

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/ELECTION PETITION No. 3 of 2018

FOR APPROVAL AND SIGNATURE :

HONOURABLE Mr. JUSTICE PARESH UPADHYAY

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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

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ASHWINBHAI KAMSUBHAI RATHODPETITIONER

Versus

BHAILALBHAI KALUBHAI PANDAV,
BHUPENDRASINH MANUBHA CHUDASAMA
AND OTHERSRESPONDENTS

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Appearance :

MR P.C. KAVINA, SENIOR ADVOCATE with
MR S.P. MAJMUDAR, ADVOCATE for the PetitionerMR N.D. NANAVATI, SENIOR ADVOCATE with
MS TEJAL VASHI, ADVOCATE for the contesting Respondent No. 2MR MEHUL S. SHAH, SENIOR ADVOCATE with
MR JENIL M. SHAH, ADVOCATE for the Respondent No. 5MR 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

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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.

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.

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. Pursis (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.

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 Sarada 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).

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.

"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.

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."

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.

“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.

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).

“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

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 ?

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 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.

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 re-verification 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 unrebutted.

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 ?

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 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.

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 than 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.

"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.

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.)

