ZIYAUDDIN BURHANUDDIN BUKHARI

v.

BRIJMOHAN RAMDASS MEHRA & ORS.

April 25, 1975

[M. H. BEG, A. ALAGIRISWAMI AND N. L. UNTWALIA, JJ.]

Representation of the People Act—Section 123(2), (3) & 3 *(A)—Corrupt practice—Appeal on the ground of religion—Promoting feelings of hatred and enmity between different classes—Amendment of petition—form of affidavit—Vagueness of petition—Evidence Act—Cassettes evidence whether admissible—Order of costs in favour of the respondent.*

The appellant a candidate of Muslim League defeated respondent No. 3 Shauket Chagla, the Congress candidate in the Maharashtra State in Assembly Election.

Respondent No. 1, a voter filed an Election Petition, *inter alia,* alleging that the appellant appealed to the voters to refrain from voting for respondent No. 2 on the ground of religion and that the appellant promoted feelings of enmity or hatred between different classes of the citizens of India on grounds of religion.

The appellant made the following appeal to the voters in his variuos election speeches :

(1) Muslim personal law was a matter of religious faith for Muslims and that it extended to the mode of disposing of bodies of the dead. The voters were told that if they voted for Chagla they would have to cremate the bodies of their dead instead of burying them because Chagla had cremated the dead body of his sister.

(2) The appellant entreated his audience not to vote for those who stood against their religion.

(3) Chagla was not true to his religion and that the appellant was a true Muslim.

(4) If Muslim personal law may be considered a personal matter by Chagla it was considered to be "the law of God" by Muslims who would not tolerate any attempts to amend it as that would raise a religious question.

(5) If the Congress Government brought any amendments in Muslim religious law the battle would be fought in every street.

(6) Chagla advocated inter-communal or inter-caste marriages and that he wanted a Hindu to be a member of the Haj Committee.

(7) There were references to riots in which only Muslims were alleged to have been killed.

(8) The appellant claimed that he would die for Islam and further said that "God has blessed us that every drop of our blood would give birth to thousands of Bukharis."

(9) "At the moment we are in such a war in which our opponent is such a person who is playing with our religious affairs. He considers us to be a community whose conscience is dead."

(10) "We have not signed any deed of slavery for the Government. When we find that the Government is working against us, our rights are being crushed, our religious affairs are being interfered with, then we will rise openly against it. We would rise like a wall cemented with lead. Then who would bang with this wall, would get his hand broken. No harm would be done to us."

A (11) Chagla's wife Nalini was a Hindu and his son was named Ashok. Chagla used to attend the mosque as well as the temple and he should be excluded from Muslim localities.

(12) Chagla was neither a good Hindu nor a true Muslim so that neither God nor Bhagwan was pleased with him.

The High Court allowed the petition and set aside the election of the appel-
B lant. The High Court awarded costs of Rs. 12,000 to the first respondent and costs of Rs. 3,000 to the second respondent.

In the present statutory appeal the appellant contended :

(1) The affidavit filed by the election petitioner was not in proper form since it does not give the sources of information of the corrupt practices.

C (2) The High Court erred in not framing issue on the vagueness of the petition.

(3) The High Court erroneously allowed the amendment of the Election petition.

(4) The High Court ought not to have relied on the cassettes of tape records.

D (5) The appellant merely asked the voters to suport one who opposed any change in muslim personal law as against another who wanted to change it. If change of personal law is a secular matter opposition to its change could not become an appeal on grounds of religion.

(6) The order of costs passed by the High Court was very excessive.

E (7) The appellant did not get a fair trial.

HELD : Our Constitution-makers intended to set up a Secular Democratic Republic. Our political history made it particularly necessary that the basis of religion, race, caste, community, culture, creed and language which can generate powerful emotions depriving people of their powers of rational thought and action should not be permitted to be exploited lest the imperative conditions for preservation of democratic freedoms are disturbed. Section 123(2), (3)
F and (3A) were enacted to eliminate from the electoral process appeals to those decisive factors which arouse irrational passions that run counter to the basic tenets of our Constitution. Due respect for the religious belief and practices, race, creed, culture and language of other citizens is one of the basic postulates of our democratic system. The line has to be drawn by the court between what is permissible and what is prohibited after taking into account the facts and circumstances of each case interpreted in the context in which the statements or acts complained of were made. The court has to determine the effect of statements made by the candidate upon the minds and feelings of the ordi-
G nary average voters of this country. [288A-F]

The High Court was right in holding that tape records of the speeches were documents and were admissible in evidence, provided the voice of the speaker was identified, accuracy of the actual recording ascertained—and the relevancy of the subject matter established. [290A-B]

The High Court rightly considered the tape records to be reliable for the following three reasons; firstly, the tape records have been prepared by an
H independent authority, the police ; secondly, transcripts from the tape records were duly prepared very soon after the tape records were made which made the subsequent tampering easy to detect ; and thirdly, the police had made the tape records as part of its routine duties and not for the purpose of laying any trap to procure evidence. [290G-H, 291A]

The High Court rightly treated the shorthand notes and shorthand transcripts made by those who heard the speeches as corroborative evidence and which could be used by the witness to refresh his memory. [291-F]

The High Court rightly held that the various speeches made by the appellant violated the provisions of section 123(2), (3) and (3A). We do not consider such speeches have any place in a democratic set up in our Constitution. Our democracy can only survive if those who aspire to become people's representatives and leaders understand the ipirit of secular democracy. If such propaganda was permitted it would injure the interests of the members of the religious minority groups more than those of others. [293 BF, 294 E, G, 295 E, H, 296 B] A

B

The objection that the affidavit was not in proper form is wholly untenable. The alleged defect is one of lack of particulars which was given up by the appellant in the High Court. [286 A & C]

There is no substance in the objection that the High Court did not frame an issue on the question of vagueness of the petition. The real objection is that the particulars of the speeches made by the appellant were given in great detail in the statements annexed to the petition with the necessary affidavit. The law does not require the whole evidence to be set out in the petition in the form of particulars. [286 CDE] C

The trial court by allowing the amendment merely removed the vagueness from the petition by confining the allegation of corrupt practice against the appellant himself. [286 G-H]

D

Various allegations have been made of unfairness against the trial Judge. There is no substance in those allegations. The nature of these allegations discloses an unreasonable attitude of the appellant's counsel which was also exhibited during the course of the trial. [287-F]

The order of costs appears tc err on the side of severity. The order of costs in favour of respondent No. 2 was set aside since the petition was filed by respondent No. 1. The costs awarded in favour of respondent No. 1 was reduced from Rs. 12,000 to Rs. 6,000. [298 E, FG] E

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 134 of 1973.

From the Judgment and order dated the 27th/28th November, 1972 of the Bombay High Court in Election Petition No. 4 of 1972. F

K. K. Singhvi, R. K. Garg, V. J. Francis and *S. C. Agarwala,* for the appellant.

M. C. Bhandare, P. H. Parekh, and *S. Bhandare,* for respondent No. 1.

The Judgment of the Court was delivered by G

BEG, J.—This appeal under section 116A of the Representation of the People Act, 1951 (hereinafter referred to as 'the Act') is directed against the Judgment and order of the High Court of Bombay setting aside the election of the appellant to the Maharashtra State Assembly from Kumbharwada constituency held on 9-8-1972 on a voter's election petition. H

The voter alleged that the appellant, in the course of his election, had committed corrupt practices defined in Section 123, sub. s. (2) and (3) and (3A) of the Act. The gist of the charges against the appellant Ziyauddin Burhanuddin Bukhari (hereinafter referred to as 'Bukhari'), a Muslim League candidate, was, that, he had made

A speeches in the course of his election campaign calculated to induce a belief in the voters that they will be objects of divine displeasure or spiritual censure if they voted for Shaukat Currimbhoy Chagla (hereinafter referred to as 'Chagla'), a Congress Party candidate, who was impleaded as the 2nd respondent that, in the above mentioned speeches, the appellant had called upon the electors to vote for him and not for B Chagla on the ground that he alone stood for all that was Muslim whereas Chagla represented all that was against Muslim religion and belief so that Chagla could not be a true Muslim at all, the object of such appeals being to further the chances of election of Bukhari and to prejudicially effect the prospects of the election of Chagla ; that, the appellant, Bukhari, had attempted to promote feelings of enmity and hatred between Muslims and Hindus on grounds of religion and com- C munity. Particulars of the speeches delivered at sixteen meetings and what was said there by Bukhari were furnished with the election petition.

The alleged corrupt practices are defined in the following provisions of Section 123 :

"(2) Undue influence, that is to say, any direct or indirect D interference or attempt to interfere on the part of the candidate or his agent, or of any other person with the consent of the candidate or his election agent, with the free exercise of any electoral right :

Provided that—

(a) without prejudice to the generality of the provisions of E this clause any such person as is referred to therein who—

(i) threatens any candidate or any elector, or any person in whom a candidate or an elector is interested, with injury of any kind including social ostracism and ex-communication or expulsion from any caste or community; or

F (ii) induces or attempts to induce a candidate or an elector to believe that he, or any person in whom he is interested, will became or will be rendered an object of divine displeasure or spiritual censure,

shall be deemed to interfere with the free exercise of the electoral right of such candidate or elector within the G meaning of this clause;

(b) a declaration of public policy, or a promise of public action, or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this clause.

(3) The appeal by a candidate or his agent or by any other H person with the consent of a candidate or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or the use of, or appeal to religious symbols or the use of, or appeal to, national symbols, such as the national flag or the national emblem, for the furtherance of the prospects of the election of that

candidate or for prejudicially affecting the election of any candidate. A

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

Before considering whether the allegations made in the petition are substantiated, and, if so, whether any corrupt practice, as defined above C was committed, beyond reasonable doubt, by the appellant, we will deal with certain technical objections placed before us at the outset by learned Counsel for the appellant.

It is urged that allegations of corrupt practices, falling under Section 123(3) and 123(3A), are not supported by the affidavit required by the proviso to Section 83(1) of the Act. Section 83 of the Act D enacts :

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

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

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

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

Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompained by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof. G

(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition".

It was submitted that Section 80 of the Act amounts to a prohibition against calling in question any election, "except by an election petition H presented in accordance with the provisions of this part" (i. e. Chapter II which contains Section 83). Apart from the fact that the High Court dealing with this question had, in our opinion, rightly recorded the finding that the issue No. 2, framed on this objection, was specifically given up in its entirety by the learned Counsel for the appeallant, so that he could not wriggle out of it by a vague reservation of some right to

A urge that the affidavit filed was not in proper form, we were not shown any defect of form at all in the affidavit filed. All that was urged is that the relevant affidavit does not give the sources of information so far as corrupt practices under section 123(3) and 123(3A) are concerned. As was pointed out by this Court in *Hardwari Lal* v. *Kanwal Singh*(1), this is not a defect of the required form but may, in suitable cases, form the subject matter of an objection based on
B Section 86 and Section 123 (7) of the Act relating to supply of material particulars. It was indicated by this Court in *Prabhu Narayan* v. *A. K. Srivastava*(2), that a petition can only be dismissed for a substantial defect.

In the case before us, as there is no defect at all in the form of
C the affidavit, and the alleged defect of want of particulars, set up in paragraph 2 of the written statement on which issue No. 2 was framed, must be deemed to have been given up on behalf of the appellant, we cannot now entertain in this Court an objection, based on alleged want of particulars, particularly as nothing material seems to have been wanting. We also think there is no substance in the appellant's objection that the Trial Court had not framed an issue
D on an alleged vagueness of the petition which is another way of saying that it was wanting in particulars. The particulars of the speeches made by the appellant were given in great detail in the statements annexed to the petition with the necessary affidavit. We can presume that, if such an objection on the ground of insufficient particulars is actually given up by a party so that an issue actually framed
E on it is not tried, the party could have suffered no disadvantage from alleged want of further details which are really matters of evidence. The law does not require the whole evidence to be set out with the petition in the form of particulars.

Still another objection was that the Trial Court had eroneously allowed an amendment of the election petition by an order dated
F 29-9-1972. Reliance was placed upon this Court's decision in *Manubhai Nandlal Anersey* v. *Popatlal Mainilal Joshi & Ors.*(3) and *Samant N. Balakrishna etc.* v. *George Fernandez & Ors. etc.*(4), to contend that the amendment asked for should not have been allowed. We have examined the application for amendments of the petition sought by the petitioner and allowed by the Court. We think that the amendments really removed vagueness from the petition by
G confining the allegations of corrupt practice to what of corrupt practice to what the appellant Bukhari himself had said in his speeches. Attributions of those very statements to his agents, in the alternative, which introduced some ambiguity, were deleted. Another amendment sought was the insertion of names of persons said to have made certain other speeches. The High Court had allowed the amendments on the ground that they did not amount to any allegation
H of a fresh corrupt practice. The question whether the speeches of certain persons other than the appellant were rightly permitted to become the subject matter of consideration by the amendment has lost all

(1) [1972] (2) SCR 742.
(2) C.A. No. 1174 of 1973—delivered on 14-2-75.
(3) [1969] (3) SCR 217.
(4) [1969] (3) SCR 603.

importance as the appellant has been held guilty of corrupt practices solely for speeches made by himself and we propose to deal with those only. We, therefore, find no force in the objections to the order allowing amendment of the election petition, which only clarified the petitioner's case.

Learned Counsel for the appellant invited out attention especially to ground 'H' of the grounds of appeal. This is the most prolix of all the grounds of appeal the number of which not only exhausts the whole alphabet 'A' to 'Z' but ground numbered 'Z' is divided into sub-grounds 'Z1' to 'Z.15', and each of these sub-grounds is further split up into a number of minor grounds. Ground 'H' itself is split up into 22 parts which cover 5 printed pages of our paper book. Ground 'H' thus consists of a long statement of the appellant's grievances about mutifarious matters covering the whole course of trial of the case, such as a permission given by the Court to recall a police Sub-Inspector for further examination, permission accorded by the Court to the respondent's Counsel for getting transcripts of the appellant's tape recorded speeches made under the supervision of a Court officer, permission granted to the Solicitors of Chagla to obtain copies of documents filed, the observations recorded by the learned Judge about the demeanour of witnesses and other similar matters. No illegality whatsoever is even alleged in most of these purported grounds of objection. If these grounds indicate a carpingly unreasonable attitude of the appellant's Counsel during the course of the trial in the High Court or attempts to make mountains out of molehills, they may afford some light on why the rather unusual order of heavy costs was passed by the learned Judge with which we shall deal separately at the end of this Judgment we are, however, unable to find, from material on record, that the conduct of the trial by the learned trial Judge was unfair in any respect. Moreover, we think that the only really material question before the Court for decision, on which we have ourselves re-examined the whole evidence on record, were : Did the appellant's speeches contain what was said to be tape-recorded and also sought to be proved by oral evidence supported by the notes of those who are alleged to have heard these speeches themselves ? If this was so, was their effect upon the ordinary average voters of this country such as to come within the mischief provided for by any of the three heads of provisions of Sec. 123 of the Act set out above ? These are questions capable of determination objectively irrespective of the subjective inclinations or opinions of the Judge deciding such issues although we cannot, and should not even try to, escape the consequences, upon any case before us, of our conclusions about the purposes and meanings of the relevant provisions of Section 123 of the Act, set out above, reached by applying relevant rules of interpretation of such provisions.

We propose to indicate, at this stage, what mischief the provisions were designed to supress because that seems to us to be the most illuminating and certain way of correctly construing these statutory

provisions. We cannot do so without adverting to the historical, political, and Constitutional background of our democratic set up, such provisions are necessary in our opinion, to sustain the spirit or climate in which the electoral machinery of this set up could work.

Our Constitution-makers certainly intended to set up a Secular Democratic Republic the binding spirit of which is summed up by the objectives set forth in the preamble to the Constitution. No democratic political and social order, in which the conditions of freedom and their progressive expansion for all make some regulation of all activities imperative, could endure without an agreement on the basic essentials which could unite and hold citizens together despite all the differences of religion, race, caste, community, culture, creed and language. Our political history made it particularly necessary that these differences, which can generate powerful emotions, depriving people of their powers of rational thought and action, should not be permitted to be exploited lest the imperative conditions for the preservation of democratic freedoms are disturbed.

It seems to us that Section 123, sub s. (2), (3) and (3A) were enacted so as to eliminate, from the electroral process, appeals to those divisive factors which arouse irrational passions that run counter to the basic tenets of our Constitution, and, indeed, of any civilised political and social order. Due respect for the religious beliefs and practices, race, creed, culture and language of other citizens is one of the basic postulates of our democratic system. Under the guise of protecting your own religion, culture or creed you cannot embark on personal attacks on those of others or whip up low hard instincts and animosities or irrational fears between groups to secure electoral victories. The line has to be drawn by the Courts, between what is permissible and what is prohibited, after taking into account the facts and circumstances of each case interpreted in the context in which the statements or acts complained of were made.

Section 123(2) gives the "undue influence" which could be exercised by a candidate or his agent during an election a much wider connotation than this expression has under the Indian Contract Act. "Undue influence", as an election offence under the English law is explained as follows in Halsbury's *Laws of England,* Third Edition, Vol. 14, p. 223-224 (para 387):—

> "A person is guilty of undue influence, if he, directly or indirectly, by himself or by any other person on his behalf, makes use of or threatens to make use of any force, violence or restraint, or inflicts, or threatens to inflict, by himself or by any other person, any temporal or spiritual injury, damage, harm or loss upon or against any person in order to induce or compel that that person to vote or refrain from voting or on account of that person having voted or refrained from voting.
>
> A person is also guilty of undue influence if, by abduction, duress or any fraudulent device or contrivance, he impedes or prevents the free exercise of the franchise of an elector or proxy for an elector, or thereby compels, induces

or prevails upon an elector or proxy for an elector either to vote or to refrain from voting". A

It will be seen that the English law on the subject has the same object as the relevant provisions of Section 123 of our Act. But, the provisions Section 123(2), (3) and (3A) seems wider in scope and also contain specific mention of what may be construed as "undue influence" viewed in the background of our political history and the special conditions which have prevailed in this country. B

We have to determine the effect of statements proved to have been made by a candidate, or, on his behalf and with his consent, during his election, upon the minds and feelings of the ordinary average voters of this country in every case of alleged corrupt practice of undue influence by making statements. We will therefore, proceed to consider the particular facts of the case before us. C

We have already mentioned above that the offending statements were alleged to have been made by the appellant at sixteen election meetings addressed at various places between 12-2-1972 and 6-3-1973. Out of these, the petitioner's counsel had given up, in the Trial Court, reliance on speeches at four meetings some of which were held at places outside the appellant's constituency. The High Court held that the contents of speeches alleged to have been made on 1-3-1972 at Erskine Road and on 3-3-1972 at Ismail Curtay Road and on 4-3-1972 at Nizam Street by the appellant were not duly proved. The High Court did not find that the statements made by the appellant in the course of the speeches on 12-2-1972 at Kachi Memon Jamat Khana and on 23-2-1972 and 28-2-1972 at Chima Butcher Street had transgressed the limits of propriety set by Section 123(2) and (3) and (3A) of the Act. But, it found that the appellant had violated the provisions of either Section 123(2) or 123(3) or 123(3A) of the Act by statements made in the course of the remaining six speeches proved to have been made by the appellant. D E F

The evidence relating to the appellant's speeches, discussed fully by the High Court, consisted of :

1. Cassettes or tape records of the appellant's speeches.

2. Transcripts of tape recorded speeches prepared shortly after tape-recording them. G

3. Full shorthand records of speeches of the appellant by those who heard them at meetings.

4. Notes and records containing summaries of the appellant's speeches made by persons attending meetings.

5. Statements of witnesses present at the meetings who had actually heard what was said by the appellant. H

There could be and was no objection raised to the admissibility of the last mentioned type of evidence. But questions relating to the admissibility of the first four types of evidence, mentioned above, were taken and may be conveniently dealt with here.

A We think that the High Court was quite right in holding that the tape records of speeches were "documents", as defined by Section 3 of the Evidence Act, which stood on no different footing than photographs, and that they were admissible in evidence on satisfying the following conditions :

B (a) The voice of the person alleged to be speaking must be duly identified by the maker of the record or by others who knew it.

(b) Accuracy of what was actually recorded had to be proved by the maker of the record and satisfactory evidence, direct or circumstantial, had to be there so as to rule out possibilities of tampering with the record.

C (c) The subject matter recorded had to be shown to be relevant according to rules of relevancy found in the Evidence Act.

These requirements were deduced by the High Court from *R. V. Maqsud Ali* (1)

The High Court had also relied on *Yusufalli Esmail Nagree* v. D *State of Maharashtra*(2), to hold that a contemporaneous tape record of a relevant conversation or speech would be part *res gestae*. In this case, Court, while laying down requirements of admissibility of tape records as evidence, also pointed out that the case with which the recording on a tape could be erased by subsequent recording, so that insertion could be superimposed, made it E necessary to receive such evidence with caution, and it said that the Court should be satisfied, beyond reasonable doubt, that the record had not been tampered with

The High Court also referred to *N. Sri Rama Reddy and Ors.* v. *V. V. Giri,*(3) for the proposition that, like any document, the tape record itself was "primary and direct evidence admissible of what F has been said and picked up by the receiver". In other words, its use was not confined to purposes of corroboration and contradiction only, but, when duly proved by satisfactory evidence of what was found recorded and of absence of tampering, it could, subject to the provisions of the Evidence Act, be used as substantiative evidence. Thus, when it was disputed or in issue whether a person's speech, on a particular occasion, contained a particular statement there could be G no more direct or better evidence of it than its tape record, assuming its authenticity to be duly established.

In our opinion the High Court had rightly relied upon the tape recorded reproductions of the appellant's speeches. It had given three grounds for considering the tape records to be reliable and authentic: firstly, the tape records had been prepared and preserved safely by H an independent authority, the police, and not by a party to the case: second, the transcripts from the tape records, shown to have been duly prepared under independent supervision and control, very soon afterwards, made subsequent tempering with the cassettes easy to

(1) [1965] (2) All.E.R.464.
(2) 1968 (Vol.70) Bombay Law Reporter 76@78.
(3) [1971] (1) SCR 399.

detect; and, thirdly, the police had made the tape records as parts of its routine duties in relation to election speeches and not for the purpose of laying any trap to procure evidence. A

We may add a fourth reason. This is that, after, going through the deposition of Bukhari in Court, we find that, although he was identified by police officers as the person who was speaking when the relevant tape records were made, he did not, at any stage, dispute that the tape recorded voice was his. He only denied having made some of the statements found recorded after the tape records had been played in Court in his presence. In fact, he admitted that he knew that "the cassettes were recorded by police officers who gave evidence" in Court. If the indirect implication of his dubious statement, in denying some of the statements found in the speeches without denying that the voice making these statements was his, could be that some portions had been interpolated, the police officers should have been cross-examined about it. Nevertheless, the appellant admitted, under cross-examination, that he had given no instructions to his Counsel to cross-examine these officers on this matter. No suggestion was put to the police officers concerned indicating that there had been any interpolation in the records the making of which was proved beyond all reasonable doubt by evidence which had not been shaken. B C D

As regards the shorthand transcripts of the tape records, the evidence of their makers is there, it is certainly corroborative inasmuch as it only goes to confirm what the tape records contained. The tape records were the primary evidence of what was recorded. The transcripts could be used to show what the transcriber had found recorded there at the time of the transcription. This operated as a check against tampering. They had been rightly used by the High Court only as corroborative evidence. E

As regards the shorthand notes and full short-hand transcripts made by those who heard the speeches, the High Court had treated these also as corroborative evidence which could be used by a witness to refresh his memory as laid down in Section 159 of the Evidence Act. It held that their contents could be brought on record by direct oral evidence in the manner prescribed by Section 160 of the Evidence Act, a course the propriety of which has the support of decisions in this Court in *Laxminarayan and Anr* v. *The Returning Officer and Ors.*(1), and in *Kanti Prasad Jayshankar Yagnik* v. *Purshottamdas Ranchhoddas Patel and Ors.*,(2). We find no errors in the views adopted by the High Court on these questions. F G

It was suggested that the tape recording, the making of transcripts, the making of shorthand notes by the police had taken place at the instance of a Journalist, Yunus Rehman Ansari, who appeared as a witness for the petitioner in the case. He had frankly stated in his evidence in Court : H

> "During the elections I was looking after the interest of the second respondent. I did feel disappointed when the

(1)[1974] 3 S.C.C. 425

(2) [1969] 3 SCR 400.

A second respondent lost the election. Every worker of the candidate feels disappointed if the candidate loses".

After having been taken through the evidence, in the light of the submissions made by the learned Counsel for the appellant, we are unable to hold that there must have been a conspiracy between the B Police Officers and Yunus Rehman Ansari to procure evidence for declaring the election of Bukhari void. Ansari, although not a disinterested witness, had stood the test of cross-examination well and could not be disbelieved merely because he was a worker of Chagla. His evidence is corroborated by the duly proved contents of tape recorded speeches, and, indeed, by some of the admissions of Bukhari C himself showing, *inter-alia,* that he considered any one who advocated reform of Muslim personal law to be a person unfit to get the support of "any Muslim". He said :

> "It is true that Muslim personal law is apart of our religion (Wit. gives this answer after first attempting to evade D giving a direct answer). It would follow that whoever attempted to change the Muslim personal law would be attempting to affect the Muslim religion. It is true that whoever attempted to do so would not be entitled to the support of a true Muslim or of any Muslim. I conveyed this repeatedly in my speeches to my electorate".

E

We will now take up the contents of each of the six offending speeches, which, for the reasons indicated above, were rightly held to have been proved beyond reasonable doubt to have been made by the appellant.

The first of the speeches found to be objectionable was delivered F by the appellant on 27-2-1972, at Masjid Street, within his own constituency. It is true that the contents of this speech are proved only by the evidence of Ansari corroborated by the notes prepared by Ansari himself. But, as these correspond with contents of other speeches examined by us, there seems no reason to disbelieve Ansari when he says that the appellant told the audience that Muslim personal law was a matter of religious faith for Muslims and that it extended to the G mode of disposing off bodies of the dead. The appellant went on to tell the listeners that, if they voted for Chagla, they would have to cremate the bodies of their dead instead of burying them because Chagla had cremated the dead body of his sister. The appellant also attacked Chagla's religion by stating that everyone had to observe his religion whole-heartedly and not like one who was (to put it in the equivalent English idiom) "neither fish nor fowl". The appellant en- H treated his audience not to vote for those who stood against their religion. The clear implication of his words was that Chagla was not true to his religion whereas the appellant was, and, therefore, the voters should prefer Bukhari. His absolutely unambiguous object was to persuade the audience not to vote for Chagla but to vote for Bukhari on the ground that Bukhari was a true Muslim whereas Chagla was not.

The High Court had referred to *Kultar Singh* v. *Mukhtiar Singh*[1], and said that a candidate appealing to voters in the name of his religion could be guilty of a corrupt practice struck by Section 123(3) of the Act if he accused a rival candidate, though of the same religious denomination, to be a renegade or a heretic. The appellant had made a direct attack of a personal character upon the competence of Chagla to represent Muslims because Chagla was not, according to Bukhari, a Muslim of the kind who could represent Muslims. Nothing could be a clearer denunciation of a rival on the ground of religion. In our opinion, the High Court had rightly held such accusations to be contraventions of Section 123(3) of the Act.

The second speech found to contain objectionable matter was proved to have been delivered by the appellant on 29-2-1972 at Hussainibagh, a place said to be so situated that, though it lies outside the Kumbharwada constituency, a meeting there would be attended largely by persons residing within Kumbharwada constituency. Its contents were proved by a police Stenographer, Shcikh, who had made a full short-hand record of it which was translated. In this speech, the appellant was shown to have stated that, although Muslim personal law may be considered a personal matter by Chagla, it was considered to be "the law of God" by Muslims who would not tolerate any attempts to amend it as that would raise a religious question. In the course of this speech, the appellant is reported to have said that, if the Congress Government brought in "amendments in our religious law", the "battle would be fought in every street" as "the question of religion has arisen". The appellant had threatened the ruling Congress party with open rebellion if attempts were made to change Muslim personal law which he called "a question of religion". The appellant had also made statements implying that Chagla was a supporter of this policy of change in what Bukhari called "a matter of religion" for Muslims. The High Court had held that these statements amounted to a violation of Section 123(3A) of the Act, on the ground that Bukhari's language was calculated to promote hostility between Hindus and Muslims. It opined that, in the appellant's mind, the Congress stood for the Hindu majority. We think that the language employed, viewed in the context of its purposes, could also fall within the purview of Section 123(3) of the Act inasmuch as Chagla was represented as a candidate advocating what was contrary to Bukhari's view of Muslim religion. Indeed, the words used by Bukhari could be said to have even graver implications. However, we think that it was sufficiently unrestrained and irresponsible so as to promote feelings of hostility between different classes of citizens of India on ground of religion and also directed personally against Chagla, an alleged supporter of an assumed attack on Bukhari's relion. We do not find sufficient reason to differ from the view adopted by the High Court that these statements amounted to electoral offences struck by Section 123(3A) of the Act.

The third speech containing objectionable matter was proved to have been delivered by the appellant on 2-3-1972 at Saifi Jubilee

(1) [1964] 7 S.C.R. 790.

A Street within his own constituency. Its contents are proved by a full transcript made by Police Stenographer Sheikh, of which an English translation was before the Court, and by the oral evidence of Ansari corroborated by Ansari's notes. It contained allegations against Chagla's faithfulness to Muslim religion on the ground that he had advocated inter-communal or inter-caste marriages and that he wanted
B a Hindu to be a member of the Haj Committee. After the usual fulminations against Chagla, the appellant flung a question addressed to Chagla. It was translated : "With what cheek you say that you are a representative of ours"? In addition, there were references to riots in which only Muslims were alleged to have been killed. There was also the usual statement that Muslim personal law was a matter of
C religion to Muslims. Bukhari then declared that if this law was sought to be changed, Muslim league candidates "would become such a wall for them against which they will break their heads". Bukhari claimed that he could die for Islam. He then said: "God has blessed us that every drop of our blood would give birth to thousands of Bukharis".

It appears to us that the High Court was right in construing the
D speech as highly inflammatory. It certainly amounted to the assertion that Muslim religion (or, what Bukhari thought it was) was in danger and could only be saved by man like Bukhari and not by Chagla. We think that it is a fair construction on the speech to hold that it amounted to at least a violation of Section 123(3) of the Act. We think that it was also struck by Section 123(3A) of the Act.

E The fourth speech of the appellant, said to contain offending matter, was shown to have been delivered on 6-3-1972 at Bara Imam Road within the appellant's constituency. It was tape recorded by Sub Inspector N. A. Khan. In it, after the usual accusations, Chagla is attacked in the following words :

F > "At the moment we are in such a war in which our opponent is such a person who is playing with our religious affairs. He considers us to be a community whose conscience is dead".

The High Court rightly held it to be a violation of Section 123(3)
G of the Act.

Another part of the speech which the High Court is held to be violative of Section 123(3A) of the Act runs as follows :

> "We have not signed any deed of slavery for the Government. When we feel that this Government is working against us, our rights are being crushed, our religious affairs are
H being interfered with, then we will rise openly against it. We would rise like a wall cemented with lead. Then who would bang with this wall, would get his head broken. No harm would be done to us".

It could be argued that, even if it did not directly contravene the letter of Section 123(3A) of the Act, it was an incitement to violence.

We, however, do not think it necessary to go further into this question here. We are not prepared to disagree with the opinion of the High Court about this speech. The High Court had rightly concluded that, in the appellant's mind, the Congress Govt. constituted "Hindu Raj". A

The fifth objectionable speech of the appellant was shown to have been made on 6-3-1972 at Saifi Jubilee Street within the Kumbharwada constituency. This speech was heard by Sub-Inspector Kulkarni who had made notes containing the gist of all the speeches delivered at the meeting. Nothing was brought out to cast any doubt on the veracity of Sub-Inspector Kulkarni, who appeared as a witness and gave out the contents of the appellant's speech. In the speech, the appellant had attacked Chagla and his family on the ground that Chagla had advocated the inclusion of Hindus in the Haj Committee. Bukhari alleged that Chagla's wife, a Hindu lady called Nalini, his son Ashok, as well as Chagla used to attend the mosque as well as the temple. Bukhari went so far as to state that Chagla should be excluded from Muslim localities. Bukhari alleged that Chagla and his family pleased neither Allah nor Bhagwan. In other words, Bukhari, apart from making a direct attack on the alleged religious beliefs and practices of the Chagla family, clearly conveyed to the hearers that Chagla was an unfit person, on the ground of his mixed religious faith and practices, to represent Muslims. Bukhari had also called upon Muslims to unite against such a person if they wanted their religion to survive. The High Court had very rightly held that these statements contravened the provisions of Section 123(3) of the Act. B C D E

The sixth and the last speech containing offensive matter was shown to have been made on 6-3-1972 at Chowki Mohalla Underia Street which, although outside the Kumbharwada constituency, was so situated as to attract the voters from the Kumbharwada constituency hardly 600 ft. away. The speech was tape recorded by Sub-Inspector N. A. Khan. In this speech, the appellant again attacked Chagla and repeated what, according to him, he had also stated at another meeting, that is to say, that Chagla was neither a good Hindu nor a true Muslim so that neither God nor Bhagwan was pleased with him. He compared Chagla to a Dhobi's dog who neither belonged to the Dhobi nor to the Ghat. The appellant, while thus attacking the alleged personal beliefs and practises of Chagla, obviously in an attempt to induce the voters to refrain from voting for Chagla, prayed to God for success so that no one may be able to attack the religion of Bukhari. F G

The whole outlook revealed by the speeches of Bukhari is that of a medeival crusuder who had embarked on a Jehad for extirpation of the heresy or "kufr" which, in Bukhari's imagination, was represented by Chagla and his party. We do not consider such speeches to have any place in a democratic set up under our Constitution. Indeed, they have none in the world of modern science which has compelled every type of religion, for its own survival, to seek securer foundations than child-like faith in and unquestioning conformity of obediency to an invariable set of religious beliefs and practises. H

A We do not think that any useful purpose is served by citing authorities, as the learned Counsel for the appellant tried to do, to interpret the facts of the case before us by comparing them to the very different facts of other cases. In all such cases, the line has no doubt to be drawn with care so as not to equate possible impersonal attacks on religious bigotry and intolerance with personal ones actuated by bi-
B gotry and intolerance.

As already indicated by us, our democracy can only survive if those who aspire to become people's representatives and leaders understand the spirit of secular democracy. That spirit was characterised by *Montesquieu* long ago as one of "virtue". It implies, as the late Pandit Jawaharlal Nehru once said, "self discipline". For such a spi-
C rit to prevail, candidates at elections have to try to pursuade electors by showing them the light of reason and not by inflaming their blind and disruptive passions. Heresy hunting propaganda on professedly religious grounds directed against a candidate at an election may be permitted in a theocratic state but not in a secular republic like ours. It is evident that, if such propaganda was permited here, it would in-
D jure the interests of members of religious minority groups more than those of others. It is forbidden in this country in order to preserve the spirit of equality, fraternity, and amity between rivals even during elections. Indeed, such prohibitions are necessary in the interests of elementary public peace and order.

E Learned Counsel for the appellant submitted that if we considered the substance of what was said by the appellant it would only amount to a plea that the voters should support one who opposes any change in Muslim personal law as against another who wanted to change it. If change of personal law is, it is suggested, only a secular matter, opposition to its change could not become an appeal on grounds of religion. To accept this argument would be to view the appeal to the
F voters after turning it upside down, or, perhaps, inside out. We are not concerned so much with the real nature of what is opposed or supported as with the grounds on which a candidate claims support over a rival. We have to primarily examine the cloak which the appeal wears to parade in and not only what lies beneath it.

G If all human activity in this world could be labelled "secular", on the ground that it appertains to "this world" as against "the other world", all religious thought and activity could be described as "secular", as it takes place in this world. But, the term it not used so broadly. It is a convenient label to distinguish all that is done in this world without seeking the intervention or favour of or propitiating a Superhuman or Divine Power or Being from that which is done professedly
H to please or to carry out the will of the Divinity. Secularism, in the realm of Philosophy, is a system of Utilitarian ethics, seeking to maximize human happiness or welfare quite independently of what may be either religious or the occult.

Primitive man does practically nothing without making it wear a religious garb because his understanding of the physical world, of

human nature, and of social needs and realities, is limited. He surrounds customary modes of action with an aura of superstitious reverence. He is fearful of departures from these lest he is visited by Divine wrath. Modern man, with his greater range of scientific knowledge and better understanding of his own needs as well as of the nature of the Universe, attempts to confine religion to its proper sphere—that where he reaches a satisfying relationship between himself and the Divinity he believes in so as to get an inner strength and solace which enable him to overcome psychological crises or fears when confronted with disturbing or disrupting events, such as a Death, or their prospects. He does not permit his religion, which should be essentially his individual affair, to invade what are properly the spheres of law, politics, ethics, aesthetics, economics and technology, even where its administration is institutionalised and it operates as a social force.

The Secular State, rising above all differences of religion, attempts to secure the good of all its citizens irrespective of their religious beliefs and practices. It is neutral or impartial in extending its benefits to citizens of all castes and creeds. *Maitland* had pointed out that such a state has to ensure, through its laws, that the existence or exercise of a political or civil right or the right or capacity to occupy any office or position under it or to perform any public duty connected with it does not depend upon the profession or practise of any particular religion. Therefore, candidates at an election to a legislature, which is a part of "the State", cannot be allowed to tell electors that their rivals are unfit to act as their representatives on grounds of their religious professions or practices. To permit such propaganda would be not merely to permit undignified personal attacks on candidates concerned but also to allow assaults on what sustains the basic structure of our Democratic State.

Our Constitution and the laws framed thereunder leave citizens free to work out happy and harmonious relationships between their religions and the quite separable secular fields of law and politics. But, they do not permit an unjustifiable invasion of what belongs to one sphere by what appertains really to another. It is for Courts to determine, in a case of dispute, whether any sphere was or was not properly interfered with, in accordance with the Constitution, even by a purported law. The validity of Section 123(2), (3) and (3A) has not been questioned before us. And, we have explained above what these provisions are meant for.

To return to the precise question before us now, we may repeat that what is relevant in such a case is what is professed or put forward by a candidate as a ground for preferring him over another and not the motive or reality behind the profession or ostensible ground that very secular or mundane. It is the professed or ostensible ground that matters. If that ground is religion, which is put on the same footing as race, caste, or language as an objectionable ground for seeking votes, it is not permissible. On the other hand, if support is sought on a ground distinguishable from those falling in the prohibited categories, it will not be struck by Section 123 of the Act whatever else

A it may or may not offend. It is then left to the electorate to decide whether a permissible view is right or wrong.

According to his own professions, the appellant wanted votes for himself on the ground that he staunchly adhered to what he believed to be Muslim religion as contrasted with Chagla who did not. There B is no doubt whatsoever in our minds that the High Court had rightly found the appellant guilty of the corrupt practices defined by the provisions of Section 123(2), 123(3) and 123(3A) of the Act by making the various speeches closely examined by us also.

Lastly, we have before us the order for costs made by the High Court in the following terms :

C

> "Having regard to the provisions of Section 99 of the Act and Rules 24 and 26 of the Rules framed by this Court under the Act, I order the first respondent to pay to the petitioner the sum of Rs. 12,000/- for costs. I also order the first respondent to pay to the second respondent the sum of Rs. 3,000/- for costs. There will be no order in regard D to costs of the other respondents as they have not filed written statements or appeared at the hearing."

We think that, although Section 99 of the Act may permit the award of special costs in suitable cases, and, although, the appellant has been found guilty of corrupt practices of quite an offensive kind, yet, the order for costs appears to us to err on the side of severity. E If the respondent Chagla is aggrieved in such a manner that he has grounds for some actionable claim against the appellant, he can, if so advised, take other steps which may be open to him under the law. An order for costs should not become a substitute for such other action with which we are not concerned here. Moreover, in the case before us, the petition itself was not filed by the 2nd respondent F Chagla. In these circumstances, we do not think that there should have been an order for costs payable by the appellant to the second respondent Chagla. We, therefore, set aside the order awarding Rs. 3,000/- as costs to Chagla. We also reduce by half the costs awarded to the successful petitioner, that is to say from Rs. 12,000/- to Rs. 6,000/-. We, however, think that the appellant must pay respondents 1 and 2 in this Court their costs occasioned by his appeal. G to this Court.

The result is that, subject to the modifications of the order for costs, to the extent indicated above, this appeal is dismissed with costs to respondents 1 and 2 on whose behalf appearance was put in.

P.H.P. *Appeal dismissed.*