

PETITIONER:
M.J. ZAKHARIA SAIT

Vs.

RESPONDENT:
T.M. MOHAMMED AND ORS.

DATE OF JUDGMENT 25/04/1990

BENCH:
SAWANT, P.B.
BENCH:
SAWANT, P.B.
SHARMA, L.M. (J)

CITATION:
1990 SCR (2) 719 1990 SCC (3) 396
JT 1990 (2) 404 1990 SCALE (1) 816

ACT:

Representation of People Act, 1951: Sections 40, 83, 100, 123(4) and 127-A.

Election--Corrupt practice--Pleadings and proof of--Requirements--Oral testimony--Corroboration by contemporaneous documents--Need for.

Statement maligning personal character and conduct of candidate--Innuendo meaning to be proved by special or extrinsic facts--Statements must be proved to have been reasonably calculated to prejudice the prospects of the candidate.

Electoral offence--Complaint under s. 127-A of the Act and s. 171/PC--Evidence of corrupt practice.

Libel action and corrupt practice--Difference between.

Status of election agent--Almost similar to that of candidate.

HEADNOTE:

In the 1987 election to Kerala Legislative Assembly the appellant contested against the first respondent.

The appellant and respondents belonged to two different fronts, each consisting of several political parties. The appellant was declared elected, by a margin of 1873 votes over his nearest rival, the first respondent.

The first respondent filed an election petition in the High Court claiming that the appellant's election was void and that he should be declared elected in place of the appellant. In support of his contention, he alleged various corrupt practices on the part of the appellant. The High Court negatived all except two of the allegations, viz., (i) printing and publication on March 22, 1987, a day prior to the election, pamphlets containing a news item in daily "Malayala Manorama" dated May 22, 1983, and (ii) publication of a wall poster, maligning the
720

personal character and conduct of the first respondent.

The High Court held that both the said acts amounted to corrupt practices within the meaning of Section 123(4) of the Representation of People Act, 1951 and were sufficient to void the election.

This appeal under s. 116A of the Representation of People Act, is against the High Court's judgment. Allowing the appeal, this court,

HELD: 1.1. As regards the pamphlets, the first respondent in his election petition had relied upon an innuendo, and the innuendo was based upon the fact that, firstly, he was a Marxist leader and, secondly, he was arrested for harbouring the murderers. However, in the election petition, no averment was made that it was because he was a Marxist leader and was also arrested for harbouring the murderers that the electorate was likely to construe the said two statements as accusing him as the murderer. No facts were pleaded in the Election Petition whereby the electorate would gather an impression that the first respondent was the murderer of the said four victims. [733B-C; 746 E-F]

1.2. Barring his own testimony, all other evidence led by the first respondent is also totally silent on this aspect of the matter. None of his witnesses has stated anywhere that the contents of the pamphlet had made out the first respondent as the murderer of the four victims or even that they were capable of doing so. On the other hand, all his witnesses without exception are unanimous that after reading the pamphlet the impression it created on them was that it referred to an incident which had taken place on the previous day or to an earlier incident and nothing more. None of the witnesses has stated that the said pamphlet even remotely connected the first respondent with the murders. The impression conveyed by the document that the Marxists or Communists were murderers and therefore the electorate should not vote for them and hence it was unfavourable to the first respondent, was not an impression about his personal character/ conduct. It was an impression at best about his political character/ conduct. In particular there was no impression that he was the murderer or one of the murderers. Although the first respondent has also added at the end that many persons who gathered such an impression, viz., that he was meant by the publication, had contacted him over phone, he admitted that he did not examine anyone from among the said persons. This is a telling circumstance against him because he had

721

followed as a witness after all his witnesses were examined, and he knew that none of his witnesses had stated that they had connected the imputations in the publication with him. On the other hand, as stated earlier, not only all his witnesses had stated that they had gathered the impression that the incident had taken place the previous day but he himself was of the view that the publication was meant to create such impression and that it did so. Hence, there was no reason for the electorate to connect him with the said incident even remotely. On his own testimony as well as on the testimony of his witnesses, therefore, it is clear that the publication was intended to create an impression and did create an impression that the incident of murders had taken place a day previous to the election. If that is so, then the publication and the two allegedly offending statements in the same did not connect him with the murders much less had they called him a murderer. Even his arrest for harbouring the accused in the old incident of murders was not capable of identifying him as the murderer in the eyes of the people. None knew who were the accused and who were arrested in connection with the murders which were committed the previous day. The people, however, certainly knew that the first respondent was not arrested in connection with the said murders. Hence the extrinsic facts which the first respondent stated in his testimony for the first time even if they were given in the pleadings would not have spelt out the corrupt practice. For those facts in the face of the

assertion of the first respondent himself were incapable of identifying him as the murderer in the eyes of the electorate. For these reasons, the extrinsic facts given for the first time by the first respondent in his testimony were incapable of identifying him as the hand behind the murders or as the murderer in the eyes of the people. [746F-H; 751A-B; 755D-H; 756A-B]

1.3. In the absence of the extrinsic facts supporting the innuendo meaning of the publication, the petition lacked the statement of material facts for spelling out the corrupt practice complained of. Either, therefore, the allegation of the corrupt practice should have been struck off or the petitioner ought not to have been allowed to lead evidence in support of it. [756C]

2.1. Where the defamatory words complained of are not defamatory in the natural or ordinary meaning, or in other words, they are not defamatory per se but are defamatory because of certain special or extrinsic facts which are in the knowledge of particular persons to whom they are addressed, such innuendo meaning has to be pleaded and proved specifically by giving the particulars of the said extrinsic facts. It is immaterial in such cases as to whether the action is for

722

defamation or for corrupt practice in an election matter, for in both cases it is the words complained of together with the extrinsic facts which constitute the cause of action. It is true that Section 123(4) of the Act states that the statement of fact in question must be "reasonably calculated to prejudice the prospects" of the complaining candidate's election. However, unless it is established that the words complained of were capable of being construed as referring to the personal character or conduct of the candidate because of some specific extrinsic facts or circumstances which are pleaded and proved, it is not possible to hold that they were reasonably calculated to prejudice his prospects in the elections. For, in the absence of the knowledge of the special facts on the part of the electorate, the words complained of cannot be held to be reasonably calculated to prejudice such prospects. Once, however, it is proved by laying the foundation of facts that the words in question were, by virtue of the knowledge of the special facts, likely to be construed by the electorate as referring to the personal character or conduct of the complaining candidate, it may not further be necessary to prove that in fact the electorate had understood them to be so. That is because all that Section 123(4) requires is that the person publishing the complaining words must have intended and reasonably calculated to affect the prospects of the complaining candidate in the election. [745E-H; 746A-B]

2.2. Whenever an innuendo is alleged, a statement of material facts as required by Section 83(i)(a) of the Act is not complete without stating the extrinsic facts spelling out the innuendo meaning. It is the publication together with the extrinsic facts which in such circumstances constitute the corrupt practice. The absence of the statement of such facts is not an absence of the particulars of corrupt practice but an absence of the averment of material facts themselves.

Sheopat Singh v. Ram Pratap, [1965] 1 SCR 175; Kumara Nand v. Brijmohan Lal Sharma, [1967] 2 SCR 127; Habib Bhai v. Pyarelal & Ors., AIR 1964 MP 62; Manmohan Kalia v. Yash & Ors., [1984] 3 SCR 383; W. Hay & Ors. v. Aswini Kumar Samanta, AIR 1958 Cal. 269; Hough v. London Express Newspaper Ltd., [1940] 3 All ER 31; Fullam v. Newcastle Chronicle and

Journal Ltd. & Anr., [1977] 3 All ER 32; Cassidy v. Daily Mirror Newspapers, [1929] 2 KB 331; Nevill v. Fine Art and General Insurance Co. Ltd., L.R. 1887 AC 68 and Capital and Counties Bank Ltd. v. George Henty & Sons, LR 1882 7 AC 741, referred to.

Halsbury's Laws of England, Vol. 28, 4th Edn. paras 174-178; Gatley on Libel and Slander, 8th Edn. paragraph 95; Street on Torts, 723

6th Edn., p. 294 and Duncan & Neil on Defamation, [1978] Edn., p. 17, referred to.

3. Both, for libel action as well as for an allegation of corrupt practice in an election petition, it is necessary to plead as well as to prove the extrinsic facts to spell out the innuendo meaning of the words complained of. However, whereas in a libel action it may further be necessary to prove that those with special knowledge of the extrinsic facts were likely to interpret or understand the words complained of in a defamatory sense, in an election action, it may not be necessary to do so and all that is necessary is to prove that the words complained of were reasonably calculated to prejudice the prospects of the defamed candidate's election. However, this latter distinction does not obliterate the similarity between the two actions viz., that in each case in the first instance the defamation is to be spelt out by pleading the necessary extrinsic facts. In a libel action, the extrinsic facts constitute a cause of action whereas in the election action they constitute the corrupt practice. In other words, without them, there is no cause of action in the libel suit and no allegation of corrupt practice in an election petition. [756F-H; 757A]

4.1. As regards the wail-posters in which the first respondent was described as a murderer and it is stated that hence he should be defeated, the first respondent in his petition has stated generally that it was the appellant, his agents and his workers who had pasted the wallposters. He has not specified any wail or wails on which the poster was pasted. He has not mentioned either the agent or the election agent nor did he state that the pasting was done with the knowledge and consent of the election agent. It is important to note that he mentioned the pasting of the poster only on one wail, though there was a vague reference to "walls". [761F-H; 765B]

4.2. Time and again, the courts have uttered a warning against the acceptance of a non-corroborated oral testimony in an election matter because it is not only difficult to get a non-partisan witness but is also easy to procure partisan witnesses in such disputes. The courts have, therefore, insisted upon some contemporaneous documentary evidence to corroborate the oral testimony when in particular such evidence could have been maintained. Such a danger is illustrated by the testimony of PW. 25 in the instant case. It is not only contradictory, and fails to impress this court but also leads to the belief that there is much force in the contention of the appellant that the poster in question was concocted at a later day. It is difficult to explain as to why the witness a

724

professional photographer who in the ordinary course should maintain his accounts and other documents should keep them off from the court on pretexts which are not only far from convincing but positively doubtful. Although he stated that he was paid Rs.8,00 for the photographs and Rs.1,000 for copies thereof, he did not enter the amounts in his accounts. He stated that he had a Bank account but he did not

remit the amount to the Bank. He then stated that in his studio there would be no record to show that the photographs were taken. He also stated that he had not given any receipt for receiving the payment. [764G-H; 767A-D]

4.3. "Election agent" as defined in Section 40 of the Act is accorded a special status of almost an alter ego of the candidate so much so that whatever is done by the election agent or with his consent is deemed to have been done by the candidate himself whether it is with the candidate's consent or not. He is empowered to discharge almost all the functions that a Candidate can himself perform. 1729E-FI

4.4. It was alleged that the wall-poster was written at the specific instructions of the Chief Agent and the Convenor. It was not specified who the Chief Agent and the Convenor of the Election Committee were. The argument that the expression "Chief Agent" should be construed to mean election agent, cannot be accepted since the pleadings with regard to corrupt practice have to be specific since everyone who is guilty of the corrupt practice is liable to be prosecuted for the offence. And except in one place, there is no reference to any such person as Chief Agent. Wherever the first respondent wanted to refer to the election agent, he has done so. It cannot, therefore, be said that he did not know the difference between the election agent and the Chief Agent. [762B-E]

4.5. The first respondent has come to the court with a version that the wall-poster and such other posters were pasted on walls in the different parts of the constituency at least a week prior to the election. Admittedly, such false propaganda is an electoral offence punishable both under Section 127A of the Act and Section 171-C of the Indian Penal Code. The first respondent or his agents and workers could have made complaints both to the Election Officer as well as to the police in that connection immediately, and a regular panchnama of the same could also have been made at the time. That would have been the best evidence of the said allegation. The first respondent and his workers would not have failed to do so had the posters been pasted at the time alleged by them. [767E-F]

725

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3951 (NCE) of:1987.

From the Judgment and Order dated 19.11.1987 of the Kerala High Court in E.P. No. 3 of 1987.

K.K. Venugopal, E.M.S. Anam, E. Ahmad and V.K. Beeram for the Appellant.

Dr. Y.S. Chitale, M.K. Damodaran, V.J. Mathew, Aseem Mehrotra and K.M.K. Nair for the Respondents.

The Judgment of the Court was delivered by

SAWANT, J. This is an appeal under Section 116A of the Representation of the People Act, 1951 (hereinafter referred to as the 'Act') against the judgment of the High Court of Kerala in Election Petition No. 3 of 1987, by which the election of the appellant to the Kerala Legislative Assembly from Mattancherry Constituency No. 73 was declared void on the ground that the appellant had committed two corrupt practices within the meaning of Section 123(4) of the Act.

2. The admitted facts are that election to the Kerala Legislative Assembly from all the constituencies was held on March 23, 1987. The main contest in almost all the constituencies was between the United Democratic Front (UDF) con-

sisting of Congress-I, Kerala Congress, Indian Union Muslim League (IUML) and others on the one hand, and the Left Democratic Front (LDF) consisting of the Communist Party of India--Marxist (CPI-M), Revolutionary Socialist Party and others on the other. The appellant was the candidate of the LDF and the first respondent was the candidate of the UDF. In the said election, the appellant was declared elected by a margin of 1873 votes over his nearest rival, the first respondent.

3. On May 8, 1987, the first respondent filed an election petition claiming a declaration that the appellant's election was void and that he was entitled to be declared duly elected from the said constituency. In support of the petition, the first respondent alleged various corrupt practices on the part of the appellant. However, the High Court negated all the said corrupt practices except two, viz., (i) printing and publication on March 22, 1987, a day prior to the election, pamphlets containing a news item in daily "Malayala Manorama" dated May 22, 1983, and (ii) publication of a wall poster, both maligning the personal character and conduct of the first respondent. The High Court held that both these acts amounted to corrupt practices within the meaning of Section 123(4) of the Act and were sufficient to

726

void the election. The pamphlet containing the reprint of the daily "Malayala Manorama" was marked as Ex. P-1 and two photographs of the wall-poster were marked as Exs. P-14 and P-15 before the High Court and would be referred to hereinafter as such. Ex. P-14 is the close-up and Ex. P-15 is the distant photograph of the same wall-poster.

4. Before we refer to the rival contentions and the material on record, it would be convenient if we reproduce here the contents of Ex. P-1 and Exs. P-14 and P-15 to understand the allegations made in the said documents.

Ex. P-1 is a reprint of a page of the issue of 22nd May, 1983 of a daily newspaper "Malayala Manorama". It contains the names and the photographs of four men, who were admittedly murdered in May 1983. It also carries two other photographs, one showing two killed bodies lying and the other showing the front part of the court building where allegedly all the four were killed. It also carries a photograph of the appellant with his election symbol which was 'ladder' and a photograph of the then Prime Minister, Rajiv Gandhi. Apart from the contents of the said newspaper as they appeared in the said old issue, it carries additions on the left hand, the English translation of which is as follows:
"ELECT ZAKHARIA THE UNITED FRONT CANDIDATE MATTANCHERRY.

On March 23rd a decisive election is taking place in our State. We wish to have a Government who will protect life and property of the people. In the light of past experience the only front acquired legitimate claim to give protection is the United Democratic Front under the leadership of Congress (I). Marxist Party has only created insecurity in the country.

X X X X

The Marxist Comrades who create lawlessness and commit murders while in power and out of power, is a challenge to peace loving inhabitants of Mattancherry. Mattancherry is a constituency which has witnessed terrible cruelties of the Marxists. The Mattancherry Town, once the centre of commerce, today became equal to a grave

727

yard only due to violent activities of the Marxist people.

The wounds created by their cruelties are always unhealed. They need not be detailed by one.

X X X X

You may remember only the cruel murder that shocked Mattancherry in 1983. Four youngsters were cut to death in the road in broad day light. The relevant portion of the Malayala Manorama which published that news is given herewith as, such; everybody knows the hands behind that murder. The Marxist leader arrested is also known.

X X X X

Dear sisters, brothers, you may think a while. Should we have the rule of the Marxist terrorists.

We believe that the people of Mattancherry who wish peaceful life in the country will defeat Marxists.

X X X X

Believers in democracy should be specially careful not to split their votes. It is possible to defeat Marxists only through unity of the believers in democracy. That is why the Indian National Congress lead by Shri Rajiv Gandhi'- the stalvert of democratic Bharath is giving leadership to the democratic front. It is the necessity of peace lovers that United Democratic Front should win for law and order and stable administration. Therefore, it is humbly requested that M.J. Zakharia may be elected with big majority casting votes to his Ladder Symbol.

 Photo of M.J. Zakharia
 Vote Democratic Front to avoid Marxist Rule of Terror
 Photo of Rajiv Gandhi

 Constituency Election Committee
 United Democratic Front,
 Mattancherry
 728
 Give Strength to Rajiv Gandhi's hands

VOTE FOR UNITED DEMOCRATIC FRONT CANDIDATE
 M.J. ZAKHARIA IN LADDER SYMBOL

Printed at Veekshanam."

The High Court has found that the following statement in paragraph 3 above, viz., "everybody knows the hands behind that murder. The Marxist leader arrested is also known" was in relation to the personal character/conduct of the first respondent. Exs. P-14 and P-15 are the photographs, as stated earlier, of the poster pasted on a wall, with the pamphlet (Ex. P-1) pasted on its left side. The contents of the wall-poster are as follows:

"Defeat murderer T.M. Mohammed who murdered four Christian brothers at Fort Cochin.

Our Symbol."

The symbol is the ladder. This poster directly accused the first respondent as being murderer of the said four killed persons and requested the voters to vote for the appelliant.

5. As regards Ex. P-1, there is no mention of the first respondent directly by his name anywhere in the poster. However, the first respondent has alleged that there is an innuendo by which he is projected there as the murderer of the four victims. The High Court has accepted that the first respondent is referred to in the said pamphlet by innuendo. The High Court has also found that the pamphlets were got printed by one Latif who was appelliant's agent, on behalf of his Election Committee and at the instance of and with the consent and connivance of the appelliant and his election agent and was distributed by them among the electors knowing

the imputation to be false and calculated to affect the prospectus of his election. As regards Exs. P- 14 and P-15, the High Court has recorded a finding that the said wall-poster was pasted on a wall at the instance and with the consent of the appellant's election agent. Thus, the High Court has recorded a finding that the first respondent had proved that the appellant was guilty of the corrupt practices within the meaning of Section 123(4) of the Act.

6. Before we proceed to discuss the relevant evidence on record, it is necessary to understand the correct position of law on the subject. The corrupt practices and electoral offences are mentioned in Part-7 of the Act. Chapter I of the said Part deals with corrupt practices and contains Section 123 whereas Chapter III thereof enumerates electoral offences. and penalties therefore, and contains Sections 125 to 136.

729

Section 123(4) with which alone we are concerned in the present appeal reads as follows:

"123(4) The publication by a candidate or his agent or by any other person with the consent of a candidate or his election agent, of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, or in relation to the candidature, or withdrawal, of any candidate, being a statement reasonably calculated to prejudice the prospectus of that candidate's election."

It is obvious from the aforesaid provisions of Section 123(4) that for a publication to constitute the corrupt practice (a) it must be a statement of fact: by (i) a candidate; or (ii) his agent; or (iii) any other person with the consent of the candidate or his election agent; (b) the statement must be false or the candidate must believe it to be false or should not believe it to be true; (c) the statement should refer to the personal character and conduct of another candidate and (d) that it must be reasonably calculated to prejudice the prospects of that other candidate's election. Explanation 1 to Section 123 states that in that Section the expression "agent" includes election agent, a polling agent and any person who is held to have acted as an agent in connection with the election with the consent of the candidate. The expression "election agent" is defined in Section 40 and is accorded a special status of almost an alter ego of the candidate so much so that whatever is done by the election agent or with his consent is deemed to have been done by the candidate himself whether it is with the candidate's consent or not. It is further sufficient to note that the election agent is empowered to discharge almost all the functions that a candidate can himself perform.

7. The further provisions of the Act which are necessary to be noted are those of sub-sections (1)(b), (1)(d) and (2) of Section 100. They read as under:

"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).....

730

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

(c).....

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

(i).....
(ii) by any corrupt practice committed in the interests of the returned candidate by an agent other than his election agent, or
(iii)
the High Court shall declare the election of the returned candidate to be void.
(2) If in the opinion of the High Court, a returned candidate has been guilty by an agent, other than his election agent of any corrupt practice but the High Court is satisfied--
(a)
(c).....
(d).....
then the High Court may decide that the election of the returned candidate is not void".

The aforesaid provisions of Section 100 show that where the corrupt practice is committed not by the candidate or his election agent or any other person with the consent of the candidate or his election agent but by an agent other than the election agent and in his interest, and the corrupt practice by such agent has materially affected the result of his election, the High Court is enjoined to declare the election of the candidate to be void. Sub-section (2) of Section 100 enacts a rider to sub-section (1) thereof, and states that even if the

731
agent has committed the corrupt practice in the interest of the returned candidate, if the High Court is satisfied that the said corrupt practice was not committed by the candidate or his election agent and every such corrupt practice was committed contrary to the orders and without the consent of the candidate or his election agent and that the candidate and his election agent took all reasonable means for preventing the commission of the corrupt practice at the election, and that in all other respects the election was free from any corrupt practice the part of the candidate or any of his agents, the High Court may decide that the election of the returned candidate is not void.

8. With this statement of law in mind, we may now refer to the two corrupt practices alleged to have been committed by the appellant. We will first deal with Ex. P-1 the printing, publication and distribution of which is held to have been one of the two corrupt practices committed by the appellant's agent at his instance and with his consent and connivance as well as of his election agent. As far as the petition is concerned, the relevant averments with regard to Ex. P-1 are as follows:

"13. Another important aspect which will amount to corrupt practice is the publication of pamphlets by the candidate, his agents and his workers with his consent and knowledge.

14. Malayala Manorama dated 23.5.1983 was reported by the candidate at the expenses of the first respondent. This reprinting is intended to propagate false statements which the candidate, his agents and as workers

X X X X
X

19. It is clear from these that the reprinting of Malayala Manorama by the candidate was with a view to create a false impression among the electorate that the petitioner is a murderer and hence the electorate shall not vote in favour of him. This was done with a mala fide intention to propagate false news among the electorate.

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46. Malayala Manorama daily dated 22nd May, 1983 was re-printed with certain additions and also with photographs

732

of Prime Minister and the candidate with the candidate's symbol. This was reprinted from the Veekshanam Press at Ernakulam and got printed by the Election Committee of the first respondent

47. Annexure I reprinted Malayala Manorama was widely distributed in the constituency. It was distributed on 22nd March, 1987. March 22, 1987 was a Sunday and May 1983 was also a Sunday. The petitioner is reliably informed that about 25,000 copies of Annexure I were printed and those copies of reprinted Malayala Manorama were distributed throughout the constituency."

In paragraphs 48 to 53 of the petition, the first respondent has proceeded to give the names of the persons who distributed the said pamphlet in different divisions of the constituency and of the persons whom he was going to examine as witnesses to prove the same. In paragraph 54, he has made further averments in connection with the said pamphlet as follows:

"Annexure was really the reproduction of Malayala Manorama daily dated 22.5.1983. Since a news item regarding the murder of 4 persons was reported in the daily mentioned above, to mislead the electorate, the Malayala Manorama printed and published on 22.5.1983 was reprinted

9. It will be apparent from these averments in the petition that although the first respondent has stated in his petition that the pamphlet was printed and distributed with a view to create a false impression among the electorate that he was a murderer, he has not stated as to why it will create such an impression among the electorate. It was necessary for him to state so in the petition because admittedly the pamphlet nowhere names him as a murderer of the said four victims. What was, however, argued by Dr. Chitale on behalf of the first respondent was that the statements in the pamphlet, viz., "everybody knows the hands behind that murder. The Marxist leader arrested also is known" were a clear and a direct reference to the first respondent, because it was an admitted fact that the first respondent was arrested for an offence of harbouring the accused in that murder case. There was also a protest meeting held in that connection, and the appellant who was his agent at that time had also addressed the said meeting condemning his arrest. According to Dr. Chitale, therefore,

733

the arrest of the first respondent though for the offence of harbouring the murderers, was in connection with the murder and the statement in the pamphlet that "The Marxist leader arrested is also known" read with the earlier statement that "Everybody knows the hands behind that murder" was clearly calculated to create an impression in the mind of the electorate that it was the first respondent who was the murderer. Admittedly, therefore, even according to Dr. Chitale, these were the only two statements which could be said to have had a reference to the first respondent as the murderer and there was no direct reference to or implication of the first respondent as the murderer of the said four victims. In other words, the first respondent even in his petition had relied upon an innuendo, and the innuendo was based upon the fact that, firstly, the first respondent was a Marxist leader and, secondly, he was arrested for harbouring the murderers. However, in the petition, no averment is made anywhere that it was because he was a Marxist leader and was also arrested for harbouring the murderers that the elector-

ate was likely to construe the said two statements as accusing him as the murderer.

10. The facts and/or particulars which spell out the innuendo where one is alleged or relied upon to constitute a corrupt practice are themselves material facts and it is necessary to state them in the petition in view of the mandatory provisions of Section 83(1) of the Act. The provisions of Section 83(1) are as follows:

"83. Contents of petition--(1) An election petition--

(a) shall contain a concise statement of the material facts on which the petitioner relies;

(b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and

(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:

Provided that where the petitioner alleges any corrupt practice, the petitioner shall also be accompanied by an affidavit in the prescribed form in support of the allegation-

734

tion of such corrupt practice and the particulars thereof."

It is clear from the provisions of both clauses (a) and (b) of the Section that election petition has to contain (i) a concise statement of the material facts on which the petitioner relies and also (ii) give full particulars of any corrupt practice that the petitioner alleges. In a case therefore, where what constitutes a corrupt practice is not a bare statement/statements published but those which are not published, and yet are implied, a statement of material facts will not be complete without the statement of such implicit facts. In other words, without the statement of the said facts, the statement will not be a statement of material facts within the meaning of the said Section. This provision of law is indisputable.

11. Much of the debate that took place before us centered round this aspect which has assumed all importance in the context of the first charge of the corrupt practice. Various authorities were cited on both sides in support of the respective contentions on the subject. We may briefly refer to them to the extent they are relevant for our purpose.

In *Hough v. London Express Newspaper Ltd.*, [1940] 3 All ER 31 it was a case of an action for an alleged libel published in the newspaper. The plaintiff, Florence Sarah Hough, married Frank Hough in 1933 and lived with him in Battersea as his wife and had one child from him. In February, 1936, he deserted her, and in June 1936 he was ordered to pay maintenance for the child. He was known at Battersea, where he lived at the time of the order, and after the desertion also he continued to live there. He acquired some notoriety as a boxer, and the plaintiff became known in the district as his wife. On December 22, 1937, an article appeared in *Daily Express*, a newspaper owned by the defendants, containing the words:

"Frank Hough's curly-headed wife sees every fight. "I should be in more suspense at home." she says, "I always get nervous when he gets in the ring although I know he won't get hurt. Nothing puts him off his food. He always eats a cooked meal last thing at night, however late it is when he gets in"."

From the description given of the wife, it was obvious to

those who knew the wife that another person was referred to. Hence, the plaintiff brought an action for libel alleging that the words by innuendo meant that she was falsely representing herself to be the wife and that she was

735

an unmarried woman who had cohabited with and had children by the boxer. On these facts, the Court of Appeal held: (i) the words were defamatory as reasonable persons knowing the circumstances would understand the words in defamatory sense (ii) it was not necessary for the plaintiff to prove that one or more persons understood the words in a defamatory sense. It is sufficient that reasonable persons might so understand them. The decision, therefore, shows that it is not necessary that a person publishing a defamatory statement should intend that the statement should refer to the defamed person. It is sufficient that reasonable persons should understand it to refer to him or her. The words need not be defamatory in the primary sense. They are actionable if the existence of certain circumstances makes it reasonable that persons to whom those circumstances are known, might understand them in a defamatory sense. It is not necessary to prove that in fact persons with such knowledge did so understand them. What is necessary, however, is that the special circumstances which are known to others and by which they are likely to understand the reference as being one to that defamed persons must be pleaded and proved.

In Fullam v. Newcastle Chronicle and Journal Ltd. & Anr., [1977] 3 All ER 32 the facts were that prior to 1962, the plaintiff was a Roman Catholic priest and a curate in the dioceses of Salford near Manchester. In 1962, he gave up the priesthood and became a schoolteacher. In 1964, he married and in 1965 he and his wife had their first child. The plaintiff took a teaching post at Wakefield, South Yorkshire, where he lived. In July 1973, he applied for the deputy headmastership at a school in Redcar on Teesside, which was about 80 miles north of Wakefield, and he was appointed to that post. There had been a controversy about the previous deputy headmaster. On 21st July, a local newspaper which circulated in the districts of Teesside and Newcastle-Upon-Tyne but not in the Wakefield area, published an article about the plaintiff's appointment which stated inter alia that he was a former Catholic priest, that he had left his parish in the Salford diocese and later had married and that it was claimed by the general secretary of the National Association of School masters that he "went off very suddenly from the parish where he was curate 'about seven years ago'." The plaintiff pleaded in his statement of claim that the words in the article meant and would be understood to mean that he (a) had lathered a child whilst still a priest serving in a parish, (b) had lathered an, illegitimate child, (c) had wrongly continued to serve as a priest after his marriage, (d) had wrongly withheld the fact of his marriage from his ecclesiastical

736

superiors and parishioners and accordingly was unfit to be deputy headmaster of the school at Redcar. Pursuant to RSC Order 82, rule 3(1), the plaintiff gave as the particulars of the facts on which he relied in support of innuendoes (i) that he had married on 15th February, 1964 and (ii) that his eldest child had been born in May 1965. He did not give particulars of the persons who knew one or the other of those extrinsic facts and who, therefore, having regard to the statement in the article that he had left the parish suddenly "seven years ago", might have derived from the article the imputations alleged in (a) to (d) of para 5 of

the statement of claim. The defendants applied to strike out para 5 of the claim on the ground that it disclosed no reasonable cause of action. The Court of Appeal held as follows:

"(i) Although it was not the usual practice in libel actions to plead particular acts of publication if the words complained of had been published in a newspaper, in cases where the action was based on a legal, or 'true', innuendo and the ordinary readers of the paper would not have derived from the words complained of the innuendo alleged, the plaintiff was required, under RSC Order 18, rule 7(I) and Order 82, rule 3(I) to particularise not only the special circumstances which were alleged to give rise to the innuendo but also the identity of the readers of the paper who were alleged to know of those special circumstances, since the identity of those readers was a material fact on which the plaintiff relied in support of his cause of action.

(ii) Since the only readers of the article who could have concluded that the plaintiff had lathered a child or married while he was still a priest were readers who knew either the date of birth of his 'eldest child or the date of his marriage but did not know both those facts and such readers would be rare and exceptional, having regard in particular to the area where the paper circulated, the plaintiff should be ordered to give particulars identifying those readers. Accordingly, unless such particulars were given, para 5 of the statement of claim should be struck out."

While discussing the law on the subject, Lord Denning MR observed as follows:

"The essence of libel is the publication of written words to 737

a person or persons by whom they would be reasonably understood to be defamatory of the plaintiff. But those words may give rise to two separate and distinct causes of action First, the cause of action based on a popular innuendo. If the plaintiff relies on the natural and ordinary meaning of the words, he must in his statement of claim satisfy the person or persons to whom they were published, save in the case of newspaper or periodical which is published to the world at large, when the persons are so numerous as to go without saying.

Secondly, the cause of action based on a legal innuendo. If the plaintiff relies on some special circumstances which convey some particular person or persons knowing the circumstances, a special defamatory meaning other than the natural and ordinary meaning of the words when he must in his statement of claim specify the particular person or persons to whom they were published and the special circumstances known to that person or persons for the simple reason that these are the material facts on which he relies and must rely for this cause of action. It comes straight within the general rule of pleading contained in RSC Order 82, rule 3. In the second cause of action, there is no exception in the case of a newspaper because the words would not be so understood by the world at large but only by the particular person or persons who know the special circumstances."

(emphasis supplied)

Lord Denning further observed that this rule of pleading was not observed in *Cassidy v. Daily Mirror Newspapers*, [1929] 2 KB 331 or in *Hough v. London Express Newspaper Ltd.*, (supra) because the defendant did not ask for particulars. After referring to paragraph 5 of the plaint, he then observed that paragraph 5 was utterly inadequate as it stood and that no ordinary reader could ever derive those imputations about "fathering a child" etc. from the article. It

would have to be some particular person with knowledge of some special circumstances. He further observed that the pleading in that case told the circumstances, viz., the marriage in 1964 and the birth of a son in 1965 but it did not tell as to who were the persons who knew of the circumstances and derived the imputations from the article.

In the same case, Scarman LJ stated that it was obvious that a

738

material fact in such a cause of action was that the persons to whom the words were published knew the extrinsic facts. In principle, therefore, their knowledge being a material fact should be pleaded. He further observed that there may be a case where the facts may be very well 'known' in the area of the newspaper distribution in which even it would suffice to plead merely that the plaintiff would rely on inference that some of the newspaper readers must have been aware of the facts which are said to give rise to the innuendo. But that was not the case in that action and, therefore, justice required that the plaintiff should fully particularise the publication relied on so that the defendants may understand the nature of the case they have to make.

These two decisions, however, are in libel action and not in election matters.

12. In Sheopat Singh v. Ram Pratap, [1965] 1 SCR 175, one of the questions that directly arose for consideration was of the burden of proving the ingredients of the corrupt practice under Section 123(4). The facts were that an allegation was made against the personal character and conduct of one of the candidates in the election, viz., that a cinema theatre of Rs.7 lakhs in Ganganagar was the barkat of the cement of the Rajasthan Canal. The candidate concerned was at the crucial time the Minister-in-charge of the Rajasthan Canal Project. During the election, a cinema theatre known as Adarsh Theatre was being put up at Ganganagar. There was no dispute that the theatre referred to in the poster was the said Adarsh Theatre and it belonged to the concerned candidate and his sons. In that context, therefore, it was manifest that the poster meant to convey the idea that the candidate had misappropriated the cement of the Rajasthan Canal of which he was in-charge and built a big theatre in the name of his sons. Hence, it was a clear reflection on the candidate's personal character and conduct. The argument advanced on behalf of the returned candidate was that there was no evidence in the case that the said statement was one reasonably calculated to prejudice the prospects of the election of the candidate against whom the said statement was meant, viz., Ramchander Chowdhary. In that connection, it was argued that if the voters did not know that the cinema theatre which was being built in Ganganagar belonged to Ramchander Chowdhary or his sons, the statement concerned would not deflect the voters from voting in favour of Chowdhary. It was also argued that there was no evidence in the case that all or any of the voters knew the fact that the cinema theatre belonged to Chowdhary or his sons. This Court stated in that case that they were not dealing with a libel action and, therefore, the

739

cases cited at the Bar on libel action such as Nevill v. Fine Art and General Insurance Co. Ltd., LR 1887 AC 68 and the Capital and Counties Bank Ltd. v. George Henty & Sons, LR 1882 7 AC 741 had no relevance for determining the question under Section 123(4) of the Act. The only question is whether the statement in question was reasonably calculated

to prejudice the prospects of Chowdhary's election. The Court then pointed out that on behalf of the returned candidate it was not contended either before the Election Tribunal or before the High Court that the voters had no knowledge of the fact that the cinema theatre at Ganganagar belonged to Chowdhary or his sons. The Court further observed that apart from that the object with which the statement was made was the crucial test. Since it was proved that Ganganagar cinema theatre belonged to Chowdhary's sons and that Chowdhary was the Minister-in-charge of the Rajasthan Canal and he was also the only effective candidate against the returned candidate who was the appellant in that case, the appellant's intention in making that statement was obvious and that was to attack the personal character of Chowdhary in order to prejudice his prospects in election. The appellant must have reasonably calculated that the voters, or at any rate the voters in and about the locality where the cinema theatre was being put up, had knowledge or the fact that it was being constructed by the Minister of his sons. It cannot also be said that when a big cinema theatre at a cost of Rs.7 lakhs was being put up in Ganganagar the voters in and about that place would not have known about the ownership of that building. Hence, the fact that the building was brought in for attacking the personal character of Chowdhary merely indicated that the appellant knew that the voters had knowledge of its ownership and expected that it would create the impression which it manifestly indicated to convey. Hence, this Court held that the High Court's finding that the statement was reasonably calculated to prejudice Chowdhary's prospects in election could not be said to be unsupported by evidence or by the admitted facts placed before the High Court. It was a reasonable inference from the facts found by the High Court.

It must be said that in this case the question whether it was necessary for the election petitioner to state in the petition the extrinsic facts which would connect the person concerned with the libelous statement was not raised and, therefore, was not answered. The only question which was agitated was whether the voters without knowing that the theatre belonged to the defamed candidate would be deflected from voting and this Court upholding the finding of the High Court, observed that it was not contended either before the Election

740

Tribunal or before the High Court that the voters had no knowledge of the fact that the cinema theatre belonged to Chowdhary or his sons. Secondly, it was held that whether the voters had such knowledge was immaterial since what was crucial for the corrupt practice under Section 123(4) of the Act is the object with which it was made. Since the election petitioner had proved that the theatre belonged to Chowdhary's sons and that Chowdhary was the Minister-in-charge of the Rajasthan Canal, it must be held that the returned candidate had reasonably calculated that the voters or at any rate the voters in and about the locality where the theatre was being put up, had knowledge of the fact that it was being constructed by the Minister or his sons, and that such extrinsic facts could not have been unknown to the voters. This decision may be construed as laying down that even if the petition does not state the extrinsic facts but the electorate is well aware of them, the petitioner can lead evidence and prove them. Whether the petition in that case did or did not state the extrinsic facts is not clear from the decision. It is also not clear from the judgment whether any evidence was led that in fact the voters had

understood the said statement to refer to Chowdhary. On the other hand, one of the observations made in the judgment shows that the proof of such an impression of the voters is dispensable for the purpose of establishing a corrupt practice under Section 123(4) of the Act. That observation is as follows:

"To be within the mischief of sub-section (4) of Section 123 of the Act such a statement shall satisfy another test, namely, it shall be a statement reasonably calculated to prejudice the prospects of the election of the candidate against whom it is made. The word "calculated" means designed: it denotes more than mere likelihood and imports a design to affect voters. It connotes a subjective element, though the actual effect of the statement on the electoral mind reflected in the result may afford a basis to ascertain whether the said statement was reasonably calculated to achieve that effect. The emphasis is on the calculated effect, not on the actual result, though the latter proves the former. But what is important to notice is that it is not necessary to establish by positive evidence that the voters, with the knowledge of the contents of the statement were deflected from voting for the candidate against whom the statement was made."

In *Kumara Nand v. Brijmohan Lal Sharma*. [1967] 2 SCR 127 the 741

facts were that the complaining candidate was called "the greatest of the thieves" in a poem recited at a public meeting in the presence of the returned candidate. It was held that it was not a mere expression of opinion but was a statement of fact. It was further held that in such circumstances, particulars are not necessary before a bald statement with respect to personal character or conduct of the candidate can be said to be a statement of fact. It was also observed that whether particulars are necessary will depend on the facts and circumstances of each case. We may state here that the discussion in that case mainly centered around the question whether the particular statement was a statement of fact or an expression of opinion.

In *Habib Bhai v. Pyarelal & Ors.*, AIR 1964 MP 62 dealing with the question of innuendo the High Court referred to certain English cases on the point and held that "in view of these decisions, it is obvious that an innuendo is simply an averment that such a one, means such a particular person; or that such a thing, means such a particular thing: and, when coupled with the introductory matter, it is an averment of the whole connected proposition by which the charge may be brought home to the person concerned. The whole attempt of the learned counsel for the appellant before us was to suggest that the words, though not per se defamatory of the third respondent, were definitely so in their secondary meaning read in the context of circumstances. But, as no attempt was made in the pleadings to plead the extrinsic facts to show by those facts as to how the allegations contained in annexure I were related to the third respondents, we are of opinion that it must be held that by referring to any possible meaning of the words used, no imputation could be read in the words as against him."

It can, therefore, be said that in this case the Court had insisted that it was necessary to plead the extrinsic facts to show all those facts as to how allegations were related to the defamed or complaining candidate.

In *Manmohan Kalia v. Yash & Ors.*, [1984] 3 SCR 383 which is more or less on par with the present case, it was alleged by the election petitioner that the returned candidate through speeches either made by him or his friends had

carried on a vilifying campaign to show that the complaining candidate was directly connected with the murder of one Asa Ram, a Harijan and one of the supporters of Congress (I) Party so as to wean away the votes of the harijans of the locality and members of the Congress (I) Party. The High Court had disbelieved oral evidence and found no nexus with the news items etc. and had

742

dismissed the petition. This Court held that where the doctrine of innuendo is applied, it must be clearly proved that the defamatory allegation was made in respect of a person though not named, yet so fully described that the allegation would refer to that person and that person alone. Innuendo cannot be proved merely by inferential evidence which may be capable of two possibilities. On the facts, the Court held that after having gone through the evidence, statement of witnesses and the documents placed before the Court, it was difficult to find any close connection or direct link between the imputations made against the appellant in 1978 and those made in 1980. In none of the documents produced by the complaining candidate which referred to the activities of the returned candidate, there was the slightest possibility that the appellant had anything to do with the murder of Asa Ram.

The Court further observed as follows:

"It is now well-settled by several authorities of the Supreme Court that an allegation of corrupt practice must be proved as strictly as a criminal charge and the principle of preponderance of probabilities would not apply to corrupt practices envisaged by the Act because if this test is not applied a very serious prejudice would be caused to the elected candidate who may be disqualified for a period of six years from fighting any election, which will adversely affect the electoral process".

In *W. Hay & Ors. v. Aswini Kumar Samanta*, AIR 1958 Cal. 269 a Division Bench of the Calcutta High Court held that it is well-settled that in a "libel action" the ordinary defamatory words must be set out in the plaint. Where the words are per se or prima facie defamatory only the words need be set out. Wherever the defamatory sense is not apparent on the face of the words, the defamatory meaning or as it is technically known in law, the innuendo must also be set out and stated in clear and specific terms. Where again the offending words would be defamatory only in the particular context in which they were used, uttered or published, it is necessary also to set out except where as in England, the law is or has been made expressly otherwise, the offending context (colloquium) in the plaint, and to state or aver further that this context or the circumstances constituting the same, were known to the persons to whom the words were published, or, at least, that they understood the words in the defamatory sense. In the absence of these necessary averments, the plaint would be liable to be rejected on the ground that it does not disclose any cause of action.

743

13. What exactly should be pleaded in an action for defamation has been stated also in Halsbury's Laws of England Vol. 28 4th ed. In paragraphs 174, 175, 176, 177 and 178 of the said Volume, we have discussion with regard to natural and ordinary meaning of the words complained of, and about the innuendo and the facts and matters supporting innuendo which should be pleaded and proved. It is stated there that in drafting a statement of claim in libel or slander, it is necessary to distinguish between cases in which the words complained of are alleged to be defamatory

in their natural and ordinary meaning, whether the literal or the inferential meaning, and those in which the defamatory meaning is a secondary meaning derived from extrinsic or special facts or matters, so that a legal or true innuendo must be pleaded. If it is claimed that the words are defamatory in their natural and ordinary meaning and the words bear only one literal meaning, which is clear and explicit, it is not necessary to plead the meaning in the statement of claim. However, if the words are reasonably capable of bearing more than one literal meaning or if the defamatory meaning relied on is inferential (a "false or popular" innuendo), it is desirable and may even be necessary to plead the defamatory meaning or meanings. Where the plaintiff wishes to claim that the words complained of were understood to be defamatory in a secondary or extended meaning by those persons having knowledge of some special facts or matters, such a meaning constitutes a separate cause of action and the same should be pleaded expressly in a separate paragraph in the statement of claim (emphasis supplied). Particulars must be given of the facts and matters on which the plaintiff relies in support of any secondary or extended defamatory meaning which it is decided to plead. These special facts or matters may be extrinsic to the words used or there may be some special meaning of the words themselves. The plaintiff should plead that particular words bore the innuendo meaning.

14. In *Gatley on Libel and Slander* (8th ed.) in paragraph 95, while dealing with "True and False Innuendoes", it is observed that in distinguishing between the ordinary and natural meaning and the innuendo meaning or words, the substantive law cannot be separated from the requirements of pleadings and the rules of evidence. When the plaintiff wishes to rely on any special facts as giving the words a defamatory or any particular defamatory meaning, he must plead and prove such facts including, where necessary, any special knowledge possessed by those to whom the words are published which gives the words that meaning, and must set out the meaning in his pleading. Where words are not defamatory in their natural and ordinary mean-

744

ing but are so only by reason of extrinsic circumstances, the plaintiff must plead also those circumstances and the precise defamatory meaning conveyed by them to those persons to whom the words were published. Otherwise, the statement of claim will disclose no cause of action. Such an innuendo is required to be pleaded whenever the plaintiff relies on any extrinsic facts as giving to the words the meaning he alleges. The plaintiff must plead the words, the extrinsic facts and knowledge of those facts on the part of one or more of those persons to whom the words were published. He can also give evidence of any facts and circumstances which he has pleaded and which would lead reasonable persons to infer that the words were understood in that meaning provided such facts or circumstances were known to those persons to whom the words were published. The evidence required is the evidence of special facts causing the words to have a meaning revealed to those who knew the special facts.

Street in his treatise on Torts (6th ed.) at page 294, has stated that where nothing is alleged to give an extended meaning, words must be construed by the judge in their ordinary and natural meaning. The whole of the statement must be looked at, not merely that part on which the plaintiff relies as being defamatory, although, of course, it may be relevant to take account of the greater importance of some part of a statement, e.g., the headlines of an article

in a newspaper. There may be circumstances where the plaintiff alleges that the statement is defamatory because specific facts known to the reader give to the statement a meaning other than or additional to its ordinary meaning; this is known as a true or legal innuendo. In that case, the plaintiff must plead and prove such facts, for the defendant is entitled to know that meaning of the statement on which the plaintiff relies so that he is able to argue either that the statement in that meaning is not defamatory or that it is then true of the plaintiff. There is a third possibility. The words may have a meaning beyond their literal meaning which is inherent in them and arises by inference or implication: this is sometimes known as the "false" innuendo. The plaintiff has to plead separately any such "false" innuendo. A "false" innuendo differs from a "true" innuendo in that the pleader of a "false" innuendo does not set out any extrinsic facts in support of his plea.

Duncan & Neil in their book on defamation (1978 ed.) while referring to "innuendo" on page 17 onwards have stated that the law of defamation recognises that (a) some words have technical or slang meaning or meanings which depend on some special knowledge possessed not by the general public but by a limited number of persons

745

and (b) that ordinary words may on occasions bear some special meaning other than their natural and ordinary meaning because of certain extrinsic facts and circumstances. The plaintiff who seeks to refer to an innuendo meaning has to plead and prove the facts and circumstances which give words a special meaning'. He has also to prove that the words were published to one or more persons who knew these facts or circumstances or where appropriate, the meaning of the technical terms etc.

While referring to the test where identification depends on extrinsic facts, the learned authors have stated that where identification is in issue, the matter can sometimes be decided by construing the words themselves in their context. More often, however, the plaintiff will be seeking to show that the words would be understood to refer to him because of some facts or circumstances which are extrinsic to the words themselves. In these cases the plaintiff is required to plead and prove the extrinsic facts on which he relies to establish identification and, if these facts are proved, the question becomes: would reasonable persons knowing these facts or some of them, reasonably believe that the words referred to the plaintiff.

Where identification depends on extrinsic facts these extrinsic facts must be pleaded because they form part of the cause of action.

15. The conspectus of the authorities thus shows that where the defamatory words complained of are not defamatory in the natural or ordinary meaning, or in other words, they are not defamatory per se but are defamatory because of certain special or extrinsic facts which are in the knowledge of particular persons to whom they are addressed, such innuendo meaning has to be pleaded and proved specifically by giving the particulars of the said extrinsic facts. It is immaterial in such cases as to whether the action is for defamation or for corrupt practice in an election matter, for in both cases it is the words complained of together with the extrinsic facts which constitute the cause of action. It is true that Section 123(4) of the Act states that the statement of fact in question must be "reasonably calculated to prejudice the prospects" of the complaining candidate's election. However, unless it is established that

the words complained of were capable of being construed as referring to the personal character or conduct of the candidate because of some specific extrinsic facts or circumstances which are pleaded and proved, it is not possible to hold that they were reasonably calculated to prejudice his prospects in the elections. For, in the absence of the knowledge of the special facts on the part of the

746
electorate, the words complained of cannot be held to be reasonably calculated to prejudice such prospects. Once, however, it is proved by laying the foundation of facts that the words in question were, by virtue of the knowledge of the special facts, likely to be construed by the electorate as referring to the personal character or conduct of the complaining candidate, it may not further be necessary to prove that in fact the electorate had understood them to be so. That is because all that Section 123(4) requires is that the person publishing the complaining words must have intended and reasonably calculated to affect the prospects of the complaining candidate in the election.

16. It is in the light of this position in law that we have to examine as to whether the first respondent (election-petitioner) had discharged this primary burden cast on him. We have already shown above by referring to the portions of the petition relating to Ex. P-1, that beyond alleging that the pamphlet in question and particularly the two statements therein, viz., "everybody knows the hands behind that murder. The Marxist leader arrested also is known", the first respondent has not shown as to how the said two statements or the rest of the contents of Ex. P-1 had projected him as the murderer in the eyes of the electorate. Dr. Chitale, learned counsel appearing for the first respondent relied upon the contents of paragraphs 14 and 19 of the petition to contend that the extrinsic facts to spell out the innuendo were sufficiently set out there and those facts being known to the electorate the said two offending statements were enough to point to the first respondent as the murderer in the eyes of the electorate. We have already referred to the relevant portions from the said paragraphs. We do not find any facts pleaded there whereby the electorate would gather an impression that the first respondent was the murderer of the Said four victims.

17. Barring his own testimony, all other evidence led by the first respondent is also totally silent on this aspect of the matter. None of his witnesses has stated anywhere that the contents of Ex. P- 1 had made out the first respondent as the murderer of the four victims or even that they were capable of doing so. On the other hand, all his witnesses without exception are unanimous that after reading Ex. P- 1 the impression it created on them was that it referred to an incident which had taken place on the previous day or to an earlier incident and nothing more. None of the witnesses has stated that Ex. P-1 even remotely connected the first respondent with the murders. This is what the witnesses have stated:

747

V.H. Ashraft, PW-2 states in his examination-in-chief as follows:

"I read Ex. P-1. The impression that it created in me was that it referred to an incident that took place on the previous day."

In cross-examination, the witness states:

"On seeing a copy of Ex. P- 1 my first impression was that it is an issue of the daily paper for that day I did not go through Ex. P-1 in full. Immediately I have gone

through the daily issue also. At that time I realised that Ex P-1 did not relate to an incident that took place on the previous day. After that when I read Ex. P-1 I further realised that it relates to some incident on an earlier occasion".

VSA Muthaliff, PW-3 in his examination-in-chief states as follows:

"On reading Ex. P-1 I thought that it is a supplement published in connection with the election. I thought that it is a supplement of Malayala Manorama Daily for that day. I thought that it was the report regarding murders in connection with the election".

M.K. Saidalavi, PW-4 in his examination-in-chief states as follows:

"On reading Ex. P- 11 thought that it was the news about a murder that took place the previous day. The impression that I gathered was that murder was committed by the Communists I thought that Ex. P-1 is likely to affect Left United Front adversely."

In cross-examination, the witness says as follows:

"I had occasion to talk to my friends about Ex. P-1. After reading Ex. P-11 understood that it was not the news of a recent incident. I had occasioned to read about that incident earlier in 1983. On going through Ex. P-1 I understood that it related to an incident that took place in 1983."

C.J. Dominic, PW-5 in his examination-in-chief states as follows:

748

"On reading the headlines I went to the market. When I returned home the talk there was as if murder took place the previous day. Then in order to clear doubt I went to the reading room. On going through the daily issue of the Malayala Manorama I was not able to find the news in Ex. P- 11 felt sorry that such a murder took place on the eve of the election."

K.D. Abdu, PW-6 states in his examination-in-chief as follows:

"I read the copy of Ex. P-1 I realised that it was a conscious attempt on the part of the United Democratic Front to defeat the petitioner in the election. Copies of Ex. P- 1 were supplied by them in almost all the houses in the locality. Majority of the voters in that locality was ladies and they were illiterate also."

In cross-examination, the witness states as follows:

"Regarding Ex. P- 1 my enquiry revealed that almost all the persons of the locality had complained. I went through the entire copy of Ex. P- 1."

Then it appears that there is a note by the court that the witness says that Ex. P-1 was purposely intended to defame the petitioner. The witness further stated in cross-examination as follows:

"When I talked to the petitioner (i.e., the first respondent) about the speeches I made mention of the copy of Ex. P-1 also. He did not ask for a copy. ' ' "

K. Prakash, PW-7 in his examination-in-chief states as follows:

"On reading such posters Ex. P-1 the news appeared to me to be true. It was only after the election that I came to know that the impression was not correct."

Though T.M. Darar, PW-8 states in his examination-in-chief that he had seen copies of Ex. P- 1 being distributed in 7th Division and he also alleges that he had seen the copy of the said pamphlet and the wall posters containing the photographs of the appellant seen pasted there, he does not give the impression about the same. However, in crossex-

amination he states as follows:

749

"I went through the copy of Ex. P-1. On reading I understood that it is an old story."

Thanhapen, PW-9 in examination-in-chief has nothing to state. However, in cross-examination he states as follows:

"I did not read the copy of Ex. P-1 in full when it was given to me. Even before reading I was pained to see it. Pain was because I saw that four persons were murdered. After going over to my daughter's residence on the same day I read another copy of Ex. P-1 in full. On reading I understood that it is an old story. Then the pain that I felt at first was slightly relieved. But the pain continued because after all murder is murder."

C.S. Devadas, PW-10 in his cross-examination states as follows:

"The impression that I gathered was that the Marxists are murderers and therefore instead of giving votes to them it must be given to the 1st respondent (i.e., the appellant)."

Sathyan, PW-13 in his examination-in-chief states as follows:

"In Ex. P-1 there was also a statement of the 1st respondent. The reading of the news regarding 4 murders appears at first sight to be an item of news going adverse to the petitioner. This news item was a general discussion in the locality."

In cross-examination he states as follows:

"When I got Ex. P-1 I read through the same. Even after reading Ex. P-1 in full I was not able to realise that it was the news of murders committed much earlier. Even after discussions with others I did not realise that it was an earlier incident. It had news importance. It was only after the election that I came to understand that the news item in Ex. P-1 related to an earlier incident. Discussion was with my colleagues. They said that they also got the copies of Ex. P-1. They are persons without politics. I did not bring this news item to the notice of the petitioner (i.e., the first respondent).

750

5. The workers of the petitioner (i.e., the first respondent) also used to come to me for canvassing. I asked them about the news in Ex. P-1. They said they knew about it. This was after lunch on the date previous to election. When Rajappan and Vasukutty gave a copy of Ex. P-1 to me others were waiting outside. On seeing and reading a copy of Ex. P-1 it appeared to me to be a supplement of Malayala Manorama daily for that day. Even after reading the news item in Ex. P-1, on account of the importance of the news, I had no occasion to think about it further to ascertain whether it is a recent news or an old news."

P.M. Kaviraj, PW-14 in his examination-in-chief has only this to say:

"I heard ladies saying that the news contained in Ex. P-1 is a cruel act."

In cross-examination he says as follows:

"On getting PW-1, I read through it in entirety. Even then I understand (sic) that it is the news of an old incident. My impression was that it was the news relating to an incident which took place on that date. I did not inform the petitioner that I read EX. P-1. I wanted to tell him but I did not do so. Till now I did not inform him. That is because I am not interested. I told my friends. It was then that I knew that it was an old news."

T.A. Guide, PW-15 in his examination-in-chief states as follows:

"The persons mentioned in Ex. P-1 who have been murdered are my neighbours."

In cross-examination he states as follows:

"On reading of Ex. P-11 understood that it related to an earlier incident. We discussed the matter at home. I also discussed the matter with some friends."

18. Thus, it is clear from the testimony of the first respondent's witnesses that the contents of Ex. P-1 gave them an impression variously as either the incident had occurred the previous day or that it was

751

an old story or that the Communists or Marxists were murderers or that it was a cruel act or that it was unfavourable to the first respondent. The impression conveyed by the document that the Marxists or Communists were murderers and therefore the electorate should not vote for them and hence it was unfavourable to the first respondent, was not an impression about his personal character/conduct. It was an impression at best about his political character/conduct. In particular there was no impression that he was the murderer or one of the murderers.

19. As far as the petitioner himself is concerned, in paragraph 2 of his deposition in examination-in-chief he makes a general statement as follows:

"Personally against me the propaganda on behalf of the first respondent (i.e., the appellant) was that I am a murderer, a non-religious man and one who is unfit to be elected as a member of the legislative assembly."

Thereafter in paragraph 19 of his deposition he says with reference to Ex. P-1 as follows:

"The original of Ex. P-1 was printed and published on a Sunday which was 22.5.83, distribution was on a Sunday which was 22.3.1987. Four murders were described as incidents which took place on the previous day. Out of the 4 murdered, the photos of two dead bodies lying in the hospital were also published therein. Ex. P-1 mainly contained the news about murders alone. The intention behind the publication was to make the electors understand 4 murders that took place in 1983 as murders that took place on the previous day. That paper also contains a request by the committee with the photos of 1st respondent (i.e., the appellant) and Rajiv Gandhi. In the request it is specifically stated 'that it is only common knowledge as to who is behind the murder. So also it is written that the Marxist leader who is arrested is also known to all. That was the result of a conspiracy consciously entered into for the purpose of maligning and exposing me as a murderer and an undesirable person. I was never an accused of any murder case."

20. In connection with the 4 murders described in Ex. P-1 a 752

case was registered against me for having given shelter to the accused in that case. There were several meetings in protest against my rest in connection with that case stating that it is a false case. I had absolutely no involvement in giving protection or shelter to those persons. Subsequently that case ended in acquittal. In the main protest meeting held at Thoppumpadi one of the speakers was the 1st respondent himself. (i.e., the appellant). At the time of those murders in 1983 Mr. Vayalar Ravi was the Home Minister. He was also the leader of the Union in the Cochin Port Trust. I was also a worker of a rival union there. There were differences of opinion between myself and Mr. Vayalar Ravi. Therefore it was at his instigation that I was implicated in a false case."

(emphasis supplied)

Then there is a Court question: Whether the murders of those persons were political murders? The answer is: Those four murdered persons were anti-social elements. There was no politics involved in it. Then he continues to state:

"The publication of Ex. PW-1 on the date previous to the election had the effect of creating an impression among the impartial electors that I am a person involved in murders If such a propaganda is made as was done in this case the opposite candidate will not be getting an opportunity to rectify the result. 1st respondent and his workers were fully aware of the fact that I am completely innocent in connection with the murders of the said four persons. Since they were fully aware of the fact that I am sure to succeed in the election, this story was purposely manipulated as a result of conspiracy."

"22. Ex. PW-1 when it was published had the appearance of a real issue of Manorama. Daily People on reading the report went under the impression that what was contained therein was the news of an incident which took place the previous day. On seeing copies of Ex. PW-1, many of my workers and electors also telephoned and told me that a supplement of Malayala Manorama was seen. They also inquired about the murders mentioned therein. Since I was not able to get an opportunity of bringing the real facts

753

before the electors, myself and my workers were in a help-less condition."

(emphasis supplied)

In his cross-examination he states in paragraph 32 of his deposition as follows:

"The fight hand side of Ex. P- 1 contains a true copy of the Malayala Manorama. In that portion there is no difference. On the left hand side and the lower portion of the right side there are certain additions. The news item in Ex. P-1 regarding murders are correct in all details. What is wrong is only that it was published as if to appear that it was an incident that took place on the previous day. My complaint is that an impression was created among the people that it was an incident that took place on 21.3.1987. Even after reading the whole of Ex. P-I people go only under the impression that the incident happened on the previous day. My memory is that I have specifically alleged in the petition that such an impression was created. It was unfavourable to my interest only on account of the creation of such an impression that it was an incident that happened on the previous day. My complaint is that I did not get an opportunity to correct the impression before the polling. I have alleged in the petition that such an impression was created among the voters and I did not get time to correct the impression before the polling. In the true copy of Malayala Manorama contained in Ex.. P-1 there is nothing against me. On the left hand side of Ex. P-1 is the request to vote for the 1st respondent even though my name was not mentioned it was intended against me. Even without mentioning my name it is possible to know that it was intended against me. The writings in that request capable of identifying me as the culprit are the statements that the persons responsible are known to all and the Marxist leader who was arrested was also known to all."

(emphasis supplied).

He was then asked the question: "Have you so stated in the petition?" The answer was "My memory is that it is so stated". He then proceeds to state as follows:

"If I remember correct I have stated in the petition that the person intended by the arrested Marxist leader is my-

self.

754

Many persons who gathered such an impression contacted me over phone. I did not examine anybody among them. I have examined several persons for proving the distribution of Ex. P-1. None of those witnesses were asked by my counsel whether any of them understood the reference in the request contained in Ex. P-1 as concerning me. I was present in court when those witnesses were examined. I did not ask any of them whether they continued to hold the impression that the murder took place on the previous day My impression is only from what my workers told me."

(emphasis supplied)

20. We have supplied the emphasis at the proper places in the first respondent's testimony reproduced above. He has himself admitted that all those who read Ex. P-1 gathered an impression that the incident had occurred on the day previous to its publication. If that is so, then even the statements in Ex. P-1 that "Every body knows the hands behind that murder. The Marxist leader arrested is also known" were not connected by the people with his arrest for harbouring the accused in the old murder case and vice versa. The first respondent has repeated his allegation that the people had thought that the incident had taken place on the day previous to the publication of Ex. P-1 at places more than one in his testimony. He has also placed his own interpretation on the said publication which is incompatible with the extrinsic facts stated by him in support of the innuendo meaning of the publication. According to him (i) the four murders were described as incident which had taken place on the previous day; (ii) the intention behind its publication was to make the electorate believe that the murders which had taken place in 1983 were murders that had taken place on the previous day; (iii) it is in the context of this intention that it was specifically stated that it was only common knowledge as to who was behind the murders. So also in the context of this intention that it was written that the Marxist leader who was arrested was also known to all; (iv) again it is to explain this intention that he has given the extrinsic facts, viz., that in connection with the four murders described in the publication a case was registered against him for having given shelter to the accused in that case. He has also stated that there were several meetings in protest against his arrest and that in the main protest meeting the appellant was one of the speakers on his behalf; (v) according to him further the people on reading the report gathered the impression that what was stated in the publication was the news of an incident which had taken place the previous day; (vi) further what

755

was wrong with the publication, according to him, was only that it was published as if to appear that it was an incident that had taken place on the previous day. He has reiterated this by specifically stating that his complaint was that an impression was created among the people that it was an incident that had taken place on March 21, 1987. According to him, further even after reading the whole of Ex. P-1 people went only under the impression that the incident had occurred on the previous day. It is his case further that he has specifically alleged in the petition that such an impression was created and that it was unfavourable to his interest only on account of the creation of such an impression, viz., that it was an incident that had happened on the

previous day. He has then stated that even though his name was not mentioned, it was intended against him, and that even without mentioning his name it was possible to know that it was intended against him and that the publication was capable of identifying him as the culprit because of the statements that "the persons responsible were known to all" and "the Marxist leader arrested was also known to all."

Although he has also added at the end that many persons who gathered such an impression, viz., that he was meant by the publication, had contacted him over phone, he admitted that he did not examine anyone from among the said persons. This is a telling circumstance against him because he had followed as a witness after all his witnesses were examined, and he knew that none of his witnesses had stated that they had connected the imputations in the publication with him. On the other hand, as stated earlier, not only all his witnesses had stated that they had gathered the impression that the incident had taken place the previous day but he himself was of the view that the publication was meant to create such impression and that it did so. Hence, there was no reason for the electorate to connect him with the said incident even remotely.

21. On his own testimony as well as on the testimony of his witnesses, therefore, it is clear that the publication was intended to create an impression and did create an impression that the incident of murders had taken place a day previous to the election. If that is so, then the publication and the two allegedly offending statements in the same did not connect him with the murders much less had they called him a murderer. Even his arrest for harbouring the accused in the old incident of murders was not capable of identifying him as the murderer in the eyes of the people. None knew who were the accused and who were arrested in connection with the murders which were committed the previous day. The people, however, certainly knew that the first
756

respondent was not arrested in connection with the said murders. Hence the extrinsic facts which the first respondent stated in his testimony for the first time even if they were given in the pleadings would not have spelt out the corrupt practice. For those facts in the face of the assertion of the first respondent himself were incapable of identifying him as the murderer in the eyes of the electorate. For these reasons, we are of the view that the extrinsic facts given for the first time by the first respondent in his testimony were incapable of identifying him as the hand behind the murders or as the murderer in the eyes of the people.

22. We are also of the view that in the absence of the extrinsic facts supporting the innuendo meaning of the publication, the petition lacked the statement of material facts for spelling out the corrupt practice complained of. Either, therefore, the allegation of the corrupt practice should have been struck off or the petitioner ought not to have been allowed to lead evidence in support of it. For, as stated earlier, whenever an innuendo is alleged, a statement of material facts as required by Section 83(i)(a) of the Act is not complete without stating the extrinsic facts spelling out the innuendo meaning. It is the publication together with the extrinsic facts which in such circumstances constitute the corrupt practice. The absence of the statement of such facts is not an absence of the particulars of corrupt practice but an absence of the averment of material facts themselves. Hence, it is not necessary for us to deal with the controversy raised before us with regard to the respon-

sibility of furnishing of or asking for particulars.

23. It is necessary, in this connection, to make a distinction between a purely libel action and an allegation of corrupt practice in an election petition. Both, for libel action as well as for an allegation of corrupt practice in an election petition, it is necessary to plead as well as to prove the extrinsic facts to spell out the innuendo meaning of the words complained of. However, whereas in a libel action it may further be necessary to prove that those with special knowledge of the extrinsic facts were likely to interpret or understand the words complained of in a defamatory sense, in an election action, it may not be necessary to do so and all that is necessary is to prove that the words complained of were reasonably calculated to prejudice the prospectus of the defamed candidate's election. However, this latter distinction does not obliterate the similarity between the two actions, viz., that in each case in the first instance the defamation is to be spelt out by pleading the necessary extrinsic facts. In a libel action, the extrinsic facts constitute a cause of action whereas in the election action they

757

constitute the corrupt practice. In other words, without them, there is no cause of action in the libel suit and no allegation of corrupt practice in an election petition.

24. Dr. Chitale, however, contended that the appellant had nowhere stated that the first respondent was not intended to be referred to by the said publication. In this connection, he invited our attention to the appellant's deposition. In his cross-examination on the subject. In paragraph 25 the appellant has stated as follows:

"The statement contained in Ex. P-1 may give an impression that it was in the name of the Election Committee. On a reading of that statement, it would appear that it was on behalf of the Election Committee."

There were then the following questions and answers:

Question: Do you agree to the contents of the statement included in Ex. P-17 Answer: I do not have any disagreement. Question: In the statement contained in Ex. P-1 it is stated that everyone knows persons behind the murder and also the Marxist leader who was arrested in that connection. What is your opinion regarding those statements? Answer: That is only a repetition of an incident that took place in 1983. I cannot say what was the intention behind that statement and who was intended thereby. Question: No Marxist leader was arrested in connection with that case. Further on a reading of that statement the impression that could be gathered is that the Marxist leader in the election was responsible for the murder and he was arrested. Is it so? Answer: I have nothing to do with that statement. And I was not able to gather such an impression on reading it. I do not think that anybody else also will go under that impression. Question: When any such statement is reprinted and published, it must be intended for upsetting the candidate..Answer: That depends upon the intention entertained by the person. I cannot give an opinion. Question: When the petitioner (the first respondent) was the Deputy Mayor of the Cochin Corporation, was he not arrested in connection with that case under the false accusation that he gave shelter to the accused? Answer: I remember that the petitioner (the first respondent) was arrested in connection with such a case. He then proceeds as follows:

"I was a speaker in a meeting in protest against his arrest. I spoke in that meeting because I felt that it is a politically motivated false case. In 1983, I have gone to the

hospital

758

where the dead bodies were taken for post mortem."

In the first instance, in the absence of the statement of the material facts in the petition as stated above, the appellant was not called upon to join issue with them in his written statement. Secondly, there is nothing in his testimony referred to above, which helps the first respondent in his case that the publication had referred to him as the murderer. This is more so, because, as stated above, the first respondent himself has interpreted the publication as creating an impression of a different murder.

25. The next corrupt practice of which the High Court has found the appellant guilty is the wall-poster affixed on the Palace Road on the northern side of the City Rationing Office, within 25 yards from the polling station. Near this wall-poster was also affixed Ex. P- 1. The contents of the wall-poster are as follows:

"Defeat murderer T.M. Mohammed who murdered four Christian brothers at Fort Cochin.

Our symbol."

Ex. P-14 is the close-up photograph of the said poster whereas Ex. P-15 is a photograph from a distance as stated earlier. There is no doubt that the contents of this wall-poster directly named the first respondent as the murderer of the four victims, and if it is proved that the said poster was affixed prior to the election by the workers of the appellant with his knowledge and consent as alleged in the petition, nothing more has to be established to hold the appellant guilty of the corrupt practice within the meaning of Section 123(4) of the Act. The finding of the High Court on this corrupt practice is recorded in paragraph 50 of its judgment. The High Court has stated there that the writings were at the instance of the appellant and with the consent of his election agent and that it was published in the presence of and under the supervision of the appellant's election agent and hence it attracts all the requirements of Section 123(4) of the Act. This finding is attacked on behalf of the appellant before us. It is necessary, therefore, first to find out the allegations made by the first respondent in his election petition in that behalf. The first respondent has alleged in paragraphs 17, 34, 84 and 120 of his petition as follows:

"17. The wall posters and writings on the walls are done by the first respondent, his agents and his workers with a view to propagate false aspects against the petitioner and to mis-

759

lead the electorate that the petitioner is a murderer and if anyone votes in favour of him the law and order of the society will be adversely affected. This has misled the whole electorate which has caused serious prejudice in the election of the petitioner.

X X X X

34. On the Palace Road, on the northern side of the City Rationing Office the workers of the first respondent with the knowledge and consent of the first respondent affixed wall poster that the petitioner had murdered 4 Christian brothers at Fort Cochin and hence the electorate shall vote against the petitioner and they have to vote in favour of the first respondent. It is also relevant to note that this is within 25 yards from the polling station and near this writing they have affixed the reprinted Malayala Manorama daily on 22nd March, 1987 morning. This is to mislead the

public that the petitioner is a murderer and he had murdered four Christian brothers

X X X X

84. To prove Annexures 20 and 21 the wall posters pasted on the walls near the City Rationing Office, Palace Road, COchin, the petitioner is examining two witnesses namely, (1) K. Prakash, House No. 8/796, T.D. East Raod, Cherali, Cochin-2 and (2) J. Sundaram, Kocherry Junction, Pandikuddy, Cochin-2.

X X X X

120. Even before the distribution of reprinted Malayala Manorama the first respondent has specifically instructed his workers to write on the walls and also paste handwritten wall posters throughout the constituency publishing that the petitioner is a murderer. The hand-written wall poster was pasted near the City Rationing Office on the Palace Road, a photostat copy of which is produced and marked as Annexure 20. This was pasted by Anil Raj S. Thamaraparambu, Amaravathy, Cochin-1. This wall poster was written at the specific instruction of the Chief Agent and convener of the election committee and in their

760 presence Anil Raj pasted this wail poster on the wails. This fact was witnessed by K. Prakash and J. Sundaram. Really these writings misled the whole electorate and give a bad impression about the petitioner that he is a murderer, and he is responsible for the murder of 4 Christian brothers. This is absolutely falsehood. This publication was done by the candidate, his agents and by his workers with the consent and knowledge of the candidate and they knew that this statement is false in relation to the petitioner."

26. The allegations in the petition were denied by the appellant in his written statement as follows:

"12. Averments in paragraphs 30 to 35 are also false and are hereby denied. Neither the first respondent nor his agents or workers have any knowledge of the wail writings filed by the petitioner as Annexures 15 to 22. Nor were any such writings made by any person with the consent or knowledge of this respondent. Nor do the writings show anything beyond a criticism of the Marxist party on grounds of law and order. However, the wall writings shown as Annexure 20 were not seen anywhere in the constituency nor made by the respondent or his workers. It is deliberately concocted by the petitioner. In these paragraphs also no material facts required to impute a corrupt practice against the first respondent have been stated. The entire allegations in the aforesaid paragraphs have been falsely made.

X X X X

18 The annexure 20 appears to have been deliberately concocted by the petitioner with an ulterior motive and the rest of the aforesaid annexures are also similarly concocted nor do they show any corrupt practice. The further contention in para 98 that these writing and wall posters appeared in the constituency between 10th and 14th March 1987 is absolutely false. Nor were they done by this respondent or by his agents or workers of the UDF. Neither, with the consent of the knowledge of the respondent. The witness mentioned in paragraph 98 also appears to be partisans of the petitioner.

X X X X

25. The averments in paragraph 120 that the reprinted Malayala Manorama was pasted and hand-written wallposter was published stating that the petitioner is a murderer is entirely false and the averment that the first respondent instructed his workers to do so is false. The averment that annexure 20 is a photo copy of a handwritten wall poster near the City Rationing Office on the Palace Road and this was pasted by Anil Raj and they are written on the specific instruction of the Chief Agent and convener of the election committee is wholly untrue and is denied

X X X X

26. The averments in paragraph 121 that this respondent has spent more than two lakhs for the election purpose is wholly untrue. The expense incurred by this respondent for the election has been strictly within the limits prescribed by law, and the ejection accounts of this respondent have been duly submitted as required by law. The petitioner is furnishing a wholly fanciful idea of Auto rikshaws and cars etc. out of his imagination in paragraph 121."

27. It will thus be seen that in paragraph 17 of the petition, the first respondent has averred generally that it was the appellant, his agents and his workers who had pasted the wall-posters. Secondly, in this paragraph he has not specified any wall or walls on which the poster was pasted. Thirdly, he has attributed the pasting only to the appellant, his agents and his workers. There is no mention of the election agent. What is further in this paragraph he has not said whether the workers had done it with the Appellant's consent or knowledge.

As regards the averments in paragraph 34 of the petition, the first respondent does state that the workers of the appellant had pasted the wall-poser with the knowledge and consent of the appellant. But it is necessary to remember here that he does not mention in this paragraph either the agent or the election agent nor does he state here that the pasting was done with the knowledge and consent of the election agent. What is further important to note is that in this paragraph he mentions the pasting of the poster only on one wall and that is the Palace Road wall near the City Rationing Office.

762

In paragrah 84 again, he specifies that he is going to examine witnesses in connection with the pasting only on one wall, viz., the same wall on the Palace Road near the City Rationing Office, and he gives the names of two witnesses and one of them, viz., K. Prakash (PW-7) has been examined in that connection.

In the last paragraph where there is a reference to the said posters. Exs. P- 14/P- 15, viz., paragraph 120, although there is a vague mention of the "walls", the only wall specified is the same wall on the Palace Road. In this paragraph, again the averment is that the said pasting was done by the workers and agents with the knowledge and consent of the appellant. In this paragraph, for the first time he has introduced the "Chief Agent" and the convenor of the Election Committee, and the allegation is that the wall-poster was written at the specific instructions of the said Chief Agent and the Convenor. He has not specified who the Chief Agent and the Convenor of the Election Committee were. Although Dr. Chitale submitted that the expression "Chief Agent" should be construed to mean election agent, it is not possible for us to accept the submission for reasons more than one. In the first instance, the pleadings with regard to corrupt practice have to be specific since everyone who

is guilty of the corrupt practice is liable to be prosecuted for the offence. Secondly, except in this paragraph, we don't find there is a reference to any such person as Chief Agent. Wherever the first respondent wanted to refer to the election agent, he has done so. It cannot, therefore, be argued that he does not know the difference between the election agent and the Chief Agent.

28. The averments in the petition, therefore, bring out two facts in particular prominently. One is that, though the first respondent has alleged vaguely in paragraphs 17 and 120 of the petition, that the wall-posters were on more walls than one he has specified no wall in paragraph 17 and he has referred to only one wall, i.e., the Palace Road wall in all the other relevant paragraphs, viz. , , 34, 84 and 120. What is more, in paragraph 84, he had made it clear that he was going to examine witnesses only in connection with the pasting of the poster on the said one wall and no more. Secondly, even with regard to the pasting of the wall-poster on the said wall, he is not sure as to who had done it and with whose knowledge and consent. As pointed out above, in paragraph 17 he has stated that only the appellant's agents and workers had pasted it. He has not stated that his workers had done it with the appellant's consent or with the consent of the election agent. In paragraph 34 no doubt he states that the appellant's workers had done it with the knowledge of the appellant, but in paragraph 120, he

763

states that it was done at the specific instructions of the Chief Agent of the appellant and in the presence of the Chief Agent and the convenor of the Election Committee. Nowhere in the petition it is stated that it was done with the knowledge and consent and at the instance of or in the presence of the appellant's election agent. This assumes importance because his witness, K. Prakash (PW-7) as will be pointed out hereafter, has come out with a version which is inconsistent with the averments in the petition and has stated that the pasting of the poster on the Palace Road wall was being done under the supervision among others of Joseph Katithara, who was the appellant's election agent.

29. As regards the evidence which the petitioner has led to prove Exs. P-14 and P-15. we find that although he had cited two witnesses, viz., K. Prakash and J. Sundaram, to prove the lone wallposter on the Palace Road only one witness, viz. K. Prakash is examined. Though K. Prakash (PW-7) was cited to prove the lone wall-poster on the Palace Road, he has from the witness box deposed to the fact that he had seen "wall-posters" being pasted on the Saturday, a week prior to the election. Since he is the only witness who has been examined to prove the actual pasting of the wall-poster and the appearance of the wall-poster prior to the election, his deposition has to be scanned carefully. He has stated that he resided in the 8th Division of the Mattancherry Assembly Constituency. In examination-in-chief, he stated that he was a medical wholesale distributor. He had also an occasion to see a copy of Ex. P-1. It was given to him at his residence on the date previous to the election. He has also named the appellant and M/s. M.K. Latif, Naveen Kumar, Radhakrishnan and others as being the persons who had brought the copy of Ex. P-1 to his residence. Indeed he seems to be a very important man, since not only the workers of the appellant but the appellant himself had, according to him, gone to his residence specially to deliver a copy of Ex. P-1 to him. Then he has deposed to the fact that he had seen copies of Exs. P-14 and P-15 being pasted on the

"wails" and not only one wail near the City Rationing Office on the Palace Road. He admits that Ex. P-14 is the close-up photo and Ex. P-15 is the distant photo of the same poster. It is, therefore, difficult to understand how he could have seen both being pasted. May that be as it is. It has further to be remembered that both Exs. P- 14 and P- 15 are the photographs of not only the wail-poster but also of Ex. P-1 which was pasted by its side. Because, he has gone on to say that he had seen "wall-posters" being pasted on Saturday, one week prior to the election. Since it is the case of the first respondent himself that Ex. P-1 was printed and published only a day prior to the election, it is difficult to understand as to how this witness

764

could have seen the wall-poster together with Ex. P- 1 being pasted one week prior to the election. He has then named Anil Raj, Joseph Katithara who is the election agent of the appellant, K.M. Mohammed, Radhakrishnan and other unnamed workers of the UDF being persons present to supervise the pasting of the wail-posters.' Thereafter, he has corrected himself by saying that at that time the "photo" of Ex. P-1 was not there, a statement difficult to follow. According to him at the time he saw the pasting being done, his co-worker was also there. He has not named him nor is he examined. It is then his case that on the day previous to the election, he also saw a copy of Ex. P-1 being pasted near the wall-poster. Of course, this witness has also deposed to the writings on walls which are Exs. P-16, P-17 and P-18 with which we are not concerned in this appeal but about which the first respondent had made serious complaint in the petition before the High Court which has been rejected by the High Court. He is thus a witness not only for the pasting of Exs. P- 14/P- 15 on all the walls in the City but for a similar pasting of all other exhibits complained of. An omnipresent witness indeed.

In cross-examination he was asked whether he was not the Secretary of the Election Committee of the first respondent in Division No. 8 and also the branch Secretary of the Marxist Communist Party. He denied the said suggestion and stated that he did not work in the election for the first respondent and that he had no politics and he was not a member or sympathizer of any political party. He has also gone on to maintain that he had seen wail-posters similar to Ex. P-14 in other places and has named some of the places as Anavadil, UCO Bank, Cherlai, Pandikuddy Junction. He has then stated contrary to what he had stated in his examination-in-chief, that he had not seen the act of pasting of Ex. P-1 and he did not know who pasted Ex. P-1 near Ex. P-14 although in examination-in-chief he has categorically stated as follows:

"On the day previous to the election I saw copy of Ex. P-1 being pasted near the wall-poster."

30. Time and again, the courts have uttered a warning against the acceptance of a non-corroborated oral testimony in an election matter because it is not only difficult to get a non-partisan witness but is also easy to procure partisan witnesses in such disputes. The courts have, therefore, insisted upon some contemporaneous documentary evidence to corroborate the oral testimony when in particular such evidence could have been maintained. The dangers of accepting only

765

the oral testimony are illustrated by this witness. In the first instance, this witness was cited by the first respondent himself to prove only Exs. P- 14/P- 15 pasted on one

wail, viz., the City Rationing Office wall on the Palace Road as has been stated clearly in paragraph 84 of the petition. Even if we construe the said paragraph in the petition liberally, it can only mean that this witness was cited to prove the "wallposters" being pasted on the "walls" near the City Rationing Office on the Palace Road. He was not cited to depose to posters on walls in any other part of the City. Secondly, the petitioner has not produced any documentary evidence such as the photographs of the posters on the other walls even near the City Rationing Office not to speak of the walls in other parts of the City. Ex. P-15 shows the long length of the wall. But except for this poster there is no poster on any other part of that wall seen in the photograph. Assuming that there were posters on the other walls, even near the City Rationing Office, we have no evidence in that behalf much less of the posters on the walls in the other parts of the City. The witness has, however, chosen to depose to his having seen posters on walls in other parts of the City to which again there is no specific reference in the petition. It was the duty of the petitioner to give the particulars of the posters on the other walls or in other parts of the City. His testimony is also suspect for other reasons as well. Firstly, this witness has also deposed to the fact that he had received a copy of Ex. P-1 on the day prior to the election and what is further, he has gone to the extent of saying that it was the appellant himself who along with his election agent and other workers had gone to his residence to deliver the said copy. It is difficult to believe that on the day prior to the election the appellant and his election agent in particular, will have no other work but to go from house to house distributing Ex. P-1. Secondly, the witness has also deposed to the fact that he had not only seen the wall-poster, Exs. P- 14/P- 15 but he had also seen other wall-posters which were the subject matter of the petition. What is further, according to him, he had also seen Exs. P- 14/P- 15 being pasted in his presence by one, Anil Raj under the supervision of the appellant's election agent Joseph Katithara and the workers of the UDF one week prior to the election. We have pointed out above that in the petition there is no reference to the election agent in this connection anywhere and the reference to the Chief Agent cannot be construed as a reference to him. What is further, he has also in his examination-in-chief gone to the extent of saying that even when Ex. P- 1 was pasted near Ex. P- 14, a day prior to the election, he had seen the actual pasting. This, of course, he retracted in his cross-examination when he stated that he had not seen the said act of pasting. We have, therefore, a witness here who is

766

omnipresent at all crucial times and places and has no compunction in contradicting himself on vital matters. It is this witness that we are asked to believe in support of the first respondent's case that the wall-poster Exs. P-14/P-15 was pasted by the appellant's agents and workers under the supervision of the appellant's election agent. Needless to say that his testimony has to be discarded being of a very doubtful nature.

31. The only other witness who is examined in connection with Exs. P-14/P-15 is the photographer, K.J. Simon (PW-25). Even according to this witness, he had taken the photographs, Exs. P-14/ P-15 on March 25 and 26, 1987, i.e., two days after the election. Therefore, even if we accept his evidence that he had taken the photographs in question on the said days, that will not support the first respondent's

case that the said posters were there prior to the election day. The appellant's cross-examination of this witness was directed to prove that he had not taken the photographs even on 25th and 26th March, 1987 but at a much later date and just prior to the filing of the present election petition. The appellant's case both in his written statement as well as in the Court is that the wall poster of which Exs. P- 14 and P-15 are the photographs was concocted much after the election and only for the purpose of the election petition. It is in the light of this case of the appellant that we have to scrutinise the testimony of this witness. The witness says that Ex. P-14 is the close-up photograph of the wall writing near the City Rationing Office and Ex. P-15 is its long-distance view and that he had taken the photographs in question on March 25 and 26, 1987. In cross-examination, he was asked whether since he was a professional photographer and had his studio, he kept accounts. His answer was that he kept accounts only for the indoorwork and not for the out-door work--an answer which is very difficult to appreciate. The answer was given obviously to forestall the further investigation in the matter by compelling him to produce his accountbooks which would have shown the date on which he had actually taken the photographs. He was then asked as to how he had remembered the dates on which he had taken the photographs of various other posters including Exs. P-14/P-15. To that he replied that he had given the dates of the photographs from his memory. To test his memory, he was asked that since he was also taking photographs of marriage ceremonies which were on an average three or four times in a month, he could give the dates on which he had taken photographs in connection with some of the marriages. To that question, of course, he answered in the negative. This witness, further, who was called only to depose to the fact that he had taken the photographs in question, has

767

gone further and stated that all the wall-writings and wall-posters appeared to him to be old and he had "seen them earlier". According to him, further, they were written even two days prior to the date of election. He also goes on to say that Ex. P-1 was seen by him on the day prior to the election. Although he stated that he was paid Rs.800 for the photographs and Rs.1,000 for copies thereof, he did not enter the amounts in his accounts. He stated that he had a Bank account but he did not remit the amount to the Bank. He then stated that in his studio there would be no record to show that the photographs were taken. He also stated that he had not given any receipt for receiving the payment. It was then suggested to him that he was a sympathizer of the Marxist Party which suggestion, of course, he denied.

His testimony not only fails to impress us, but leads us to believe that there is much force in the contention of the appellant that the poster in question was concocted at a later day. For otherwise it is difficult to explain as to why the witness who in the ordinary course should maintain his accounts and other documents should keep them from the court on pretexts which are not only far from convincing but positively doubtful.

32. There is yet another and a very important reason as to why the entire version with regard to Exs. P-14/P-15 has to be rejected. The first respondent has come to the court with a version that the wall-poster and such other posters were pasted on walls in the different parts of the constituency at least a week prior to the election. Admittedly, such false propaganda is an electoral offence punishable both

under Section 127A of the Act and Section 17 I-C of the Indian Penal Code. The first respondent or his agents and workers could have made complaints both to the Election Officer as well as to the police in that connection immediately, and a regular panchnama of the same could also have been made at the time. That would have been the best evidence of the said allegation. We have no doubt that the first respondent and his workers would not have failed to do so had the posters been pasted at the time alleged by them.

We are, therefore, impelled to reject the evidence produced by the first respondent in connection with the publication of the wallposter represented by Exs. P- 14/P-15.

33. In the circumstances, the finding of the High Court in respect of both the alleged corrupt practices will have to be set aside and

768

is hereby set aside. Hence, we allow the appeal, set aside the order of the High Court and dismiss the election petition. Interim order passed by this Court also stands vacated. In the circumstances of the case, the parties will bear their own costs.

The Registry will take immediate action under Section 116C (2) of the Act.

G N.
allowed.

Appeal al-

769