment was pronounced by the Hon'ble High Court through video conferencing.
- 12.05.2020 Hence, the present Election Appeal.

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/ELECTION PETITION No. 3 of 2018

FOR APPROVAL AND SIGNATURE :

HONOURABLE Mr. JUSTICE PARESH UPADHYAY

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

ASHWINBHAI KAMSUBHAI RATHOD PETITIONER

Versus

BHAILALBHAI KALUBHAI PANDAV,
 BHUPENDRASINH MANUBHA CHUDASAMA
 AND OTHERS RESPONDENTS

Appearance :

E-MAIL COPY

MR P.C. KAVINA, SENIOR ADVOCATE with
 MR S.P. MAJMUDAR, ADVOCATE for the Petitioner

MR N.D. NANAVATI, SENIOR ADVOCATE with
 MS TEJAL VASHI, ADVOCATE for the contesting Respondent No. 2

MR MEHUL S. SHAH, SENIOR ADVOCATE with
 MR JENIL M. SHAH, ADVOCATE for the Respondent No. 5

MR JAL UNWALA, SENIOR ADVOCATE with
 MR BHAGIRATH N. PATEL, ADVOCATE for the Respondent No. 12

MR BHADRISH RAJU, ADVOCATE for the Respondent No.13

MR SAHIL SHAH, ADVOCATE for the Respondent No.14

MR NARENDRA K. AMIN, MR AMIT R. TIWARI and
MS HETU M. SUDARSHAN, ADVOCATES for the Respondents No. 15

=====

CORAM: HONOURABLE Mr. JUSTICE PARESH UPADHYAY

12th May 2020

CAV JUDGMENT (EXH.153)

1.1 Challenge in this Election Petition is made to the General Election to the Gujarat Legislative Assembly held in December 2017, for 58-Dholka Constituency. Mr. Ashwinbhai Kamsubhai Rathod (the petitioner) was the candidate set up by the Indian National Congress Party. Mr. Bhupendrasinh Manubha Chudasama (the respondent No. 2) was the candidate set up by the Bharatiya Janta Party. The said election was held on 14.12.2017. The counting of votes was held on 18.12.2017 and the result of the said election was declared on the same date. As per the result of the said election, Mr. Bhupendrasinh Manubha Chudasama (respondent No. 2) is the returned candidate, by securing total 71530 votes, out of which 71189 votes were received through EVMs and 341 votes were received through postal ballots. The petitioner secured total 71203 votes, out of which 70675 votes were received through EVMs and 528 votes were received through postal ballots.

1.2 The victory margin of the respondent No.2 over the petitioner is 327 votes.

1.3 The grievance of the petitioner in substance is to the

effect that :- (i) as against the victory margin of 327 votes, 429 postal ballot papers were illegally rejected / excluded from consideration by the Returning Officer, at the time of counting of votes, which has materially affected the result, (ii) the exclusion of those 429 postal ballots was behind everybody's back, (iii) to conceal this exclusion, election record is systematically manipulated by the Returning Officer, (vi) to manipulate the election record and in turn to conceal the said manipulation, all the orders / instructions of the Election Commission of India, including mandatory instructions, regarding procedure of counting of votes, preparation of election record and announcement of result were defied by the Returning Officer, on the day of counting of votes. According to the petitioner, the respondent No.2, who at the relevant time was the Revenue Minister, got all that done through the Returning Officer, for the furtherance of the prospects of the respondent No.2 in the Election in question and thereby corrupt practice, as defined under Section 123(7) of Representation of the People Act, 1951 was also committed.

1.4 The petitioner has prayed that, the said election of the respondent No.2 be declared void under the provisions of the Representation of the People Act, 1951. The petitioner has also prayed that, he be declared as the returned candidate in the said election, in place of the respondent No.2.

2.1 The details with regard to the pleadings of the contesting parties i.e. the petitioner and the returned candidate (the respondent No.2), which were the basis for framing the issues to be tried by this Court in this petition / trial, are noted in para:3 and para:4 respectively.

2.2 Issues framed by the Court are noted in para:5.

2.3 The details with regard to the respondents in this petition, including deletion of two of them and subsequent addition of three respondents and the circumstances leading to their deletion and subsequent addition, are noted in para:6.

2.4 The details with regard to the evidence brought on record by the petitioner are recorded in para:7. Further, the details with regard to the evidence / deposition of the Returning Officer, who had entered the witness box at the instance of the petitioner, pursuant to the witness summons issued by this Court, are recorded in para:8. The said evidence / deposition of the Returning Officer is recorded at Exh. 99 and is treated to be part of the evidence brought on record by the petitioner.

2.5 The details with regard to the evidence brought on record by the Returned Candidate (the respondent No.2) are recorded in para:9.

2.6 The details with regard to the evidence / say / case of the Returning Officer (Mr.Dhaval Jani, Deputy Collector), after he was joined as party respondent No.13 by this Court vide order dated 02.04.2019, as required under Section 99 of the Representation of People Act, 1951, are recorded in para:10 to 13.

2.7 The details with regard to the evidence / say / case of the Observer (Mrs.Vinita Bohra, IAS), after she was joined as party respondent No.15 by this Court vide order dated 02.04.2019, as required under Section 99 of the Representation of People

Act, 1951, are recorded in para:14 & 15.

2.8 The response of the Election Commission of India, after it was joined as the respondent No.14 by this Court vide order dated 02.04.2019, is recorded in para:16.

2.9 The details with regard to the pleadings / evidence on behalf of other respondents i.e. respondent Nos.1 to 11 (except the returned candidate - respondent No.2,) are noted in para:17.

2.10 The details with regard to the legal submissions / arguments made on behalf of the petitioner are noted in para:18.

2.11 The details with regard to the legal submissions / arguments made on behalf of the returned candidate - the respondent No.2, are noted in para:19.

2.12 The answers to the issues framed by this Court, on the basis of the evidence on record, are noted in para:20.

2.13 The details with regard to the appreciation of the evidence on record and the reasons & the findings of this Court, for arriving at the answer qua each issue, are noted as under.

2.13.1 Qua Issue No.2, 6 & 10, para:21 to 32.

2.13.2 Qua Issue No. 1, 7 & 11, para:33 to 41.

2.13.3 Qua Issue No. 3, para:42 to 54.

2.13.4 Qua Issue No. 4 & 5, para:55 to 65.

2.13.5 Qua Issue No. 8, 9 & 12, para:66 to 96.

2.13.6 Qua Issue No. 13, para:97 to 99.

2.13.7 Qua Issue No.14, as per final order.

2.14 The final order is recorded in para:100 to 106.

3.1 The case of the petitioner, as pleaded in the memo of the petition (Exh.1), in substance, is as under.

3.2 It is stated by the petitioner that, as per the Final Result Sheet Form-20, the petitioner secured total 71203 votes out of which 70675 votes were received through EMVs and 528 votes were received through postal ballots. The respondent No.2 secured total 71530 votes out of which 71189 votes were received through EMVs and 341 votes were received through postal ballots. The victory margin of the respondent No.2 over the petitioner was 327.

3.3 According to the petitioner, a copy of an unsigned Final Result Sheet Form 20 (Exh.83), was given to him by the Returning Officer on the date of declaration of result (18.12.2017), which was acknowledged by the petitioner. As per the said Final Result Sheet (Exh.83), total number of postal ballots shown to have been received by the Returning Officer were 927, and from these total 927 postal ballots, zero postal ballot was shown to have been rejected by the Returning Officer, at the time of counting of votes. It is stated by the

petitioner that he was given another copy of the Final Result Sheet Form-20 on a subsequent day with the seal and signature of the Returning Officer (Exh.76A), in which total number of postal ballots shown to have been received by the Returning Officer were 1356, and from these total 1356 postal ballots, 429 postal ballots were shown to have been rejected by the Returning Officer, at the time of counting of votes. It is submitted by the petitioner that thus, there is manipulation of election record, because there can not be two Final Result Sheets Form-20, depicting two different figures of votes received through postal ballots. It is pleaded that, the said difference of 429 postal ballots is more than the victory margin of 327 votes, which has materially affected the result.

3.4 It is pleaded that, the process of counting of votes was illegal and against the instructions of the Election Commission of India.

3.5 It is pleaded that, there are discrepancies in the figures of total votes polled, as reflected in the Total Voters Turnout Report published by the District Election Officer vis-a-vis the Final Result Sheet Form-20.

3.6 Grievance is also made that there are discrepancies in the figures of total votes polled (through EVMs), as reflected in the Total Voters Turnout Report published by the Returning Officer vis-a-vis the Final Result Sheet Form-20. Specific reference in this regard is made to five polling stations viz.,(i) 60-Dholka-16, (ii) 70-Dholka-26, (iii) 175-Ganol-2, (iv) 177-Dholi and (v) 230-Salajada.

3.7 It is pleaded that, the re-counting of votes was asked for by and on behalf of the petitioner but the Returning Officer did not do that. It is the grievance of the petitioner that the Returning Officer was reluctant even to accept the application of the petitioner for recounting.

3.8 It is also the grievance of the petitioner that, as per the instructions of the Election Commission of India, though a CD containing the record of complete videography of counting process should have been given by the Returning Officer to all candidates or their election agents free of cost after the counting process is over, the same was not given to the petitioner or his election agent by the Returning Officer, in spite of that being asked for.

3.9 Specific complaint is made by the petitioner against the respondent No.2 and Mr. Dhaval Jani, the Returning Officer (respondent No.13) for committing corrupt practice. According to the petitioner, the concerned Returning Officer, whose regular posting was as Deputy Collector at Dholka, was under the influence of the respondent No.2, who at the relevant time was the Revenue Minister and Dholka was his home constituency. According to the petitioner, the manipulation in the entire counting process by the concerned Returning Officer (respondent No.13) was a well thought design. The respondent No.2, who at the relevant time was the Revenue Minister, got Mr. Dhaval Jani posted as Deputy Collector at Dholka, by transferring one officer who was already working there, after the code of conduct came in force. It is pleaded by the petitioner that all these mischiefs were played by the Returning Officer, only with a view to see that the respondent

No.2 gets elected by hook or crook. As per the assertion of the petitioner, the Returning Officer Mr.Dhaval Jani (respondent No.13) and the returned candidate (the respondent No.2) acted hands in glove and in connivance with each other, for the furtherance of the prospects of respondent No.2 in the election in question.

3.10 The petitioner has prayed that, the election of the respondent No.2 be declared as void. The petitioner has also prayed that he be declared elected.

4.1 The respondent No.2 contested this petition by filing his written statement (Exh.20).

4.2 The respondent No.2 was not present, at the counting center, on the date of counting of votes. He could not have any personal knowledge, what had happened on that day, in the counting hall. The respondent No.2 however referred to the contents of the written statement (Exh.10) filed by the Returning Officer, to assert that nothing wrong had happened at any stage of the election in question, not even in the counting hall, on the date of counting of votes. He has denied that there was any corrupt practice.

E-MAIL COPY

4.3 The above, in-substance, is the contest put forward by the respondent No.2 by way of his written statement (Exh. 20).

5.1 The following issues were framed by this Court vide order dated 24.12.2018.

-: ISSUES :-

"1. Whether the petitioner proves that the procedure adopted for counting of votes for '58-Dholka Constituency' was against the orders of the Election Commission of India and was illegal?

2. Whether the petitioner proves that 429 postal ballot papers were illegally rejected at the time of counting of votes ?

3. Whether the petitioner proves that objection was raised by the petitioner, or his election agent, regarding alleged illegal rejection of postal ballot papers and / or non-compliance of the orders of the Election Commission of India, at the time of counting of votes ?

4. Whether the petitioner proves that there are discrepancies in the figures of total votes polled, as reflected in the final result sheet published by the Returning Officer, vis-a-vis the figures reflected in the Total Voters Turnout Report published by the District Election Officer ?

5. Whether the petitioner proves that there are discrepancies in the number of total votes shown to have been polled through EVMs at the polling stations, visa-vis the number of votes taken into consideration from those EVMs at the time

of counting of votes ?

6. Whether the petitioner proves that the result of the election, in so far as it concerns the returned candidate (the respondent No.2) from '58-Dholka Constituency' for the Gujarat State Legislative Assembly Elections, held on 14.12.2017, has been materially affected by improper refusal / rejection of the votes ?

7. Whether the petitioner proves that the result of the election, in so far as it concerns the returned candidate (the respondent No.2) from '58-Dholka Constituency' for the Gujarat State Legislative Assembly Elections, held on 14.12.2017, has been materially affected by non-compliance with the provisions of the Representation of the People Act, and / or Rules or Orders made under the said Act ?

8. Whether the petitioner proves that any corrupt practice was committed under Section 123 of the Representation of the People Act, 1951 during the election of '58-Dholka Constituency' held in December 2017 ?

9. Whether the petitioner proves that any corrupt practice was committed by the returned candidate (the respondent No.2) or his election agent or by any person with the consent of the respondent No.2 or his election agent during the election of '58- Dholka Constituency' held in

December 2017 ?

10. Whether the petitioner proves that the election of the returned candidate (the respondent No.2) from '58-Dholka Constituency' for the Gujarat State Assembly Elections held on 14.12.2017, needs to be declared as void under Sec. 100(1)(d)(iii) of the Representation of People Act, 1951 ?

11. Whether the petitioner proves that the election of the returned candidate (the respondent No.2) from '58-Dholka Constituency' for the Gujarat State Assembly Elections held on 14.12.2017, needs to be declared as void under Sec.100(1)(d)(iv) of the Representation of People Act, 1951 ?

12. Whether the petitioner proves that the election of the returned candidate (the respondent No.2) from '58-Dholka Constituency' for the Gujarat State Assembly Elections held on 14.12.2017, needs to be declared as void under Sec. 100(1)(b) of the Representation of People Act, 1951 ?

13. Whether the petitioner proves that he is entitled to be declared as duly elected candidate from '58-Dholka Constituency' for the Gujarat State Assembly Elections held on 14.12.2017 ?

14. What final order to be passed ?”

5.2 It is noted that, the said order of this Court dated 24.12.2018, whereby the issues were framed, was challenged by the respondent No.2 (the returned candidate) before the Supreme Court of India, along with other orders passed by this Court recorded on this petition and applications therein, in the group of SLPs being Special Leave Petition (Civil) Nos.3075 to 3081 of 2019 with SLP (Civil) No.3950 of 2019, which was dismissed as withdrawn vide order dated 11.02.2019.

6. The details with regard to the respondents in this petition, including deletion of two of them and subsequent addition of three respondents and the circumstances leading to their deletion and subsequent addition, are as under.

6.1 In the election in question, total 13 candidates were in the fray.

6.2 The respondent No.2 secured highest number of votes and is the returned candidate. The petitioner secured the highest votes, next to the respondent No.2 – the returned candidate. The principal prayer in the petition is that the election of the respondent No.2 – the returned candidate be declared void. The real contest is between the petitioner and the respondent No.2.

6.3 Since the petitioner has also prayed that he be declared as the returned candidate in place of the respondent No.2, it would be necessary to join all the candidates, who had contested the election, as the respondents in this Election

Petition, as required under Section 82 of the Representation of the People Act, 1951. This is how, all those candidates are respondent Nos.1 to 12, including the returned candidate being respondent No.2.

6.4 In the petition, the petitioner has made various allegations against the Returning Officer, including of corrupt practice. Mr.Dhaval Jani, the concerned Returning Officer is referred by name in the petition and the petitioner had joined the said officer, as party respondent No.13. The said Returning Officer also filed his written statement (Exh.10) contesting this Election Petition.

6.5 The petitioner also joined the Election Commission of India as respondent No.14.

6.6 This is how, when this petition was filed, there were total 14 respondents.

6.7 After filing the written statement (Exh.10) (standing as the respondent No. 13), the Returning Officer (Mr.Dhaval Jani), along with the Election Commission of India, jointly filed an application being Election Application No. 11 of 2018 (Exh.24) before this Court seeking that they be deleted as party respondents. The said application (Exh.24) was treated to be an application by the Election Commission of India (respondent No.14) only and was allowed vide order dated 27.11.2018. Liberty was reserved to the Returning Officer (respondent No.13) to file separate application, for that purpose. In view of this, Mr.Dhaval Jani – the Returning Officer (respondent No.13) filed an application being Election Application No.41 of 2018

(Exh.47) with the prayer that he be deleted as respondent. The said application was allowed by the Court vide order dated 19.12.2018 (Exh.50). With the said deletion, total 12 respondents remained on record of this Election Petition.

6.8 Subsequently, the petitioner filed Chamber Summons No.1 of 2019 (Exh.94). One of the prayers therein was that, the concerned Returning Officer be summoned as a witness by the Court. The contesting respondent No.2 gave purshis (Exh.95) and declared that, he does not have any objection if the Returning Officer is summoned as a witness. In view of this, summons was issued to Mr.Dhaval Jani, Returning Officer to appear before this Court, in this trial, as a witness. An order to that effect was passed on 22.02.2019 (Exh.96). Mr. Dhaval Jani, the concerned Returning Officer appeared before the Court as a witness and his deposition was recorded at Exh.99. During the course of his deposition, additional evidence also came on record through him, being Exhs.100, 101, 107, 110, 111, 112 and 113. Recording of his evidence was concluded on 15.03.2019, as noted in order dated 15.03.2019 (Exh.114), subject to the liberty to the parties to further cross-examine him, for the reasons recorded in the said order.

E-MAIL COPY

6.9 The evidence of the Returning Officer (Exh.99) and other evidences which came on record through him (as noted above), led to a situation where it was necessary to join him and the Observer as party respondents, as required under Section 99 of the Representation of People Act, 1951. An order to that effect was passed by this Court on 02.04.2019 (Exh.115). This is how, the Returning Officer and the Observer were joined as party respondents, by name. The Court also

thought it proper, at that time, to put certain factual aspects to the notice of the Election Commission of India. Under these circumstances, the concerned Returning Officer – Mr.Dhaval Jani, Deputy Collector was added as respondent No.13. The Election Commission of India was added as respondent No.14. The Observer – Mrs.Vinita Bohra, IAS, was added as respondent No.15.

6.10 This is how, there are total 15 respondents in this petition.

7. On behalf of the petitioner, the following evidence has come on record.

7.1 His deposition is at Exh.75.

7.2 His affidavit in lieu of Examination-in-Chief, in-substance is on the line of his pleadings, the details of which are noted in para:3 above. In his cross examination also, his stand has remained the same.

7.3 The documents, which were annexed by the petitioner with the petition (Exh.1), were produced by him, while he was in the witness box and those documents were taken on record as evidence being Exh. Nos.76 to 86, as reflected in the order dated 12.02.2019 (Exh.87). The details in that regard are as under.

- (i) The voters' turn out report published by the Collector and D.E.O., Ahmedabad. (Exh.76)
- (ii) Application of the petitioner under R.T.I. Dated

26.12.2018. (Exh.77)

- (iii) Letter by the Additional District Election Officer, Ahmedabad dated 02.01.2019. (Exh.78)
- (iv) The voters' turn out report prepared by the Returning Officer, Dholka. (Exh.79)
- (v) Complaint of the petitioner dated 27.12.2017 to the Chief Electoral Officer, Gujarat (Annexure : P-4 to the petition). (Exh.80)
- (vi) Application of the petitioner under R.T.I. Dated 20.12.2017 to the Returning Officer, Dholka. (Exh.81)
- (vii) Reply of the Public Information Officer - cum - Deputy Collector, Dholka dated 22.12.2017 to the petitioner. (Exh.82)
- (viii) Final Result Sheet - Form No.20 (Exh.83)
- (ix) Application of the petitioner under R.T.I. Dated 20.12.2018 to the Returning Officer, Dholka. (Exh.84)
- (x) Reply of the Public Information Officer - cum - Deputy Collector, Dholka dated 19.01.2018 to the petitioner. (Exh.85)
- (xi) Application of the petitioner under R.T.I. Dated 17.01.2019 to the Deputy Collector, Dholka. (Exh.86)

7.4 While the petitioner was in the witness box on 12.02.2019, Annexure-P/1 to the petition (copy of the Final Result Sheet - Form 20, signed by the Returning Officer) was inadvertently missed to be given Exhibit number, which, with the consent of the parties, was given Exhibit No.76A on 01.03.2019, as reflected in the order dated 01.03.2019

(Exh.103), more particularly para:6.1 to 6.4 thereof.

7.5 Before the petitioner entered the witness box, procedurally, he was required to put on record, original of the copies of the Annexures to petition. The petitioner had placed those documents on record, on 28.12.2018, with the purshis, which was given Exhibit No.63.

7.6 On behalf of the petitioner, list of witnesses (Exh.62) was tendered, which contained five names, including that of the petitioner. Thus, over and above the deposition of the petitioner (Exh.75), four more persons entered the witness box, their deposition is recorded at Exhibit Nos.89, 91, 92 & 93, the details of which are as under.

- (i) Shri Manubhai Ishwarbhai Prajapati, PW-2 (Exh.89)
- (ii) Shri Manishbhai Ratilal Makwana, PW-3 (Exh.91)
- (iii) Shri Harishbhai Shankarbhai Parmar, PW-4 (Exh.92)
- (iv) Shri Kailashkumar Jakshibhai Thakore, PW-5 (Exh.93)

7.7 An objection is raised by the respondent Nos.2 and 12, as noted in the orders dated 14.02.2019 and 18.02.2019, that the evidence of the above four witnesses (PW-2 to PW-5) being Exh. Nos.89, 91, 92 and 93 can not be taken into consideration. This objection is considered in the later part of this judgment.

8.1 The Returning Officer was summoned as a witness by this Court, at the request of the petitioner, and his evidence is recorded at Exh.99.

8.2 While the Returning Officer (Mr.Dhaval Jani) was in the

witness box, the following documents have come on record as evidence through him.

- (i) Press Release issued by the Press Information Bureau (dated 09.03.2017). (Exh.100)
- (ii) A book titled as 'Handbook for Returning Officer - 2014" by the Election Commission of India. (Exh. 101)
- (iii) Communication of the Election Commission of India dated 15.12.2017. (Exh. 107)
- (iv) DVD containing recording of all the moving cameras. (Exh. 110)
- (v) Statement showing round wise details of voters of EVMs. (Exh. 111)
- (vi) Authorization given by observer before declaration of the final result. (Exh. 112)
- (vii) Hand written communication dated 18.12.2017. (Exh. 113)

8.3.1 While being in the witness box, the Returning Officer also placed on record a DVD at Exh.110, as reflected in the order dated 15.03.2019 (Exh.114). The relevant part of the said order dated 15.03.2019 (Exh.114) reads as under.

"1. Pursuant to the order of this Court dated 14.03.2019 (Exh.109), Mr.Dhaval Jani, Deputy Collector, Dholka (the Returning Officer) is present before this Court for further examination. During the course of his deposition, he has tendered one DVD to the Court, the details of which are referred to, in the replies given by the witness to the question nos.265, 266 and 267 put to him by Mr.

C.B.Upadhyaya, learned advocate for the contesting respondent No.2. As per those details, the said DVD contains complete recording of all the moving cameras, which were used on the day of counting i.e. on 18.12.2017, so far the 58-Dholka Assembly Constituency is concerned. The said DVD is taken on record at Exh.No.110. A copy of the said DVD is made available to the learned advocates for the respective parties by the witness, at the time when it was tendered to the Court. It is noted that, the contents of the said DVD is not gone through by any of the parties, not even by the Court today."

8.3.2 The said DVD (Exh.110) was in addition to the DVD which he had already placed on record earlier at Exh.57. The said Exh.57 was placed on record by him (the Returning Officer) through his own forwarding letter Exh.55. The said DVDs (Exh.57 & Exh.110) were, over and above the CCTV footages (Exh.56) placed on record on behalf of the District Election Officer, by the forwarding letter of the Additional District Election Officer (Exh.54). Thus, the CCTV footages (Exh.56) and the DVD (Exh.57) have come on record from the custody of the authorities of the Election Commission of India, at the request of the petitioner and consequential direction of this Court, while the DVD (Exh.110) has come on record at the instance of the Returned Candidate - respondent No.2 through the Returning Officer (vide answer to question Nos.263, 264 and 265) of Exh. 99.

8.3.3 The details with regard to CCTV footage (Exh.56) and DVD (Exh.57) are noted in the orders recorded on Election Application No.10 of 2018 in Election Petition No.3 of 2018, being orders dated 19.12.2018, 21.12.2018, 24.12.2018 and 09.01.2019. The said orders of this Court were challenged by the respondent No.2 (the returned candidate) before the Supreme Court of India, along with other orders passed by this Court recorded, in the group of SLPs being Special Leave Petition (Civil) Nos.3075 to 3081 of 2019 with SLP (Civil) No.3950 of 2019. The group of the said SLPs was dismissed as withdrawn by the Supreme Court of India vide order dated 11.02.2019.

9. On behalf of the respondent No.2, the following evidence has come on record.

9.1 The deposition of the respondent No.2 is at Exh.139.

9.2 In his written statement (Exh.20), he had referred to and relied upon the written statement filed by the Returning Officer (Exh.10). The substance of his written statement (Exh.20) was that, nothing wrong had happened in the entire election process, including on the date of counting of votes, since it is so asserted by the Returning Officer in his written statement (Exh.10).

9.3 A list of witness was given on behalf of the respondent No.2 vide Exh. 68. In the said list, the names of five witnesses were included, but his own name was not included as a witness, at the relevant time.

9.4 The Returning Officer entered the witness box thereafter. His evidence was recorded at Exh.99. The evidence of the Returning Officer was not entirely on the line, which would have helped the respondent No.2. The respondent No.2 filed Election Application No. 12 of 2019, praying that though his own name was not included as a witness, after having read and perused the evidence of the Returning Officer at Exh. 99, he (the respondent No.2) wishes to appear and depose before the Court. The said application was allowed by this Court vide order dated 30.08.2019 (Exh.138), for the reasons recorded therein and that is how the respondent No.2 entered the witness box and gave his evidence (Exh.139).

9.5 The tenor of the evidence of the respondent No.2 (Exh.139), more particularly the contents of the affidavit in lieu of Examination-in-Chief is to the effect that, nothing wrong had happened on the date of counting of votes and he says so as he (the respondent No.2) was informed by his election agent to that effect. In his deposition, he also denied that he had influenced the Returning Officer in any manner.

9.6 After the deposition of the respondent No.2 was over, other five witnesses on his behalf were to enter the witness box, as per list of witnesses (Exh.68) initially tendered on his behalf. However the respondent No.2, after his deposition was over, declared (vide Exh.143) that, he does not wish to examine any other witness, on his behalf. The net effect thereof is that, none of the five witnesses, as originally included in the list of witnesses (Exh.68) entered the witness box and it is only the respondent No.2, whose evidence is recorded at Exh.139, on his behalf. No other evidence was

produced by him, on his behalf.

10.1 In the petition, allegations are made against the Returning Officer, including of corrupt practice. Mr. Dhaval Jani, the concerned Returning Officer is referred by name by the petitioner and the petitioner had joined the said officer, as party respondent No.13.

10.2 The Returning Officer had filed his written Statement (Exh.10) to contest the Election Petition.

10.3 Thereafter, the Returning Officer (Mr.Dhaval Jani), filed application(s) before this Court that he be deleted as party respondent, the details of which are noted in para:6.7 above. Subsequently, the petitioner filed Chamber Summons No.1 of 2019 (Exh.94). One of the prayers therein was that, the concerned Returning Officer be summoned as a witness. The respondent No.2 gave purshis (Exh.95) and declared that, he does not have any objection if the Returning Officer is summoned as a witness. In view of this, summons was issued to Mr.Dhaval Jani, Returning Officer to appear before this Court, in this trial, as a witness. An order to that effect was passed on 22.02.2019 (Exh.96). Mr.Dhaval Jani, the concerned Returning Officer appeared before the Court as a witness and his deposition was recorded at Exh.99.

11.1 The evidence of the Returning Officer (Exh.99) and other evidences which came on record through him (as noted above in para:8), led to a situation where it was necessary to join him and the Observer as party respondents, as required under Section 99 of the Representation of People Act, 1951. An order

to that effect was passed by this Court on 02.04.2019 (Exh.115). This is how, the Returning Officer and the Observer were joined as party respondents, by name, to give them an opportunity as required under Section 99 of the Representation of People Act, 1951.

11.2 The written statement (Exh.10) filed by the Returning Officer and his deposition (Exh.99) were already on record. As such, the said evidence was the basis to join him as party respondent, as required under Section 99 of the Representation of the People Act, 1951.

11.3 After joining Mr.Dhaval Jani - the concerned Returning Officer as respondent No.13 by this Court vide order dated 02.04.2019, he was again given an opportunity vide order dated 19.06.2019 to deal with / rebut any material - evidence / part thereof, which had come on record by that time, as contemplated under Section 99 of the Representation of the People Act, 1951. Availing that opportunity, he requested that, he be permitted to cross-examine the petitioner, whose evidence was recorded at Exh.75. Purshis (Exh.129) was given to that effect on 02.07.2019. This was permitted by the Court. On 11.07.2019, the petitioner entered the witness box again and he was cross-examined on behalf of this newly added respondent No.13 (The Returning Officer - Mr. Dhaval Jani). This is reflected in order dated 11.07.2019 (Exh.130). Beyond this, the said newly added respondent No.13 did not ask for any further opportunity. He did not deal with / rebut any material - evidence / part thereof, which had come on record by that time. He did not lead any evidence in his defence, the opportunity which was available to him under Section 99 of the

Representation of the People Act, 1951. Closing Purshis (Exh.147) was given on his behalf to this effect.

11.4 No written arguments are submitted on his behalf.

12. Mr.Bhadrish Raju, learned advocate on behalf of respondent No.13 (Mr.Dhaval Jani - the concerned Returning Officer) has submitted that, he had discharged his duties as the Returning Officer, as per the directions / instruction of the Election Commission of India and if the Court finds that any of the instructions of the Election Commission of India was not followed properly, it may be a bona fide error. It is submitted that there was no intention to help the respondent No.2 in any manner.

13. It is noted that, when the respondent No.13 - the Returning Officer was in the witness box on 15.03.2019 and his deposition was being recorded at Exh. 99, he tendered a DVD, at the instance of the respondent No. 2, which was claimed to be a DVD containing complete recording of all the moving cameras which were used on the day of counting. It was taken on record at Exh. 110. His evidence was concluded on that day, subject to liberty to the parties to further examine / cross-examine him qua the additional material tendered to the Court by him on that date, and the issues connected therewith and arising therefrom. This was recorded in the order of the Court dated 15.03.2019 (Exh. 114). In view of that, he was required to enter the witness box again, however by the purshis Exh.131, he took the stand that he be not called for further examination / cross-examination. On the said purshis (Exh.131) an order was passed by the Court on 24.07.2019 (Exh.132), to

the effect that no direction is given to him to enter the witness box again, against his wish. It was also noted in the said order dated 24.07.2019 (Exh.132) that the consequences of the Returning Officer not being ready to enter the witness box, in spite of what was noted in the said order and earlier orders dated 14.03.2019 & 15.03.2019, would be considered by this Court later.

14.1 As already noted above, Mrs. Vinita Bohra, IAS - Observer was joined as party respondent No.15 in this petition under the following circumstances.

14.2 The evidence of the Returning Officer (Exh.99) and other evidence which came on record through him (as noted above), led to a situation where it was necessary to join him (the Returning Officer) as party respondent, as required under Section 99 of the Representation of People Act, 1951. Since there was also an attempt, on the part of some respondent(s) to drag in the Observer, she was also required to be heard and therefore she was joined as respondent, along with the Returning Officer. An order to that effect was passed by this Court on 02.04.2019 (Exh.115). This is how, the Observer was joined as party respondent, by name, along with the Returning Officer, to give her opportunity as required under Section 99 of the Representation of People Act, 1951.

14.3 Pursuant to the notice of this Court dated 02.04.2019, the respondent No.15, personally remained present before this Court on the returnable date i.e. 01.05.2019 and addressed the Court personally and gave her first written response vide Exh.120, inter-alia stating therein that :- 'The result of Postal

Ballot papers submitted to me by RO with his signatures in standard format of ECI, duly signed by him, did not show any rejected votes. All 927 votes were shown as valid, hence I was satisfied and I signed the certificate'. Though the observer had personally remained present before the Court on the returnable date and had also addressed the Court and also gave her first response vide Exh.120, she was entitled to avail the opportunities, as contemplated under Section 99 of the Representation of the People Act, 1951, such as to deal with / rebut any material - evidence / part thereof, which had come on record by that time. For that purpose, she was granted time by the Court.

14.4 Thereafter, she filed written statement (Exh.126). In substance, her case is to the effect that, she did everything which was required to be done as the Observer, as per the standing instructions of the Election Commission of India. Beyond this, she did not ask for any further opportunity.

14.5 Purshis (Exh.128) was given on her behalf to the effect that, she does not intend to deal with any material evidence, which had come on record by that time.

14.6 Closing Purshis (Exh. 148) was given on her behalf to the effect that she does not wish to lead any evidence.

14.7 No written arguments are submitted on her behalf.

15. Mr. N.K.Amin, learned advocate has appeared on her behalf and has submitted that, she did everything which was required to be done as the Observer, as per the standing

instructions of the Election Commission of India. He has also referred to the standing instructions of the Election Commission of India with regard to the responsibility of the Observer as contained in the Handbook for Observer.

16.1 The details with regard to the Election Commission of India being party respondent No.14 are noted in detail, in earlier part of this judgment. The Election Commission of India was deleted as party respondent, at its request vide order dated 19.12.2018, recorded on Election Application No.11 of 2018.

16.2 Based on the evidence of the Returning Officer (Exh.99), it was necessary to add certain persons as party respondents in the petition, as required under Section 99 of the Representation of People Act, 1951. An order to that effect was passed by the Court on 02.04.2019 (Exh.115). This is how, Mr.Dhaval Jani, - the Returning Officer and Mrs. Vinita Bohra, IAS - the Observer were joined as party respondents, which is noted above.

16.3 The Election Commission of India can neither be said to be contesting respondent, nor any opportunity, which otherwise is required to be given to the concerned Officer - who may be named in the judgment, as required under Section 99 of the Representation of the People Act, 1951, need to be given to it, however while recording order dated 02.04.2019, this Court also thought it proper to put certain factual aspects to the notice of the Election Commission of India, for the reasons recorded in the said order and that is how, while joining the Returning Officer and the Observer as party

respondents by name, the Election Commission of India was also added as respondent No.14, in this petition.

16.4 The case of the Returning Officer and the Observer, being respondent Nos.13 and 15 respectively is noted separately.

16.5 The Election Commission of India responded to the notice of this Court by stating that the Chief Secretaries of the state of Gujarat and Rajasthan were directed, to initiate disciplinary proceedings against Mr.Dhaval Jani, the concerned Returning Officer (of Gujarat Cadre) and Mrs.Vinita Bohra, IAS, the concerned Observer (Rajasthan Cadre Officer) for imposing major penalty for non-compliance of the instructions of the Election Commission of India, while counting of votes of the election in question. Copies of two separate but identical letters dated 30.04.2019, along with two other letters were placed on record vide Exh.121 on 01.05.2019.

16.6 Thereafter, the Observer made representation to the Election Commission of India and explained how she could not be blamed for what has happened on the date of counting of votes, more particularly with regard to alleged illegal rejection of 429 postal ballots against which the petitioner has the complaint. At this stage it is noted that, as already noted above it was the case of the Observer even before this Court in Exh.120 that :- 'The result of Postal Ballot papers submitted to me by RO with his signatures in standard format of ECI, duly signed by him, did not show any rejected votes. All 927 votes were shown as valid, hence I was satisfied and I signed the certificate'. Considering her representation dated 09.05.2019 and 28.05.2019, the Election Commission of India reconsidered

its earlier order and intimated the Chief Secretary of the State of Rajasthan that disciplinary action against the Observer may not be initiated. A letter to that effect was sent to the Chief Secretary of the state of Rajasthan on 22.07.2019 and a copy thereof, was placed on record of this petition on 30.07.2019 vide Exh.134.

17. The details with regard to the pleading / arguments of other candidates - who had contested the election in question i.e. the respondent Nos.1 to 12 (except respondent No.2 - the returned candidate - whose case is separately recorded), are as under.

17.1 Total 13 candidates were in the fray, in the election in question.

17.2 Since the respondent No.2 is the returned candidate and the petitioner is the candidate who had secured the highest votes, next to the returned candidate, the real contest is between the petitioner and the respondent No.2.

17.3 Other 11 candidates are less affected, so far the principal controversy in this petition is concerned. However, as noted earlier, since the petitioner has also prayed that he be declared as the returned candidate in place of respondent No.2, it would be necessary to join all the candidates, who had contested the election in question, as the respondents in the Election Petition, as required under Section 82 of the Representation of the People Act, 1951. This is how, there are 12 respondents (respondent Nos.1 to 12) including the returned candidate (being respondent No.2). The case of the

contesting respondent No.2 is separately recorded.

17.4 The respondent No.5 and respondent No.12 have appeared before this Court. Rest of the respondents i.e. respondent Nos.1, 3, 4, 6 to 11 have chosen not to appear. No further mention needs qua them.

17.5 So far respondent Nos.5 and 12 are concerned, none of them have filed written statement.

17.6 Initially, the respondent No.5 had, vide Exh.70 declared that he would enter the witness box but on 23.08.2019, learned advocate for the respondent No.5, on instructions, stated that he does not wish to give any evidence. Thus no evidence has come on his behalf. The above factual aspect is noted in order dated 23.08.2019.

17.7 The respondent No.12 had earlier (vide Exh.69) indicated that he would enter the witness box, however, subsequently he declared that, he does not wish to enter the witness box / lead any evidence. Closing purshis on behalf of the respondent No.12 was given vide Exh.146.

18. Mr. P.C. Kavina, learned senior advocate has addressed the Court at length on behalf of the petitioner. Written arguments are also submitted on behalf of the petitioner(Exh.150).

18.1 From amongst the various submissions made on behalf of the petitioner, it is argued that there is manipulation of the record of the election in question by the Returning Officer.

Elaborating this, it is submitted that, a copy of an unsigned Final Result Sheet Form-20 (Exh.83) was given to the petitioner by the Returning Officer on the date of counting of votes / declaration of result, in which total number of postal ballots shown to have been received by the Returning Officer were 927, and from these total 927 postal ballots, zero postal ballot was shown to have been rejected by the Returning Officer at the time of counting of votes, however in an another copy of the Final Result Sheet Form-20 (Exh.76A), which was given to the petitioner by the Returning Officer on a subsequent day with his seal and signature, total number of postal ballots shown to have been received by the Returning Officer were 1356, and from these total 1356 postal ballots, 429 postal ballots were shown to have been rejected by the Returning Officer, at the time of counting of votes. It is argued that there can not be two Final Result Sheets Form-20, depicting two different figures of votes received through postal ballots and thus there is manipulation of election record. It is submitted that, the said difference of 429 postal ballots is more than the victory margin of 327 votes, which has materially affected the result of the Election in question and therefore the election be declared void.

E-MAIL COPY

18.2 It is also submitted that, the procedure adopted by the Returning Officer at the time of counting of votes was illegal. It was in breach of the orders / instructions of the Election Commission of India regarding Mandatory Recounting and Re-verification of postal ballots, Commencement of penultimate round of counting of votes through EVMs after completion of counting of postal ballots, Restriction on use of mobile phone, Preparation of Final Result Sheet Form-20 etc., which has

materially affected the result.

18.3 It is submitted that the transfer of Mr. Dhaval Jani from the post of Deputy Collector, Dwarka and posting him as Deputy Collector, Dholka to work as the Returning Officer, after the code of conduct was put in force, was a well thought design of the respondent No.2, who at the relevant time was the Revenue Minister. It is submitted that, if the illegalities / irregularities committed by the said officer are conjointly considered, the respondent No.2 and the Returning Officer are seen working hands in glove, for the furtherance of the prospects of the respondent No.2 in the election in question, which amounts to corrupt practice as defined under Section 123 (7) of the Representation of People Act, 1951. By referring to the developments which took place during the trial, it is also argued that there is quid pro quo between the respondent No.2 and the Returning Officer.

18.4 It is further submitted that the presence of the Additional Private Secretary of the respondent No.2 (the then Revenue Minister) in the counting hall, at the time of counting of votes, is an additional factor which aggravates the corrupt practice and it also amounts to 'booth capturing' under Section 123 (8) read with Section 135-A of the Representation of People Act, 1951.

18.5 Addressing the issue of admissibility of the documents at Exh. Nos. 56, 57 & 110 (CCTV footage and recording of moving cameras), it is submitted that these documents need to be taken into consideration by the Court. These documents are public documents and further, they have come on record from

the custody of an authorized officer of the Election Commission of India. Submissions are also made regarding the reluctance of the Returning Officer to place on record the DVD containing the complete recording of moving cameras, even after the direction of the Court and subsequently seeking permission of the Court to place it on record at the insistence of the respondent No.2, and not offering himself for cross-examination in that regard.

18.6 It is submitted that the petitioner has proved his case, as pleaded in the petition by leading documentary as well as oral evidence. As against that, there is no rebuttal by the respondent No.2. Neither any documentary evidence is placed on record by him nor he has presented any person as his witness to rebut what is deposed by the petitioner. The respondent No.2, in substance has given walkover to the petitioner so far oral evidence is concerned. Not only no witness is presented by the respondent No.2 from his side, there is no cross-examination of the petitioner by the Returning Officer on any material part of his evidence.

18.7 Learned senior advocate for the petitioner submitted that in view of the above, the petition be allowed and the prayers as prayed for be granted.

18.8 The following authorities are relied on behalf of the petitioner.

- (i) Shafhi Mohammad v. State of Himachal Pradesh, reported in (2018) 2 SCC 801.
- (ii) Anvar P.V. v. P.K. Basheer, reported in (2014) 10

SCC 473.

- (iii) Asif Balwa v. C.B.I., reported in 2012 SCC Online Del 903.
- (iv) Nathu Ram Mirda v. Gordhan Soni & Anr., reported in (1971) 38 ELR 16.
- (v) Bhabhi v. Sheo Govind & Ors., reported in (1976) 1 SCC 687.
- (vi) Modula India v. Kamakshya Singh Deo, reported in (1988) 4 SCC 619.
- (vii) Karnidan Sarda and another v. Sailaja Kanta Mitra, reported in AIR 1940 Pat 643.
- (viii) State of U.P. v. Nahar Singh, reported in 1998 (3) SCC 561.
- (ix) Rajinder Prasad v. Darshana Devi, reported in 2001 (7) SCC 69.
- (x) Baldev Singh v. Shinder Pal Singh & Anr., reported in 2007 (1) SCC 341.
- (xi) Pradip Buragohain v. Pranati Phukan, reported in 2010 (11) SCC 108.
- (xii) Narain Pandey v. Pannalal Pandey, reported in 2013 (11) SCC 435.
- (xiii) Vinod Kumar v. State of Haryana, reported in 2015 (3) SCC 138.
- (xiv) Rasiklal Manikchand Dhariwal v. M.S.S. Food Products, reported in (2012) 2 SCC 196.
- (xv) Prashant Maheshbhai Pandya & Ors. v. State of Gujarat & Ors., recorded in Special Criminal Application No. 4561 of 2015.

19. Mr.N.D. Nanavati, learned senior advocate has addressed the Court at length on behalf of the respondent No.2. Written

arguments are also submitted on behalf of the respondent No.2 (Exh.151).

19.1 It is submitted that the CCTV footage and DVD (Exh.56, 57 and 110) can not be taken into consideration. It is submitted that those documents are the electronic documents and the requirement of Section 65B of the Indian Evidence Act would come in play, which is not fulfilled in the present case. It is submitted that, the decision of the Supreme Court of India in the case of Shafhi Mohammad Vs. State of Himachal Pradesh reported in (2018) 2 SCC 801 as relied by the petitioner, is not a good law on the question of admissibility of the electronic document, but the correct law on that point can be traced in the decision of the Supreme Court of India in the case of Anvar P.V. Vs. P.K.Basheer reported in (2014) 10 SCC 473. It is further submitted that, by the subsequent order of the Supreme Court of India (dated 26.07.2019) recorded on Civil Appeal Nos.20825 & 20826 of 2017 and cognate matters, the said issue is referred to the Larger Bench of the Supreme Court. The following authorities are relied on behalf of the respondent No.2 to contend that, it is the decision of the Supreme Court of India in the case of Anvar P.V. Vs. P.K. Basheer reported in (2014) 10 SCC 473 which should be followed and not the decision in the case of Shafhi Mohammad Vs. State of Himachal Pradesh reported in (2018) 2 SCC 801 as relied by the petitioner. In support of this argument, reliance is placed on the following decisions of the Supreme Court of India.

- (i) Anvar P.V. vs. P.K. Basheer, reported in (2014) 10 SCC 473.

- (ii) Shafhi Mohammad vs. State of H.P., reported in (ii) (2018) 2 SCC 801 & (2018) 5 SCC 311.
- (iii) Vikram Singh @ Vicky Walia vs. State of Punjab, reported in (2017) 8 SCC 518.
- (iv) Ramanbhai Ashabhai Patel vs. Dabhi Ajitkumar Fulsinji, reported in (iv) AIR 1965 SC 669.
- (v) Vashist Narain Sharma vs. Dev Chandra, reported in (v) AIR 1954 SC 513.
- (vi) P. Ramachandra Rao vs. State of Karnataka, reported in (vi) 2002(2)GLH 518.
- (vii) Rattiram vs. State of Madhya Pradesh, reported in (vii) (2012) 4 SCC 516.
- (viii) Pradip Buragohain vs. Pranati Phukan, reported in (viii) (2010) 11 SCC 108.

19.2 It is further submitted that non-compliance of the instructions of the Election Commission of India, if any, such as recounting and re-verification of postal ballots, sequence of counting of postal ballots vis-a-vis counting of votes through EVMs, prohibition to bring mobile phone in the counting hall etc., would not fall within the ambit of 'breach of any provision of the Constitution or Act or any Rule or Order made under the Act' and the election in question therefore can not be declared as void under Section 100(1)(d)(iv) of the Representation of People Act, 1951.

19.3 It is further submitted that 429 Postal Ballots were rejected by the Returning Officer, even before opening the cover Form No.13-B. Those postal ballots could not be termed to be 'votes' in view of Rule 54-A of the Conduct of Election Rules. The rejection of postal ballots, at that stage therefore

can not be termed to be 'rejection of any vote'. The election in question therefore can not be declared as void under Section 100(1)(d)(iii) of the Representation of People Act, 1951.

19.4 It is submitted that there is no evidence with regard to any corrupt practice. There is no evidence that there was any consent of the respondent No.2, even with regard to any of the procedural irregularities, if any, on the part of the Returning Officer, at any stage of the election, including on the date of counting of votes. It is submitted that Section 123 of the Representation of People Act, 1951 is not violated in any manner, which may warrant declaration to the effect that the election was void under Section 100(1)(b) and/or 100(1)(d)(ii) of the Representation of People Act, 1951. In support of this argument, reliance is placed on the following decisions of the Supreme Court of India.

- (i) Santosh Yadav vs. Narender Singh, reported in (2002) 1 SCC 160.
- (ii) Samant N. Balkrishna vs. George Fernandez, reported in 1969 (3) SCC 238.
- (iii) Azhar Hussain vs. Rajiv Gandhi, reported in 1986 (supp.) SCC 315.
- (iv) Tek Chand vs. Dile Ram, reported in (2001) 3 SCC 290.
- (v) Baldev Singh Mann vs. Surjit Singh Dhiman, reported in (2009) 1 SCC 633.

19.5 While dealing with the argument of learned senior advocate for the petitioner regarding 'booth capturing', it is submitted that presence of any person which may have

dealings with respondent No.2, by itself can not be termed to be consent of the respondent No.2 in any manner. The said aspect, in no way can be stretched as 'booth capturing'.

19.6 It is submitted that none of the issues can be said to have been proved by the petitioner. The election in question can not be declared void under any of the contingencies provided under Section 100 of the Representation of People Act, 1951.

19.7 It is further submitted that in the light of the material on record and above legal submissions, there is no question of declaring the petitioner as the Returned Candidate.

20.1 Answers, to the issues framed by this Court as noted in Para : 5 above, are as under.

Issue No.1 - In affirmative

Issue No.2 - In affirmative

Issue No.3 - Partly in affirmative

Issue No.4 - In affirmative

Issue No.5 - In affirmative

Issue No.6 - In affirmative

Issue No.7 - In affirmative

Issue No.8 - In affirmative

Issue No.9 - In affirmative

Issue No.10 - In affirmative

Issue No.11 - In affirmative

Issue No.12 - In affirmative

Issue No.13 - In negative

Issue No.14 - As per final order

20.2 The details with regard to (i) the grouping of issues; (ii) the appreciation of the evidence on record; and (iii) the reasons & the findings of this Court for arriving at the answers qua each issue, are as under.

20.2.1 Qua Issue No.2, 6 & 10, para:21 to 32.

20.2.2 Qua Issue No. 1, 7 & 11, para:33 to 41.

20.2.3 Qua Issue No. 3, para:42 to 54.

20.2.4 Qua Issue No. 4 & 5, para:55 to 65.

20.2.5 Qua Issue No. 8, 9 & 12, para:66 to 96.

20.2.6 Qua Issue No. 13, para:97 to 99.

20.2.7 Qua Issue No.14, (final order), para:100 to 106.

ISSUE NOS.: 2, 6 & 10

21. Issue Nos. 2, 6 & 10 are inter connected and are considered together. These issues read as under.

"2. Whether the petitioner proves that 429 postal ballot papers were illegally rejected at the time of counting of votes ?

6. Whether the petitioner proves that the result of the election, in so far as it concerns the returned candidate (the respondent No.2) from '58-Dholka Constituency' for the Gujarat State Legislative Assembly Elections, held on 14.12.2017, has been materially affected by improper refusal / rejection of the votes ?

10. Whether the petitioner proves that the election of the returned candidate (the respondent No.2) from '58-Dholka Constituency' for the Gujarat State Assembly Elections held on 14.12.2017, needs to be declared as void under Sec. 100(1)(d)(iii) of the Representation of People Act, 1951 ?"

22.1 So far Issue No.2 is concerned, the case of the petitioner is that, at the time of counting of votes, total 1,60,844 votes were taken into consideration by the Returning Officer, of which 1,59,917 votes were from EVMs and 927 were postal ballots.

22.2 The Final Result Sheet Form-20 with the seal and signature of the Returning Officer (Exh.76A) shows that, at the time of counting of votes, total 1,61,273 votes were taken into consideration by the Returning Officer, of which 1,59,917 votes were from EVMs and 1356 were postal ballots. The said Final Result Sheet Form-20 (Exh.76A) further shows that, from total 1356 postal ballots shown to have been received and considered by the Returning Officer at the time of counting of votes, 429 postal ballots were rejected. The difference of these

429 votes (postal ballots) is the point at issue, which is quoted above. It needs to be ascertained by the Court, whether the rejection of 429 postal ballots by the Returning Officer was legal or illegal.

23.1 To appreciate these issues, six figures need to be kept in view. They are as under:-

- (A) Total votes received by the petitioner through EVMs.
- (B) Total votes received by the returned candidate through EVMs.
- (C) Total votes received by the petitioner through postal ballots.
- (D) Total votes received by the returned candidate through postal ballots.
- (E) Total votes taken into consideration by the Returning Officer at the time of counting of votes from EVMs.
- (F) Total postal ballots taken into consideration by the Returning Officer at the time of counting of votes.

23.2 There is no dispute amongst the petitioner, the respondent No.2 & the Returning Officer on first five of the above noted six figures. Those five figures are as under.

- (A) Total votes received by the petitioner through EVMs are 70675.
- (B) Total votes received by the returned candidate through EVMs are 71189.
- (C) Total votes received by the petitioner through

postal ballots are 528.

- (D) Total votes received by the returned candidate through postal ballots are 341.
- (E) Total votes counted / taken into consideration by the Returning Officer, at the time of counting of votes, from EVMs are 1,59,917.

24. The dispute is only on one point :- total how many postal ballots were counted / taken into consideration by the Returning Officer, at the time of counting of votes. The case of the petitioner is that, only 927 postal ballots were shown to have been received and taken into consideration by the Returning Officer at the time of counting of votes and from these 927 postal ballots, the rejected votes were shown to be zero. As against that, the contest put forward by the respondent No.2 and the Returning Officer is that, total postal ballots received and taken into consideration by the Returning Officer at the time of counting of votes were 1356, and from these total 1356 postal ballots, 429 postal ballots were rejected, and from remaining 927 votes, the petitioner got 528 votes and the returned candidate got 341 votes. Thus there is difference of 429 postal ballots between these two figures (1356 or 927).

E-MAIL COPY

25. The Issue (No.2) therefore is, whether the petitioner proves that 429 postal ballot were illegally rejected by the Returning Officer at the time of counting of votes. There are oral as well as documentary evidences on record, in this regard, the details of which are as under.

26.1 The petitioner entered the witness box. His deposition is

at Exh.75. His affidavit in lieu of Examination-in-Chief, in substance is on the line of his pleadings. In his cross-examination also, he maintained his stand that the total number of votes taken into consideration were 1,60,844, out of which total postal ballots were 927 (Q.No. 16 of Exh.75). The petitioner placed documentary evidence on record, in support of his say, while he was in the witness box. According to the petitioner, a copy of an unsigned Final Result Sheet-Form 20 (Exh.83) was given to the petitioner by the Returning Officer on the date of counting of votes / declaration of result, in which total number of postal ballots shown to have been received by the Returning Officer were 927, and from these total 927 postal ballots, zero postal ballot was shown to have been rejected by the Returning Officer, at the time of counting of votes.

26.2 The petitioner further deposed to the effect that, in an another copy of the Final Result Sheet Form-20 (Exh.76A), which was given to the petitioner by the Returning Officer on a subsequent day with his seal and signature, the total number of postal ballots shown to have been received by the Returning Officer were 1356, and from these total 1356 postal ballots, 429 postal ballots were shown to have been rejected by the Returning Officer at the time of counting of votes. It is the case of the petitioner that there can not be two Final Result Sheets Form-20 and the one which was given to the petitioner subsequently i.e. Exh.76A contains manipulated figures and that be not taken into consideration and only Final Result Sheet Form-20 (Exh.83), which was given to him on the day of declaration or result, be taken into consideration.

26.3 As against the above evidence of the petitioner, the deposition of the respondent No.2 is at Exh.139. Nothing turns much on this aspect from the evidence of the respondent No.2. The respondent No.2 did not have any personal knowledge in that regard, since he was not present at the counting center on the date of counting of votes, at any time. Further, in his evidence, in reply to question No.69, he deposed to the effect that :- 'any question that may be put to me hereinafter pertaining to, what had happened at the time of counting of votes, my answer would be that, since I was not present there and therefore, I may not know, but I may only know that, which is told to me by my counting agent.' It is also noted that the said counting agent or the election agent or any other person did not enter the witness box on behalf of the respondent No.2, though their names were given in the list of witnesses tendered on behalf of the respondent No.2 (Exh.68) and all were subsequently dropped vide purshis Exh.143. On behalf of the respondent No.2, it is asserted that the Final Result Sheet-Form 20 (Exh.76A), which is a signed document by the Returning Officer, is the only authenticated document and only that can be taken into consideration and Final Result Sheet Form-20 (Exh.83) can not be taken into consideration. At the same time the respondent No.2 also conceded that Final Result Sheet Form-20 (Exh.83) is also a matter of record (vide Question Nos. 63 & 65 of Exh.139).

26.4 The Returning Officer (vide Exh.99) deposed to the effect that the Final Result Sheet-Form 20 (Exh.76A), which is signed by him is the only authenticated document and only that can be taken into consideration. He however was not sure whether

he had given Final Result Sheet-Form 20 (Exh.76A) to the petitioner on the same date of counting of votes or on a subsequent date (vide Q. No.221 of Exh.99), as claimed by the petitioner.

26.5 The oral evidence in this regard is as noted above, however such issues can not be decided only on the basis of the oral evidence. Documentary evidences are also on record, which may have bearing on these issues. The relevant documents in this regard are Exh. 111 & 112, the details of which are as under.

27.1 As per the standing instructions of the Election Commission of India (Para- 16.2.2 of the Handbook for Returning Officer Exh. 101), no Returning Officer can declare the result without prior authorization from the Observer, in the prescribed format. In the present case, the Returning Officer was asked, whether he had obtained any such authorization from the Observer, which he answered in affirmative (vide question No. 273 of Exh.99). The Returning Officer placed the said authorization given by the Observer on record at Exh. 112. It reads as under.

E-MAIL COPY

"Mrs. Vinita Bohra (IAS), Observer code (G22074) for 58-Dholka Assembly Constituency / Assembly segment of 17 - Kheda Parliamentary Constituency, after having satisfied myself about the fairness of counting of votes and complete accuracy of compilation of result in Form No.20 hereby authorize the Returning Officer of 58-Dholka Assembly Constituency to

declare the result.

Sd/-

Name of the observer: Mrs. Vinita Bohra

Code of the observer: G22074

Assembly Constituency No. & Name: 58-Dholka"

27.2 The above certificate (Exh.112) is based on a document (Exh. 111) - which is a document containing the details of all the votes (round wise) taken into consideration by the Returning Officer at the time of counting of votes, including postal ballots. It is a 20 pages document. It bears signatures of both - the Returning Officer as well as the Observer on each page. The last page of the said documentary evidence (Exh.111), which is placed on record by the Returning Officer himself, while he was in the witness box, contains all the details of the postal ballots. As per the said document, which is signed by the Returning Officer and the Observer, total postal ballots received are 927 and rejected postal ballot is zero. The said last page also denotes that total votes taken into consideration were 1,60,844 (1,59,917 votes from EVMs and 927 postal ballot votes).

28.1 On weighting the above document Exh. 111 vis-a-vis two Final Result Sheets Exh. 76A and Exh. 83, it is Exh. 83 which tallies with Exh. 111 on all counts. As against this, Exh. 76A does not match with Exh.111 on two material counts.

28.2 In Exh.111, total postal ballots shown to have been received and taken into consideration by the Returning Officer at the time of counting of votes are shown to be 927, the same

is the figure in Exh.83. Further, in Exh.111, total votes (through EVMs and postal ballots) shown to have been received and taken into consideration by the Returning Officer at the time of counting of votes are shown to be 1,60,844, the same is the figure reflected in Exh.83 as well.

28.3.1 As against that, Exh.76A does not match with Exh.111 on two material counts. In Exh.111, total postal ballots shown to have been received and taken into consideration by the Returning Officer at the time of counting of votes are shown to be 927, while in Exh.76A the said figure is 1356 (difference of 429 postal ballots).

28.3.2 Similarly, in Exh.111, total votes (through EVMs and postal ballots) shown to have been received and taken into consideration by the Returning Officer at the time of counting of votes are 1,60,844, while in Exh.76A the said figure is 1,61,273 (the same difference of 429 votes).

28.4 The above referred Exh.111, which is signed by the Returning Officer and the Observer both, and which was the basis for the Observer to give authorization to the Returning Officer for declaration of result of the election in question, has to be accepted by the Court. It can not be and it is nobody's case that the said document, which has come on record through the Returning Officer himself, should not be accepted for any reason.

28.5 For the above reasons, this Court holds that, of the two Final Result Sheets Form-20 i.e. Exh. 76A and Exh. 83, it is Exh. 83 which reflects true figures of total number of votes taken

into consideration by the Returning Officer at the time of counting of votes, which were shown by him to the Observer.

29.1 At this stage it is noted that the Returning Officer had deposed (vide Q. No. 256 of Exh.99) that total postal ballots received by him were 1356 and from those 1356, 429 postal ballots were rejected by him at the time of counting of votes. It is also a matter of record that, while seeking authorization from the Observer to declare the result, the Returning Officer shown the Observer in writing (vide Exh.111) that total postal ballots received and taken into consideration by him (the Returning Officer) at the time of counting of votes were 927 (and not 1356) and rejected postal ballot was zero (and not 429). Conjoint consideration of these documentary evidences lead to conclusion that, 429 postal ballots were not only not shown to any candidate including the petitioner (which is his case and evidence), those 429 postal ballots were not shown even to the Observer. This also shows that there was manipulation of record of the election in question, more particularly the Final Result Sheet Form-20 by the Returning Officer. This may have serious consequences, which are discussed in detail in the later part of this judgment (while dealing with issue of corrupt practice), however so far Issue No. 2 is concerned, on the basis of the documentary evidences on record, this Court arrives at the conclusion that 429 postal ballots were illegally excluded from consideration by the Returning Officer at the time of counting of votes and were thus illegally rejected. Issue No.2 therefore, needs to be and is answered in affirmative.

29.2 Having held as above, for the purpose of Issue No.6 it

further needs to be examined whether the result of the election, in so far as it concerns the returned candidate can be said to have been materially affected by the said improper exclusion / rejection of 429 postal ballots. In the present case, the victory margin of the returned candidate over the petitioner is 327 votes. The number of illegally rejected votes (429 votes) are more than the victory margin (327 votes) and therefore, it is also proved that the result of the election in question has been materially affected by the said improper refusal / rejection of those 429 votes. Issue No. 6 therefore is answered in affirmative. As the consequence of this, the Issue No. 10 needs to be and is answered in affirmative and it is held that, it is proved that the election of the returned candidate (the respondent No.2) from 58-Dholka Constituency for the Gujarat Assembly Elections held on 14.12.2017, needs to be declared void under Sec. 100(1)(d)(iii) of the Representation of People Act, 1951.

30.1 Though, the above referred documentary evidences (Exh.111 & 112 vis-a-vis Exh.76A & 83) are sufficient to answer Issue No. 2, 6 & 10 in affirmative, as held above, there are other evidences also, which further fortifies the above conclusion.

E-MAIL COPY

30.2 While the Returning Officer was being cross-examined on behalf of the respondent No.2, an attempt was made that nothing wrong had happened at the time of counting of votes and had there been anything wrong, the Observer would have certainly stopped the Returning Officer at that stage itself. Reference in this regard can be made to Q. No. 249 & 250 of Exh.99, which read as under.

"249. Question : Is it true that, the fundamental object of appointment of Observer by the Election Commission of India is to watch the conduct of election process ?

Ans. : Yes, that is true.

250. Question : During the counting process for 58-Dholka Constituency, did you receive any written or oral directions from the general Observer with regard to any irregularity relating to the counting process ?

Ans. : No."

30.3 On the conclusion of recording of the evidence of the Returning Officer vide Exh.99, this Court prima-facie found that the irregularities on part of the Returning Officer at the time of courting of votes were so grave that, while deciding the issue pertaining to corrupt practice, the Returning Officer may be named in the judgment. Keeping this in view, the Returning Officer was joined as party respondent in his personal capacity by this Court vide order dated 02.04.2019 (Exh.115), as required under Section 99 of the Representation of People Act, 1951. While doing so, since the respondent No.2 had attempted to drag the Observer into this controversy, even the Observer was joined as party respondent by name, along with the Returning Officer.

30.4 In response to the notice of this Court dated 02.04.2019, the Observer personally remained present before this Court on

the returnable date i.e. 01.05.2019 and she addressed the Court in-person and gave her first written response vide Exh.120, inter-alia stating therein that :- 'The result of Postal Ballot papers submitted to me by RO with his signatures in standard format of ECI, duly signed by him, did not show any rejected votes. All 927 votes were shown as valid, hence I was satisfied and I signed the certificate'. Thus even in response to the notice of this Court under Section 99 of the Representation of People Act, 1951, the say of the Observer is to the effect that the figures in the Final Result Sheet Form-20 (Exh.76A) which was the basis for declaring the respondent No.2 as the Returned Candidate does not reflect the figure which was shown to the Observer. At this stage, it is noted that, on the face of the stand of the Returning Officer in Exh.99 (Q.No. 249 & 250) and in-spite of the evidence (Exh.111) which was placed on record by the Returning Officer himself and additional material (Exh.120) which came on record on 01.05.2019, the Returning Officer chose not to give any explanation or rebut it or examine & put any question to the Observer, in-spite of opportunity to him under Section 99 of the Representation of People Act, 1951, coupled with the specific reiteration of the said opportunity by this Court in order dated 19.06.2019, more particularly para : 5 thereof.

30.5 Further, when the returned candidate - the respondent No.2 entered the witness box on 09.09.2019 to give his evidence, he also made reference to the documents signed by the Observer, to contend that no illegality was committed at the time of counting of votes. Reference in this regard is made to Q.No. 68 and 83 of Exh.139. When the respondent No.2

referred to the documents signed by the Observer, the said reference can only be to Exh.111 & Exh. 112, because except those two documents and Exh.120 which was also a part of record by that time, there is no other document on record, which is signed by the Observer. No explanation has come on behalf of the respondent No.2 in this regard.

31.1 At this stage one argument pressed into service on behalf of the returned candidate needs to be answered. It is submitted by the learned senior advocate for the returned candidate that 429 Postal Ballots stood rejected because of procedural irregularities in sending those covers and the covers (Form No.13-B) were not even opened by the Returning Officer and therefore those 429 postal ballots could not be termed to be 'votes' within the meaning of Rule 54-A of the Conduct of Election Rules. Therefore, according to him, rejection of those 429 postal ballots can not be termed to be 'rejection of any vote' and therefore the election in question can not be declared as void under Section 100(1)(d)(iii) of the Representation of People Act, 1951.

31.2 This argument would be self-destructive for the respondent No.2 because the fact as to how many postal ballots were received and taken into consideration by the Returning Officer for the purpose of deciding the result of the election in question can not be different for getting the authorization by the Returning Officer from the Observer to declare the result and for the purpose of showing it in the Final Result Sheet Form-20. Further, this argument is no answer to the manipulation of record by the Returning Officer behind the back of the Observer. This argument is therefore rejected.

32. There is an additional factor, which would further tilt the balance against the returned candidate and the Returning Officer. Considering the observations of this Court in the order dated 02.04.2019, the Election Commission of India directed the concerned disciplinary authorities to initiate disciplinary proceedings against the Returning Officer and the Observer for imposing major penalty, for the lapses / illegalities committed at the time of counting of votes of the Election in question. Thereafter, the Observer made her position / stand clear (as noted above) to the Election Commission of India and considering her explanation / representation dated 09.05.2019 and 28.05.2019, the Election Commission of India reconsidered its earlier order and intimated the Chief Secretary of the State of Rajasthan vide communication dated 22.07.2019 (Exh.134) that disciplinary action against the Observer may not be initiated. The Election Commission of India however, did not give any such concession qua the Returning Officer. Thus the said illegality at the hands of the Returning Officer is not only a matter of record (as noted above), the same is also supported by the say of the Observer and further acknowledged by the Election Commission of India. It is noted that any circumstance, after the declaration of result can not be a ground to decide or answer any Issue, however the same can be considered as an additional factor to further support the conclusion at which this Court has independently arrived at on the basis of the documentary evidences, which is noted in para:29 above.

ISSUE NOS.: 1, 7 & 11

33. Issue Nos. 1, 7 & 11 are inter - connected and are

considered together. Those issues read as under.

"1. Whether the petitioner proves that the procedure adopted for counting of votes for '58-Dholka Constituency' was against the orders of the Election Commission of India and was illegal?"

7. Whether the petitioner proves that the result of the election, in so far as it concerns the returned candidate (the respondent No.2) from '58-Dholka Constituency' for the Gujarat State Legislative Assembly Elections, held on 14.12.2017, has been materially affected by non-compliance with the provisions of the Representation of the People Act, and / or Rules or Orders made under the said Act ?

11. Whether the petitioner proves that the election of the returned candidate (the respondent No.2) from '58-Dholka Constituency' for the Gujarat State Assembly Elections held on 14.12.2017, needs to be declared as void under Sec.100(1)(d)(iv) of the Representation of People Act, 1951 ?"

34. The procedure of counting of votes is defined by the Election Commission of India. Instructions of the Election Commission of India, issued from time to time, are compiled in the form of 'Hand-Book for the Returning Officer'. The same is on record at Exh.101. The process of counting of votes was undertaken by the Returning Officer. At the request of the

petitioner and with the consent of the Returned Candidate, the Returning Officer was examined as a witness. His evidence is recorded at Exh.99. The Returning Officer was asked to explain, what exactly had happened, procedurally, at the time of counting of votes. The relevant part of the evidence of the Returning Officer is noted and discussed as under.

35. Regarding timing of commencement of counting of votes of the penultimate round of EVMs.

35.1 The instruction of the Election Commission of India, as contained in Para : 15.16.2 of the said Handbook Exh. 101, regarding timing of commencement of counting of votes for the penultimate round (second last round) of EVMs, reads as under.

"After 30 minutes of the commencement of postal ballot counting, the EVM counting can start. The EVMs can be brought under escort (agents can accompany) from the strong room to the counting hall even if the postal ballot counting is still going on. However, the penultimate round of EVM counting shall not commence unless the postal ballot counting is over."

35.2 Relevant part of the deposition of the Returning Officer with regard to the compliance of the above quoted instructions of the Election Commission of India reads as under.

"282. Question : When the EVMs for the 2nd last round (penultimate round) were brought out of

the strong room and were taken to the counting hall ?

Ans. : At 11:17:00 hours onwards.

283. Question : When the EVMs for 2nd last round were being brought in the counting hall, at that time, was the counting of postal ballot over ?

Ans. : No. That process was not over.

284. Question : What was the stage at Table No.15 when the EVMs for the 2nd last round were being brought in the counting hall ?

Ans. : At the request of the witness, CCTV footage is shown to him of VM626 - On RO table - time 11:07:52 to 11:17:58. On playing the said footage, the witness states that :- all the trays of the candidates are empty and even the distribution of the valid postal ballots candidate-wise had not started at that time."

35.3 In view of above, it is undisputed that the above quoted instruction of the Election Commission of India, was not complied with at the time of counting of votes. How this was the first step by the Returning Officer in the chain of assistance for the furtherance of the prospects of the respondent No.2 is examined in detail while answering Issue Nos.8, 9 & 12 (corrupt practice), but leaving it aside, it is undisputed that there was breach of this instruction of the Election Commission of India.

36. Regarding mandatory re-verification and mandatory recount of postal ballots.

36.1 It is not in dispute that the total postal ballots received by the Returning Officer (1356 or 927) were more than the victory margin of 327 votes. The instructions of the Election Commission of India is to the effect that, under such circumstances, there will be mandatory re-count and also mandatory re-verification of all postal ballots. Those instructions are quoted here below. The said procedure was not followed by the Returning Officer, is stated by the Returning Officer himself, which is also quoted here below.

36.2 The instruction of the Election Commission of India, as contained in Para : 15.15.5.1 of the Handbook for the Returning Officer Exh. 101, regarding mandatory re-verification of Postal Ballots reads as under.

"In case the victory margin is less than total number of postal ballots received then there should be a **mandatory re-verification** of all postal ballots. In the presence of Observer and the RO all the postal ballots rejected as invalid as well as the postal votes counted in favour of each and every candidate shall once again be verified and tallied. The Observer and the RO shall record the findings of re-verification and satisfy themselves before finalizing the result. The entire proceeding should be videographed without compromising the secrecy of ballot and the video-cassette / CD

should be sealed in a separate envelope for future reference."

36.3 The instruction of the Election Commission of India, as contained in Para : 15.30.9 of the said Handbook Exh. 101, regarding mandatory recount of Postal Ballots reads as under.

"The Commission has decided that where the result of an election is going to be decided by difference of postal ballot received by the first two candidates, then there shall be **mandatory and comprehensive recount** of postal ballot papers, even though no candidate ask for it."

36.4 Relevant part of the deposition of the Returning Officer, showing defiance of the above quoted instructions of the Election Commission of India, i.e. with regard to (i) mandatory re-verification of Postal Ballots and (ii) mandatory and comprehensive recount of Postal Ballot papers, reads as under.

"276. Question : What was the victory margin of the returned candidate (respondent no.2) over the petitioner ?

Ans : 327 votes.

277. Question : You have deposed earlier that, total postal ballots received by you were 1356. Total postal ballots rejected by you were 429. Thus the victory margin of the returned candidate over the petitioner was less than

total postal ballots received. In this situation, which of the instructions of the Election Commission of India

would come into play ?

Ans. : In this situation, the instructions contained in Paras : 15.30.9 and 15.15.5.1 in the Hand Book (Exh.101) would come into play.

278. Question : Whether you had done the re-counting of postal ballots which is mandatory as per the above referred instructions (para : 15.30.9) ?

Ans. : No. I had not done that re-counting.

279. Question : Whether you had done the reverification of postal ballots which is mandatory as per the above referred instructions (para : 15.15.5.1) ?

Ans. : No. I had not done that re-verification either."

E-MAIL COPY

36.5 In view of above, it is undisputed that the above quoted two instructions of the Election Commission of India, which are mandatory in nature, were also not complied with at the time of counting of votes. In the present case, when the victory margin of 327 votes was less than the total postal ballots received (1356) and even less than rejected postal ballots (429), there should have been mandatory re-verification of all

the postal ballots and it should have been video-graphed. There should also have been mandatory and comprehensive recount of all the postal ballots, even though no candidate asks for it, but the same was not done, is the evidence of the Returning Officer himself. How the Returning Officer abused this non-compliance in the chain of assistance for the furtherance of the prospects of the respondent No.2 is examined in detail while answering Issue Nos.8, 9 & 12 (corrupt practice) but leaving it aside, it is undisputed that there was also breach of these two instructions of the Election Commission of India.

37. Regarding Final Result Sheet Form-20.

37.1 The instructions of the Election Commission of India, regarding preparation of Final Result Sheet Form-20 as contained in Exh.101, reads as under.

"15.15.3.6 The valid votes should then be counted and each candidate credited with the votes given to him. The total number of postal votes received by each candidate should then be calculated, entered in the Result Sheet in Form 20 in the appropriate place and announced by you aloud for the information of the candidates.

15.27.3 While striking this grand total, the entire Final Result Sheet should be carefully checked and it must be ensured that entries have been made therein in respect of each and every polling station and that the Form is not

incomplete in any respect.

15.27.5 The grand total should also be correctly struck as any incorrect totaling may materially affect the result of election and the declaration of result, which has to be made on the basis of this Form. Any discrepancy in that Form will be very seriously viewed by the Commission and will result in severe disciplinary action."

37.2 Relevant part of the deposition of the Returning Officer with regard to the compliance with the above quoted instructions of the Election Commission of India, reads as under.

"209. Question : At 12.24.35 hours, you declared that total postal ballots received by you were 1231. Is it true that you are seen in the said footage, declaring this ?

Ans. : Yes that is true.

210. Question : You also declared that out of total 1231 postal ballots received, 301 votes prima facie were rejected. Is it true?

Ans. : Yes, the footage shows so.

287. Question : Before announcing the figures of postal ballots, at 12:24:00 hours, as stated by you above, did you enter that figure in Form

No.20 ?

Ans. : I do not remember at this stage.

288. Question : What is the requirement in this regard, as per the instructions of the Election Commission of India ?

Ans. : From the Hand Book (Exh.101), I say that Para : 15.15.3.6 would come in play at that stage.

289. Question : When did you declare the final result?

Ans. : At 13:16:00 hours.

290. Question : Before declaring the final result, whether all figures were filled in - in Form No.20 ?

Ans. : Yes, that was done.

291. Question : When you say that all the figures were filled in - in Form No.20 before declaring the final result, it also included the figures of postal ballots ?

Ans. : Yes.

292. Question : When you entered the figures of postal ballots received by each candidate in

Form No.20, before declaring the final result at 13:16:00 hours, as stated by you above, did you enter the same figure of postal ballots which you had announced at 12:24:00 hours ?

Ans. : No, it is not the same figure. There is difference in the figures of postal ballots as entered in Form No.20 and what was announced by me at 12:24:00 hours.

At this stage, the witness requested that he be permitted to give some explanation in this regard. On being permitted to do so, he states that :-

As it is evident even from the CCTV footage which is played in the Court in this regard today, even I had asked for the said figure from somebody else and subsequently, when it came to my notice that there is difference in that regard, I entered correct figures in Form No.20. I further say that, the figures which I had announced - what each candidate has got and what I entered in Form No.20, is the same in both the cases."

37.3 In view of above, it is undisputed that the above quoted three instructions of the Election Commission of India (qua preparation of Final Result Sheet Form-20) were also not complied with at the time of counting of votes. The very glaring aspect is that, as per the evidence of the Returning Officer, it was announced by him aloud at 12:24:35 hrs that

total postal ballots received by him were 1231 and from these 1231 postal ballots, he had rejected 301 postal ballots. This would also show that the figure announced by him was neither the figure mentioned by him in the Final Result Sheet Exh.76A (which was 1356) nor the one which was shown to the Observer in Exh.111 (which was 927) for seeking authorization to declare the Result. The announced figure (1231) was all together the third figure, which was not reflected in any of the documents.

38. On conjoint consideration of the above, it is proved that the procedure adopted for counting of votes in the election in question was against the orders of the Election Commission of India, at-least on six counts, and was illegal. Issue No.1 therefore needs to be and is answered in affirmative.

38.1 Though it is proved that the procedure adopted for counting of votes was in breach of the above noted orders / instructions of the Election Commission of India, it further needs to be proved whether the result of election in question can be said to have been materially affected by the said non-compliance.

38.2 At this stage, it is noted that an argument is advanced on behalf of the returned candidate (respondent No.2) that non-compliance of the instructions of the Election Commission of India, can not be said to be non-compliance with the provisions of the Constitution or of the Act or of any rules or orders made under the Act and therefore the election in question can not be declared void under Section 100(1)(d)(iv) of the Representation of People Act, 1951.

38.3 So far this argument is concerned, it first needs to be seen, what is the force of the instructions of the Election Commission of India with regard to conduct of election. For that purpose it needs to be seen, what are the powers of the Election Commission of India in this regard. Reference needs to be made to Article 324(1) of the Constitution of India. It reads as under.

"324. Superintendence, direction and control of elections to be vested in an Election Commission.

(1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice President held under this Constitution shall be vested in a Commission (referred to in this Constitution as the Election Commission)"

38.4 The scope and ambit of the powers of the Election Commission of India, flowing from Article 324(1) of the Constitution of India is defined by the Supreme Court of India in various decisions. Following the decision of the Constitution Bench in the case of Mohinder Singh Gill and Anr. V/s The Chief Election Commissioner (AIR 1978 SC 851), the Supreme Court of India, in the case of Kanhiya Lal Omar V/s R. K. Trivedi (AIR 1986 SC 111), observed as under.

"16. Even if for any reason, it is held that

any of the provisions contained in the Symbols Order are not traceable to the Act or the Rules, the power of the Commission under Article 324(1) of the Constitution which is plenary in character can encompass all such provisions. Article 324 of the Constitution operates in areas left unoccupied by legislation and the words 'superintendence', 'direction' and 'control' as well as 'conduct of all elections' are the broadest terms which would include the power to make all such provisions."

38.5 On conjoint consideration of the language of Article 324 (1) of the Constitution of India and the interpretation thereof by the Supreme Court of India in various decisions including in the case of Mohinder Singh Gill (supra) and Kanhiya Lal Omar V/s R. K. Trivedi (supra), nothing remains to be decided by this Court but to follow the law. The argument advanced on behalf of respondent No.2, as noted above is therefore rejected.

38.6 Reverting back to the Issue No.7, after it is proved that the procedure adopted for counting of votes was in breach of the above noted orders / instructions of the Election Commission of India, it further needs to be examined whether the result of the election in question can be said to have been materially affected by the said non-compliance. In this regard it is noted that, the breach of the above quoted / noted instructions of the Election Commission of India, at-least on six counts, were not mere omissions on the part of the Returning Officer but it was a part of well thought design for the

furtherance of the prospects of the respondent No. 2 in the election in question and how it facilitated manipulation / falsification of Final Result Sheet is discussed in detail while answering Issue No.2 (in the earlier part of this Judgment) and how it was 'corrupt practice' within the meaning of Section 123(7) of the Representation of People Act, 1951, is discussed in detail while answering Issue No.8 (in the later part of this Judgment), but leaving aside the aspect of falsification of election record and / or corrupt practice, even if these breaches are seen as it is, when the Election Commission of India has directed that the election should mandatorily be conducted in a particular manner, if it is not conducted that way, that itself is the ground which would vitiate the election and consequently the final result. Not only that, in the present case, on conjoint consideration of the evidence on record, this Court arrives at the conclusion that, had the counting of votes been done as per the instructions of the Election Commission of India, the Final Result Sheet would have been different than the one which was the basis for the Observer to authorize the Returning Officer to declare the respondent No.2 as the returned candidate. For these reasons this Court holds that the above non-compliance with the instructions of the Election Commission of India has materially affected the result of the election in question. Issue No. 7 therefore needs to be and is answered in affirmative.

39. As the consequence of the Issue Nos. 1 and 7 being answered in affirmative, Issue No.11 also needs to be answered in affirmative.

40. For the above reasons this Court arrives at the conclusion

that, it is proved that the procedure adopted for counting of votes for 58-Dholka Constituency was against the orders of the Election Commission of India and was illegal and further that the result of the election, in so far as it concerns the returned candidate (the respondent No.2) from 58-Dholka Constituency for the Gujarat Legislative Assembly Elections, held on 14.12.2017, has been materially affected by it and that the election of the returned candidate (the respondent No.2) from 58-Dholka Constituency for the Gujarat Assembly Elections held on 14.12.2017, needs to be declared void under Sec.100(1)(d)(iv) of the Representation of People Act, 1951.

41. Though above noted reasons are sufficient to arrive at this conclusion, it is further noted that, what was the consequential effect of each of the above non-compliance with the instructions of the Election Commission of India, on the final result, is discussed in detail, in the later part of this judgment, while examining the Issue Nos. 8, 9 and 12 (corrupt practice).

ISSUE NO.: 3

42. Issue No. 3 reads as under.

E-MAIL COPY

"3. Whether the petitioner proves that objection was raised by the petitioner, or his election agent, regarding alleged illegal rejection of postal ballot papers and / or non-compliance of the orders of the Election Commission of India, at the time of counting of votes ?"

43. The above issue can be divided into two parts.

43.1 The first part is :- Whether the petitioner proves that objection was raised by the petitioner, or his election agent, regarding alleged illegal rejection of postal ballot papers at the time of counting of votes.

43.2 The second part is :- Whether the petitioner proves that objection was raised by the petitioner, or his election agent, regarding non-compliance of the orders of the Election Commission of India, at the time of counting of votes.

44.1 So far the first of the above two parts is concerned, the Issue No. 2 which is already answered by this Court in the earlier part of the judgment may have relevance. The Issue No. 2 reads as under.

"2. Whether the petitioner proves that 429 postal ballot papers were illegally rejected at the time of counting of votes ?"

44.2 The findings of this Court qua Issue No.2 is to the effect that:- conjoint consideration of these aspects would lead to the conclusion that, 429 postal ballots were not only not shown to any candidate including the petitioner (which is his case and evidence), those 429 postal ballots were not shown even to the Observer.

44.3 The petitioner could not be expected to raise an objection against rejection of those 429 postal ballots, which were not shown to anyone by the Returning Officer. In any case, it is a

matter of record that there was no objection by the petitioner or his election agent in this regard at the time of the counting of votes. This part of the issue is therefore answered in negative.

45. So far the second part of this issue is concerned, the following evidence is relevant for this purpose.

45.1 The Returning Officer has, while giving his evidence (Exh.99), replied to the questions in this regard, as under.

"296. Question : The witness is shown an Annexure to his written statement at Exh.10, at running page 127 (as it stands today), which is a hand written communication dated 18.12.2017. It is part of Annexure - R-4 to the said written statement. By showing this, the witness is asked to explain what that document is ?

Ans. : On reading the contents of the said document, it appears that, it is a formal objection taken on behalf of the representative of present respondent no.2 against the demand of the petitioner with regard to recounting of votes. The said document is given Exh.No.113."

45.2 It is asserted on behalf of the Returning Officer (respondent No. 13) and the returned candidate (respondent No. 2) both that no objection was taken by the petitioner or that no recount was asked for by the petitioner. Exh. 113 is a documentary evidence signed by election agent of the respondent No. 2 taking objection against the demand of the

petitioner for recounting of votes. There could not be any objection on behalf of the respondent No. 2 against the demand of recounting of votes by the petitioner, had there not been any such demand by him.

45.3 There are other evidences in this regard. The Returning Officer, while giving his evidence (Exh.99), further replied as under.

"212. Question : The witness is shown the CCTV footage at 12.28.43 hours. Is it true that at that time, an oral request is audible, having been made on behalf of the petitioner for the recount of the voting ?

Ans. : Yes, it is audible.

217. Question : The witness is shown the CCTV footage from VM239 (RO table) time from 12.44.20 to 12.54.27. At 12.45.39, the Returning Officer is given one paper by the election agent of the petitioner. By showing this, he is asked - is this not an application for recounting given to you by an agent of the petitioner ?

Ans. : I do not recollect at present, what that application was. The said footage also shows that I had given that paper back to him."

46. The above shows that not only there was demand by the petitioner for recounting of votes, there was reluctance on the part of the Returning Officer to even accept the application,

leave aside acceding to it. The second part of this issue therefore stands proved by the documentary evidence (Exh. 113) and the oral evidence of the Returning Officer himself as noted above. This issue is therefore answered partly in affirmative.

47. At this stage it is noted that, number of objections were taken during the trial, many of which became obsolete, as the trial progressed and many were ultimately not pressed. Further, many orders of this Court, in which either the objections were answered or were not accepted by this Court during the trial, were challenged by the respondent No.2 (the returned candidate) before the Supreme Court in the bunch of SLPs being Special Leave Petition (Civil) Nos.3075 to 3081 of 2019 with SLP (Civil) No.3950 of 2019. The group of the said SLPs was dismissed as withdrawn by the Supreme Court of India vide order dated 11.02.2019. Even thereafter there are few objections, which may deserve mention, which are noted hereunder. The objections which are being considered here, can not be said to be qua Issue No. 3 only. Those objections were taken during the trial and the answers to those objections may not be understood to have been given by this Court qua Issue No. 3 only.

E-MAIL COPY

48.1 At this stage it is noted that, an objection is raised on behalf of the respondent No. 2 that the electronic documents Exh. 56, 57 and 110 be not taken into consideration. To deal with this objection, the following aspects need to be kept in view.

48.2 After the pleadings of the contesting parties came on

record and before framing of issues, certain procedural aspects were required to be undertaken, as statutorily required under the Civil Procedure Code and the Gujarat High Court Rules, 1993. In due compliance thereof, the petitioner had filed an application being Election Application No. 10 of 2018 for issuance of summons for directions, in this petition. In the said application, the petitioner had requested that the competent officer / authority be asked to produce before the Court - the copy of the videography of the counting process. It was informed to the Court that those documents are maintained under the orders of the Election Commission of India and are kept in the custody of the concerned District Election Officer. Further, it is the very same document / material which the returning officer was even otherwise obliged to make available to all the candidates including the petitioner (vide instruction No. 15.14.1.9 as contained in the Handbook for the Returning Officer - Exh.101) and in-spite of that, it was not given to the petitioner or to any candidate by the returning officer as per his own evidence (vide Q.No.121 of Exh. No. 99). Those documents were directed to be produced before this Court, vide order dated 19.12.2018. The said direction was given to the District Election Officer. Those documents were tendered to the Court on behalf of the District Election Officer, by the Additional District Election Officer and the Returning Officer by personally remaining present before the Court along with proper forwarding letters. The said documents were accepted by the Court on 21.12.2018, as recorded in the order dated 21.12.2018. An objection was raised on behalf of the respondent No. 2 that those documents be not taken on record and be not given Exhibit numbers. The said objection, after hearing the parties, was rejected by this Court vide order

dated 16.01.2019 and they were ordered to be given Exhibit numbers. It was inter-alia considered and held by this Court that those documents are public documents within the meaning of Section 74 of the Evidence Act, 1872 and it had come from the custody of the authorized officers of the Election Commission of India and was pursuant to the orders passed by this Court. After rejecting the said objection on behalf of the respondent No. 2, those documents were ordered to be given Exhibit numbers vide order dated 16.01.2019. They are Exh. Nos. 56 and 57.

48.3 The Election Application No. 10 of 2018, under which those documents were ordered to be produced and accepted by this Court by above referred orders dated 19.12.2018 and 21.12.2018 was disposed of vide order dated 09.01.2019.

48.4 The above orders i.e. :- (i) Order dated 19.12.2018, by which those documents were directed to be produced before the Court, (ii) Order dated 21.12.2018, by which those documents were accepted by the Court, (iii) Order dated 16.01.2019, by which those documents were held to be public documents and were ordered to be exhibited on the record of the petition, and (iv) Order dated 09.01.2019, by which the Election Application No. 10 of 2018 (under which those documents were directed to be produced before the Court) was disposed of; were challenged by the respondent No.2 (the returned candidate) before the Supreme Court of India, along with other orders passed by this Court recorded on this petition and applications therein, in the batch of SLPs being Special Leave Petition (Civil) Nos.3075 to 3081 of 2019 with SLP (Civil) No.3950 of 2019. The group of the said SLPs was dismissed as

withdrawn by the Supreme Court of India vide order dated 11.02.2019.

48.5 It is noted that a copy of the paper-book of the said SLP is on record of this petition at Exh. 140. The same has come on record through the evidence of the respondent No. 2 – the returned candidate himself (vide Q.No.22 of Exh. 139). The objections by respondent No. 2 before this Court at this stage is the reiteration of the objections raised on his behalf at the time of accepting and exhibiting these documents, which was adjudicated and rejected by this Court vide order dated 16.01.2019. The same line of objection was taken before the Supreme Court in the above referred SLPs, which were withdrawn by the respondent No. 2. This objection therefore may not require any further adjudication by this Court. In any case, no different view need to be taken by this Court at this stage. There are additional reasons, not to accept this objection on behalf of the respondent No. 2. They are as under.

49.1 The contest put forward by the returned candidate as per his written statement (Exh. 20) is based on the contest put forward by the Returning Officer by his written statement (Exh. 10). The contest put forward by the Returning Officer (vide Exh. 10) was inter-alia based on the video recording which he had intended to put on record (vide Para 11 of his written statement Exh.10). The said document was placed on record by the Returning Officer at Exh. 57 (i.e. DVD which was claimed to have been containing the recording of moving camera of the day of counting) with his own forwarding letter Exh. 55.

49.2 The Returning Officer (Mr. Dhaval Jani) is a witness in this Trail. His deposition is on record at Exh.99. During his examination-in-chief on behalf of the petitioner, it came on record (vide question no. 69 and 70 of Exh.99) that Exh. 57 does not contain the entire recording of the moving cameras. It further came on record (vide Q.No.131 of Exh.99) that the videography presented to the Court (Exh. 57) with forwarding letter (Exh. 55) was incomplete to the knowledge of the Returning Officer himself. This has its own consequence. Though the said document was earlier produced under the orders of this Court, during cross-examination of the Returning Officer on behalf of the petitioner, it was his say that, if the Court gives directions again, he will produce the complete recording (vide question No. 140 of Exh.99). There was no question of repeatedly giving directions to any public authority.

49.3 On 14.03.2019, the Returning Officer was being cross-examined on behalf of the respondent No. 2. Being mindful of the above noted consequences, it was asked to the Returning Officer on behalf of the respondent No. 2 whether at that stage he was ready and willing to provide those DVDs to the Court (vide question no. 263 and 264 of Exh.99), the Returning Officer was ready to oblige. The earlier stand of the Returning Officer, when the petitioner had asked for it, was 'if the Court directs', now changed to 'if the Court permits'. The said permission was asked for and the same was permitted by the Court to be taken on record on 15.03.2019 at Exh.110, subject to liberty granted by this Court to the learned advocates for the respective parties, to further examine / cross examine the Returning Officer, qua the additional material tendered to the Court by him and the issues connected therewith and arising

therefrom.

49.4 In continuation of the above, though the Returning Officer was required to enter the witness box again. Not only the Returning Officer had refused to enter the witness box again, even the respondent No.2 took the stand that the Returning Officer be not called again to face questions qua Exh.110 i.e. qua the said material which was insisted to be taken on record by the respondent No.2 himself. Reference in this regard can be made to the order of this Court dated 24.07.2019.

49.5 In view of above, the argument put forward on behalf of the respondent No. 2 that even that document which was insisted to be taken on record by him be not taken into consideration, needs to be and is rejected.

50.1 There is one more factor against the respondent No. 2 in this regard. It is pleaded on behalf of the respondent No.2 that the decision of the Supreme Court of India in the case of Anvar P.V. Vs. P.K.Basheer (Supra) be followed, as it is the correct proposition of law, and the decision of the Supreme Court of India in the case of Shafhi Mohammad Vs. State of Himachal Pradesh (Supra), as relied by the petitioner, should not be taken into consideration as it is not a good law. This argument of the learned senior advocate for the respondent No.2 is accepted. It is noted that in the light of the decision of the Supreme Court of India in the case of Anvar P.V. Vs. P.K.Basheer (Supra), which is pressed into service by the respondent No.2, this Court had permitted the said CCTV footage (Exh. 56) to be played in the Court, as noted in order

dated 01.03.2019.

50.2.1 Thus, even by accepting the say of respondent No.2, to consider the decision of Anvar P.V. Vs. P.K.Basheer (Supra), the argument that the said electronic documents at Exhs. 56, 57 & 110 be not considered as an evidence, can not be sustained.

50.2.2 Since this Court had, after considering the facts noted above and after referring to the decision of the Supreme Court of India in the case of Anvar P.V. Vs. P.K.Basheer (Supra), permitted the CCTV footages to be played in the Court, the authorities to support that, that course should have been followed, need not be discussed further.

50.3.1 There is additional reason not to accept this objection. It is the very same material, which the Returning Officer had independently obtained from the District Election Officer and had looked at it, at his own place before answering the questions put to him while being in the witness box. Reference in this regard is made to the deposition of the Returning Officer recorded on 06.03.2019 (Answer to Q.No.172 of Exh.99).

E-MAIL COPY

"Ans. : It is true that, on last date i.e. 01.03.2019, when the deposition was recorded last, I had said that, after looking at the CCTV footage, I will be able to reply to the said question. I have already asked a copy of the CCTV footage which is given to the Court by the District Election Officer, Ahmedabad (being

Exh.56), I am likely to get it from the Collector, Ahmedabad (DEO, Ahmedabad) within couple of days and after I get the same, I will be able to look at it, independently of the copy given to the Court being played in the Court and some time may be granted for that purpose. I further state that, Hon'ble the Prime Minister of India had visited the State on 04.03.2019 and 05.03.2019 and therefore, I being one of the Sub-Divisional Magistrates in the Ahmedabad District, I was also busy with those duties along with my Collector and therefore, this has taken some time."

50.3.2 Further, at more than one stages, it is the Returning Officer himself who requested the Court that CCTV footage be played in the Court, while he was in the witness box so that he can reply to the questions put to him correctly. The said part of the evidence is already quoted at appropriate places while answering the Issue No. 2 & 1, in the earlier part of this Judgment.

50.4 The objection by the returned candidate qua the material, which is referred to by the Returning Officer himself, in the manner noted above, can not be sustained.

50.5 For the above reasons, the objection on behalf of respondent No. 2 against Exh. No. 56, 57 and 110 is rejected. Even otherwise, excluding the electronic evidence would also not change the ultimate result of this petition because, even on the basis of the documentary evidences, this Court has

arrived at the conclusion that the election in question needs to be declared void on more than one grounds, as noted in the findings qua two groups of issues being Issue Nos. 2, 6 & 10 and Issue Nos. 1, 7 & 11, which is noted in the earlier part of this judgment.

51.1 One more objection raised on behalf of the respondent No.2 is that the paper-book of Special Leave Petition (Civil) Nos.3075 to 3081 of 2019 with SLP (Civil) No.3950 of 2019 can not be referred by the Court and therefore be not given Exhibit Number.

51.2 The above is responded on behalf of the petitioner contending that those group of SLPs were arising from the orders passed by this Court in this very petition and the say of the respondent No.2 is reflected therein in the form of pleadings which may have bearing on the issues being tried by this Court and therefore no objection could be taken by or on behalf of the respondent No.2.

51.3 So far this objection is concerned, this Court finds that no prejudice would be caused if, to complete the record, the details with regard to the SLPs being Special Leave Petition (Civil) Nos.3075 to 3081 of 2019 with SLP (Civil) No.3950 of 2019 arising from this petition are kept in view by this Court. The reasons recorded in para:47 above is an additional factor why this objection should not be sustained.

52.1 One more objection raised on behalf of the respondent No.2 is to the effect that the compilation of the Instructions of the Election Commission of India to the Returning Officers,

which is called 'Handbook for the Returning Officers' can not be taken into consideration by the Court and in any case, non-compliance thereof can not be a ground to declare the election in question void.

52.2 So far this objection is concerned, it needs to be rejected on more than one grounds. Firstly, the consent of the learned advocate for the respondent No.2 to take that document on record at Exh.101 is already noted in the order dated 28.02.2019 (Exh.102). Secondly, the force of those instructions are from Article 324 of the Constitution of India and this aspect is discussed in detail while answering Issues Nos.1, 7 & 11 more particularly para:38 thereof. For these two reasons, this objection is rejected.

53.1 Learned advocates for the contesting respondent No.2 and the respondent No.12 had raised an objection regarding admissibility of the deposition of PW-2 to PW-5, contending that, if a person - who is to enter the witness box at a subsequent stage is present in the Court, at the time of recording of deposition of other witness(es), evidence of such a person would be vitiated, on his entering the witness box subsequently. It is further submitted that, in the present case, not only such persons were present in the Court, but their affidavits in lieu of examination-in-chief were also supplied to them (i.e. learned advocates for the respondent Nos.2 and 12) and the same were also tendered to the Court. It is submitted that, had this not been done, the case of the petitioner might have been on different footing, to some extent.

53.2 As against this, learned senior advocate for the petitioner

has submitted that, the law - as was prevailing when there was practice of having jury, has no applicability in the present era, more particularly in the matters like Election Petitions.

53.3 The above objection / argument need not detain the Court any further. It is for the reason that, while recording the findings qua each issue, reference is not required to be made to the deposition of PW-2 to PW-5. Accepting or rejecting this objection, does not change the complexion of the matter in any manner. This objection is sustained and the depositions of PW-2 to PW-5 (Exhs. 89 to 92) are excluded from consideration by the Court while recording findings.

54.1 While recording the evidence of the respondent No.2 (vide Exh.139), a question had cropped up whether he could depose beyond or inconsistent with his pleadings. Since the respondent No.2 was on his legs in the witness box, with a view to see that the process of recording of his deposition is not obstructed in any manner, he was permitted to depose the way he intended, keeping that issue open as noted in the order dated 09.09.2019 (Exh.141).

54.2 In this regard, it is noted that, one of the issues being tried in this petition is as to whether any corrupt practice was committed by the respondent No.2 during the election in question. The answer to the said issue may have serious consequences. Keeping this in view, taking most lenient view in favour of the respondent No.2 his entire evidence (Exh.139) is taken into consideration by this Court, as it stands, without any exclusion therefrom.

ISSUE NOS.: 4 & 5

55. Issue Nos.4 and 5 are interconnected and are considered together. These issues read as under.

"4. Whether the petitioner proves that there are discrepancies in the figures of total votes polled, as reflected in the final result sheet published by the Returning Officer, vis-a-vis the figures reflected in the Total Voters Turnout Report published by the District Election Officer ?

5. Whether the petitioner proves that there are discrepancies in the number of total votes shown to have been polled through EVMs at the polling stations, vis-a-vis the number of votes taken into consideration from those EVMs at the time of counting of votes ?"

56. Both these issues pertain to the discrepancies in the number of total votes shown to have been polled through EVMs in different documents. Grievance is also made by the petitioner about manipulation in EVMs. In this regard, he has made two fold grievance. In para 2.6 of the petition (Exh.1) it is stated that in polling stations Nos. 60 (Dholka -16), 70 (Dholka - 26), 175 (Ganol -2), 177 (Dholi) & 230 (Salajada), total votes polled were 755, 659, 390, 526 & 716 respectively, whereas the same were counted as 728, 658, 389, 525 & 717 respectively. In para 2.10 of the memo of the petition (Exh.1),

it is stated that in Polling Station No. 173 - Ganesar, the respondent No.2 was shown to have got 421 votes out of total 426 votes and the petitioner is shown to have zero votes. It is alleged that there is serious error in counting of votes cast at Ganesar Polling station.

57. There is no dispute about the fact that the total number of votes counted through EVMs are 159917. This figure is reflected in the Final Result Sheet Form-20.

58. There are two Final Result Sheets Form-20 on record; (i) Exh.76A, which is signed by the Returning Officer and (ii) Exh.83, which is an unsigned document but it is the case of the petitioner that the said document was given by the Returning Officer to him (the petitioner) on the date of counting of votes and acknowledgment was also taken in that regard. Though, the difference in these two Final Result Sheets Form-20 has bearing on other issue(s), so far these two issues (Nos.4 and 5) which pertain to the discrepancies in the number of total votes shown to have been polled through EVMs in different documents, are concerned, there is no dispute, going by any of these two Final Result Sheets Form-20 Exh.76A or Exh.83. For this reason, it is noted that, there is no dispute between the contesting parties, either by the petitioner or the returned candidate or even the Returning Officer that, total votes counted from all EVMs were 159917.

59. The above figure needs to be weighed vis-a-vis the following two documents.

(i) Exh.76 is the 'Total Voters Turnout Report' published

on behalf of the Collector & District Election Officer, Ahmedabad. It pertains to all the Assembly Constituencies of Ahmedabad District. One of the entries therein, pertains to '58-Dholka Constituency' which is the concerned Constituency so far this petition is concerned. As per the said entry, total votes shown to have been polled through EVMs are 159918.

(ii) Exh.79 is the 'Voters Turnout Report' prepared by the concerned Returning Officer. As per the said document, the total votes shown to have been polled through EVMs is 159946. In the said document, there is also break up, polling stations-wise.

60.1 Thus, there is difference of 1 (one) vote in the figures of the total votes polled through EVMs in the 'Final Result Sheet' Form-20 (Exh.76A or Exh.83) vis-a-vis Exh.76 which is the 'Total Voters Turnout Report' published on behalf of the Collector & District Election Officer, Ahmedabad, and;

60.2 There is difference of 29 (twenty-nine) votes in the figures of the total votes polled through EVMs in the Final Result Sheet Form-20 (Exh.76A or Exh.83) vis-a-vis Exh.79, which is the 'Voters Turnout Report' prepared by the concerned Returning Officer, which also has the break up, polling stations-wise.

61. The difference of the above 29 votes can be further examined, polling station-wise since Exh.79 contains the polling station-wise details. The conjoint reading of Exh.79 vis-a-vis the Final Result Sheet Form-20 (Exh.76A or Exh.83)

makes it clear that, in polling stations Nos. 60 (Dholka -16), 70 (Dholka - 26), 175 (Ganol -2), 177 (Dholi) & 230 (Salajada), total votes shown to have been polled were 755, 659, 390, 526 & 716 respectively, whereas the same were counted as 728, 658, 389, 525 & 717 respectively.

62. On the face of the above documentary evidences, it is proved that there is discrepancy in the figures of total votes polled, as reflected in the Final Result Sheet Form-20 published by the Returning Officer, vis-a-vis the figures reflected in the Total Voters Turnout Report published by the District Election Officer. It is also proved that there are discrepancies in the number of total votes shown to have been polled through EVMs at the polling stations (more particularly the Dholka -16, Dholka - 26, Ganol -2, Dholi, Salajada polling stations), vis-a-vis the number of votes taken into consideration from those EVMs at the time of counting of votes.

63. Since there is a documentary evidence to come to the above conclusion, who says what (oral evidence) may not have any consequence. Still, it is noted that, there is no dispute on this point amongst the contesting respondents. The petitioner has stated so, in his pleadings (Exh.1) and deposition (Exh.75). As against that, the returned candidate does not say anything in this regard. The Returning Officer had responded to this factual aspect, by saying that, booth-wise figures are sent by him (as the Returning Officer) to the District Election Officer and there could be some typographical or clerical error therein (answer to question No.231 of Exh.99).

64. On the face of the above evidences (documentary and

oral), it is proved that there is discrepancy in the figures of total votes polled, as reflected in the Final Result Sheet Form-20 published by the Returning Officer, vis-a-vis the figures reflected in the Total Voters Turnout Report published by the District Election Officer. It is also proved that there are discrepancies in the number of total votes shown to have been polled through EVMs at the polling stations, vis-a-vis the number of votes taken into consideration from those EVMs at the time of counting of votes. The Issue Nos. 4 & 5 are answered in affirmative.

65. In-spite of what is held above, it further needs to be seen whether, as the consequence of the above, the result of the election in question can be said to have been materially affected. In this regard, it is noted that, as against the discrepancy of 29 votes recorded through EVMs, the victory margin of the respondent No.2 over the petitioner is 327 votes. If the said discrepancy is weighed vis-a-vis the victory margin, it can not be said that it has materially affected result of the election in question. The election in question therefore can not be declared void, on this count.

ISSUE NOS.: 8, 9 & 12

E-MAIL COPY

66. Issue No. 8, 9 & 12 are inter-connected and are considered together. These issues read as under.

"8. Whether the petitioner proves that any corrupt practice was committed under Section 123 of the Representation of the People Act, 1951 during the election of '58-Dholka Constituency'

held in December 2017 ?

9. Whether the petitioner proves that any corrupt practice was committed by the returned candidate (the respondent No.2) or his election agent or by any person with the consent of the respondent No.2 or his election agent during the election of '58- Dholka Constituency' held in December 2017 ?

12. Whether the petitioner proves that the election of the returned candidate (the respondent No.2) from '58-Dholka Constituency' for the Gujarat State Assembly Elections held on 14.12.2017, needs to be declared as void under Sec. 100(1)(b) of the Representation of People Act, 1951 ?"

67. As already noted while answering two groups of issues being Issue Nos. 2, 6 & 10 (vide para Nos. 21 - 32) and Issue Nos. 1, 7 & 11 (vide para Nos. 33 - 41), number of illegalities - in procedure and in substance are found to have been committed by the Returning Officer at the time of counting of votes and as already held, those illegalities have materially affected the result and therefore the election in question is being declared void on those grounds. Even if it was to be accepted that those illegalities / breaches were not the assistance procured by the respondent No.2 or his agent, from the Returning Officer for the furtherance of the prospects of respondent No.2 in the election in question, which would attract Section 123(7) of the Representation of People Act,

1951, then also the ultimate result is the same leading to the declaration that the election in question is void but not on the ground of corrupt practice. However, if those illegalities / breaches are seen in a proper chain and the consequences thereof are examined at each stage & in totality, it takes the Court to a conclusion, which is other than the bona-fide mistakes of the Returning Officer. Number of illegalities, including breach of the mandatory instructions of the Election Commission of India and also manipulation / falsification of election record & the consequential effect thereof on the prospects of the respondent No.2 are noted in detail in the earlier part of this judgment. They need to be seen again, from the view point of 'corrupt practice' as defined under Section 123 (7) of the Representation of the People Act, 1951, which reads as under.

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

(7) The obtaining or procuring or abetting or attempting to obtain or procure by a candidate or his agent or, by any other person with the consent of a candidate or his election agent, any assistance (other than the giving of vote) for the furtherance of the prospects of that candidate's election, from any person whether or not in the service of the Government and belonging to any of the following classes, namely:—

(a) gazetted officers;

(b) stipendiary judges and magistrates;

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

(d) members of the police forces;

(e) excise officers;

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

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

Provided that where any person, in the service of the Government and belonging to any of the classes aforesaid, in the discharge or purported discharge of his official duty, makes any arrangements or provides any facilities or does any other act or thing, for, to, or in relation to, any candidate or his agent or any other person acting with the consent of the candidate or his election agent (whether by reason of the office held by the candidate or for any other reason), such arrangements, facilities or act or thing shall not be deemed to be assistance for the furtherance of the prospects of that candidate's election;"

68.1 The reading of the above sub-section makes it clear that, in order to prove the aspect of 'corrupt practice', it has to be examined if a candidate or his agent has obtained or procured or abetted or attempted to obtain or procure any assistance, for the furtherance of the prospects of that candidate's election, from any person as mentioned in clause (a) to (g) of Section 123(7) of the Representation of the People Act, 1951.

68.2 The requirement of Section 123(7) of the Representation of the People Act, 1951, is further that, if the above is done by any person other than a candidate or his agent, that should have been done with the consent of that candidate or his election agent.

69.1 There is voluminous material on record in the form of unrebutted documentary evidences, which, when considered in a proper sequence & keeping in mind the requirement of Section 123(7) of the Representation of the People Act, 1951, it takes this court to an inescapable conclusion that in the present case, the respondent No.2 and his election agent have not only attempted but have successfully obtained and procured assistance from the Returning Officer for the furtherance of the prospects of the respondent No.2, in the election in question. There is also evidence on record that, for that purpose, all sorts of illegalities were committed which include, manipulation & falsification of record of the election in question and breach of mandatory instructions of the Election Commission of India with regard to conduct of election. It is also noted that, though there is voluminous material on record in the form of unrebutted documentary evidence which has bearing on the aspect of corrupt practice, the entire design of

corrupt practice centers around only three undisputed documentary evidences being Exh. Nos. 111, 112 & 113. All these three documents were placed on record by the Returning Officer, while he was giving his evidence at Exh.99. Not only that, those three documents were on record right from the early stage of the Trial, since they were annexed with the written statement of the Returning Officer (Exh.10). The details with regard to these three documents are as under.

(i) Exh.111 is a statement containing details of all the votes, round wise taken into consideration by the Returning Officer at the time of counting of votes, including postal ballots. The said document is a 20 pages document and it bears signatures of both - the Returning Officer as well as the Observer, on each page.

(ii) Exh.112 is the authorization given by the Observer to the Returning Officer for declaration of the final result of the election in question.

(iii) Exh.113 is a hand written document dated 18.12.2017, signed by the election agent of the respondent no.2. While placing it on record, the Returning Officer described it (at Q.No.296 of Exh.99) as a formal objection taken on behalf of the respondent no.2 against the demand of the petitioner with regard to recounting of votes.

69.2 How the entire controversy centers around the above referred three documents and how the design of corrupt practice was successfully executed by the respondent No.2 /

his election agent and the Returning Officer, and how it has materially affected the result of the election in question, is discussed in detail and in a proper sequence hereunder.

70.1 The first step by the Returning Officer, in the chain of assistance for the furtherance of the prospects of the respondent No.2 is the breach of the instructions of the Election Commission of India regarding the timing of commencement of counting of the penultimate round of EVMs. Those instructions, as contained in Exh.101, are as under.

"15.15.3.1 Under the law (Rule 54A of the Conduct of Election Rules, 1961) the postal ballot papers are to be counted first. It is clarified further that it is not necessary to wait for the counting of postal ballots to be completed before counting of votes recorded in EVMs starts. After a gap of 30 minutes from the commencement of counting of postal ballot papers, the counting of votes in EVMs can start. Counting of postal ballot papers shall be done at your Table. All postal ballot papers received by you should be brought before you. Only such postal ballot papers as are received before the hour fixed for commencement of counting shall be counted."

"15.16.2 After 30 minutes of the commencement of postal ballot counting, the EVM counting can start. The EVMs can be brought under escort (agents can accompany) from the strong room to

the counting hall even if the postal ballot counting is still going on. However, the penultimate round of EVM counting shall not commence unless the postal ballot counting is over."

70.2 It is the evidence of the Returning Officer himself that the above instructions were flouted. The relevant part thereof reads as under.

"282. Question : When the EVMs for the 2nd last round (penultimate round) were brought out of the strong room and were taken to the counting hall ?

Ans. : At 11:17:00 hours onwards.

283. Question : When the EVMs for 2nd last round were being brought in the counting hall, at that time, was the counting of postal ballot over ?

Ans. : No. That process was not over.

284. Question : What was the stage at Table No.15 when the EVMs for the 2nd last round were being brought in the counting hall ?

Ans. : At the request of the witness, CCTV footage is shown to him of VM626 - On RO table - time 11:07:52 to 11:17:58. On playing the said footage, the witness states that :- all the trays of the candidates are empty and even the

distribution of the valid postal ballots candidate-wise had not started at that time.”

70.3 By flouting the above referred instructions regarding the timing of commencement of the penultimate round of EVMs, the object which was sought to be and which was successfully achieved, is discussed as under.

70.3.1 The spirit of the above quoted instructions of the Election Commission of India is that while the counting of postal ballots is being undertaken, any person present in the counting hall should not be aware, with what margin the first candidate is leading over the second, so far the votes from EVMs are concerned. This is because, between the EVMs and postal ballots, the postal ballots are more susceptible to human interventions and one may have motivation / inclination to accept an invalid vote or reject a valid vote, if the margin is less and within the reach of the figures of the postal ballots to be counted, which precisely has happened in the present case.

70.3.2 At this stage reference needs to be made to Exh. 111 – which is a statement showing round-wise details of votes including postal ballots. It is a 20 pages document. It bears signatures of the Returning Officer as well as the Observer, on each page. From the said document Exh.111, the following facts are evident.

(i) There were total 19 rounds of counting of votes from EVMs. So the 18th round of counting of votes was the penultimate round (second last round) of counting of votes through EVMs.

(ii) At the end of 16th round of the counting of votes through EVMs, total 139416 votes were counted from EVMs. From those votes, the petitioner had secured 59438 votes and the respondent No.2 had secured 64415 votes. Thus, at the end of the 16th round of counting of votes through EVMs, the respondent No.2 was leading over the petitioner by the margin of 4977 votes.

(iii) At the end of 17th round of the counting of votes through EVMs, total 147871 votes were counted from EVMs, from which the petitioner had secured 63656 votes and the respondent No.2 had secured 67506 votes. Thus, at the end of the 17th round of counting of votes through EVMs, the respondent No.2 was leading over the petitioner by the margin of 3850 votes.

70.4 As per the instructions of Election Commission of India to the Returning Officers (para 15.16.2 as quoted above), the counting of postal ballots could not have been kept pending beyond this stage. If the counting of postal ballots was not completed and the figures thereof were not announced aloud (as required vide para 15.15.3.6 of Exh. 101) , the penultimate round could not have been started at all. In this case, the Returning Officer was required to announce aloud which candidate had got how many votes from postal ballots and how many postal ballots were rejected, before the commencement of 18th round of counting of votes through EVMs, which was not done. It is at this stage, the Returning Officer started playing mischief. He continued with the counting of votes through all the EVMs, without even starting the distribution of postal ballots, candidate-wise. Thus, the

actual counting of postal ballots had not even started, when it should have been completed. As the result of this, everybody, including the Returning Officer and the election agent of the respondent No.2, was aware that at the beginning of the 18th round (the penultimate round – the second last round) of the counting of votes through EVMs, the respondent No.2 was leading over the petitioner by the margin of 3850 votes, and all the postal ballots were yet to be counted.

70.5 At the end of 18th round of the counting of votes through EVMs, total 155811 votes were counted from EVMs. From those votes, the petitioner had secured 68179 votes and the respondent No.2 had secured 70129 votes. Thus, at the end of the 18th round of counting of votes through EVMs, the lead of the respondent No.2 over the petitioner was reduced to 1950 votes.

70.6 The counting of votes through EVMs still continued. At the end of the last round i.e. the 19th round of the counting of votes through EVMs, total 159917 votes were counted from EVMs, from which the petitioner had secured 70675 votes and the respondent No.2 had secured 71189 votes. Thus, on conclusion of counting of all the votes through EVMs, the lead of the respondent No.2 over the petitioner was further reduced to 514 votes. Till that time also, the counting of all the postal ballots was kept pending by the Returning Officer. The net effect of this was that, the lead of 514 votes of the respondent No.2 over the petitioner was known to the Returning Officer, which was to be salvaged, and as against that, all the 1356 postal ballots were still at his disposal.

70.7 It is at that belated stage and with that playing field and that scope of adjustment of postal ballots, the counting of postal ballots started. With the commencement of counting of postal ballots, the margin further reduced in favour of the petitioner and against the respondent No.2. While the counting of postal ballots was on and at the stage when 927 postal ballots got counted, the victory margin was further reduced to 327. As against that, 429 postal ballots were yet to be counted. The final result could go either way. The Returning Officer did not take that risk. Those 429 votes were concealed from all, even from the Observer. This was the next step in the chain of assistance by the Returning Officer for the furtherance of the prospects of the respondent No.2. Had this action of the Returning Officer been simple omission, the Returning Officer would have informed the Observer (as was required while entering figures of votes in Exh.111) that 429 postal ballots were rejected, but that was not done. The rejected postal ballot was shown to be zero in Exh.111. The authorization given by the Observer to declare the result of the election in question (Exh.112), which was based on Exh. 111, was thus obtained by the Returning Officer from the Observer in such a fraudulent manner. This is discussed in detail while answering Issue Nos. 1, 7 & 11 also but it was without keeping the aspect of 'corrupt practice' in view.

71. The next step by the Returning Officer for the furtherance of the prospects of the respondent No.2 was to salvage the above noted manipulation / falsification of record. For that purpose, it was further required for the Returning Officer to manipulate other records as well, more particularly the Final Result Sheet Form-20, which he did by violating three

instructions of the Election Commission of India regarding preparation of Final Result Sheet Form-20. What type of manipulation / falsification was done by the Returning Officer at the time of preparation of Final Result Sheet Form-20, is already discussed in detail earlier while answering the Issue No. 1, however for the purpose of this issue of corrupt practice, the relevant is noted again.

71.1 The instructions of the Election Commission of India, regarding preparation of Final Result Sheet Form-20 as contained in Exh.101, reads as under.

"15.15.3.6 The valid votes should then be counted and each candidate credited with the votes given to him. The total number of postal votes received by each candidate should then be calculated, entered in the Result Sheet in Form 20 in the appropriate place and announced by you aloud for the information of the candidates.

15.27.3 While striking this grand total, the entire Final Result Sheet should be carefully checked and it must be ensured that entries have been made therein in respect of each and every polling station and that the Form is not incomplete in any respect.

15.27.5 The grand total should also be correctly struck as any incorrect totaling may materially affect the result of election and the declaration of result, which has to be made on the basis of this Form. Any discrepancy in that

Form will be very seriously viewed by the Commission and will result in severe disciplinary action."

71.2 Relevant part of the deposition of the Returning Officer with regard to compliance with the above quoted instructions of the Election Commission of India, reads as under.

"209. Question : At 12.24.35 hours, you declared that total postal ballots received by you were 1231. Is it true that you are seen in the said footage, declaring this ?

Ans. : Yes that is true.

210. Question : You also declared that out of total 1231 postal ballots received, 301 votes prima facie were rejected. Is it true?

Ans. : Yes, the footage shows so.

287. Question : Before announcing the figures of postal ballots, at 12:24:00 hours, as stated by you above, did you enter that figure in Form No.20 ?

Ans. : I do not remember at this stage.

288. Question : What is the requirement in this regard, as per the instructions of the Election Commission of India ?

C/EP/3/2018

Ans. : From the Hand Book (Exh.101), I say that
Para : 15.15.3.6 would come in play at that
stage.

289. Question : When did you declare the final
result?

Ans. : At 13:16:00 hours.

290. Question : Before declaring the final
result, whether all figures were filled in - in
Form No.20 ?

Ans. : Yes, that was done.

291. Question : When you say that all the
figures were filled in - in Form No.20 before
declaring the final result, it also included the
figures of postal ballots ?

Ans. : Yes.

292. Question : When you entered the figures of
postal ballots received by each candidate in
Form No.20, before declaring the final result at
13:16:00 hours, as stated by you above, did you
enter the same figure of postal ballots which
you had announced at 12:24:00 hours ?

Ans. : No, it is not the same figure. There is
difference in the figures of postal ballots as
entered in Form No.20 and what was announced by

me at 12:24:00 hours.

At this stage, the witness requested that he be permitted to give some explanation in this regard. On being permitted to do so, he states that :-

As it is evident even from the CCTV footage which is played in the Court in this regard today, even I had asked for the said figure from somebody else and subsequently, when it came to my notice that there is difference in that regard, I entered correct figures in Form No.20. I further say that, the figures which I had announced - what each candidate has got and what I entered in Form No.20, is the same in both the cases."

71.3 It is already held while answering Issue No.1 that the instructions of the Election Commission of India (qua preparation of the Final Result Sheet Form-20), were not complied with at the time of counting of votes, but this would also show that the figures of the postal ballots announced by the Returning Officer and entered in the Final Result Sheet Form-20 is not the same, even as per the deposition of the Returning Officer himself.

71.4 It can not be disputed that the result can be declared by the Returning Officer, only with prior authorization from the Observer. There can not be any authorization from the Observer, unless the figures shown in the statement showing

round-wise details of votes, including postal ballots, which is shown to the Observer by the Returning Officer and signed by both of them (which in this case was Exh.111), tallies with the Final Result Sheet Form-20, prepared by the Returning Officer.

71.5 It is a matter of record that, while seeking authorization from the Observer to declare the result, the Returning Officer had shown to the Observer, in writing (vide Exh.111) that total postal ballots received and taken into consideration by him at the time of counting of votes were 927 and rejected postal ballot was zero. It is also a matter of record that in the Final Result Sheet Exh.76A, which is signed by the Returning Officer and which is claimed to be the basis by the Returning Officer for declaring the respondent No.2 to be the returned candidate, the total postal ballots shown to have been received and taken into consideration by the Returning Officer at the time of counting of votes were 1356 and rejected postal ballots were 429. This shows that, as against the victory margin of 327 votes, 429 postal ballots were not only not shown to any candidate including the petitioner, the fact of those 429 postal ballots having been received and rejected was not made known even to the Observer. On the contrary, there was falsification of Exh.111.

E-MAIL COPY

71.6 Further, one very glaring aspect is that, as per the evidence of the Returning Officer (vide answers to Q. No. 209 & 210 of Exh.99), on the day on counting i.e. 18.12.2017, it was announced by him aloud in the counting hall at 12:24:35 hrs that total postal ballots received by him were 1231 and from these 1231 postal ballots, he had rejected 301 postal ballots. This shows that the figure announced by him was

neither the figure mentioned by him in the Final Result Sheet Exh.76A (which shows the total postal ballots as 1356) nor the one which was shown to the Observer in Exh.111 (which shows the total postal ballots as 927) for seeking authorization to declare the Result. The announced figure (1231) was all together the third figure, which was not reflected in any of the documents. This is how the record of the election in question, more particularly the Final Result Sheet Form-20, was manipulated by the Returning Officer.

72. The above design still goes further. The next step for the furtherance of the prospects of the respondent No.2 was the defiance of the instructions of the Election Commission of India regarding 'mandatory and comprehensive recount of all postal ballots' and also 'mandatory re-verification of postal ballots'. In this regard, the following aspects are noted.

72.1 It is not is dispute that the total postal ballots received by the Returning Officer (be it 1356 or 927) were more than the victory margin of 327 votes. The instructions of the Election Commission of India in this regard are to the effect that, under such circumstances, there will be 'mandatory and comprehensive recount of all the postal ballots' and also 'mandatory re-verification of all the postal ballots'. The said procedure was not followed by the Returning Officer, is the evidence of the Returning Officer himself, which is quoted below. The said instructions are as under.

(A) The instruction of the Election Commission of India, as contained in Para:15.30.9 of the said Handbook Exh.101, regarding mandatory recount of Postal Ballots

reads as under.

"The Commission has decided that where the result of an election is going to be decided by difference of postal ballot received by the first two candidates, then there shall be mandatory and comprehensive recount of postal ballot papers, even though no candidate ask for it."

(B) The instruction of the Election Commission of India, as contained in Para:15.15.5.1 of the Handbook for the Returning Officer Exh.101, regarding mandatory re-verification of Postal Ballots reads as under.

"In case the victory margin is less than total number of postal ballots received then there should be a mandatory re-verification of all postal ballots. In the presence of Observer and the RO all the postal ballots rejected as invalid as well as the postal votes counted in favour of each and every candidate shall once again be verified and tallied. The Observer and the RO shall record the findings of re-verification and satisfy themselves before finalizing the result. The entire proceeding should be videographed without compromising the secrecy of ballot and the video-cassette / CD should be sealed in a separate envelope for future reference."

72.2 Relevant part of the deposition of the Returning Officer,

showing defiance of the above quoted instructions of the Election Commission of India, i.e. with regard to (i) mandatory and comprehensive recount of Postal Ballot papers and (ii) mandatory re-verification of Postal Ballots , reads as under.

"276. Question : What was the victory margin of the returned candidate (respondent no.2) over the petitioner ?

Ans : 327 votes.

277. Question : You have deposed earlier that, total postal ballots received by you were 1356. Total postal ballots rejected by you were 429. Thus the victory margin of the returned candidate over the petitioner was less than total postal ballots received. In this situation, which of the instructions of the Election Commission of India would come into play ?

Ans. : In this situation, the instructions contained in Paras : 15.30.9 and 15.15.5.1 in the Hand Book (Exh.101) would come into play.

278. Question : Whether you had done the re-counting of postal ballots which is mandatory as per the above referred instructions (para : 15.30.9) ?

Ans. : No. I had not done that re-counting.

279. Question : Whether you had done the reverification of postal ballots which is mandatory as per the above referred instructions (para : 15.15.5.1) ?

Ans. : No. I had not done that re-verification either."

72.3 In view of above, it is undisputed that the above quoted two instructions of the Election Commission of India, which are mandatory in nature were not complied with at the time of counting of votes. Recount of postal ballots was required to be done, even if nobody asks for. That breach itself was fatal, since the victory margin of 327 votes was not only less than total (1356) postal ballots received, but it was less than even rejected (429) postal ballots. This mischief (not omission) was very important link in the chain of actions for the furtherance of the prospects of the respondent No.2, in the election in question, which is explained below.

72.4 Let it be examined, what would have happened, had the recount of postal ballots been done by the Returning Officer, which even otherwise he was obliged to do, even if no one asks for it. The first thing which would have happened is, the Returning Officer would have been left with no option but to reassert, how many postal ballots were taken into consideration by him at the time of counting of votes. He had already committed in writing before the Observer in Exh.111 that total postal ballots received were 927 and rejected postal ballot was zero. He had also announced publicly that the total postal ballots received were 1231 and rejected postal ballots

were 301 (Answers to Q.Nos.209, 210 of Exh.99). This would not have reconciled, had the recount been done. Further, in the Final Result Sheet Form-20, he was to show all together the third figure i.e. total postal ballots received to be 1356 and rejected postal ballots to be 429. This manipulation in the Final Result Sheet Form-20 would not have been possible. It is for this reason, the recount was not done, though it was mandatorily required. Under these circumstances, whether the petitioner had asked the recount or not pales into insignificance, however there is evidence on record that, not only the recount was asked for by the petitioner, it was even objected on behalf of the respondent No.2. There is documentary evidence in this regard being Exh.113, which is a hand written document dated 18.12.2017, signed by the election agent of the respondent no.2. While placing it on record, the Returning Officer described it (at Q.No.296 of Exh.99) as a formal objection taken on behalf of the respondent no.2 against the demand of the petitioner with regard to recounting of votes. Neither the Returning Officer nor the respondent No.2 can disown this document. Factually also, it is not disowned by them. Without there being any demand by the petitioner for recount of votes, there could not have been any objection against it on behalf of the respondent No.2, which is already there in writing at Exh.113. Even on the face of this documentary evidence (Exh.113), the stand of the Returning Officer was to the effect that the petitioner had not asked for recounting of votes (vide para:9 of written statement Exh.10). The said Exh.10 is treated as part of the evidence of the Returning Officer (vide Q. No. 262 of Exh.99). Even the assertion of the respondent No.2 (vide Q.No.80 of Exh.139) is to the effect that, no recount was asked for by the petitioner.

This shows how the Returning Officer and the respondent No.2 are hands in glove, to assert, even on the face of Exh. 113, that the petitioner had not asked for recount. This needs to be seen from the view point of corrupt practice.

73. On conjoint consideration of the above, this Court arrives at the prima-facie conclusion that, in the present case the respondent No.2 and his election agent have not only attempted but have successfully obtained and procured assistance from the Returning Officer for the furtherance of the prospects of the respondent No.2, in the election in question and further that they were hands in glove for this purpose. However, before arriving at any final conclusion, it needs to be seen what is the say of the Returning Officer and the respondent No.2 in this regard.

74.1 The say of the Returning Officer is already noted in detail in the earlier part of this judgment (para:10 to 13). The written statement (Exh.10) filed by the Returning Officer, his deposition (Exh.99) and the other evidence placed on record by him led to a situation where it was necessary to join him as party respondent, as required under Section 99 of the Representation of People Act, 1951. An order to that effect was passed by this Court on 02.04.2019 (Exh.115). After issuance of the said notice, the Returning Officer (the respondent No.13) was virtually on trial, atleast to the extent as to why he be not named in the judgment, while deciding the issue of corrupt practice. Therefore he was required to give explanation regarding all the material staring against him, including which had come on record vide his own evidence Exh.99. Even after the said notice dated 02.04.2019, the Returning Officer did not

rebut any material staring against him. This Court therefore again reminded the Returning Officer about this, vide order dated 19.06.2019. Para 5 thereof reads as under.

"5. Learned advocates for the respondent Nos. 13 and 15 to respond, if they intend to deal with / rebut, any material - evidence / part thereof, which has come on record by this time.

6. List on 25.06.2019"

74.2 Availing that opportunity, the Returning Officer requested on 02.07.2019 (vide Exh. 129) that, he be permitted to cross-examine the petitioner. This was permitted by the Court and the petitioner was cross-examined on behalf of the Returning Officer. Then also nothing changed on any material aspect. Beyond this, the Returning Officer did not ask anything. He did not deal with / rebut any material - evidence / part thereof, which had come on record by that time. He also did not lead any evidence in his defense.

74.3 Thus, not only there was no explanation, there was not even any attempt on the part of the Returning Officer to deal with / rebut, any material - evidence / part thereof, which was on record and staring against him, in-spite of the notice of this Court under Section 99 of the Representation of People Act, 1951 vide order dated 02.04.2019 and further reminder in that regard vide order dated 19.06.2019. By not giving any explanation / rebutal against the material against him, and further by leading no evidence on his behalf, all the material which is the basis for this Court to arrive at prima-facie

conclusion against the respondent No.2 and the Returning Officer, as noted above, stood unrebutted, atleast qua the Returning Officer. The following are a few of many points, which the Returning Officer was required to rebut and / or offer his explanation, which he has not.

75.1 It can not be disputed that the result can be declared by the Returning Officer, only with prior authorization from the Observer. There can not be any authorization from the Observer unless, the figures shown in the statement showing round-wise details of votes, including postal ballots, which is shown to the Observer by the Returning Officer and signed by both of them (which in this case was Exh.111), tallies with the Final Result Sheet Form-20, prepared by the Returning Officer.

75.2 It is a matter of record that, while seeking authorization from the Observer to declare the result, the Returning Officer had shown to the Observer, in writing (vide Exh.111), that total postal ballots received and taken into consideration by him at the time of counting of votes were 927 and rejected postal ballot was zero. It is also a matter of record that in the Final Result Sheet Exh.76A, which is signed by the Returning Officer and which is claimed to be the basis by the Returning Officer for declaring the respondent No.2 to be the returned candidate, the total postal ballots shown to have been received and taken into consideration by the Returning Officer at the time of counting of votes were 1356 (and not 927) and rejected postal ballots were 429 (and not zero). Both could not be true. There is no explanation by the Returning Officer in this regard.

75.3 Thus, by not offering any explanation in this regard, the evidence and the circumstances pointing finger towards manipulation / falsification of record of the election in question, stood as it is, against the Returning Officer. This aspect is further aggravated by the following.

75.4 When the Returning Officer was being cross-examined on behalf of the respondent No.2, an attempt was made that nothing wrong had happened at the time of counting of votes and had there been anything wrong, the Observer would have certainly stopped the Returning Officer at that stage itself. Since the respondent No.2 had attempted to drag the Observer into this controversy, even the Observer was joined as party respondent by name, along with the Returning Officer. In response to the notice of this Court dated 02.04.2019, the Observer gave her first written response vide Exh.120 on 01.05.2019, inter-alia stating therein that :- "The result of Postal Ballot papers submitted to me by RO with his signatures in standard format of ECI, duly signed by him, did not show any rejected votes. All 927 votes were shown as valid, hence I was satisfied and I signed the certificate". Thus, on the face of the stand of the respondent No.2 & the Returning Officer in Exh.99 (Q.No. 249 & 250) and in-spite of the evidence (Exh.111) which was placed on record by the Returning Officer himself and additional material (Exh.120) which came on record on 01.05.2019, the Returning Officer chose not to give any explanation or rebut it or examine & put any question to the Observer, in-spite of opportunity to him under Section 99 of the Representation of People Act, 1951, coupled with the specific reiteration of the said opportunity by this Court in

order dated 19.06.2019, more particularly para : 5 thereof. Thus, by not offering any explanation in this regard, the evidence and the circumstances pointing finger towards manipulation / falsification of record of the election in question, stood unrebuted, against the Returning Officer.

76. There is one more glaring aspect, which has stood unrebuted. As per the evidence of the Returning Officer (Answers to Q.Nos.209, 210 of Exh.99), on the day of counting i.e. 18.12.2017, it was announced by him aloud, in the counting hall at 12:24:35 hrs that, total postal ballots received by him were 1231 and from these 1231 postal ballots, he had rejected 301 postal ballots. This shows that the said figure announced by him was neither the figure mentioned by him in the Final Result Sheet Exh.76A (which reflects total postal ballots as 1356), nor the one which was shown by him to the Observer in Exh.111 (which reflects total postal ballots as 927), for seeking authorization from the Observer to declare the Result. The announced figure (1231) was all together the third figure, which was not reflected in any of the documents. Thus, by not offering any explanation in this regard, the evidences and the circumstances pointing finger towards manipulation / falsification of record of the election in question, more particularly the Final Result Sheet Form-20, also stood unrebuted, against the Returning Officer.

77. There is one more glaring aspect, which has stood unrebuted. No recount was asked for by the petitioner, is the stand taken / deposition by, not only the respondent No. 2 but the Returning Officer as well. During the deposition of the Returning Officer, Exh. 113 came on record, which is a hand

written document dated 18.12.2017, signed by the election agent of the respondent no.2. While placing it on record, the Returning Officer described it (at Q.No.296 of Exh.99) as a formal objection taken on behalf of the respondent no.2 against the demand of the petitioner with regard to recounting of votes. The said document was even an annexure to the written statement (Exh.10) filed by the Returning Officer himself. Without there being any demand by the petitioner for recount of votes, there could not have been any objection against it on behalf of the respondent No.2. He was required to reconcile this and / or give explanation in that regard, which he did not. He could have even called the author of the said document i.e. the election agent of the respondent No.2, availing the opportunity under Section 99 of the Representation of People Act, 1951, which also he did not do. Further, when the respondent No.2 was in the witness box, the Returning Officer could have put questions to him on this point, which also he did not do. As such, the respondent No.2 was not cross-examined at all by the Returning Officer on any point, much less qua Exh.113. Even on the face of this documentary evidence (Exh.113), the stand of the Returning Officer was to the effect that the petitioner had not asked for recounting of votes (vide para:9 of written statement Exh.10). The said Exh.10 is treated as part of the evidence of the Returning Officer (vide Q. No. 262 of Exh.99). Even the assertion of the respondent No.2 (vide Q.No.80 of Exh.139) is to the effect that, no recount was asked for by the petitioner. This also shows how deep the Returning Officer and the respondent No.2 are hands in glove, to assert, even on the face of Exh. 113, that the petitioner had not asked for recount. What would have happened, had the recount been done is

already discussed in detail in the earlier part of the judgment. This needs to be seen from the view point of corrupt practice.

78. On conjoint consideration of the above unrebutted evidences and the circumstances against the Returning Officer, the prima-facie conclusion recorded by this Court in para:73 above, needs to be confirmed against the Returning Officer.

79.1 The say of the respondent No.2 is already noted in detail in the earlier part of this judgment. Taking that into consideration vis-a-vis the factors against him as noted above, the following are a few of many points which the respondent No.2 was required to rebut and / or offer his explanation, which he did not.

79.2 It is relevant to note at this stage that, at the beginning of the Trial when the list of witnesses (Exh. 68) was submitted on behalf of the respondent No. 2, his own name was not included therein, however names of five other witnesses were included. After the evidence of the Returning Officer Exh. 99 and other evidence coming on record, the respondent No. 2 gave an application (being Election Application No. 12 of 2019) praying therein that, he be permitted to enter the witness box to give evidence on his behalf. The same was permitted vide order dated 30.08.2019 (Exh. 138). His evidence is recorded at Exh. 139. Even after considering the said evidence, not only the evidence against him has stood unrebutted, the circumstances have further stood aggravated against him which are noted hereunder.

80. When the respondent No. 2 entered the witness box, Exh.76A & Exh. 111 both were staring on his face. As already noted, it is a matter of record that, while seeking authorization from the Observer to declare the result, the Returning Officer had shown to the Observer, in writing (vide Exh.111), that total postal ballots received and taken into consideration by him at the time of counting of votes were 927 and rejected postal ballot was zero. It is also a matter of record that in Final Result Sheet Exh.76A, which is signed by the Returning Officer and which is claimed to be the basis by the Returning Officer for declaring the respondent No.2 as the returned candidate, the total postal ballots shown to have been received and taken into consideration by the Returning Officer at the time of counting of votes were 1356 and rejected postal ballots were 429. Both could not be true. If any one of these two goes, and one has to, then the consequences are fatal for the respondent No.2. In the event Exh.111 is accepted to be true document, which has to be, then as the necessary consequence, the result of the election goes. If that is to be salvaged, it needs to be atleast asserted that Exh.111 is not right. For doing so, respondent No.2 was required to put questions in that regard to the Returning Officer first, because that document had come on record through the Returning Officer himself. The respondent No.2 did not do that. He could have called the Observer to be questioned in that regard. He did not do even that. The respondent No.2 did not say anything in that regard, when he was giving his evidence. On the contrary, when he was confronted with those figures, he conceded (vide answers to Q. Nos. 63, 64 and 65 of Exh.139) that it is a matter of record. This alone may prove to be fatal for the respondent No.2 so far the election in question is concerned, because by

not offering any explanation, the manipulation and falsification of record including the Final Result Sheet Form 20, remained unrebuted.

81. Further, when the respondent No. 2 entered the witness box, it was also on record, as per the evidence of the Returning Officer himself that, as per the figures of the postal ballots announced by him aloud on 18.12.2017 in the counting hall at 12:24:35 hrs, total postal ballots received were 1231 and from those 1231 postal ballots, he had rejected 301 postal ballots. The said figure was neither the figure mentioned by him in the Final Result Sheet Exh.76A (which shows total postal ballots as 1356 & rejected postal ballots as 429) nor the one which was shown to the Observer in Exh.111 (which shows total postal ballots as 927 & rejected postal ballot as zero) for seeking authorization to declare the Result. The figure (1231) announced in the counting hall was all together the third figure, which was not reflected in any of the documents. The respondent No. 2 took the stand in the evidence, while replying to question No. 69 that : - "any question that may be put to me hereinafter pertaining to, what had happened at the time of counting of votes, my answer would be that, since I was not present there and therefore, I may not know, but I may only know that, which is told to me by my counting agent."

82.1 Still further, when the respondent No.2 entered the witness box, there was also evidence of the Returning Officer that many instructions of the Election Commission of the India, including with regard to mandatory recounting and mandatory re-verification were not complied with. This had its own

consequences on the election in question.

82.2 The relevant part of the evidence of the respondent No. 2, in this regard, is as under.

"68. Question : Is it that you have no comments to offer with regard to the evidence of the Returning Officer (Exh.99) ?

Ans. : He would have done his work as per the guidelines of the Election Commission of India. Further, there are AROs, RO, Micro-observers and main Observer. And the main Observer has signed also.

79. Question : If the re-counting or re-verification is not done as per the instructions of the Election Commission of India, the same should not have been done ?

Ans. : If it is not asked for by the petitioner, it need not be done. At this stage, the witness has further stated that, there are instances where even when the victory margin was of one vote, re-counting was rejected by the authority.

85. Question : If in the election in question, reception or rejection of the postal ballots were against or inconsistent with the instructions of the Election Commission of India, the election in question needs to be declared as void. What do you say ?

Ans. : There is no question of declaring the election in question to be void, since the entire process of counting of votes was strictly in accordance with the instructions of the Election Commission of India."

82.3 Thus, even that part of the evidence against the respondent No.2 (with regard to breach of mandatory instructions of the Election Commission of India) also stood unexplained.

83.1 When the respondent No.2 entered the witness box, Exh.113 was on record. It had come on record through the evidence of the Returning Officer. As a matter of fact, the very purpose of the respondent No.2 to enter the witness box was that he was required to meet with the material which had come on record through the deposition of the Returning Officer. Exh.113 was one such evidence weighing against him. It is a hand written document dated 18.12.2017, signed by the election agent of the respondent no.2. While placing it on record, the Returning Officer had described it as a formal objection taken on behalf of the respondent no.2 against the demand of the petitioner with regard to recounting of votes (vide Q.No.296 of Exh.99). Without there being any demand by the petitioner for recount of votes, there could not have been any objection against it on behalf of the respondent No.2, which was already there in writing at Exh.113. The Returning Officer and the respondent No.2 both were required to give explanation in this regard. It was more so for the respondent No.2 to reconcile this and / or give explanation in that regard, since the said document was authored by the election agent of

the respondent No.2, as claimed by the Returning Officer. The respondent No.2 did not offer any explanation. He could have even called the author of the said document i.e. his own election agent, to give explanation in this regard. Not only he did not do so, the said person was already there in the list of witnesses of the respondent No.2 (Exh.68), even then he was not called. All the witnesses, including the said person i.e. his election agent, were dropped by the respondent No.2 vide Exh.143. Still further, even on the face of this documentary evidence (Exh.113), not only the stand but even the deposition of the respondent No.2 was to the effect that, no recount was asked for by the petitioner.

83.2 The relevant part of the evidence of the respondent No. 2 reads as under.

"80. Question : Learned senior advocate for the petitioner has shown to the witness the answer given by the Returning Officer (Exh.99) to the Question No.296. And asked that, as per the said answer, your representative had taken objection against the re-counting of votes. What do you say ?

E-MAIL COPY

Ans. : There was no demand for re-counting and therefore there is no question of taking any objection against recounting."

83.3 The above stand of respondent No. 2, on the face of Exh. 113, is the same which even the Returning Officer took, as noted above. This factor establishes the chain between the

Returning Officer and the respondent No. 2. This needs to be seen from the view point of corrupt practice.

84. On conjoint consideration of the above unrebutted evidences and the circumstances against the respondent No.2, the prima facie conclusion recorded by this Court in para:73 above, needs to be confirmed against the respondent No.2.

85. On conjoint consideration of the above unrebutted / unexplained evidences and circumstances against the Returning Officer (vide para 74 to 77) and the respondent No. 2 (vide para 79 to 83), the prima facie conclusion recorded by this Court as noted in para:73 above, needs to be confirmed against the Returning Officer and the respondent No. 2.

86. At this stage, one contention pressed into service on behalf of the respondent No.2 needs to be noted and considered. It is vehemently submitted on behalf of the respondent No.2 that, any finding by this Court regarding 'corrupt practice' would have very serious consequences and therefore the standard of proof required for that issue should be like in a criminal trial. Various authorities are cited to support this argument. This argument is accepted. Since this argument is being accepted, the authorities in this regard need not be discussed. In this regard it is noted that, though the language of Section 100 of the Representation of People Act, 1951 mandates this Court to form an opinion on the basis of the evidence on record, whether corrupt practice was committed in the election in question or not, taking most liberal view in favour of the respondent No. 2, not only the issue of 'corrupt practice' but all the other issues framed / tried

in this petition are considered and answered by this Court with that standard of proof i.e. not preponderance of probability but 'to be proved beyond any reasonable doubt'. Even while adopting that standard of proof, it also needs to be kept in view that, even in the cases of circumstantial evidence in criminal trials, the law is to the effect that, when the various links have satisfactorily been established and the circumstances point finger towards a particular persons(s) as the probable culprit with reasonable definiteness and in proximity with commission of crime as regards time and situation, and he offers no explanation, which if accepted, though not proved, would afford a reasonable basis for a conclusion on the entire case consistent with his innocence, such absence of explanation or false explanation would itself be an additional link which completes the chain. Number of decisions of the Supreme Court of India can be referred in this regard, starting from the case of Deonandan Mishra v. State of Bihar (AIR 1955 SC 801), to its reiteration in the case of Anjan Kumar Sarma and Ors. vs. State of Assam (AIR 2017 SC 2617), the relevant of which is noted here. Keeping the above proposition of law in view, when, on the basis of the documentary evidences on record, this Court has arrived at the conclusion (as noted in para 73, 78 and 84 above) that in the present case the respondent No.2 and his election agent have not only attempted but have successfully obtained and procured assistance from the Returning Officer for the furtherance of the prospects of the respondent No.2, in the election in question and further that they were hands in glove for this purpose, and corrupt practice was committed by the respondent No.2 in the election in question, not offering any explanation by the Returning Officer and the respondent No.2

itself is an additional link which completes the chain and it further fortifies the view taken by this Court.

87. On conjoint consideration of the above, this Court arrives at the conclusion that, in the present case the respondent No.2 and his agent have not only attempted but have successfully obtained and procured assistance from the Returning Officer for the furtherance of the prospects of the respondent No.2, in the election in question and further that they were hands in glove for this purpose.

88. On weighing the evidence on record, which is noted & discussed in detail above and keeping in view the language of Section 123(7) of the Representation of People Act, 1951, this Court arrives at the conclusion that it is proved that in the present case :- the candidate (the respondent No.2) and his agent, have not only attempted but have successfully obtained and procured assistance from the Returning Officer (Deputy Collector), who has been both - a gazetted officer [as covered by clause (a) of sub-Section (7)] and also a revenue officer [as covered by clause (f) of sub-Section (7)], for the furtherance of the prospects of the respondent No.2, in the election in question. On facts, this Court has further found that it is also proved that, the Returning Officer on one hand and the respondent No.2 & his election agent on the other hand, were hands-in-glove in the election in question, more particularly at the time of counting of votes. Issue Nos. 8 & 9 are therefore answered in affirmative. It is proved that corrupt practice, as defined under Section 123 (7) of the Representation of the People Act, 1951 was committed by the respondent No.2 (the returned candidate) and his election agent during the election

in question. As the consequence of this, Issue No.12 is also answered in affirmative. It is proved that the election of the returned candidate (the respondent No.2) from 58-Dholka Constituency for the Gujarat Assembly Elections held on 14.12.2017, needs to be declared void under Section 100(1)(b) of the Representation of People Act, 1951.

89. Though, above noted evidences and circumstances are sufficient to arrive at the conclusion and answer the Issue Nos. 8, 9 & 12 in affirmative, which is recorded above, it is further noted that there are number of other evidences and circumstances which have bearing on this issue (corrupt practice) and they further fortify the conclusion arrived at by this Court. There is also material on record which indicates that, the respondent No. 2 and the Returning Officer were not only hands in glove for the furtherance of the prospects of the respondent No. 2 in the election in question, there has also been an arrangement of quid pro quo between them. The details with regard to these evidences and the circumstances are noted hereinafter. While recording this, it is also noted that, any illegality committed by the Returning Officer or the respondent No. 2 after declaration of the result of the election in question, may not be a ground in itself to declare the election in question to be void, but those evidences / circumstances further fortify the view which is taken by this Court. Having arrived at the conclusion and answered Issue Nos. 8, 9 & 12 in affirmative as above, it is noted that the following are other evidences and circumstances, which further fortify the conclusion arrived at by this Court.

90. The following aspects, when are seen in a sequence,

indicate that in the present case, not only on the date of counting of votes the respondent No.2 had obtained and procured assistance from the Returning Officer for the furtherance of his prospects in the election in question, even to salvage the election in question in this petition, the respondent No.2 has successfully obtained and procured assistance from the Returning Officer, since each move by the Returning Officer during the trial of this petition is less to defend himself, more to facilitate the say of the respondent No.2. Even after issuance of notice by this Court to the Returning Officer vide order dated 02.04.2019 as to why he be not named in the judgment while recording findings qua the issue of corrupt practice, there is no change in the above arrangement. The stand of the Returning Officer all through out the trial has been, as if he was holding brief for the respondent No.2, even by concealing material evidence from the Court and placing incomplete record, and thereby exposing him to the proceedings under Section 191 & 192 of the Indian Penal Code, 1860. The Returning Officer is appropriately rewarded as well, even by defying the directions of the Election Commission of India, and the quid pro quo arrangement has worked effectively. The details, as to how the respondent No.2 procured assistance from the Returning Officer to salvage his election in this petition and how the quid pro quo arrangement has worked, are noted as under. While recording this, it is noted again that, any illegality committed by the Returning Officer or the respondent No. 2 after declaration of the result of the election in question, may not be a ground in itself to declare the election in question to be void, but that may further fortify the view which is being taken by this Court.

91.1 The Returning Officer filed his written statement at Exh.10 (on 24.03.2018). Even the tenor of his written statement (Exh.10) was such, as if he was the contesting respondent. Only after the written statement was filed by the Returning Officer, the respondent No.2 filed his written statement (Exh.20) (on 30.04.2018) with an application for condonation of delay in filing written statement. His written statement (Exh.20) was based on the contents of the written statement (Exh.10) filed by the Returning Officer. This sequence has its own relevance. It is undisputed that the respondent No.2 was not present at the time of counting of votes. He could not have any personal knowledge, what had happened on the date of counting of votes. He had to rely on the say of someone else. He could have filed his written statement on the basis of the information from his election agent, who was present at the time of counting of votes. However he chose to base his written statement (Exh.20) on the written statement of the Returning Officer (Exh.10). Further, when the the respondent No.2 filed an application (being Election Application No.14 of 2018) under Order VII Rule 11 of the Code of Civil Procedure for rejection of this petition without trial, the written statement filed by the Returning Officer (Exh.10) was one of the arguments pressed into service on his behalf. This is referred in the order of this Court dated 09.10.2018.

91.2 Having served the above purpose, the Returning Officer filed an application that he was unnecessarily joined as party respondent and therefore he be relieved. The respondent No.2 was asked to make his stand clear. It was stated on behalf of the respondent No.2 that he does not have any stand, so far

the deletion of the Returning Officer from the array of the respondents is concerned. By order dated 19.12.2018, recorded in Election Application No. 41 of 2018, the Returning Officer was deleted as party respondent, at his request.

91.3 Issues were framed by this Court vide order dated 24.12.2018, including of corrupt practice.

91.4 In-spite of asserting on 19.12.2018 that 'there is no stand' whether the Returning Officer should be deleted as party or not, on framing of issues, stand was taken by the respondent No.2 that in absence of the Returning Officer, the issue of corrupt practice can not be tried. This was one of the grounds pressed into service by the respondent No.2 in the group of SLPs before the Supreme Court of India (SLP (Civil) No.3075-3081 of 2019), which ultimately came to be dismissed as withdrawn. Thus, the issue of 'corrupt practice' was unsuccessfully sought to be sabotaged, without trial, in the above manner.

92.1 Pursuant to the directions of this Court as contained in the order dated 19.12.2018 in Election Application No. 10 of 2018, the Returning Officer placed on record a DVD which was claimed to be complete record of videography of the day of counting (Exh.57). When the Returning Officer was being cross-examined on behalf of the petitioner, it came on record through the evidence of the Returning Officer himself that the said DVD (Exh.57), which was placed on record along with his own forwarding letter (Exh.55), does not contain the entire recording of the moving camera functional at the counting hall and as conceded by him (vide answer to Q.No.131 of Exh.99),

the said videography which was presented by him to the Court vide Exh.55 was incomplete to his own knowledge. He however made a show that 'if the Court directs', he is ready to place on record the complete videography of the moving cameras of the day of counting of votes. Since that direction was already given earlier by the Court, it was not required to be repeated.

92.2 Having realized the consequence of the above, when the Returning Officer was being cross-examined on behalf of the respondent No.2, it was asked by the respondent No.2 that let the complete recording of moving camera be placed on record. This was the command for the Returning Officer. The earlier stand of the Returning Officer, when the petitioner had asked for it, was 'if the Court directs', now changed to 'if the Court permits'. As such, it was not only requested but insisted on behalf of the respondent No.2 that the Court may permit the Returning Officer to place the complete record of moving cameras on record. The same was permitted by the Court to be taken on record on 15.03.2019 at Exh.110, subject to liberty granted by this Court to the learned advocates for the respective parties, to further examine / cross-examine the Returning Officer, qua the additional material tendered to the Court by him and the issues connected therewith and arising therefrom.

92.3 Placing an incomplete recording before the Court earlier (vide Exh.57), that too with knowledge, itself was a very serious thing. Therefore, while placing the so called complete version thereof (vide Exh.110), a show was made that now it is the complete recording of moving cameras. Questions put to the Returning Officer in this regard on behalf of the respondent

No.2, are as under.

"267. Question : Is this the complete data of the videography conducted through the moving cameras on the date of counting i.e. 18.12.2017 for 58-Dholka Assembly Constituency?

Ans. Yes. This is complete recording of the videography conducted through all the moving cameras, which were used during the counting process, on the date of counting i.e. 18.12.2017

294. Question : Do you confirm that the DVD which you have given today to the Court (Exh.110), contains the complete recording of those moving cameras - be it two or three.

Ans. : Yes, I confirm that."

92.4 The said DVD (Exh.110) was played in the Court on 06.12.2019. It turned out that even the said DVD is incomplete. As a matter of fact, it is mischievously incomplete. On being played in the Court in presence of all, including learned advocate for the Returning Officer (respondent No.13), it turned out that, at 12:27:59 the DVD abruptly stops when the figures of total postal ballots received were being written in total column on a white board, for the information of all present in the counting hall. The said moment was the only relevant moment so far the principal controversy in this petition is concerned.

92.5 Since it was already provided in the order dated

15.03.2019 that the Returning Officer will have to enter the witness box again with regard to Exh.110, with riders as noted in para:92.2 above, request was made by the petitioner that the Returning Officer should be called again. This request of the petitioner was responded by the Returning Officer saying that he be not called again. The Court did not give any direction to the Returning Officer however, made certain observations in the order dated 24.07.2019 (Exh.131). Para:5 of the said order reads to the effect that :- "Having heard learned advocates for the respective parties and considering the totality, no direction is given by this Court to the Returning Officer, to enter the witness box, again, against his wish. Consequences of the Returning Officer, not ready to enter the witness box, inspite of what is noted in para : 1 above, shall be considered by this Court, at an appropriate stage."

92.6 In this regard, a very interesting development took place. Not only the Returning Officer had refused to enter the witness box again as noted above, even the respondent No.2 took the stand that the Returning Officer be not called again to face questions qua Exh.110 i.e. qua the said material which was insisted to be taken on record by the respondent No.2 himself. Reference in this regard can be made to the order of this Court dated 24.07.2019.

92.7 The totality of the above is that :- (i) incomplete material was placed on record by the Returning Officer in-spite of the directions of the Court, (ii) the same was incomplete even to his own knowledge, (iii) when the petitioner put questions to

the Returning Officer, he wanted directions again from the Court, which was not given, (iv) having realized the consequences thereof, when the respondent No.2 asked the Returning Officer to place it on record, the Returning Officer and respondent No.2 both jointly urged before the Court that let it be taken on record, (v) the same was taken on record with the riders as provided in the order dated 15.03.2019 as noted above, (vi) the said material again turned out to be mischevously incomplete and now (vii) both - the Returning Officer and even the respondent No.2 are unanimously saying that the Returning Officer be not examined in this regard. This is how the finding of this Court qua corrupt practice is further fortified. Not only that, this itself would have attracted proceedings against the Returning Officer under Section 191 & 192 of the Indian Penal Code, 1860, punishable under Section 193 thereof. However, it is not stretched that far, since it may change the focus of the trial. Suffice it to hold that not only on the date of counting of votes, even before this Court, the Returning Officer has allowed him to be used as a tool by the respondent No.2. The overall conduct of the respondent No.2 and the Returning Officer is within the four corners of Section 123(7) of the Representation of People Act, 1951.

E-MAIL COPY

93.1 Though the Returning Officer has obediently behaved and danced to the tunes of respondent No.2 all through out, on the crucial day of counting of votes, an extra layer was put in place by the respondent No.2, even in the counting hall itself. Relevant part of the evidence of the respondent No.2 (Exh.139), reads as under.

"89. Question : The witness is shown the

CCTV footage from Exh.56 (Camera No. VM239 i.e. RO Table) from time 12:44:30 to 12:45:51.

A person wearing black pant and white full-sleeve shirt, with thick black mustache and spectacles, without any identity card around his neck, enters the frame, he exchanges pleasantries with someone, stands besides the RO table, asks for ID card lanyard (a cord worn around the neck to hold an ID card) from other person, gets it, puts it around his neck (without any ID card) and puts the bottom end thereof into his shirt pocket (in white shirt) and the Returning Officer (who is in yellow shirt) are standing together at 12:45:50.

Do you know who that person (in white shirt) is?

Ans. : Yes. I know him. He is Mr. Mehta. He is my Additional Private Secretary."

93.2 It would not have been a routine thing for the Returning Officer, whose parent cadre was Deputy Collector, to welcome an officer of the rank of Additional Collector - and not an ordinary Additional Collector but working as Additional Private Secretary to the respondent No.2 (the Revenue Minister at the relevant time), in the counting hall.

93.3 The Additional Private Secretary of the respondent No.2 was an unauthorized person who entered the counting hall. He had nothing to do with the counting process. The Returning

Officer not only allowed such unauthorized person to enter the counting hall, as identified and acknowledged by the respondent No.2 himself (at Q. No. 89 of Exh.138), his presence was acknowledged by the Returning Officer as well, as he could be seen walking into the counting hall without any Identity Card, he stood next to the chair of the Returning Officer, asked for ID card lanyard (a cord worn around the neck to hold an ID card) from other person, got it, put it around his neck (without any ID card) and put the bottom end thereof into his shirt pocket. All this, right under the nose of the Returning Officer. On further playing the relevant footages of the CCTV recording in the Court, his repeated entry and exit could be seen in the counting hall at the crucial time of dealing with postal ballots and demand of the petitioner regarding recounting of votes. He is seen standing with the Returning Officer in the counting hall – shoulder to shoulder. When the result was being announced, he was reporting it to someone on phone, he also walked to the election agent of the respondent No.2 in the counting hall and handed over his phone to him to talk with the person with whom he was talking.

93.4 The presence of Additional Private Secretary of the respondent No.2 (the then Revenue Minister) in the counting hall at very crucial time of dealing with postal ballots and demand of the petitioner regarding recounting of votes, could be examined as 'corrupt practice' under Section 123(8) of the Act, from the view point of 'booth capturing' as defined under Section 135A of the Representation of People Act, 1951, as argued on behalf of the petitioner, however this aspect is not stretched that far. However, in any case, (i) the repeated

unauthorized entry and exit in the counting hall, of an officer of the rank of Additional Collector with the position as the Additional Private Secretary attached with the respondent No.2 in the Ministry, (ii) that too at very crucial time of dealing with the postal ballots and demand of the petitioner regarding recounting of votes, and further, (iii) he standing with the Returning Officer in the counting hall - shoulder to shoulder, and (iv) at the time of declaration of result, conveying it to someone on phone and also walking to the election agent of the respondent No.2 in the counting hall itself and giving his phone him, to talk with the person with whom he was talking, are the glaring aspects, which the respondent No.2 should have explained, which he did not. Immediately after the deposition of the respondent No.2 (which concluded on 12.09.2019), the said election agent of the respondent No.2, (who had accepted the mobile phone from that unauthorized person viz. the Additional Private Secretary attached with the respondent No.2 in the Ministry, and had talked with the person on the other end), was to enter the witness box as per the initial list of witnesses on behalf of the respondent No.2 (Exh.68) but all the witnesses, including the said election agent of respondent No.2 were dropped by the respondent No.2 vide Exh.No.143 on 17.09.2019. In any case, this aspect was required to be explained by the Returning Officer because it was he, who was in the total charge of the counting hall, but the Returning Officer had already taken the stand (as noted in order dated 24.07.2019) that he be not called for questioning again. Even the respondent No.2 took the stand that let the Returning Officer be not called again for questioning (as noted in order dated 24.07.2019). This has further fortified the conclusion already arrived at by this Court qua corrupt practice

as noted above.

94.1 There is one more glaring aspect, which further aggravates this aspect of corrupt practice. It is with regard to the disputed postal ballots, which is the bone contention in the petition.

94.2 When a question cropped as to whether these postal ballots should be called before this Court or not, the respondent No.2 and the Returning Officer both are saying that let it not be called. The say of the respondent No.2 in this regards (Q. No. 82 of Exh. 139) is as under.

"82. Question : The petitioner has asked that, the said postal ballots be called before this Court. Do you have any objection in that regard ?

Ans. I have objection."

94.3 The stand of the Returning Officer in this regard is noted in order dated 07.08.2019 Exh.-135 (recorded in Chamber Summons No. 01 of 2019). It reads as under.

E-MAIL COPY

"6. Mr. Raju, learned advocate for the respondent No.13 - the Returning Officer has adopted the line of argument of Mr.N.D. Nanavati, learned senior advocate for the contesting respondent No.2 - the returned candidate. It is submitted that no case is made out by the original petitioner for calling the record of the election in question before this

Court.”

94.4 Being the returned candidate, the above stand of the respondent No.2 could be justified, but how the Returning Officer could contend that the disputed postal ballots, which is the principal controversy of the trial, be not called before this Court. This shows that the Returning Officer was doing everything for the furtherance of the prospects of the respondent No.2 even before this Court in the trial. This is no less than an unholy nexus of the Returning Officer and the respondent No.2 which further fortifies the findings of this Court qua corrupt practice.

95.1 The above noted unholy nexus ultimately turned out to be quid pro quo arrangement between the Returning Officer and the respondent No.2. At this stage, it is again noted that any illegality committed by the Returning Officer or the respondent No.2 after declaration of result of the election in question may not be a ground in itself to declare the election in question to be void but that would be an additional factor to understand how the respondent No.2 and the Returning Officer were hands in glove.

95.2 It is already noted in detail above, to what extent the Returning Officer has obliged the respondent No.2 not only on the date of counting of votes but even before this Court. At the relevant time, the respondent No.2 was the Revenue Minister. With the respondent No.2 having been declared as the returned candidate in the election in question, he is again cabinet minister with the portfolios of Education, Law, Parliamentary affairs & Aviation, and now there is time to pay

back to the Returning Officer. The promotion of the Returning Officer from the post of Deputy Collector to that of the Additional Collector was in the pipeline. The Election Commission of India noticed that the Returning Officer has committed serious illegalities and directed the Chief Secretary of the State of Gujarat to initiate disciplinary proceedings against the Returning Officer for imposing major penalty. The said instruction is dated 29.03.2019 which is on record at Exh.121. That proceeding has not even started till date. At least nothing is put to the notice of the Court till 04.03.2020, when this matter was lastly listed. Not only that, pending the above instructions of the Election Commission of India, the said Returning Officer is even promoted vide notification of the General Administration Department of the Government of Gujarat, dated 09.10.2019. This is quid pro quo between the respondent No.2 and the Returning Officer. Subsequently, when the petitioner made reference in that regard in the Court, the said promotion is indicated to have been withdrawn, however there was no word, what has happened to the directions of the Election Commission of India regarding initiation of departmental inquiry.

96. In totality, the above noted evidences and circumstances further fortify the conclusion arrived at by this Court as noted above, which is to the effect that, on weighing the evidence on record, which is noted & discussed in detail in the earlier part of this judgment, and keeping in view the language of Section 123(7) of the Representation of People Act, 1951, this Court arrives at the conclusion that it is proved that in the present case, the candidate (the respondent No.2) and his agent, have not only attempted but have successfully obtained and

procured assistance from the Returning Officer, for the furtherance of the prospects of the respondent No.2, in the election in question. On facts, this Court has further found that it is proved that, the Returning Officer on one hand, and the respondent No.2 and his election agent on the other hand, were hands-in-glove in the election in question. Issue Nos. 8 & 9 are therefore already answered in affirmative. It is proved that corrupt practice, as defined under Section 123 (7) of the Representation of the People Act, 1951 was committed by the respondent No.2 (the returned candidate) and his election agent during the election in question. As the consequence of this, Issue No.12, which is also answered in affirmative, stands further fortified. It is proved that the election of the returned candidate (the respondent No.2) from 58-Dholka Constituency for the Gujarat Assembly Elections held on 14.12.2017, needs to be declared void under Sec. 100(1)(b) of the Representation of People Act, 1951.

ISSUE NO.:13

97. Issue No. 13 reads as under.

"13. Whether the petitioner proves that he is entitled to be declared as duly elected candidate from '58-Dholka Constituency' for the Gujarat State Assembly Elections held on 14.12.2017 ?"

98. It is already held by this Court, while answering Issue Nos.1, 7 & 11 that the procedure adopted for counting of votes in the election in question was against the orders of the

Election Commission of India and was illegal, and further that the result of the election in question has been materially affected by it, and consequently the election of the returned candidate (the respondent No.2) is being declared void, also under Sec.100(1)(d)(iv) of the Representation of People Act, 1951.

99. In view of above, this issue can not be answered in affirmative and need not be examined further. Even otherwise, it would be the realm of assumptions to examine, had those illegalities not been committed by the Returning Officer at the time of counting of votes, where the petitioner would have stood in the election in question. Issue No.13 therefore needs to be and is answered in negative.

FINAL ORDER

100. This election petition is partly allowed.

101.1 It is held that, it is proved that 429 postal ballot papers were illegally rejected / excluded from consideration by the Returning Officer at the time of counting of votes in the election in question, as against the victory margin of 327 votes.

101.2 It is further held that, it is proved that the result of the election, in so far as it concerns the returned candidate (the respondent No.2) from 58-Dholka Constituency for the Gujarat Legislative Assembly Elections, held on 14.12.2017, has been materially affected by the said illegal rejection of the votes.

101.3 As the consequence of what is held in para 101.1 and 101.2, it is declared that the election of the returned candidate (the respondent No.2) from 58-Dholka Constituency for the Gujarat Assembly Elections held on 14.12.2017, is void under Section 100(1)(d)(iii) of the Representation of the People Act, 1951.

102.1 It is also held that, it is proved that the procedure adopted for counting of votes in the election in question was against the orders of the Election Commission of India and was illegal.

102.2 It is also held that, it is proved that because of the said illegalities, the result of the election, in so far as it concerns the returned candidate (the respondent No.2) from 58-Dholka Constituency for the Gujarat Legislative Assembly Elections, held on 14.12.2017, has been materially affected.

102.3 As the consequence of what is held in para 102.1 and 102.2, it is declared that the election of the returned candidate (the respondent No.2) from 58-Dholka Constituency for the Gujarat Assembly Elections held on 14.12.2017, is void under Section 100(1)(d)(iv) of the Representation of the People Act, 1951.

E-MAIL COPY

103.1 It is held that, it is proved that, 'corrupt practice' as defined under Section 123(7) of the Representation of the People Act, 1951 was committed during the election in question.

103.2 It is held that, it is also proved that, the respondent

No.2 and his election agent have not only attempted but have successfully obtained and procured assistance from the concerned Returning Officer for the furtherance of the prospects of the respondent No.2 in the election in question, and further that, for that purpose the respondent No.2 and the concerned Returning Officer Mr.Dhaval Jani were hands-in-glove in the election in question. Before recording this, the concerned Returning Officer Mr. Dhaval Jani is heard by this Court, by joining him as party respondent No.13 in this Election Petition, as required under Section 99 of the Representation of the People Act, 1951.

103.3 As the consequence of what is held in para 103.1 and 103.2, it is declared that the election of the returned candidate (the respondent No.2) from 58-Dholka Constituency for the Gujarat Assembly Elections held on 14.12.2017, is void under Section 100(1)(b) of the Representation of the People Act, 1951.

104. The election in question is thus declared void on three different grounds, as noted above and this petition is allowed to this extent.

105. The prayer of the petitioner that he - the petitioner, be declared as duly elected candidate from 58-Dholka Constituency for the Gujarat Assembly Elections held on 14.12.2017 in place of the respondent No.2, is rejected. This petition is dismissed to this extent.

106. Registry shall communicate this order to:- (i) the Election Commission of India, and (ii) the Speaker of the

Gujarat Legislative Assembly, as required under Section 103 of the Representation of the People Act, 1951. The same shall be done by the Registry within the time limit, as prescribed under Rule 305 of the Gujarat High Court Rules, 1993.

(PARESH UPADHYAY, J.)

FURTHER ORDER

107.1 After the pronouncement of this judgment and order, request is made on behalf of the respondent No.2 (the returned candidate) that this judgment and order be stayed for some time.

107.2 In this regard it is noted that, even if the issue of 'corrupt practice' is kept aside, after a full fledged trial; on the basis of the evidence of the Returning Officer and the documentary evidences placed on record by the concerned Returning Officer himself, it has stood proved that :- (i) as against the victory margin of 327 votes, 429 postal ballot papers were illegally excluded from consideration by the Returning Officer, at the time of counting of votes, which has materially affected the result, (ii) the exclusion of those 429 postal ballots was behind everybody's back, including the Observer nominated by the Election Commission of India, (iii) to conceal this exclusion, election record is systematically manipulated by the Returning Officer and (iv) to manipulate the election record and in turn to conceal the said manipulation, the relevant orders / instructions of the Election Commission of India, including mandatory instructions,

regarding procedure of counting of votes, announcement of result and preparation of Final Result Sheet Form:20 were defied by the Returning Officer, on the day of counting of votes. Such an election should not be permitted to hold the field any further.

107.3 This request is therefore rejected.

Prakash/01

(PARESH UPADHYAY, J.)



IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. OF 2020

(UNDER STATUTORY APPEAL UNDER SECTION-116A OF
REPRESENTATION OF THE PEOPLES ACT, 1951)

(Arising out of the impugned final judgment and order dated
passed by High Court of Gujarat at Ahmedabad in Election
Petition No. 3 of 2018)

IN THE MATTER OF:-

POSITION OF PARTIES

	In the High Court	In this Court
Bhupendrasinh Manubha Chudasama Udna Pada ni Pole, Tal. Dholka, Dist: Ahmedabad, Gujarat	Respondent No. 2	Petitioner
VERSUS		
1. Ashwin Kamsubhai Rathod Post Bhamsara, Tal. Bavla, Dist: Ahmedabad, Gujarat	Petitioner	Respondent No.1
2. Bhailalbhaii Kalubhai Pandav Post Paldi, Tal. Dholka Dist: Ahmedabad, Gujarat	Respondent No.1	Respondent No.2
3. Haribhai Dipubhai Makwana Post Bagodara, Tal. Bavla Dist: Ahmedabad, Gujarat	Respondent No. 3	Respondent No. 3
4. Dr. Mahendrakumar Shantilal Jadav Lala Ukani Chawl Near Railway Crossing, Viramgam, District Ahmedabad, Gujarat	Respondent No. 4	Respondent No. 4

5. Javedmiya Chhotasaheb Kadari Near Chilla Post Dholka, Taluka Dholka, District Ahmedabad, Gujarat	Respondent No. 5	Respondent No. 5
6. Govindbhai Dhayabhai Gol Post Badarka, District Ahmedabad Gujarat	Respondent No. 6	Respondent No. 6
7. Bharatbhai Babubhai Thakore Laljipur, Thakorvas, Post Dhola Taluka Dholka, District Ahmedabad, Gujarat	Respondent No. 7	Respondent No. 7
8. Mashrubhai Mohanbhai Makwana Valthera, Taluka Dholka District Ahmedabad, Gujarat	Respondent No. 8	Respondent No. 8
9. Kalubhai Lakhabhai Rathod Post Kharoti, Taluka Dholka District, Ahmedabad, Gujarat	Respondent No. 9	Respondent No. 9
10. Alpeshsinh Surubha Vaghela Post Rasham, Taluka Bavla, District Ahmedabad, Gujarat	Respondent No. 10	Respondent No. 10
11. Ramanbhai Kaljibhai Vaghela At-Post Bagodra, Taluka Bavla District Ahmedabad, Gujarat	Respondent No. 11	Respondent No. 11
12. Shaktisinh Sardarsinh Sisodiya Post Chandisar, Taluka Dholka District Ahmedabad, Gujarat	Respondent No. 12	Respondent No. 12
13. Mr. Dhaval Jani, G.A.S. Deputy Collector at Dholka, District Ahmedabad, Gujarat (Joined as Party Resp. by the order of the Court dated 02.04.2019)	Respondent No. 13	Respondent No. 13
14. The Election Commission of India Nirvachan Sadan, Ashoka Road New Delhi – 110001	Respondent No. 14	Respondent No. 14

(Joined as Party Resp. by the order
of the Court dtd 02.04.2019)

15. Mrs. Vinita Bohra IAS
(Notice to be served through,
The Election Commission of India)
Nirvachan Sadan, Ashoka Road,
New Delhi – 110001
(Joined as Party Respondent by the
order of the Court dated
02.04.2019)

Respondent Respondent
No. 15 No. 15

**ALL ARE CONTESTING
RESPONDENTS**

TO

HON'BLE THE CHIEF JUSTICE OF INDIA
AND HIS COMPANION JUDGES OF
THE SUPREME COURT OF INDIA

THE HUMBLE APPEAL OF THE
APPELLANT ABOVE NAMED

MOST RESPECTFULLY SHOWETH THAT

1. The Appellant by way of present statutory appeal under Section-116A of the Representation of the People Act, Article 136 of the Constitution of India challenging the final impugned final judgment and order dated 12th May 2020 passed by Hon'ble High Court of Gujarat at Ahmedabad in R/Election Petition No.3 of 2018 partly allowing Election Petition No.3 of 2018 preferred by the Respondent No.1. The High Court by the impugned order has set aside and declaring the election of '58-Dholka Constituency' void on the main 3 grounds of (a) 429 Postal ballots illegally excluded and thus has materially affected the results; (b) procedure adopted in counting the votes is against the guidelines/ procedure set by the Election Commission of India which has also materially affected the results; and (c) Corrupt practice is committed by the Appellant

hand in glove with the Returning Officer and is proved. The High Court further has rejected the request of the Appellant to stay the impugned order.

2. QUESTIONS OF LAW:

The following questions of the law arise for consideration of this Hon'ble Court:

- A. Whether or not the findings of the High Court are erroneous in so far as the High Court answers in the affirmative that the Respondent No.1 proves that the procedure adopted for counting of votes for '58-Dholka Constituency' was against the orders of the Election Commission of India and was illegal and that the Respondent No.1 proves that the result of the election, in so far as it concerns the returned candidate (the Respondent No.2) from '58-Dholka Constituency' for the Gujarat State Legislative Assembly Elections, held on 14.12.2017, has been materially affected by non-compliance with the provisions of the Representation of the People Act, and / or Rules or Orders made under the said Act and consequently that the election of the returned candidate (the Appellant herein) from '58-Dholka Constituency' for the Gujarat State Assembly Elections held on 14.12.2017, needs to be declared as void under Sec. 100(1)(d)(iv) of the Representation of People Act, 1951 ?
- B. Whether or not the findings of the High Court are erroneous in so far as the High Court answers in the affirmative that the Respondent No.1 proves that 429 postal ballot papers were illegally rejected at the time of counting of votes and that the result of the election, in so far as it concerns the returned candidate (the Appellant herein) from '58-Dholka

Constituency' for the Gujarat State Legislative Assembly Elections, held on 14.12.2017, has been materially affected by improper refusal / rejection of the votes and consequently that the election of the returned candidate (the Appellant herein) from '58-Dholka Constituency' for the Gujarat State Assembly Elections held on 14.12.2017, needs to be declared as void under Section 100(1)(d)(iii) of the Representation of People Act, 1951 ?

- C. Whether or not the findings of the High Court are erroneous in so far as that the Respondent No.1 proves that objection was raised by him, or his election agent, regarding alleged illegal rejection of postal ballot papers and / or non-compliance of the orders of the Election Commission of India, at the time of counting of votes ?
- D. Whether or not the findings of the High Court are erroneous in so far as the High Court answers in the affirmative that the Respondent No.1 proves corrupt practice was committed under Section 123 of the Representation of the People Act, 1951 during the election of '58-Dholka Constituency' held in December 2017 and that corrupt practice was committed by the returned candidate (the Appellant herein) or his election agent or by any person with the consent of the Appellant herein or his election agent during the election of '58- Dholka Constituency' held in December 2017 and consequently that the election of the returned candidate (the Appellant herein) from '58-Dholka Constituency' for the Gujarat State Assembly Elections held on 14.12.2017, needs to be declared as void under Sec. 100(1)(b) of the Representation of People Act, 1951 ?

E. Whether or not the finding of the High Court is erroneous that the Respondent No.1 proves that he is entitled to be declared as duly elected candidate from '58-Dholka Constituency' for the Gujarat State Assembly Elections held on 14.12.2017 ?

3. The present appeal is preferred under the provisions of section-116A of the Representation of the People Act, 1951 being a Statutory Appeal against the Judgement and Order dated 12/05/2020 pronounced by the High Court of Gujarat through video conferencing and pursuant to the Judgement and Order being pronounced by the Hon'ble High Court, the appellant herein had made oral request to stay the operation, implementation and execution of the said impugned Order dated 12/05/2020 in Election Petition No.3 of 2018 in compliance with the provisions of Section-116B(1) of the Act, which came to be rejected by the court and the same is forming part of the Judgement and Order. Therefore, in view of the present a separate interim application under the provisions of Section-116B (2) of the Act is preferred by the appellant.

4. **BRIEF FACTS**

4.1 The State legislative assembly elections 2017 for State of Gujarat were held in December 2017. For the '58 – Dholka Assembly Constituency' were held on 14.12.2017. Mr. Bhupendrasinh Manubha Chudasama (Appellant herein) was the candidate set up by the Bharatiya Janta Party. Mr. Ashwinbhai Kamsubhai Rathod (Respondent no. 1 herein)

was the candidate set up by the Indian National Congress Party.

- 4.2 The result of the said elections came to be declared on 18.12.2017. As per the said result, the Appellant herein was declared the returned candidate. The returned candidate/Appellant herein, at the relevant time, was a Member of the Council of Ministers of the Government of Gujarat, with the portfolio of Revenue Department. At present, he is a Member of the Council of Ministers of the Government of Gujarat, holding the portfolios of the Departments of Education and Law & Justice. As per the said Election result, the total number of valid votes cast in favour of the Respondent No.1 herein were 71203 votes. Total number of valid votes cast in favour of the returned candidate the Appellant herein were 71530 votes. The returned candidate thus got elected with the margin of 327 votes. Total votes received by the Returning Officer through postal ballot papers were 1356. Out of 1356 postal ballots, the Returning Officer rejected 429 postal ballots.
- 4.3. The election of the Appellant herein (original respondent No. 2 before the High Court) was challenged on various grounds as pleaded in memo of the petition, more particularly on the ground of corrupt practice and that since the difference in the victory margin (327 votes) was less than the total number of rejected postal ballots (429 postal ballots), the result was materially affected. It was prayed before the High Court the election of the Appellant herein should be set aside. A true copy of the Memo of the Election Petition No. 3 of 2018 dated 11.01.2018 filed before the

High Court of Gujarat at Ahmedabad is annexed hereto and marked as **ANNEXURE A-1** (at pages 189 to 236).

- 4.3. On 26.03.2018, the Respondent No.13 in the Election Petition/ The Returning Officer and Prant Officer, filed his Written Statement. A true copy of the Written Statement of the Returning Officer dated 24.03.2018 filed in Election Petition No. 3 of 2018 before the High Court of Gujarat at Ahmedabad is annexed hereto and marked as **ANNEXURE A-2** (at pages 237 to 251).
- 4.4. On 09.04.2018, the Respondent no. 1 herein/Election Petitioner filed his Rejoinder to the Written Statement filed by the Returning Officer.
- 4.5. On 16.04.2018, the Appellant herein filed his Written Statement with a purshish for extension of time for placing the aforesaid written statement on record of the file of the Election Petition. It was directed by the Hon'ble court to file a detailed Application instead of a purshish. A True Copy of the Written Statement dated 30.04.2018 filed by Appellant herein in the Election Petition No. 03 of 2018 before the High Court of Gujarat at Ahmedabad is annexed hereto and marked as **ANNEXURE A-3** (at pages 253 to 286).
- 4.6. On 05.05.2018, the Appellant herein filed Election Application No. 9 of 2018 seeking permission to place the written statement on record which was filed on 18/4/2018.
- 4.7. On 07.05.2018, the written statement of the Petitioner, came to be taken up on record by virtue of order passed by the

Hon'ble High court dated 7/5/2018 in Election Application No. 9 of 2018.

- 4.8. On 09.05.2018, An Election Application No. 10 of 2018 came to be presented and instituted in the captioned Election Petition under the provisions of Rule 293 of the Gujarat High Court Rules 1993. In the said application, summons for issuance of directions were sought for by the Respondent no.1 herein.
- 4.9. Thereafter on same day, an Election Application No. 11/2018 was preferred by the Election Commission of India and returning officer praying to be deleted as Respondents nos. 13 and 14 in the petition.
- 4.10. On 28.06.2018, Appellant herein filed Election Application No. 14/2018 under the provisions of Order 7 Rule 11 of the civil procedure code 1908.
- 4.11. An Order dated 09.10.2018 was passed by the High Court in Election Application No. 14/2018, whereby the aforementioned Application under Order 7 Rule 11 came to be rejected.
- 4.12. A Special Leave Petition was filed before this Hon'ble Court being S.L.P (Civil) 28389/2018 by the Petitioner against the aforementioned Order dated 09.10.2018. This Hon'ble Court was pleased to dispose off the said SLP (Civil) No. 28389/2018 by this Hon'ble court in the facts and circumstances of the case whereby this Hon'ble Court opined that the contentions with regards to improper rejection of votes require to be decided by leading evidence

in the trial. A true copy of Order dated 12.11.2018 passed by this Hon'ble Court in SLP (C) No. 28389 of 2018 is annexed herewith and marked as ANNEXURE A-4 (at pages 287 to 288).

- 4.13. That thereafter an Order under the provisions of Rule 293 of Gujarat High Court Rules 1993 came to be passed by the Hon'ble high court on 27.11.2018 and the pleadings were completed and all the rights of respective parties for pleadings came to be closed.
- 4.14. That the aforementioned Election Application No. 11 of 2018 for deletion of Election Commission of India and returning officer came to be allowed partially by deleting the Election Commission by the High Court vide order dated 27.11.2018.
- 4.14. The Hon'ble court directed the parties to submit proposed issues vide Order dated 13.12.2018.
- 4.15. In Election Application No. 41 of 2018 filed by the Returning Officer to be deleted as party respondent, the Hon'ble High Court allowed the same and deleted the Returning Officer as party respondent vide order dated 19.12.2018.
- 4.16. Thereafter in Election Application No. 10 of 2018, the Hon'ble High Court vide order dated 19.12.2008 directed the Registry to issue summons to the District Election Officer, Ahmedabad, for production of documents (videography of voting process) as prayed for in the application.

- 4.17. On 21.12.2018, pursuant to the above mentioned order dated 19.12.2018 passed in Election Application No. 10 of 2018, two officers from the office of the District Election Officer, Ahmedabad remained present in court with three copies of a Hard Disc and DVD containing the videography of the counting process along with forwarding letters which were taken on record. In Election Petition No. 3 of 2018, the Hon'ble Court posted the matter for settling of issues. The Petitioner seeks and craves liberty of this Hon'ble Court to produce the said Hard Disk and DVDs before this Hon'ble Court and refer and rely on the same for during the course of hearing as and when required.
- 4.18. On 24.12.2018, issues were thereafter framed by the Hon'ble High Court under Rule 296 of the Gujarat High Court Rules, 1992 read with Order XIV of the Code of Civil Procedure, 1908.
- 4.19. On 24.12.2018, in the Election Application No. 10 of 2018, the Hon'ble High Court took on record further objections of the Appellant herein and listed it for further consideration on 28.12.2018.
- 4.20. On 28.12.2018, the Respondent no. 1 herein tendered his List of Witnesses along with a List titled "List of Original Documents as per Order 13, Rule 1 of the Code of Civil Procedure, 1908.
- 4.21. On 08.01.2019, Appellant herein undertook to file his List of Witnesses within a week from the said date without prejudice to the rights and contentions of the Appellant

herein in the above mentioned Election Application No. 10 of 2018.

- 4.22. On 09.01.2019, the Election Application No. 10 of 2018 came to be disposed of by the Hon'ble High Court.
- 4.23. On 09.01.2019, Election Application No. 41 of 2018 along with note filed therein disposed of by the Hon'ble High Court.
- 4.24. On 16.01.2019, List of Witnesses tendered by the Petitioner taken on record. List of witness tendered by Respondent no. 12 in the Election Petition was also taken on record. The Respondent no. 12 stated that he will examine himself as a witness. The Hon'ble Court also noted the stand of the Respondent no. 12 that he supported the case of the Appellant herein. List of witness tendered by Respondent no. 5 in the Election Petition was also taken on record. The Respondent no. 5 stated that he will examine himself as a witness. The Hon'ble Court also noted the stand of the Respondent no. 5 that he supported the case of the Election Petitioner/Respondent no. 1 herein.

The Appellant herein raised objections against exhibiting of documents mentioned in order dated 21.12.2018, namely the Hard Disc and the DVD along with the forwarding letters. The Hon'ble High Court exhibited the said documents, keeping the question of admissibility of the said documents open and stated that the authenticity of the contents shall be decided at an appropriate stage, during the trial, in accordance with law.

- 4.25. Appellant herein/original Respondent no. 2 filed SLP (C) Nos. 3075-3081 of 2019 before this Hon'ble Court against the aforementioned orders dated 19.12.2018, 21.12.2018, 24.12.2018, 28.12.2018, 08.01.2019, 09.01.2019 and 16.01.2019 passed by the Hon'ble High Court in Election Application No. 10 of 2018 and in Election Petition No. 3 of 2018.
- 4.26. On 24.01.2019, Affidavits-in-lieu of examination-in-chief of all witnesses of original Petitioner exchanged and Petitioner present for cross examination before the High Court.
- 4.27. On 30.01.2019, Respondent No. 1 herein filed Chamber Summons 1/2019 before the High Court seeking production and inspection of ballots.
- 4.28. The aforementioned SLP (C) Nos. 3075-3081 of 2019 were dismissed as withdrawn before this Hon'ble Court. A true copy of the Order dated 11.02.2019 passed by this Hon'ble Court in SLP (C) Nos. 3075-3081 of 2019 is annexed herewith and marked as **ANNEXURE A-5** (at pages 289 to 290).
- 4.29. On 12.02.2019, The Respondent No.1 entered the witness box. His affidavit-in-lieu of Examination-in-Chief was taken on record along with the documents annexed therewith. The Hon'ble kept it open for the Appellant herein to make legal submissions qua admissibility of the said documents (Exhibits 76 TO 86) during the course of arguments. The Appellant herein thereafter commenced the

cross examination of the Election Petitioner/Respondent no. 1 herein.

4.30. On 14.02.2019, an objection was raised by advocate for original Respondent no. 5 to cross examination of the Petitioner/witness by the original Respondent no. 12 since the original Respondent no. 12 cannot be said to be an adverse party under the Indian Evidence Act, 1872. The Hon'ble Court permitted the original Respondent no. 12 to cross-examine the original Petitioner keeping the question of law raised in that regard open and in the event that the Hon'ble Court upholds the objection raised by the original Respondent no. 5, then that part of the evidence of the witness may be excluded from consideration. Cross-examination of original Petitioner by original Respondent no. 12 was concluded. The second witness on behalf of the original Petitioner entered the witness box and his cross examination by Respondent no. 2 and original Respondent no. 12 was also concluded.

4.31. On 18.12.2019, The evidence of remaining witnesses concluded. In the Chamber Summons filed by the original Petitioner, the Hon'ble Court directed the original Respondent no. 2 to file their reply if any before the next date of hearing.

4.32. On 22.02.2019, the original Respondent No. 2, 5 and 12 jointly stated that they have no objection if the concerned Returning Officer is summoned as a witness. The Hon'ble Court directed the Registry to issue witness summons to the

Returning Officer directing him to remain present on 28.02.2019.

- 4.33. On 28.02.2019, pursuant to the summons, Mr. Dhaval Jani, the concerned Returning Officer, remained present before the Hon'ble Court. His examination by the Petitioner commenced and during the course of recording of his evidence, two documents were shown by the learned counsel for the Petitioner No. 1. Press Release issued by the Press Information Bureau , Government of India, regarding security arrangement for strong rooms and counting centers and, 2. A book titled "Handbook for Returning Officers, 2014" indicated to be in the public domain. Objection raised by the original Respondent no. 2. Above argument of learned advocate for the contesting respondent no.2 is kept open, reserving liberty to make submissions at appropriate stage of the trial. A true copy of Press Release issued by the Press Information Bureau , Government of India, regarding security arrangement for strong rooms and counting centers and, 2.
- 4.34. On 01.03.2019, Learned senior advocate for the Petitioner pointed out that, on 12.02.2019 while recording the evidence of the petitioner vide Exh.75, different documents were given exhibit numbers from Exh. Nos.76 to 86, however inadvertently, one document was missed to be pointed out to the Court in that regard. It is stated that the document - Annexure - P1 to the petition, was exhibited as Exhibit 76A and question of admissibility thereof was kept open on the same lines as per order dated 12.02.2019.

- 4.35. On 14.03.2019, In response to question nos.263 and 264 put to the witness Mr. Jani by the learned advocate for the contesting respondent no.2, the witness has shown readiness to put on record of this petition, a DVD containing complete recording of all moving cameras, which were functioning on the day of counting in the counting hall. The witness stated that, if permitted, he will be able to do the next day itself.
- 4.36. On 15.03.2019, pursuant to the order of the Court dated 14.03.2019 (Exh.109), Mr.Dhaval Jani, Deputy Collector, Dholka (the Returning Officer) remained present before the Court for further examination. During the course of his deposition, he tendered one DVD to the Court, the details of which are referred to, in the replies given by the witness to the question nos.265, 266 and 267 put to him. As per those details, the said DVD contains complete recording of all the moving cameras, which were used on the day of counting i.e. on 18.12.2017, so far the 58-Dholka Assembly Constituency is concerned. The said DVD was taken on record at Exh.No.110. Evidence of witness stood concluded.
- 4.37. On 02.04.2019, High Court passed an order impleading Mr. Dhaval Jani, RO, Ms, Vinita Bohra, Observer and Election Commission of India as party respondents in the Petition.
- 4.38. On 01.05.2019, Respondent no. 15 tendered an application below Exh. 120.

- 4.39. On 11.07.2019, the Original Petitioner was cross examined by Respondent no. 13-the Returning Officer.
- 4.40. On 24.07.2019, Pursuant to the above mentioned order dated 14.03.2019, advocate for Petitioner requested for returning officer to be called into the witness box. The officer objected to such request and did not enter the witness box.
- 4.41. On 30.07.2019, Arguments were concluded and reply of returned candidate was taken on record in Chamber Summons 1 of 2019.
- 4.42. On 07.08.2019, consideration of the prayer made by the petitioner in the Chamber Summons as noted above, was deferred at that stage.
- 4.43. On 27.08.2019, an Election Application No. 12 of 2019 was filed by the Petitioner seeking permission from the Court to allow him to enter the witness box.
- 4.44. On 30.08.2019, Election application 12 of 2019 came to be allowed. An affidavit in lieu of examination-in-chief was tendered thereafter.
- 4.45. On 09.09.2019, Appellant herein was thereafter cross examined. The said Cross examination thereafter came to be concluded on 12.09.2019.
- 4.46. On 17.09.2019, Advocate for the Appellant herein gave purshis declaring that the he does not wish to examine any further witness on his behalf and was closing his evidence.

- 4.47. On 27.09.2019, closing Purshis were filed on behalf of all the Respondents.
- 4.48. On. 06.12.2019, Senior advocate for the Petitioner concluded his arguments. During the course of his submissions, learned senior advocate for the petitioner had requested that Exh.56 – (CCTV footage of the day of counting) be played in the Court. As per his request the same was played in the Court. Exh.110 (DVD containing recording of all the moving cameras on the date of counting), as tendered to the Court by the Returning Officer on 15.03.2019, was also played in the Court.
- 4.49. On 10.02.2020, written arguments were submitted by the parties. A True Copy of the written arguments dated 10.02.2020 was filed by the Petitioner in the Election Petition No. 03 of 2018 before the High Court of Gujarat at Ahmedabad is annexed hereto and marked as **ANNEXURE A-6** (at pages 291 to 317).
- 4.50. The High Court passed the impugned order erroneously allowing the Election Petition whereby the election of the Appellant herein was declared invalid. The said impugned Judgment was pronounced by the Hon'ble High Court through video conferencing.
5. The Appellant says that no other Appeal has been filed by him against the impugned final judgment and order dated 12.05.2020 passed by High Court of Gujarat at Ahmedabad in Election Petition No.3 of 2018 before this Hon'ble Court or any other Courts in India.

6. The Annexures A-1 to A-6 produced along with the present Civil Appeal are true copies of the pleadings/documents which formed part of the records of the case in the Court below against whose order the Appeal is sought for.

7. **GROUND:**

The appellant prefers this statutory appeal under Section-116A of the Representation of the People Act, 1951 against final judgment and order dated 12-05-2020 passed by Hon. High Court of Gujarat at Ahmedabad allowing Election Petition no. 3 of 2018 preferred by the Respondent No.1 inter alia on the following grounds:

- A. Because the High Court failed to appreciate that so far as illegal rejection of 429 postal ballots is concerned, Rule 54-A of the Conduct of Election Rules, 1961 clearly draws a distinction between postal ballot and vote, i.e. when a postal ballot culminates into a vote. A ballot only becomes a vote at Rule 54(7) which is when the covers in Form 13-B not already dealt with till Rule 54(6) are opened one after another and therefore, in the present case, what is rejected is only 429 postal ballots NOT votes. The 429 ballots have not seen the light of day since the second cover has not been opened and one does not know in whose favour the said vote was cast since the said “vote” was not opened at all.
- B. Because the High Court failed to appreciate that procedure adopted by the Returning Officer has not affected the result in any manner so as to set the result and election aside and that all 429 Postal ballots rejected were as per the law and

directives of Election Commission which fact has even come on record in the deposition of the Returning Officer.

- C. Because the High Court failed to appreciate that due adherence to the law was given in the counting procedure and Counting of postal ballots started at 8.00 AM and counting of EVM votes started at 8.30 AM in consonance with the law. This also has come on record from the Returning Officer's evidence.
- D. Because the High Court erred in allowing the Election Petition on the ground that since the victory margin was less than the total number of postal ballots rejected, the said postal ballots were wrongly rejected and that procedure mandated by law was not followed, therefore the election is liable to be set aside.
- E. Because the High Court failed to appreciate that at the time of declaration of results or prior thereto, no written complaint and/or any demand or objection came from the Respondent No.1 or his counting agent(s) regarding rejection of 429 postal ballots.
- F. Because the High Court failed to appreciate that in Exhibit No. 10 i.e. Written Statement of the Returning Officer, he states that (Out of 429 postal ballots) in 79 ballots declaration Form No.13A was not found. 339 ballots were found not bearing signature of either candidate, gazette officer or witness. 5 ballots were found defective, thus total 423 ballots were rejected prior to opening of Form no.13B. Rest 6 were also rejected in accordance with provisions of

Conduct of Election rules. Signatures of counting agents were obtained. It is pertinent to note that this statement was not rebutted by the Appellant in his rejoinder or at a belated stage.

- G. Because the High Court failed to appreciate that even assuming without admitting that certain procedure is not followed by the Returning Officer, then also lapses would not be a ground for setting aside election since no cogent, reliable or proper evidence has been led by the Respondents in the Court below that such lapses have materially affected the election and that lapses, if any even *strict senso*, cannot visit the election of the returned candidate/Appellant herein adversely.
- H. Because the High Court failed to appreciate that the averments in the Election Petition are absolutely vague and hypothetical regarding illegal rejection of 429 postal ballots since the same are only based on presumptions of popularity and mere conjectures and surmises and are not in the manner as prescribed under Section 83 of the Representation of People Act, 1951.
- I. Because the High Court failed to appreciate that the question of onus of proof is on the person alleging it and it is for him to prove illegal adjustment/improper rejection of votes. It is submitted that the Respondent No.1 herein has not discharged this onus of wrongful rejection of votes and that the result was materially affected.

- J. Because the High Court failed to appreciate that there is no way for the Election petitioner to figure out that the 429 votes were cast in a proper manner since the cover containing the vote has not been opened at all on account of faulty declaration in Cover-A. There is a mere presumption by the Respondent No.1, that 429 postal ballots were wrongly rejected. Rule 54-A of the Conduct of Election Rules, 1961 clearly lays down adherence to Form 13-C.
- K. Because the High Court failed to appreciate that if the evidence of PW-4 is perused, more particularly Question No.14, he states that the dispute about rejection of postal ballots is raised only because the Respondent No.1 lost elections, which fact exhibits that none of the witnesses of the Respondent No.1 including himself are aware about procedure of counting of postal ballots.
- L. Because the High Court failed to appreciate that if the Handbook is seen, it is in the nature of guidelines/instructions which may be binding on the Returning Officer and may invite consequences for him but non-compliance thereof cannot be pressed into service to displace the returned candidate's election to say that election is void unless it is shown that the same is materially affected.
- M. Because the High Court failed to appreciate that there was no objection raised by the Respondent No.1 and/or his agent(s) regarding till the very end of the counting process. Raising such contention belatedly is not a bar but it certainly

establishes that 429 postal ballots were not wrongly rejected.

- N. Because the High Court failed to appreciate that from the deposition of the Election petitioner and/or his agents it is not proved that there is improper refusal / rejection of the votes since there is no assertion that they are wrongly rejected nor has the Election Petitioner produced any cogent, reliable or positive evidence.
- O. Because the High Court failed to appreciate that there was no demand made for recounting of votes during the counting process and till the time of declaration of results made by the Election petitioner and/or his election/counting agent(s). There is no evidence even to show effort to seek re-count, much less an application.
- P. Because the High Court failed to appreciate that Rule 63 of the Conduct of Election Rules, 1961 is a self-contained code that provides for mechanism and procedure for recount. Between the procedure envisaged under Rule 63(1) till Rule 63(6), there is ample opportunity accorded to any party to request for a recount/make an application for recount which was not done in the present case.
- Q. Because the High Court failed to appreciate that an insignificant margin (28 votes) between the list prepared by DEO and the list prepared by the Returning Officer persists which has not materially affected the result of the elections. It could have been an arithmetical error and assuming

without admitting that there are discrepancies, even then the question of deciding validity of election does not turn on it.

- R. Because the High Court failed to appreciate that if the evidence of the Returning Officer as recorded is taken into consideration, any non-compliance as alleged of the provisions of the Handbook has not materially affected the election process and result either under Sections 100(1)(d)(ii), 100(1)(d)(iii) or 100(1)(d)(iv) of the Act.
- S. Because the High Court failed to appreciate that even if the Preamble of the Handbook (below Exhibit 101) is taken into consideration, it merely states that the same is in the nature of guidelines and hence, the same does not have statutory character since the Election Commission of India anyway does not have the authority or power to frame rules or orders under the Act. Therefore, the question of non-compliance with the provisions of the Representation of the People Act, and / or Rules or Orders made under the said Act does not arise since the Handbook does not fall within the ambit of the Constitution, the Representation of People's Act, 1951 or rules /orders made under the Act, and there is no non-compliance of any statutory provision and the question of the result being materially affected does not arise on that count.
- T. Because the High Court failed to appreciate that even if there are certain irregularities at the hands of the Returning Officer qua the provisions of the Hand Book, say for instance, Para 15.15.5.1 which orders for mandatory re-verification in case the victory margin is less than the total

number of postal ballots received, even then the result is not materially affected since the said provision will have to be read with Rule 63 of the Conduct of Election Rules, 1961 which lays down the entire procedure of recounting and by no stretch of imagination can it be said that Paragraph 15.15.5.1 will have overriding effect over Rule 63 nor can Rule 63 be amended by Election Commission of India.

- U. Because the High Court failed to appreciate that non-compliance of guidelines issued by ECI namely the Handbook cannot confer any right on the orig. petitioner to question the election u/s. 100(1)(d)(iv) of the Act, 1951.
- V. Because the High Court failed to appreciate that every procedural non-compliance cannot affect result or prejudice the result unless pleaded and proved. Non-compliance of Paragraph 15.15.5.1 is not a well taken ground under Section 100(1)(d)(iv) of the Act, 1951 and that the Election Petitioner has not been able to prove or make out a case that non re-verification of such votes has materially affected the result of the election.
- W. Because the High Court failed to appreciate that to bring home the charge of corrupt practice, consent needs to be pleaded and proved as per S.99(2), 123(7), S.100(1)(b) and explanation to S. 123(8) and proviso to Section 123 of the Representation of People's Act, 1951. Section 123(7) makes specific requirement of consent and Section 100(1)(d)(ii) also requires consent (by taking internal aid of sections 99, 100 and 123 of the Act)

- X. Because the High Court failed to appreciate that no case of corrupt practice with consent of the returned candidate is established through evidence. Only vague and general allegations of corrupt practice made out. Neither consent/agency qua the returned candidate is proved by the Election petitioner.
- Y. Because the High Court failed to appreciate that there is no consent coming on record and no agency is established as to who is the agent of the returned candidate which is a requirement under Section 99(2) read with the explanation to Section 123(8). In all of the evidence, even by implication there is nor suggestion about consent and agency.
- Z. Because the High Court failed to appreciate that no case of corrupt practice made out under Sections 100(1)(b), 123(7), 100(i)(d)(ii), 100(i)(d)(iii) and 100(1)(d)(iv) of the Representation of People Act, 1951.
- AA. Because the High Court has not appreciated any of the decisions and judgments relied on by the Appellant.
- BB. Because the High Court failed to appreciate that the Respondent No.1 has not led positive, reliable and cogent evidence to prove any of the issues and therefore, he is not entitled to be declared as duly elected candidate from '58-Dholakia Constituency' for the Gujarat State Assembly Elections on 14.12.2017.
- CC. Because the High Court has not appreciated the arguments of the Appellant herein pertaining to admissibility of electronic records, more particularly the footage contained

in the Hard Disk and the DVD (below Exhibits 56,57 and 110) with respect to Section 65-B and other provisions of the Indian Evidence Act,1872.

- DD. Because the High Court has not appreciated that the Election petitioner has been unable to prove beyond reasonable doubt that corrupt practice has been committed by any person much less the returned candidate.
- EE. Because the High Court has not appreciated that as regards corrupt practice, without leading positive, reliable and cogent evidence, the petitioner therein cannot allege that Mr. Mehta's presence is influencing the election process or that he is committing an overt act. There is no pleading to that effect in the petition or in the evidence of the petitioner.
- FF. Because the impugned order passed by the High Court is patently bad, illegal, contrary to law and in gross violation of the fundamental rights guaranteed to the Appellant herein under the Constitution of India and is against the spirit of democracy enshrined under the Constitution of India where the election of a rightly elected candidate cannot be set aside lightly.
- GG. Because if the deposition of the Respondent No.1 and the Returning Officer is carefully perused it evident that the Court has undertaken the exercise to examine these witnesses by posing certain questions on behalf of the Hon. Court.

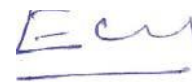
PRAYER

It is therefore most respectfully prayed that this Hon'ble Court may graciously be pleased to:

- a. Admit and allow the present Civil Appeal and quash and set aside the impugned final judgment and order dated 12/05/2020 passed by High Court of Gujarat at Ahmedabad in R/Election Petition No. 3 of 2018; and/or
- b. Pass such further and other order as this Hon'ble Court may deem fit and proper in the interest of justice.

FOR THIS ACT OF KINDNESS AND JUSTICE THE APPELLANT AS IN DUTY BOUND SHALL EVER PRAY

FILED BY



E.C. AGRAWALA
ADVOCATE FOR THE APPELLANT

New Delhi
Filed on: 12.05.2020

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. _____ OF 2020

(UNDER STATUTORY APPEAL UNDER SECTION-116A OF
REPRESENTATION OF THE PEOPLES ACT,1951)

IN THE MATTER OF:

Bhupendrasinh Manubha Chudasama ...Appellant

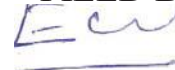
VERSUS

Ashwin Kamsubhai Rathod & Ors. ...Respondents

CERTIFICATE

Certified that the Civil Appeal is confined only to the pleadings before the Court whose order is challenged and the other documents relied upon in those proceedings. No additional facts, documents or ground have been taken therein or relied upon in the Civil Appeal. It is further certified that the copies of the documents/annexures attached to Civil Appeal are necessary to answer the question of law raised in the Appeal or to make out grounds urged in the Civil Appeal for consideration of this Hon'ble Court. This certificate is given on the basis of instructions given by the Appellant/the person authorized by the Appellant whose affidavit is filed in support of Civil Appeal.

FILED BY



E.C. AGRAWALA
ADVOCATE FOR THE APPELLANT

New Delhi
Filed on: 12.05.2020

(CIVIL APPELLATE JURISDICTION)

IN THE MATTER OF:-

VERSUS

AFFIDAVIT

1. That I am the Appellant/Applicant in the abovesaid matter and I am well conversant with the facts and circumstances of the case and as such I am duly authorised to swear this affidavit.
2. That I have read and understood the contents of the accompanying Synopsis and List of Dates consisting of 15 Pages (B to P), Appeal/SLP consisting of 29 pages (145 to 173), and para 1 to 8 of the APPEAL/SLP and say that the facts stated therein are true and correct to best of my knowledge and belief as derived from the record of the case. I also state that the contents of the accompanying applications are true and correct to the best of my knowledge and belief.

VERIFICATION:

I the abovenamed deponent, do hereby solemnly verify that the contents of the aforesaid affidavit are true and correct to the best of my knowledge and belief and nothing has been concealed therefrom.

Verified at Ahmedabad on this 12th day of May, 2020.



DEPONENT

APPENDIX-I**Constitution of India**

226. Power of High Courts to issue certain writs

(1) Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories

(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without

- (a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and
- (b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the

copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the aid next day, stand vacated

(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of Article 32.

APPENDIX-2**The Representation of the People Act, 1951****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.]

98. Decision of the High Court.—At the conclusion of the trial of an election petition 1[the High Court] shall make an order—

(a) dismissing the election petition; or

(b) declaring the election of [all or any of the returned candidates] to be void; or

(c) declaring the election of [all or any of the returned candidates] to be void and the petitioner or any other candidate to have been duly elected.

99 Other orders to be made by the High Court.— (1) At the time of making an order under section 98 [the High Court] shall also make an order— [(a) where any charge is made in the petition of any corrupt practice having been committed at the election, recording—

(i) finding whether any corrupt practice has or has not been proved to have been committed [***] at election, and the nature of that corrupt practice; and

(ii) the names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt practice and the nature of that practice; and]

(b) fixing the total amount of cost payable and specifying the persons by and to whom costs shall be paid: Provided that 4[a person who is not a party to the petition shall not be named] in the order under sub-clause (ii) of clause (a) unless—

(a) he has been given notice to appear before the High Court] and to show cause why the should not be so named; and

(b) if he appears in pursuance of the notice, he has been given an opportunity of cross-examining any witness who has already been examined by [the High Court] and has given evidence against him, of calling evidence in his defence and of being heard.

[(2) In this section and in section 100, the expression “agent” has the same meaning as in section 123.]

100. Grounds for declaring election to be void.—

(1) Subject to the provisions of sub-section (2) if [the High Court] is of opinion—

(a) that on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution or this Act [***] [or the Government of Union Territories Act, 1963 (20 of 1963)]; or

(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) that any nomination has been improperly rejected; or

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

(i) by the improper acceptance or any nomination, or

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

(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or

(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act, [the High Court] shall declare the election of the returned candidate to be void.]

[(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; [***]

(c) that the candidate and his election agent took all reasonable means for preventing the commission of corrupt [***] practices at the election; and

(d) that in all other respects the election was free from any corrupt [***] practice on the part of the candidate or any of his agents, then [the High Court] may decide that the election of the returned candidate is not void.

116A. Appeals to Supreme Court.—(1) Notwithstanding anything contained in any other law for the time being in force, an appeal shall lie to the Supreme Court on any question (whether of law or fact) from every order made by a High Court under section 98 or section 99.

(2) Every appeal under this Chapter shall be preferred within a period of thirty days from the date of the order of the High Court under section 98 or section 99:

Provided that the Supreme Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within such period.

116B. Stay of operation of order of High Court.—(1) An application may be made to the High Court for stay of operation of an order made by the High Court under section 98 or section 99 before the expiration of the time allowed for appealing therefrom and the High Court may, on sufficient cause being shown and on

such terms and conditions as it may think fit, stay the operation of the order; but no application for stay shall be made to the High Court after an appeal has been preferred to the Supreme Court.

(2) Where an appeal has been preferred against an order made under section 98 or section 99, the Supreme Court may, on sufficient cause being shown and on such terms and conditions as it may think fit, stay the operation of the order appealed from.

(3) When the operation of an order is stayed by the High Court or, as the case may be, the Supreme Court, the order shall be deemed never to have taken effect under sub-section (1) of section 107; and a copy of the stay order shall immediately be sent by the High Court or, as the case may be, the Supreme Court, to the Election Commission and the Speaker or Chairman, as the case may be, of the House of Parliament or of the State Legislature concerned.

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

(1) “Bribery”, that is to say—

(A) any gift, offer or promise by a candidate or his agent or by any other person with the consent of a candidate or his election agent of any gratification, to any person whomsoever, with the object, directly or indirectly of inducing—

(a) a person to stand or not to stand as, or [to withdraw or not to withdraw] from being a candidate at an election, or

(b) an elector to vote or refrain from voting at an election, or as a reward to—

(i) a person for having so stood or not stood, or for [having withdrawn or not having withdrawn] his candidature; or

(ii) an elector for having voted or refrained from voting;

(B) the receipt of, or agreement to receive, any gratification, whether as a motive or a reward—

(a) by a person for standing or not standing as, or for [withdrawing or not withdrawing] from being, a candidate; or

(b) by any person whomsoever for himself or any other person for voting or refraining from voting, or inducing or attempting to induce any elector to vote or refrain from voting, or any candidate [to withdraw or not to withdraw] his candidature. Explanation.—

For the purposes of this clause the term “gratification” is not restricted to pecuniary gratifications or gratifications estimable in money and it includes all forms of entertainment and all forms of employment for reward but it does not include the payment of any expenses bona fide incurred at, or for the purpose of, any election and duly entered in the account of election expenses referred to in section 78.]

(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 interested, with injury of any kind including social ostracism and ex-communication or expulsion from any caste or community; or

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

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

(3) The appeal by a candidate or his agent or by any other person with the consent of a candidates or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or the use of, or appeal to religious symbols or the use of, or appeal to, national symbols, such as the national flag or the national emblem, for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate:

[Provided that no symbol allotted under this Act to a candidate shall be deemed to be a religious symbol or a national symbol for the purposes of this clause.]

(3A) The promotion of, or attempt to promote, feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community, or language, by a candidate or his agent or any other person with the consent of a candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.]

[(3B) The propagation of the practice or the commission of sati or its glorification by a candidate or his agent or any other person with the consent of the candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.

Explanation.—For the purposes of this clause, “sati” and “glorification” in relation to sati shall have the meanings respectively assigned to them in the Commission of Sati (Prevention) Act, 1987 (3 of 1988).]

(4) The publication by a candidate or his agent or by any other person 9[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.

(5) The hiring or procuring, whether on payment or otherwise, of any vehicle or vessel by a candidate or his agent or by any other person [with the consent of a candidate or his election agent] [or the use of such vehicle or vessel for the free conveyance] of any elector (other than the candidate himself the members of his family or his agent) to or from any polling station provided under section 25 or a place fixed under sub-section (1) of section 29 for the poll:

Provided that the hiring of a vehicle or vessel by an elector or by several electors at their joint costs for the purpose of conveying him or them to and from any such polling station or place fixed for the poll shall not be deemed to be a corrupt practice under this

clause if the vehicle or vessel so hired is a vehicle or vessel not propelled by mechanical power: Provided further that the use of any public transport vehicle or vessel or any tramcar or railway carriage by any elector at his own cost for the purpose of going to or coming from any such polling station or place fixed for the poll shall not be deemed to be a corrupt practice under this clause.

Explanation.—In this clause, the expression “vehicle” means any vehicle used or capable of being used for the purpose of road transport, whether propelled by mechanical power or otherwise and whether used for drawing other vehicles or otherwise.

(6) The incurring or authorizing of expenditure in contravention of section 77.

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

(a) gazetted officers;

(b) stipendiary judges and magistrates;

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

(d) members of the police forces;

(e) excise officers; 13[(f) revenue officers other than village revenue officers known as lambardars, malguzars, patels, deshmukhs or by any other name, whose duty is to collect land revenue and who are remunerated by a share of, or commission on,

the amount of land revenue collected by them but who do not discharge any police functions; and]

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

[Provided that where any person, in the service of the Government and belonging to any of the classes aforesaid, in the discharge or purported discharge of his official duty, makes any arrangements or provides any facilities or does any other act or thing, for, to, or in relation to, any candidate or his agent or any other person acting with the consent of the candidate or his election agent (whether by reason of the office held by the candidate or for any other reason), such arrangements, facilities or act or thing shall not be deemed to be assistance for the furtherance of the prospects of that candidate's election.]

[(8) Booth capturing by a candidate or his agent or other person.]

Explanation.—(1) In this section the expression “agent” includes an election agent, a polling agent and any person who is held to have acted as an agent in connection with the election with the consent of the candidate.

(2) For the purposes of clause (7), a person shall be deemed to assist in the furtherance of the prospects of a candidate's election if he acts as an election agent [***] of that candidate.]

(3) For the purposes of clause (7), notwithstanding anything contained in any other law, the publication in the Official Gazette of the appointment, resignation, termination of service, dismissal or removal from service of a person in the service of the Central Government (including a person serving in connection with the

administration of a Union territory) or of a State Government shall be conclusive proof—

(i) of such appointment, resignation, termination of service, dismissal or removal from service, as the case may be, and

(ii) where the date of taking effect of such appointment, resignation, termination of service, dismissal or removal from service, as the case may be, is stated in such publication, also of the fact that such person was appointed with effect from the said date, or in the case of resignation, termination of service, dismissal or removal from service such person ceased to be in such service with effect from the said date.]

[(4) For the purposes of clause (8), “booth capturing” shall have the same meaning as in section 135A.]

IN THE HIGH COURT OF GUJARAT.

Dist. Abad

01/ST-97/18

ELECTION PETITION NO. 3 OF 2018

IN THE MATTER OF:

Ashwinbhai Kamsubhai Rathod

Sex: Male, aged about 40 years,

Occupation:

Mobile No.: 8156089653

Email ID : --

Having address at:

Post Bhamsara, Tal. Bavla.

Dist. Ahmedabad. ... Petitioner

VERSUS

(1) Bhailalbhai Kalubhai Pandav

Sex: Male, aged adult,

Occupation: --

Mobile No.: --

Email ID : --

Having address at:

Post Paldi, Tal. Dholka,

Dist. Ahmedabad.

(2) Bhupendrasinh Manubha Chudasama

Sex: Male, aged adult,

Occupation: --

Mobile No.: --

Email ID : --

Having address at:

Unda Pada ni Pole, Dholka,

Tal. Dholka,
Dist. Ahmedabad.

(3) Haribhai Dipubhai Makwana

Sex: Male, aged adult,

Occupation: --

Mobile No.: --

Email ID : --

Having address at:

Post Bagodara, Tal. Bavla,

Dist. Ahmedabad.

(4) Dr. Mahendrakumar Shantilal Jadav

Sex: Male, aged adult,

Occupation: --

Mobile No.: --

Email ID : --

Having address at:

Lala Uka ni Chawl,

Nr. Railway Crossing,

Viramgam, Dist. Ahmedabad.

(5) Javedmiya Chhotasaheb Kadari

Sex: Male, aged adult,

Occupation: --

Mobile No.: --

Email ID : --

Having address at:

Nr. Chhilla, Post Dholka,

Tal. Dholka,

Dist. Ahmedabad.

(6) Govindbhai Dhayabhai Gol

Sex: Male, aged adult,

Occupation: --

Mobile No.: --

Email ID : --

Having address at:

Post Badarkha

Tal. Dholka,

Dist. Ahmedabad.

(7) Bharatbhai Babubhai Thakore

Sex: Male, aged adult,

Occupation: --

Mobile No.: --

Email ID : --

Having address at:

Lilajpur, Thakore Vas,

Post Dhola, Tal. Dholka,

Dist. Ahmedabad.

(8) Mashrubhai Mohanbhai Makwana

Sex: Male, aged adult,

Occupation: --

Mobile No.: --

Email ID : --

Having address at:

Valthera,

Tal. Dholka,

Dist. Ahmedabad.

(9) Kalubhai Lakhabhai Rathod

Sex: Male, aged adult,

Occupation: --

Mobile No.: --

Email ID : --

Having address at:

Post Kharoti,

Tal. Dholka,

Dist. Ahmedabad.

(10) Alpeshsinh Surubha Vaghela

Sex: Male, aged adult,

Occupation: --

Mobile No.: --

Email ID : --

Having address at:

Post Rasham,

Tal. Bavla,

Dist. Ahmedabad.

(11) Ramanbhai Kaljibhai Vaghela

Sex: Male, aged adult,

Occupation: --

Mobile No.: --

Email ID : --

Having address at:

At-Post Bagodara

Tal. Bavla,

Dist. Ahmedabad.

(12) Shaktisinh Sardarsinh Sisodiya

Sex: Male, aged adult,

Occupation: --

Mobile No.: --

Email ID : --

Having address at:

Post Chandisar,
Tal. Dholka,
Dist. Ahmedabad.

(13) Election Officer (Returning
Officer) & Prant Officer
Shri Dhaval Jani
Office of the Deputy Collector,
Dholka Sub-Division, Dholka,
Dist. Ahmedabad.

(14) The Election Commission of India
Nirvachan Sadan, Ashoka Road,
New Delhi-110 001.

... Respondents

To,
The Hon'ble The Chief
Justice and other
Hon'ble Judges of the
High Court of Gujarat
at Ahmedabad.

The petitioner abovenamed:

ELECTION PETITION UNDER SECTIONS 80, 81, READ
WITH SECTIONS 100, 101 AND 123 OF THE
REPRESENTATION OF PEOPLE ACT, 1951 FOR SETTING
ASIDE THE ELECTION OF RESPONDENT NO.2 HEREIN TO
THE GENERAL ELECTION TO GUJARAT LEGISLATIVE
ASSEMBLY, 2017 FOR 58-DHOLKA CONSTITUENCY
HELD ON 14.12.2017 WITH A FURTHER PRAYER THAT
THE PETITIONER BE DECLARED AS ELECTED IN PLACE
OF RESPONDENT NO.2 IN THE SAID ELECTION AND
FURTHER HOLDING RESPONDENT NO.2 OF GUILTY OF
COMMITTING CORRUPT PRACTICES AS DEFINED UNDER
SECTION 123 OF THE SAID ACT OR ANY OTHER RELIEF
THAT THIS HON'BLE COURT MAY DEEM FIT UNDER THE
FACTS AND CIRCUMSTANCES OF THE CASE

MOST RESPECTFULLY SHEWETH THAT:

- (1) By way of filing the present petition under sections 80, 81, read with sections 100, 101 and 123 of the Representation of the People Act, 1951, the petitioner is challenging the election of respondent no.2 herein to the General Election to Gujarat Legislative Assembly, 2017 for 58-Dholka Constituency held on 14.12.2017 with a further prayer that the petitioner be declared as elected in place of respondent no.2 in the said election and further holding respondent no.2 of guilty of committing corrupt practices as defined under section 123 of the said Act or any other relief that this Hon'ble Court may deem fit under the facts and circumstances of the case.

Hence, the petitioner is constrained to prefer the present petition.

- (2) The brief facts giving rise to the filing of the present application are briefly as under:

- (2.1) It is submitted that the General Elections to Gujarat Legislature Election, 2017 for the 58-Dholka Constituency were held on 14.12.2017. It is submitted that the petitioner contested the said election from Indian National Congress Party, whereas *Respondent* No.2 contested the said election from Bharat Janta Party (BJP). It is submitted that as respondent no.2 was a sitting ~~a~~ Ministry at the time when the said election in question was held and was having portfolio of Revenue and

Education Departments. It is submitted that it is the case of the petitioner that because of his status of being a sitting ministry, respondent no.2 has been able to exert undue influence over the election officer, who was in-charge of the election in question of 58-Dholka Constituency. It is submitted that the result of the elections were declared on 18.12.2017 and respondent no.2 was declared as elected candidate from the said 58-Dholka Constituency. A true copy of the result declared by the Returning Officer and Prant Officer is annexed hereto and marked as ANNEXURE-P1.

(2.2) It is respectfully stated and submitted that as per the aforesaid result declared on 18.12.2017 it is mentioned that

respondent no.2 received in all 71,530 votes, out of which votes from EVM were 71,189 and votes received from postal ballot papers were 341 votes. It is submitted that as far as the petitioner is concerned, the petitioner received 70,675/- votes from EVM and 528 votes from postal ballot papers. It is submitted that thus, the petitioner received significantly higher number of votes from postal ballot papers than respondent no.2. It is submitted that shockingly, the returning officer has rejected 429 votes recorded on postal ballot papers at the time of making counting of the total votes. It is submitted that the postal ballot papers were votes belonging to the Government employees, Army officers, etc.

It is submitted that at least

400 of such 429 votes recorded from the postal ballot papers, which have been rejected by the Returning Officer would have been in favour of the petitioner as the petitioner was a very popular candidate amongst the Government employees and other persons who had cast their votes on the postal ballot papers. It is further submitted that it is absolutely unbelievable that the Government employees and other employees who had cast their votes through postal ballot papers would make mistake while casting their votes as they otherwise from a very literate class of the society. It is submitted that a considerable high proportion of votes recorded through the postal ballot have been rejected by the Returning Officer in most


Assistant Secretary to
the Hon'ble the Chief Justice
High Court of Gujarat
Ahmedabad-380001.

unlawful, unjustified, illegal and arbitrary manner.

(2.3) It is respectfully stated and submitted that the rejection of 429 votes that were cast through the postal ballot is completely unlawful. It is submitted that though the said 429 votes were cast in a proper manner and there was no infirmity in such votes, they have been wrongly rejected by the Returning Officer. It is most pertinent to note here that as a matter of standard practice and established norms, the counting of postal ballot papers is required to be done prior to the counting of votes cast through EVM machines. It is submitted that in the present case astonishingly and in complete disregard of the standard practice and established norms,

the Returning Officer first made counting of the votes that were cast through EVMs and thereafter counting of the postal ballot papers were done. It is submitted that many candidates were surprised by such deviation from the standard practice by the Returning Officer, however, the Returning Officer did not budge and after finishing counting of votes through EVMs, the counting of votes that were cast through the postal ballot papers. It is submitted that such illegal method adopted by the Returning Officer has also prejudiced the result of the petitioner because the Returning Officer has been able to thereafter illegally adjust the votes of respondent no.2 in such a manner that he becomes the most successful candidate by wrongfully rejecting as many as

429 votes that were cast through the postal ballot papers. It is submitted that if the votes that were cast through the postal ballot papers were counted first there would have been no reason to reject 429 votes and thereafter adjustment of votes through EVMs would not have been possible for the Returning Officer and the petitioner would have been the successful candidate. However, only with a view to see that some illegal adjustment of votes that were recorded through the postal ballot papers is possible, the counting of such votes was done after the counting of votes cast through EVMs.

(2,4) It is respectfully stated and submitted that all such 429 votes which were cast through the postal ballot papers and

which have been rejected by the Returning Officer are in fact legal votes and are in fact required to be considered as proper votes for the purpose of counting of total votes. It is submitted that the result of election is required to be declared after considering such 429 postal ballot papers, which have been illegally rejected by the Returning Officer. It is most pertinent to note that before such rejecting such 429 postal ballot votes, no candidate was given any opportunity or was made aware as to why such large number of postal ballot votes are being rejected. It is submitted that in most arbitrary manner and without any justification whatsoever, 429 postal ballot votes were rejected by the Returning Officer. It is

(2.5) It is also pertinent to note that there has been some discrepancy in the votes recorded by the EVMS also in the present case. It is submitted that as per the total Voters Turnout Report dated 14.12.2017 published by the Collector and District Election Officer, Ahmedabad, the total number of voters for 58-Dholka Constituency are shown as 1,59,918. A true copy of the Voters Turnout Report dated 14.12.2017 published by the Collector and District Election Officer, Ahmedabad is annexed

SECRET
High Court of Gujarat
Ahmedabad-360005

hereto and marked as ANNEXURE-P2. However, it is submitted that in the Voters Turnout of 58-Dholka Constituency prepared by the Returning Officer, Dholka, the total Voters Turnout for the said constituency is shown as 1,59,946. A true copy of the Turnout Report prepared by the Returning Officer, Dholka is annexed hereto and marked as ANNEXURE-P3. Moreover, It is submitted that in the final result sheet, which is already annexed at Annexure-P1 hereto, the total votes recorded are shown as 1,59,917. It is submitted that the aforesaid Voters Turnout is with regard to the votes that were cast through EVMs. It is submitted that thus, there is discrepancy in total Voters Turnout in the report of the Collector and District Election Officer, in the report


Assistant Secretary to
the Hon'ble the Chief Justice
High Court of Gujarat
Ahmedabad-380062

- 17 -

of the Returning Officer, and also in the final result sheet for the Assembly Constituency 58-Dholka. It is submitted that in the final result sheet the total Voters Turnout, as stated above, is shown as 1,59,917 and in the report of the Returning Officer the said is shown as 1,59,946. It is submitted that thus, in the final result sheet 29 less votes are shown than what is mentioned in the report of the Returning Officer. It is submitted that these 29 votes, which were cast through EVMs and have not been taken into consideration in the final result sheet were cast in favour of the petitioner. It is submitted that this deletion of 29 votes cast through EVMs is completely illegal, unjustified, contrary to law and improper. It is submitted that these 29

20
tant Secretary to
on'ble the Chief Justice
Court of Gujarat
dabad-380060.

votes, as described above, are required to be considered in the final result sheet prepared while declaration of result of Assembly Constitution 58-Dholka.

(2.6) It is respectfully stated and submitted that in the final result sheet there are few polling stations where the votes recorded through EVMs were wrong and it appears that either the said EVMs were tampered with or deliberately wrong mentioning of votes of the said polling station is done while preparation of the final result sheet. It is submitted that in Polling Station No.60 (Dholka-16) total voting is 755 votes whereas they are counted at 728 votes. Similarly in Polling Station No.70 (Dholka-26), total voting is 659 votes, which is wrongly counted as 658 votes. It

Chief Secretary to
Hon'ble the Chief Justice
Court of Gujarat
Ahmedabad-380001.

is submitted that in Polling Station No.175 (Ganol-2), total voting is 390 votes, whereas the same is counted as 389 votes. Moreover, in Polling Station No.177 (Dholi), total voting is 529 votes, whereas it is counted as 525 votes. In Polling Station No.230 (Salajada), total voting is 716 votes, whereas it is counted as 717. Therefore, It is submitted that the Returning Officer has violated the provisions of the Representation of People Act, 1951 and the Conduct of Election Rules, 1961 to benefit respondent no.2.

(2.7). It is respectfully stated and submitted that the petitioner has demanded the respondent-Returning Officer to have re-counting of votes at the time of declaration of result, but he had refused the said demand

*Assistant Secretary to
Hon'ble the Chief Justice
High Court of Gujarat
Ahmedabad-380009.*

arbitrarily and without any reason. It is further submitted that the petitioner had also made an application to the Chief Electoral Officer and Principal to Government of Gujarat, GAD, on 27.12.2017 voicing various grievance and requesting for recounting of votes in reference to Dholka Constituency. A true copy of the said application dated 27.12.2017 given by the petitioner is annexed hereto and marked as ANNEXURE-P4.

(2.8) It is respectfully stated and submitted that on the next of declaration of result, the Election Officer gave copy of the final result sheet to the petitioner and thereafter the petitioner made an application under the provisions of the Right Information of Act, after which further information was

provided to the petitioner. A true copy of the RTI application given by the petitioner is annexed hereto and marked as ANNEXURE-P5. It is submitted that this also indicates the arbitrary and discriminatory conduct of the Returning Officer of not providing the information to the petitioner as sought for. It is further submitted that there is also it is mandatory under the Conduct of Election Rules, 1961, that the postal ballot papers are required to be counted first, despite which, in violation of the said Rules, the Returning Officer counted the postal ballot papers last. Moreover, it is submitted that all the postal ballot papers were not shown to the petitioner. It is submitted that initially in Form No.20, which was provided to the petitioner


Assistant Secretary to
the Hon'ble the Chief Justice
High Court of Gujarat
Ahmedabad-380001.

and which was signed by the petitioner, details of such postal ballot papers were not mentioned. A true copy of Form No.20, which was initially provided to the petitioner and in which the signature of the petitioner was obtained is annexed hereto and marked as ANNEXURE-P6. It is submitted that therefore, there are two Form No.20 (Declaration of result of the election in the present case), which clearly show that the entire counting of votes has been done in most unlawful and illegal manner.

(2.9) It is further pertinent to note that the entire counting process and declaration of result has been video recorded as per the procedure adopted in the present election. It is submitted that if the said video recording is

ad
Assistant Secretary to
the Hon'ble the Chief Justice
High Court of Gujarat
Ahmedabad-380060.

shown to this Hon'ble Court, it will reveal that the facts stated by the petitioner in the present petition are correct. It is submitted that the postal ballot papers can be rejected in the following cases:

- e-PBID in the postal ballot papers does not match with issued e-PBID;
- No vote is recorded thereon or;
- Spurious the postal ballot papers;
- So damaged or mutilated that identity cannot be established or;
- It is not returned with cover;
- Mark indicating the vote place on the postal ballot papers, in such manner that it is doubtful as to which candidate the vote is given or;
- It bears any mark of writing (other than marked to record the same).

It is submitted that in the present case none of the above factors were prevalent for the 429 ballot papers, which have been rejected in the final result sheet prepared by the Returning Officer. It is submitted that the rejection of 429 postal ballot papers is completely illegal.

(2.10) It is respectfully stated and submitted that in Ganesar Polling Station, being Polling Station No.173; respondent no.2 is shown to have got 421 votes, out of total 426 votes and the petitioner is shown to have zero votes. It is submitted that there is a serious error in counting of the votes of Ganesar Polling Station because it is not possible that a popular candidate like petitioner gets zero vote in the said polling


Assistant Secretary to
Hon'ble the Chief Justice
1st Court of Gujarat
Ahmedabad-380060.

station. It is submitted that at least the supporters and people who have canvassed for the petitioner at Ganesar would have cast votes in favour of the petitioner. This also indicates that declaration of result of the election and counting votes in the present case is unfair, arbitrary and illegal. It is submitted that thus, if the wrongfully rejected postal ballot papers to the tune of 429 votes are considered valid and if 29 votes, which are missing in the counting of votes through EVMs are considered, the petitioner would be the successful candidate in the election of Assembly Constituency 58-Dholka held on 14.12.2017.

(2.11) It is respectfully stated and submitted that, despite the fact that the code of conduct was in force, respondent no.13 herein was posted as election officer and the

adp
Joint Secretary to
Hon'ble the Chief Justice
Court of Gujarat
Ahmedabad-380009

original deputy collector Gaurang Prajapati was transferred from Dholka pran. It is further submitted that, even the Consideration of the election process has not been given to the petitioner. It is further submitted that, respondent no.13 was put in as election officer even though the code of conduct was in place only with a view to help respondent no.2

- (3) It is respectfully stated and submitted that respondent no.2 is liable to be held guilty for corrupt practice also under section 123 of the Representation of the People Act, 1951. The relevant part of the said definition for the purpose of the present petition is reproduced hereinbelow:

*Assistant Secretary to
the Hon'ble the Chief Justice
High Court of Gujarat
Ahmedabad Bench.*

"(7) The obtaining or procuring or abetting or attempting to obtain or

procure by a candidate or his agent or, by any other person [with the consent of a candidate or his election agent], any assistance (other than the giving of vote) for the furtherance of the prospects of that candidate's election, [from any person whether or not in the service of the Government] and belonging to any of the following classes, namely:-

(a) gazetted officers;

(b) stipendiary judges and magistrates;

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

(d) members of the police forces;

(e) excise officers;

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

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

[Provided that where any person, in the service of the Government and belonging to any of the classes aforesaid, in the discharge or purported discharge of his official duty, makes any arrangements or provides any facilities or does any other act or thing, for, to, or in relation to, any candidate or his agent or any other person acting with the consent of the candidate or his election agent (whether by reason of the office held by the candidate or for any other reason), such arrangements, facilities or act or thing shall not be deemed to be assistance for the furtherance of the prospects of that candidate's election.]

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

add
Assistant Secretary to
the Hon'ble the Chief Justice
High Court of Gujarat
Amn. dated 3-10-2008.

It is submitted that respondent
no.2 has committed corrupt

practice of procuring the assistance by himself and through his agents for the purpose of furtherance of his prospectus in the election in question of the Election/Returning Officer. It is submitted that respondent no.2 was a sitting a Ministry at the time when the said election in question was held and was having portfolio of Revenue and Education Departments. It is submitted that using his undue influence, he has procured the assistance of the Election Officer, who has assisted him - firstly by not counting the postal ballot papers first, and secondly by invalidating 429 the postal ballot papers votes, which were otherwise required to be considered as valid votes. It is submitted that respondent no.2 has directly interfered


Assistant Secretary to
the Hon'ble the Chief Justice
High Court of Gujarat
Ahmedabad-380008.

- 30 -

with the fair declaration of results and counting of the votes in question with the assistance of the Election Officer. It is submitted that the Election Officer assisted respondent no.2 to such an extent, that he even refused the demand of recounting of votes made by the petitioner and also did not show to the petitioner the postal ballot papers, which were rejected. It is submitted that the perusal of the videography of the entire process would in no uncertain term lead to a conclusion that respondent no.2 and his agents have illegally procured the assistance of the Election Officer with regard to counting and declaration of votes for the election in question in such a manner that the prospects of respondent no.2 are increased.


Joint Secretary to
Office of the Chief Justice
Court of Gujarat
dated-12/11/06.

(3.1) It is respectfully stated and submitted that respondent no.2 has also procured assistance of the Election Officer in seeing to it that even 29 votes of the EVMs are discarded in illegal manner, which is already described hereinabove. It is submitted that thus, such action of respondent no.2 is a corrupt practice as defined under the Representation of the People Act, 1951. / It is submitted that in absence of procuring such illegal assistance of the Election Officer, respondent no.2 would not have got elected to the Assembly Constituency 58-Dholka, election of which was held on 14.12.2017. It is submitted that using had the Election Officer acted fairly,

- 32 -

respondent no.2 would not have got elected in the election in question at all. It is further submitted that, respondent no.13 was put in as election officer even though the code of conduct was in place only with a view to help respondent no.2

- (4) It is submitted that the present petition deserves to be allowing on the following amongst the other grounds. The grounds setout hereunder are without prejudice to one another:

:: GROUND S ::

- (A) That the declaration of result on 18.04.2017 for the election in question declaring respondent no.2 as successful candidate is perverse, arbitrary, illegal and

Assistant Secretary
The Hon'ble the Chief Justice
High Court of Gujarat
Ahmedabad-380001

- 33 -

contrary to the settled legal principles of law.

(B) That the declaration of result for the election in question is required to be set aside considering grounds mentioned in sections 100 and 101 of the Representation of the People Act, 1951 are clearly made in the facts of the present case.

(C) That the election officer acted in most arbitrary, unfair, discriminatory and illegal manner by invalidating 429 votes cast through of the postal ballot papers in the final declaration of result of the election in question.

(D) That though 429 votes cast through the postal ballot papers were absolutely legal and proper votes, they have been wrongly

all
Assistant Secretary to
The Hon'ble the Chief Justice
High Court of Gujarat
Ahmedabad-380009.

- 34 -

invalidated by the election officer in the final result.

(E) That in violation of the Conduct of the Election Rules and the established procedure and norms, the counting of votes cast through EVMs was done prior to the counting of votes done through the postal ballot papers.

(F) That the prior counting of votes cast through EVMs was done only with a view facilitate the adjustment of votes cast through the postal ballot papers later on with a view benefit respondent no.2.

(G) That the demand for recounting of votes made by the petitioner at the time of declaration of result, has been illegally

Case
Assistant Secretary to
Hon'ble the Chief Justice
High Court of Gujarat
Ahmedabad-380002

turned out by the election officer.

(H) That the petitioner was not even shown the postal ballot papers, which have been invalidated by the election officer in the final result of the election in question.

(I) That even in the votes declared through EVMs there are inconsistency with regard to the actual votes recorded and the actual votes that were cast in Polling Station Nos. 60, 70, 175, 177, and 230, which has also vitiated the declaration of the result of the election in question.

(J) That the votes of EVMs recorded in Ganesar Polling Station (Polling Station No. 173) is also illegal.

*Assistant Secretary to
the Hon'ble the Chief Justice
High Court of Gujarat
Ahmedabad-380061*

(K) That respondent no.2 is guilty of corrupt practice as defined under section 123 of the Act,

(L) That respondent no.2, and his agents have procured assistance of the election officer for furtherance of the prospect of election of respondent no.2 to Assembly Constituency 58-Dholka held on 14.12.2017.

(M) That respondent no.2 using his status as sitting Minister when the election in question was conducted, has procedure illegally and unfairly the assistance of the election officer to have the counting of votes done in illegal manner and to have the rejection of 429 postal ballot papers in illegal manner.


Assistant Secretary to
the Hon'ble the Chief Justice
High Court of Gujarat
Ahmedabad-380004

(N) That the entire counting and declaration of result of the election in question is most arbitrary, unlawful and dishonest manner.

(O) That the election officer, being a quasi-judicial officer could not have acted in such arbitrary, discriminatory and unlawful manner, which he has so acted, with a view facilitate the prospects of respondent no.2 in the election in question.

(P) That had the counting of votes and declaration of results in fair manner, the petitioner would have been the successful candidate in the election in question.

(Q) That even otherwise also for the reasons stated above and for the submissions, which may be urged at the time of hearing of the

petition, the present petition deserves to be allowed in terms of the prayers made in the petition.

(5) That the result of Gujarat Legislative Assembly Election 58-Dholka Constituency 2017 was declared on 18.12.2017. The Election Petition as per section 81 of the Act, can be filed within 45 days of the declaration of the result. Therefore, the election petition is being filed within limitation.

(6) That the petitioner has deposited an amount of Rs.2,000/- as security as required by Section 117 of the Representation of People Act.

(7) That the petitioner is attaching sufficient number of copies to


Assistant Secretary to
Hon'ble the Chief Justice
High Court of Gujarat
Ahmedabad-380005

be served on the respondents duly attested to be true copies of the Election Petition under his own signatures.

(8) That since the election was declared in Dholka, voting was held in Dholka, counting was done in Dholka and, therefore, Hon'ble Gujarat High Court i.e. this Hon'ble Court has the jurisdiction to entertain and decide the present election petition.

(9) In the afore-referred set of facts and circumstances of the case, the petitioner most humbly prays as beneath.

PRAYER

It is, therefore, most humbly and respectfully prayed that this Hon'ble Court may be pleased to summon the records of the case and after the trial of

the election petition may be pleased to:

(i) declare that the declaration of result in Form No.20 made on 18.12.2017 by the Returning Officer for the Election of 58-Dholka Assembly Constituency is illegal, unfair, contrary to law and be pleased to set aside the said declaration of result;

(ii) set aside the election of respondent no.2 as a successful candidate in the General Election to Gujarat Legislative Assembly, 2017 for 58-Dholka Constituency held on 14.12.2017;

(iii) hold that 429 votes recorded through postal ballot papers have been illegally rejected by the Returning Officer while declaration of the result of 58-Dholka Constituency in the

Assembly Election held on
14.12.2017;

(iv) hold that 29 votes, which have not been considered in the votes recorded through EVMs (the difference between 1,59,946 votes in the Voters Turnover report of the Returning Officer and 1,59,917 votes in the final declaration of result made by the Returning Officer) should be considered in the final declaration of result of 58-Dholka Constituency in the Assembly Election held on 14.12.2017;

(v) set aside the election of respondent no.2 of 58-Dholka Constituency in the Assembly Election held on 14.12.2017 on the ground of respondent no.2 having committed corrupt

all
Assistant Secretary to
the Hon'ble the Chief Justice
High Court of Gujarat
Ahmedabad Bench

practice as defined under section 123(7) of the Act;

(vi) direct the recounting of all votes recorded in 58-Dholka Constituency in the Assembly Election held on 14.12.2017 and direct the Election Officer to produce VVPAT of all votes recorded through EVMs in the said election;

(vii) declare that the petitioner has been duly elected in place of respondent no.2 to 58-Dholka Constituency in the Assembly Election held on 14.12.2017;

(viii) allow the cost of the petition to the petitioner or pass any other or further orders or direction, which this Hon'ble Court may deem fit and proper under the facts and circumstances of the case.


Assistant Secretary to
Hon'ble the Chief Justice
High Court of Gujarat
Ahmedabad-380009



AND FOR THIS ACT OF JUSTICE AND
KINDNESS, THE PETITIONER SHALL AS IN
DUTY BOUND FOR EVER PRAY.

PLACE: AHMEDABAD
DATE: 08/01/2018

SHARVIL P. MAJMUDAR
Advocate for Petitioner

AFFIDAVIT

I, Ashwinbhai Rathod, s/o. Kamsubhai
Rathod, Hindu, Adult, aged about 40
years, Indian inhabitant, by caste
Hindu, resident of: Post Bhamsara,
Tal. Bavla., Dist. Ahmedabad, do
hereby take and state on solemn
affirmation that whatever is stated
in the paragraphs hereinabove are
true and correct to the best of my
knowledge, belief and information and
I believe the same to be true.

Solemnly affirmed on this 11th day of
January at Ahmedabad.

Solemnly affirmed before me
by A. K. Rathod
who is identified before me
by A. S. Shelar
whom I personally know
this 11 day of Jan 2018

DEPONENT

2202 6691 9077

Amm

08/01/2018

Joint Secretary to
Hon'ble the Chief Justice
Court of Gujarat
Ahmedabad-380002

Identified by me
(17) 08/01/2018
Ashwinbhai Rathod

VERIFICATION

I, Ashwinbhai Rathod, s/o. Kamsubhai Rathod, Hindu, Adult, aged about 40 years, Indian inhabitant, by caste Hindu, resident of: Post Bhamsara, Tal. Bavla., Dist. Ahmedabad, on this 11.01.2018 at Ahmedabad, verify that the averments contained in Paragraph No.1 to 8, and prayer clauses 9(i) to 9(viii) of the annexed election petition are true and correct to my own knowledge, the averments contained in Paragraph No.4 of the annexed election petition are true and correct based on the legal advice received. I further verify that the annexures annexed with the election petition are true and correct

Place: Ahmedabad
Date : 11.01.2018

Ram
DEPONENT

220266919077

Amer ram

Attest
Joint Secretary to
Hon'ble the Chief Justice
Court of Gujarat
Ahmedabad-380001



IN THE HIGH COURT OF GUJARAT

ELECTION PETITION NO. OF 2018

IN THE MATTER OF:

Ashwinbhai Kamsubhai Rathod
 Post Bhamsara, Tal. Bavla.
 Dist. Ahmedabad. ... Petitioner

VERSUS

Bhailalbhai Kalubhai Pandav
 & Ors. ... Respondents

AFFIDAVIT

I, Ashwinbhai Rathod, S/o. Kamsubhai Rathod, Hindu, Adult, state on solemn affirmation and declare on oath that I have verified the documents attached to the petition and the same are the true copies of their original and the same are true.

Solemnly affirmed at Ahmedabad on
 11th January, 2018

[Signature]

DEPONENT

22026691 9077

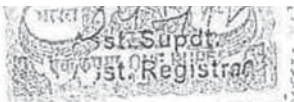
Identified by me

C.H. Ashok
Praveen

Solemnly affirmed before me
 by A.K. Rathod
 who is identified before me
 by A.S. Shelar
 whom I personally know
 this 11 day Jan 2018

Ashwin

Instant Secretary to
 Hon'ble the Chief Justice
 HC Court of Gujarat
 Ahmedabad 380009.



Conduct of election Rules
(Statutory Rules and Order)

Form 25

(rule 94A)

AFFIDAVIT

I, Ashwinbhai Rathod, s/o. Kamsubhai Rathod, Hindu, Adult, aged about 40 years, the petitioner in the accompanying election petition, calling in question the election of Bhupendrasinh Manubha Chudasama (respondent no.2 in the said petition) make solemn affirmation/ oath and say :-

- a) That the statements made in Paragraph Nos. 3 to 3.1 of the accompanying election petition of the commission of corrupt practice and the particulars of such corrupt practice mentioned in Paragraph Nos.3 to 3.1 of the same petition and in Paragraph

all
Assistant Secretary to
the Hon'ble the Chief Justice
High Court of Gujarat
Ahmedabad-380009

A

Nos. -- of the schedule annexed hereto are true to my knowledge.

b) That the statements made in Paragraph Nos. 3 to 3.1 of the said petition about the commission of corrupt practice and the particulars of such corrupt practice given in Paragraph Nos. 3 to 3.1 of the said petition and in Paragraph Nos. -- of the schedule annexed hereto are true to my information.

c) That the statements made in Paragraph Nos. 3 to 3.1 of the accompanying election petition of the commission of corrupt practice of undue influence and the particulars of such corrupt practice mentioned in Paragraph Nos. 3 to 3.1 of the same petition and in Paragraph Nos. -- of the


Assistant Secretary to
the Hon'ble the Chief Justice
High Court of Gujarat
Ahmedabad-380003.

schedule annexed hereto are true to my knowledge.

d) That the statements made in Paragraph Nos.3 to 3.1 of the said about the commission of corrupt practice of undue influence and the particulars of such corrupt practice given in Paragraph Nos.3 to 3.1 of the said petition and in Paragraph Nos. -- of the schedule annexed hereto are true to my information.

Solemnly affirmed/sworn by Ashwinbhai Kamsubhai Rathod at Ahmedabad on this 11th day of January, 2018.

Signature of the Deponent

22026691 9077

Before me

Amu m

Solemnly affirmed before me
by A.K. Rathod
who is identified before me
by A.S. Shela
whom I personally know
this 11 day of Jan 2018

Assistant Secretary to
the Hon'ble the Chief Justice
High Court of Gujarat, Ahmedabad.

Assistant Secretary to
the Hon'ble the Chief Justice
High Court of Gujarat
Ahmedabad-380008.

Hon'ble Justice
C.J. Rathod
Dated 11/1/2018

[Signature]

[Signature]

ANNEXURE A-2

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

DISTRICT : AHMEDABAD

ELECTION PETITION NO. 3 OF 2018

Exh-10

Ashwinbhai Kamsubhai Rathod

...Petitioner

Versus

Bhailalbhai Kalubhai Pandav & Ors.

...Respondents

WRITTEN STATEMENT ON BEHALF OF THE RESPONDENT NO.13

I, Dhaval Jani S/o Rashmikant Jani, aged 39 years, Returning Officer 58-Dholka Assembly Constituency and Prant Officer, Dholka Prant, Dholka, residing at: Dholka, District: Ahmedabad, do hereby solemnly affirm and state on oath as under:

For
S.B. Upadhyay
Adv

1. The Respondent No.13 states and submits that, the present petition filed for challenging election of Respondent No.2 herein to the general election to Gujarat Legislative Assembly, 2017 for 58 - Dholka Constituency, is devoid of merits and deserves to be dismissed by this Honourable Court.

From:
S.M. Sheikh
Adv.

2. With respect to content of Para-1 of the petition under reply, the same are denied hereby. It is submitted that, the respondent No.2 was declared as the successful candidate in accordance with Rule 56 of the Conduct of election Rules, 1961, since, he had received the highest number of votes. It is submitted that, the reliefs sought for by the

88



petitioner in the captioned petition, do not deserve to be granted by this Honourable Court.

3. With respect to content of Para-2.1 of the petition under reply, the same are denied hereby. It is denied that any undue influence was exerted on the answering respondent, by respondent No.2 herein. The final results were declared by the answering respondent, after obtaining the requisite approval of the General Observer, appointed by the Election Commission of India. Copy of the authorization issued by the General Observer for declaration of result, is annexed hereto and marked as Annexure-R⁴¹

4. With respect to content of Para-2.2 of the petition under reply, the same are denied hereby. It is submitted that, the answering respondent had rejected the 429 postal ballot papers, in accordance with the provisions of Conduct of Elections Rules, 1961. The averments have been made by the petitioner in Para-2.2, on the basis of assumptions and therefore the same ought not to be considered by this Honorable Court. It is denied that the postal ballot papers have been rejected by the answering respondent in an unlawful, unjustified, illegal or arbitrary manner.

5. With respect to content of Para-2.3 of the petition under reply, the

same are denied hereby. It is denied that the rejection of 429 votes

which were cast through postal ballots, is unlawful. It is denied that the

said 429 votes were cast in a proper manner or that there was no

infirmity in such votes. It is denied that the said 429 votes were wrongly

rejected by the answering respondent. It is denied that the counting of

postal ballots papers was done in disregard of the standard practice and

established norms. It is submitted that the counting of the postal ballots

papers was started at 8.00 a.m. in the presence of the candidates

and/or their election agents. Whereas the counting of EVM votes

started at 8.30 a.m. It is denied that, any illegal method was adopted

by the returning officer, or that the method adopted by the returning

officer has prejudice the result of the petitioner. It is denied that the

returning officer has illegally adjusted the votes of respondent No.2 in

such a manner, that respondent No.2 become the most successful

candidate, by wrongfully rejecting the 429 votes that were cast through

the postal ballots papers. It is submitted that at the time of declaration

of results or prior thereto, no complaint or representation was made by

the candidates/counting/election agents/counting agents, regarding

rejection of the 429 votes which were cast through postal ballot papers.

It is submitted that out of the said 429 votes cast through ballot papers,

no declaration in Form 13A was found in 79 ballot papers. Further, the

declarations contained in 339 ballot papers were found to be not

bearing any signature of either the candidate, gazetted officer or the



Read RO's cross
- ques No-22



witness. The same were accordingly rejected in accordance with provisions of the Conduct of Election Rules, 1961 and the instructions/guidelines issued by Election Commission of India. Further, 5 votes cast through postal ballot papers were found to be substantially defective and were therefore rejected in accordance with provisions of the Conduct of Election Rules, 1961 and the instructions/guidelines issued by Election Commission of India. Accordingly, 423 votes out of the 429 votes cast through postal ballots papers were rejected, prior to even opening of any cover in Form 13B. Accordingly, it is submitted that 423 votes out of 429 votes cast through postal ballot papers were rejected before opening covers in Form 13B of 933 votes cast through postal ballot papers. The said rejection of 423 votes cast through postal ballot papers, were completed much before the counting of the EVM votes was over. Further, out of the said 933 votes, 6 votes were cast through postal ballot papers were rejected in accordance with provisions of the Conduct of Election Rules, 1961 and the instructions/guidelines issued by Election Commission of India. Accordingly, it is submitted that, there was no illegal adjustment of votes by the answering respondents. Copy of the statement showing details of the counting of votes cast through postal ballot papers is annexed hereto and marked as Annexure-R~~2~~ 2.

Handwritten notes:
Voted
by
elector
personally
in
polling
station

6. With respect to content of Para-2.4 of the petition under reply, the same are denied hereby. It is denied that, 429 votes which were cast

through the postal ballot papers and which had been rejected by the answering respondent, were legal votes or were required to be considered as proper votes for the purpose of counting of the total votes. It is denied that, while rejecting such 429 votes cast through postal ballot papers, no candidate was given any opportunity or was made aware as to why such large numbers of postal ballots votes were being rejected. It is submitted that, signature of the counting/election agents of the concerned candidates who were present at the time of counting of the postal ballots, was obtained. It is denied that the 429 postal ballots votes were rejected in arbitrary manner or without any justification by the answering respondent. It is denied that the answering respondent has acted in a unilateral manner. It is denied that the said 429 postal ballots votes were rejected without making aware any candidates as to why such large numbers of postal ballots votes are being discarded.

7. With respect to content of Para-2.5 of the petition under reply, the same are denied hereby. It is submitted that, the total voters turnout report dated 14/12/2017 published by the Collector and District Election Officer, Ahmedabad, as well as the voter turnout report prepared by the returning officer, Dholka, are provisional in nature; since the same are prepared on the basis of the information obtained from the concerned Presiding Officers and the concerned Zonal Officers. It is submitted that, there might be discrepancies in the said

turnout reports, due to typographical/clerical errors committed by the concerned Presiding Officers and Zonal officers. It is submitted that, the EVM votes as mentioned in the final result sheet, are the final votes which are to be considered. It is submitted that EVM votes were announced round wise. The micro observers used to independently verify the EVM votes counted, by randomly selecting two EVMs in each round and by counting the votes of the said two EVMs. There were in total 19 rounds of EVM votes being counted and thereby 38 EVMs were randomly checked by the Micro Observers, who are representatives of the General Observer who is in turn appointed by Election Commission of India. Once the two EVMs were checked by the Micro Observers, the round-wise results were declared after the round-wise result sheets were signed by the General Observer. The said round-wise result sheets were also published on the white-board. The EVM votes were recorded in Form 17C-part 2 and signatures of the candidates or their agents, who were present at that time, were also obtained. It is denied that, the said 29 votes casts through the EVMs were deleted. It is denied that the said 29 votes are required to be considered in the final result sheet prepared while declaration of the results of Assembly Constituency, 58-Dholka. Copy of the tabular statement of round-wise declaration of results, duly signed by the answering Respondent and the General Observer, is annexed hereto and marked as Annexure-R43

8. With respect to content of Para-2.6 of the petition under reply, the same are denied hereby. It is denied that any of the EVMs were tempered with or that there was any deliberate wrong mentioning of votes of the said polling station, while preparation of final result sheet.

It is submitted that, discrepancies in the number of votes as shown in the total voter turnout of Polling Station No.60 (Dholka-60), 70 (Dholka-26), 175 (Ganol-2), 177 (Dholi), 230 (Salajada) and the numbers of votes shown in the final result sheet, is due to the typographical/clerical error on the part of the concerned presiding officers. Accordingly, it is denied

that the answering respondent has violated any of the provisions of the Representation of the Peoples Act, 1951 or the Conduct of the Elections

Rules, 1961, so as to benefit respondent No.2. It is submitted that no representation was made for recounting of votes, at the time of declaration of election results or during the entire process of counting of the EVM votes.

9. With respect to content of Para-2.7 of the petition under reply, the same are denied hereby. It is denied that the petitioner had demanded recounting of votes at the time of the declaration of the result. It is denied that answering respondent has refused any such demand of recounting of votes. It is sub[mitted that the petitioner has not made any demand for recounting of votes at the time of declaration of results.

It is submitted that the request for counting of VVPAT slips was refused by the answering respondent, through a speaking order, in accordance

with the instructions/guidelines issued by the Election Commission of India. Further, as per the instructions/guidelines of Election Commission of India, one EVM of polling station no. 95 was randomly selected for checking, and the same was checked in presence of the candidates and/or their counting/election agents, who were present at that time. The said EVM votes were verified and matched with the VVPAT slips. Copy of the order dated 18.12.2017 issued by the answering respondent, rejecting the request for counting of VVPAT slips is annexed hereto and marked as Annexure-R¹. Copy of statement of polling station no. 95, which was selected for random checking of the VVPAT slips is annexed hereto and marked as Annexure-R².

10. With respect to content of Para-2.8 of the petition under reply, the same are denied hereby. It is denied that the answering respondent had adopted any arbitrary or discriminatory conduct of not providing the information sought for by the petitioner. It is denied that all the postal ballots papers were not shown to the petitioner. It is denied that, Form No.20 did not contain the details of postal ballots papers. The other Form No. 20 does not bear the signature of the answering respondent. It is denied that there were two copies of Form no. 20. It is submitted that the entire elections were conducted under the supervision of the General Observer of the Election Commission of India. It is submitted that the information was provided to the Petitioner in response to the application filed under the Right to Information Act, at the earliest. It is

submitted that answering respondent had not received any other application or request from the Petitioner for seeking any information, other than the one received under the Right to Information Act, 2005.

It is denied that the answering respondent had refused to provide any information to the Petitioner herein.

11. With respect to content of Para-2.9 of the petition under reply, the same are denied hereby. It is submitted that, the postal ballots papers can be rejected in accordance with Rule 54 A of the Conduct of Election Rules, 1961. It is submitted that as per the said rules, postal ballots papers can be rejected if does not contain a declaration made by the voters in accordance with the said rules. It is submitted that, 429 postal ballots papers were rejected by the answering respondent in accordance with the Conduct of Election Rules, 1961. It is denied that the rejection of 429 postal ballots papers is illegal. It is submitted that the videography of the entire election process and the declaration of results, can be produced by the answering respondent before this Hon'ble Court, if the answering respondent is so directed by this Hon'ble Court to do so. The process of rejection of votes cast through postal ballot papers were carried out in presence of the election agents and/or the candidates.

12. With respect to content of Para-2.10 of the petition under reply, the same are denied hereby. It is denied that there is any error in counting

of votes of Ganesar Polling Station. It is submitted that, averments made by the petitioner are based on the assumptions and that the same may therefore not be considered by this Honourable Court. It is also denied that the result of the election and counting votes in the present case is unfair, arbitrary and illegal.

13. With respect to contents of Para-2.11 of the petition under reply, the same are denied hereby. It is submitted that answering respondent was one of the 16 officers who were transferred by the Government of Gujarat through notification dated 10.11.2017, in concurrence with the Election Commission of India. Copy of the notification dated 10.11.2017 issued by Government of Gujarat is annexed hereto and marked as Annexure-R36.

14. With respect to content of Para-3 of the petition under reply, the same are not admitted and are denied hereby. It is denied that the answering respondent herein was under undue influence of Respondent no. 2 and/or that the answering Respondent has provided any sort of assistance to Respondent no. 2, as has been alleged by Petitioner herein in para 3 of the petition under reply. The Petitioner has made vague and baseless allegations against the answering Respondent and the same are therefore denied hereby. It is denied that Respondent no. 2 has

refused the demand of recounting of votes allegedly made by the
Petitioner.

15. With respect to contents of Para-3.1 of the petition under reply, the same are denied hereby. It is denied that 29 votes of the EVMs are discarded in illegal manner. It is denied that the answering respondent had given an illegal assistance to respondent No.2 herein. It is denied that the answering respondent has not acted fairly. It is submitted that answering respondent was one of the 16 officers who were transferred by the Government of Gujarat through notification dated 10.11.2017, in concurrence with the Election Commission of India.

16. With respect to content of Para-4(A) of the petition under reply, the same are denied hereby. It is denied that the declaration of the respondent No.2 as a successful candidate is perverse, arbitrary, illegal and contrary to the settled principles of law.

17. With respect to content of Para-4(B) of the petition under reply, the same are denied hereby. It is denied that the election in question deserves to be set aside, under the provisions of Section 100 and 101 of Representations of the Peoples Act, 1951. It is submitted that the election process was carried out in accordance with the provisions of the Conduct of Election Rules, 1961, provisions of the Representation

of Peoples Act and the instructions/guidelines issued by the Election Commission of India. It is further submitted that unless the outcome election results is affected by virtue of the grounds raised in the present petition, the election in question cannot be set aside. It is further submitted that the burden to prove the case lies on the petitioner, and unless that burden is discharged, the answering Respondent ought not to be called upon to prove his defence.

18. With respect to content of Para-4(C) and 4(D) of the petition under reply, the same are denied hereby. It is respectfully submitted that, invalidation of 429 votes cast through the postal ballots papers in final declaring of result was in accordance with law. It is denied that answering respondent had acted in an arbitrary, unfair, discriminatory or illegal manner in invalidating the 429 votes cast through the postal ballot papers, or that the same were wrongly rejected by the answering Respondent.

19. With respect to content of Para-4(E) of the petition under reply, the same are denied hereby. It is denied that the counting of votes cast through postal ballot papers was done after the counting of votes of EVMs. It is submitted that the counting of the postal ballots papers were started at 8.00 a.m. in the presence of the candidates and/or their counting/election agents. Whereas the counting of EVM votes started at 8.30 a.m.

Read Answer
in reply to 22
06.05.2015
26055

20. With respect to content of Para-4(F) of the petition under reply, the same are denied hereby. It is denied that the answering Respondent had done any adjustment of votes cast through postal ballot papers.

21. With respect to content of Para-4(G) of the petition under reply, the same are denied hereby. It is denied that the demand of petitioner for recounting of votes was illegally turn out. It is submitted that Petitioner had not made any demand for recounting of votes during the counting process and till the time of declaration of results.

22. With respect to content of Para-4(H) of the petition under reply, the same are denied hereby. It is denied that the postal ballot papers were rejected in presence of the election agents and/or the candidates. None of the election agents and/or the candidates have raised any objection with respect to the manner in which the postal ballot papers were rejected, at the relevant point of time.

23. With respect to content of Para-4(I) of the petition under reply, the same are denied hereby. It is denied that due to the discrepancy of the number of votes recorded in the total voter turn out reports and the actual votes cast in the Polling station nos. 60, 70, 175, 177, and 230, vitiated the declaration of the result of the election in question. It is

submitted that the said discrepancies were due to the typographical/clerical errors on the part of the concerned Presiding Officers and Zonal Officers.

24. With respect to content of Para-4(I) of the petition under reply, the same are denied hereby. It is denied that votes of the EVMs recorded in Ganesar Polling Station (polling station no. 173) is illegal.

25. With respect to contents of Para-4 (L) of the petition under reply, the same are denied hereby. It is denied that the answering respondent has provided any sort of assistance to Respondent no. 2 herein.

26. With respect to content of Para-4(M) of the petition under reply, since the same relate to Respondent no. 2 herein, no comments are offered hereby.

27. With respect to content of Para-4(N) of the petition under reply, the same are denied hereby. It is denied that the entire counting and declaration of result of election was arbitrary, unlawful or dishonest.

28. With respect to content of Para-4(O) of the petition under reply, the same are denied hereby. It is denied that the answering respondent has acted in an arbitrary, discriminatory or an unlawful manner. It is denied that Respondent no. 2 has in any manner acted with a view to facilitate the prospect of the respondent No.2 herein, in the election in question.

29. With respect to content of Para-4(P) of the petition under reply, the same are denied hereby. It is denied that the counting of votes and/or declaration of results was not done in a fair manner.

30. With respect to content of Para-4(Q) of the petition under reply, it is stated and submitted that in the present petition is devoid of merits and the same therefore deserves to be dismissed by this Hon'ble Court.

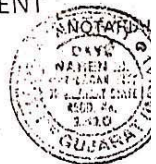
31. With respect to content of Paras-5 to 8 of the petition under reply, the same are not admitted hereby. The Petitioner may be put to strict proof to prove the contents of the said paragraphs.

32. With respect to content of Para-9 of the petition under reply, it is submitted that the present petition is devoid of merits, does not warrant any interference of this Honourable Court and therefore deserves to be dismissed by this Hon'ble Court.



VERIFICATION

DEPONENT



I, the deponent above named, do hereby verify that the contents of this affidavit are true and correct to the best of my knowledge and no part of it is false and nothing material has been concealed thereof.

NOTARIA

Verified at Ahmedabad on 24th March of 2018

IDENTIFIED BY ME

SR. NO. 1890-2018
SOLEMNLY AFFIRMED
BEFORE ME

DEPONENT

ANNEXURE A-3ANNEXURE ~~A3~~**IN THE HIGH COURT OF GUJARAT
AT AHMEDABAD****DISTRICT: AHMEDABAD****ELECTION PETITION NO. 3 OF 2018**

ASHWINBHAI KAMSUBHAI RATHOD

.... PETITIONER

VERSUS

BHAILALBHAI KALUBHAI PANDAV AND OTHERS

...RESPONDENTS

WRITTEN STATEMENT ON BEHALF OF
RESPONDENT NO.2

I, Bhupendrasinh Chudasama, respondent No. 2 herein, adult, residing at Udna Pada ni pole, Dholka, Taluka ; Dholka, District: Ahmedabad, do hereby solemnly state and affirm as under:-

That I am respondent No. 2 in the aforesaid petition, and I am the returned candidate for the aforesaid constituency being Dholka-58, and I have gone through the contents and the



averments made in the aforesaid petition and therefore am competent to file the written statement to the aforesaid petition.

1. It is submitted that I'm the returned candidate and the respondent No. 2 in the aforesaid petition which has been preferred by the petitioner, challenging and impugning the election for the legislative assembly seat for Dholka-58 constituency, more particularly the result declaring the deponent herein as the returned candidate. The petitioner has also sought for a relief to the effect that the petitioner shall be declared as a returned candidate instead of the respondent No. 2 that is the deponent herein.

2. All the contents, averments and allegations made in the aforesaid petition are baseless and are hereby denied in toto. My not dealing with any of the specific contentions or averments shall not be termed to be any admission on my part unless and until any factual or legal aspect alleged or averred in the aforesaid petition are specifically



accepted by me. I also reserve my right to file preliminary objections as to maintainability and a further written statement or reply or any affidavit during the course of the hearing of the petition as and when required by the Hon'ble court or as the need be. The deponent herein reserves his right to file an application under order 7 rule 11 of the CPC and filing of the present reply shall not be construed to be a waiver of right on the part of the deponent to file the same.

3. It is submitted that the aforesaid petition has been presented under the provisions of section 80, 81 and sections 100, 101 and 123 of the representations of people's act 1951. It is submitted that the aforesaid petition is absolutely baseless and the petitioner has miserably failed to make out a case for the purpose of seeking reliefs under the provisions of sections 100 and 101. It is also to be noted that the basic requirements of the provisions of the representations of peoples act 1951 for the purpose of



presenting an election petition has not been complied with and therefore the aforesaid petition deserves to be rejected by this Hon'ble court.

4. With regards to the contents of paragraph No. 1 of the petition, it is stated that the aforesaid petition has been preferred on the ground of alleged corrupt practice under the provisions of section 123 of the RP act 1951. More particularly the aforesaid reliefs have been claimed in accordance with the provisions of section 100 (1) (D) (ii) (iii) and (iv). It is pertinent to note that all the aforesaid grounds which have been pressed into service by the petitioner are based on the basic contention that corrupt practice has been committed. It is submitted that throughout the petition the petitioner has failed to exhibit as to under what circumstances and based on what evidence the petitioner can make allegations as to commission of corrupt practice at the behest of respondent No. 2 herein, more particularly



the petitioner has not been able to allege or exhibit any instance which can be considered to be any instigation on the part of the deponent herein or any instance to show that whatever has been alleged in the petition was undertaken by the express or implied consent or authorization of the deponent herein or of the election agent of the deponent herein. In absence of these averments or any evidence on record to that effect, the petitioner cannot invoke the provisions of section 123 of the representations of peoples act, nor can the same seek any of the reliefs as prayed for in the petition.

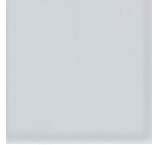
5. With regards to contents of paragraph No.

2.1, it is submitted that the contents of the said paragraph are denied. It is specifically denied that the deponent herein had exerted undue influence over the election officer, who was in charge of the election in question of 58-Dholka constituency. It is also denied that the deponent herein had utilized his position



as a Minister at the relevant point of time for the purpose of influencing the election machinery. The petitioner except for making bald allegations have not been able to produce anything on record which would lead to believe that the deponent herein has exerted any influence or pressure on the election machinery. The petitioner has also failed to show as to any communication, event or circumstance with any evidence on record to the effect that the deponent herein had influence the election machinery during the legislative assembly elections 2017 in the state of Gujarat. Merely on bald allegations, inference cannot be drawn against the deponent who otherwise is an elected candidate at the end of a valid election process.

6. With regards to paragraph No. 2.2 of the petition, the deponent herein states that all the averments and contentions made in the said paragraph are specifically denied to be incorrect and false. It is further submitted



that with regards to the number of votes and the calculations mentioned by the petitioner, the deponent does not dispute the figures which appear in the aforesaid paragraphs.

However it is submitted that the petitioner proceeds completely on the basis of assumptions and presumptions by alleging that out of the total number of votes rejected, 400 votes would have been in favor of the petitioner. The petitioner also alleges that since the government employees and army officials had voted to those ballots which came to be rejected, it can be safely assumed that they are literate people and therefore the petitioner says that corrupt practice has been committed. This stand of the petitioner is specifically denied as being without any substance as the same is based on assumptions and presumptions. It is also to be noted that even if for the sake of argument it is assumed that 429 votes which were rejected, is added to the total number of votes obtained by the petitioner, the



petitioner was still lagging behind compared to the total number of votes obtained by the deponent herein. It is also to be noted that the petitioner simply assumes that the 400 votes out of 429 votes would have been in favor of the petitioner. However it is to be noted that the said rejected votes were to be bifurcated amongst all the contesting candidates at that point of time and there was no reason to believe that those ballots came to be rejected by the election officer merely because the petitioner assumes that 400 votes out of 429 votes, which came to be rejected would have been in favor of the petitioner as the petitioner was a popular candidate amongst the government employees. This proposition of the petitioner is absolutely without any reason, logic or justification and therefore the same is specifically denied to be baseless and false.

7. With regards to paragraph No. 2.3 it is hereby submitted that the contents of the said paragraph are specifically denied in toto.



It is submitted that the allegation with regards to illegal adjustment of votes by the election officer is absolutely without logic and without any foundation of justification. It is pertinent to note that the votes which were recorded through EVMs, can never be adjusted in any manner whatsoever. It is also to be noted that the recording of the votes through EVMs, is done by different preceding officers on different tables in different rounds and for different booth. It is also to be noted that the counting of the ballots is done on a separate table. Apart there from the process of counting is always carried out in the presence of the candidate or his election as well as counting agents. If the petitioner alleges at this point of time that there was a deviation in the procedure for counting of the ballots as well as the wards from the EVMs, the counting or the election agent of the petitioner ought to have raised an objection in writing before the election officer. However no such objection



was raised considering the fact a legal process in accordance with the conduct of election rules 1961 was followed by the election officer. Not only this but it is pertinent to note that what emerges from the reply filed by the election officer would be wiped out as irrelevant for this purpose, to the effect that the 429 votes, were rejected only on the basis of form no. 13 A. It is to be noted that the returning officer as mentioned in its affidavit that form No. 13B was never opened at the time of rejection of the aforesaid votes considering the fact that 423 votes, were rejected only on the ground of inappropriate declaration as contemplated under the provisions of rule 54A of the conduct of election rules 1961 and therefore even the election officer was not aware as to how many votes have been cast in favor of either the petitioner or all the present deponent or any of the candidate. It is also vital to note that all the contesting candidates also have received votes through



ballots and therefore the probability that the 429 ballots came to be rejected by the election officer would have been distributed amongst all contesting candidates which are 12 in number and there is no reason to believe that the petitioner would have obtained 400 votes out of the said rejected votes. This rational if considered from a proper perspective, the whole argument of the petitioner to the effect that of corrupt practice has been committed because there is an adjustment of the votes illegally by the election officer, cannot be considered at all and therefore the fact remains that though the petitioner and his election agent's were themselves present at the time of counting, they have come up with this petition by way of an afterthought with a view to hamper and in the functioning of respondent No. 2 herein.

8. With regards to contents of paragraph No. 2.4 it is further submitted that the same are denied as being baseless and incorrect. It is to be noted that the contention of the



petitioner to the effect that all the rejected a
429 votes a valid and legal votes and the
same has to be considered cannot be
accepted as the same is baseless and
contrary to the provisions of the
representations of peoples act 1951 as well
as the conduct of election rules 1961. It is to
be noted that the petitioner herein, along
with his election agent and counting agent
was present at the time of counting, did not
raise a written objection at the time of
rejection of the aforesaid votes. It is also
denied that the candidate was not given any
opportunity or was not made aware as to
why such a large number of postal ballot
votes were being rejected. It is also denied
that the returning officer has acted in an
illegal manner without making the candidate
agents aware of such a rejection of votes. It
is submitted that the petitioner himself had
filed an application on 18/4/2017 that is at
the time of counting with his own signature
and had requested for recount of the VVPAT

for 2 different booths. The said application is annexed at page No. 126 along with the reply filed by the returning officer. It is also to be noted that the petitioner has filed a rejoinder based on the reply filed by the election officer and has not dealt with this aspect. Throughout the petition, the petitioner has not made any statement in precise terms as to whether the petitioner was present at the time of counting and whether petitioner had raised any objection at the relevant point of time during the counting process before the election officer. Instead thereof the petitioner has straight away made bald allegations to the effect that 429 votes came to be rejected by the election officer without affording an opportunity, which according to the deponent is absolutely incorrect and false.

9. With regards to contents of paragraph 2.5, it is submitted that there is no discrepancy in the actual number of votes which were voted. It is also to be noted that in the time of counting of counting agent of the

candidate sits across the table on each and every table where the counting of different both is being conducted by the concerned preceding officer. The petitioner straight away alleges that there is a discrepancy in the total number of votes polled, but the petitioner does not mention that according to the records maintained by his own counting agents what is the actual number of votes that were polled. Apart therefrom, the total number of votes which appear in the final result sheet are to be considered as the final number of votes which have been polled for a particular constituency. However the returning officer in his affidavit has clarified the said issue and therefore it would not be appropriate for the deponent to comment on the said aspect, as the same deals with the internal functioning of the election machinery. It is further submitted that the allegations to the effect that 29 whatsoever not considered which were cast to the EVMs, and the same is illegal, is specifically denied

to be misleading. However mere discrepancy in preparing the turnover sheet for total number of votes casted in a particular constituency cannot be termed to be a corrupt practice and would not entitle the petitioner to any relief as claimed for by invocation of the provisions of section 123 of the representations of people's act 1951.

10. With regards to contents of paragraph No. 2.6, the same are denied as false, and without any substance. It is submitted that it is not possible for an election officer to wrongfully mention the number of votes polled in a particular constituency or a particular booth. It is to be noted that every number which is displayed on the monitor at the time of counting of the votes through EVMs, is noted down by the counting agent of every concerned candidate as well as the preceding officer. The total number of votes cast in favor of a particular candidate in each and every round, in each and every booth, and on each and every table is always tallied

between the election officer and the counting agent of the candidate. Therefore the allegation made by the petitioner to the effect that there is a manipulation in the final result sheet is absolutely baseless and without any rational or logic. Not only that but the petitioner was to the extent of making at all claim to the effect that there is a manipulation in the preparation of the final result sheet because the number of votes cast in a particular booth is different from the number of votes considered. It is pertinent to note at this juncture that all the votes which are in a particular booth are never the number of votes allotted in favor of a particular candidate. In some cases where the votes are inappropriately cast would automatically get rejected as per the EVMs and apart there from there are also options of NOTA. Therefore based on such bald allegations, the petitioner does not deserve the aforesaid relief which has been claimed.

11. With regards to paragraph No. 2.7 it is submitted that at one instance in the petition more particularly in paragraph 2.4 the petitioner claims that the returning officer rejected the ballots without making the petitioner aware of such a rejection and even without affording an opportunity to the petitioner to raise any objection. On the contrary in paragraph 2.7 herein, the petitioner mentions that the petitioner had preferred an application for the purpose of recounting of votes at the time of declaration of the results but the same was not considered by the returning officer. It is pertinent to note that the petitioner was present throughout the counting process and also during the declaration of result. The petitioner did not raise any objection with regards to rejection of votes, or discrepancy in the number of votes in the EVMs is alleged herein above, on the contrary the petitioner filed an application not for recounting of votes but for recounting of the VVPAT slips. It

is to be noted that not only that but the returning officer had considered the said application on the same day and a reasoned order was passed rejecting the said application. Therefore there is no question of making any allegation to the effect that the application filed by the petitioner was not considered. It is also to be noted that the recount application for the VVPAT slips, was also given only for 2 booths that is both numbers 28 and 112. It is to be noted that for the 1st time on 27/12/2017, a grievance was raised by the petitioner before the election commission of India in form of an election petition. It is also to be noted that the contents of the said application which came to be filed before the Chief electoral officer, there are severe discrepancies between the said application and the present petition. In the said application the petitioner submits that the fact of rejection of 429 votes was provided to the petitioner afterwards and the petitioner was not aware

about the same. It is submitted that only considering the contents of the aforesaid application preferred before the Chief electoral officer in juxtaposition to the contents of the petition herein, it is amply clear that the petitioner has not approached this Hon'ble court with clean hands and the filing of the present petition is only an afterthought whereby baseless allegations of corrupt practice without any evidence or material on record has been made. Therefore the petition deserves to be rejected at the threshold.

12. With regards to contents of paragraph No. 2.8 it is submitted that the petitioner has deliberately made false statement. The same is denied. The petitioner states that the copy of the final result sheet was given to the petitioner by the returning officer on the next day of the declaration of results. It is to be noted that without form 20 being prepared and the final result sheet being prepared by the returning officer, no candidate can be

construed to be a returned candidate. Not only that but at the time of counting, the moment the final result sheet is prepared, a particular candidate is declared to be a returned candidate by the returning officer, and the copy of the final result sheet has to be affixed on the notice board by the returning officer. Therefore there is no question of providing the copy of the final result sheet to the petitioner on the next day. Only on this count the petition requires to be rejected by this Hon'ble court. It is submitted that the allegations to the effect that the returning officer had acted in an arbitrary manner are denied. It is submitted that the stand of the petitioner is self-contradictory to the effect that at one point of time the petitioner states that the petitioner was not at all aware about the rejection of 429 votes, and the same time you're the petitioner mentions that all the votes which were rejected by the returning officer were not shown to him. Therefore there is a clear

admission on the part of the petitioner that the petitioner was present at the time of counting of the votes as well as rejection of the ballot papers and therefore there is no illegality committed by the returning officer. It is also denied that there are 2 form No. 20 and therefore the case which is sought to be put forward by the petitioner to create some prejudice against either the returning officer or the deponent herein is completely baseless and hence the petition is required to be rejected.

13. With regards to contents of paragraph No. 2.9, the same are denied. It is submitted that the argument which is sought to be canvassed by the petitioner to the effect that the ballot papers can be rejected only in the eventuality as mentioned by the petitioner at page No. 24, is misconceived. It is to be noted that the said rejection is sought to be canvassed by the petitioner more particularly which appears in sub rule 8 of rule 54A of the conduct of election rules 1961, is a

subsequent procedure which is to be followed after the process mentioned in sub rules 1 to 6 is completed. Therefore the grounds for rejection mentioned by the petitioner in paragraph 2.9 more particularly at page 23 are misconceived and therefore are clearly denied.

14. With regards to contents of paragraph 2.10 it is specifically and clearly denied. It is submitted that the petitioner straight away presumes that because the petitioner did not obtain a single vote in a particular booth, some illegality has been committed. This aspect is denied to be true. It is also to be noted that merely because the petitioner himself thinks that he is a very popular candidate and he should get votes from each and every booth, cannot be the basis for coming to the conclusion that some illegality has been committed. The allegation to the effect that the rejected votes of 429 votes as well as the valid votes of 29 votes in the EVMs are considered the petitioner would be



the successful candidate. This aspect is denied as misconceived because the petitioner makes this statement on a presumption that the petitioner would have got all those votes in his favor the carrier the rejected or not calculated. There is no material on record which would lead to believe that all votes which are disputed by the petitioner would have been cast in favor of the petitioner. The probability that all these wards could have been distributed amongst different candidates in the eventuality if the same was considered at the time of final counting; cannot be ruled out and therefore merely because the petitioner things that the same is a very popular candidate there is no reason to believe that he would have got all the votes. Apart there from even if it is assumed that the petitioners would have got all 429 votes in his favor, despite that the petitioner would not have been able to win the election and cross the

total number of votes obtained by the deponent herein.

15. With regards to contents of paragraph 2.11, the same are clearly denied. It is pertinent to note that the moment the code of conduct, is into effect, any transfer of the officers from one point to the other is always based on the directions of the election commission of India or it's delegated. The petitioner has not made any averments to the effect that the election commission has acted contrary to its powers or has undertaken any action to favor the deponent herein and therefore the contents of the aforesaid paragraph are denied as baseless.

16. With regards to contents of paragraph 3 of the petition the same are denied. It is submitted that the contents of the said paragraph are absolutely false, misleading and incorrect and the same are denied. It is specifically denied by the deponent herein that the deponent has committed any corrupt practice or has procured any assistance

either by himself or under his authority through his agents for the purpose of furtherance of his prospects in the election in question from the election officer or the returning officer. It is submitted that this whole allegation is made without any material on record or any evidence to this effect. Merely because that the deponent, was a Minister and the relevant point of time straight away inference cannot be drawn against him that he has influence the whole election process. It is submitted that the whole allegation of undue influence or assistance from the election officer is based on a presumption by the petitioner that all 429 votes/ballot papers which came to be rejected by the election officer, were without any doubt to be posted in the favor of the petitioner. Apart there from the petitioner also alleges corrupt practice on the ground that the counting of votes by the petitioner was refused by the election officer. This is absolutely in germane, misleading and

contrary to the facts. It is denied that any such undue influence has been applied by the deponent or any undue favor has been accorded by the election officer in favor of the deponent herein. It is submitted that as per the requirement of law, the allegations of corrupt practice has to be specific with all relevant details and along with the names of the concerned persons who are involved in undertaking such corrupt practice. All the allegations of corrupt practices have to be backed up by sufficient and valid evidence which is admissible in law. In absence of any evidence on record to back up that all claims made by the petitioner, and only based on assumptions and presumptions of the petitioner of his popularity, corrupt practice cannot be alleged against the election machinery or against the deponent. Moreover apart from making bald allegations as to corrupt practice, the petitioner does not state anywhere in the petition or even a whisper about any circumstances or any incident,

along with the valid evidence to that effect, whereby any legal action including application of undue influence is either authorized by the deponent herein or his election agent is completely absent. Therefore the aforesaid petition deserves to be rejected at the threshold only on this count.

17. It is submitted that the contents of paragraph 3.1 are hereby denied as the same are incorrect and without any proof. The deponent herein denies that any assistance has been procured from the election officer for the 29 votes of the EVMs which are discarded. It is to be noted that discarded of 29 votes, even if assumed for the sake of argument to be correct, the same would not have any impact on the final result of the election and therefore by no stretch of imagination the said allegation can be believed to be correct. However the deponent herein specifically denies any such act or action being undertaken by the deponent or

by any of his agent under his authority. It is submitted that whatever has been alleged in the petition against the concerned election officer is with regards to the procedure followed by the election officer in consonance with the provisions of the conduct of election rules 1961. However throughout the petition or even in the aforesaid paragraph, the petitioner does not mention a word about any nexus between the election machinery and the deponent herein. Merely by stating that the deponent has procured assistance of the election officer, would not amount to corrupt practice. There is no explanation as to how, in what manner, at what place and by what means the deponent has procured assistance from the election officer, neither does the petitioner referred to any particular act undertaken by the election officer at the behest of the deponent herein, all the content of the opponent herein and nor does the petition disclose any or action being undertaken by with the authorization and

consent of the deponent herein. Merely, by way of such a vague allegations, and without being supported by any documentary evidence, corrupt practice cannot be alleged neither can be proved. Therefore the aforesaid petition is misconceived and requires to be directed by this Hon'ble court.

18. With regards to grounds A and B of paragraph No. 4 it is submitted that merely because provisions of section 100 and 101 of the representations of peoples act 1951, contemplates various grounds for setting aside the election, the petitioner cannot straight away claim those grounds to be applicable to the petition in absence of any consolidated material to prove the bald allegations of corrupt practice.

19. With regards to grounds C and D of paragraph 4 it is submitted that the returning officer has filed a detailed affidavit and has explained the legal provision under which the same has acted upon. It is also to be noted that except for bald allegation to the effect

that the votes have been wrongly invalidating, the petitioner is not entitled to any relief whatsoever.

20. With regards to grounds E, F and G of paragraph No. 4, it is submitted that the application of conduct of election rules is not only applicable to the election machinery but the same applies to all the parties to the election process. It is submitted that as per the election rules, a proper procedure has been prescribed for the purpose of requesting recounting of votes and also of raising various objections at the relevant point of time. It is also to be noted that as per the rules and the provisions of the act, the petitioner and his counting agents were present at the time of counting and did not raise any objection at the relevant point of time. Apart there from there is nothing on record to show that the counting of the ballots was done subsequent to the counting of the votes of EVMs. This stand of the petitioner in most for the 1st time on

27/12/2017 when the same file an application before the Chief electoral officer and this is an afterthought as the petitioner himself admits in his petition that he was present at the time of counting of the ballot papers and also alleges that all ballot papers were not shown to him. It is also denied that there is any facilitation in favor of the deponent herein and hence the petition requires to be rejected.

21. With regards to grounds H and I of paragraph No. 4, it is submitted that the same is contrary to the contents of the petition stated by the petitioner herein above. The petitioner himself has admitted that ballot papers were shown to him but not all ballot papers were shown to him, this itself shows that he was present and was aware about the whole process but is an afterthought to take advantage of the whole situation has made bald allegations. With regards to inconsistency in the actual votes recorded and the actual votes that were cast,

it has been clarified that the counting agents were present on each and every table at the time of the counting of the votes along with the preceding officer. The actual number of votes displayed on the EVMs was tallied between the preceding officer and the counting agents. In spite thereof no objection was raised to this effect and is an afterthought the said ground is pressed into service for alleging corrupt practice which is impermissible. It is also to be noted that the total number of votes wherein discrepancy has been alleged in the EVMs is about 29 votes. Even if it is assumed that those 29 votes were in favor of the petitioner the same could not have been declared as a returned candidate and there is no assurance that all those 29 votes were in favor of the petitioner. Therefore there is no intent which emerges from the petition which would lead to believe that any corrupt practices being committed by any of the parties to the election.

22. With regards to grounds J, K, L, M and N it is submitted that the same are baseless and without any substance. It is submitted that the deponent herein has already dealt with these aspects in the earlier part of the reply and has specifically denied any illegality being committed. Merely by alleging deponent herein is guilty of practice would not suffice the ingredients of section 123 of the act. The petitioner also does not mention that under what clause of section 123 of the act the actions of the deponent based on the facts stated in the petition can be termed as a corrupt practice. Merely by making bald statement to the effect that the petitioner was deprived because the deponent was a sitting Minister would not constitute a corrupt practice. The petitioner has miserably failed to even alleged or content in the petition which would show nexus between the deponent and the election officer through which it can be alleged that the deponent has procured any assistance from the election

officer. Therefore also the petition is required to be rejected.

23. With regards to contents of grounds O,P and Q of paragraph 4 it is stated that the election officer is not a Qusi judicial officer. It is specifically denied that the same has acted in an arbitrary and discriminatory manner but on the contrary the same is acted in accordance with the rules and regulations and the provisions of the act. It is also denied that the petitioner would have been the successful candidate because even if the number of votes which have been alleged in the petition would have been added to the total number of votes obtained by the petitioner for the sake of argument, even in that eventuality the petitioner would not have been declared as a returned candidate.

24. Therefore considering the above mentioned submissions and contentions put forward by the deponent herein, it is respectfully submitted that the petition deserves to be rejected as having no



substance and not backed up by any documentary or other evidence which would lead to believe that any corrupt practice has been committed by any of the parties to the election process. Hence the petition deserves to be rejected.

Date: 30/04/18

Place: Ahmedabad

Deponent

Identified by the

Advocate

ITEM NO.20

COURT NO.4

SECTION III

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Petition(s) for Special Leave to Appeal (C) No(s). 28389/2018

(Arising out of impugned final judgment and order dated 09-10-2018 in EA No. 14/2018 passed by the High Court Of Gujarat At Ahmedabad)

BHUPENDRASINH MANUBHA CHUDASAMA

Petitioner(s)

VERSUS

BHAILALBHAI KALUBHAI PANDAV & ORS.

Respondent(s)

(FOR ADMISSION and I.R. and IA No.152496/2018-EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT and IA No.154170/2018-PERMISSION TO FILE ADDITIONAL DOCUMENTS/FACTS)

Date : 12-11-2018 This petition was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE A.K. SIKRI

HON'BLE MR. JUSTICE R. SUBHASH REDDY

For Petitioner(s) Mr. Maninder Singh, Sr. Adv.
Mr. Mahesh Agarwal, Adv.
Mr. Chitrajeet Upadhyay, Adv.
Mr. Sahil Trivedi, Adv.
Ms. Aastha Mehta, Adv.
Mr. E. C. Agrawala, AOR

For Respondent(s) Mr. Huzefa Ahmadi, Sr. Adv.
Mrs. Taruna Singh Gohil, AOR

UPON hearing the counsel the Court made the following
O R D E R

The election of the petitioner herein is challenged on the ground that the petitioner indulged in corrupt practice and also that 429 postal ballot papers were wrongly rejected. Insofar as the allegation of corrupt practice is concerned, there must be some substance therein. We find that the issue about the improper rejection has to be gone into by the High Court by virtue of the

provisions contained in Section 100(1)(b) of the Representation of People Act, 1951 and at this stage the High Court has rightly opined that the petition could not be rejected under the provisions of Order VII, Rule 11 of the Code of Civil Procedure, 1908.

Mr. Maninder Singh, learned senior counsel appearing for the petitioner, has argued that no objection was raised by the agent when those ballot papers were rejected. It would be open to the petitioner to raise this plea before the High Court. This aspect can be considered only on the basis of evidence.

The Special Leave Petition is dismissed with the aforesaid observations.

Pending application(s), if any, stands disposed of accordingly.

(ASHWANI THAKUR)
COURT MASTER (SH)

(RAJINDER KAUR)
BRANCH OFFICER

ITEM NO.43, 43.1

COURT NO.2

SECTION III

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (C) No(s). 3075-3081/2019

(Arising out of impugned final judgment and order dated 19-12-2018 in EA No. 10/2018 21-12-2018 in EA No. 10/2018 24-12-2018 in EA No. 10/2018 28-12-2018 in EP No. 3/2018 08-01-2019 in EP No. 3/2018 09-01-2019 in EP No. 3/2018 16-01-2019 in EP No. 3/2018 passed by the High Court Of Gujarat At Ahmedabad)

BHUPENDRASINH MANUBHA CHUDASAMA

Petitioner(s)

VERSUS

BHAILALBHAI KALUBHAI PANDAV & ORS.

Respondent(s)

(WITH PRAYER FOR INTERIM RELIEF AND IA No.17614/2019-EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT)

WITH

SLP(C) No. 3950/2019 (III)

(WITH PRAYR FOR INTERIM RELIEF AND IA No.21873/2019-EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT)

Date : 11-02-2019 These petitions were called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE A.K. SIKRI

HON'BLE MR. JUSTICE S. ABDUL NAZEER

For Petitioner(s) Mr. Mukul Rohtagi, Sr. Adv.
Mr. Mahesh Agarwal, Adv.
Mr. Chitrajeet Upadhyay, Adv.
Ms. Aastha Mehta, Adv.
Mr. Chitrajeet Upadhyaya, Adv.
Mr. Bhagirath Patel, Adv.
Mr. E.C. Agrawala, AOR

For Respondent(s) Mr. Kapil Sibal, Sr. Adv.
Mr. Percy Kavina, Sr. Adv.
Mr. Sunil Fernandes, AOR
Mr. Mohd. Nizam Pasha, Adv.
Mr. Shashavat Shukla, Adv.
Ms. Nupur Kumar, Adv.
Ms. Anju Thomas, Adv.
Mr. Darpan Sachdeva, Adv.
Ms. Priyansasha Indra Sharma, Adv.

UPON hearing the counsel the Court made the following
O R D E R

Learned senior counsel for the petitioners
seeks permission to withdraw these petitions.

Permission sought for is granted.

The special leave petitions are dismissed as
withdrawn.

Pending applications stand disposed of.

[Charanjeet Kaur]
A.R. - cum - P.S.

[Rajinder Kaur]
Branch Officer

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

DISTRICT: AHMEDABAD

ELECTION PETITION NO. 3 OF 2018

Ashwinbhai Kamsubhai Rathod. ...Petitioner

Versus

Bhailalbhai Kalubhai Pandav & Ors. ...Respondents

**WRITTEN ARGUMENTS/SUBMISSIONS ON BEHALF
OF RESPONDENT NO.2 – RETURNED CANDIDATE**

1. That the present petition is based on two main pillars/submissions:

- I. Corrupt practice under the provisions of the Representation of People Act, 1951
- II. Illegal rejection of 429 postal ballots for 58-Dholka constituency

2. On reading of Paragraphs 2.2, 2.4, 2.6, 2.8, 2.10, 2.11 and 3 of the memo of the Election Petition, the case of the Petitioner is based on contentions (albeit presumptions, conjectures and surmises) which coupled with the videography, take the net outcome to mean the Petitioner's case is that since the returned candidate was a sitting Minister at the relevant point in time, he was able to exert undue influence and accordingly, the alleged improper rejection of 429 postal ballots was done on account /at the behest of the returned candidate. Therefore, the present case is based on the aforesaid two pillars.

**ADMISSIBILITY OF DOCUMENTS AT EXHIBIT
NOS. 56, 57 AND 110**

3. As regards admissibility and authenticity of documents at Exhibit nos. 56 and 57 i.e. the Hard Disk and DVD tendered on 21.12.2018, Section 59 of the Indian Evidence Act, 1872 clearly states that all facts, except contents of documents or electronic records may be proved by oral evidence. Therefore, contents of documents have to be proved from the document itself and oral evidence cannot be led to prove contents of any document, much less an electronic record. As regards, document, Section 3 of the Act defines the same to mean “*any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.*” Further, if Sections 60,61,62,63 and 67-A of the Act are taken into consideration, the admissibility of documents at Exhibits 56,57 and 110 cannot be established since neither the Hard Disk nor the DVD fall within the ambit of primary or secondary evidence.
4. Further, as regards Section 65-A of the Indian Evidence Act, in order to prove the contents of electronic records in accordance with the provisions of Section 65-B, the words “*may be proved*” will have to be read as “*shall be proved*” taking internal aid from the statute itself therefore making compliance to Section 65-B a mandatory requirement for proving the contents of and authenticating electronic records.

5. Moreover, the non-obstante clause in Section 65-B is deemed to have an overriding effect over any other provision under the Act thereby commanding strict adherence to the conditions meted out in the Section more particularly Section 65-B(4) in the present case, which means that a certificate doing any of the things required under clauses (a), (b) or (c) of sub-section (4) of S. 65-B is a sine qua non and has to be provided in letter and spirit as prescribed under the said Section. Section 65-B(4) states as under:

65B. Admissibility of electronic records.—

(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.*

6. As per the judgment rendered by a three-judge bench of the Hon'ble Apex Court in *Anvar P.V. Versus P.K. Basheer*¹, while dealing with the issue of admissibility of electronic

¹ (2014) 10 SCC 473

records and Section 65-B(4) of the Indian Evidence Act, 1872, has clearly stated that the procedure mandated by Section 65-B has to be followed and that electronic records can only be proved in the manner laid down by the Section.

7. It is further stated that as per the judgment rendered by a two-Judge Bench the Hon'ble Supreme Court in *Shafi Mohd. Versus State of Himachal Pradesh*², a charitable view has been taken wherein the Hon'ble Court has diluted the observations made by the three-judge Bench in *Anvar's* case (*supra*).
8. It is further stated that the aforementioned decision in *Shafi Mohd's case* (*Supra*) cannot be considered to be good law in view of the fact that it does not take into consideration the dictum laid down by the Apex Court in *Anvar P.V.'s* case and is in total contravention of the law of precedents set out under Article 141 of the Constitution of India. Assuming without admitting that the decision rendered in *Shafi Mohd.'s* case is good law, even then in the facts of the present case, it is not that the Petitioner is not in a position to obtain a certificate as prescribed and mandated by Section 65-B of the Indian Evidence Act, 1872.
9. It is further submitted that the decision rendered by the Hon'ble Apex Court in *Shafi Mohd's case* is referred to a Larger Bench vide order dated 26.07.2019 passed in Civil Appeal No. 20825 of 2017 by a two-Judge Bench (i.e. a bench of equal strength in *Shafi Mohd's case*) . Therefore, *Shafi Mohd.'s case* cannot be pressed into service by the

² (2018) 2 SCC 801

Petitioner in view of the reference pending before the Hon'ble Supreme Court coupled with the fact that the decision in *Anvar P.V.'s case* (supra) was given by a three-Judge Bench while the decision in *Shafi Mohd.'s case* was delivered by a two-Judge Bench and that law of judicial propriety will have substantial bearing in that regard.

10.As regards the law of precedents more particularly with reference to effect of decisions rendered by a bench of equal and larger strength, the decisions rendered by a 7-judge bench of the Hon'ble Supreme Court in *P. Ramachandra Rao v. State of Karnataka*³ as well as the decision of a 3-judge Bench of the Hon'ble Supreme Court in *Rattiram and Ors. V. State of Madhya Pradesh*⁴ throw light on the same.

11.Therefore, as regards the argument on admissibility of documents at Exhibit Nos. 56,57, and 110 qua the binding value of the decisions cited, it is clear that the decision rendered in *Anvar P.V.'s case* is binding and if that is so, then documents at Exhibit Nos. 56,57, and 110 are inadmissible in evidence as the judgment rendered in *Shafi Mohd.'s case* (supra) is *per incuriam* in view of the reference made by the Hon'ble Supreme Court to a larger Bench as mentioned above.

12.Upon reading the evidence of the Petitioner, the returned candidate and the evidence of the Returning Officer in relation to admissibility of documents at Exhibit No's. 56,57 and 110 and Section 65-B of the Indian Evidence Act,

³ 2002 (2) GLH 518

⁴ (2012) 4 SCC 516

1872, nothing substantial in the footage comes on record to show that result is liable to be interfered with or that any irregularity, or that the offence of corrupt practice is made out. Therefore also, the documents are in admissible to that extent.

ARGUMENTS ADVANCED ISSUE-WISE

13. ISSUE NO.1

1. *“Whether the petitioner proves that the procedure adopted for counting of votes for '58-Dholka Constituency' was against the orders of the Election Commission of India and was illegal?”*

- a. At the outset, if the the evidence on record is considered, the same is not proved.
- b. As regards counting of the postal ballots, Rule 54-A(1) to (10) of the Conduct of Election Rules, 1961 is of relevance here. The said rule clearly draws a distinction between postal ballot and vote, i.e. when a postal ballot culminates into a vote. A ballot only becomes a vote at Rule 54(7) which is when the the covers in Form 13-B not already dealt with till Rule 54(6) are opened one after another and therefore, in the present case, what is rejected is only 429 postal ballots NOT votes. The 429 ballots have not seen the light of day since the second cover has not been opened and one does not know in whose favour the said vote was cast since the said “vote” was not opened at all.

- c. The procedure adopted by the Returning Officer has not affected the result in any manner so as to set the result and election aside
- d. All 429 Postal ballots rejected were as per the law and directives of Election Commission. This has come on record in the deposition of RO (Ref: Question nos. 163, 164, 165, 171, 201, 240, 255, 262, 288-290 Exhibit 99).
- e. Counting of postal ballots started at 8.00 AM and counting of EVM votes started at 8.30 AM. This also has come on record from RO's evidence.
- f. At the time of declaration of results or prior thereto, no written complaint and/or any demand or objection came from the petitioner or his counting agent(s) regarding rejection of 429 postal ballots.
- g. It is submitted that even in Exhibit No. 10 i.e Written Statement of the Returning Officer, (Annexure-R-2) states that (Out of 429 postal ballots) in 79 ballots declaration Form no. 13A was not found. 339 ballots were found not bearing signature of either candidate, gazette officer or witness. 5 ballots were found defective, thus total 423 ballots were rejected prior to opening of Form no.13B. Rest 6 were also rejected in accordance with provisions of Conduct of Election rules. Signatures of counting agents were obtained. It is pertinent to note that this statement has not been

rebutted by the Petitioner in his rejoinder or at a belated stage.

- h. Assuming without admitting that certain procedure is not followed, then also lapses would not be a ground for setting aside election since no cogent, reliable or proper evidence has been led by the Petitioner that such lapses have materially affected the election. Further, lapses, if any even *stricto sensu*, cannot visit the election of the returned candidate adversely.

14. ISSUE NOS. 2,6 and 10

2. *“Whether the petitioner proves that 429 postal ballot papers were illegally rejected at the time of counting of votes ?”*

6. *“Whether the petitioner proves that the result of the election, in so far as it concerns the returned candidate (the respondent No.2) from ‘58-Dholka Constituency’ for the Gujarat State Legislative Assembly Elections, held on 14.12.2017, has been materially affected by improper refusal / rejection of the votes ?”*

10. *Whether the petitioner proves that the election of the returned candidate (the respondent No.2) from ‘58-Dholka Constituency’ for the Gujarat State Assembly Elections held on 14.12.2017, needs to be declared as void under Sec.100(1)(d)(iii) of the Representation of People Act, 1951 ?”*

- a. There is no evidence on record to prove the present issue
- b. The averments are absolutely vague and hypothetical regarding illegal rejection of 429 postal ballots since

the same are only based on presumption of popularity and mere conjectures and surmises.

- c. The question of onus of proof is on the Petitioner to prove illegal adjustment/improper rejection of votes. It is submitted that the Petitioner has not discharged this onus of wrongful rejection of votes and that result was materially affected.
- d. Any number of votes upto 326 votes will have no bearing on the result of the election since the victory margin is 327 votes.
- e. There is no way for the petitioner to figure out that the 429 votes were cast in a proper manner since the cover containing the vote has not been opened at all on account of faulty declaration in Cover- A. There is a mere presumption by the Petitioner that 429 postal ballots were wrongly rejected. Rule 54-A of the Conduct of Election Rules, 1961 clearly lays down adherence to Form 13-C
- f. The contention raised regarding commencement of counting of Postal Ballot first is baseless since it is proved that counting of Postal Ballot commenced at least half an hour prior to counting of EVM votes. Further, Rule 60 of the Conduct of Election Rules, 1961 states that the process of counting should be continuous.
- g. Further, if the evidence of PW-4 is perused, more particularly Question no.14, he states that the –

dispute about rejection of postal ballots is raised only because the petitioner lost elections, which fact exhibits that none of the witnesses of the petitioner including himself are aware about procedure of counting of postal ballots.

- h. Further, if the Handbook is seen, it is in the nature of guidelines/instructions which may be binding on the Returning Officer and may invite consequences for him but non-compliance thereof cannot be pressed into service to displace the returned candidate's election to say that election is void unless it is shown that the same is materially affected.
- i. There is no objection raised by the Petitioner and/or his agent(s) regarding this point and no objection was raised till the very end of the counting process. Raising such contention now is not a bar but it certainly establishes that 429 postal ballots were not wrongly rejected.
- j. From the deposition of the petitioner and/or his agents it is not proved that there is improper refusal / rejection of the votes since there is no assertion that they are wrongly rejected nor has the Petitioner produced any cogent, reliable or positive evidence.
- k. No written objection is raised so far as counting of votes is concerned and 429 Postal ballots are rightly rejected, and no question raised except for the first time here in this petition.

- l.* There is nothing on record, not even a sample survey to show that the decision taken by RO to reject 429 votes was to favour the returned candidate. It is obligatory upon the Petitioner to produce relevant and satisfactory evidence to show that the same was wrongly rejected.
- m.* The pleadings in the petition have been countered by the Respondent no. 2 in his Written Statement as well as by the Returning Officer in his Written Statement (Exhibit 10).
- n.* As per the Written Statement of the Returning Officer (exhibit 10), there was no declaration in Form 13A found in 79 ballot papers. No signature on declaration on 339 ballot papers. 5 votes found to be defective. Therefore, 423 out of 429 were rejected even prior to opening of cover in Form 13-B.
- o.* The assertion of the Petitioner that such votes were wrongly rejected is an afterthought since no objection/representation qua postal ballots was made at the relevant time.
- p.* There is nothing on record to show improper reception, refusal or rejection of votes or postal ballots.
- q.* It has come on record that the Petitioner was present in the counting hall. Still, no objection was raised by him despite remaining present.

- r. Assuming without admitting for the sake of argument that there may be irregularity regarding non-compliance to certain provisions of the Handbook , but even then the result of the election is not materially affected .
- s. Assuming without admitting that the CCTV and DVD footage are admissible, even then no case is made out to show that there was improper refusal or rejection of votes.
- t. Question nos. 201 to 203 of the evidence of the Returning Officer clearly explains the whole process of Form 13-C and rejection of postal ballots.
- u. The allegation of improper refusal/rejection is random and bald.

15.ISSUE NO. 3

“Whether the petitioner proves that objection was raised by the petitioner, or his election agent, regarding alleged illegal rejection of postal ballot papers and / or non-compliance of the orders of the Election Commission of India, at the time of counting of votes”

- a. There was no demand made for recounting of votes during the counting process AND till the time of declaration of results made by petitioner and/or his election/counting agent(s). There is no evidence even to show effort to seek re-count, much less an application.
- b. No document is produced on record to show that such objection was raised.

- c. Rule 63 of the Conduct of Election Rules, 1961 is a self-contained code that provides for mechanism and procedure for recount. Between the procedure envisaged under Rule 63(1) till Rule 63(6), there is ample opportunity accorded to any party to request for a recount/make an application for recount which was not done in the present case.

16. ISSUE NOS. 4 & 5.

“4. Whether the petitioner proves that there are discrepancies in the figures of total votes polled, as reflected in the final result sheet published by the Returning Officer, vis-a-vis the figures reflected in the Total Voters Turnout Report published by the District Election Officer ?”

“5. Whether the petitioner proves that there are discrepancies in the number of total votes shown to have been polled through EVMs at the polling stations, vis-a-vis the number of votes taken into consideration from those EVMs at the time of counting of votes ?”

- a. The figures from Turnout report are as under:

Total voters are counted as 1,59,918 in the list prepared by DEO whereas Total votes are 1,59,946 in the list prepared by the Returning Officer. An insignificant margin (28 votes) persists which has not materially affected the result of the elections. It could have been an arithmetical error and assuming without admitting that there are discrepancies, even

then the question of deciding validity of election does not turn on it.

- b. Mere discrepancy in preparing turnover sheet for total number of votes cast in a particular constituency cannot be termed to be corrupt practice.
- c. Therefore, this issue also stands as not proved.

17. ISSUE NOS. 7 AND 11

7. *“Whether the petitioner proves that the result of the election, in so far as it concerns the returned candidate (the respondent No.2) from ‘58-Dholka Constituency’ for the Gujarat State Legislative Assembly Elections, held on 14.12.2017, has been materially affected by non-compliance with the provisions of the Representation of the People Act, and / or Rules or Orders made under the said Act?”*

11. *“Whether the petitioner proves that the election of the returned candidate (the respondent No.2) from ‘58-Dholka Constituency’ for the Gujarat State Assembly Elections held on 14.12.2017, needs to be declared as void under Sec. 100(1)(d)(iv) of the Representation of People Act, 1951 ?”*

- a. Deviation/non-compliance has to be read as to its impact on the bearing on the case.
- b. If the evidence of the Returning Officer as recorded is taken into consideration, any non-compliance as alleged of the provisions of the Handbook has not materially affected the election process and result either under Sections 100(1)(d)(ii), 100(1)(d)(iii) or 100(1)(d)(iv) of the Act.

- c. Even if the preamble of the Handbook is taken into consideration, it merely states that the same is in the nature of guidelines and hence, the same does not have statutory character since the Election Commission of India anyway does not have the authority or power to frame rules or orders under the Act. Therefore, the question of non-compliance with the provisions of the Representation of the People Act, and / or Rules or Orders made under the said Act does not arise since the Handbook does not fall within the ambit of the Constitution, the Representation of People's Act, 1951 or rules /orders made under the Act, and there is no non-compliance of any statutory provision and the question of the result being materially affected does not arise on that count.
- d. It is further stated that even if there are certain irregularities at the hands of the Returning Officer qua the provisions of the Hand Book, say for instance, Para 15.15.5.1 which orders for mandatory re-verification in case the victory margin is less than the total number of postal ballots received, even then the result is not materially affected since the said provision will have to be read with Rule 63 of the Conduct of Election Rules, 1961 which lays down the entire procedure of recounting and by no stretch of imagination can it be said that

Paragraph 15.15.5.1 will have overriding effect over Rule 63 nor can Rule 63 be amended by Election Commission of India.

e. It is submitted that non-compliance of guidelines issued by ECI namely the Handbook cannot confer any right on the petitioner to question the election u/s. 100(1)(d)(iv) because –

- (i) It is not shown that the Handbook is statutory or that the Handbook is made under the Act but is in essence, only an internal guideline;
- (ii) The Handbook provisions are not constitutional or statutory requirements
- (iii) There is no violation of statutory rules. Hence, the Handbook is not even subordinate legislation. These are instructions given by the Election Commission. Therefore, if we read para-15.15.5.1 as part of Rule 63 of the Rules, it amounts to insertion of statutory provisions by an incompetent authority, namely the Election Commission of India. Merely because Para 15.15.5.1 says “mandatory” it does not become “mandatory” and non-compliance cannot be said to be proved. Any non-compliance by the Returning

Officer cannot be countenanced by the Election Commission of India.

- f.* Every procedural non-compliance cannot affect result or prejudice the result unless pleaded and proved. Non-compliance of Paragraph 15.15.5.1 is not a well taken ground under Section 100(1)(d)(iv)
- g.* The Petitioner has not been able to prove or make out a case that non re-verification of such votes has materially affected the result of the election.

18. ISSUE NOS. 8 AND 9 and 12

8. Whether the petitioner proves that any corrupt practice was committed under Section 123 of the Representation of the People Act, 1951 during the election of '58-Dholka Constituency' held in December 2017 ?

"9. Whether the petitioner proves that any corrupt practice was committed by the returned candidate (the respondent No.2) or his election agent or by any person with the consent of the respondent No.2 or his election agent during the election of '58 Dholka Constituency' held in December 2017 ?"

- a. Consent needs to be pleaded and proved as per S.99(2), 123(7), S.100(1)(b) and explanation to S. 123(8) and proviso to Section 123 of the Representation of People's Act, 1951

- b. Section 123(7) makes specific requirement of consent and Section 100(1)(d)(ii) also requires consent (by taking internal aid of sections 99, 100 and 123)
- c. No case of corrupt practice with consent of the returned candidate established through evidence. Only vague and general allegations of corrupt practice made out. Neither consent/agency qua the returned candidate is proved by the petitioner.
- d. The charge of corrupt practice is a criminal charge and like proving criminal conspiracy, where the condition precedent is “prior meeting of minds”, in corrupt practice, consent has to be pleaded and proved beyond reasonable doubt and the petitioner has to clearly make out a case stating the means, manner and mode of assistance procured so as to bring home the charge of corrupt practice.
- e. There is nothing on record to show who has helped for furthering the prospects of returned candidate and whose assistance has been sought which is a sine qua non under Section 123(7) of the Act.
- f. There is no consent coming on record and no agency is established as to who is the agent of the returned candidate which is a requirement under Section 99(2) read with the explanation to Section 123(8). In all of the evidence, even by implication there is nor suggestion about consent and agency.
- g. The issue framed is so broad and encompassing but even then, no iota of evidence is led by the petitioner

to arrive at any conclusion that corrupt practice was committed thereunder.

- h. Therefore no case of corrupt practice made out under Sections 100(1)(b), 123(7), 100(i)(d)(ii), 100(i)(d)(iii) and 100(1)(d)(iv) of the Representation of People Act, 1951.
- i. Case law relied on to substantiate arguments on corrupt practice and result materially affected:
 1. AIR 1954 SC 513- *Vashist Narain Sharma v. Dev Chandra & Ors.* (**Overruled on procedural aspect in AIR 1965 SC 699**)
 2. (1969) 3 SCC 238- *Samant N. Balkrishna v. George Fernandez & Ors.*
 3. (1986) (Supp) SCC 315- *Azhar Hussain v. Rajiv Gandhi*
 4. (2002) 1 SCC 160 *Santosh Yadav v. Narender Singh*
 5. (2001) 3 SCC 290 *Tek Chand v. Dale Ram*
 6. (2009) 1 SCC 633- *Baldev Singh Mann v. Surjit Singh Dhiman*
 7. (2010) 11 SCC 108- *Pradip Buragohain v. Pranati Phukan*

19. ISSUE NO. 13

13. “ Whether the Petitioner proves that he is entitled to be declared as duly elected candidate from ‘58-Dholakia Constituency’ for the Gujarat State Assembly Elections on 14.12.2017?

- a. On the basis of what is submitted herein-above issue-wise, the petitioner has not led positive, reliable and cogent evidence to prove any of the issues and

therefore, he is not entitled to be declared as duly elected candidate from '58-Dholakia Constituency' for the Gujarat State Assembly Elections on 14.12.2017.

**ARGUMENTS ADVANCED COMPARTMENT-
WISE/BROADLY**

20.The Petition pivots around two main issues:

- a. Corrupt Practice
- b. Difference between victory margin and rejection of postal ballots which has allegedly materially affected the result of the election

It is submitted that all the issues are interconnected and at the end, taking all the issues cumulatively, the petitioner has been unable to prove beyond reasonable doubt that corrupt practice has been committed by any person much less the returned candidate.

Further, it does not lie in the mouth of the Petitioner to say that the result is materially affected by such corrupt practice or owing to the victory margin being less than the postal ballots rejected only on the basis of conjectures, presumptions and surmises and the same has to be substantiated by positive, cogent, reliable evidence which must be proved beyond reasonable doubt, not by mere preponderance of probabilities. Merely because the victory margin is less than the total number of postal ballots rejected is

no conclusive proof that the result is materially affected.

Therefore, the petitioner has not proved that there has been any corrupt practice by or with the consent of the returned candidate by his election agent or any gazetted officer or any other person and/or that the result of the election has been materially affected.

EVIDENCE OF RETURNING OFFICER

21. It can be seen from the evidence of the Returning officer that he was being grilled by the advocate of the Petitioner from the very outset. Discrediting the witness is one thing, but grilling and browbeating a witness so as to demoralise him takes away the sacrosanctity of the proceedings itself. Irrelevant questions were posed to the witness only to demoralise him and then further grill him which makes the endeavour apparent. This, in essence, takes away the evidentiary value of any answer given by the witness since the witness has always been under a threat of intimidation. Even if there may be non-compliance on part of the Returning Officer, at best he can be admonished but the election cannot be set aside based on the answers given by him in his examination or based on the appreciation of evidence. If questions upto Question no. 123 are seen, they are in the nature of cross examination and even until Question 123, there was no answer which prompted the advocate for the petitioner to seek permission under Section 154 of the Indian Evidence Act, 1872. Therefore, the idea

to discredit the witness from the very outset is evident. The idea of a fair trial is vitiated by such acts.

22. Further, even if the evidence of the Returning officer is taken into account, no case is made out to set aside the election under Section 100 of the Representation of the People Act, 1951 since no assistance, no furthering of prospects and no case of corrupt practice or materially affected has been made out even upon re-reading of the evidence.

23. That the Returning Officer was not the petitioner's witness. He was sought to be cross examined by the Petitioner's counsel at/after Q. 123 (Exh. 99) under Section 154 of the Indian Evidence Act, 1872 and was granted permission accordingly, but if the evidence (Exh. 99) is seen, then it is clear beyond any reasonable doubt, that he was being cross examined right from the beginning. The tenor of the questions suggests that the witness – RO was cross examined right from the inception so as to demoralize the said witness and he was discredited at Question no. 123 only because the Petitioner could not get palatable answers.

24. That continuous efforts were made to intimidate the witness – Returning Officer and put him under pressure. Certain questions which were not relevant were asked in the cross and therefore the idea was apparent from the outset, i.e. to intimidate/ discredit and demoralize the witness. Such grilling and browbeating of witness takes away the evidentiary value of the answers given by him, since the witness was always put under threat/intimidation.

25. Assuming without admitting for the sake for argument, that there is breach of any of the conditions/instructions of Handbook by the RO, more particularly even if the phone was carried in the counting hall then also it has not materially affected the results and the same is only a speculative apprehension by the Petitioner which has not been substantiated by any positive, reliable and cogent evidence.

EVIDENCE OF PETITIONER

26. If the evidence of the Petitioner is taken into account, it clearly does not make out a/any case as alleged of either corrupt practice under the relevant provisions or that of result being materially affected so as to set the election aside. If the evidence is perused, words such as “anumaan” and “thoda mat” are all that he relies on. Further, as regards the CCTV footage, if that is taken into consideration, even then no ground is made to set the election aside since the Petitioner only bases his allegations and submissions on mere presumptions, conjectures and surmises.

ARGUMENTS CANVASSED ON THE ASPECT OF ASSUMING WITHOUT ADMITTING THAT THE DVD AND HARD DISK AT EXHIBITS 56,57 AND 110 ARE ADMISSIBLE IN EVIDENCE

27. Assuming without admitting that the electronic documents at Exhibits 56,57 and 110 are admissible in evidence, and if the relevant footage is seen, even then no ground for setting

aside the election is made out. The Election Petition, as summed up earlier, pivots on the grounds of corrupt practice and/or result being materially affected as a consequence of such corrupt practice or due to the victory margin being lesser than the number of postal ballots rejected.

28. As regards, corrupt practice, without leading positive, reliable and cogent evidence, the petitioner cannot allege that Mr. Mehta's presence is influencing the election process or that he is committing an overt act. There is no pleading to that effect in the petition or in the evidence of the petitioner.
29. Further, as far as the result being materially affected is concerned, even if the visual has its impact in the RO announcing total postal ballots as 1231 at one stage and the total count being 1356 in Form 20, even then what is the effect of this discrepancy? There is no effect on the result being materially affected so as to render the election void or have it set aside.
30. As regards use of mobile phone to speak with the returned candidate during the counting process, question relating to which were posed to the RO based on the CCTV footage, the same is only based on conjectures and surmises. There is not an iota of evidence to show that the RO was engaged in any conversation relating to the counting process or otherwise with the returned candidate. In keeping with the decision of the Hon'ble Apex Court in *Azhar Hussain v. Rajiv Gandhi (supra)*, the election petition has to clearly state all facts more particularly relating to corrupt practice and the Hon'ble Court in Para 14 has clearly laid down the manner in which such allegation and assertion should be

stated. Further, the RO in Question no. 57, has also agreed to share his Call Data Records or has agreed for them to be called.

31. The electronic evidence shows that there may have been certain non-compliance to the guidelines or the Handbook at best, but none of the contents therein show or exhibit any ingredients of corrupt practice namely agency, consent and how the agency came to be established as also no non-compliance on part of the RO can be said to have materially affected the result of the election as alleged by the petitioner.
32. Therefore, assuming that the electronic evidence is admissible (without admitting), even then no case as alleged is made out under Section 100, Section 100(1)(b), 100(1)(d)(ii), or Section 123 and other relevant provisions.

REPLY TO PETITIONER'S ARGUMENTS WITH REGARD TO BOOTH CAPTURING

33. The petitioner has neither pleaded nor proved the case of booth capturing within the meaning of Section 123(8) of the Representation of People's Act, 1951 and if the explanation to Section 135-A of the Act is seen, then also it is clear that the activities as mentioned therein only would constitute the offence of booth capturing which in the present case, the petitioner has not made out. Further, as per the provisions of Section 83 of the Act, the petitioner has to make a concise statement of material facts and particulars relating to booth capturing as well as the mode, manner and method and full particulars as to the commission of such offence. In absence

of any averment/pleading coupled with positive, reliable and cogent evidence, no case of booth capturing is made out in the present case.

CONCLUSION

In conclusion, as mentioned above, the case at hand revolves around two main pillars, namely, corrupt practice and wrongful rejection of 429 postal ballots which has materially affected the result of the election.

So far as the allegation of corrupt practice is concerned, the charge needs to be proved to the hilt i.e. beyond any reasonable doubt and the ingredients of consent and agency as mentioned under Section 99(2), 123(7) and explanation to Section 123(8) are all sine qua non or conditions precedent to make out a case of corrupt practice which has not been done and hence, no case of corrupt practice is made out in the present case as elucidated in the aforementioned submissions.

As regards the wrongful rejection of 429 postal ballots, relevant portions of the evidence on record has been relied on which assigns reasons for rejection of 429 postal ballots and against those reasons, no rebuttal is offered by the Petitioner, which fact establishes that the 429 postal ballots are rightly rejected. Merely saying that all the rejected votes, if opened, would be in favour of the Petitioner is only based on bald assertions, premises, surmises and conjectures since it is not backed by any material on record. Further, merely because the victory margin is lesser than

total number of postal ballots rejected, it cannot be said that the result is materially affected more particularly, in the absence of any positive, reliable and cogent evidence led by the Petitioner.

Therefore, no case, **on any count or on any issue** is made out so as to set aside the election of the returned candidate.

DATE : 10-02-2020 _____

//TRUE COPY//

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

I.A. NO. _____ OF 2020

IN

CIVIL APPEAL NO. _____ OF 2020

(UNDER STATUTORY APPEAL UNDER SECTION-116A OF
REPRESENTATION OF THE PEOPLES ACT,1951)

IN THE MATTER OF:

Bhupendrasinh Manubha Chudasama ...Appellant

VERSUS

Ashwin Kamsubhai Rathod & Ors. ...Respondents

**APPLICATION FOR EXEMPTION FROM FILING
CERTIFIED OF THE IMPUGNED ORDER**

TO,

THE HON'BLE CHIEF JUSTICE OF INDIA

AND HIS COMPANION JUSTICES OF

HON'BLE SUPREME COURT OF INDIA

THE HUMBLE PETITION OF THE
APPELLANT ABOVE NAMED:-

MOST RESPECTFULLY SHOWETH

1. The Appellant is filing the captioned statutory appeal under Section-116A of the Representation of the People Act, Article 136 of the Constitution of India challenging the final impugned final judgment and order dated 12th May 2020 passed by Hon'ble High Court of Gujarat at Ahmedabad in Election Petition No. 3 of 2018.

2. That the facts and circumstances giving rise to the present application are narrated in the accompanying petition for Civil Appeal and the same are not reiterated herein for the sake of brevity. The Appellant carves leave to this Hon'ble Court to refer to and rely upon the accompanying Civil Appeal at the time of hearing at the time of hearing of the present application.

3. That the Hon'ble High Court vide impugned order dated 12.05.2020 partly allowed Election Petition no. 3 of 2018 preferred by the Respondent no. 1, to the extent of holding Issues nos. 1, 2, 6, 7, 8, 9, 10, 11, 10 in affirmative and setting aside and declaring the election of '58-Dholka Constituency' void on the main 3 grounds of 1) 429 Postal ballots illegally excluded and thus has materially affected the results, 2) procedure adopted in counting the votes is against the guidelines/procedure set by the Election Commission of India which has also materially affected the results, 3) Corrupt practice is committed by the Appellant hand in glove with the Returning Officer and is proved. The Hon'ble High Court has been pleased to not grant the prayer made by the Appellant to declare him as elected. Further the Hon. High Court has been pleased to reject the request of the Appellant to stay the impugned order. Since the present Civil Appeal had to be filed urgently for seeking immediate interim relief from this Hon'ble Court with the ordinary copy of the impugned order dated 12.05.2020.

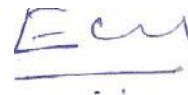
4. That the Appellant undertakes to file certified copy of the impugned order as soon as the same is made available to the Appellant. The Appellant prays for an order to exempt the Appellant from filing the certified copy of the impugned order dated 12.05.2020.

PRAYER

It is, therefore, most respectfully prayed that this Hon'ble Court may be pleased to:

- a) exempt the Appellant from filing certified copy of the impugned final judgment and order dated 12th May 2020 passed by Hon'ble High Court of Gujarat at Ahmedabad in Election Petition No. 3 of 2018; and/or
- b) Pass such other and further orders as may deem fit and proper in the facts and circumstance of the present case.

FILED BY:



(E.C. AGRAWALA)

ADVOCATE FOR THE APPELLANT

New Delhi

Filed on: 12.05.2020

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

I.A. NO. _____ OF 2020

IN

CIVIL APPEAL NO. _____ OF 2020

(UNDER STATUTORY APPEAL UNDER SECTION-116A OF
REPRESENTATION OF THE PEOPLES ACT, 1951)

IN THE MATTER OF:

Bhupendrasinh Manubha Chudasama ...Appellant

VERSUS

Ashwin Kamsubhai Rathod & Ors. ...Respondents

APPLICATION FOR AD-INTERIM EX-PARTE STAY

TO

HON'BLE THE CHIEF JUSTICE OF INDIA

AND HIS COMPANION JUDGES OF

THE SUPREME COURT OF INDIA

THE HUMBLE APPLICATION OF
THE APPELLANT ABOVE NAMED

MOST RESPECTFULLY SHOWETH THAT

1. That the Appellant has filed the captioned statutory appeal under Section-116A of the Representation of the People Act, Article 136 of the Constitution of India challenging the final impugned final judgment and order dated 12th May 2020 passed by Hon'ble High Court of Gujarat at Ahmedabad in Election Petition No.3 of 2018 partly allowing Election Petition No.3 of 2018 preferred by the Respondent No.1. The High Court by the impugned order has set aside and declaring the election of '58-

Dholka Constituency' void on the main 3 grounds of (a) 429 Postal ballots illegally excluded and thus has materially affected the results; (b) procedure adopted in counting the votes is against the guidelines/procedure set by the Election Commission of India which has also materially affected the results; and (c) Corrupt practice is committed by the Appellant hand in glove with the Returning Officer and is proved. The High Court further has rejected the request of the Appellant to stay the impugned order.

2. The Appellant prays that the averments made in the Civil Appeal may be read as part and parcel of this application and the Appellant craves leave of this Hon'ble Court to refer to and to rely upon the averments made in the Civil Appeal which has not been reproduced herein for the sake of brevity

3. That the impugned order is patently bad, illegal, contrary to law and in gross violation of the fundamental rights guaranteed to the appellant herein under the Constitution of India and is against the spirit of democracy enshrined under the Constitution of India where the election of a rightly elected candidate cannot be set aside lightly.

4. That the Respondent No.1 has not led positive, reliable and cogent evidence to prove any of the issues and therefore, he is not entitled to be declared as duly elected candidate from '58-Dholakia Constituency' for the Gujarat State Assembly Elections on 14.12.2017.

5. That no objection was raised by the Respondent No. 1 and/or his agents with regard to purported illegal rejection/exclusion of 429 postal ballot papers from consideration

by the Returning Officer at the time of counting votes in the election, till the very end of the counting process.

6. The Respondent No.1 (Election Petitioner) has been unable to prove beyond reasonable doubt that corrupt practice has been committed by any person much less the returned candidate. Further as regards corrupt practice, without leading positive, reliable and cogent evidence, the Respondent No.1 cannot allege that Mr. Mehta's presence is influencing the election process or that he is committing an overt act. There is no pleading to that effect in the petition or in the evidence of the Respondents.

7. That the Appellant has extraordinary, strong prima facie case. Balance of convenience heavily leans in favour of the Appellant as High Court has not appreciated. The Appellant will suffer irreparable loss which cannot be compensated in monetary terms if the interim relief as prayed for is not granted.

8. The present application is being made bonafide and in the interest of justice.

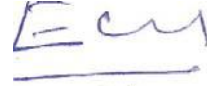
PRAYER

It is therefore most respectfully prayed that this Hon'ble Court may graciously be pleased to:

- a. Stay implementation and execution of the impugned final judgment and order dated 12th May 2020 passed by High Court of Gujarat at Ahmedabad in Election Petition No. 3 of 2018; and /or
- b. Pass such further and other order as this Hon'ble Court may deem fit and proper in the interest of justice.

FOR THIS ACT OF KINDNESS AND JUSTICE THE
APPELLANT AS IN DUTY BOUND SHALL EVER PRAY

FILED BY

A handwritten signature in blue ink, appearing to read 'E.C. Agrawala', is written over a horizontal line.

E.C. AGRĀWALA
ADVOCATE FOR THE APPELLANT

New Delhi
Filed on: 12.05.2020

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

I.A. NO. _____ OF 2020

IN

CIVIL APPEAL NO. _____ OF 2020

(UNDER STATUTORY APPEAL UNDER SECTION-116A OF
REPRESENTATION OF THE PEOPLES ACT, 1951)

IN THE MATTER OF:

Bhupendrasinh Manubha Chudasama ...Appellant

VERSUS

Ashwin Kamsubhai Rathod & Ors. ...Respondents

**APPLICATION FOR SEEKING EXEMPTION FROM
FILING NOTARIZED AFFIDAVITS AND
VAKALATNAMA**

TO

THE HON'BLE CHIEF JUSTICE OF INDIA

AND HIS HON'BLE COMPANION JUSTICES OF

THE SUPREME COURT OF INDIA

THE HUMBLE APPLICATION OF
THE APPELLANT ABOVENAMED.

MOST RESPECTFULLY SHOWETH:

1. That the Appellant has filed the captioned statutory appeal under Section-116A of the Representation of the People Act, Article 136 of the Constitution of India challenging the final impugned final judgment and order dated 12th May 2020 passed by Hon'ble High Court of Gujarat at Ahmedabad in Election Petition No.3 of 2018 partly

allowing Election Petition No.3 of 2018 preferred by the Respondent No.1. The High Court by the impugned order has set aside and declaring the election of '58-Dholka Constituency' void on the main 3 grounds of (a) 429 Postal ballots illegally excluded and thus has materially affected the results; (b) procedure adopted in counting the votes is against the guidelines/procedure set by the Election Commission of India which has also materially affected the results; and (c) Corrupt practice is committed by the Appellant hand in glove with the Returning Officer and is proved. The High Court further has rejected the request of the Appellant to stay the impugned order.

2. In light of the prevailing situation concerning the global pandemic COVID-19, the present appeal is being without any notarized affidavit or vakalatnama. The Appellant undertakes to file the same as soon as the court functioning resumes.
3. The present application is being filed bona fide and in the interest of justice.

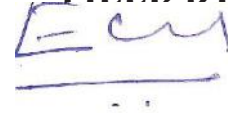
PRAYER

In the circumstances, it is therefore most respectfully prayed that this Hon'ble Court may graciously be pleased to:

- A. Allow the present application and exempt the Appellant from filing court fees, notarized affidavit or vakalatnama along with the present appeal for the time being;
- B. Pass any other order this Hon'ble Court may deem fit and necessary, in the interest of justice and good faith.

AND FOR THIS ACT OF KINDNESS, THE APPELLANT
SHALL DUTY BOUND PRAY.

FILED BY



**E.C. AGRAWALA
ADVOCATE FOR THE APPELLANT**

FILED ON: 12.05.2020
NEW DELHI