

(2002) 5 Supreme Court Cases 568 : 2002 SCC OnLine SC 589

(BEFORE M.B. SHAH, B.P. SINGH AND H.K. SEMA, JJ.)

Civil Appeals Nos. 2-3 of 2002

PRAKASH KHANDRE . . Appellant;

Versus

Dr. VIJAY KUMAR KHANDRE AND OTHERS . . Respondents.

With

Civil Appeal No. 1455 of 2002

BASWARAJ D. HONNA . . Appellant;

Versus

PRAKASH KHANDRE AND OTHERS . . Respondents.

Civil Appeals Nos. 2-3 of 2002[±] with No. 1455 of 2002, decided on May 9, 2002

A. Election — Election petition — Relief — Declaring the petitioner as elected — Multi-cornered contest — Where there are more than two candidates for one seat and the elected candidate subsequently found to be disqualified, the candidate who secured more votes than the remaining candidates cannot be declared as elected — Votes cast in favour of the disqualified candidate cannot be regarded as thrown away, nor can it be presumed that those votes would have been secured by the next candidate who secured more votes — It cannot be predicted as to in whose favour the voters would have voted if they were aware that the elected candidate was disqualified — Representation of the People Act, 1951, Ss. 101, 84 & 53

B. Election — Disqualification — Govt. contractor — Whether candidate's contract with Govt. was subsisting on the date of scrutiny of nomination — Held, is a question of fact to be determined from the evidence on record — On facts held, the candidate had terminated all contracts with the Govt. and the Govt. also accepted the same, issued no-dues certificate and cancelled his registration as a Class I contractor and therefore, the contract or any part thereof was not subsisting — Contract having been terminated, a stipulation therein requiring the contractor to perform any part of the contract found defective or not properly executed also not subsisting — After termination of the contract with the candidate, conferment of the contract on his brother, also a Class I contractor, would not indicate that his brother was acting as his benamidar — Merely because name of the candidate erroneously continued to be mentioned as contractor in the measurement book, that would be of no consequence — Non-compliance with departmental procedure in accepting termination of the contract and granting contract to another person, on facts, cannot be a ground to hold that the contract was subsisting — Representation of the People Act, 1951, Ss. 9-A & 100(1)(a) — Codal Rules, R. 167

The appellant, along with four other candidates including the respondent, contested election for a State Legislative Assembly seat from a constituency and



was declared elected. He polled 47,132 votes and his nearest rival, the respondent, polled 36,805 votes, the difference being of 10,327 votes. The other three candidates polled 660, 1054 and 177 votes respectively. The respondent challenged the election by filing an election petition and contending that he may be declared as duly elected to the Legislative Assembly on the ground that under Section 9-A of the RP Act the appellant was disqualified to contest the election as there were subsisting contracts entered into by him in the course of his business with the State Government. A voter also filed an election petition for a declaration that election of the appellant was void under Sections 100(1)(a) and 100(1)(d)(i) of the RP Act. The High Court allowed the writ petition and

declared the election of the appellant as void under Section 100(1)(a) on the ground that work of effective improvement and asphaltting of a road was continued to be carried out by the appellant even after the purported closure of contract. With regard to the rest of the contract works, the High Court held that the contracts were terminated. The Court also declared that the votes polled by the elected candidate would become wasted and therefore, the respondent who secured the next highest number of valid votes, be elected under Section 101 of the Act. Before the Supreme Court, the following two questions came up for determination:

(1) In an election petition under the RP Act when contest for election to the post of MLA is by more than two candidates for one seat and a candidate, who was disqualified to contest the election, is elected — whether the court can declare a candidate who has secured next higher votes as elected?

(2) Whether contract between the elected candidate and the Government was subsisting on the date of scrutiny of nomination papers?

Answering the questions in the negative and allowing the appeal of the elected candidate, the Supreme Court

Held :

(1) There are two ingredients of Section 101 which inter alia provide that after declaring election of the returned candidate to be void, the High Court may declare the petitioner or such other candidate to have been duly elected. The first ingredient for declaring the election petitioner or other candidate to have been duly elected depends upon error for various reasons in counting of valid votes and if it is found that in fact the petitioner or such other candidate received a majority of valid votes, he is to be declared elected. The second ingredient provides for establishing that the votes obtained by the returned candidate were obtained by corrupt practices and but for such votes the petitioner or such other candidate would have obtained a majority of valid votes.

(Paras 11 to 13)

However, in an election where the elected candidate is declared to be disqualified to contest election and there are more than two candidates contesting election, there is no specific provision under the Act under which the person who has secured the next highest number of votes could be declared as elected. The Act is silent on this point. Further, it cannot be presumed that the votes secured by the disqualified elected candidates would have been wasted or would have been secured by the next candidate who has secured more votes. If disqualified candidate was not permitted to contest the election then how the voters would have voted in favour of the candidate who has secured more votes than the other remaining candidates would be a question in the realm of speculation and



Page: 570

unpredictability. In such a situation, declaring the election of the returned candidate on the ground of his initial disqualification to contest the election by itself would not entitle the election petitioner or any other candidate to be declared elected.

(Para 14)

The impugned order passed by the High Court declaring the election petitioner as elected on the ground that the votes cast in favour of the elected candidate (appellant) are thrown away was totally erroneous and cannot be justified. Some general rule of election law prevailing in the United Kingdom that the votes cast in favour of a person who is found disqualified for election may be regarded as "thrown away" only if the voters had noticed before the poll the disqualification of the candidate, has no application in our country and has only merit of antiquity. The question of sending such notice to all voters appears alien to the Act and the Rules. But that question is not required to be dealt with in this matter. In the present case, for one seat, there were five candidates and it would be impossible to predict or guess in whose favour the voters would have voted if they were aware that the elected candidate was disqualified to contest election or if he was not permitted to contest the election by rejecting his nomination paper on the ground of disqualification to contest the election and what would have been the voting pattern.

(Para 24)

Konappa Rudrappa Nadgouda v. Vishwanath Reddy, (1969) 2 SCR 90 : AIR 1969 SC 604; *Thiru John v. Returning Officer*, (1977) 3 SCC 540 : (1977) 3 SCR 538; *Lata Devi (Mali) v. Haru Rajwar*, (1989) 4 SCC 773; *D.K. Sharma v. Ram Sharan Yadav*, 1993 Supp (2) SCC 117, *relied on*

Keshav Lakshman Borkar v. Dr Deorao Lakshman Anande, AIR 1960 SC 131 : (1960) 1 SCR 902; *R.M. Seshadri v. G. Vasantha Pai*, (1969) 1 SCC 27, *referred to*

(2) From the Objects and Reasons for substituting Section 7(d) by Section 9-A it is clear that an unduly strict view about the government contract in the present day is not required to be taken and the change became necessary in order to do away with the disqualification that attaches to a person for being chosen as or for being a Member of Parliament or State Legislature even after he has fully performed his part of the contract. Therefore, the amended Section 9-A uses the phrase that a person shall be disqualified "so long as there subsists a contract". The Explanation is added to Section 9-A to clarify that mere non-performance on the part of the Government, say non-payment of money would not be deemed to mean that the contract subsists even though the contract has been fully performed by such person.

(Paras 31, 61 and 33)

Ranjeet Singh v. Harmohinder Singh Pradhan, (1999) 4 SCC 517, *relied on*

Dewan Joyal Abedin v. Abdul Wazed, 1988 Supp SCC 580, *cited*

The question whether the contracts were subsisting or not is always a question of fact to be determined from the evidence on record.

(Para 52)

In the present case the letters written by the appellant to the Department for terminating the contracts and the action taken by the Department on the basis of the said letters as also the deposition of all the witnesses of the Department examined by the election petitioner, manifestly establish that the appellant terminated all his contracts with the State Government as he was to contest election and the same was accepted by the Department and the Chief Engineer issued "no-dues certificate" and also cancelled his registration as Class I contractor. Hence, contracts were brought to an end by the parties. The Department also permitted the remaining works to be carried out by the appellant's brother. Therefore, the finding given by the High Court that the work



Page: 571

of effective improvement and asphaltting of a road continued and the contract was subsisting is erroneous. There is no question of contract or any part thereof subsisting on the date of scrutiny of the nomination.

(Paras 35, 37, 51 and 60)

S. Munishamappa v. B. Venkatarayappa, (1981) 3 SCC 260; *Aslhing v. L.S. John*, (1984) 1 SCC 205, *relied on*

Konappa Rudrappa Nadgouda v. Vishwanath Reddy, AIR 1969 SC 447 : (1969) 1 SCR 395, *distinguished*

Chatturbhuj Vithaldas Jasani v. Moreshwar Parashram, AIR 1954 SC 236 : 1954 SCR 817, *referred to*

Presuming that according to the terms of the contract if some part of the contract work is found to be defective or is not properly executed and the contractor was bound to perform the same during a period of one year after completion of the contract, then also as contracts stood terminated, the said term of the contract of repairing for a period of one year of curing the defect would also not subsist.

(Para 60)

There is no substance in the submission that the contract work which was given to the brother of the appellant was, as a matter of fact, performed on behalf of the appellant by his brother and, therefore, the contract was subsisting on the date of scrutiny of the nomination paper. After termination of the contract, fresh contract was executed by the appellant's brother for carrying out remaining work. Because the person to whom the contract was given is the brother of the

contractor, it cannot be said that he was acting as a benamidar as he himself was a registered Class I contractor. Further, the question of benamidar or carrying out on behalf of the appellant might require some consideration under Section 7(d) as it stood prior to its amendment in 1958. But after substitution of Section 7(d) by Section 9-A, the essential ingredient of the section is that the contract for the execution of any works undertaken by the Government should be subsisting on the date of scrutiny of nomination.

(Para 61)

Similarly, subsequent payment by the Government for the work done which was payable at the time of termination of contract would not mean that contract between the parties was subsisting and Explanation to Section 9-A has made the position clear.

(Para 61)

The contractor's registration was cancelled. No-dues certificate was also given. Fresh contracts with the firm of the brother of the appellant, who himself was a Class I contractor, were executed. In these set of circumstances, it would be totally unreasonable and unjustifiable to refer to some errors committed by some officers as admitted by the witnesses, in mentioning the name of the appellant as contractor in the measurement book to arrive at the conclusion that contract between the appellant and the Government was subsisting.

(Para 62)

The election petitioner could not challenge the acceptance or termination of contract and grant of contract to the appellant's brother by the Department by resorting to certain departmental procedure prescribed for grant of contract to other contractor. In any case, not following the procedure prescribed under the Codal Rules would hardly be a ground for holding that the contract was subsisting. The Chief Engineer, North Zone has specifically stated that he had verified the Codal Rules and that he was competent to grant permission of transfer of work from one contractor to another under special circumstances and that similar procedure was adopted before general elections during 1994. Hence,



Page: 572

presuming that he has wrongly interpreted Codal Rule 167, then also it cannot be held that contract between the appellant and the State Government was subsisting. Therefore, further evidence led by the parties is not required to be dealt with or considered.

(Para 64)

It must, therefore, be held that there was no contract subsisting between the appellant and the State Government so as to apply the provisions of Section 9-A of the Act and to hold that the appellant was disqualified to contest the elections. The order passed by the High Court declaring the respondent as elected is, on the face of it, illegal.

(Para 65)

Vijaya Kumar Khandre (Dr) v. Prakash Khandre, AIR 2002 Karn 145, reversed

R-M/ATZ/25749/C

Advocates who appeared in this case:

Ashok Desai, Shanti Bhushan and K.N. Bhat, Senior Advocates (Ms Indu Malhotra, Vikram Mehta, Dheeraj Nair, Ms Madhu Sweta, Sanjay Pathak, Manish Jha, Manmohan, K. Rajeev, Vijay Kr. Majage, S. Sukumaran, Gangadhar Mayage, Ms Divya Nair, V.K. Sidharthan, Randhir Singh Jain, Sanjay R. Hegde, Satya Mitra, Shanth Kumar V. Mahale and Rajesh Mahale, Advocates, with them) for the appearing parties.

Chronological list of cases cited

on page(s)

1. (1999) 4 SCC 517, *Ranjeet Singh v. Harmohinder Singh Pradhan*

583d

-
2. 1993 Supp (2) SCC 117, *D.K. Sharma v. Ram Sharan Yadav* 579d-e
 3. (1989) 4 SCC 773, *Lata Devi (Mali) v. Haru Rajwar* 579b-c
 4. 1988 Supp SCC 580, *Dewan Joynal Abedin v. Abdul Wazed* 583e
 5. (1984) 1 SCC 205, *Aslhing v. L.S. John* 599e
 6. (1981) 3 SCC 260, *S. Munishamappa v. B. Venkatarayappa* 598d-e
 7. (1977) 3 SCC 540 : (1977) 3 SCR 538, *Thiru John v. Returning Officer* 578b
 8. (1969) 2 SCR 90 : AIR 1969 SC 604, *Konappa Rudrappa Nadgouda v. Vishwanath Reddy* 576d-e, 579b, 579d-e, 579f-g
 9. AIR 1969 SC 447 : (1969) 1 SCR 395, *Konappa Rudrappa Nadgouda v. Vishwanath Reddy* 600d-e
 10. (1969) 1 SCC 27, *R.M. Seshadri v. G. Vasantha Pai* 578e-f
 11. AIR 1960 SC 131 : (1960) 1 SCR 902, *Keshav Lakshman Borkar v. Dr Deorao Lakshman Anande* 576f-g
 12. AIR 1954 SC 236 : 1954 SCR 817, *Chatturbhuj Vithaldas Jasani v. Moreshwar Parashram* 600e-f

The Judgment of the Court was delivered by

M.B. SHAH, J.— In the background of facts briefly stated below, questions for determination in these appeals are—

1. In an election petition under the Representation of the People Act, 1951 (hereinafter referred to as "the Act"), when contest for election to the post of MLA is by more than two candidates for one seat and a candidate, who was disqualified to contest the election, is elected — whether the court can declare a candidate who has secured next higher votes as elected? and

2. Whether contract between the elected candidate and the Government was subsisting on the date of scrutiny of nomination papers?



2. Appellant Prakash Khandre contested election from 2, Bhalki Constituency of

Karnataka State Legislative Assembly and was declared elected. Respondent 1 Dr Vijay Kumar Khandre contested the said election but was defeated. The details of the votes secured by each candidate are as follows:

<i>Sl. No.</i>	<i>Name of the candidate</i>	<i>No. of votes polled</i>	<i>Difference</i>
1.	Shri Prakash Khandre	47,132	10,327
2.	Dr Vijay Kumar Khandre	36,805	
3.	Shri Bheemanna Kolle	660	
4.	Shri Shivaraj Patil	1054	
5.	Shri Siddaramaiah S. Swamy	177	

3. Respondent 1 challenged the said election by filing Election Petition No. 25 of 1999 and contended that declaration of election dated 5-9-1999 resulting in favour of the appellant was illegal and void. He prayed that he may be declared as duly elected to Karnataka State Legislative Assembly on the ground that under Section 9-A of the Act, the appellant was disqualified to contest the election as there were subsisting contracts entered into by him in the course of his business with the State Government.

4. Further, a voter Mr Baswaraj D. Honna — appellant in CA No. 1455 of 2002 also filed Election Petition No. 30 of 1999 for a declaration that election of Mr Prakash Khandre was void under Section 100(1)(a) and Section 100(1)(d)(i) of the Act.

5. The appellant also filed recrimination petition under Section 97 of the Act praying that in the event of his election to the constituency being declared void, Respondent 1 Dr Vijay Kumar Khandre should not be declared as elected as he is guilty of corrupt practices as specified in Section 123 of the Act.

6. The High Court of Karnataka at Bangalore (Mr Justice A.V. Srinivasa Reddy) by its judgment and order dated 21-12-2001 allowed the election petition filed by Respondent 1 and the election of the appellant was declared void under Section 100 (1)(a) on the ground that work of effective improvement and asphaltting of Halburga-Bawgi-Kamtana Road was continued to be carried out by Prakash Khandre even after purported closure of contract. With regard to the rest of the contract works, the High Court held that the contracts were terminated. The Court also declared that the votes polled by the elected candidate would become wasted and, therefore, Dr Vijay Kumar Khandre who has secured the next highest number of valid votes has to be declared elected under Section 101 of the Act and was declared accordingly. That order is challenged by Prakash Khandre by filing Civil Appeals Nos. 2-3 of 2002. Civil Appeal No. 1455 of 2002 is filed by Baswaraj D. Honna.

7. At the time of admission of this matter, by order dated 18-1-2002, the Court granted interim relief as under:

“Appeals admitted.



The impugned judgment is stayed thereby entitling the appellant only to attend the assembly sessions and sign the register but he will neither participate in the proceedings nor vote nor draw remuneration in his capacity as Member of the Legislative Assembly till the disposal of the appeals. Any further documents to be filed by either party be filed within four weeks from today.

These appeals may be listed for final disposal in the second week of March 2002. On the other respondents, dasti notice is permitted.”

Re: Question 1

8. At the time of hearing of these appeals, learned Senior Counsel Mr Ashok Desai submitted that the order passed by the High Court declaring election petitioner Dr Vijay Kumar Khandre as elected is, on the face of it, illegal and erroneous as election was contested by 5 candidates and in support of his submission, he referred to various decisions rendered by this Court. As against this, Mr K.N. Bhat, learned Senior Counsel for Respondent 1 submitted that the High Court rightly declared Dr Vijay Kumar Khandre as elected and the decision of the High Court is based on the provisions of Section 101 of the Act.

9. For appreciating the aforesaid submissions, we would first refer to the relevant provisions of the Act, namely, Sections 53, 84 and 101 of the Act which are as under:

“53. *Procedure in contested and uncontested elections.*—(1) If the number of contesting candidates is more than the number of seats to be filled, a poll shall be taken.

(2) *If the number of such candidates is equal to the number of seats to be filled, the Returning Officer shall forthwith declare all such candidates to be duly elected to fill those seats.*

(3) If the number of such candidates is less than the number of seats to be filled, the Returning Officer shall forthwith declare all such candidates to be elected and the Election Commission shall, by notification in the Official Gazette call upon the constituency or the elected members or the members of the State Legislative Assembly or the members of the electoral college concerned as the case may be, to elect a person or persons to fill the remaining seat or seats:

Provided that where the constituency or the elected members or the members of the State Legislative Assembly or the members of the electoral college having already been called upon under this sub-section, has or have failed to elect a person or the requisite number of persons, as the case may be, to fill the vacancy or vacancies, the Election Commission shall not be bound to call again upon the constituency, or such members to elect a person or persons until it is satisfied that if called upon again, there will be no such failure on the part of the constituency of such members.

* * *

84. *Relief that may be claimed by the petitioner.*—A petitioner may, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claim a further declaration that he himself or any other candidate has been duly elected.



* * *

101. *Grounds for which a candidate other than the returned candidate may be declared to have been elected.*—If any person who has lodged a petition has, in addition to calling in question the election of the returned candidate, claimed a declaration that he himself or any other candidate has been duly elected and the High Court is of opinion—

(a) that in fact the petitioner or such other candidate received a majority of the valid votes; or

(b) that but for the votes obtained by the returned candidate by corrupt

practices the petitioner or such other candidate would have obtained a majority of the valid votes,

the High Court shall after declaring the election of the returned candidate to be void declare the petitioner or such other candidate, as the case may be, to have been duly elected.”

10. From a reading of sub-section (2) of Section 53, it is clear that if the number of candidates is equal to the number of seats to be filled, the Returning Officer has to declare all such candidates to be duly elected to fill those seats, meaning thereby it would be an uncontested election. Further, if the number of contesting candidates is more than the number of seats to be filled, a poll is required to be taken. Finally, after taking poll, if one candidate is declared elected and there are only two candidates who contested for the election, and if it is found that the elected candidate was disqualified for one or the other reason for being declared to be elected then his election would be set aside and the unsuccessful candidate, if otherwise eligible, could be declared as elected and that relief could be granted in view of Section 53 read with Section 84 of the Act.

11. However, the question which requires consideration is — if there are more than two candidates for one seat and the elected candidate is subsequently found to be disqualified, whether the candidate who has secured more votes than the remaining candidates should be declared as elected or not. For this, we would consider the ingredients of Section 101 which *inter alia* provide that after declaring election of the returned candidate to be void, the High Court may declare the petitioner or such other candidate to have been duly elected if—

(a) in fact the petitioner or such other candidate received a majority of valid votes; or

(b) but for the votes obtained by the returned candidate by corrupt practices, the petitioner or such other candidate would have obtained a majority of the valid votes.

12. Therefore, the first ingredient for declaring the election petitioner or other candidate to have been duly elected depends upon error for various reasons in counting of valid votes and if it is found that in fact the petitioner or such other candidate received a majority of valid votes, he is to be declared elected.

13. The second ingredient provides for establishing that the votes obtained by the returned candidate were obtained by corrupt practices and



but for such votes the petitioner or such other candidate would have obtained a majority of valid votes. Say as in the present case, the difference between the elected candidate and the election petitioner is of 10,327 votes and if it is established that the elected candidate obtained more than 10,327 votes by corrupt practices then the petitioner or such other candidate who has obtained majority of valid votes could be declared as elected.

14. However, in an election where the elected candidate is declared to be disqualified to contest election and there are more than two candidates contesting election, there is no specific provision under the Act under which the person who has secured the next highest number of votes could be declared as elected. The Act is silent on this point. Further, it cannot be presumed that the votes secured by the disqualified elected candidates would have been wasted or would have been secured by the next candidate who has secured more votes. If disqualified candidate was not

permitted to contest the election then how the voters would have voted in favour of the candidate who has secured more votes than the other remaining candidates would be a question in the realm of speculation and unpredictability. In such a situation, declaring the election of the returned candidate on the ground of his initial disqualification to contest the election by itself would not entitle the election petitioner or any other candidate to be declared elected.

15. The learned counsel for the parties referred to various decisions rendered by this Court and we would refer to them in chronological order. The Constitution Bench of this Court in *Konappa Rudrappa Nadgouda v. Vishwanath Reddy*¹ dealt with the case where one Vishwanath Reddy was declared elected to Mysore Legislative Assembly and that election was challenged by Nadgouda who was a contesting candidate on the ground that Reddy was disqualified from standing as a candidate for election. This Court by order dated 19-7-1968 held that election of Reddy was void and that votes cast in his favour be treated as thrown away. The Court held "as there was no other contesting candidate, we declare the appellant (election petitioner) as elected to the seat from Yadgiri Constituency". That order was challenged by filing a review application which was granted and question whether it was open to the Court on finding recorded about disqualification of Reddy to declare Nadgouda as duly elected to Mysore Legislative Assembly was dealt with and decided. The Court referred to an earlier decision in *Keshav Lakshman Borkar v. Dr Deorao Lakshman Anand*² wherein it was held that a candidate whose nomination paper is accepted after scrutiny, is a validly nominated candidate "at least for the purpose of receiving votes at the election", and that the candidate must be treated as a person for whom votes could be given. The Court on that view held that where there are only two candidates for a seat and the election of the candidate declared elected is set aside on the ground that he was disqualified, the defeated candidate cannot be declared elected, and there must be a fresh election. In the opinion of the



Court the votes cast in favour of the disqualified candidate cannot be said to be thrown away unless there is a "special pleading" that certain voters had cast their votes with the knowledge or notice that the candidate for whom they had voted was not eligible for election, and they had deliberately thrown away their votes in favour of the disqualified person; in the absence of such a plea it cannot be said that the votes cast in favour of a person who was by law disqualified from being nominated, but who was in fact nominated, were thrown away. In the opinion of the Court, a defeated candidate out of the two who contested the election may be declared elected under Section 84 read with Section 101 of the Act, if he proves that the voters had notice of the disqualification of the successful candidate.

16. The correctness of the said view was challenged before the Constitution Bench. The Court considered various English decisions cited at the Bar and observed that the cases decided by the courts in the United Kingdom appear to have proceeded upon some general rule of election law that the votes cast in favour of a person who is found disqualified for election may be regarded as thrown away only if the voters had notice before the poll of the disqualification of the candidate. Thereafter, the Court pertinently observed *but in our judgment the rule which has prevailed in the British courts for a long time has no application in our country. The rule enunciated in U.K. has only the merit of antiquity*; the rule cannot be extended to the trial of disputes under our election law, for it is not consistent with our statute law, and in any case the conditions prevailing in our country do not justify the application of that rule. The

Court also considered Section 53 of the Act and held that it renders a poll necessary only if there are more candidates contesting the election than the number of seats contested and if the number of candidates validly nominated is equal to the seats to be filled, no poll is necessary and where by an erroneous order of the Returning Officer poll is held which, but for that order, was not necessary, the court would be justified in declaring those contesting candidates elected, who, but for the order, would have been declared elected.

17. Thereafter, the Court observed thus: (AIR p. 608, para 12)

“When there are only two contesting candidates, and one of them is under a statutory disqualification, votes cast in favour of the disqualified candidate may be regarded as thrown away, irrespective of whether the voters who voted for him were aware of the disqualification. This is not to say that where there are more than two candidates in the field for a single seat, and one alone is disqualified, on proof of disqualification all the votes cast in his favour will be discarded and the candidate securing the next highest number of votes will be declared elected. In such a case, question of notice to the voters may assume significance, for the voters may not, if aware of the disqualification have voted for the disqualified candidate.”

18. The Court also considered Section 101 and held as under: (AIR pp. 608-09, para 13)



“The votes obtained by corrupt practice by the returned candidate, proved to be guilty of corrupt practice, are expressly excluded in the computation of total votes for ascertaining whether a majority of votes had been obtained by the defeated candidate and no fresh poll is necessary. The same rule should, in our judgment, apply when at an election there are only two candidates and the returned candidate is found to be under a statutory disqualification existing at the date of the filing of the nomination paper.”

19. In *Thiru John v. Returning Officer*³ the Court dealt with the biennial election to the Rajya Sabha from the State of Tamil Nadu where the voting pattern is single transferable vote wherein the elected candidate Shri John was found by the Court to be statutorily disqualified for election. The Court considered the question whether the votes secured by such candidate be regarded as “thrown away” and in consequence the next candidate be declared elected. In that context the Court observed: (SCC p. 555, para 55)

“55. Again, the answer to this question, in our opinion, must be in the negative. It is nobody's case that the electors who voted for Shri John, had at the time of election, knowledge or notice of the statutory disqualification of this candidate. On the contrary, they must have been under the impression that Shri John was a candidate whose nomination had been validly accepted by the Returning Officer. Had the electors notice of Shri John's disqualification, how many of them would have voted for him and how many for the other continuing candidates, including Sarvshri Subrahmanyam and Mohana Rangam, and in what preferential order, remains a question in the realm of speculation and unpredictability.”

20. The Court also referred to the following observations made by Hidayatullah, C.J. speaking for the Court in *R.M. Seshadri v. G. Vasantha Pai*⁴ rejecting similar contention: (SCC p. 37)

“This (question) will depend on our reaching the conclusion that but for the fact that voters were brought through this corrupt practice to the polling booths, the result of the election had been materially affected. In a single transferable vote, it is very difficult to say how the voting would have gone, because if all the votes which Seshadri had got, had gone to one of the other candidates who got eliminated at the earlier counts, those candidates would have won. We cannot order a re-count because those voters were not free from complicity. It would be speculating to decide how many of the voters were brought to the polling booths in car. We think that we are not in a position to declare Vasantha Pai as elected, because that would be merely a guess or surmise as to the nature of the voting which would have taken place if this corrupt practice had not been perpetrated.”



And, thereafter the Court held as under: (SCC pp. 555-56, para 58)

“58. The position in the instant case is no better. It is extremely difficult, if not impossible, to predicate what the voting pattern would have been if the electors knew at the time of election, that Shri John was not qualified to contest the election. In any case, Shri Subrahmanyam was neither the sole continuing candidate, nor had he secured the requisite quota of votes. He cannot, therefore, be declared elected.”

21. The Court also considered the dictum in the case of *Vishwanath*¹ and observed that the ratio decidendi of the said case is applicable only where (a) there are two contesting candidates and one of them is disqualified; and (b) the election is on the basis of single non-transferable vote.

22. Again in *Lata Devi (Mali) v. Haru Rajwar*⁵ this Court dealt with the same question and observed as under: (SCC p. 780, para 16)

“It is to be noted that in an election petition what is called in question is the election and what is claimed is that the election of all or any of the returned candidates is void, with or without a further declaration that the election petitioner himself or any other candidate had been duly elected. Declaring the election of the returned candidate void does not, by itself, entitle the election petitioner or any other candidate to be declared elected.”

23. Learned counsel for the appellant lastly referred to the decision in *D.K. Sharma v. Ram Sharan Yadav*⁶. In that case, the High Court referred to the decision in *Konappa Rudrappa Nadgouda*¹ and held that on the basis of the oral evidence, it was not possible to hold that the voters who cast their votes in favour of the elected candidate did so after having noticed about the disqualification and knowing that their votes would be wasted and therefore, the second prayer of the election petitioner to declare him as duly elected after throwing away the votes of the elected candidate, was not allowed. This Court did not find any infirmity in the said reasoning and, therefore, dismissed the appeal.

24. In view of the aforesaid settled legal position, in our view, the impugned order passed by the High Court declaring the election petitioner as elected on the ground that the votes cast in favour of the elected candidate (appellant) are thrown away was *totally erroneous and cannot be justified*. As held by the Constitution Bench in *Konappa case*¹ that some general rule of election law prevailing in the United Kingdom that the votes cast in favour of a person who is found disqualified for election may be

regarded as "thrown away" only if the voters had noticed before the poll the disqualification of the candidate, has no application in our country and has only merit of antiquity. We would observe that the question of sending such notice to all voters appears to us alien to the Act and the Rules. But that question is not required to be dealt with in this matter. As stated earlier, in the present case, for one seat, there were five candidates and it would be impossible to predict or guess



in whose favour the voters would have voted if they were aware that the elected candidate was disqualified to contest election or if he was not permitted to contest the election by rejecting his nomination paper on the ground of disqualification to contest the election and what would have been the voting pattern. Therefore, order passed by the High Court declaring the election petitioner Dr Vijay Kumar Khandre as elected requires to be set aside.

Re: Question 2

Whether contract between the Government and the appellant was subsisting on the date of scrutiny of nomination papers

Finding given by the High Court

25. On this question, we would first refer to the finding given by the High Court. The learned Judge held that out of seven contracts between the appellant and the State Government, six contracts were terminated. But from the evidence on record, he held that the work of effective improvement and asphaltting of Halburga-Bawgi-Kamtana Road was continued to be carried out by Prakash Khandre even after the purported closure of contract, that is, subsequent to the writing of the letters and, therefore, as a matter of fact there was subsistence of contract between him and PWD. For this purpose, the learned Judge relied upon Ext. 118 wherein the name of the contractor appeared to be Mr Prakash Khandre and the likely date of completion was shown as December 1999. He has also placed reliance upon Ext. 105 which is a measurement book pertaining to Halburga-Bawgi works and held that if these works were carried out by Mallikarjun Khandre after 1-9-1999, the entries under various columns could not have borne the details of the contract as entered into by Prakash Khandre and the name of the contractor would also have been mentioned as Mallikarjun Khandre. He held that except letters and agreements Exts. 71 and 72, there was nothing on record to show that the Department closed the contract of Mr Prakash Khandre. He further referred to the evidence of Mallikarjun Khandre and held that earnest money deposit was not given by him to the authority. He, therefore, held that the Department as well as Mallikarjun Khandre did not actually treat the work allotted to Mallikarjun Khandre as a fresh contract and there appeared to be mere substitution of Mallikarjun Khandre in place of Prakash Khandre. With regard to the rest of the contract works, he arrived at the conclusion that the contracts were not subsisting. He finally arrived at the conclusion that election of Mr Prakash Khandre was void under Section 100(1)(a) of the Act as he was disqualified under Section 9-A of the Act on the date of scrutiny of nomination papers, on the date of election and on the date of declaration of result and it was declared as such on that count.

Submissions

26. Learned Senior Counsel Mr Ashok Desai for the appellant submitted that once the contract is terminated by writing various letters by the appellant and when such termination is accepted by the Department, it inevitably means that contract does not subsist. Further, the moment registration of the contractor is cancelled and no-dues

certificate is issued, it would mean that



Page: 581

contracts were terminated. The Government cancelled registration of Prakash Khandre as Class I contractor on 16-8-1999 and issued no-dues certificate. It is his submission that the appellant has unequivocally terminated the contracts and that is accepted by all witnesses from the Public Works Department examined by the election petitioner. Therefore, there was no reason for the learned Judge to hold that Halburga-Bawgi contract works continued. It is his submission that prior to termination of the contract, 95% of the work was over and 5% of the work remained to be completed but the appellant was required to terminate the contract as elections for the Legislative Assembly were preponed. For this purpose, he referred to the cost of the actual contract work as per the tender, which was for a sum of Rs 3,21,97,034. He pointed out that out of that, he has completed the work of Rs 2,90,42,705. For the work done by him prior to termination of the contract, he had received Rs 2,31,52,778 and had recovered remaining amount by instalments in the months of September/October/November and December, but that does not mean that the appellant has carried out further contract work. He pointed out that whatever amount he had received after termination of the contract was for the work done by him prior to termination of the contract.

27. Learned Senior Counsel Mr Shanti Bhushan appearing for the election petitioner submitted that the finding of the High Court that the contracts between the appellant and the State Government were subsisting is based upon appreciation of evidence and the said appreciation cannot be said to be in any way erroneous. It is his contention that contracts were not terminated and the appellant continued the contract work through his brother as benamidar. He submitted that from the evidence on record, it is proved that the contracts were subsisting. It is his further contention that mere cancellation of registration would not be sufficient to arrive at the conclusion that contract was terminated. He heavily relied upon certain exhibits and submitted that there was tampering of evidence by the Department in favour of the appellant. It is his say that transfer of work in favour of Mallikarjun Khandre was as such benami.

Statutory provision

28. Before dealing with the facts, we would refer to relevant statutory provision. Under the Act, disqualification on the ground of subsistence of contract was first provided under Section 7(d) which reads as under—

“7. A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State—

* * *

(d) if, whether by himself or by any person or body of persons in trust for him or for his benefit or on his account, he has any share of interest in a contract for the supply of goods to, or for the execution of any works or the performance of any services undertaken by, the appropriate Government;”

(emphasis supplied)



Page: 582

Thereafter it was amended by Act 58 of 1958 which read thus—

“7. A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State—

* * *

(d) if there subsists a contract entered into in the course of his trade or business by him with the appropriate Government for the supply of goods to, or for the execution of any works undertaken by, that Government;”

(emphasis supplied)

29. The aforesaid section was replaced by Section 9-A by Act 47 of 1966 which came into force from 14-12-1966. It reads thus:

“9-A. *Disqualification for government contracts, etc.*—A person shall be disqualified if, and for so long as, there subsists a contract entered into by him in the course of his trade or business with the appropriate Government for the supply of goods to, or for the execution of any works undertaken by, that Government.

Explanation.—For the purposes of this section, where a contract has been fully performed by the person by whom it has been entered into with the appropriate Government, the contract shall be deemed not to subsist by reason only of the fact that the Government has not performed its part of the contract either wholly or in part.”

30. The objects and reasons for substituting Section 7(d) by Section 9-A are as under:

“Apart from the grouping of the sections effected by clause 20, some changes have also been made in the relevant provisions. In the new Section 9-A, an Explanation has been added to make it clear that a contract with the Government shall be deemed not to subsist by reason only of the fact that the Government has not performed its part of the contract either wholly or in part. *This change has become necessary in order to do away with the disqualification that attaches to a person for being chosen as or for being a Member of Parliament or State Legislature even after he has fully performed his part of the contract, since it would hardly be justifiable to retain such a disqualification provision in a modern welfare State when State activities extend almost over every domain of the citizen's affairs where very many persons, in one way or the other, have contractual relationship with the Government. That being the case, an unduly strict view about government contract in the present day might lead to the disqualification of a large number of citizens many of whom may prove to be able and capable Members of Parliament or State Legislatures. It would be of interest to note in this connection that in the United Kingdom, any disqualification arising out of any contract with the Crown has been done away with by the House of Commons Disqualifications Act, 1957.*”

(emphasis supplied)

31. From the aforequoted objects and reasons of substituting Section 9-A, it is clear that an unduly strict view about the government contract in the present day is not required to be taken and the change became necessary in order to do away with the disqualification that attaches to a person for being chosen as or for being a Member of Parliament or State Legislature even after he has fully performed his part of the contract.

32. Further, initially Section 7(d) was very wide. A person having any share or interest in contract or such person having interest by any person in trust for him or for his benefit or on his own account was disqualified to contest election. This disqualification was narrowed down in 1958. Thereafter in 1966, Section 9-A was substituted, which provides that the person shall be disqualified—

(a) if and for so long as there subsists a contract by him in course of his trade or business;

(b) for the supply of goods to; or

(c) for the execution of any work undertaken by him.

33. The Explanation further provides that where the contract has been fully performed by the person by whom it has been entered into the contract shall be deemed not to subsist by reason only of the fact that the Government has not performed its part of the contract either wholly or in part. This Explanation is added to clarify that mere non-performance on the part of the Government, say non-payment of money would not be deemed to mean that the contract subsists even though the contract has been fully performed by such person.

34. In *Ranjeet Singh v. Harmohinder Singh Pradhan*⁷ this Court (in SCC pp. 520-21, para 7) observed thus:

“7. Section 9-A is a statutory provision which imposes a disqualification on a citizen. *It would, therefore, be unreasonable to take a general or broad view, ignoring the essentials of the section and the intention of the legislature. Purposive interpretation is necessary.* In *Dewan Joynal Abedin v. Abdul Wazed*⁸ Section 9-A of the Act has been correctly interpreted in the following words: (SCC pp. 589 & 591, paras 16 & 17)

‘An analysis of Section 9-A of the Act shows that only in two cases a person would be disqualified if he has entered into a contract with the appropriate Government in the course of his trade or business which is subsisting on the date of scrutiny of nomination. They are (i) when the contract is one for supply of goods to the appropriate Government and (ii) where the contract is for the execution of any works undertaken by that Government.’ ”

Correspondence for termination of contract

35. In the light of the aforesaid statutory provision, to find out whether contract was subsisting on the date of filing of nomination, we would first refer to the letters written by the appellant to the Department for terminating the contracts and the action taken by the Department on the basis of the said letters:



Copy of letter dated 4-8-1999 (Ext. R-5)

“To,

The Executive Engineer,

PWD, Bidar Division,

Bidar.

Sir,

Sub: Regarding finalisation of works and issue of no-dues certificate and cancellation of my registration (licence).

I am contesting for the forthcoming assembly election. Hence I request you kindly to finalise the works which are entrusted to me in your Department even if the works are incomplete, as per rules. I also request you to issue me the no-dues certificate and cancel my registration of contractorship. Further I write to state that I am also a managing partner of M/s C. Saraswathi & Sons, Engineer and Contractor, Bhalki. So now I want to retire from the partnership which may kindly be accepted.

Early action in the matter is requested and issue me the no-dues certificate immediately.

Thanking you sir,

Yours faithfully,
sd/-
(Prakash Khandre)"

Copy of letter dated 6-8-1999 (Ext. P-55)

"To,
Chief Engineer,
Communication and Buildings,
Government of Karnataka,
Bangalore.
Sir,

Sub: Termination of contract with the Government in respect of various works which will be set out hereinbelow.

I am a Class I contractor of the Government of Karnataka. I intend to contest the ensuing election for the Legislative Assembly. Hence I pray as hereunder:

1. As a contractor I have been entrusted the various works mentioned hereinbelow:

(a) Improvements and asphaltting of Halburga-Bawgi-Kamtana in Bidar district — completed 95% of the work. Balance 5% work not completed due to EIRL not approved by the Department.

(b) Improvement and asphaltting of Dhanurapati to Chandapur km 0/0-5/6 — completed 30% of the work. Due to rains the work is stopped.

(c) Improvement and asphaltting of Mahagoan to Shulepeth — work started in the month of April 1999 — 25% of the work is completed, due to rains the work is stopped.



(d) In km 76 RBC Canal lining in KPCC Division, Bhalki — construction of the work not started. Due to rains the work is not started, due to election coming, I am not ready to start the work.

(e) Bijapur to Athani work completed. Final bill to be submitted by the Department.

(f) Sholapur-Chitradurga NS 13 km 237/0-256/0 work completed but final bill to be submitted by the Department.

(g) In Bijapur NH Division, the PR work on Sholapur-Chitradurga Road in km 32/0-97/0 184/0-183/0 and km 217/0-227/0 — work order received, tender agreement also completed — work to be done after rainy season.

In respect of the works referred to above, I have completed the work substantially. In view of the rainy season and incessant rains in Bidar district, the aforesaid work could not progress so as to complete the work before August 1999. I humbly state that I undertook the various works referred to above with an intention to complete them by end of November 1999. As pointed out by me earlier, I intended to contest the ensuing election for the assembly elections. In view of the preponement of the election and for reasons beyond my control, I could not complete the aforesaid work.

2. As you may be aware the Election Commission of India has issued the calendar of events. The last date for submitting the nomination is 18-8-1999. For reasons beyond my control, I would not complete those works and I will not be in a position to complete the aforesaid work on or before 18-8-1999. Right to contest the election is my fundamental right. I want to exercise that fundamental right by contesting the ensuing assembly election. In view of Section 9-A of the Representation of the People Act, 1951, the existing contract between me and the Government is causing me undue hardship and is coming in the way of my contesting the ensuing assembly election. Having regard to various facts and circumstances, I have decided to request you to terminate all the existing contracts subsisting between me and the Government forthwith. Further, I request you to cancel my registration as Class I contractor with the Department thereby putting an end to any sort of subsisting contractual relationship between me and the Government. Further, there are several contractors in Bidar district who are ready and willing to undertake the said work and complete the same on the same rates and conditions which are given to me in the subsisting contract between me and the Government.

Therefore, I humbly request you to terminate all the existing contracts between me and the Government in respect of various works referred to above and issue necessary certificate declaring that there is no subsisting relationship between me and the Government forthwith. I humbly request you to entrust the work to other Class I contractors of Bidar district who are ready and willing to undertake the work on the same rates, terms and conditions. It is needless to state the last date for filing nomination is 18-8-1999. Therefore, I humbly request you to take the decision at the earliest and allow me to exercise my fundamental right to contest the election in the ensuing assembly election of 1999 and oblige.



Thanking you,

Yours faithfully,
sd/-
(Prakash Khandre)"

Copy of letter dated 6-8-1999 (Ext. P-39)

"To,
Chief Engineer,
Communication and Buildings (South),
Bangalore.

Sub: Requesting to cancel registration of Class I contractor in Karnataka Public

Works Department regarding—

Ref: Registration No. 65 dated 5-4-1995.

Related to the above subject, I am willing to contest the 1999 State Assembly elections; I am a registered Class I contractor of Karnataka Public Works Department and now I am contesting in the forthcoming election as a candidate.

Therefore, I pray you to cancel my registration.

Thanking you,

Yours faithfully,
sd/-
(Prakash Khandre)"

Copy of letter dated 6-8-1999 (Ext. P-61)

"Government of Karnataka
No. Lo.E:LEVI:99-2000:1165.

Office of the Executive Engineer,
Public Works Department, Bidar,
Bidar Division.

Dated: 6-8-1999

To,
Superintending Engineer,
Public Works Department,
Gulbarga Circle,
Gulbarga.

Respected Sir,

Subject: Regarding the issue of no-dues certificate to Shri Prakash Khandre, Class I contractor, Bhalki.

Ref.: (1) Letter of Shri Prakash Khandre dated 4-8-1999.

(2) Letter of Shri Prakash Khandre dated 4-8-1999.

(3) Letter of Shri Mallikarjun Khandre dated 4-8-1999.

In respect to the above subject, Shri Prakash Khandre, Class I contractor, Bhalki in his letter Ref. 1 has requested to close all his works as in the present stage which come in this division and also requested to issue no-dues certificate and to cancel his registration of contractor and also sought



permission to retire from the firm, namely, 'C. Saraswathi & Sons' because he is willing to contest the forthcoming assembly elections as a candidate.

In Ref. 2, Shri Prakash Khandre requested as in the first letter to close all works entrusted to him and to transfer the incomplete works in Shri Mallikarjun Khandre, Class I contractor. Contractor licence of Mallikarjun Khandre is enclosed.

Hot mix plant, paver and roadroller are ready to do the incomplete works of Shri Prakash Khandre in the same rates quoted and on the same tender clause of Shri Prakash Khandre and regarding this, he is ready to submit the affidavit of the court.

Present tender works in the name of Shri Prakash Khandre:

<i>Sl. No.</i>	<i>Details of the works</i>	<i>Progress stage</i>
----------------	-----------------------------	-----------------------

- | | | |
|----|--|-------------------------------|
| 1. | Impts. Halburga-Bawgi-Kamtana Road
(under NABARD works) | 90% of the work is completed. |
| 2. | Halburga Junior College Building | work is completed. |
| 3. | Impts. Dhanurapati to Chandapur Road | work is under progress. |
| 4. | Dadgi to Muchlum (HKDB) | work is under progress. |
| 5. | Bhalki to Humnabad Road | work is completed. |
| 6. | Bhalki to Neelanga Road | work is completed. |

Therefore, the above matter is sent to kind attention and requesting to give directions. The matter is related to the coming election, hence the order and the directions are expected soon.

Yours faithfully,

sd/-

Executive Engineer, PWD,

5-8-1999

Division Bidar.

1. Copy submitted for the kind information of Chief Engineer, Communication and Buildings (North), Dharwad."

Copy of letter dated 7-8-1999 (Ext. P-40)

"No. CBS:65:RCT:CSB:99

Office of the Chief Engineer,
Communication & Buildings (South),
Bangalore.

Dated: 7-8-1999

To,

1. All the Chief Engineers (All Projects).
2. Chief Engineer, National Highways, Bangalore.
3. All the Superintending Engineers (All Projects).
4. Superintending Engineer, National Highway Circle, Dharwad.
5. All the Executive Engineers, PWD and Irrigation Departments.
6. Executive Engineer, Zila Panchayat Engineering Division.



Respected Sir,

Subject: Regarding the application of Shri Prakash Khandre, Class I contractor to cancel his registration of Class I contractor, to contest the forthcoming assembly elections.

Ref: Request letter of Shri Prakash Khandre, Class I contractor dated 6-8-1999.

Shri Prakash Khandre, Class I contractor, Bhalki, Bidar district has given a requisition to cancel his registration of Class I contractor because he is willing to contest the forthcoming assembly elections. His registration number being CBS:65 Civil 95 dated 5-4-1995 (for the period of 1995-2000).

Therefore submit the details regarding the incomplete works and any dues to

come to the Government. This is an election matter hence give personal attention and send the reply in the next post. If any dues come from contractor to the Government, send it within 16-8-1999 to this office. If any reports showing the dues are sent after the abovementioned date and are not considered the concerned Executive Engineer and the Account Superintendent will be held responsible.

Yours faithfully,
sd/-
Chief Engineer,
Communication & Buildings (South),
Bangalore."

Amshi: 7899.

Copy of letter dated 9-8-1999 (Ext. P-68a)

"Government of Karnataka
(Public Works Department)
No. /PWD/BDR/AC-1/99-2000/

Office of the Executive Engineer,
Bidar Division,
Bidar.

Dated: 9-8-1999.

To,
The Superintending Engineer,
PWD, Gulbarga Circle,
Gulbarga.

Sir,

Sub: Closing of PWD works and issue of no-dues certificate regarding—

Ref: 1. Application of Shri Prakash Khandre, PWD contractor, Bhalki dated 4-8-1999.

2. Chief Engineer, C&B (North Dharwar) Letter No. CBS:65:RCT:CSB:99 dated 7-8-1999.



Anent to the above, it is to be stated that statement showing the works entrusted to Shri Prakash Khandre, PWD Class I contractor, Bhalki on tender basis is submitted herewith showing the details of estimated amount, physical and financial progress and balance of the works.

The above works entrusted to the agency are in progress as the agency is capable of completing the work. The completion of work may take some more time. In the meanwhile, he has requested to close his works and issue no-dues certificate, as he intends to contest for ensuing assembly election.

Further, Shri Mallikarjun Khandre, PWD Class I contractor has given his consent letter dated 4-8-1999 with the copy of his registration for Class I contractor to execute the works and completion of the balance work at the rates quoted by Shri Prakash Khandre, Class I contractor and terms and conditions of the agreement and also to pay any government dues outstanding against the above agency.

Therefore, it is requested to accord permission for closing the works entrusted to

Shri Prakash Khandre, Contractor and to rescind the contract on his request. Shri Mallikarjun Khandre, PWD Class I contractor has given his consent to execute the balance works at the agreed rates by Shri Prakash Khandre.

Therefore, in view of the above, as a special case, permission may also be given to entrust *the balance works to Shri Mallikarjun Khandre, Contractor on Form No. PWG-65 i.e. piecework entrusted agreement system* at the agreed rates by Shri Prakash Khandre, in order to complete the work as scheduled. Thus there will be no loss to the Government.

Early orders are requested in the matter.

Yours faithfully,
sd/-

Executive Engineer, PWD,
Bidar Division,
Bidar.

1. Copy submitted to the Chief Engineer (C&B) North, Dharwad, along with the statement for favour of kind information and needful action in the matter.

sd/-
Executive Engineer, PWD,
Bidar Division,
Bidar."

Copy of letter dated 11-8-1999

"Govt. of Karnataka
(Public Works Department)
No. CE:Tha.Sa/4:99-2000/4908

Office of the Chief Engineer,
Communication and Buildings (North),
Dharwad.

Dated: 11-8-1999.



To,
Chief Engineer,
Communication & Buildings (South),
Bangalore.

Respected Sir,

Sub: Regarding the application of Shri Prakash Khandre, Class I contractor to cancel his registration of Class I contractor, to contest the forthcoming assembly elections.

Ref: 1. CE (C&B) South, Bangalore, Letter No. CBS:65:RCT: CSB:99 dated 7-8-1999.

2. Letter No. AAGu:C-5:BeBaaKi:PramanaPathra:99-2000: 2514:12, dated 10-8-1999 of Superintending Engineer, PWD, Gulbarga Circle, Gulbarga.

Shri Prakash Khandre, Class I contractor, Bhalki is willing to contest the forthcoming assembly elections therefore requested to cancel his contractor registration. Superintending Engineer has submitted the details regarding this in

his letter (Ref. 2). Shri Prakash Khandre, Contractor has submitted the affidavit along with the letter of Shri Mallikarjun Khandre, Class I, PWD contractor regarding the completion of the incomplete work of Shri Prakash Khandre. Mallikarjun Khandre himself has submitted the affidavit to take over the works entrusted to Prakash Khandre in the old rates and stated to take full responsibility. Shri Prakash Khandre also submitted the affidavit stating that in case if Mallikarjun Khandre fails to complete the works, he will take responsibilities to get it completed. On the basis of the affidavit this proposal may be accepted.

Therefore as explained above, PWD, C&B (North) has no objection to cancel the Class I contractor registration of Shri Prakash Khandre.

Yours faithfully,
sd/-
Chief Engineer,
Communication & Buildings (North),
Dharwad."

Copy of letter dated 12-8-1999 (Ext. P-27)

"Government of Karnataka
(Irrigation Department)
No. SEB:IPCC/AE-2/76Km.RBC/99-2000
Office of the Superintending Engineer,
ID, IPC Circle,
Bidar.
Dated: 12-8-1999.



Page: 591

To,
The Executive Engineer, ID,
KPC Division 2,
Bhalki.
Sir,

Sub: Providing and fixing SS/CC lining from Ch:75000 to 76000m in km 76 of RBC of Karanja Project.

Ref: Chief Engineer, IPZ, Gulbarga Phonogram Confirmation Letter No. CEG/IPZ/KR/TA-2/A-E-2/Km.76/lining/RBC/99-2000/2202 dated 13-8-1999.

Please refer the abovesaid letter originally addressed to this office as well as your office. You are hereby directed to close the contract of Shri Prakash Khandre duly observing the Codal Rules as per tender clause as instructed by the Chief Engineer forthwith.

Yours faithfully,
sd/-
Superintending Engineer, ID,
IPC Circle, Bidar.

Copy submitted to the Chief Engineer, ID, Irrigation Projects Zone, Gulbarga with reference to Central Office Letter No. 2202 dated 13-8-1999."

Copy of letter dated 16-8-1999 (Ext. P-53)

"No. CBS:66:RCO:CSB:99

Office of the Chief Engineer,
Communication and Buildings (S),
Bangalore.

Dated: 16-8-1999.

MEMORANDUM

Sub: Regarding cancellation of Class I contractor registration of Shri Prakash Khandre.

Ref: 1. The request of Shri Prakash Khandre dated 6-8-1999.

2. The letter of Chief Engineer, Communication & Buildings (N), Dharwad, vide No. CE:N:SS-1:99-2000-4908 dated 11-8-1999.

3. Letter of Chief Engineer, Raichur Division vide No. ESH:TAS:REG:MIS99-2000 dated 13-8-1999.

Preamble

Shri Prakash Khandre, Class I contractor, Bhalki, Bidar district has submitted an application to this office on 6-8-1999 requesting for cancellation of his Class I contractor registration as he is willing to contest the ensuing assembly elections. In this connection letters were sent to all the Chief Engineers and the Executive Engineers to send reports pertaining to any dues or incomplete projects of the Government from Shri Prakash Khandre, the contractor, requesting them to submit report before 16-8-1999 to this office. As per the reports received till date, there are no dues from Shri Prakash Khandre to the Government and the Chief Engineer and the Executive Engineer have recommended for cancellation of Class I registration as per the above references referred at Nos. 1 and 2. Based on the recommendations, the registration of Shri Prakash Khandre, Class I contractor can be cancelled.



Page: 592

Order

The registration of Class I contractor Shri Prakash Khandre, Bhalki, Bidar district vide Ref. No. CBS:65:Civil:95 dated 6-4-1995 *is cancelled with immediate effect and it is also certified that there are no dues from Shri Prakash Khandre pertaining to any projects to the Government.*

sd/-
(B. Srinivas)
Chief Engineer,
Communication and Buildings (South),
Bangalore."

Copy of letter dated 29-8-1999 (Ext. P-8)

"Government of Karnataka
(PWD)
No. EE/PWD/BDR/TS.1/99-2000

Office of the Executive Engineer,
PWD, Bidar Division,

Bidar.

Dated: 29-8-1999.

To,
The Assistant Executive Engineer,
PWD, Sub-Division Bhalki/Bidar.

Sub: Closing measurement of Prakash Khandre, Contractor Works regarding—

Ref: CE/Office Letter No. CE/North/Dharwad/TS.4/99-2000/4108 dated 11-8-1999.

Sir,

With reference to the above subject you are hereby directed that the registration of Prakash Khandre, Class I contractorship has been cancelled, so the following works should be closed and closing measurements will be recorded and intimated to this office.

1. Impts. to Halburga-Bawgi to Kamtana Road km 0/0 to 34/40.
2. Impts. to Dhanurapati to Chandapur km 4/0 to 9/50 in Bhalki Tq.

Yours faithfully,

sd/

-sd/-

Received

Executive Engineer, PWD,
Bidar Division,
Bidar.

Copy to Shri Prakash Khandre, Class I, PWD Contractor, R/original Bhalki Tq. for information.

sd/-

Executive Engineer, PWD,
Bidar Division,
Bidar."



36. From the correspondence stated above, it can be held as under:

1. On 4th, the appellant requested the Executive Engineer—

(a) to finalise the works which were entrusted to him even if the works were incomplete as per the rules,

(b) to issue "no-dues certificate", and

(c) to cancel his registration of contractorship.

2. On 6th August, he wrote similar letter to the Chief Engineer specifically requesting him to do the needful forthwith for termination of all existing contracts and to put an end to any sort of subsisting contractual relationship between him and the Government. Again, he reiterated to terminate all existing contracts and to issue necessary certificate declaring that there existed no subsisting relationship between him and the Government.

3. On the same date, he wrote a letter to the Chief Engineer, Communication and Buildings (South), Bangalore to cancel his registration.

4. On 6th itself, the Chief Engineer wrote a letter to the Superintending Engineer

for taking necessary immediate action as prayed for by the appellant as the matter related to the coming election and the copy was also submitted to the Chief Engineer, Communication and Buildings (North), Dharwad.

5. On 7th August, the Chief Engineer, Communication and Buildings (South), wrote letters to all Chief Engineers (All Projects), Chief Engineer, National Highways, Bangalore, Superintending Engineers (All Projects), all Executive Engineers, PWD and Irrigation Departments, Executive Engineer, Zila Panchayat Engineering Division for cancellation of Prakash Khandre's registration of Class I contractor as he was to contest the forthcoming assembly elections and to communicate any reports showing the dues, if any, with a specific statement. It was also stated that if any reports showing the dues are sent after 16th August, the Executive Engineer and the Account Superintendent concerned would be held responsible.

6. On 9th August, the Executive Engineer, Bidar Division wrote a letter to the Superintending Engineer, Gulbarga Circle that Prakash Khandre has requested to close his work and issue "no-dues certificate" and certificate of cancellation of registration as he wanted to contest the ensuing assembly elections. Therefore, permission was sought for closing the works entrusted to Prakash Khandre and that Mallikarjun Khandre, Class I contractor had given his consent to execute the work at the rate agreed by Prakash Khandre. Therefore, as a special case, permission was sought to entrust the balance work to Shri Mallikarjun Khandre as it would not cause any loss to the Government.

7. On 11-8-1999, the Chief Engineer, Communication and Buildings (North), Dharwad wrote a letter to the Chief Engineer, Communication



and Buildings (South), Bangalore stating that Prakash Khandre (Contractor) has submitted affidavit along with the letter of Shri Mallikarjun Khandre that regarding completion of the incomplete work, Mallikarjun Khandre would complete the same and Prakash Khandre has also submitted an affidavit stating that in case if Mallikarjun Khandre fails to complete the work, he will take responsibility to get it completed.

8. On 12th August, the Superintending Engineer directed the Executive Engineer to close the contract of Shri Prakash Khandre as instructed by the Chief Engineer.

9. Finally on 16th August, the Chief Engineer issued a memorandum Ext. 53 that registration of Prakash Khandre was cancelled with immediate effect and it was certified that there were no dues pertaining to any project to the Government. For this purpose, relevant correspondence is referred to in Ext. 52.

10. On 29th August, the Executive Engineer, PWD, Bidar Division, Bidar directed the Assistant Executive Engineer, PWD, Sub-Division Bhalki/Bidar that as the registration of Prakash Khandre Class I contractor is cancelled, the works of Halburga-Bawgi to Kamtana Road and Dhanurapati to Chandapur in Bhalki Tq. should be closed and closing measurements of the work executed be recorded and the same may be intimated to the office.

37. This correspondence manifestly establishes that the appellant terminated all his contracts with the State Government as he was to contest election and the same was accepted by the Department and the Chief Engineer issued "no-dues certificate" and also cancelled his registration as Class I contractor.

Oral evidence

38. To the same effect, all witnesses of the Department examined by the election

petitioner have deposed before the Court. This would be clear from the evidence discussed below.

39. The election petitioner examined PW 2 B. Mallikarjuna, who was the Chief Engineer, Irrigation Project. He was asked about the procedure for termination of subsisting contract and to that, he replied — the authority who entered into the contract is also the authority for terminating the contract. He produced the entire file containing the correspondence regarding cancellation of contract which was marked as Ext. P-9 and the file of inspection note Ext. P-10. He carried out the inspection on 8-11-1999 on account of closure of the work by the appellant in order to issue further instructions to his subordinate officers to entrust the same work to some other contractor. He had called for explanation from the Superintending Engineer and the Executive Engineer regarding the work being carried out after the termination of the contract in favour of the appellant. He denied the suggestion that the work was being carried out by the appellant. He has produced letter dated 12-8-1999 sent by the Superintending Engineer in response to phonogram Ext. 32. He has also stated that the Executive Engineer had sought permission from him for



Page: 595

entrustment of work to Mallikarjun Khandre but the permission was not granted. He has also denied the suggestion that he has manipulated the record in order to help the appellant. The learned Judge has noted that after the evidence was read over to the witness, he pointed out that when he made surprise inspection on 8-11-1999, he noted that bed concreting had already been completed as stated in Ext. 28 and his statement that the work was in progress was not correct.

40. Other witness PW 8 N.L. Matry was working as Assistant Executive Engineer at the relevant time. He stated that he had accompanied the Chief Engineer on 8-11-1999 for surprise inspection of the piecework from 75.750 to 75.810 km. He was not in a position to say who executed some portion of the work as observed by the Chief Engineer in his report. However, he definitely stated that it was false to suggest that the said work was carried out by Mr Prakash Khandre and that he was suppressing the said fact.

41. The next witness PW 4 Dinkar Rao, who was working as Superintending Engineer, IPC Circle, Bidar at the relevant time between July 1998 to 5-10-1999, has stated that the appellant had given a representation to the Executive Engineer requesting to issue no-dues certificate. It is his say that he had sought the opinion of the Government Pleader regarding premature termination of the contract and on receipt of the said opinion, the same was forwarded to the Chief Engineer.

42. Other witness is PW 5 S.K. Desai, who was working as Executive Engineer, KPC Division 2, Bhalki from 6-3-1999 to 8-8-2000. He was shown Ext. P-22 — a letter dated 10-8-1999 given by the appellant to him to close the work entrusted to him and to issue a no-dues certificate at the earliest. It is his say that he also received another letter from the appellant enclosing the necessary affidavit in prescribed pro forma to close his tender work which was produced as Ext. P-23. Both these exhibits were endorsed by him on 10-8-1999 and the necessary entries were made in inward and outward register maintained by their office. He has also produced letter dated 9-8-1999 written by him to the Chief Engineer, South Zone, Bangalore which is Ext. P-24 along with the no-dues certificate. "No-dues certificate" was given after getting clearance from the accounts section. He has stated that it was false to suggest that the appellant himself had executed the work and he was suppressing the truth from the Court. He admits that he has written letter dated 12-8-1999 (Ext. 27) to the

appellant informing that the tender for the work was closed. It is his say that even though the appellant requested to entrust the remaining work to his brother Mallikarjun Khandre, the Central Office did not accede to his request.

43. PW 7 Ashok Kumar Mogsheety was working as a Junior Engineer at the relevant time. He has stated that the last measurement in respect of the work entrusted to the appellant was taken on 10-8-1999 and it is his say that the entries of measurement book Ext. 34 were in his handwriting. He stated that the measurement book was also signed by the Executive Engineer and



Page: 596

that there was no further measurement of work pertaining to Shri Prakash Khandre.

44. Next witness PW 9 K. Mallikarjunaiah who was working at the relevant time as the Chief Engineer, North Zone, PWD (C&B), Dharwad, has stated that letter dated 9-8-1999 sent by the Executive Engineer, PWD, Bidar Division was subsequently brought to his notice on 11-8-1999. Pursuant to the said letter, he addressed letter dated 11-8-1999 Ext. P-37 to the Chief Engineer (C&B), South, Bangalore. It is his say that he permitted the transfer of work from the appellant to his brother Shri Mallikarjun Khandre. It is his say that by Ext. P-37, he had informed the Chief Engineer (C&B), South, Bangalore stating that he has no objection to cancellation of the registration of the appellant. With regard to the transfer of contract work from one contractor to another, he specifically stated that he had verified the Codal Rules and that he was competent to grant the permission of transfer of work from one contractor to another under special circumstances. During 1994 before the general elections, the same procedure was adopted. In further cross-examination, he has stated that he had ordered the transfer of contract work after 16-8-1999. On 16-8-1999, the registration of contractorship of the appellant was cancelled.

45. PW 10 B. Srinivasa who was working as Engineer-in-Chief has stated that at the relevant time he was working as Chief Engineer, PWD (C&B), South, Bangalore. It is his say that his office received a letter dated 6-8-1999 Ext. P-39 requesting for cancellation of registration of the appellant. Pursuant to that letter, he sought for sending no-dues certificate from all the Chief Engineers, Superintending Engineers etc. as mentioned in his letter dated 7-8-1999 Ext. P-40. On 16-8-1999, he passed the orders cancelling the registration of the appellant after obtaining necessary information from the Chief Engineer and the Superintending Engineers and others. He has denied the suggestion that the order of cancellation of registration was manipulated. It is his further say that as per the portion of Ext. 52(c), he passed the order Ext. P-52(e) terminating all the contracts of the appellant. Ext. 52 order was issued on 16-8-1999 to the appellant.

46. PW 11 Basavraj Kukunda who was working as a Superintending Engineer has produced correspondence file of one inward and one outward register for the month of August onwards which were exhibited as Ext. P-56, Ext. P-57 and Ext. P-58. He has stated that on the basis of information given by the Executive Engineer, Ext. P-59, he had sent a letter dated 10-8-1999 to the Chief Engineer recommending cancellation of the registration of the contract of the appellant and to entrust the same work to his brother Mallikarjun Khandre. That letter is produced as Ext. P-60. It is his say that during the 1994 elections, pending work of a contesting candidate for the general elections was transferred in favour of another contractor and on the basis of the same analogy, the contract of the appellant was cancelled and the same was recommended to be transferred to his brother Mallikarjun Khandre. He agreed to the suggestion that

barring the precedence stated above, the Codal Rules of PWD do not authorise or empower him to transfer the work.



Page: 597

47. PW 12 V.S. Pathange, Executive Engineer has admitted that after cancellation of the contract work in favour of the appellant the balance work was entrusted to his brother Shri Mallikarjun Khandre. He has also stated that the contract comes to an end when the registration of the contract is cancelled. He has denied the suggestion that even though the contract was transferred in the name of Mallikarjun Khandre, the same has been carried out benami by the appellant. He admitted that he has entrusted the work to Mallikarjun Khandre on 1-9-1999 and has sent the original Exts. 71 and 72 in his office at Bidar and the entrustment of the work under the aforesaid exhibits was on the direction of the higher authority. Such directions were given to him in writing which was Ext. P-20. He has also produced Agreement Form PWG 65. He denied the suggestion that work was done by Mallikarjun Khandre for the appellant. It is his say that in the month of September 1999, a different pro forma was prescribed which was Ext. 115 and because of the oversight, he might have earlier stated the agency as Prakash Khandre for the months of October to December 1999.

48. PW 16 Raj Kumar Wadde who was working as Junior Engineer, Bhalki Sub-Division has stated that nobody has done the work of Halburga-Bawgi Road during August 1999. Regarding stopping of work by Prakash Khandre, he made entry in Ext. P-103. Thereafter, further work which was carried out by Mallikarjun Khandre was also entered in Ext. P-103. It is his say that writing of name of Prakash Khandre at p. 56 Ext. P-103 was a mistake and, therefore, the same was struck off and in his place Mallikarjun Khandre's name was written. He further stated that from the month of September to December 1999, no work was carried out on Halburga-Bawgi Road.

49. PW 17 Chandrasekhar Patil who was working as Assistant Executive Engineer has also stated that he was inspecting the progress of work of Halburga-Bawgi Road between 4-8-1999 to 30-8-1999 and during that period he had not seen any progress in the work. He had received the letter from the Executive Engineer on 29-8-1999 to take the closing measurement of the said work. After taking the measurement on 30-8-1999, he submitted it to the Divisional Office at Bidar.

50. From the aforesaid oral evidence, it is abundantly clear that contract of asphaltting of Halburga-Bawgi-Kamtana Road was cancelled and the work was handed over to Mallikarjun Khandre. PW 10 Engineer-in-Chief who was working as Chief Engineer, PWD, South Zone, Bangalore has specifically stated that registration and cancellation of contractors falling in Classes I and II is to be made by the Chief Engineer, Communication and Buildings (South), Bangalore and the power to remove from approved list of the contractors is vested in him under Rule 12. After getting information from all offices, he issued no-dues certificate and cancelled the registration of the appellant on 16-8-1999. The contracts were terminated after obtaining the opinion of the Government Pleader regarding premature termination of the contracts. PW 2 Chief Engineer carried out inspection on 8-11-1999 because of the closure of the work by the appellant. He denied that work was carried



Page: 598

out by Prakash Khandre after termination of the work. No-dues certificate was also issued after getting clearance from all the departments including the accounts section. The last measurement with regard to the work executed by Prakash Khandre was taken on 10-8-1999, as stated by PW 7 Ashok Kumar. PW 9 Chief Engineer has also stated that he had permitted the transfer of work from the appellant to his brother Mallikarjun Khandre after verifying the Codal Rules and that he had ordered transfer of contract work after 16-8-1999. The work was entrusted to Mallikarjun Khandre on the recommendation of the Superintending Engineer, PW 11. It is also stated that contracts come to an end when the registration of contractorship is cancelled. PW 12 (Executive Engineer) denied the suggestion that even though the contract was transferred in the name of Mallikarjun Khandre, the same was carried out benami by the appellant.

51. From the evidence and the correspondence produced between the appellant and the Department, it is crystal clear that the appellant terminated the subsisting contracts and the Department accepted it. Hence, contracts were brought to an end by the parties. The Department also permitted the remaining works to be carried out by Mallikarjun Khandre. In this view of the matter, the finding given by the High Court that work of effective improvement and asphaltting of Halburga-Bawgi-Kamtana Road continued and, therefore, contract was subsisting is erroneous.

52. The question whether the contracts were subsisting or not is always a question of fact to be determined from the evidence on record, still however, we would refer to the relevant case-law cited at the Bar. In *S. Munishamappa v. B. Venkatarayappa*⁹ the Court considered letter (at SCC p. 265, para 10) written by a candidate who was elected wherein he stated that—

“I cannot contest the elections to the Vidhan Sabha. Therefore, I request you to immediately cancel the work licence registered under you in my name. I request you to finalise all the works pending in my name and cancel my licence immediately”.

That was processed by the Department and it was endorsed

“please finalise the claims of the contractor for the above works”.

A further endorsement was made directing the bills of the contractor to be submitted immediately. The High Court arrived at the conclusion that on the relevant date the contract was subsisting and, therefore, he was disqualified for contesting the election in view of Section 9-A of the Act. This Court considered the submission that contract can come to an end (1) by parties, (2) by express agreement, (3) under the doctrine of frustration, and (4) by breach; and after considering the letter Ext. 17, the Court held thus: (SCC p. 270, para 16)

“[T]he appellant makes it manifestly clear that he intended to contest the election and to enable him to do so he wanted to have the licence in his favour cancelled immediately and to have his bills settled. The said



letter clearly proceeds on the basis that at that point of time there was no existing contract between him and the Government and he was only asking for a settlement of his bills and for cancellation of the licence. The endorsements made on the said letter by the authorities also go to indicate that the said position is accepted by them and necessary directions for finalisation of the bills are given.”

53. With regard to the breach of contract, the Court further observed as under: (SCC pp. 270-71. para 17)

“Even if it be held that the appellant had committed a breach of the contract, the contract cannot be said to be subsisting thereafter. If the contract is discharged by breach on the part of the appellant, the entire contract necessarily goes and along with this the agreement, if there be any, with regard to the maintenance, must necessarily go, leaving the party aggrieved to take steps to recover damages for such breach. The contract, however, cannot be said to be subsisting. ... The fact that the bills of the appellant were settled at a later date and that the security deposit was refunded later on, will not disqualify the appellant in view of the Explanation to Section 9-A of the Act.”

54. The Court negated the contention that if any contractor is permitted to put an end to a contract by committing breaches thereof to enable him to contest the election, it will frustrate the very purpose of Section 9-A of the Act by holding that whether a contract subsists or not, has to be determined in the light of the provisions of law relating to contract and the interpretation cannot be in any way different while considering the provisions contained in Section 9-A of the Representation of the People Act.

55. Similarly in *Asling v. L.S. John*¹⁰ the Court considered the letter written by the contractor to the Executive Engineer concerned stating that he was closing his contract, to be sufficient for holding that the contract was no longer subsisting as the contractor unilaterally put an end to the contract and informed the Department concerned accordingly and he had also resigned from the contractor's list of PWD. The Court negated the contention that unless the letter was accepted by the authority, the contract would continue and the contractor would suffer from disqualification by holding that acceptance of the letter by the authorities was unnecessary for putting an end to the contract although the breach may give rise to a cause of action for damages.

56. Mr Shanti Bhushan, learned Senior Counsel heavily relied upon the affidavit dated 9-8-1999 sworn by appellant Prakash Khandre. That affidavit was sent along with a letter written by Mallikarjun Khandre who was the substitute contractor for the appellant to the Executive Engineer stating that he was willing to execute all the balance works entrusted to Shri Prakash Khandre on his quoted rates as per agreement and to complete them in all respects. In the said letter, it was further stated that he was prepared to pay any dues outstanding against Shri Prakash Khandre. Along with the letter



there is an affidavit of Prakash Khandre stating that in view of the preponement of the assembly election, he could not complete the work and, therefore, he had submitted application to terminate subsisting contracts between him and the Government of Karnataka. For the remaining work, in his place, Shri Mallikarjun Khandre, Class I contractor has agreed to execute the same on the same rate, terms and conditions.

57. We would quote paragraph 7 of the said affidavit as heavy reliance is placed by the learned Senior Counsel for contending that it would establish that contract subsisted or there was *novatio*:

“7. I hereby declare in case Shri Mallikarjun Khandre, Class I contractor person fails to execute the work, I will take the full responsibility of getting it completed on the same rate and terms and conditions.”

58. Firstly, from the aforesaid affidavit, it can be stated that the appellant had terminated the contract and that there was no question of subsisting contract. Further,

statement made in the affidavit only indicates that if Mallikarjun Khandre fails to execute the work, the election petitioner will take the full responsibility of getting it completed on the same rate, terms and conditions. But the said statement would not mean that any new contract for getting the works to be carried out was executed between the appellant and the State Government.

59. Learned Senior Counsel also relied upon the decision in *Konappa Rudrappa Nadgouda v. Vishwanath Reddy*¹¹ and submitted that in the present case also there is condition to repair the work for a period of one year even after completion of the contract work. It is his further submission that in view of paragraph 7 of the affidavit, the appellant agreed to take over the responsibility of completing the work if Mallikarjun Khandre failed to execute the same and, therefore, there was a fresh contract between the appellant and the Department. In the aforesaid case, the Court referred to *Chatturbhuj Vithaldas Jasani v. Moreshwar Parashram*¹² wherein a contention was raised that no longer any contract for supply of goods was in existence but only an obligation arising under a guarantee clause subsisted and, therefore, it cannot be held that contract was subsisting. The Court negated the said contention by holding thus: (AIR p. 242, para 32)

"32. It was argued that, assuming that to be the case, then there were no longer any contracts for the 'supply of goods' in existence but only an obligation arising under the guarantee clause. We are unable to accept such a narrow construction. This term of the contract, whatever the parties may have chosen to call it, was a term in a contract for the supply of goods. When a contract consists of a number of terms and conditions, each condition does not form a separate contract but is an item in the one contract of which it is a part. The consideration for each condition in a case like this is the consideration for the contract taken as a whole. It is



not split up into several considerations apportioned between each term separately.

But quite apart from that, the obligation, even under this term, was to supply fresh stocks for these three depots in exchange for the stocks which were returned and so even when regarded from that narrow angle it would be a contract for the supply of goods. It is true they are replacements but a contract to replace goods is still one for the supply of the goods which are sent as replacements."

The Court thereafter held that applying these observations in the context of construction of buildings and roads, it is obvious that if some part of the work is found defective and has to be redone, the contract of execution as such is still to be fully performed. This term of contract is part of the contract of the execution because no execution can be said to be proper or complete till it is properly executed. In such circumstances, the Court held that the contract would subsist and, therefore, disqualification provided under Section 9-A would apply.

60. In our view, the aforesaid decision would have no bearing on the facts of the present case. That case dealt with a situation where contract work was over, but the time period as stipulated in the contract for carrying out the repairs was not over. Therefore, it cannot be said that the contract was fully performed and hence, it was subsisting. In the present case, there is termination of all contracts by the appellant. The Department accepted such termination and the contracts were brought to an end by both the parties. Therefore, there is no question of contract or any part thereof subsisting on the date of scrutiny of the nomination. This has been made clear in the first letter written by the appellant on 6-8-1999 to the Chief Engineer by stating that

his registration as Class I contractor with the Department be cancelled thereby putting an end to any sort of subsisting contractual relationship between him and the Government. Presuming that according to the terms of the contract if some part of the contract work is found to be defective or is not properly executed and the contractor was bound to perform the same during a period of one year after completion of the contract, then also as contracts stood terminated, the said term of the contract of repairing for a period of one year of curing the defect would also not subsist.

61. Learned Senior Counsel Mr Shanti Bhushan submitted that the contract work which was given to the brother of the appellant was, as a matter of fact, performed on behalf of the appellant by Mr Mallikarjun, his brother and, therefore, the High Court rightly held that contract was subsisting on the date of scrutiny of the nomination paper. In our view, this submission is without any substance mainly because after termination of the contract, fresh contract is executed by Mallikarjun Khandre for carrying out remaining work. Further Section 7(d) as it stood prior to its amendment in 1958 inter alia provided if the work is carried out "by himself or by any person or body of persons in trust for him or for his benefit or on his account", then such person was disqualified and in such a situation, the



question of benamidar or carrying out on behalf of the appellant might require some consideration. After substitution of Section 7(d) by Section 9-A, there must be subsisting contract by the contesting candidate for execution of any works undertaken by him with the Government. The essential ingredient of the section is that the contract for the execution of any works undertaken by the Government should be subsisting on the date of scrutiny of nomination. It is to be stated that because Mallikarjun Khandre is the brother of the contractor, it cannot be said that he was acting as a benamidar as he himself was a registered Class I contractor. Further, as stated above, the objects and reasons of Section 9-A provide that an unduly strict view about the government contract should not be taken as it might lead to disqualification of a large number of citizens, many of whom may prove to be able or capable Members of Parliament or State Legislatures. Therefore, the amended Section 9-A uses the phrase that a person shall be disqualified "so long as there subsists a contract". Similarly, subsequent payment by the Government for the work done which was payable at the time of termination of contract would not mean that contract between the parties was subsisting and Explanation to Section 9-A has made the position clear.

62. Learned counsel further referred to Ext. 105, which is a measurement book and submitted that in the months of September, October, November and December 1999 also, the name of the contractor, Prakash Khandre continued and, therefore, it cannot be held that the contract was terminated. In our view, as stated above, all contracts with the appellants stood terminated on 16-8-1999. The contractor's registration was cancelled. No-dues certificate was also given. Fresh contracts with the firm of the brother of the appellant, Mallikarjun Khandre were executed. Mallikarjun Khandre himself was a Class I contractor. In these set of circumstances, it would be totally unreasonable and unjustifiable to refer to some errors committed by some officers as admitted by the witnesses, in mentioning the name of Prakash Khandre as contractor in the measurement book to arrive at the conclusion that contract between the appellant and the Government was subsisting. Further, as per letter dated 29-8-1999, the Executive Engineer directed the Assistant Executive Engineer that the closing measurement of the work executed be recorded and the same may be intimated to the

office. The work included Halburga-Bawgi Road to Kamtana Road.

63. Learned counsel next referred to Codal Rule 167 and contended that contract work should not have been given to Mallikarjun Khandre and the Department was required to follow the procedure prescribed thereunder. Codal Rule 167 reads as under:

“167. (1) Contracts for works estimated to cost Rs 10,000 and over mentioned in sub-para 4 infra, should be prepared only on regular Contract Form PWG 65 and should be invited by public tenders.

(2) Sanctioned works falling under the following categories may be got executed on piecework system at rates not exceeding the current minimum schedule of rates, each case being however reported to Government.



Page: 603

(a) Works for which there have been no response from any of the contracts to the notification calling for tenders.

(b) Works for which only individual tenders are received and which cannot be accepted in view of the prohibitively high rates quoted which will not bear any comparison with the sanctioned estimate rates or the current schedule of rates. In the case of tendered contractors who stop away in the middle, action should be immediately taken to cancel their contract, strictly enforcing the penal clause of the contract, the balance of work being got done as above or as per terms of contract. In any case, either the same tendered contractor or his agents should not be given the balance work for execution.”

64. In our view, the election petitioner could not challenge the acceptance or termination of contract and grant of contract to Mallikarjun by the Department by resorting to certain departmental procedure prescribed for grant of contract to other contractor. In any case, not following the procedure prescribed under the Rules would hardly be a ground for holding that the contract was subsisting. PW 9 Chief Engineer, North Zone has specifically stated that he had verified the Codal Rules and that he was competent to grant permission for transfer of work from one contractor to another under special circumstances and that similar procedure was adopted before general elections during 1994. Hence, presuming that he has wrongly interpreted Codal Rule 167, then also it cannot be held that contract between the appellant and the State Government was subsisting. In this view of the matter, in our view, further evidence led by the parties is not required to be dealt with or considered.

65. From the aforesaid discussion, it is apparent that there was no contract subsisting between the appellant and the State Government so as to apply the provisions of Section 9-A of the Act and to hold that the appellant was disqualified to contest the elections. As stated above, the order passed by the High Court declaring Dr Vijay Kumar Khandre, Respondent 1 as elected is, on the face of it, illegal.

66. In the result, Civil Appeals Nos. 2-3 of 2002 filed by Prakash Khandre are allowed, the impugned order passed by the High Court declaring election of Prakash Khandre, the returned candidate, as void and declaring Dr Vijay Kumar Khandre who had polled the next highest number of valid votes as elected from 2, Bhalki Legislative Assembly Constituency to the Eleventh Karnataka Legislative Assembly is quashed and set aside.

67. In view of the order passed above, Civil Appeal No. 1455 of 2002 stands dismissed.

68. There shall be no order as to costs.

[†] From the Judgment and Order dated 21-12-2001 of the Karnataka High Court in EPs Nos. 25 and 30 of 1999 : AIR 2002 Karn 145

¹ (1969) 2 SCR 90 : AIR 1969 SC 604 sub nom *Vishwanatha Reddy v. Konappa Rudrappa Nadgouda*

² AIR 1960 SC 131 : (1960) 1 SCR 902

³ (1977) 3 SCC 540 : (1977) 3 SCR 538

⁴ (1969) 1 SCC 27

⁵ (1989) 4 SCC 773

⁶ 1993 Supp (2) SCC 117

⁷ (1999) 4 SCC 517

⁸ 1988 Supp SCC 580

⁹ (1981) 3 SCC 260

¹⁰ (1984) 1 SCC 205

¹¹ AIR 1969 SC 447 : (1969) 1 SCR 395

¹² AIR 1954 SC 236 : 1954 SCR 817

Disclaimer: While every effort is made to avoid any mistake or omission, this casenote/ headnote/ judgment/ act/ rule/ regulation/ circular/ notification is being circulated on the condition and understanding that the publisher would not be liable in any manner by reason of any mistake or omission or for any action taken or omitted to be taken or advice rendered or accepted on the basis of this casenote/ headnote/ judgment/ act/ rule/ regulation/ circular/ notification. All disputes will be subject exclusively to jurisdiction of courts, tribunals and forums at Lucknow only. The authenticity of this text must be verified from the original source.