

CASE NO.:
Appeal (civil) 4 of 2003

PETITIONER:
Mercykutty Amma

RESPONDENT:
Kadavoor Sivadasan & Anr.

DATE OF JUDGMENT: 06/11/2003

BENCH:
CJI & S.B.Sinha

JUDGMENT:
J U D G M E N T
With
CIVIL APPEAL NO.8648 OF 2003
(Arising out of S.L.P.(C) No. 15350/2003)

S.B. SINHA, J.

Leave granted in S.L.P. (C) No. 15350/2003.

This appeal under Section 116-A of the Representation of People Act, 1951, arises out of a Judgment and order dated 29th October, 2002 passed by the High Court of Kerala at Ernakulam in Election Petition No. 7 of 2001 whereby and whereunder the election petition filed by the appellant herein was dismissed.

FACTUAL BACKGROUND :

The parties herein contested the election from 123 Kundara Legislative Assembly Constituency. The respondent got 50,875 votes, whereas the appellant obtained 46,408 votes. The respondent was declared to be elected by the returning officer of the said Constituency on 13th May, 2001. The appellant in his Election Petition inter-alia contended that the respondent had taken recourse to "corrupt practices" within the meaning of Section 123 of the Representation of People Act, 1951 insofar as a pamphlet was brought out with an intent to promote feelings of enmity and hatred amongst the voters belonging to Ezhava caste and communal feelings, which was raised thereby, became a major factor resulting in the split of votes of the people of the said community. The appellant contended that had such pamphlet being not printed and published, the votes of these aforementioned community would have gone mainly in his favour. The said publication, the appellant urged, was made by Sh. K.C. Marydasan, an agent of the first respondent amounting to a corrupt practice within the meaning of Section 123(3A) of the Act, particularly having regard to the fact that the contents thereof are false and made with the full knowledge that they were untrue. It was further alleged that the photographs of the petitioner was published in a bi-weekly publication by name 'Palco Crime Magazine' wherein an article was published making allegation that the appellant might be responsible for the murder of one Thankama, a cashew factory worker and the said Thankama had been upbringing a child aged 11 years as its fostered mother, who was very likely the illegitimate child of the appellant. It was alleged that the said publication was also made at the instance of the first respondent herein with a view to defame the appellant and the same was distributed by Shri Vellimon Vijayanandan, UDF Convenor, Perinad Mandalam in Kundara Constituency, segment of the

constituency in question.

ISSUES:

In the light of the pleadings of the parties, the High Court inter alia framed the following issues:

- "2. Whether K.C. Marydasan and Vellimon Vijayanandan referred to in paras 3 & 5 of the E.P. were acting as agents of the Ist respondent when they acted as alleged in the said paras?
3. Whether the publication of Annexures II and IV were made by K.C. Marydasan with the full knowledge and consent of the Ist respondent?
4. Whether the publication of Annexures II & IV amounts to corrupt practice for the purpose of Sections 123(3A) and 123(4) read with Section 100(1)(d)(ii) of the R.P. Act?
5. Whether the publication of Annexures II and IV were made by the agent and workers of the first respondent with the knowledge and belief of themselves and of the first respondent that the contents thereof were false and untrue and with intent to prejudice the prospects of the petitioner's election?"

HIGH COURT JUDGMENT:

The High Court in its judgment held that printing and publication of the aforementioned pamphlet and article amounted to a corrupt practice within the meaning of Section 123(3A) of the Act. It was further held that assuming that the publication of Ex.P-2 was made at the instance of or the consent or knowledge of the first respondent, there was nothing to show that the contents thereof came within the purview of the corrupt practices justifying setting aside of the election on the basis that it promoted feelings of enmity or hatred on the part of the voters of Ezhava community against the CPM and its candidate.

Analysing the said ingredients which are required to be proved for the purpose of Section 123(4) of the Act, the High Court came to the conclusion that the appellant has not been able to prove that the said publication was made by Shri Marydasana and Vellimon Vijayanandan as agents of the first respondent. The appellant having not been able to prove consent of the first respondent as regards the publication of the said pamphlet by Marydasana and Vellimon Vijayanandan, the same did not meet the requirements of law as no sufficient evidence has been brought on records to show that any of them was authorised to act on behalf of the first respondent. The High Court, however, without issuing any notice to Marydasan held that the proved circumstances, fully justify the conclusion beyond reasonable doubt, that Ex. P-2 was brought out by none other than Marydasan.

At the trial an application was filed by the first respondent for examining the said Shri K.C. Marydasan as a court witness. By an order dated 2.8.2002 the said application was disposed of by the High Court observing that it would be open to the first respondent to examine him

but no step was taken to summon the said witness.

The High Court despite the same held:

"The proved circumstances also fully justify a conclusion, beyond reasonable doubt, that it was brought out by none other than Marydasan.

In the circumstances it is safe to conclude that Exhibit P2 is a Convenor pamphlet printed and published by Marydasan himself...I, therefore, find that the petitioner had succeeded in establishing that publication of material that can constitute corrupt practice under section 123(4), (Subject to proof of consent) was done by the person Marydasan in respect of Exhibit P2. Though it is not proved that any corrupt practice was committed by him within the meaning of Section 123(3A) of the Act."

As regard, Issue No. 5 the High Court observed:

"Publication of Annexure 2. (Exhibit.P2) by K.C. Marydasan, UDF Convenor stands established, but that does not amount to corrupt practice within the meaning of Section 100 of the Act."

SUBMISSIONS:

Mr. G. Prakash, learned counsel appearing on behalf of the appellant would submit that the High Court committed a manifest error in arriving at the conclusion that the appellant was not able to prove the corrupt practice on the part of the first respondent having regard to the fact that he had pleaded and proved that the aforementioned Marydasan and Vellimon Vijayanandan were agents of the first respondent herein. The learned counsel would contend that for the purpose of arriving at a conclusion as to whether the elected candidate had taken recourse to corrupt practices or not, it is not necessary to prove that the publication in question was made by an election agent or polling agent or counting agent as it is sufficient to show that the same was made by a person who was otherwise an agent of the returned candidate. Strong reliance, in this behalf, has been placed on S.N. Balakrishna Vs. Fernandez (AIR 1969 SC 1201). In any event the learned counsel would submit that as the materials brought on records clearly show that the publications in question were sent to the Election Commissioner for the purpose of showing that the election expenses incurred by the first respondent that had been proved by PW-18 (G. Kumaran); the consent of first respondent in relation to the said publication must be held to have been proved.

Mr. Reddy, learned Senior counsel appearing on behalf of the respondent, on the other hand, would submit that the appellant had not been able to establish any nexus between the material published and the Ex. P-10, which is said to be the list containing details of pamphlets, posters and notices printed during the last general election by both the rival candidates. The learned counsel had also drawn our attention to the statements made by PW-17 (Prasad Nanappan) in this behalf. The learned counsel would urge that the said witness being the manager of Karthika Press, having denied that the pamphlet in question, was printed in the said Press, the appellant cannot be said to have proved the material fact that the said Exhibit was printed at the instance of the first respondent herein.

STATUTORY PROVISIONS:

The relevant statutory provisions of the Representation of the People Act, 1951 read as under:

"99. Other orders to be made by the High Court.

\027 (1) At the time of making an order under section 98 the High Court shall also make an order\027

(a) where any charge is made in the petition of any corrupt practice having been committed at the election, recording--

(ii) the names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt practice and the nature of that practice; and

Provided that a person who is not a party to the petition shall not be named in the order under sub-clause (ii) of clause (a) unless\027

(a) he has been given notice to appear before the High Court and to show cause why he should not be so named; and

(b) if he appears in pursuance of the notice, he has been given an opportunity of cross-examining any witness who has already been examined by [the High Court] and has given evidence against him, of calling evidence in his defence and of being heard.

(2) In this section and in section 100, the expression "agent" has the same meaning as in section 123.

123. Corrupt practices. \027The following shall be deemed to be corrupt practices for the purposes of this Act:--

(3A) The promotion of, or attempt to promote, feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community, or language, by a candidate or his agent or any other person with the consent of a candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.]

(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 prospects of that candidate's election.

(8) Booth capturing by a candidate or his agent or other person.

Explanation. \027(1) In this section the expression "agent" includes an 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."

CORRUPT PRACTICES - WHETHER PROVED:

Indisputably the burden of proof to prove commission of corrupt practices by the first respondent was on the appellant.

For proving corrupt practices within the meaning of Section 123(4) of the Act, he was required to prove the following:

- (i) Ext.P2 was published by the first respondent or by his 'agent' or other person, but with his consent.
- (ii) the statement are false and the first respondent believed them to be true.
- (iii) the allegations touch upon the personal conduct of the petitioner.
- (iv) the statement are reasonably calculated to prejudice the prospects of the petitioner's election.

The appellant in paragraph 3 of the Election Petition alleged:

(i) K.C. Marydasan, general Convener, U.D.F. Election Committee, Kundara, published Annexure A2 (Ex.P2) notice containing defamatory statements about the petitioner, which are false on the face of it, and believing the same to be not true.

(ii) This was done with the full knowledge and consent of the first respondent."

In the written statement the first respondent traversed the said allegations stating :

"It is quite incorrect to contend that but for the publication and distribution of Annexures A2 and A4 the petitioner would have secured more number of votes. The first respondent has not resorted to any corrupt practice."

The first respondent, however, categorically stated that no defamatory statement was made or published with his knowledge. He further denied and disputed the allegation that Marydasan was his election agent or a polling agent or agent for any purpose. He further denied and disputed that Ex.P-2 was published with his knowledge.

It may further be noticed that no allegation was made in the election petition that the first respondent had incurred the expenditure as regard the printing and publishing of the said exhibit.

The submission of the learned counsel is that apart from election agent, polling agent or counting agent, another types of agents are also contemplated within the meaning of Section 123 of the Act. The learned counsel may be correct, but as would appear from the discussions made hereinafter the same would not make any material difference in law.

In terms of sub-section (4) of Section 123 the corrupt practices may be committed by (a) the candidate; (b) his agent, that is to say \026 (i) an election agent, (ii) a polling agent, (iii) any person who is held to have acted as an agent in connection with the election with the consent of the candidate; (c) by any other person with the consent of

the candidate or his election agent.

The categories of agents enumerated in (i) and (ii) of clause (b) are to be notified by the candidate, before the statutory authorities. Such agents, thus, are not only known to the appropriate authorities but also to his opponents and other persons concerned. However, so far as category (iii) is concerned, the name of such agent is not required to be notified. He must have an express or implied authority to act on behalf of the candidate. For the purpose of proving corrupt practices on the part of such agent, there would not be any material difference between the third category of "agent" or "any other person" inasmuch as in both the cases consent of the candidate being the material factor, would be required to be pleaded and proved. Thus, the appellant was required to prove that alleged corrupt practices were committed by the aforementioned Marydasan and Vellimon Vijayanandan with the consent and knowledge of the elected candidate. The first respondent, as noticed hereinbefore, herein in his written statement denied or disputed that a pamphlet has been published defaming the appellant herein at his instance or with his knowledge or consent. The appellant sought to prove such consent on the part of the first respondent vis-à-vis Marydasan on the ground that not only the same was printed in Karthika Press but the expenditure incurred by Respondent No.1 on the printing and publishing thereof was intimated to the Election Commission in his election expenditure account.

In terms of Section 127A of the Representation of People Act, the printers are required to produce four copies of each printed material that they printed and provided during the election period to the candidates or their representatives. The authorities of the Karthika Press responded to a notice issued by the said witness. A data was also collected on such disclosures and further materials were collected by the officers of the department on the basis whereof the list was prepared. It is, however, accepted that the posters and pamphlets produced by the printers were not exhibited in the notice board of the Collectorate.

PW10 upon undertaking a purported comparison of Ex. P2(b) with the entries made in Ex. X10, sought to correlate the both on the ground that a sum of Rs. 4,350/- was paid by the first respondent herein to the printer. However, in cross-examination he stated that it was not easy to correlate those items of printing with entries in Ex. X10; the reason being that payments towards printing charges may not be made in one lump. He categorically stated:

"I now see a bill dt. 19.05.2001 issued to the Secretary of the L.D.F., Election Committee, Kundara from the Kollam District Co-operative Printing Society (the bill is marked Ext. XII(a). A verification of Ext. X10 is not a statement prepared based on bills produced by the candidate and their agent. Actually we collected data from the field which is verified by the staff after going to the election offices of the candidates as also the various printing presses. Later on when the candidate submitted their bills, I cross checked the details with those in Ext. X10.

I now see Bill dt. 30.04.2001 issued from the Don Bosco Industries. Offset Printers to the Secretary, the LDF Election Committee, Kundara on 30.04.2001 for the sum of Rs. 4,250/- These are in respect of printing two matters. First of these was 1000 posters for which the printing charge was Rs. 3000/-. This is shown as serial

No. 7 of Ext. X10. The other item mentioned in the bill dt. 30.04.2001 is shown as item 6 of Ext. X10 (the bill is marked Ext. X1(b))."

It is, therefore, clear that the evidence of the said witness is not conclusive on the question that offending material was printed and published by Karthika Press or the expenditure therefor was borne by the respondent No. 1.

The Manager of the aforementioned Karthika Press was examined by the appellant as PW17. He categorically stated that Ex. P2(b) was not printed in the his Press.

He furthermore denied the suggestion that the matter printed in his Press was Ex. P2(b). A question was asked to whom as to which pamphlet pertaining to the printing shown in Ext. X7(d) and in answer thereto he stated:

"Sl. No. 3 of Ext. X7(d) covers printing charges of Ext. P3(a). Item 2 shown as Convenor Pamphlet in Ext. X7(c) was a matter printed in four pages. I deny the suggestion that it relates to Ext. P2(b) actually has six pages."

Allegations of corrupt practices are quasi-criminal charges and the proof that would be required in the support thereof would be as in a criminal charge. The charges of corrupt practices are to be equated with the criminal charges and proof thereof would not be not preponderance of probabilities as in civil action but proof beyond reasonable doubt as in a criminal trials. (See *Surender Singh Vs. Hardial Singh and Ors.* (1985) 1 SCR 1059)

From the materials on record, therefore, in our opinion, it has not been proved that the offending article was printed and published with the consent and knowledge of the first respondent herein.

NON-COMPLIANCE OF SECTION 99:

Admittedly Shri Marydasan was not issued any notice. He was not given any opportunity to cross-examine the witnesses examined on behalf of the appellant or adduce evidence on his own behalf.

Section 99 of the Act empowers the High Court to record the names of all persons, who have been proved at the trial to have been guilty of any corrupt practice and the nature of that practice. The proviso appended to Clause (a) of sub-section 1 of Section 99 mandates that before a person is so named, he has to be given notice to appear before the High Court and to show cause why he should not be so named and upon his appearance, if any, pursuant to such notice he must be given an opportunity to cross-examine the witnesses who have already been examined by the High Court and gave evidence against him and further giving him an opportunity of calling evidence in his defence and of being heard.

The requirement to apply the provisions of Section 99 is in respect of a person who is not a party to the proceeding. The statute mandates that before a person is named as having indulged in corrupt practices he must be given the same opportunity which is given to a party to the petition. By reason of such a notice and giving an opportunity to the noticee to cross-examine the witnesses examined on behalf of the parties to the said petition and examining witnesses on

behalf of his defence, he is placed on same position as that of a party in the petition. (See Dr. Ramesh Yeshwant Prabhoo Vs. Prabhakar Kashinath Kunte and Others (1996) 1 SCC 130).

Naming of a person as having indulged in corrupt practices has serious consequences. A person indulged in corrupt practices whether party to the petition in terms of Section 82 or subsequently receives a notice in terms of Section 99 would stand on the same footing having regard to the provisions contained in Section 8A of the Act. Such a person may not be a necessary party within the meaning of Section 82 of the Act but it is beyond any cavil that no finding could be recorded by naming such a person unless the mandatory provisions of Section 99 are complied with. (See Patangrao Kadam Vs. Prithviraj Sayajirao Yadav Deshmukh and Others (2001) 3 SCC 594).

Even if Marydasan was agent of the first respondent within the meaning of Section 123 of the Act, the High Court was required to comply with the aforementioned statutory mandate. It has not been disputed that the provisions of Section 99 are mandatory. Marydasan, thus, could not have been named as having indulged himself in corrupt practices without complying with the mandatory provisions of Section 99 of the Act.

The High Court, thus, committed a manifest illegality in coming to the conclusion that the offending article Ex. P2(b) was published at the instance of Marydasan.

CONCLUSION:

We, therefore, are of the opinion that the appellant has not been able to prove:

- a. That the said Shri K.C. Marydasan was his agent;
- b. that the offending material was published with the knowledge and consent of the first respondent.

We have, therefore, no hesitation in coming to the conclusion that the High Court was right in its finding to the said effect. In view of our finding, it is not necessary to go into the cross-appeal filed by the first respondent.

For the reasons aforementioned, we do not find any merit in this appeal, which is accordingly dismissed.

So far as the Appeal filed by Shri K.C. Marydasan is concerned, we are of the opinion, that having regard to the fact that he had not been given a notice nor was allowed to cross-examine the witnesses examined on behalf of the parties on the said issues, the High Court was not correct in making any observation against him. The said observations against Shri K.C. Marydasan shall stand expunged. Civil Appeal No. 4 of 2003 is dismissed and the appeal arising out of Special Leave Petition (C) No.15350 of 2003 filed by K.C. Marydasan is allowed. No costs.