

PETITIONER:
LAXMINARAYAN AND ANOTHER

Vs.

RESPONDENT:
RETURNING OFFICER AND OTHERS

DATE OF JUDGMENT 28/09/1973

BENCH:
DWIVEDI, S.N.
BENCH:
DWIVEDI, S.N.
REDDY, P. JAGANMOHAN

CITATION:
1974 AIR 66 1974 SCR (1) 822
1974 SCC (3) 425
CITATOR INFO :
R 1974 SC 405 (29)
E 1975 SC 290 (3)
R 1975 SC 1788 (25)
RF 1976 SC 1866 (39)
R 1985 SC 89 (13)

ACT:
Representation of the People Act (43 of 1951). Ss. 98, 116A, 119, 123(4) Corrupt practice--Scope of review by appellate Court--'Incurred' in s. 119, meaning of--Conduct of Election Rules, 1961, r. 63--Scope of. Evidence Act (1 of 1872) Ss. 98 and 159 to 161--Record of speeches in shorthand and long hand--Admissibility. 'Bhrashtachar', meaning of.

HEADNOTE:

JD and RS were two of the five candidates for election to the Lok Sabha. JD was the returned candidate and RS polled the next highest number of votes. After the counting of the votes, RS applied for a recount under r. 63 of the Conduct of Election Rules, 1961. In the petition he alleged that the difference in votes obtained by JD and himself was marginal, that more than 7000 votes were declared invalid; that votes have not only been declared as invalid but also that "admitted disputed votes" were not properly counted, and that the number of votes declared invalid materially affected the result of the election. He also alleged certain irregularities. The Returning Officer directed that all the votes cast in favour of JD and RS as well as the rejected votes should be recounted. There was a slight discrepancy in the number of votes obtained by each of the two candidates, and in the number of rejected votes, in the recount, but there was no effect on the result of the election.

In a petition challenging the election of JD the following grounds were urged, (1) that the election should be set aside under s. 100(l) (iii) and (iv) of the Representation of the People Act, 1951, because, the votes have not been properly counted as valid or invalid and there was a violation of rule 63; and (2) that JD was guilty of corrupt practice under s. 123(4) of the Act in that statements were made and documents published, by person, with the consent of

JD attacking the personal character of RS; that his election agent distributed a weekly containing an attack on the personal character of RS; and that JD himself made such statements and published such documents. The petition was dismissed by the High Court.

Dismissing the appeal to this Court (except in respect of costs),

HELD (1) The plea in the election petition that valid votes have been counted as invalid and invalid votes as valid would not include the plea that any valid votes of RS and other candidates have been counted as valid for JD. Therefore, it was not necessary to recount the votes of candidates other than JD and RS. On the allegations contained in the application to the Returning Officer he could not have ordered a recount of all the votes and his order directing recount was not in contravention of rule 68. The discrepancies in the number of votes was satisfactorily explained and there was no acceptable evidence of the alleged irregularities. [826 C; 827 A-B]

(2)(i) Section 116A of the Act provides for appeal to this Court from an order of the High Court dismissing an election petition and an appeal lies on issues of both of law and of facts. Section 116C applies the Code of Civil Procedure as nearly as possible in the determination of the appeal. The power of the appellate courts is very wide. it can reappraise the evidence and reverse the trial court's findings of fact, but the practice of the appellate court, however, has uniformly been to give the greatest assurance to the assessment of the evidence made by the judge who hears the witnesses and watches their demeanour and judges of their credibility in the first instance. The appellate court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion

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of the trial court. This limitation on the power of the appellate court in a first appeal from decrees will also apply to an election appeal under s. 116A. In an appeal burden is on the appellant to prove how the judgment under appeal is wrong. To establish this he must do something more than merely ask for reassessment of the evidence. He must show wherein the assessment had gone wrong. This is especially so when the alleged corrupt practice is of a quasi criminal nature; and this Court would be slow to disagree with the finding of the High Court that such a charge was not established. [839 G-840 E]

Saraveeraswami v. Talluri, A.I.R. 1949 P.C. 32, Sarju Pershad v. Raja Jwalesliwari Pratap Narain Singh, [1950] S.C.R. 781 at p. 784 per Mukherjea J., Narbada Prasad v. Chhagaul, [1969] 1 S.C.R. 499 at p. 504 by Hidayatullah C.J., D. P. Misra v. Kam Narain Sharma, [1971] 3 S.C.R. 257 at p. 261 per Shah. J., Virendra Kumar Saklecha v. Jagjiwan [1973] 1 S.C.C. 826, referred to.

(ii) In the present case, the High Court was right in holding that there is, no acceptable evidence, (a) of any consent given by JD to any one for them making of the various statements or the publishing of documents containing statements against the personal character of RS and (b) of the distribution of the weekly, either by JD or his followers or agents. [834 B-C; 849 F; 850 F. H]

(iii) As regards the statements attributed to JD himself the evidence consists of the oral evidence of some witnesses who claimed to have heard the statements being made at various

meetings, and the oral evidence of two police witnesses who took down his speeches in shorthand and one speech in long hand. While assessing the probative value of the oral evidence of the police witnesses it is necessary to remember that the report of a shorthand writer is strictly speaking not substantive evidence as such, and it can only be used as a part of the oral evidence. Three conditions are, however, necessary for admitting such statements in evidence,, under s. 159 to 161 of the Evidence Act; (a) the notes must have been taken down by the witnesses as and when the speeches were being delivered or so soon afterwards that the speeches were fresh in their memory, (b) the witnesses must be sure that the speeches have been correctly recorded by them, and (c) the notes must be produced and shown to the adverse party if he requires them. In the present case the first condition may be taken to be satisfied. The third condition was also satisfied. It could not be said that merely because the notes of speeches were in shorthand they would not be admissible in evidence and that they should have been recorded in a language which could be understood by the adverse party. According to section 98 of the Evidence Act evidence may be given to show the meaning of illegible or not commonly intelligible characters or of abbreviations etc. Notes in shorthand may be said to in 'not commonly intelligible characters' and 'abbreviations. [841 A-842 D] However, the record of the speeches, made by one of these witnesses, is not admissible in the present case, because the second condition is not satisfied. The evidence shows that there are various infirmities and that the extracts were not a correct recording of the speeches made by JD. [842 F-G]

Kanti Prasad layshanker Yagnika. Purshottamdas Ranchhoddas Patel [1969] 3 S.C.R. 400 and P. C. Purshothama Reddiar v. S. Perumal [1972] 2 S.C.R. 646, distinguished.

(iv) As regards the other police witness according to his notes JD is alleged to have made the following statements. (a) That RS was "Bhrasthachar," (b) This is a war between truth and power. We have to see whether truth wins or power wins. We have to see whether truth wins or power loses, whether falsehood wins or truth wins. We have to see whether corruption wins or purity, wins' and (c) 'You know his (RS) achievements and capacity. I do not wish to speak anything about him.'

The word "Bhrashtachar" means a man of fallen conduct. The High Court, however, translated it to mean 'Corruption', but in the context it is susceptible of the interpretation of a person who has fallen from orthodox conduct. It is-

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one of those flourishes or hyperboles which are the common stock-in-trade of election speakers of exploit the emotions of the audience and to augment their popular support. As regards the other statements they do not refer to statements of fact in relation to the personal character or conduct of RS. Therefore, the speeches attributed to JD do not make out any corrupt practice. The evidence of the other witnesses was rightly rejected by the High Court.

[846 F; 847 D-E]

(v) The application for production of the summaries of the notes of the speeches said to have been sent by the police witnesses to the government for corroborating the two witnesses should not be allowed, because apart from the fact that an elaborate inquiry will have to be made by examining a number of police witnesses and admitting a large number of documents for finding out whether summaries or full reports were sent to the government, in view of the findings that

the record by one of the writings is subject to infirmities and that the statements in the record of the other witness did not amount to corrupt practice, the production of such records will not advance the case of the appellants. [847 F-848 C]

(vi) The contention of the appellants that those records would establish other instances of corrupt practice against JD cannot be entertained, because, such other instances were not pleaded in the election petition and JD had no opportunity to deny them or disprove them. [848 C-D]

(3) While dismissing the petition the High Court ordered that JD would be entitled to his costs including costs at the scheduled rate of Rs. 400/- per day for 52 hearings, from the petitioners. The sum of Rs. 400/- per day is prescribed by the Bombay High Court Rules for fees of counsel. Under s. 119 of the Representation of the People Act which deals with costs, "Costs shall be in the discretion of the High Court provided that whether a petition is dismissed under clause (a) of section 98 the returned candidate shall be entitled to the costs incurred by him in contesting the petition and accordingly the High Court shall make an order for costs in favour of the returned candidate". The petition in the present case was dismissed by the High Court under s. 98(a). But the word 'incurred' means actually spent. There is no proof of payment of any fee to counsel by JD. Therefore, he was not entitled to the amount of Rs. 400/per diem awarded by the High Court. [851 F-G]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1014 of 1972.

Appeal under section 116 of the Representation of People Act 1951, from the Judgment and Order dated 21st January, 1972 of the Bombay High Court (Nagpur Bench) at Nagpur in Election Petition No. 3 of 1971.

M. N. Phadke, V. G. Palshikar, D. K. De and H. E. Devani and A. G. Ratnaparkhi, for the appellants.

A. K. Sen, S. N. Sirpurkar, G. L. Sanghi, D. N. Mishra, O. C. Mathur, J. B. Dadachanji, for respondent no. 2.

V. R. Manohar, B. K. De, H. C. Devani, A. C. Ratnaparkhi and S. Balakrishnan and N. M. Ghatate, for respondent No. 3.

H. R. Khanna and S. P. Nayar, for respondents Nos. I and 21.

The Judgment of the Court was delivered by DWIVEDI, J. The appellants, Laxminaray an and Marotrao, filed an election petition challenging the election of Jambuwantao Dhote to the Lok Sabha from 21 Nagpur Parliamentary Constituency. There were five candidates in the run. Dhote was one. He was

825 elected. The, poll was on April 18, 1971. Dhote obtained 1,25,665 votes. The next highest votes were obtained by Rikhabchand Sharma. He polled 1,23,615 votes.

The election was challenged on diverse grounds. There were as many as 13 issues. The record of evidence is voluminous. The judgment of the High Court runs to 244 pages. The High Court decided all the issues against the appellants. Hence this appeal.

Sri Phadke, counsel for the appellants, has not covered the whole ground again; he has confined his arguments, to issues 2, 4, 5, 8 and 9. Thus the scope of inquiry is much narrower in the appeal.

Issue No. 2 :

Section 100 of the Representation of the People Act, 1951 (hereinafter called the Act) specifies the grounds on which the election of a returned candidate may be set aside. According to s. 100(l) (d) (iii), the election may be set aside if the result of the election of the returned candidate has been materially affected by the improper reception, refusal or rejection of any vote or the reception of any vote which is void. Section 100(l) (d) (iv) provides that the election may be set aside if the result of the election of the returned candidate has been materially affected by any non-compliance with the provisions of the Constitution or of the Act or of any Rules or Orders made under the Act.

Paragraphs 14, 15 and 16 of the election petition allege facts in respect of this issue. According to paragraph 14, votes were counted in the YMCA Hall on April 19, 1971. There were no proper arrangements for admission of the candidates and their counting agents at the count. A large number of people had entered into the Hall. The counting was not complete on the said date. There was some counting on the day following, that is, on April 20, 1971. The counting when completed revealed that 3,46,093 votes were polled in all. J. B. Dhote received 1,25,665 votes; R. C. Sharma, 1,23,615, 7425 votes were rejected votes.

Paragraph 15 states that at the end of the counting R. C. Sharma made an application to the Returning Officer claiming recount of votes. The Returning Officer directed that all votes cast in favour of J. B. Dhote and R. C. Sharma as well as all the rejected votes should be recounted. He did not order that the votes of other candidates also should be recounted. Paragraph 16 states that after the recount it was declared that 3,46,079 votes were polled in all. The total of J. B. Dhote came down to 1,25,550; of R. C. Sharma to 1,23,493. The number of rejected votes went up to 7,597. It is further alleged that the recount showed that 14 votes were missing, that many rejected votes were counted as valid and that there is a difference in the aggregate of different candidates.

Paragraph 15 then sums up : "It is, therefore, clear that the votes have not been properly counted as valid or invalid, without a proper

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scrutiny required under the law. This has very much materially affected the result of the election. In fact the recount should have been for the entire votes cast in the election."

Paragraph 16 states that it was necessary to count all the votes as there was no proper recount by the Returning Officer. The recount itself shows that many rejected votes were counted as valid and many valid votes were rejected. The tendered votes were not counted and 14 votes were missing.

The plea in paragraph 16 that valid votes have been counted as invalid and invalid votes as valid would not include the plea that many valid votes of R. C. Sharma and other candidates have been counted as valid for Dhote. It was accordingly not necessary to recount the votes of candidates other than Dhote and R. C. Sharma. The recount of the rejected votes and of the votes of these two candidates was enough. The appellants gave an application in the High Court for inspection of all the votes. This application was rejected by an order on November 15, 1971. For the reasons already discussed the application was rightly rejected.

Rule 63 of the Conduct of Election Rules, 1961 provides for the recount of votes. According to sub-rule (2) thereof

recount of all votes or any part may be claimed on behalf of any candidate. An application should be made on his behalf to the Returning Officer. The application should state the ground on which the recount is claimed. The Returning Officer shall decide the question of recount and make an order either accepting or rejecting the application. The order should set forth the reasons. He may allow the application in whole or in part. The application for recount made by R. C. Sharma is Ex. P. 21 Paragraph I of the application states that more than 7000 votes were declared invalid. They were neither shown to him nor to his agents. Lighting arrangements were not satisfactory so that marks could not be properly read at the counting. Paragraph 6 states that the difference in votes obtained by Dhote and R. C. Sharma is marginal. The number of votes declared invalid has materially affected the result of the election. Many unauthorised persons entered the hall and they were interfering with the process of counting. Paragraph 8 states that the votes declared invalid were not so declared in accordance with the prescribed procedure. "Admitted disputed votes" were not admitted according to the prescribed procedure. So the prayer for recounting of votes was made. The main charge is that the votes have not only been declared as invalid but also that "admitted disputed votes" were not properly counted. The Returning Officer allowed partial recounting. He directed that all votes cast in favour of Dhote and R. C. Sharma and all the rejected and invalid votes should be recounted. The reason given by him is that the difference of votes cast in favour of Dhote and R. C. Sharma is only 2049. He says that "the margin is small and in the interest of justice I agree to have a recount of votes" as directed. Accordingly, the votes of Dhote and R. C. Sharma were recounted as also invalid votes. The recounting had no effect on the result of election.

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On the allegation contained in the application the Returning Officer could not have ordered recount of all the votes. In our view, the order of the Returning Officer directing recount was not in contravention of Rule 63. The appellants have examined several witnesses in support of the alleged irregularities, but that evidence has not been accepted by the High Court. Nothing has been shown to us for taking a different view. The Returning Officer has been examined by the appellants. He has stated that the count and recount have been done in accordance with the prescribed procedure. He has also explained the apparently missing 14 votes on recount. According to the Returning Officer the discrepancy of 14 votes might be due to the mistake in counting the votes and making them into bundles of 50 each. In the recount they recounted only some of those bundles and not all.

For the reasons discussed above, we accept the finding of the High Court on this issue.

Issue No. 4 :

Three or four days prior to poll the Nagpur City District Congress Committee published an appeal in the name of Smt. Indira Gandhi to the voters of the constituency for supporting Rikhabchand Sharma. On the left top of this printed appeal there is a photograph of Smt. Indira Gandhi; on the right top there is the picture of a cow and a calf, the symbol of the Congress candidate. On the left bottom there is printed "New Delhi, 8 April, 1971;" on the right bottom appears the signature of Smt. Indira Gandhi. On April 16, 1971 one Satya Narain Sharma issued a statement to the press in respect of this appeal. The next day, that is,

April 17, Tarun Bharat, a newspaper, published a summary of his statement. The summary states that Satya Narain Sharma has expressed "doubt about the genuineness of the letter by the Prime Minister calling upon the voters to vote for. Mr. Rikhabchand Sharma." The summary further states that "there is no seal of the Prime Minister's Secretariat on this letter, nor it is mentioned to whom this letter is addressed." Satya Narain Sharma is also stated to have, expressed doubt that the Prime Minister, who has avoided even to mention the name of a candidate, would have issued a letter in support of him. The election petition states that Satya Narain Sharma was an agent of Dhote and that he issued the statement with the consent of Dhote. The statement was false and was believed to be false by Dhote. It was reasonably calculated to prejudice the prospects of the election of R. C. Sharma. Thus a corrupt practice under s. 123 (4) of the Act has been committed. The High Court has held that no such corrupt practice was committed by Dhote. It has held that Satya Narain Sharma did not make a statement of fact. He has expressed an opinion. It has also held that the statement was not false and that it did not relate to the personal character or conduct of R. C. Sharma or to his candidature. It has also held that Satya Narain Sharma did not make this statement with the consent of Dhote. We shall first consider whether the statement was issued by Satya Narain Sharma with the consent of Dhote.

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Satya Narain Sharma was examined by Dhote. He has denied that he made the statement with the consent of Dhote. Dhote has stated that he had not given his consent to any such statement. The High Court has believed Dhote. Nothing has been shown to us to take a different view. It is true that according to the evidence on record Satya Narain Sharma seems to have addressed several meetings in support of Dhote and that in some of those meetings Dhote had also delivered speeches. But this circumstance alone would not prove the consent of Dhote. As we agree with the High Court that the statement is not proved to have been made with the consent of Dhote, it is not necessary for us to record a finding on the other aspect of issue No. 4. We agree with the High Court that the appellants have failed to establish this particular corrupt practice.

Issue No. 5 :

In his return of election expenses Dhote is shown to have spent Rs. 648/- on the publication of a pamphlet. The nature of the pamphlet does not seem to have been disclosed in the return. The appellants have alleged in the election petition that document C attached to the petition is that pamphlet. Dhote has emphatically denied that it was document C. According to him, it was document 2R 20. Document C opens with : "I am contesting this Lok Sabha electionagainst a corrupt candidate of Congress. The appellants say that this is a false statement relating to the personal character of Rikhabchand Sharma. 2R 20 is an innocuous document. It was printed by the Narkesari Press and it bears the print line of the press. The close question is whether document C or document 2R 20 was published by Dhote. To prove their case, the appellants have examined one witness Prabhakar Sakhardande. He was employed on the relevant date as a printer in the Narkesari Press. He says that document C was printed in the Narkesari Press on Sunday, April 11, 1971. According to him, it is printed in mono type. He also says that only the Narkesari Press in Nagpur has a mono-machine. The High Court has not believed him. He is the President of the Rashtriya Press

Kamgar Sangh which is affiliated to the Indian National Trade Union Congress. He does not give out the name of the person who printed the document C in the Narkesari Press, nor does he disclose the name of the person who delivered the printed copies to the appropriate authority in the Narkesari Press. Although he admitted in cross-examination that he had not been to any other press in Nagpur, he has said that except Narkesari Press no other press in Nagpur has a mono-machine. Evidently, this part of his evidence does not inspire confidence. Not having seen any other press in Nagpur, he could not say that the Narkesari Press alone has got a mono-machine. For these reasons, we find it difficult to place any reliance on his testimony.

Dhote has examined Manohar Bokare in support of his case that the document 2R 20 was published in the Narkesari Press. Manohar Bokare is the Manager of the Job Section of the Narkesari Press. He says that he receives orders from customers, hands over printed material to them, examines and makes bills and prepares quotations for printing jobs. Initially, he was summoned by the appellants as their
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witness. But later they gave him up. So he was examined by Dhote.. He has said that document 2R 20 was published in the Narkesari Press. He produced the original of the document. He has stated that B. N. Gaikwad had given him the original for printing. He has also filed the counter-foil of the bill issued by him in connection with, the printing of the document 2R 20. He has denied that the document C was printed in the Narkesari Press. The High Court has believed his evidence. Nothing has been shown to us to enable us to take a different view.

Sri Phadke has made several comments on his evidence. Firstly, he has not produced the order book. But he was never asked by the appellants to produce the order book. In cross-examination he, simply said that he has not brought the order book. Secondly, while he has said that the printed matter was delivered by him to a boy, B. M. Gaikwad has stated that it was sent for by him through one Doonger aged about 50 years. This discrepancy is not sufficient to discredit his evidence. He was examined several months after the event. Such a minor mistake is accordingly not unnatural and may be a slip of memory. Thirdly, document C is printed on news print paper. It is, said that news print paper is not available in the market and that document C must have been printed in the Narkesari Press where Tarun Bharat was also being printed. But there is some evidence on record to show that newsprint paper was available in the open market. That aside, B. M. Gaikwad has stated that the paper for printing document 2R 20 was supplied by him from the, stock of paper belonging to his party at Chhindwara from where a weekly organ of his party was being published. Manohar Bokare has deposed that there is an endorsement on the original of 2R 20 that paper was given by the party who got it printed. The endorsement was according to him necessary for the purpose of sales-tax. On his copy of the bill there is an endorsement "not taxable". He has explained that it was necessary to obtain the signature of the customer if the paper was given by the press.. Fourthly, the Narkesari Press did not comply with the provisions of s. 127A of the Act in regard to document 2R 20. So it should be held that this document was not published by the Narkesari Press. Section 127A(2) provides that no person shall print or cause to be printed any election pamphlet or poster-(I) unless a declaration as to the identity of the publisher thereof, signed by him and attested by two persons

to whom he is personally known, is delivered by- him to the printer in duplicate; and (2) unless, within a reasonable time after the printing of the document, one copy of the declaration is sent by the printer, together with one copy of the document, if printed in the capital of the State to the Chief Electoral Officer and in any other case to the District Magistrate of the District in which it is printed. Manohar Bokare has admitted in cross-examination that he has neither obtained a declaration from B. M. Gaikwad, nor has he sent a copy of the document 2R 20 to the District Magistrate, Nagpur. This is incomplete and ineffective cross-examination. Manohar Bokare should have been also asked if he had any explanation for those omissions. The omissions might have been of some assistance to the appellants if Bokare could not give a proper explanation. The possibility of a good explanation cannot be ruled out. We agree with the High

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Court that no adverse inference can be drawn from these breaches of law. Fifthly, he could not give the exact date of the printing of 2R 20. But he has said that no record of the date of printing is maintained by him. Lastly, Dhote has admitted that the diction of the document C resembles his own. It would show that he has published this document. This criticism has little force. Dhote has also said that he had made numerous speeches in the course of his election. So it was quite easy to pick out words and phrases from his speeches and piece them together in the document C.

Now, the case of the appellants is that the document C was printed. The case of Dhote that is 2R 20 was printed. It is significant that it is not the case of the appellants that two documents were published at once and the same time, one innocuous and the other offending. This has an important bearing on probabilities. It is highly improbable that a candidate would publish an offending document and show the expenses incurred on its printing in his return of election expenses.

The appellants have examined several witnesses to prove the distribution of the document C during the election. The High Court has disbelieved those witnesses. It has held that from their demeanour they appear to be tutored witnesses. Their evidence has not been pressed in service before us on behalf of the appellants. So we do not deal with it.

Issue No. 8

This is the crucial issue in the appeal. The appellants' case is -that Pundalik Masurkar and Satya Narain Sharma had delivered speeches in three meetings during the election. Those meetings were held on March 29 and 30, 1971, and April 7, 1971. They were held respectively at Nawi Mangalwari Ganji Peth and Maska Sath. By their speeches they have committed the corrupt practice specified in s. 123(4) of the Act. They committed the corrupt practice with the consent of Dhote. Dhote, it is alleged, delivered speeches in the said meetings as well as in the meetings in Chamar Nala and Kasturchand Park. The meetings in the latter two places were held on April 14 and 15, 1971. By his speeches, he also has committed the aforesaid corrupt practice. The High Court has recorded these findings on this issue : (1) the appellants have failed to prove that Dhote made any offending statements in the aforesaid meetings; (2) they have also failed to prove that Pundalik Masurkar and Satya Narain Sharma made any offending statements in the aforesaid meetings; (3) they have also failed to prove that Pundalik

Masurkar and Satya Narain Sharma made any offending statements in those meetings with the consent of the Dhote. It has further held that they have failed to -prove that the statements attributed to Dhote, Pundalik Masurkar and Satya Narain Sharma constituted the corrupt practice specified in 123(4) of the Act.

The ground of challenge in the petition is one covered by s. 100(l) (b) and not s. 100(l) (d). So we shall first examine the evidence to find out whether Pundalik Masurkar and Satya Narain Sharma made the allegedly offending statements with the consent of

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Dhote. If his consent is not proved, it will not be necessary to examine the other aspects of this part of the issue.

Nawi Mangalwari Meeting: 29-3-1971

The appellants have examined Marot Rao, Ishwar Giri, Shanker Laxman and Manohar Kashinath Kalankar. Dhote has examined himself, Pundalik Masurkar and Satya Narain Sharma.

According to Ishwar Giri, Dhote was not present in the meeting while Pundalik Masurkar and Satya Narain Sharma were sneaking. Dhote came to the meeting just five minutes before the end of Satya Narain Sharma's speech. Marot Rao and Shanker Laxman say nothing about the presence of Dhote during the speeches of Pundalik Masurkar and Satya Narain Sharma. Manohar Kashinath Kalankar is the C.I.D. Shorthand Writer. He says that he was present in the meeting and he took down the notes of speeches of various speakers including the aforesaid two speakers. He says that he remembers that Dhote was present in the meeting from the very beginning. But there is no note to that effect in his note-book. It will accordingly be not safe to depend on his memory, especially when Ishwar Giri contradicts him. Pundalik Masurkar has said that Dhote was not present while he was speaking. Dhote has said that he was not present when Pundalik Masurkar and Satya Narain Sharma delivered their speeches. He arrived in the meeting just when Satya Narain Sharma was finishing his speech. He has further said that Pundalik Masurkar and Satya Narain Sharma had spoken in the meeting without his knowledge and consent. He has said that it was not his business to arrange election meetings and to invite speakers. His election office used to attend to these matters. His workers use to take him to various meetings without any prior information of the meetings on his part. Satya Narain Sharma has said that he did not report to any one the contents of his speeches. He has also said that B. M. Gaikwad, the election agent of Dhote, used to invite him to speak in the meetings held in support of Dhote. This is the entire evidence on the question of consent. This evidence would show that Dhote was not present in the meeting when Pundalik Masurkar and Satya Narain Sharma were speaking. He had no prior knowledge of the fact that they would speak in the meeting. He had not invited them to the meeting. He denies his consent to their speeches. There is no direct evidence of consent from the side of the appellants. It is not possible to infer constructive consent from the foregoing facts and circumstances.

Ganji Peth Meeting: 30-3-1971 :

The appellants have examined Manohar Kashinath Kalankar, Shesh Rao Kambale, another C.I.D. Shorthand Writer, Mohd. Yakub Qamar and Dr. Ram Narain. Dhote has examined himself and Satya Narain Sharma. There is no direct evidence of consent. Mohd. Yakub Qamar and Dr. Ram Narain say nothing about the presence of Dhote while Satya Narain Sharma was

speaking. Manohar Kashinath Kalankar says that he remembers that Dhote was present in the meeting from the very beginning. Shesh Rao, refreshing his memory from his notes, said that his notes show that Dhote was welcomed and

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"therefore I say he was present from the very beginning." The note book of Manohar Kashinath Kalankar does not record that Dhote was present from the very beginning. it will not be safe to rely on his memory. It is true that Shesh Rao has noted in his note book that Dhote was welcomed. But from this fact it does not necessarily follow that he was present from the very being. He could be welcomed whenever he arrived in the meetings Dhote has said that when he reached the meeting, Satya Narain Sharma was 'halt way through his ,.speech'. But we do not know when Satya Narain Sharma made the allegedly offending remarks in the course of his speech. It cannot therefore be said that those remarks were made in the presence of Dhote. So we agree with the High Court that the appellants have failed to prove that Dhote had given his consent to the speech of Satya Narain Sharma in this meeting.

Maska Sath Meeting : 7-4-1971 :

The witnesses of the appellants for this meeting are Manohar Kashinath Kalankar, Shesh Rao Kambale, Manohar Tajane, Yadao Shripurkar and Marot Rao, Dhote has examined himself and Satya Narain Sharma Manohar Kashinath Kalankar and Shesh Rao Kambale are the C.I.D. Shorthand Writers. The appellants' witnesses have deposed that offending speeches were delivered by Dhote and Satya Narain Sharma. According to Manohar Kashinath Kalankar, Gunawant Nagpure had spoken before Satya Narain Sharma. He says that Dhote arrived in the meeting while Gunawant Nagpure was speaking and that Gunawant Nagpure continued speaking after his arrival. He also says that he has made a note about Dhote's arrival while Gunawant Nagpure was speaking in his note-book. He has produced his note-book. It begins with the speech of Chandrabhan Bodkar. The speech is written in shorthand. Two-third of the page is covered by the speech of Chandrabhan Bodkar, and over the remaining seven lines of the page no speech is recorded. The speech of Satya Narain Sharma is taken down in short-hand on the next page. The contents recorded over seven lines of the preceding page are these :

"Kamal Kishore Upadhyaya Something in Short-hand

Gunwant Nagpure , (F.B.) -/2

Sri J. B. Dhote arrived.

Sri Nagpure continued speaking."

There is absolutely no difference in the ink of the notes of the speeches of Chandrabhan Bodkar and Satya Narain Sharma. But the ink of the aforesaid quoted lines written in English is visibly different. This difference is suggestive of later interpolation of the aforesaid quoted lines, the purpose being to prove the presence of Dhote during Satya Narain Sharma's speech and his implied consent to that speech. It may, however, be observed that Manohar Kashinath Kalankar was not cross-examined by Dhote on the difference in ink. However, suspicious the entry of the aforesaid lines may be, we are reluctant to draw any adverse inference against Manohar Kashinath Kalankar from the difference in ink for want of cross-examination. But in view of certain other circumstances we do not think it safe to rely on the aforesaid

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note in his note-book. One, Shesh Rao Kambale, another C.I.D. Shorthand writer, was also present in the meeting.

He has taken down in short-hand the speeches of Kamal Kishore Upadhyaya, Gunwant Nagpure, Keshav Rao Gadekar and Dhote. He has not deposed that Dhote arrived in the meeting while Gunwant Nagpure was speaking. Two Manohar Kashinath Kalankar seems to us to be anxious to help the cause of the defeated Congress candidate, R. C. Sharma. As regards the meeting held at Nawi Mangalwari and Ganji Peth, he has deposed from memory that Dhote was present from the very beginning of those meetings. It may be observed that he has made no such note in his note-book. We have already held that Dhote arrived in those meetings when Satya Narain Sharma was about to finish his speech. We have disbelieved his statement made from memory. It seems to us that he has ventured to speak 'from memory' in order to help the appellants and R. C. Sharma. Third, Manohar Tajane, Shesh Rao- Kambale and Marot Rao say nothing in their evidence about the presence of Dhote during the speech of Gunwant Nagpure and Satya Narain Sharma. Marot Rao is one of the appellants in this appeal. The note alleged to have made by Manohar Kashinath Kalankar in his note-book does not get support from their testimony. Fourth, Yadao Shripurkar said that Dhote was present when Satya Narain Sharma was speaking. The High Court has disbelieved him. We see no reason to differ with the High Court. He has admitted that he was the Vice-President of the Nagpur City Congress Committee. He has also admitted that he has canvassed and given speeches in support of R. C. Sharma. He has distributed cards for R. C. Sharma. He was R. C. Sharma's counting agent also. He is thus a partisan witness. The High Court has made an adverse note about his demeanour. He is unable to explain his presence in the meeting, for his evidence shows that he had no prior information of the meeting. Although he was very closely connected with the election campaign of R. C. Sharma, he admits that he informed neither the Congress Election Office nor R. C. Sharma of the offending speeches of Dhote and Satya Narain Sharma. According to him, he and Manohar Tajane went together to the meeting. He further says that when Satya Narain Sharma finished his speech, both of them were away to Itwari Chowk for about 1-1/2 hours for taking tea. When both of them returned to the meeting, Dhote was speaking. Manohar Tajane does not support him there. According to him, he did not go with Yadao Shripurkar to Itwari Chowk. They parted company after the end of Satya Narain Sharma's speech. Yado Shripurkar betrays a tendency of giving evasive answers to awkward questions in cross-examination by merely saying "I do not remember." For all these reasons, we are not inclined to place reliance on his evidence.

In his cross-examination, Satya Narain Sharma has stated that he arrived at the meeting when Kesho Rao Gadekar was speaking. He further said that Dhote spoke after him. He was not asked as to whether Dhote was present in the meeting when he arrived or while he was speaking. In his examination-in chief, Dhote stated that he reached the meeting after the speech of Satya Narain Sharma. In his cross-examination he stated that he generally arrived in the meetings at the end as several meetings were addressed by him every day. He further stated

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that he did not remember whether Gunwant Nagpure spoke in this meeting. He was not specifically asked whether it was a fact that he arrived at the meeting when Gunwant Nagpure was speaking. It may also be observed that the appellants did not come forward with, a positive case in their petition that Dhote was present during the speech of Satya Narain

Sharma and that he did not protest against the allegedly offending statements of Satya Narain Sharma. This lack of a positive statement is a characteristic of the appellants' allegation of consent in respect of all the meetings discussed earlier. In the circumstances of this case and for the reasons already discussed we think that the High Court has rightly held that the appellants have failed to prove the consent of Dhote to the speech of Satya Narain Sharma in this meeting.

The Case against Dhote

We shall now examine the appellants, evidence against Dhote. The High Court has elaborately discussed and commented upon the evidence. As we are in agreement with the High Court, we shall indicate only the salient features of the evidence. Nawi Mangalwari Meeting-29-3-1971

It is alleged in paragraph 23(a) of the election petition that Satya Narain Sharma and Pundlik Masurkar said that Rikhabchand Sharma 'is a man having no character and is a smuggler of gold.' Satya Narain Sharma, it is alleged, also said that Rikhabchand Sharma "has taken a bribe of Rs. 5 lakhs from powerloom owners and, therefore, the recommendations of Ashok Mehta Committee to the effect that the Coloured saris should not be printed on powerloom has not been given effect to." It is further alleged that Dhote "also made personal attack on Shri Sharma saying that he has no character."

In his written statement Dhote has admitted that he had spoken in the meeting. But he said that he made no adverse remarks against Rikhabchand Sharma.

To prove their case, the appellants examined Marot Rao (one of them), Ishwargiri, Shankar Laxman Nandankar and Manohar Kashinath Kalankar. We shall discuss the evidence of the last witness at a later stage and under the general heading of police witnesses. For the present, we shall confine ourselves to the evidence of the remaining witnesses.

As regards Marot Rao, the High Court says that his evidence is not reliable. The High Court has further remarked that counsel for the appellants did not rely on his evidence. According to the High Court, Ishwar Giri did not attend the meeting and has given a tutored version. Shankar Laxman Nandankar was a chance witness and is not believed by the High Court. Counsel for the appellants has not been able to show us that the High Court is wrong in the appraisal of the evidence of the aforesaid witnesses.

Marot Rao is an appellant in this case. He is an interested witness. He is also an omnibus witness. He claims to have been present not only in this meeting but also in the Ganji Peth and Kastur-

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chand Park meetings Admittedly, he, did not take down notes of the speeches. His evidence does not completely correspond to the pleadings in paragraph 23 (a). In his evidence he says that Pundlik Masurkar called him a smuggler of gold. In his evidence he says that Satya Narain Sharma said that Rikhabchand Sharma has received Rs. 5 lakhs from powerloom owners, and that he was a man of no character.

Ishwar Giri is a chance witness. He has admitted that in his life he has never attended any meeting except this meeting. He pretended to have an excellent memory. But a vigorous cross-examination has shattered his tall claim and has shown that he is a man of short memory. He has admitted that he did not take notes of the speeches in the meeting. According to him, Pundlik Masurkar said that Rikhabchand Sharma was carrying on smuggling business and was corrupt. Satya Narain Sharma said that when the Bunker Sena made a

statement on the production of coloured saris on power loom, the Maharashtra Government "hung up the Ashok Mehta Committee Report on a peg". Rikhabchand Sharma was "a leader of the people who manufacture illicit liquor in Nagpur and who run gambling dens in Nagpur." Dhote said that corrupt and characterless Rikhabchand Sharma was talking of purchasing poor people. Corrupt and characterless Sharma has committed the political murder "of my friend Deoghare." Corrupt Sharma has secured 500 powerlooms for the Momins. He has taken Rs. 5 lakhs from them and he has distributed that amount lavishly for election purposes. He runs distillation centres, gambling dens and brothels in Nagpur. Obviously he is making preceptible improvements on the pleading in paragraph 23(a) of the petition.

Shanker Laxman Nandankar also is a chance, witness. Nawi Mangalwari is three miles from his house. He says that he went to the house of his aunt's son who is living there because he was called by the latter to his house. But for this explanation he would not have been present in the meeting. Admittedly, he did not take down notes of the speeches. Although several speakers spoke in the meeting, he does not remember the speeches of the speakers other than Dhote, Pundlik Masurkar and Satya Narain Sharma. According to him, Pundlik Masurkar said that Rikhabchand Sharma was selling land which he had purchased during his Mayorlity of the Nagpur City Corporation and using that money for election. He also said that Rikhabchand Sharma was carrying on 'smuggling business'. Satya Narain Sharma said that Rikhabchand Sharma was a corrupt man and that he had taken money from powerloom owners and was utilising that money for elections. He also said that Rikhabchand Sharma carried on 'smuggling business' and that he was a corrupt and characterless man. Dhote said that Rikhabchand Sharma was a corrupt man. While paragraph 23(a) of the petition alleges that Rikhabchand Sharma was called a man of no character, he says that Rikhabchand Sharma was also spoken of as a corrupt man. He makes other variations and omissions from the pleadings in his evidence.

Having regard to the foregoing discussion, we agree with the High Court that it will not be safe to rely upon the evidence of these witnesses.

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Ganji Peth-30-3-1971

Paragraph 23 (d) of the petition alleges that Satya Narain Sharma and Dhote spoke in this meeting. Satya Narain Sharma said that Rikhabchand Sharma "is a supporter of gundas and gangs involved in smuggling." Dhote said that Rikhabchand Sharma "is trying to purchase votes by money". He also said that Rikhabchand Sharma "is a corrupt man and in fact Rikhabchand Sharma is thy name corruption." The appellants examined three witnesses, Marot Rao (one of them), Mohd. Yakub Qamar and Dr. Ram Narain. The High Court has not relied upon the evidence of Marot Rao. Regarding Mohd. Yakub Qamar, it has held that he did not attend the meeting. Dr. Ram Narain, according to the High Court, has given false evidence.

We have already rejected the testimony of Marot Rao in regard to Nawi Mangalwari meeting. Obviously, there is variance between the pleading and his evidence, in regard to the speeches of Satya Narain Sharma and Dhote. Mohd. Yakub Qamar seems to have a grouse against Dhote. He is the Chairman of the powerloom society. He has admitted that Dhote led an agitation against the production of coloured saris on powerlooms and that the powerloom society was opposed to the agitation. He was a Congress candidate for

the Nagpur Corporation in the elections held in 1959, 1962 and 1969. He is an 'active' member of the Congress. He has admitted that he did not take notes of the speeches in the meeting. He has also admitted that he did not inform anybody about the speeches in the meeting he did not inform even the Congress Election Office. With his interest in the Congress candidate, it is difficult to believe that if Satya Narain Sharma and Dhote had made objectionable speeches, he would have failed to inform Rikhabchand Sharma or the Congress Election Office. He is a man of weak memory. He could not reproduce the speech of Satya Narain Sharma which he had repeated earlier in his evidence. He, could not explain as to how the appellants came to know that he was present in the meeting. There is variance between the pleading and his evidence as regards the speeches of Satya Narain Sharma and Dhote. According to him, Satya Narain Sharma said that Rikhabchand Sharma was the protector of the goondas and that he arranged for regular payments to be made to the police by person who maintained gambling dens and that he also indulged in smuggling gold. Dhote, according to him, said that Rikhabchand Sharma was a Bhrashtachari (corrupt)

Dr. Ram Narain has appeared as a witness for Rikhabchand Sharma. He was the counting agent of Rikhabchand Sharma and was in the hall where counting was done from 8.00 a.m. to 10.00 p.m. He was a Congress candidate in the Nagpur Corporation election in 1969. He is an 'active' member of the Congress. So, he is a highly interested witness. He has admitted that he did not inform Rikhabchand Sharma and the appellants about his presence in the meeting. Having regard to his interest in Rikhabchand Sharma, it is difficult to believe that if any objectionable speeches had been made in the meeting, by Satya Narain Sharma and Dhote, he would have failed to inform Rikhabchand Sharma of the offending speeches. There is variance between the pleading and his evidence in regard to their speeches. According to him, Satya Narain Sharma and Dhote both said that Rikhabchand Sharma "was arranging regular payment to the police, that he was siding with the goondas and that he carried on smuggling business." They also said that he was a corrupt and discredited man. He also said that Dhote asked a question "whose name was Bhrashtachari and himself answered by saying the Congress chairman Bhrashtachari (Congress is corrupt). He also said that the Congress men were Haram Khor (bad living) and they purchased votes with tainted money. He further said that Rikhabchand Sharma was a Bhrashtachari (corrupt).

In view of the foregoing discussion, we are in agreement with the High Court that no reliance can be placed on the evidence of these witnesses.

Maska Sath-7-4-1971

The appellants examined two witnesses, Manohar Tajane and Yadao Shirurkar. The High Court has held that the former is a tutored witness and the latter is not reliable.

There is variance between the pleading and the evidence of Manohar Tajane. He also tried to improve on the pleading. Paragraph 23(c) of the petition alleges that Satya Narain Sharma said that Rikhabchand Sharma "is a man of no character." Dhote said that "the fight is between corruption and purity represented by him and corruption by respondent No. 3." According to Manohar Tajane, Satya Narain Sharma said that Rikhabchand Sharma "is corrupt and deals in smuggling of gold." He also said that Rikhabchand Sharma was "characterless and is a protector of people who are dealing

in liquor, ganja, satta and gambling." According to him, Dhote said that it is a fight between "corruption and characterless and purity and good character. On one side there is corrupt Sharma, on the other good character and purity."

Yadao Rao Shirpurkar, as discussed earlier, is highly interested in Rikhabchand Sharma. His evidence suffers from the same infirmities as that of Manohar Tajane. The High Court did not rely on their testimony, and neither do we.

Chamar Nala -14-4-1971.

The appellants examined Laxminarayan Ganjali (one of them) and Shankerlal. The High Court says that the evidence of the former is thoroughly unreliable and counsel for the appellants did not refer to his evidence at all. Shankerlal, the High Court has found, did not attend the meeting. Laxminarayan is one of the appellants. He is accordingly an interested witness. Admittedly, he took no notes of the speech. Although he says that both the appellants gave information to the lawyer who drafted their election petition, he did not inform the lawyer about his presence in the meeting and about the offending speech delivered by Dhote. He makes improvement upon the pleading. Paragraph 23 (d) of the petition alleges that Dhote said that Rikhabchand Sharma "is a corrupt man supported by corrupt Naik Govern-

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ment." In his evidence, he says that Dhote said that Rikhabchand Sharma has become rich by indulging in corruption and black-market. Rikhabchand Sharma was trying to purchase votes by money. A corrupt man like Rikhabchand Sharma could not usher in the socialist society. He was the symbol of sin in the city of Nagpur.

Shankerlal could not tell the name of the President of the meeting. Admittedly, he took no notes of the speech. He also admits that he did not tell any body of his presence in the meeting. He also makes improvement upon the pleading. According to him, Dhote said that Rikhabchand Sharma was a Bhrashtachari and that all his money was earned by corruption. He also said "Ye Rikhamchot Sharma earns money by corruption."

We agree with the High Court that it is not safe to rely upon the evidence of these witnesses.

Kasturchand Park-15-4-1971

The appellants have, examined Marot Rao (one of them) Janaklal and Namdeo Rao. The High Court held that Marot Rao was not present in the meeting and is an unreliable witness. It has also held that Namdeo Rao is an interested witness and that he did not attend the meeting. Janaklal's evidence is not helpful to the appellant's case. According to him, Dhote delivered an innocuous speech. It has found that Namdeo Rao is an interested witness and was not present in the meeting,

Marot Rao, being an appellant, is an interested witness. The dais in the meeting was improvised on a truck which had been used in the procession taken out before the meeting. But he did not say that the dais was improvised on a truck. He improved upon the pleading. We have already rejected his evidence in regard to other meetings.

Janaklal also could not say that the dais was improvised on a truck. He is a chance witness. Moreover, according to him, Dhote simply said that "he did not want to say anything about Sri Sharma, that they would learn about him after reading Gram Sewak." This evidence does not attribute to Dhote any statement of fact which would fill within the grip of section 123(4).

Namdeo Rao is an interested witness. He is a member of the Congress which has set up Rikhabchand Sharma as a candidate. He was Rikhabchand Sharma's counting agent in the election. He did not inform anyone about the speech of Dhote. It is difficult to believe that if Dhote had in fact made any objectionable remarks, he would have failed to inform Rikhabchand Sharma. He has improved upon the pleading. Paragraph 23(e) alleges that Dhote said that Rikhabchand Sharma "is corrupt." According to his evidence, Dhote said that Rikhabchand Sharma was a corrupt man and has no character. He also said that Rikhabchand Sharma was dealing in illicit liquor and was running brothels and was a smuggler of gold. There is one curious thing about him. While according to Janaklal Dhote said that "he did not want to say anything about Sri Sharma and that they would learn

839 about him after reading Gram Sewak", he says that Dhote first said that he did not want to speak anything about Sri Rikhabchand Sharma and that the audience knew about the work of Rikhabchand Sharma. Thereafter he says that Dhote further made the aforesaid false statement regarding the character of Rikhabchand Sharma. Thus he seeks to reconcile his statement to that of Janaklal.

Like the High Court, we are unable to rely on the evidence of these witnesses.

Police witnesses

We shall now consider the evidence of the two C.I.D. Short-hand writers, Manohar Kashinath Kalankar and Shesh Rao Kambale.

Manohar Kashinath Kalankar was it is said present in the Nawi Mangalwari, Ganji Peth, Maska Sath, Chamar Nala and Kasturchanci Park meetings. Sheshli Rao Kambale was present in the Gauji Peth, Maska Sath, Chamar Nala and Kasturchand Park meetings. One or the other of them took down the notes of the speeches of Pundalik Masurkar, Satya Narain Sharma, Dhote and other speakers. The notes were taken down in short-hand except in the case of Dhote's speech in the Nawi Mangalwari meeting. That speech was taken down in long hand in Marathi by Manohar Kashinath Kalankar. The transcribed note of speeches recorded by Manohar Kashinath Kalankar at the Nawi Mangalwari are Ex. 70, at Ganji Peth Ex. 71, at Maska Sath, Ex. 72, at Chamar Nala Chowk, Ex. 73. The transcribed notes of speeches recorded by Shesh Rao Kambale in the meeting at Ganji Peth are marked Ex. 79, and at Maska Sath Ex. 80. The transcribed notes of the speech of Dhote in the Kasturchand Park meeting are marked Ex. 81. It appears that the High Court was not sure that the speeches have been correctly recorded in the note-books. The High Court has also found that they were "too ready and willing to help the petitioners," and it will not be safe to rely on their testimony. Three preliminary questions arise for our consideration: (1) the scope of appellate review in this case, (2) the admissibility of notes of speeches recorded by the aforesaid witnesses; and (3) their credibility.

Scope of appellate review :

Section 116A of the Act provides for an appeal to this Court from an order of the High Court dismissing an election petition. The appeal lies both on issues of law and of facts. Section 116C applies the Code of Civil Procedure as nearly as possible. Hence the present appeal is in the nature, of a first appeal from decree under that Code, The power of the appellate Court is very wide. It can reappraise the evidence and reverse the trial court's findings of fact. But like any other power it is not unconfined: it is subject to certain inherent limitations in

relation to a conclusion of fact. While the trial court has not only read the evidence of witnesses on record but has also read their evidence in their faces, looks and demeanour. The appellate Court is confined to their evidence on record. Accordingly "the

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view of the trial judge as to where credibility lies is entitled to great weight." (See *Saraveeraswami v. Talluri*(1). However, the appellate court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. (See *Sarjy Pershad v. Raja Jwaleshwari Pratap Narain Singh*. (2) This limitation on the power of the appellate court in a first appeal from decree, on principle, will also apply to an election appeal under section 11.6A. It has been so extended by this Court. Whether we should believe the witnesses or not involves how far we should enter into facts. "No doubt, an appeal before this Court under S. 116A is an appeal. . . . on facts and law; still the practice of the courts has uniformly been to give the greatest assurance to the assessment of evidence made by the Judge who hears the witnesses and watches their demeanour and judges of their credibility in the first instance. In an appeal the burden is on the appellant to prove how the judgment under appeal is wrong. To establish this he must do something more than merely ask for a reassessment of the evidence. He must show wherein the assessment has gone wrong." (See *Narbada Prasad v. Chhagaul*(2). It should also be borne in mind that in the instant case the High Court has held Dhote not guilty of the alleged corrupt practice which is a quasil-criminal charge. This Court should be slow to disagree with the finding of the High Court based on appreciation of evidence. (*D. P. Misra v. Kam Narain Sharma*(4). The appellant should put their case within the scope of this limited review; otherwise they should not succeed.

Counsel for the appellants points out that in *Reddiar* (supra) and *Virendra Kumar Saklecha v. Jagjiwan*(5) this Court has reappraised evidence and reversed findings of facts relating to corrupt practice recorded by the High Court. *Reddiar* (supra) is plainly distinguishable from the present case. We have earlier referred to this case. The oral evidence in the case was corroborated by "unimpeachable documentary evidence" of applications to police for permission to hold meetings and by police reports of speeches delivered in the meetings. As regards the reports of speeches the Court said that the police witnesses were "not shown to be inimically disposed towards the respondent or his party." *Saklecha* is indeed against the appellants. There the High Court had believed the oral evidence in proof of corrupt practices. This Court, on a reappraisal of the evidence, came to the reassuring conclusion that the witnesses "were all prepared on the same pattern of evidence." In the present case the High Court has recorded a similar finding.

1. A. I. R. 1949 P. C. 32.

2. [1950] S. C. R. 781 at p. 784 per Mukherjea J.

3. [1969] 1 S. C. R. 499 at p. 504 by Hidayatullah C. J.

4. [1971] 3 S. C. R. 257 at p. 261 per Shah J.

5. [1972] 1 S. C. C. 826.

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Admissibility of their evidence :

Counsel for Dhote has submitted that their evidence is

inadmissible. in this connection it will be necessary to refer to ss. 159, 160 and 161 of the Indian Evidence, Act.

"S. 159. A witness may, while under examination refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.

The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct. Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document : Provided the Court be satisfied that there is sufficient reason for the non-production of the original:

S. 160. A witness may also testify to facts mentioned in any such document as is mentioned in section 159, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document. (emphasis added).

S. 161. Any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the witness thereupon."

There are thus three conditions for admitting their evidence. The first condition is that the notes must have been taken down by them as and when the speeches were being delivered or so soon afterwards that the speeches were fresh in their memory. The second condition is that the witnesses must be sure that the speeches have been correctly recorded by them. The third condition is that the notes must be produced and shown to the adverse party if he requires them. Such party may cross-examine them if he so desires.

It does not appear to have been the case of Dhote that the witnesses were not present in the meetings except one in which the offending speeches were delivered. The witnesses have stated that they took down the notes of the speeches as and when they were being delivered. Accordingly, the first condition is satisfied. Counsel for Dhote says that the third condition was not satisfied. The transcribed notes of the speeches were given to Dhote on demand and he has cross-examined the witnesses. But counsel says that the notes of speeches are in short-band which Dhote cannot decipher at all. According to him the notes must have been recorded in the language which can be understood by the adverse party. We are unable to appreciate this extreme contention. It means that the notes of a speech recorded in Bengali or Oriya will be inadmissible if the adverse party is ignorant of that script and language. Not any uniform rational principle, but the literacy and multi-linguality of the adverse party will determine the admissibility of document. This interpretation of S. 161 is absurd as well as impracticable. The Evidence Act itself furnishes cogent evidence against this interpretation. According to s. 98, evidence may be given to show the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local and provincial expressions or abbreviations, and of words used in peculiar sense. Under

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s. 162, where a witness asked to produce a document in Court objects to its production, the Court shall decide on such objection. For this purpose the Court may inspect the document, unless it refers to matters of State. The Court may get the document translated if it cannot read the original. Notes in short-hand may be said to be in 'not commonly intelligible characters' and 'abbreviations' under S. 98. Evidence can be given to show their meaning. It is a matter of every day experience that commercial documents recorded in mahajani are admitted in the civil courts. Claims are even founded on those documents. We go by English translations of documents on record. So we eject this argument.

However, the note of the speech taken down by Manohar Kashinath Kalankar in the Nawi Mangalwari meeting is inadmissible under 160. The relevant extract from his notes of Dhote's speech is this "Bhrashtachari Sharma is speaking the language of purchasing poor People... at the time of election (you) will get note (money) but for the movement I am willing to shed my blood." In his examination-in-chief Kalankar has deposed that the extract was correctly recorded by him while Dhote was speaking. But in his cross-examination he has made this admission: "It is possible that if the speaker had said: "Bhrashtachari Congresscha Sharma" a word might have been missed. Now, I say that the word "Congresscha" might have been missed." Now, there is a world of difference between "Bhrashtachari Sharma" and "Bhrashtachari Congresscha Sharma". The former means 'fallen conduct Sharma'; the latter means 'Sharma of the fallen conduct Congress.' if Dhote had really said "Bhrashtachari Congresscha Sharma" it would not amount to a corrupt practice. This admission of Kalankar in his cross-examination casts doubt on the accuracy of his recording of Dhote's speech in this meeting.

Two other circumstances also enhance our doubt. Admittedly, Dhote spoke in Marathi. Kalankar is not a Marathi shorthand writer. So he says that he took down the speech of Dhote in long hand in Marathi. It is quite possible that in the long hand recording of a speech some words might be missed by the reporter. Again, while the election petition alleges that in this meeting Dhote said only that Rikhabchand was a 'characterless man' (Charitrahin), in the aforesaid extract the charges are of Rikhabchand Sharma being of fallen-conduct and of the electors getting money in the election. On account of all these circumstances, we are not sure that the extract is a correct recording of the speech of Dhote. Hence we will exclude from evidence the aforesaid extract as being inadmissible in evidence.

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Counsel for the appellant has referred us to Kanti Prasad Jayshanker Yagnik v. Purshottamdas Ranchhoddas Patel(1) and P. C. Purshothama Reddiar v. S. Perumal(2). These cases do not help him. In the former case, the police reporters who took down the speeches of Shambhu Maharaj had stated that they had correctly recorded the speeches. Nothing was elicited from their cross-examination to cast doubt on their asserted correct recording of the speeches. The High Court believed the police witnesses, and this Court affirmed the view of the High Court. In the latter case, the police reports of speeches were not cited for the purpose of proving the commission of any corrupt practice. They were cited merely to prove that the returned candidate had held certain meetings, the expenses of which he had not shown in his return of election expenses. The corrupt practice charged was of spending more than the authorised amount in

election. The Court was not concerned with the question whether the police reports of speeches were admissible in proof of a corrupt practice under s. 123(4).

Credibility of the evidence of the aforesaid witnesses:

Dhote spoke in Hindi in the Chamar Nala meeting. Kalankar claims to have recorded his speech in the meeting. The relevant extract from his speech is as follows : "Sharma and Naik (reference is to Rikhabchand Sharma and Vasant Rao Naik, Chief Minister of Maharashtra) have become rich by corruption. Corruption thy name is Rikhabchand." He also said : "You have to cast your vote after thinking properly. It will be decided in this election whether people here will choose corruption or a social worker." it will not be safe to place implicit reliance on Ms testimony in regard to this meeting. While assessing the probative value of his evidence, it win be necessary to remember that "the report of a short-hand writer is, strictly speaking, not substantive evidence as such, and the document can only be used as a part of the oral evidence sanctified by oath."

(Kanti Prasad Jayshanker Yagnik, supra).

There are several reasons why his testimony does not inspire confidence. Firstly, there is some evidence to show that the Nagpur police must have had a strong prejudice against Dhote. Rikhabchand Sharma has filed a written statement. He has annexed a schedule to the written statement. The schedule gives a list of 25 cases against Dhote. On May 4, 1964 Dhote along with his associates assaulted Head Constable Deo Narain who was on duty at Yeotmal. In a public meeting held at Pimpri he is alleged to have delivered a speech instigating the people for looting godowns and assaulting public servants. On April 11, 1968 he delivered a speech in a public meeting at Hinganghat instigating people to assault government officials. On October 17, 1968 at Akola Railway Station he forcibly entered into a first class compartment in which the late Shri Gopalrao Khedekar, a minister of Maharashtra, was travelling, by pushing the police inspector aside. On May 5, 1970 he is said to have delivered a speech at Wardha threatening Police

(1) [1969] 3 S. C. R. 400.

(2) (1972] S. C. R. 646.

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Sub-inspector Pawar for prosecuting Forward Block workers and demanding his transfer and threatening revenge if he was not transferred. On November 22, 1970, Dhote along with his followers led a procession and is alleged to have threatened the police and caused damage to the police wireless van.

Secondly, Manohar Kashinath Kalankar has evidently made exaggerations in his oral evidence. For instance, in his examination-in-chief he said that he had attended meetings of different parties. But in cross-examination he was forced to admit that he had attended only one meeting of the Hindu Mahasabha. He said in his cross-examination that he could not tell from memory what speeches were delivered in the meetings which he attended. It will indicate that he is not a man of super-human memory. Nevertheless he has ventured to vouchsafe from memory that Dhote was present from the very beginning in the meetings in which Pundalik Masurkar and Satya Narain Sharma were speakers. On cross-examination, he admitted that there is no note to that effect in his note-book. We have already held that he seems to be interested in helping the cause of Rikhabchand Sharma and appellants. From a witness of speeches he has converted himself to a witness of Dhote's consent for the speeches of Pundalik Masurkar and Satya Narain Sharma. We have already

rejected his evidence in that connection. So he is not an impartial witness. Thirdly, it is not free from doubt that he was present in the Chamar Nala meeting. The relevant extract from his notes of the speech is : "Sharma and Naik had become rich by corruption.. . Corruption thy name is Rikhabchand. . you have to cast your vote after thinking properly. It will be decided in this election whether people here will choose corruption or a social worker." Counsel for the appellants says that Kalankar was not specifically cross-examined in regard to his presence in the meeting. It is true that he was not confronted with the straight question, that he was not present in the meeting and was falsely deposing. But the trend of cross-examination unmistakably shows that the crossexaminer was questioning his presence in the meeting. The relevant cross-examination elicits: "My notes show that the Chamar Nala meeting of 14-4-1971 was called by the Azad Bhim Sena. Generally we short-hand reporters do not attend cultural functions or meetings held to celebrate birth anniversaries or death anniversaries. I cannot tell whether the names of the speakers who were to address the meeting on 14-4-1971 were earlier announced. Nobody had told me nor did I ask anybody whether Shri Jambusantrao Dhote was going to speak at the meeting." His presence having been questioned, it was incumbent on the appellants to produce documentary evidence in proof of his presence. There is no doubt that if he were really present in the meeting, convincing police documentary evidence will be available to prove his presence. He has admitted that for going to the meeting a conveyance was given to him by the Department. No evidence has been produced to prove this fact also.

The meeting was called to celebrate Ambedkar Jayanti day. Dhote spoke in Hindi. But in the whole of Dhote's speech, which Kalankar has noted down in his note-book, there is a solitary reference

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to the late B. R. Ambedkar and that too in Marathi. He is reported to have said : "Today we are celebrating the Jayanti of a great man." (emphasis added). The use of tile mild epithet 'great' (and that too only once) is rather starting and unexpected of Dhote. He had gone there with an eye on vote-catching. He should accordingly have devoted the major part of his speech in recognising the qualities and services of the late Dr. B. R. Ambedkar to the downtrodden and thus winning their heart and mind. The probability is that he would have merely alluded to the aspect of election from the side-lines. But his entire speech as recorded by Kalankar is devoted to election. It is highly improbable to expect that from a shrewd speaker like Dhote. It creates misgivings in our minds about the presence of Kalankar in the meeting. Again, Kalankar has admitted in his cross-examination that "Shri Dhote's speech is always systematic and there is no incoherence in it. "Yet when one specific incoherent portion in Dhote's speech as recorded by him was pointed out to him, he admitted that the said portion does not fit in with what precedes and-succeeds it. Dhote is recorded to be- speaking about the poverty of the people. In that context he said that "in the meeting at Lakarganj, Chief Minister Vasant Rao Naik had said that they are poor who have committed sins in their past life. This is a humiliating statement. No sooner, he said so, people raised slogans that Chief Minister Naik should go away. Chief Minister who talks of ushering in socialism should disclose in which book it is written that poverty is the consequence of the sins of the past life."

After this portion the incoherent portion begins : "You should consider how Rikhabchand Sharma and Vasant Rao Naik can usher in socialism. When the whole country was fighting for independence, Sharma Ji was doing the work of puncture repairing. There are others who are doing that work, but they have not become capitalists. Sharma Ji and Naik have become rich by corruption. Sharma is rich. Therefore, we are poor. Sharmji's brain is fitted in reverse and he is a candidate of the Congress." Thereafter the speech continues : "Taking the aid of their wealth, Congress leaders like the Chief Minister Naik and Yashwant Rao Chauhan are caricaturing the poor. In this Republic those who have got ill-earned income are rulers. We are being looted and there is a fight for power. I can fight for the same. But poverty cannot be eliminated by such conduct as that of Sharma." Kalankar has made this admission in his cross-examination. It is correct that if the (sandwiched incoherent) portion is omitted, the continuity of the speech will remain and that the portion following the (sandwiched) speech fits in the context of the portion preceding it". This admission also casts doubt on his presence in the meeting.

Dhote has examined himself and Rajababu Ganpatrao Mesliram. Dhote has denied that he had made any offending remarks against Rikhabchand Sharma which Kalankar attributed to him in his notebook. Let us keep aside his denial for he is interested in denial. But Rajababu Ganpatrao Meshram's evidence cannot be overlooked. According to Kalankar, he presided over the meeting. He has deposed: "Ambedkar Jayanti falls on 14th of April. On 14th April, a meeting was held in Chamar Nala locality. This meeting was called by Azad Bhim Sena in connection with the Ambedkar Jayanti. I presided over

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this meeting" He said that the photograph of Dr.B.R.Ambetker and Buddha were placed on the dais, and that they were garlanded. According to him, Ajabrao Ingle spoke about the Bauddha community and Dr. Ambedkar. The other speakers dwelt on the work (A Dr. Ambedkar for the labourers. In his cross-examination on behalf of Rikhabchand Sharma, he admitted that Dhote also spoke about the election. In his cross-examination on behalf of the appellants, he said that Dhote first spoke, on the problems of labour, then on Di-. Ambedkar and in the concluding part of Ms speech he said that he was standing as a candidate in the election. The High Court appears to have believed his evidence. He does not seem to be an interested witness. He has stood the test of cross-examination. There appears to be no reason why we should not believe his testimony'.

It is a curious feature of this case that neither during the election nor after the election there was a whisper of protest by anyone including Rikhabchand Sharma against the alleged commission of corrupt practices. His statement issued after his defeat was published in the Nagpur Times of 23-4-1971. Even there he does not complain against the commission of corrupt practices by Dhote and his supporters. The High Court did not consider it safe to rely on Kalankar's evidence. Its view is bottomed on appreciation of evidence based oil the credibility of the witness. For the reasons already discussed, we are unable to hold that the High Court has gone wrong in its view. It has not overlooked any material feature in the evidence. Nor can its view be said to be perverse.

Shesh Rao Kambale has recorded in short-hand the Marathi speeches of Dhote in the Ganji Peth, Maska Sath and

Kasturchand Park meetings. In the Ganji Peth meeting Dhote is reported to have said: "Bhrashtachar thy name is Rikhabchand... you should not cast your vote in favour of fallen-conduct (Bhrashtachar) and if you do not want to elect me, you may vote for other candidates. Do not vote for a man of fallen-conduct (bhrashtachari). Do not allow it to be proved that you are companions of fallen-conduct (bharashtachar)." Counsel for the appellants says that this portion of Dhote's speech makes out a corrupt practice under s. 123(4). We are reluctant to take that view. It is well to remember that it is one of those flourishes or hyperboles which are the common stock-in-trade of election speakers to exploit the emotions of the audience, and to argument their popular support. Election speeches should be understood broad-mindedly, not literally. Election speakers often do not mean what they say, and the audience generally does not take them by their words. Even literally, "bhrashtachar" and "bhrashtachari" will not inevitably establish a corrupt practice. "Bhrashtachar" is a compound Sanskrit word. It is compounded of "bhrashta" and "achar". The word "bhrashta" is derived from the root "bhransh" which means, inter alia, 'fallen'. [sir MonierMonier-Williams: A Sanskrit English Dictionary 1956 Edn. p. 769]. So "Bhrashtachar" means, inter alia, 'fallen-conduet'; (compare Kalidasa's phrase, in the Meghaduta (fallen old leaves). "Bhrashtachari" will also mean a 'man of fallen conduct'.

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The High Court has given a uniform meaning of 'corruption' to the word bhrashtachar' in the reported speeches of Dhote. It appears to us from the context of the Ganji Peth speech that Dhote might have used the word 'bhrashtachar' in the sense indicated by us. In any case, the context does not plainly exclude this innocuous interpretation. It is well-known that a person who takes liquor, etc. is even now regarded by the common folk as a 'bhrashtachari'. So it cannot be said that the aforesaid portion of Dhote's speech is susceptible of one and only one construction which will establish a corrupt practice. And Dhote cannot be put in peril on an ambiguity.

In the Maska Sath meeting Dhote is reported to have said: 'This is a war between truth and power. We have to see whether truth wins or power wins. We have to see whether truth wins or power loses, whether falsehood wins, or truth wins. We have to see whether corruption wins or purity wins.' By no stretch and strain of these words, it is possible to make out a corrupt practice. In this speech Dhote dose not in our view make, any statement of fact in relation to the, personal character or conduct of Rikhabchand Sharma.

In the Kasturchand Park meeting Dhote is reported to have said: "In the Chitra Talkies meeting the Chief Minister of Maharashtra, his disciples, Mandani or Sukhadani had said that Jambuantrao Dhote would be buried seven patals deep. In democracy the language of burying seven patals is spoken and that also by the Chief of a State. What is the meaning of this?" As regards Rikhabchand Sharma he is reported to have said: "You know his achievements and his capacity. I do not wish to speak anything about him." This speech also does not amount to a corrupt practice.

The police witnesses have said that they used to send transcribed summaries of their notes of speeches to the Maharashtra government at Bombay. An application was made on behalf of the appellants in the High Court for summoning the appropriate officers to produce those summaries, for it was said that they would corroborate these; witnesses. The

High Court rejected the application because it appears to have been made, at a late stage in the course of arguments. An application has been made to the same effect in this Court also. We do not think that it will be proper to allow the application for various reasons. Firstly, Kalankar said in his examination-in-chief that full reports of the speeches were sent to the Government at Bombay, but in his cross-examination he admitted that only summaries of the speeches were sent. Shesh Rao Kamble has no doubt uniformly said that only the summaries were sent. But in view of the statement of the former witness we do not feel reassured that only summaries were sent. Secondly, the mere admission of summaries in evidence at this stage will not avail the appellants, A number of police witnesses from Nagpur as well as from Bombay will have to be summoned to give evidence. A number of documents, especially the dispatch registers, will have to be admitted in evidence to ascertain whether full reports or summaries were sent to Bombay. It is relevant to mention that Dhote has accused the witnesses of making interpolations in their note-books. It is neither proper nor prudent to launch an enquiry of such a magnitude at this stage,

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Thirdly, as regards the reported speeches of Pundlik Masurkar and Satya Narain Sharma, we have already held that they were not made with the consent of Dhote. As regards the speeches of Dhote, we have earlier held that one of them is not admissible in evidence, and three others do not make out a corrupt practice. As regards the remaining one recorded by Kalankar in the Chamar Nala meeting, we have earlier expressed doubt about his presence in the meeting. So summaries will not advance the case of the appellants. It will remain as it is now. In short, it will be a mere waste of time to summon them. The High Court has exhibited not only extracts from the reported speeches of Dhote but has also admitted the full reports of his speeches. It is argued on behalf of the appellants that the full reports establish other instances of the pleaded corrupt practice against Dhote. The High Court was also addressed on this aspect. It did not accept the argument. Nor can we. The other instances were not pleaded in the petition. The appellants did not seek to amend the petition by incorporating those instances. Dhote got no opportunity to deny them or to disprove them. He did not even cross-examine the police witnesses with respect to those instances. He confined his cross-examination mainly to the instances pleaded in the petition. Taking notice of the new instances will cause serious prejudice to him.

Issue No. 9:

It is alleged that in the Kasturchand Park meeting Dhote and his followers distributed copies of the weekly Gram Sewak which was published by Atal Bahadur Singh with the consent of Dhote. Dhote has denied that he had consented to its publication. He has also denied that he and his followers distributed the Gram Sewak in the meeting. There is no doubt that the Gram Sewak contains an attack on the personal character of Rikhabchand Sharma and falls within the grip of s. 123 (4) of the Act. But the High Court has found that neither Dhote nor his followers distributed it. It has also found that Atal Bahadur Singh did not publish it with the consent of Dhote. Accordingly the issue has been decided against the appellants.

Satya Narain Sharma, a witness for Dhote, has admitted that the copies of Gram Sewak were not distributed free but were sold on the road running from the Kasturchand statue to the

Assembly building after the close of the meeting. Similarly, another witness of Dhote, B. M. Gaikwad, has admitted that he saw copies of the Gram Sewak being sold outside the Kasturchand Park. So the important questions to be decided are: (1) whether the Gram Sewak was published by Atal Bahadur Singh with the consent of Dhote; (2) whether Dhote himself distributed the copies of the Gram Sewak- in the meeting; and (3) whether any of his followers distributed the copies of the Gram Sewak in the meeting.

Re. (1)

There is no direct evidence to prove, that Atal Bahadur Singh published the Gram Sewak with the consent of Dhote. Consent, however, may be inferred from circumstances. (See Sheopat Singh v.

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Harish Chandra(l) and R. M. Seshadri v. G. Vasantha Pai(2). Admittedly, Atal Bahadur Singh is the editor of the Gram Sewak. He has been examined by Dhote. He has stated that he had published the offending Gram Sewak on his own initiative. He has denied that it was published by him with the consent of Dhote. He has also stated that 1000 copies of the Gram Sewak were printed on his order by Sri Sharda Mudranalaya. He had sent out of Nagpur 200 copies for sale; about, 180 complimentary copies were sent to the advertising agencies; 200 copies were sent to the book stalls in Nagpur; 200 copies were given to hawkers for sale. Out of the 400 copies given to the book-stall keepers and hawkers, 70 copies were returned to him. He received the price for 330 copies sold by them. He has stated in cross-examination that he maintains accounts relating to the publication of the Gram Sewak. He further said : "If I am asked to produce these tomorrow, I am willing to do so." No such demand was made on behalf of the appellants. His evidence supports the evidence of Satya Narain Sharma that the Gram Sewak was sold and not distributed free outside the meeting. There is nothing in- his evidence to discredit his testimony. He has been believed by the High Court. So we share the view of the High Court that it was sold by hawkers only. Atal Bahadur Singh has admitted that he had been canvassing for Dhote in his ward. He has also admitted that he had pasted certain posters in his ward soliciting support for Dhote at his expense. He has also admitted that he had been working with Dhote in certain associations and in the Maha Vidarbha Andolan. His association with and his canvassing for Dhote could not establish that the Gram Sewak was published with the consent of Dhote. Evidence shows that when Dhote was canvassing from door to door in the ward in which Atal Bahadur Singh resides, he was not accompanied by the latter. This will show that the latter was working on his own initiative. We have believed his evidence that the copies of the Gram Sewak were sold and not distributed free. it is hardly probable that if Dhote had given his consent to the publication of the Gram Sewak, it would have been sold and not distributed free. The sale suggests want of consent of Dhote. So we agree with the High Court that the appellants have failed to prove the publication of Gram Sewak with the consent of Dhote.

Re. (2)

To prove distribution of the copies of Gram Sewak in the meeting as alleged in the election petition, the appellants have examined Nepat Rao, Janak Lot, Namdeo Rao, Govind Marot Rao and Marot Rao (one of the appellants). Nepat Rao and Namdeo Rao have stated that Dhote, Atal Bahadur Singh and B. M. Gaikwad had distributed the copies of the Gram Sewak. Both of them also say that Dhote gave one copy of the Gram

Sewak to them. Marot Rao says that Dhote and Atal Bahadur Singh distributed the copies of the Gram Sewak. So his evidence is not material in regard to the distribution of the Gram Sewak by Dhote. Nepat Rao is the General Secretary

(1) A.I.R. 1960 S.C. 1217.

(2) [1969] 2 S.C.R. 1019.

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of the Lal Bahadur Sastri Dal. Laxminarayan (one of the appellants) is the President of the Dal. He is also a member of the Yuvak Congress, an affiliate of Congress (R), which had sponsored Rikhabchand Sharma's candidature. He has also admitted that he had been canvassing for Rikhabchand Sharma till April 15, 1971. Namdeo Rao is also a member of the Congress (R). He has admitted that he had been canvassing for Rikhabchand Sharma. He has also admitted that he was the counting agent of Rikhabchand Sharma. Janak Lal appears to be a chance witness. He says that he went to the Sitabadi market at about 9 p.m. for purchasing a clutch wire for his motor-cycle and on his way back he went to the meeting in the Kasturchand Park. He has admitted that ordinarily the Sitabadi market is closed at 8.30 p.m. He has admitted that after the meeting he had never spoken about the distribution of the Gram Sewak to Rikhabchand or to the appellants till the date of his evidence. His presence in the meeting, accordingly, is very doubtful. Marot Rao has denied that he had been canvassing to.- Rikhabchand Sharma, but he has admitted that he went to Umred to see how the polling was proceeding as he was interested in the success of the Congress candidate. Nepat Rao, Namdeo Rao and Marot Rao are evidently highly interested witnesses. It is surprising that no independent witness has been examined by the appellants in order to prove distribution of the Gram Sewak by Dhote, especially because the meeting was attended by a large number of important persons. It has come in evidence of other witnesses of the appellants that the meeting was addressed by Dhote from an improvised dais or a truck which was used in the procession before the meeting. These witnesses were cross-examined about the nature of the dais. None of them stated that the dais was improvised on the truck. Had they really attended the meeting, they could not have failed to notice this striking improvisation. Dhote has denied that he had distributed the copies of the Gram Sewak. Having regard to the nature of the appellants evidence, we are in entire agreement with the High Court that they have failed to prove the distribution of the Gram Sewak by Dhote in the meeting.

Govind Marot Rao has deposed that B. M. Gaikwad had given him a copy of the Gram Sewak in the Chitnis Park from where the procession started before the meeting. Now, the distribution of the Gram Sewak in the Chitnis Park is not pleaded in the petition. D. M. Gaikwad was the election agent of Dhote. A corrupt practice committed by an election agent avoids the election. It is not necessary to prove the consent of the returned candidate. If B. M. Gaikwad had really distributed the copies of the Gram Sewak in the meeting or in the Chitnis Park, it is difficult to believe that the appellants would have failed to make a mention of it in their election petition. Govind Marot Rao is an active member of the Congress (R). Admittedly, he had canvassed for Rikhabchand Sharma. The High Court has believed him, and we find no reason to disagree with the High Court.

Re. (3)

We have already held that the High Court rightly rejected

the evidence of the appellants, witnesses in regard to the distribution of the

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Gram Sewak by Dhote in the meeting or anywhere else. That being so, we do not accept their evidence of distribution of copies of the Gram Sewak by Atal Bahadur Singh, B. M. Gaikwad and others in the meeting.

We agree with the High Court that the appellants have failed to prove issue No. 9 in their favour.

The last argument of the appellants is about the costs awarded by the High Court to Dhote while dismissing the election petition. The High Court's order is : "I, dismiss the petition with costs with the direction that the respondent No. 2 (Dhote) will be entitled to his costs at the scheduled rate of Rs. 400/- per day for 52 hearings front the petitioners and that respondent No. 11 will get Rs. 1500/- a.-, his costs payable by the petitioners."

Counsel for the appellants points out that Rs. 400/- per day is prescribed by the Bombay High Court Rules for fees of counsel and the High Court has awarded costs to Dhote in accordance with that rule. He has also pointed out that counsel who appeared for Dhote and respondent No. II did not file a certificate in the High Court in proof of payment of any fees to them. There is also no other evidence in proof of payment of fees to them. The opposing counsel do not contradict this statement of counsel for the appellants. Accordingly we are proceeding on the assumption that there is no evidence on the record to show that any fees were paid to counsel for Dhote and respondent No. 11.

Section 96 provides that "the reasonable expenses incurred by any parson in attending to give evidence may be allowed by the High Court to such person and shall, unless the High Court otherwise direct-,, he deemed to be part of the costs." Section 119 deals with costs in the cause' It reads : "Costs shall be in the discretion of the High Court : Provided that where a petition is dismissed under clause (a) of section 98, the returned candidate shall be entitled to the costs incurred by him in contesting the petition and accordingly the High Court shall make an order for costs in favour of the returned candidate." (emphasis added).

It may be observed that the word 'incurred' occurs both in section 96 and section 119. 'Incurred' means "actually spent". The petition was dismissed by the High Court under cl. (a) of s.98. Accordingly, it was incumbent on the High Court to award costs to Dhote. But he is entitled to only such costs as are shown to have been incurred by him. Admittedly, there is no proof of payment of any fee to counsel by Dhote. So he is not entitled to the amount of Rs. 400/- per diem awarded by the High Court. However, he will be entitled to any other costs which are shown to have been incurred by him.

Having regard to the foregoing discussion, the appeal is allowed only with respect to counsel's fees awarded to Dhote and the respondent No. 11 by the High Court. As for the rest, the appeal is dismissed. Dhote will be entitled to such costs as have been incurred by him in this Court as well as in the High Court.

V.P.S.

Appeal allowed re : costs.

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