

RAJESHEKAR BASAVARAJ PATIL

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v.

SUBASH KALLUR AND ORS.

OCTOBER 8, 2002

[M.B. SHAH AND D.M. DHARMADHIKARI, JJ.]

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Representation of People Act, 1951—Sections 9A and 100(1)(a)—Election to Assembly challenged on the ground of subsisting contract with Government on the date of election—Plea of returned candidate that prior to election unilateral termination of contract sought by submitting letter and affidavit—Petition dismissed by High Court—On appeal held, in the facts of the case letter and the affidavit proved to be interpolated and anti-dated—Contract legally and formally terminated only after date of election—Hence, returned candidate was disqualified to contest the election.

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Appellant challenged the respondent's election to Legislative Assembly on the ground that he was disqualified to contest the election as there subsisted a contract between him and the State. Respondent—returned candidate claimed that he was not disqualified since before the date of election, on 11.8.1999 he had given notice of unilateral termination of the contract and further on 13.8.1999 he filed an affidavit whereby he made it clear that he had earlier made an application to terminate the subsisting contract between him and the State. Appellant alleged that the said documents were interpolated and anti-dated and were introduced on the record after the date of election i.e. 5.9.1999. In order to prove the falsity of the claim of returned candidate, appellant summoned PW2—Executive Engineer in evidence, who deposed that he received a letter dated 11.8.1999, that on the original letter he had put the date of receipt as 14.9.1999 and the entry of its receipt was recorded in the Inward Register on 15.9.1999. PW4 deposed that formal permission for rescinding the contract was granted only on 5.9.2000. Returned candidate, in order to prove the genuineness of the letter and the affidavit, examined RW2, who stated that he received the letter and acknowledged its receipt. The affidavit was not put to him to prove that he had acknowledged its receipt. In cross-examination he admitted that normally letters are acknowledged by Manager in the office and it was not his normal duty to receive or

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A acknowledge any letter or application. Returned candidate, in cross-examination, stated that he did not know as to who acknowledged the affidavit. High court accepted the letter and the affidavit as genuine documents as having been submitted on the dates mentioned on them, and held that there was unilateral and/or bilateral termination of contract between returned candidate and Government and dismissed the election petition.

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D In appeal to this Court, respondent contended that the letter was tendered with a desire to end the contract; that original records of Notary and initials put for acknowledgement of the affidavit go to show that it was a genuine document preferred on the date shown; that genuineness of the letter is proved from the facts that in the affidavit it has been mentioned that he had already made earlier application to terminate the subsisting contract and in subsequent correspondence also there is mention of submission of letter dated 11.8.1999; and that since PW2 supported the case of returned candidate and still he was not cross-examined by the appellant, the case of the appellant is liable to be rejected.

Allowing the appeal, the Court

E HELD: 1. Returned candidate suffered a disqualification under section 9A of Representation of People Act, 1951 for contesting the election as the contract between him and the State subsisted for 10 per cent of remaining work. His election is, therefore, liable to be set aside on the ground made out under Section 100 of the Act. [160-F, G]

F 2.1. Appellant has satisfactorily proved his case that both the documents i.e. letter dated 11.8.1999 and affidavit dated 13.8.1999, were neither formally tendered nor officially received in the office of the Executive Engineer on the dates respectively shown on them. The respondent has miserably failed to dispel the doubt created on the fact and date of submission of the letter and the affidavit. [156-D, E]

G 2.2. It cannot be said that in absence of cross-examination of PW2- Executive Engineer, the case of the appellant that the letter dated 11.8.1999 was an interpolated document should be rejected. The appellant had summoned the Executive Engineer with the original documents alleged to have been presented before him. From his statement in examination-in-chief and cross-examination, the appellant has amply demonstrated that deviating from the normal laid down official procedure, the Accounts

Superintendent acknowledged receipt of the letter instead of the Executive Engineer to whom it was personally presented or the manager of the office. It was actually received by the Executive Engineer only on 14.9.1999 when he had put his initials on the same. The letter finds mention of its receipt in the entry of the Inward Register made on 15.9.1999. The appellant having proved the above circumstances from the documents produced through Executive Engineer, the burden shifted to the respondent to prove that before the due date of election he had submitted on 11.8.1999 an application expressing his desire to terminate the contract unilaterally. This burden of proof squarely lay on the respondent which he could have discharged by rebuttal evidence. [153-F-H; 154-A, B]

2.3. Respondent No.1 and RW2, both have not been able to explain why in accordance with the normal official procedure the receipt of the letter dated 11.8.1999 was not formally acknowledged in writing by either the Executive Engineer or the Manager of the office. They also could not explain why entry in the Inward Register was not made on same or subsequent day. Merely because in all subsequent correspondence there is mention of such a letter, the case of respondent cannot be accepted that in fact on 11.8.1999 the letter was submitted. The subsequent correspondence admittedly had taken place after the election. The documentary and oral evidence on record cast a serious doubt on the authenticity of the letter dated 11.8.1999. It cannot be believed that it was handed over to the Executive Engineer personally on 11.8.1999.

[154-C-E]

2.4. The claim of the respondent that the affidavit was presented in the office of the Executive Engineer on 13.8.1999, cannot be accepted. Though, there is nothing to doubt the records of the Notary but it appears unbelievable that both, the letter dated 11.8.1999 and affidavit dated 13.8.1999, although submitted in the office of the Executive Engineer instead of having been acknowledged by the concerned Executive Engineer or the Manager of the office, would have been, contrary to the normal official procedure, acknowledged by the Accounts Superintendent. The statement in cross-examination of the respondent makes it clear that the respondent himself was not personally aware as to who had put initials in the office of the Executive Engineer on the affidavit and acknowledged its receipt. It seems highly improbable that at the time of presentation of letter dated 11.8.1999 and affidavit dated 13.8.1999, the respondent, who was keen to contest the election, would not have insisted on obtaining a

A separate formal acknowledgement of the presentation and receipt of the letter and affidavit from the Executive Engineer to whom the documents are alleged to have been personally handed over. It is most unlikely that on such vital matter concerning his qualification to contest the election the respondent would have felt contented by merely obtaining initials on his personal copies of the letter and affidavit which he alleges to have retained with him for election purposes. [155-H; 156-A]

2.5. The burden of proof that the affidavit was filed by the respondent in the office of the Executive engineer on 13.8.1999 i.e. before the scheduled date of election, was squarely on the respondent, more so, when the appellant has led evidence to prove that affidavit dated 13.8.1999 was never formally received by the department in the office of the Executive Engineer on 13.8.1999. [156-C, D]

3.1. Assuming, that the letter and the affidavit were in fact submitted on the dates mentioned respectively in them, it is not possible to come to the conclusion that respondent as contractor had on his part terminated the contract by withdrawing from the contract and thus committing a breach. The contents of the letter on a plain reading does not convey an intention on the part of the respondent to unilaterally terminate the contract, regardless of the fact whether it had been completed partially or fully. The reference in the affidavit, therefore, is undoubtedly to the letter dated 11.8.1999. The contents of the letter, merely show a desire to obtain 'No Dues Certificate' on a claim that contract had been fully performed. In the affidavit, a part of the statement made is contrary to the contents of the letter. In the letter, it is stated that the contract has been "completed" whereas in the affidavit, it is stated that it "has been executed partially". The letter and affidavit were clearly with a view to request the departmental authorities to take action on their part to formally terminate the contract with cost and expenses to be borne by the contractor. None of the two documents, from the language employed therein, seem to convey an unequivocal intention on the part of the contractor to terminate the contract by treating the same as the breach of it on his part. [157-A; 159-F, G; 157-E-G]

3.2. There is ample documentary and oral evidence to show that the contract came to be terminated legally and formally only after a proposal was moved by the Executive Engineer in that direction. The Chief Engineer granted formal permission for rescinding the contract only on 5.9.2000.

These facts have been confirmed in the deposition of the Chief Engineer of the project on the basis of records shown to him when he was examined as PW4. [159-G; 160-B] A

Prakash Khandre v. V.K. Khandre, JT (2002) Supp. 1 SC 317, distinguished.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5667 of 2001. B

From the Judgment and Order dated 10.4.2001 of the Karnataka High Court in E.P. No. 13 of 1999.

V.A. Mohta, B.K. Choudhary, Santosh Kumar, Amar L.V. and E.C. Vidya Sagar for the Appellant. C

P.P. Rao, S.N. Bhat, D.P. Chaturvedi and K.M. Prakash for the Respondent.

The Judgment of the Court was delivered by D

DHARMADHIKARI, J. This is an appeal under Section 116A of the Representation of People Act 1951 (for short 'the Act') against the order dated 10th April 2001 passed by the High Court of Karnataka at Bangalore dismissing Election Petition No. 13/99 filed by the present appellant challenging election of the Returned Candidate (Respondent No.1 herein) to the Humnabad seat of Karnataka Legislative Assembly Constituency No.5. The Returned Candidate—Respondent No.1 got, 35,438 votes as against the present appellant who got 31,868 votes. E

The election of the Returned Candidate has been assailed on the sole ground that the Returned Candidate on the date of election was disqualified to contest the election as there subsisted a contract between him and the State of Karnataka for construction of Right Bank Canal under the project of Irrigation Department. The aforesaid ground of disqualification is covered by Section 100(1)(a) read with Section 9A and Section 67A of the Act. The aforesaid three Sections of the Act are reproduced hereunder for ready reference:- F

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

(a) *that on the date of his election a returned candidate was not* H

A qualified, or was disqualified, to be chosen to fill the seat under the Constitution or this Act [or the Government of Union Territories Act, 1963 (20 of 1963)]; or

(b)

B (c)

(d)

Section 9A. 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.

C *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.*

D *Section 67A. Date of election of candidate. - For the purposes of this Act, the date on which candidate is declared by the returning officer under the provisions of section 53 or section 66, to be elected to a House of Parliament or of the Legislature of a State shall be the date of election of that candidate."*

E The appellant's case pleaded and sought to be proved in the Election Petition before the High Court was that *on the date of election i.e. 5.9.1999*, there existed a contract between the Returned Candidate as Class I Government Contractor with the Government of Karnataka for the construction of Right Bank Canal including C.D. works from Km. 45 to 46 Lower Mullamari Project of the Irrigation Department. This fact is not in dispute that the tender submitted for the Contract by the respondent was accepted by the Competent Authority i.e. Chief Engineer, Irrigation Department vide his letter dated 5.11.1996. The period fixed for completion of contract was six months including the monsoon season. It is also not disputed by the respondent that even after the expiry of stipulated period of six months, respondent No.1 executed the works under the contract upto 11.8.1999 and was paid for it. Respondent No.1 claims to have submitted on 11.8.1999 an application to the Executive Engineer requesting that he be granted "No dues Certificate" as he intended to contest the Assembly Elections.

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The appellants' Election Petition before High Court was based on the letter dated 5.11.1999 (Ex.P.6) of the Executive Engineer, IPC Division No.3, Sulepeth, which he had received in reply to his query on the existence or otherwise of a contract between respondent No.1 and the State of Karnataka. The contents of the said reply dated 5.11.1999 received by the appellants from the Executive Engineer need reproduction in full:-

Ex.P.6

Dated 5.11.1999

To,
Shri Rajshekhar Patil,
Near K.S.R.T.C. Bus Stand,
Humnabad, Dist. BIDAAR.

ENDORSEMENT

Sub: Existing & subsisting contract between Govt. of Karnataka & Subhas Kallur, Class-I contractor, Humnabad.

Ref: Construction of Right Bank Canal from Km 45 to 46 of Lower Mulamary Project of Irrigation Department.

Sir,

On going through the records it has been noticed Shri *Subhash Kallur*, Class-I contractor, Humnabad, was entrusted the work for the construction of Right Bank Canal including C.D. works from Km. 45 to 46 Lower Mulamary Project of Irrigation Dept.

After verification of measurement book and perusing the entire records of work referred to above Shri Subhas Kallur, Class-I contractor, has not completed the entire work for the construction of Right Bank Canal including C.D. works, from Km 45 to 46 of Lower Mulamary project. The said Subhash Kallur, has executed the works to the extent of 90% of Total work.

There exist a subsisting contract to the extent of 10% of work with Subhash Kallur.

Subhas Kallur, by letter dated 11.8.1999 requested this office to issue No dues certificate to contest the election on the ground he completed the entire work of construction of right Bank Canal including C.D. works from Km. 45 to 46 Lower Mullamary Project.

This is for your submission that since I am contesting the forthcoming Vidhana Sabha Elections, *I require the no due certificate from your office (NDC). As per the Contract with your Department I have completed the work of construction of canal from Km 45 to 46 L.M.C. (Lower level Mullamari project). There are no outstanding dues from my side. Therefore, I request you to kindly issue a no due certificate to me at the earliest.*

Yours faithfully,

Sd/-

Subhash Kallur
First Class Contractor
Humnabad.

The further case of the respondent is that letter dated 11.8.1999 was delivered to the Executive Engineer and on his instructions of Executive Engineer he filed on 13.8.1999 an affidavit (Ex.P7) of which original is filed as Ex.P7A. It has been urged that by the affidavit filed on 13.8.1999, the respondent had made it amply clear that as he intended to contest the election, the contract entered by him with the Government be terminated and the balance work, if any, be taken up at his risk and cost. The contents of the affidavit dated 13.8.1999 also need full reproduction :-

AFFIDAVIT

Entered into Notarial Register
No.1400 Page No. 138
Date 13.8.1999

I, Subhas S/o Gurlingappa Kallur, Age: Major Occ; Contractor R/o Humnabad Dist. Bidar do hereby solemnly affirm and state on oath as follows:

1. I have been entrusted with the following work, construction of Right bank Canal Alongwith C.D. Works in Km. No 45 to 46.
2. That the aforesaid work *has been executed partially by me* and the substantial portion of the work has been completed by me. I am the class-I contractor for the last several years and executed the works as per the time schedule.
3. I humbly state that, I have taken up the aforesaid work with an

A intention to complete the same at the earliest, in view of the preponment of the Assembly elections, I could not complete the work to contest the elections.

4. *I humbly state that, I intend to contest the ensuing election of Karnataka Legislative Assembly, I submitted the application to terminate the subsisting contract between the Government of Karnataka and the said application is under consideration.*

5. *Balance work if, any, may be taken up at my risk and cost for which, I am agreed.*

No. of Correction (Two)

Date: 13.8.1999

Place: Gulbarga

Identified by me.

Deponent.....

D Subash Kallur, I Class
contractor
Humnabad Dist.
[Emphasis for pointed attention]

E After hearing the learned Senior Counsel Shri BA Mohta, appearing for the appellant and learned Senior Counsel Shri PP Rao, appearing for the Returned Candidate, we find that the controversy in this appeal centres on the authentically and legal effect of letter dated 11.8.1999 Ex. P18 and affidavit dated 13.8.1999 Ex.P7.

F The learned Senior Counsel appearing for the appellant urged that from documentary and oral evidence led by the appellant it has been amply demonstrated that the letter dated 11.8.1999 (Ex.P18) and affidavit dated 13.8.1999 (Ex.P7) were surreptitiously introduced in the record of the Irrigation Department by the Returned Candidate only after the date of declaration of result i.e. 5.9.1999.

G On the other hand, learned Senior Counsel appearing for the Returned Candidate submits that the original letter followed by submission of the affidavit and subsequent correspondence exchanged between the officials of Irrigation Department and the respondent, all show that the letter dated 11.8.1999 and affidavit dated 13.8.1999 were genuine documents and were
H neither anti-dated nor interpolated.

We shall first take up for consideration the question whether letter Ex. P18 and affidavit Ex.P7 are genuine documents and were actually tendered to the Department on the date mentioned in those documents. The High Court accepted the letter and the affidavit as genuine documents and as having been submitted on the dates mentioned in them. By relying on the contents of the above mentioned letter and affidavit the High Court recorded its conclusion that before the date of election there was unilateral and/or bilateral termination of contract between respondent and the Government.

In order to prove the alleged falsity of the claim of the Returned Candidate that he had handed over the letter dated 11.8.1999 Ex.P18 and the affidavit dated 13.8.1999, Ex.P7 to the Executive Engineer to seek termination of the Contract, the appellant summoned in evidence the then Executive Engineer, namely, Guranna Muttagi as PW2. The Executive Engineer, who was in charge of the works during the relevant period has stated in his deposition that on 11.8.1999 he had received a letter from respondent seeking issuance of 'No Dues Certificate' as the latter proposed to contest the election. He admitted that on the original letter he had put the date as '14.9.1999' and it contains an official seal showing the dates '15.9.1999' on which entry of its receipt was recorded in the Inward Register at Sr. No. 1862. He testified the entry made on 15.9.1999 in the Inward Register (Ex.P19) pertaining to letter-dated 11.8.1999.

On the question of date of filing of the letter dated 11.8.1999 Ex.P.18 the Executive Engineer in Cross-examination stated that it was submitted to him personally on 11.8.1999 by the respondent but its receipt was acknowledged by the Accounts Superintendent working under him in his office.

Regarding the *affidavit* which is alleged to have been submitted on 13.8.1999, the Executive Engineer in his deposition made the following statement:-

"Usually we make an entry in this register when a document is received in our office, by the next day itself. In this case, affidavit Ex.P7A remained in my file and it is not noticed that an entry relating to the receipt of the said affidavit has not been made in Ex.19. On the very next day, I handed over this affidavit taking it out from my file to the inward clerk on 14.9.1999 when I was about to go on leave, for the purpose of making an entry about the receipt of this affidavit in

A Ex.P19”.

B The respondent in his deposition stated that after submission of letter Ex.P18, the Executive Engineer asked the respondent to file an affidavit mentioning the work done by him. Thereupon, the respondent filed affidavit Ex. R10 on 13.8.1999. According to the respondent on the Xerox copy of the affidavit an endorsement of its receipt on original in the office of the Executive Engineer was also made.

C In his cross-examination he denied the suggestion that letter dated 11.8.1999 was not handed over to the Executive Engineer on the said date as there is no entry of the said letter in the Inward Register maintained in the office.

D To prove genuineness of the letter dated 11.8.1999 and affidavit dated 13.8.1999, the respondent examined the Accounts Superintendent viz. Sreekant Deshmukh (RW2). The Accounts Superintendent stated that he had received letter dated 11.8.1999 (Ex.P18) and according to him he had put his initials on it on the same date to acknowledge its receipt. He admitted that the letter is addressed to the Executive Engineer but explained that since he was attached to the office of Executive Engineer, the application was given to him by the Executive Engineer to acknowledge its receipt. In cross-examination the Accounts Superintendent admitted that Inward and Outwards Registers are maintained in the office and in accordance with the normal procedure applications or letters received by the Executive Engineer should have been acknowledged by the Manager in the office. The Accounts Superintendent also admitted that it was not his normal duty to receive any letter or application and to acknowledge the same. But he tried to explain that as the Executive Engineer had instructed him to acknowledge the receipt, he had done so. He admitted that the letter dated 11.8.1999 Ex.P18 bears the initials of Executive Engineer containing the date as 14.9.1999 and the said letter is entered at Sl. No.1862 in the Inward Register on 15.9.1999. He volunteered to add that the relevant entry in inward register was made subsequently.

G On this state of evidence, on behalf of the appellant, it is argued that the receipt of the letter Ex.P18 was not formally acknowledged on 11.8.1999 by the Executive Engineer who had put his initials on the said letter only on 14.9.1999. The entry of its receipt was made in the Inward Register on 15.9.1999. These facts all indicate that the letter Ex.p18 *was actually not*
H *tendered on 11.8.1999* to the Executive Engineer and a false case has been

set up to somehow get over the disqualification which the respondent suffered on the date of election. A

Learned counsel for the respondent took us through all subsequent correspondence exchanged between the respondent, the Executive Engineer and Chief Engineer. Reliance is also placed on the letter sent by Executive Engineer in reply to the query of the election petitioner, to show that in all of them, there is a mention of submission of letter by respondent on 11.8.1999 for seeking 'No Dues Certificate' and expressing his unwillingness to go ahead with the remaining work of the contract. It is strenuously argued that this Court should believe, as was done by the High Court, that in fact, on 11.8.1999 letter Ex.P18 was tendered to the Executive Engineer with a desire to end the contract. B C

On the question of date of submission of the letter, learned counsel for the respondent argued that the Executive Engineer, who was summoned by the appellant as PW2, testifies the fact that on 11.8.1999 letter Ex.P18 was submitted to him. It is argued that the appellant did not cross-examine the Executive Engineer and having failed to do so this Court should reject the case of the appellant that the aforesaid letter was not, in fact, presented to the Executive Engineer on the date mentioned in it. D

Having carefully gone through the contents of the letter dated 11.8.1999 Ex.P18, the affidavit Ex.P7, the subsequent correspondence and the oral evidence on record, we have come to the conclusion that the appellant has been able to establish that the letter dated 11.8.1999 is not a genuine document. It was not presented on 11.8.1999 as is shown to have been so presented to the Executive Engineer before the scheduled date of election. E

We are not at all impressed by the argument that the Executive Engineer examined as PW2 by the appellant ought to have been cross-examined by the appellant and in absence thereof, the case of the appellant that the letter dated 11.8.1999 was an interpolated document should be rejected. The appellant had summoned the Executive Engineer with the original documents alleged to have been presented before him. From his statement in examination-in-chief and cross-examination, the appellant has amply demonstrated that deviating from the normal laid down official procedure, the Accounts Superintendent acknowledged receipt of the letter instead of the Executive Engineer to whom it was personally presented or the Manager of the office. What appears to us is that it was actually received by the Executive Engineer F G H

A only on 14.9.1999 when he had put his initials on the same. The letter finds mention of its receipt in the entry of the Inward Register made on 15.9.1999. The appellant as the election petitioner having proved the above circumstances from the documents produced through Executive Engineer, the burden shifted to the respondent to prove that before the due date of election he had submitted on 11.8.1999 an application expressing his desire to terminate the contract unilaterally. This burden of proof squarely lay on the respondent which he could have discharged by rebuttal evidence.

C The respondent examined himself in support of his case that the letter dated 11.8.1999 Ex.P 18 was submitted personally. The respondent examined the Accounts Superintendent as RW2. They have both been effectively cross-examined by the appellant. The above named witnesses have not been able to explain why in accordance with the normal official procedure the receipt of the letter dated 11.8.1999 was not formally acknowledged in writing by either the Executive Engineer as the Competent Authority or the Manager of the office. They also could not explain why entry in the inward Register was not made on same or subsequent day. Merely because in all subsequent correspondence there in mention of such a letter, the case of respondent cannot be accepted that in fact on 11.8.1999 the letter was submitted to the Executive Engineer. The subsequent correspondence admittedly had taken place after the election. The documentary and oral evidence on record cast a serious doubt on the authenticity of the letter Ex.P18. We are not prepared to believe that it was handed over to the Executive Engineer personally on 11.8.1999 as has been sought to be projected on behalf of the respondent.

F Next we consider the authenticity of the affidavit Ex.P7, which is said to have been submitted on 13.8.1999, on the alleged instruction of the Executive Engineer and two days after the letter dated 11.8.1999 was alleged to have been submitted to him. We have already held above that the case of the respondent that on 11.8.1999 he had submitted letter Ex.P18 to the Executive Engineer cannot be believed. The further case of the respondent based on that letter of having filed an affidavit on 13.8.1999 on instruction of the Executive Engineer, for the same reason, cannot be believed. In accordance with the laid down procedure, there ought to have been an entry of this affidavit in the Inward Register. This omission has not been explained by the Executive Engineer. Learned counsel for the respondent made strenuous effort to persuade us to accept the authenticity of the affidavit and date of its submission. From the contents of the original affidavit attention of the Court is invited to the portion at the top of the affidavit having entry of 'Notarial

Register No. 1400 page No.138 with 'date' mentioned as '13.3.1999'. It is also pointed out that it contains seal of the Notary. Much emphasis is laid on the fact that at the bottom of the affidavit shown as sworn and notarized on 13.8.1999, there are initials put of its receipt on 13.8.1999 with seal mentioning office of the Executive Engineer, Irrigation Project Construction, Division No. 3, Sulepeth, Taluk-Chincholi. It is also tried to be shown that the stamp of Rs. 50 on which affidavit seems to have been prepared through Notary is shown to have been purchased on the same day i.e. 13.8.1999. It is submitted that the original contents of the affidavit with the stamp, seals and initials put for acknowledgment of its receipt, clearly go to show that it was a genuine document prepared and presented on the date as shown in the document.

Having carefully scrutinized the contents of the affidavit and the oral evidence of the witnesses examined in respect thereof, we find it difficult to accept the claim of the respondent that the affidavit (Ex.P7) was presented in the office of the Executive Engineer on 13.8.1999. We have nothing before us to doubt the records of the Notary but it appears unbelievable that both, the letter dated 11.8.1999 and affidavit dated 13.8.1999, although submitted in the office of the Executive Engineer, instead of having been acknowledged by the concerned Executive Engineer or the Manager of the office, would have been, contrary to the normal official procedure, acknowledged by the Accounts Superintendent. The respondent has very categorically stated in cross-examination thus:-

“I do not know who has received the affidavit as per Ex.R10 and made endorsement to the said affidavit for having received the same since I was waiting in the office at that time.”

This part of the statement in cross-examination of the respondent makes it clear that the respondent himself was not personally aware as to who had put initials in the office of the Executive Engineer on the affidavit marked as Ex.R.10 (a) and acknowledged its receipt (Ex. P. 19). It seems highly improbable that at a time of presentation both of letter dated 11.8.1999 and affidavit dated 13.8.1999, the respondent, who was keen to contest the election, would not have insisted on obtaining a separate formal acknowledgment of the presentation and receipt of the letter and affidavit from the Executive Engineer to whom the documents are alleged to have been personally handed over. It is most unlikely that on such vital matter concerning his qualification to contest the election the respondent would have felt contented by merely obtaining initials on his personal copies of the letter and affidavit which he

A alleges to have retained with him for election purposes.

On the contested issue of date of submission of the affidavit, the Executive Engineer as PW2 in his deposition states:

B “This Ex. P7 was submitted by the first respondent on 13.8.1999 and it was received by the Accounts Superintendent in our office.”

C The respondent examined the Accounts Superintendent Shri Srikant Deshpande RW2 but the affidavit was not put to him to prove that in the copy of the affidavit retained by the respondent, at its bottom the respondent had put initials by writing “receipt” and date “13.8.1999”. The burden of proof that the affidavit was filed by the respondent in the office of the Executive Engineer on 13.8.1999 i.e. before the scheduled date of election, was squarely on the respondent, more so, when the appellant has led evidence to prove that affidavit dated 13.8.1999 was never formally received by the department in the office of the Executive Engineer on 13.8.1999.

D In our considered opinion, therefore, the appellant has satisfactorily proved his case that both the documents i.e. letter dated 11.8.1999 and affidavit dated 13.8.1999, were neither formally tendered nor officially received in the office of the Executive Engineer on the dates respectively shown on them. The respondent has miserably failed to dispel the doubt created on the fact and date of submission of the letter and the affidavit.

E However, presuming that letter dated 11th August, 1999 was submitted to the Department. Thereafter, an affidavit was filed on 13th August, 1999, yet it is not possible to hold that the returned candidates terminated the subsisting contract with the Government.

F A close reading of the contents of letter dated 11.8.1999 (Ex. P.18), makes its meaning plain. The respondent thereby claimed to have completed the work of civil construction awarded to him and on such assumption, he requested for issuance of a ‘No Dues Certificate’. The said letter as its language makes apparent was written on an understanding on the part of the respondent that he had fully performed the contract. It appears, he wanted to bring his case within the *Explanation* (quoted above) appended below Section 9A of the Act which provides that for the purposes of Section 9A, ‘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

H by reason only of the fact that the government has not performed its part of

the contract either wholly or in part'. A

The contents of the letter on a plain reading does not convey an intention on the part of the respondent to unilaterally terminate the contract regardless of the fact whether it has been completed partially or fully. On behalf of the respondent learned counsel placed heavy reliance on the language employed in paragraphs 4 & 5 of the affidavit dated 13.8.1999 (Ex. P7). It is pointed out that in those paragraphs of the affidavit clear mention has been made of the fact that respondent had already made earlier an application to terminate the subsisting contract between him and the Government of Karnataka. It also contains intimation to the Government to take up the balance work at the risk and cost of the Contractor. On the above-described language of the affidavit, it is submitted that the contract was unilaterally put to an end. B C

We have already held that the genuineness of the affidavit and its submission on 13.8.1999 is in grave doubt. We have rejected the case that letter on 11.8.1999 and affidavit on 13.8.1999 were tendered in the office of the Executive Engineer. The reference in paragraph 4 of the affidavit to an 'earlier application' of the respondent to terminate the subsisting contract is to none other than the letter dated 11.8.1999 Ex. P. 18. It is not the case of the respondent that before 13.8.1999 any other letter, apart from the one-dated 11.8.1999 (Ex. P.18) had been submitted by the respondent. The reference in the affidavit dated 13.8.1999, therefore, is undoubtedly to the letter dated 11.8.1999 Ex. P. 18. The contents of the letter, as we have understood and held above, merely show a desire to obtain 'No Dues Certificate' on a claim that contract had been fully performed. In the affidavit, a part of the statement made is contrary to the contents of the letter. In the letter, it is stated that the contract has been "completed" whereas in the affidavit, it is stated that it "has been executed partially". In the last part of the affidavit reference is made to the application earlier made to terminate the contract as the Contractor intended to contest the election. The letter and affidavit were clearly with a view to request the departmental authorities to take action on their part to formally terminate the contract with cost and expenses to be borne by the Contractor. None of the two documents from the language employed therein seem to convey an unequivocal intention on the part of the contractor to terminate the contract by treating the same as the breach of it on his part. D E F G

On behalf of the respondent, reference was made and reliance placed on the decision of this court in the case of *Prakash Khandre v. V.K. Khandre*, H

A JT 2002 Supp. 1 SC 317 to which one of us Brother M.B. Shah J, was party and who had delivered the opinion on behalf of the Bench. We have looked into the case of *Prakash Khandre* (supra). It is clearly distinguishable on the basis of contents of the letters and notices exchanged therein which indicated a very clear unequivocal intention on the part of the contractor to terminate the contract regardless of the consequences of the breach.

B

In the case of *Prakash Khandre* (supra), in one of the letters of the contractors sent to the department before the date of election, it was indicated clearly as under:-

C

“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 the 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 9A of the Representation of 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 is given to me in the subsisting contract between me and the government.”

D

E

F

In is on the basis of the contents of such letters and other letters exchanged between the parties that the court in case of *Prakash Khandre* (supra) came to the following conclusion:-

G

“From the evidence and the correspondence produced between the appellants and the department, it is crystal clear that the appellants terminated the subsisting contracts and the departments accepted it. Hence, contracts were brought to an end by the parties. Department also permitted the remaining works to be carried out by Mallikarjun

H

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.” A

On the above mentioned peculiar features of the case of *Prakash Khandre* (supra), the decision rendered by this court in that case is of no assistance to the respondent in supporting his case that, well before the date of election, he had unequivocally terminated the contract subsisting between him and the department. In the case before us, contents of the letter dated 11.8.1999 (Ex. P. 18), do not contain any intention to terminate the contract. It contains only a request for issuance ‘No Dues Certificate’ on the assumption that the work has been completed. The affidavit alleged to have been submitted by the respondent two days thereafter only makes mention of the earlier letter, and desires action on the part of the government for terminating the contract. The following contents of the affidavit very clearly convey such intention:- B C D

“I humbly state that, I intend to contest the ensuing election of Karnataka Legislative Assembly, I submitted the application to terminate the subsisting contract between the government of Karnataka and the said application is under consideration. Balance work, if any, may be taken up at my risk and cost for which I am agreed.” E

[emphasis supplied]

Assuming, therefore, that the letter (Ex. P. 18) and the affidavit (Ex. P.7) were in fact submitted on the dates mentioned respectively in them, it is not possible to come to the conclusion that respondent as contractor had on his part terminated the contract by withdrawing from the contract and thus committing a breach. The contents of both the documents clearly desire an action on the part of the government of terminating the contract. The conclusion in the case of *Prakash Khandre* (supra) turned on the contents of the letters and notices exchanged therein and is clearly distinguishable on peculiar facts therein as discussed above. F G

There is ample documentary and oral evidence to show that the contract came to be terminated legally and formally only after a proposal was moved by the Executive Engineer in that direction. Such proposal was initiated by Executive Engineer only on 8.2.1999 (Ex. P9) which was followed by proposal H

A of Superintending Engineer to the Chief Engineer by letter dated 3.2.2000 Ex.P10. Exchange of correspondence then took place *inter se* between SE and the Chief Engineer (Ex. P11 to Ex. P. 13]. In all the above inter-departmental communications it has been stated that the Contractor had not completed 10% of the work awarded to him. The Chief Engineer granted formal permission for rescinding the contract only on 5.9.2000 by his communication (Ex. P21) to that effect sent to the S.E. These facts have been confirmed in the deposition of the Chief Engineer of the project on the basis of records shown to him when he was examined as PW4.

Thus, we find that there is neither unilateral nor mutual termination of subsisting contract by respondent no. 1. In the affidavit dated 13 August, 1999, it was stated that his application or request for termination of contract was “under consideration” of the department. Unless there was acceptance of the said request by the department, it could not be said that the contract stood terminated by mutual consent. The department accepted the request made by the respondent only in September, 2000. To support the case of unilateral termination of the contract, as advanced by the learned counsel on behalf of the returned candidate before us, there is nothing on record except the pleas developed step by step which varied from the stage of filing written statement to oral evidence and thereafter at this appellate stage.

Thus, on appreciation of documentary and oral evidence on record, we find that the High Court committed serious error in coming to the conclusion that the letter and the affidavit mentioned above were submitted by the respondent to the office of Irrigation Department of the State and resultantly there was unilateral or bilateral termination of the contract.

Our conclusion is that the returned candidate suffered a disqualification under Section 9A of the Act for contesting the election as the contract between him and the Irrigation Department of State of Karnataka subsisted for 10 per cent of remaining work. His election is, therefore, liable to be set aside on the ground made out under Section 100 of the Act.

In the result, this appeal succeeds and is allowed. The order of the High Court dated 10th April 2001 passed in Election Petition No. 13/99, is hereby set aside.

The election of the respondent as Returned Candidate to the Karnataka Legislative Constituency No. 5, Humnabad is declared to be void. The

necessary intimation of the result of this appeal be sent to the Election Commission, the Speaker or the Chairman of the State Legislature of Karnataka State in accordance with Sub-section (2) of Section 116-C for taking further steps in accordance with law. The appellant shall be entitled to the costs of the petition. Counsel's fee - Rs. 10,000 if pre-certified. A

K.K.T.

Appeal allowed. B