PETITIONER:
RAMAKANT MAYEKAR

Vs.

RESPONDENT:
SMT. CELINE D'SILVA

DATE OF JUDGMENT11/12/1995

BENCH:
VERMA, JAGDISH SARAN (J)
BENCH:
VERMA, JAGDISH SARAN (J)
SINGH N.P. (J)
VENKATASWAMI K. (J)

CITATION:
1996 AIR 826 1996 SCC (1) 399
JT 1995 (9) 73 1995 SCALE (7)72

ACT:

HEADNOTE:

JUDGMENT:

WITH

CIVIL APPEAL NO. 93 OF 1992

Chhagan Bhujbal
V.
Smt. Celine D'Silva & Anr.

AND

CIVIL APPEAL NO. 94 OF 1992

Pramod Mahajan
V.
Smt. Celine D'Silva & Anr.

AND

CIVIL APPEAL NO. 2396 OF 1992

Balasaheb Thackery
V.
Smt. Celine D'Silva & Anr.

JUDGMENT

J.S. VERMA, J. :

This is an appeal by the returned candidate under Section 116A of the Representation of the People Act, 1951 (for short "the R.P. Act") against the judgment dated 5th/6th August, 1991 in Election Petition No. 21 of 1990 by S.N. Variava, J. of the Bombay High Court whereby the election of the appellant to the Maharashtra Legislative Assembly from 49-Kurla Legislative Constituency held on 27.2.1990 has been declared to be void on the ground under Section 100(1)(b) for commission of corrupt practices under sub-section (3) and (3A) of the R.P. Act. By the said judgment, the learned Judge has decided the election petition and made the order under Section 98 declaring the election of the appellant to be void but the findings on issue Nos. 2 and 5 have been reserved for being recorded after the inquiry under Section 99 of the R.P. Act is concluded against Chhagan Bhujbal, Pramod Mahajan, Bal Thackeray, Manohar Joshi and Pramod Navalkar to whom notices

have been issued under Section 99 of the R.P. Act by the order made therein. The ultimate conclusion in the final order made in the impugned judgment is quite involved because of the unusual mode adopted of deciding the election petition piecemeal. Instead of attempting to summarise the conclusion, it is safer to quote certain portions of the concluding part of the judgment, as under :-

> "I" have already held that the cassette was displayed in the Constituency with the consent of the Respondent. There is however no proof that it was personally exhibited by the Respondent. Accordingly it will have to be held that, by mode of display of this video cassette, some other persons with the consent of the Respondent have committed the corrupt practice of appealing for votes on the ground of the Respondent's religion i.e. Hindu religion and have attempted to create enmity and hatred between different communities and religions particularly Hindu and Muslims. On this count itself, the election of the Respondent must be set aside. Accordingly, Issues Nos. 3 and 6 have been answered in the Affirmative and Issue Nos. 1 and 4 have been answered in the Negatives.
>
> However, before the final order is passed the last and the main mode of canvassing i.e. by means of the speeches made by Mr. Bal Thackeray and the other leaders of the Shiv Sena and B.J.P. alliance at the meetings held on 29th January, 1990 and 24th February, 1990, has to be considered. I have read the speeches of Mr. Bal Thackeray, Mr. Pramod Mahajan, Mr. Chaggan Bhujbal, Mr. Manohar Mahajan, Mr. Pramod Navalkar..... On reading of these speeches, I am of the prima-facie opinion that all the abovenamed persons have by their speeches committed the corrupt practice of having appealed for votes on the ground of the Respondents community and religion i.e. Hindu community and religion. They have also, prima-facie at least, committed the corrupt practice of attempting to create enmity and hatred between different classes of citizens on the basis of religion and community, particularly between Hindus and Muslims. I have already set out above that in cases like the present the consent of the Respondent can be and is implied. As stated above the effect and import of the entire speech has to be considered. At this prima-facie stage it is therefore not possible to pin point any particular portion or portions. That can only by done after hearing the import and effect and interpretation of the speeches from the person who made the speeches. Thus before I express my final

opinion I intend to issue notices under Section 99 of the Representation of People Act, 1951 to all the above named persons. thus the answer to Issues 2 and 5 has been reserved till after the final disposal of the Notices issued hereunder.

Accordingly, I direct that separate Notices under Section 99 of the Representation of People Act, 1951 be issued to Mr. Bal Thackeray, Mr. Manohar Joshi, Mr. Chaggan Bhujbal, Mr. Pramod Navalkar and Mr. Pramod Mahajan..... To each Notice shall also be annexed a copy of this Judgment. In each Notice it will be pointed that in the Judgment it is already held that the concerned speech/speeches were with the implied consent of the Respondent."

xxx xxx xxx

"As it has been held that corrupt practice has been committed by mode of wall paintings and display of video cassettes, the petition is made absolute in terms of prayers (a) and (b) i.e. the Election of the Respondent to the Maharashtra Legislative Assembly election held on 27th February, 190 from Constituency No. 49 i.e. Kurla Constituency is declared as null and void. This is on the ground that corrupt practice set out above under sub-sections (3) and (3A) of Section 123 of the Representation of Peoples Act, 1951 have been proved to have been committed with the consent of the Respondent i.e. that there has been an appeal to vote for the Respondent in the name of his religion i.e. Hindu religion and an attempt has been made to promote feelings classes of citizens of India on the ground of religion and community."

(emphasis supplied)

After the impugned judgement was rendered, notices under Section 99 of the R.P. Act were issued to the aforesaid five persons who then raised certain preliminary objections to the validity of the notices. Variava, J. by his order dated 6.1.1992 rejected those objections. The notices given to these persons related to certain speeches alleged to have been made by them on 29.1.1990 and 24.2.1990 which, it was alleged, constituted corrupt practices under Sections 123(3) and 123(3A) of the R.P. Act. In the said order dated 6.1.1992, Variava, J. has mentioned certain facts in the background of which the objections to the notices under Section 99 were considered in that order. Those facts mentioned at the outset in the said order are as under :-

"Petition No. 21 of 1990 is not an individual Election Petition before this Court. In respect of the same elections i.e. the elections to the Maharashtra Legislative Assembly held in February 1990, ten such petitions have been filed before this Court. All of these are against various successful candidates of

Shiv Sena and Bharatiya Janata Party. All these petitions are based on a plank of Hindutva/Hinduism alleged to have been adopted by these parties and allegedly declared by their leaders at the joint Public meetings held by these two parties on 29th January 1990 and 24th February 1990. In all these petitions the charges are that the respective respondents, their election agents and/or some other persons have with the consent of the respective Respondents, committed corrupt practices of appealing for votes on the grounds of the candidates religion, community and casts viz. Hindu religion, community and caste and the corrupt practice of creating enmity and hatred between various classes of citizens on the ground of religion, community and caste particularly between Hindus and Muslims. Thus the charges are under Secs. 123(3) and 123(3A) of the Representation of Peoples Act, 1951. The mode of resorting to these corrupt practices have been by way of speeches made by the leaders of the two parties at the joint meetings held on 29th January, 1990 and 24th February, 1990, by use of offending poster, banners, wall writings and a video cassette "Awahan and Avhan". This is the same material in all these Petitions. Then in individual Petitions, there are allegations of speeches made in the individual constituencies, either by the respective Respondent of somebody else with his consent.

In this Petition also, the charges against the Respondent and the alleged mode of canvassing are the same. Thus the charge is that the Respondent, his election agents and/or some other persons have with his consent, committed the corrupt practices of appealing for votes on the grounds of the Respondents religion, community and caste viz. Hindu religion, community and caste and the corrupt practice of creating enmity and hatred between various classes of citizens on the ground of religion, community and caste particularly between Hindus and Muslims. Thus the charges are under Secs. 123 (3) and 123 (3A) of the Representation of Peoples Act, 1951. In this Petition also the alleged mode of resorting to these corrupt practices is by way of speeches made by the leaders of Shiv Sena and B.J.P. at the joint public meetings held on 29th January 1990 (at Shivaji Park) and by use of offending posters, banners, wall writings and the video cassette ‘Awahan and avhan’."

(emphasis supplied)

At the beginning of the impugned judgment, the scope of

the election petition and the true perspective in which it has to be decided has been stated by Variava, J. as under :-

> "It must also be noted that these group of petitions are to a large extent unlike other election petitions. This because these petitions are not based upon individual acts of individuals. They are mainly based upon the abovementioned plank and/or policy decision of these parties. This will have a bearing on the question of consent. It is therefore necessary to note the make up of the Shiv Sena party. This already forms part of two Judgments of this court."
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> xxx xxx xxx
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> "..... Unlike other Election Petitions the main charge is not of an individual corrupt practice committed b an individual candidate in his constituency. really speaking, the charge against the candidate is the charge of implementing the plank as decided by the party..... In my view, in cases like this, where the plank has been declared by the leader of the party and the leader of the party has complete control of the affairs of the party, once it is proved and held, that the plank declared by the leader amounts to a corrupt practice, every candidate of that party will be bound by that plank..... As is set out hereafter, prima-facie it does appear that the plank of Hindutva/Hinduism, as declared by the leaders at these two meetings amounts to the corrupt practice of appealing for votes in the name of the Hindu candidates religion and also amounts to the corrupt practice of attempting to create enmity and hatred between different classes of citizens on the grounds of community and religion, particularly between Hindus and Muslims....."

It is this perception of Variava, J. which has coloured his entire judgment and led to the decision of the election petition, not confined to the record of the case but extending to all the general impressions.

An objection expressly taken to the validity of the notices that they could not be issued after the election petition had been decided by making an order under Section 98 of the R.P. Act was rejected by order dated 6.1.1992. The connected Civil Appeal No. 93 of 1992 by Chhagan Bhujbal, Civil Appeal No. 94 of 1992 by Pramod Mahajan and Civil Appeal No. 2396 of 1992 by Balasaheb Thackeray, are against the order dated 6.1.1992 passed by Variava, J. rejecting the objections of these notices to the validity of notice issued under Section 99 of the R.P. Act. The inquiry required to be made under Section 99 of the R.P. Act has not yet been made in the High Court against any of the notices in view of the pendency of these appeals. It may be mentioned that two remaining notices Pramod Navalkar and Manohar Joshi had filed Civil Appeal No. 149 of 1992 and Civil Appeal No. 795 of 1992 against rejection of their objections to the notices

but those appeals have been summarily dismissed on 19.8.1993 and 7.9.1993 apparently leaving open the question of validity of the notices to be decided at a later stage. There is no dispute at the hearing of these appeals that the case of all the five notices has to be dealt with in the same manner depending on the final outcome of these appeals.

We would now consider the points which arise for decision.

Dismissal of Election Petition under Section 86 of the R.P. Act, 1951.

The first submission in these appeals is that the election petition was liable to be dismissed under Section 86 of the R.P. Act for non-compliance of sub section (1) of Section 81, inasmuch as the election petition was filed after expiry of the prescribed period of 45 days from the date of election. Acceptance of the nominations of the candidates was on 8.2.1990, the date of poll was 27.2.1990 and the result of election was declared on 1.3.1990 at which Ramakant Mayekar was declared elected. The election petition was filed on 16.4.1990. Admittedly the last date for filing the election petition according to the prescribed period of 45 days was 14.4.1990, but the High Court and its office were closed for holidays on 14th and 15th April, 1990 and reopened only on 16.4.1990. If Section 10 of the General Clauses Act applies, then the election petition filed on 16.4.1990 was within time. We have already held in the connected Civil Appeal No. 4973 of 1993 - Manohar Joshi vs. Nitin Bhaurao Patil & Anr. - decided today, that Section 10 of the General Clauses Act applies to an election petition. It must, therefore, be held that this election petition was filed within time. This argument on behalf of the appellant is, therefore, rejected.

Meaning and Effect of Sections 98 and 99 of the R.P. Act, 1951.

The next question for consideration is the legality of deciding the election petition and declaring the election of the returned candidate to be void by making an order under Section 98 of the R.P. Act, and then proceeding to issue notice under Section 99 to the aforesaid five persons on the basis of speeches alleged to have been made by them on 29.1.1990 and 24.2.1990 which form the basis of the ground under Section 100(1)(b) for declaring the election to be void. The question really is: Whether notice under Section 99 of the R.P. Act can be issued for commission of a corrupt practice, after making an order deciding the election petition and declaring the election of the returned candidate to be void? This specific objection taken by the notices has been rejected by Variava, J. The legality of this view arises for consideration.

As for the speeches alleged to have been made on 29.1.1990, it may be stated at the outset that they have to be excluded from consideration since they cannot form the basis of any corrupt practice at the election, inasmuch as they relate to a period prior to the date on which Ramakant Mayekar became a candidate at the election as defined in Section 79(b) of the R.P. Act. This is the settled position in law. [See Subhash Desai vs. Sharad J. Rao and Others, 1994 Supp. (2) SCC 446; Indira Nehru Gandhi vs. Raj Narain, 1975 Supp. SCC 1; Mohan Rawale vs. Damodar Tatyaba, 1994 (2) SCC 392]. This was the undisputed position at the hearing of these appeals before us since the speeches mad eon 29.1.1990 were prior to the date on which Ramakant Mayekar became a candidate at the election. It follows necessarily that the impugned judgment as well as the subsequent notices issued under Section 99 of the R.P. Act, are unsustainable to the

extent they are based on the speeches alleged to have been made on 29.1.1990. No further discussion is necessary for holding that part of the impugned judgment dated 5th/6th August, 1991, notices under Section 99 of the R.P. Act and the subsequent order dated 6th January, 1992 as contrary to law and, therefore, liable to be set aside for this reason alone.

It is only the surviving part of the impugned judgment and the notices which require further consideration, for which purpose the question for decision at the threshold is the validity of the course adopted of deciding the election petition and declaring the election of the returned candidate to be void and then proceeding to give notices for taking action under Section 99 of the R.P. Act.

We have already indicated the combined effect of Sections 98 and 99 of the R.P. Act in the connected Civil Appeal No. 4973 of 1993 - Manohar Joshi vs. Nitin Bhaurao Patil & Anr. - decided today. The correct legal position has been overlooked by the High Court.

The High Court appears to have misread the decision of this Court in D.P. Mishra vs. Kamal Narayan Sharma and Anr., 1971 (1) SCR 8, to form the opinion that the course adopted by it was permissible under Section 99 of the R.P. Act. The question in that case was of the failure to issue notice under Section 99 of the R.P. Act to a person alleged to have committed the corrupt practice for which the returned candidate also was guilty. The High Court, in the appeal, did not comply with the requirement of Section 99 for avoiding further delay. This Court rejected that view as incorrect and held as under :

> "We are unable to agree with the view so propounded by the High Court. Under s. 99 of the Act the Court has no discretion in the matter, if the Court was of the view that any person who is proved at the trial to have been guilty of any corrupt practice, not to name that person. It is true that preliminary objections were argued at an earlier stage, but Sharma could not before the appeal was heard ask the Court to issue a notice under s. 99 of the Act on the footing that his case which was rejected by the Tribunal will be accepted. The duty under the Act is cast upon the Court or the Tribunal, and on the ground that the party has not applied for a notice, the High Court could not avoid the obligation imposed by statute to take proceeding under s. 99 against the person proved at the trial to have been guilty of corrupt practice and to name him. We fail also to appreciate the ground on which the High Court has referred to delay being an "outweighing factor". Shyamacharan Shukla was however not a party to the proceeding and before he could be named a notice must go to him under s. 99 of the Act.
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> We direct that the proceeding be remanded to the High Court and the High Court do give notice to Shyamacharan Shukla under s. 99 of the Representation of the People Act, 1951, to appear and to show cause why he should not be named

> for committing corrupt practices. If Shyamacharan Shukla appears in pursuance of the show cause notice he will be entitled to an opportunity of cross-examining witnesses who have already been examined by the Tribunal and has given evidence against him and he will be entitled to give evidence in his defence and of being heard.....
>
> (at pages 29-30)

There is nothing in this decision to support the view taken by the High Court that it could decide the election petition and make an order under Section 98 declaring the election of the returned candidate to be void and then proceed under Section 99 of the R.P. Act against the other persons.

It is, therefore, clear that the impugned judgment dated 5th/6th August, 1991 declaring the appellant's election to be void and the subsequent order dated 6.1.1992 rejecting the preliminary objections to the notice issued subsequently under Section 99, both by Variava, J., are contrary to law and have to be set aside. We have not to determine the nature of the final order to be made.

Speeches

We have already indicated that the speeches alleged to have been made on 29.1.1990 are irrelevant and have to be excluded from consideration as earlier stated. In respect of the speeches alleged to have been made on 24.2.1990, the relevant portions of the impugned judgment are as under :

> "The question then is whether the Respondent was also present at the meeting held on 24th February 1990. Here again the petitioner has admitted that her only source of knowledge are newspaper reports. In this case however, not a single newspaper report support the case that all 34 candidates were present or that the Respondent was present..... Thus the only evidence of Respondent's presence at this meeting is this photo. The court has looked at the photo and the Respondent a number of times. It is not possible to categorically state that this is the photo of the Respondent. If that be so, then the benefit of doubt must be given to the Respondent. Thus, there is no evidence before this court to show that the Respondent was present at the meeting held on 24th February 1990. If that be so, then the question of considering the Respondent's case, why he was not present at this meeting does not arise at all. It was for the petitioner to satisfy the court that the Respondent was present at this meeting. The petitioner has failed to do that. Therefore, so far as the meeting of 24th February, 1990 is concerned, it is not possible to hold that the Respondent was present at that meeting."
>
> (emphasis supplied)

The above finding relating to speeches by some persons other than the appellant can have relevance only if the element of appellant's consent is also pleaded and proved. The

appellant's consent was attempted to be made out by implication only from the fact of his personal presence when those speeches were made. However, the above conclusion reached by the High Court shows that the appellant's presence at the meeting was not found to be proved. This being so, the element of candidate's consent which is a constituent part of the corrupt practice alleged on the basis of speeches made on 24.2.1990 by some other persons has not been found proved. That finding alone is sufficient to reject the allegation of corrupt practice on the basis of speeches made by others on 24.2.1990, as not proved. When this is the conclusion reached in respect of the appellant himself with regard to the allegation of corrupt practice based on speeches made by others on 24.2.1990, then the question of recording a finding that the corrupt practice has been proved, does not arise and, therefore, the further question of naming any other person who could have been proved at the trial to be guilty of the corrupt practice under Section 99 of the R.P. Act does not arise.

The pleading in respect of speeches made in the public meeting held at Shivaji Park, Dadar on 24.2.1990 is in paras 22, 23 and generally in para 27 of the election petition. These are the only portions of the election petition on which reliance is placed by learned counsel for the respondent as the pleading on this point. It is pleaded in para 22 that the speeches were made by Bal Thackeray and other leaders of the alliance in that meeting where the present appellant (respondent in the election petition) and all other candidates of Shiv Sena - BJP alliance were present. Thereafter, in paras 23 and 27, there is only a general averment that the appeal made by Bal Thackeray and other leaders to the voters was with the consent of the appellant (respondent in the election petition). No fact other than the averment of personal presence of the appellant was pleaded to make out the consent of the appellant required for constituting the corrupt practice. As earlier indicated, the High Court has held that the presence of the appellant at that meeting has not been proved. Thus, the only basis for pleading and attempting to prove the appellant's consent to the making of those speeches in the meeting held on 24.2.1990 has been held to be not proved. There is thus no foundation even for a tentative finding of any corrupt practice on the basis of speeches alleged to have been made by Bal Thackeray and some other leaders in this case against the present appellant, inasmuch as a necessary ingredient of the corrupt practice, i.e., consent of the appellant has been found to be not proved. There being not even a tentative basis to hold the charge of this corrupt practice proved against the appellant, the further question of invoking Section 99 to name any other person for the commission of that corrupt practice along with the returned candidate does not arise.

In short, the finding of corrupt practice against the appellant on the basis of speeches alleged to have been made by some leaders in the meeting of 24.2.1990 being unsustainable, this charge has to fail and no occasion arises in the present case for taking any action under Section 99 of the R.P. Act. This part of the impugned judgment as well as the remaining part of the notices under Section 99 of the R.P. Act also have to be set aside.

The only surviving question now is whether the impugned judgment, to the extent it survives against the appellant on the basis of wall paintings and video cassettes can be sustained.

Wall Paintings

After the above conclusion reached in respect of the speeches alleged to have been made by some leaders on 29.1.1990 and 24.2.1990 for the reasons already given, the only remaining findings of corrupt practice recorded by the High Court are based on certain wall paintings and video cassette which have been found to constitute the corrupt practices under Section 123(3) and 123(3A) of the R.P. Act. We would now examine these findings on merits.

The pleading relating to the allegation of corrupt practice based on wall paintings is contained in para 21 of the election petition which is as under :

> "The petitioner states that the respondent and his agents with the consent of the respondent have also used posters, banners and wall paintings canvassing to vote for the respondent, appealing the voters to vote for the respondent in the name of Hindu religion. The petitioner has got the photographs taken of such wall paintings. The petitioner craves leave to refer to and rely upon the said photographs as and when produced."
>
> (emphasis supplied)

Except for repeating the words of the statute prescribing the corrupt practice, there is no pleading of the material facts or any particulars necessary to constitute the corrupt practice as required by Section 83(1) of the R.P. Act. Reference is made to certain photographs of the alleged wall paintings and it has been said that the photographs would be relied on as and when produced. The contents or form of the wall paintings or their photographs has not been pleaded and the photographs referred in para 21 of the election petition were neither annexed to the election petition nor copy thereof furnished to the returned candidate along with a copy of the petition. Thus, there is no pleading in the election petition of the language or contents of the wall paintings which were alleged to constitute the corrupt practice of canvassing for votes in the name of Hindu religion.

If the mere mention of photographs without indicating its contents in the election petition is to be construed as incorporation of its contents by reference in the election petition, then non-supply of the copy of the photographs with the copy of the election petition would result in non-compliance of Section 81(3). However, since the photographs were not annexed to the election petition, it is a case not of non-compliance of Section 81(3) but a case of total absence of any pleading in the election petition of the corrupt practice on the basis of wall paintings. Therefore, the pleading being wholly deficient in material facts necessary to constitute the cause of action, it was insufficient to raise a triable issue on that basis. In fact, this part of the pleading was liable to be struck out since it was irrelevant at the trial for the reason stated. It is clear that any evidence adduced later, in the absence of the requisite pleading of this corrupt practice was irrelevant and inadmissible and should not have been recorded and having been recorded must be excluded from consideration. The finding of the High Court of any corrupt practice being proved on this basis is contrary to law, and has to be set aside for this reason alone.

In view of the above conclusion in relation to the wall paintings, any further discussion of the finding recorded by Variava, J. on this question would be unnecessary but for

the serious grievance made to the mode of the trial. Since the finding reflects the common perception which influenced the trial and decision of the several election petitions in the High Court as mentioned in the impugned judgment, it becomes necessary to refer to the discussion on this point in the impugned judgment.

As indicated earlier, no triable issue arose in the absence of proper pleadings relating to the corrupt practice alleged on the ground of wall paintings, much less an occasion for a finding adverse to the returned candidate on this point. Surprisingly, evidence was recorded of the alleged contents of the said wall paintings through production of certain photographs later at the trial. A description of what is seen in these photographs is given in the impugned judgment to indicate that they showed the saffron flag and election symbol of the Shiv Sena and sought votes for the Shiv Sena candidates. The judgment then refers to the English translation of the slogans therein which reads, as under :

> "..... In order to remove the brokers of corruption, let us throw around the Gulal of Hindutva"..... "the lady sits angrily in Delhi Court, save Maharashtra by electing Sena-BJP"..... "Our determination is firm. Stamp on the Bow and Arrow" and "Keep Hindutva awake, elect the bow and arrow."..... "for the protection of fiery Hindutva the Shiv Sena BJP candidate....."
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> The judgement then proceeds to hold as under :
>
> "..... There can be no doubt that the "Hindutva" in these wall-paintings is the same "Hindutva" contained in the video cassettes "Awahan and Avhan". They are therefore an appeal to vote for Shiv Sena BJP candidates viz. The Respondent for protection of that "Hindutva". As is set out hereafter an appeal in the name of "Hindutva" amounts to an appeal to vote for the Hindu candidates of Shiv Sena BJP on the ground of their religion and also amounts to the corrupt practice or creating enmity and hatred amongst different classes of citizens on the grounds of religion and community. These paintings on walls and pipelines therefore amount to having appealed to the voters to vote for the Respondent on the ground of his religion and also amount to the corrupt practice of creating enmity and hatred amongst different classes of citizens on the grounds of religion and community."

Thereafter, the discussion relates to the consent of the candidate which is unnecessary in view of the earlier conclusion.

The tenor of the impugned judgment, particularly the above extract, leaves no doubt that the High Court was of the view that any appeal for votes wherein was made of "Hindutva" is by itself sufficient to amount to an appeal for votes for the Hindu candidates of Shiv Sena-BJP on the ground of their religion and is a corrupt practice or creates enmity and hatred amongst different classes of citizens on the grounds of religion and community. The above

extract from the decision itself is sufficient to indicate the erroneous perception in this behalf which is clearly contrary to law. The distinction between sub-section (3) and (3A) of Section 123 which are two different corrupt practices, was totally lost sight of, and obliterated. Moreover, the use of the word "Hindutva" in the abstract was understood by the High Court to amount to an appeal for votes on the ground of Hindu religion if the candidate happened to be a Hindu to constitute the corrupt practice under sub-section (3); and at the same time this alone without anything more has been held to also constitute the corrupt practice under sub-section (3A) of Section 123, totally obliterating the distinction between these two sub-sections of Section 123 constituting two different corrupt practices. Unfortunately, this erroneous construction of the statute leading to the formation of a wrong perception, led the High Court to commit the several errors commencing with the treating of deficient pleadings to be sufficient to raise a triable issue of a corrupt practice. This extraordinary procedure, impermissible in law, led to reception of considerable irrelevant and inadmissible evidence for which no basis can be found in the election petition.

In short, the trial of the election petition became a roving inquiry into the affairs of a political party when the only concern at the trial should have been the merit of the charge of corrupt practices attributed to the returned candidate at the election. Actions of the party were relevant only to the extent relatable to the returned candidate, in the manner pleaded in the election petition. Unfortunately, this crucial factor was overlooked by the High Court in the trial of the election petition.

In the abstract, the meaning of the word "Hindutva" is not confined only to Hindu religion unrelated to Indian culture and heritage and it is the context and the manner of its use which determines its true meaning in a particular speech. The kind of use made of the word "Hindutva", the context and the composition of the audience to which the speech is addressed, are all significant. In the connected Civil Appeal No. 2453 of 1991 - Shri Suryakant Venkatrao Mahadik vs. Smt. Saroj Sandesh Naik (Bhosale) - decided today, we have indicated how the use of the word "Hindutva" in the context and in the circumstances in which it was used in that case amounted to an appeal for votes on the ground of Hindu religion for a Hindu candidate. As a proposition of law, it cannot be said that in the abstract, the mere use of the word "Hindutva" during an election campaign must necessarily mean an appeal on the ground of Hindu religion for a Hindu candidate. We have discussed this question at some length in the connected Civil Appeal No. 2835 of 1989 - Bal Thackeray vs. Prabhakar K. Kunte and Ors. - (with Civil Appeal No. 2836 of 1989) decided today. It is unnecessary to reiterate the same herein.

What is forbidden by law is an appeal by a candidate for votes on the ground of 'his' religion or promotion etc. of hatred or enmity between groups of people, and not the mere mention of religion. There can be no doubt that mention made of any religion in the context of secularism or for criticising the anti-secular stance of any political party or candidate cannot amount to a corrupt practice under sub-section (3) or (3A) of Section 123. In other words it is a question of fact in each case and not a proposition of law as understood and enunciated by the High Court.

The view taken by the High Court in the impugned judgment indicates a wrong perception based on a mis-

construction of sub-sections (3) and (3A) of Section 123, obliterating at the same time the distinction in the two corrupt practices defined in these two provisions. The finding of the High Court of proof of the corrupt practice based on wall paintings in also, therefore, set aside.

Video Cassette

The only surviving question now relates to the corrupt practice alleged on the basis of certain video cassettes. The pleading is in paras 15 to 18 of the election petition. There is a general averment that the alliance had taken out video cassettes for the purpose of its election campaign and that they were exhibited at various places in the constituency. It is alleged that the contents of the video cassettes amounted to appeal for votes in the name of Hindu religion and they tended to create enmity and hatred amongst the voters on the basis of caste, creed and religion. The only specific fact pleaded apart from the general averment, contained in para 18 is as under :-

> "..... Bal Thackeray also boasted that if any one is obstructing the Hindu religion, he will fix him. That they (Shiv Sena) will stop all offering of "Namaz" on roads and bring down the loudspeakers from the mosques. Bal Thackeray has gone to the extent of coaxing the voters to scream aloud that they will not tolerate any one coming into power with the help of Muslim votes."

It is significant that here also the pleadings are deficient and the only averment which may be treated as specific is the above extract attributing certain speech to Bal Thackeray of which also no particulars are given. The requisite pleading of the candidate's consent for this act of Bal Thackeray to constitute a corrupt practice by the candidate (appellant) is not pleaded apart from the general pleading of consent elsewhere.

This state of pleading relating even to the video cassettes, when the video cassettes or its transcript were not produced along with the election petition or its copy furnished with the copy of the election petition to the appellant, is a serious defect in the pleading which once again has been totally overlooked at the trial of this election petition. This again has resulted in raising an issue for which the requisite pleadings were not there and then admitting considerable evidence which is irrelevant and inadmissible. We have considered this question at length in the connected Civil Appeal No. 4973 of 1993 - Manohar Joshi vs. Nitin Bhaurao Patil & Anr. - decided today. For the same reasons, the entire issue relating to the corrupt practice based on the video cassettes has to be excluded from consideration.

Even otherwise the only specific pleading on the point which is extracted above is insufficient to plead this corrupt practice against the appellant, howsoever reprehensible it may be in relation to the alleged conduct of Bal Thackeray. The more fact that Bal Thackeray was leader of Shiv Sena of which party the appellant was a candidate is by itself not sufficient to hold any candidate guilty of the corrupt practice on the basis of an act done by Bal Thackeray unless that liability can be fastened on the candidate on further proof that the act was done with the consent of the candidate or the display of that cassette was made with the candidate's consent at the specified time and place etc. during his election campaign. All these

material facts were required to be pleaded and proved, but, instead, they have been assumed and even the finding is not related to any such specific act.

The requisite consent of the candidate cannot be assumed merely from the fact that the candidate belongs to the same political party of which the wrong doer was a leader since there can be no presumption in law that there is consent of every candidate of the political party for every act done by every acknowledged leader of that party. The corrupt practice for which a candidate can be held vicariously guilty for an act of any other person who is not his agent in whose favour general authority is presumed, must be pleaded and proved to be with the consent of the candidate. Obviously, it is so because the penal consequences resulting from the finding of a corrupt practice against the candidate are visited on the candidate including the setting aside of his election. The High Court assumed for the purpose of pleading as well as proof that no specific pleading or proof of consent of the candidate was necessary if the act was attributed to any leader or even a member of the same political party. The distinction between the ground in Section 100(1)(b) on which the election petition was allowed and that under Section 100(1)(d)(ii) was completely missed. Admittedly, the ground under Section 100(1)(d)(ii) is neither the basis of the election petition nor is it of the judgment of the High Court.

It is this erroneous assumption made of the law as an abstract proposition, which has resulted in the several serious errors in the trial as well as in the impugned judgment. This discussion is sufficient to set aside the only remaining finding against the appellant.

From the above discussion, it follows that the findings on all points against the appellant, of the corrupt practices held to be proved against the appellant, have to be set aside, and so also the impugned judgment dated 5th/6th August, 1991, resulting in dismissal of the election petition. The notices issued by the High Court under Section 99 of the R.P. Act to Chhagan Bhujbal, Bal Thackeray, Pramod Mahajan, Manohar Joshi and Pramod Navalkar after conclusion of the trial must also be quashed for the above reasons.

The result of this decision is that the inquiry against Pramod Navalkar and Manohar Joshi pending in the High Court in this matter also terminates.

The appeals are allowed. The appellant Ramakant Mayekar would get costs throughout from the respondent Smt. Celine D'Silva (election petitioner). The other parties will bear their own costs throughout.