SUBHASH DESAI

v.

SHARAD J. RAO AND ORS.

MARCH 31, 1994

[A.M. AHMADI, M.M. PUNCHHI AND N.P. SINGH, JJ.]

Representation of the People Act, 1951—Sec. 83(1)—Scope, ambit and limits—Whether non-compliance of the provision entails dismissal of election petition under the R.P. Act or C.P.C.

Sec. 123(3) & (3A)—Whether in conflict with Art. 25 of the Constitution of India—A person acquires legal status as a candidate after filing the nomination—Allegation of corrupt practice before the filing of nomination—Whether could be considered in an election petition.

Sec. 123(4), objects—Explained—Allegation of corrupt practices—Onus of proof on the person alleging such corrupt practices.

Secs. 62(1), 23(3) & 19(1)(d)—Inclusion of names after the last day for making nominations—Validity of.

The appellant successfully contested from the Goregaon assembly constituency as a candidate of Shiv Sena. The respondent who contested the election as a candidate of Janata Dal filed an election petition against the appellant complaining corrupt practices; that between 18.12.1989 and 2.1.1990 about 12,000 applications for inclusion of names in the electoral roll were received and ultimately on 15.1.1990 the final electoral roll was published with several thousand bogus voters; that the appellant appealed to the voters to vote in his favour since he was a Hindu; that in "Samana" a daily Marathi Newspaper which was printed and published by the appellant, a false story against the respondent was published on 15.2.1990 with a heading - "Riotous behaviour of Janata Dal green goondas during Sri Ganesh Mahaprasad function at Goregaon."

The election petiton further alleged that the appellant made attempts to create communal division between the Hindus and Muslims and to promote the feeling of enemity or hatred between different classes of citizens of India on the grounds of religion for furthering his prospects in

A the election and for prejudicially affecting the prospects of the respondent in the election. In his written statement the appellant denied all the allegations made against him. The High Court held that the appellant was guilty of corrupt practices under Sec. 123(3), 123(3A) and 123(4) of the Representation of the People Act and set aside the election of the appellant. With regard to the grievance that bogus voters were included without B following the procedure, the High Court appointed a Commissioner to recount all the votes after eliminating the votes of such voters and to ascertain which candidate secured the highest number of votes in the said election.

C On appeal to this Court it was contended that the election petition was liable to be dismissed since it did not contain concise statement of material facts nor full particulars of corrupt practices as required by Sec. 83(1) of the Representation of the People Act. The statement had not been verified as per the Civil Procedure Code and the proviso to sub-section D (1)(c) of Section 83 of the Act; that if a call given to the voters to vote for a candidate serving the interests of Hindus is a corrupt practice within the meaning of sub-section (3) or (3A) of Sec. 123 of the Act, then those sub-sections have to be declared *ultra vires* Art. 25 of the Constitution since Art. 25 is a fundamental right which guarantees all persons right to freely profess, practice and propogate religion; that publications and speeches E alleged to have been made prior to 31.1.90 have to be ignored because the Act required to judge a person only after he becomes a candidate i.e. only after filing of nomination; that merely because the appellant was publisher of "Samana" he shall not be deemed to have published the news item, since it only raises presumption but contrary can be proved in the facts and F circumstances of a case.

Dismissing the appeal against the order of the High Court declaring the election of the appellant as void, and allowing the appeal against the order to scrutinise the valid votes for purpose of recount and to declare the result afresh, the Court

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HELD : 1.1. It cannot be said that the election petition of the respondent does not disclose any mateirial facts or give the material particulars of any of the corrupt practices. It cannot also be said that there was no affidavit supporting the allegations of corrupt practices as required H by proviso to Sec. 83(1)(c) of the Representation of the People Act. The

respondent has been able to establish that the publication by the appellant of the statement of fact regarding his personal conduct at Sankalpa Siddi Ganesh Mandir was not only false but the appellant believed it to be false or did not believe it to be true, thereby committing a corrupt practice both under Sec. 123(4) and (3A) and therefore the appellant's election stands vitiated. But as the electoral roll in the instant case was prepared before the last day for making nominations for the elections, the High Court's direction for recounting the valid votes polled after excluding the voters added, for the purposes of fresh declaration of the election result cannot be upheld. [pp. 280-E-F; 281-B-F; 290-E; 291-A-B; 293-A-C]

1.2. Section 83 of the Act enjoins that an election petition shall contain concise statement of material facts and shall set forth full particulars of corrupt practices which shall be verified and supported by affidavit lest the election petition is liable to be dismissed under the provisions of Civil Procedure Code saying it does not disclose cause of action and not under the provisions of the R.P. Act. This provision is not only procedureal but has an object behind, so that a person declared to have been elected is not dragged to the Court to defend and support the validity of his election. The underlying idea is also to delineate the scope, ambit and limits of the inquiry at the trial, and can be exercised on the conditions laid down by the said statute. [279-B-G; 280-D-E]

Jagdev Singh Sidhanti v. *Pratap Singh Daulta,* [1964] 6 SCR 750 and *Jamuna Prasad Mukhariva* v. *Lachi Ram,* [1955] 1 SCR 608, referred to.

2. A person will legally acquire the status of a candidate only after the filing of the nomination papers. Hence any allegation of corrupt practices prior to the date of filing of nomination cannot be taken into consideration for judging the legality or validity of election. [284-C-D]

Indira Nehru Gandhi v. *Raj Narain,* [1975] Supp. SCC 1 and *Mohan Rawale* v. *Damodar Tatyaba Dada Saheb*, S.L.P. (Civil) No. 5594/92 decided on 6.8.1992, relied on.

3.1. The object of sub-section (4) of Sec. 123 is not only to protect any candidate at the election from character assassination and vilification, but to maintain the purity and fairness of the election. It maintains a delicate balance between the freedom of speech of an individual and the interest of the public to get full information about the candidate concerned, but not to

A **affect the prospect of the candiate concerned by publising facts about his personal character or conduct which are false. [286-D-G]**

3.2. The charge of corrupt practice being quasi criminal in nature, has to be proved to the satisfaction of the Court by the election petitioner as per Sec. 123(4). But the onus on him to prove that the maker of the
B **statement believed it to be false or believed it not to be ture, is very light and can be discharged by him swearing to that effect; once that is done the burden shifts to the candidate making false statement of fact to show what was his belief. [286-G; 289-C-E]**

C *Kumar Nand* **v.** *Brijmohan Lal Sharma,* **[1967] 2 SCR 127 and** *Gadakh Yashwantrao Kankarrao* **v.** *E.V. alias Balasaheb Vikhe Patil & Others,* **JT [1993] 6 SC 345, relied on.**

Haji C.H. Mohammed Koya **v.** *J.K.S.M.A. Muthu Koya,* **[1979] 1 SCR 664, referred to.**

D

4.1. If in an election petition the issue regarding the inclusion of the names of electors in the electoral roll contrary to the provisions of the R.P. Act is raised, the High Court has to examine in terms of Sec. 100(1)(d) (iii) as to whether there has been improper reception, refusal or rejection of any vote or reception of any vote which is void. [292-B-C]

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4.2. Section 62(1) of the Act refers to the electoral roll in force on the last day for making nominations for the elections and votes by persons added after the last day for making the nomination in contravention of Sec. 23(3) of the Act shall be deemed to be void as contemplated by Sec.
F **100(1)(d) of the Act. [292-H; 293-A]**

Baidyanath Panjira **v.** *Sita Ram Mahto*, **AIR (1970) SC 314, referred to.**

CIVIL ORIGINAL JURISDICTION : Civil Appeal No. 1745 of
G 1991.

From the Judgment and Order dated 8.4.91 of the Bombay High Court in Election Petition No. 10 of 1990.

G.L. Sanghi, Harish Salve, A.. Khanwilkar, Ms. Punam Kumari,
H Ramachandran, Vikas C. Rele and Prashant Kumar for the Appellants.

Ashok Desai, Abhishek Singhvi, Mrs. Jaya Shree Wad, Ms. Tamali Wad, Pallav Sisodia, Ahish Wad and Hemant Gokhale for the Respondents. A

The Judgment of the Court was delivered by

N.P. SINGH, J. 1. The election of the appellant from Goregaon Legislative Assembly Constituency, has been set aside by the High Court, on an election petition filed on behalf of the respondent No.1 (hereinafter referred to as the "respondent"). The appellant had contested the election as a candidate of Shiv Sena, whereas the respondent as of Janata Dal. B

2. The respondent in his election petition stated that between 18.12.1989 and 2.1.1990 about 12,000 applications for inclusion of names in the electoral roll, were received and ultimtely on 15.1.1990, the final electoral roll was published with inclusion of the names of several thousand persons, many of them were bogus voters. Thereafter the details of the corrupt practices committed by the appellant, Shiv Sena, Bhartiya Janta Party, between 18.1.1990 and 27.2.1990 were stated. It was also alleged that they falsely propagated in February, 1990 that Pandal erected specifically for offering prayers by Hindu women at the cost of Rs. 50,000 was demolished at the instance of socialists viz. Mrinal Gore and K.R. Nevrekar, and as such, the Hindu traitors should be shown their place, for that reason it was necessary to vote for the appellant, who had brought the message of "Hindu Hridaya Samrat" Shri Balsaheb Thackeray. The aforesaid statements were exhibited on several boards in different localities in Goregaon constituency between 21.1.1990 and 27.2.1990. C D E

3. It was then alleged that there is a Sankalpasiddhi Ganesh Mandir at Goregaon. On 14.2.1990, between 11.00 A.M. and 3.00 P.M., Mahaprasad ceremony was to be celebrated. The trustees had invited thousands of prominent citizens of Goregaon for that celebration including the respondent and his colleagues. The respondent visited the said temple at about 1.00 P.M. with Shri K.R. nevrekar (PW-3) and 50 workers. The respondent met the trustees and offered his obeisance to the deity. The respondent learnt that the appellant had also attended the said function with his workers an hour before. After accepting the Mahaprasad, the respondent along with his workers left the function at about 2.30 P.M. To the utter suprise of the respondent, the appellant, who was the printer and publisher of the Marathi daily "Samana", published a false report of respondent's visit to the said function, in the issue of "Samana" dated F G H

15.2.1990. the heading of the publication was : *"Riotous behaviour of Janata Dal 'green Goondas during Shri Ganesh Mahaprasad function at Goregaon."* The relevant part of the news item translated in English is as follows :-

> "During the ceremony of Mahaprasad of Sankalpasiddhi Ganesh Temple at Motilal Nagar in Goregaon, the Janata Dal workers wearing green scarf created a mess by shouting 'Allah Ho Akbar' repeately and indulged in indecent gestures. ..... The volunteers of Ganesh Mandir Trust, accompanied by the Shiv Sena and B.J.P. workers, were distributing Mahaprasad. There were women workers of the Mahila Front also present at that time. At this moment the Janata Dal candidate Sharad Rao came there with his followers. The supporters accompanying him had tied green scarfs around their heads. These workers came as if dancing in a fair, while the devotees of Ganesh were dining during the Mahaprasad ceremony. These devotees were made to vacate highway. .....'Allah Ho Akar' slogan shouting, these people came to this most disciplined function of the Hindus capable of provoking an evil eye. repeatedly shouting 'Allah Ho Akbar', performing indecent dances in an ugly manner and left after creating a pandemonium. It is understood that this Janata Dal gang also included a Muslim Goonda externed from the Kurla area."

4. The respondent in the election petition asserted that the aforesaid publication was false, deliberately published to blackmail the said respondent and his party. This was an attempt to create communal division between Hindus and Muslims and to promote the feeling of enmit or hatred between different classes of citizens of India on grounds of religion for the furtherance of the prospects of the election of the appellant and for prejudicially affecting the election prospects of the respondent. Copies of the news report aforesaid in Marathi as well as with English translation, were annexed to the election petition. It was stated by the respondent that aforesaid publication had an impact, in view of the conditions prevailing in Jammu & Kashmir and in the background of the dispute regarding Ram Janma Bhoomi and Babri Masjid.

5. Lastly, it was alleged that a public meeting was held at Shivaji Park, Dadar, on 24.2.1990 in which the appellant and all other candidates of Shiv Sena-B.J.P. alliance were present. The said meeting was addressed by Bal

Thackeray and other leaders, at which Bal Thackeray reiterated that he was "contesting the election in the name of Hindu religion (Hindutva)". The proceedings of the said meeting were reported in various dailies, and even the voters of the constituency in question, read the press reports. A

6. In the written statement a stand was taken on behalf of the appellant, that the charge that appellant had contested the election on the ground of Hindutva or Hinduism was of no consequence, because since time immemorial this country was known as Hindustan and the inhaitants of this country were known as Hindus. It was further asserted that Shiv Sena-B.J.P. were never against any religion and the said parties had always considered all people "faithful to this country as Hindus, irrespective of their religion. The said parties have always been against anti-nationals whether they are Hindus or not". The appellant denied that Shiv Sena and/or B.J.P. at any time propounded the cause of Hinduism as their goal for the election. He also denied that he or B.J.P. and/or Shiv Sena at any time propagated religious hatred amongst the communties, as alleged, or that he had made any statement, saying "show these Hindu traitors their place, vote in the interest of Hindus for Subhash Desai". B C D

7. In respect of the allegation of the respondent regarding publication of the false report in the issue of "Samana" dated 15.2.1990 about the visit of the respondent to the function on 14.2.1990, it was said :- E

> "With reference to paragraph 50A of the petition, this respondent categorically denies that this respondent has published any false and/or perverted and/or incriminatory account of the petitioner's alleged visit to the said function as alleged. This respondent states that, this respondent published a News Item submitted to him by his News Reporter. This respondent categorically denies that the News Item published in the Daily Newspaper "Samana" was in any manner and/or perverted and/or incriminatory as alleged. This repondent in good faith published the said News Item submitted to him by News Reporter." F G

8. It was further stated in the said written statement :-

> ".....this respondent categorically denies that the report published in the Newspaper "Samana" on 15th February, 1990 was a false and/or fraudulent report and/or that the same was deliberate- H

A ly published to blackmail the petitioner and/or his partly Janata Dal as alleged,....."

9. The High Court on the materials produced before it held that the appellant had committed the corrupt practices : (i) under Section 123(3) of the Representation of the People Act, 1951 (hereinafter referred to as B the "Act") by making appeal to the voters to vote in his favour, because he was a Hindu, (ii) under Section 123(3A) of the Act by creating feeling of hatred between the dfferent classes of electors, on ground of religion, (iii) under Section 123(4) of the Act, by publisheing statements of fact, which were false, which the appellant believed to be false or did not believe to C be true, in relation to the personal character and conduct of the respondent, calculated to prejudice the prospects of the election of the respondent. The High Court also examined the grievance made by the respondent regarding registration of electors in the electoral roll in contravention of the provisions of the Representation of the People Act, 1950 and held that D those who had been mechanically added to the electoral roll, without following the procedure prescribed for inclusion of the names of the electors, could not have exercised their right to vote and as such those votes had to be treated as void. After setting aside the election of the appellant, the High Court appointed one Mr. Ajitlal Pranlal Yajnik, Ex-Prothonotary and Senior Master, as Commissioner, to ascertain the names of the per- E sons, whose names were added in the electoral roll on 15-1-1990. the Commissioner thereafter was to find out the persons who had voted from that list, after scrutinising their ballot papers. A direction was given to recount the votes after eliminating all those votes by persons, who had been included in the electoral roll on 15.1.1990. After recount, it was to be F ascertained as to whether the appellant or the respondent had secured the highest number of valid votes at the said election. However, the direction for recount was stayed by this Court during the pendency of the appeal.

10. Mr. Sanghi, the learned Senior Counsel appearing for the appellant, referred to different paragraphs of the election petition as well as the G affidavit, supporting the statements made therein. Accorrding to him, the election petition was liable to be dismissed at the threshold because it neither contains statements of material facts nor full particulars of the corrupt practices alleged to have been committed by the appellant, as required by Section 83(1) of the Act. The statements had not been verified H in the manner transcribed by the Code Procedure, and by proviso to

sub-section(1)(c) of Section 83 of the Act. A

11. Section 86 vests power in the High Court to dismiss an election petition which has not been properly presented as required by Section 81; or where there has been non-compliance of section 82 i.e, non-joinder of the necessary parties to the election petition; or for non-compliance of Section 117 i.e. non-deposit of the required amount as security for the costs of the election petition. Section 86 does not contemplate dismissal of the election petition for non-compliance of the requirement of Section 83 of the Act. But Section 83 enjoins that an election petition shall contain concise statement of material facts, and shall set forth full particulars of any corrupt practice that the petitioner alleges, which should be verified and supported by affidavit, so far the allegations of corrupt practices are concerned. This provision is not only procedural, but has an object behind it; so that a person declared to have been elected, is not dragged to court to defend and support the validity of his election, on allegations of corrupt practice which are not precise and details whereof have not been supported by a proper affidiavit. Apart from that, unless the material facts and full particulars of the corrupt practices are set forth properly in the election petition, the person whose election is challenged, is bound to be prejudiced in defending himself of the charges, which have been levelled against him. In view of the repeated pronouncements of this Court, that the charge of corrupt practice is quasi criminal in nature, the person challenging an election on the ground of corrupt practice, cannot take liberty of making any vague or reckless allegation, without taking the responsibility about the correctness thereof. Before the Court proceeds to investigate such allegations, the Court must be satisfied, that the material facts have been stated along with the full particulars of the corrupt practice, alleged by the petitioner, which have been duly supported by an affidavit. In cases where the Court finds that neither material facts have been stated, nor full particulars of the corrupt practice, as required by Section 83, have been furnished in the election petition, the election petition can be dismissed, not under Section 86, but under the provisions of the Code of Civil Procedure, which are applicable, read with Section 83(1) of the Act, saying that it does not disclose a cause of action. This aspect has been examined by this Court in detail in the cases of *Azhar Hussain* v. *Rajiv Gandhi,* [1986] 2 SCR 782 and *Hardwari Lal* v. *Kanwal Singh,* [1972] 2 SCR 742. B C D E F G

12. From the perusal of the election petition, it shall appear that H

A respondent has stated about the corrupt practices alleged to have been committed by the appellant in Paragraphs 47 to 52. It has been alleged that the appellant was a candidate of Shiv Sena, and had the support of B.J.P. and Vishwa Hindu Parishad at the election in question. He has stated about the atmosphere created, because of the Ayodhya and Babri Masjid dispute. Then statement has been made regarding putting up of boards in B different places in the constituency in question, requesting the voters to vote in the interest of Hindus and to show the traitors their place. Then the details of the celebration on 14-2-1990 at the aforesaid Sankalpasiddhi Ganesh Mandir, where the respondent is alleged to have come to receive Prasad with his workers, have been stated. Thereafter respodent has stated C about publication in "Samana" the next day, 15-2-1990, relevant part whereof has been quoted above. Lastly, about the public meeting, held at Shivaji Park on 24.2.1990, which was attended by the appellant and other candidates of Shiv Sena-B.J.P. alliance, where Bal Thackeray reiterated that the said alliance was contesting election in the name of Hindu religion, D has been stated.

13. The scope of Section 83(1) has been recently examined in the case of *F.A. Sapa* v. *Singora*, [1991] 3 SCC 375, where it was pointed out that the underlying idea in requiring the election petition to set out in a concise manner all the 'material facts' as well as the 'full particulars', where E the complaint is in respect of commission of corrupt practice, is to 'delienate the scope, ambit and limits of the inquiry at the trial by the election petition'. In the present case, the allegations made, in the election petition, may be true or false, but it is not possible to hold that the election petition does not disclose any material fact or give the material particulars F of any of the corrupt practices. It need not be pointed out that even if the Court is satisfied that, in respect of one of the corrupt practices alleged, material facts and full particulars thereof have not been stated, still the election petition cannot be dismissed, if in respect of another corrupt practice the material facts and full particulars have been stated in accordance with the requirement of Section 83(1) of the Act.

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14. In respect of the contention that the affidavit, supporting the corrupt practices alleged to have been committed by the appellant, is not as required by Section 83(1)(c) proviso, it was pointed out that reference has been made in the affidavit to Paragraph 74G, which contains the H grounds for declaring the election of the appellant to be void and has no

relation to the paragraphs giving particulars of corrupt practices. It is true that instead of saying that the statements, made in paragraph 74G of the election petition about the commission of corrupt practices, were true to the knowledge of the appellant, it should have been stated that the statement, made in Paragraphs 49, 50, 50A, 51 and 52 of the said petition were true to his knowledge. But, from bare reference to the other part of the affidavit, it shall appear that it has also been said that making of religious appeal to people and the particulars of the corrupt practices mentioned in Paragraphs 49, 50, 50A, 51 and 52 of the said election petition and the exhibits referred thereto, were true to the knowledge of the appellant. According to us, it cannot be held, in the facts and circumstances of the present case, that there was no affidavit supporting the allegations of corrupt practices, as required by Section 83(1)(c) proviso.

15. Coming to merit, according to the appellant, any call given to the voters to vote for a candidate, who serves the interest of the Hindus, cannot be held to be a corrupt practice. It was urged that if it is held to be corrupt practice within the meanting of sub-sections (3) or (3A) of Section 123 of the Act, then those sub-sections have to be declared *ultra vires* Article 25 of the Constitution. According to the appellant, Article 25 of the Constitution, subject to the public order, morality and health and other provisions of the said part of the Constitution, guarantees all persons right "freely to profess, practice and propagate religion". As such when a candidate at an election propagates his religion and asks the voters to profess and practice a particular religion, which may include Hinduism, that right cannot be restricted by any Act or statute. If the framers of the Constitution, have guaranteed that right to every citizen of this country, then any person who is a candidate at any election, can also propagate his religion and ask the voters to do or not to do an act, which may be in the interest of such religion, including not to vote a person, whose election will prejudicially affect the propagation of the religion in question.

16. When the framers of the Constitution guaranteed every citizen, right to freely profess, practice and propagate his religion, that right does not extend to creating hatred amongst two groups of persons, practising different religions. Sub-section (3) and sub-section (3A) of Section 123, never purport to curb the right guaranteed by Article 25 of the Constitution. They only purport to curb the appeal on the ground of religion or propogating religion for creating, feeling of enmity or hatred between

A different classes of citizens of India during the election campaign by the candidate or his agent or any person with his consent for furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any other candidate. Sub-sections (3) and (3A) of Section 123, in no way are in conflict with Article 25 of the Constitution - both can co-exist. Article 25 enables every citizen of India to profess, practice and propagate his religion, whereas sub-sections (3) and (3A) of Section 123 purport to ensure that an election is not influenced by considerations for religion, race, caste community or language. Sub-sections (3) and (3A) of Section 123 merely prescribe the conditions, which must be observed, if a candidate wants to enter in Parliament or Legislative Assembly. The right to stand for an election is a special right created by a statute and can be exercised on the conditions laid down by the said statute. Keeping in view that the election should not be contested on the ground of religion, race, caste, community, or language and result of an election is not affected by promoting feelings of enmity or hatred between different classes of citizens of India on grounds of religion, race, caste, community, or language; the framers of the Act, have declared appeal on ground of religion, race, caste, community or language and propogating religion, race, caste, community or language for creating feeling of enmity or hatred between different classes of citizens as corrupt practices, which shall vitiate the election.

17. On behalf of the appellant, reference was made to the case of *Jagdev Singh Sidhanti* v. *Pratap Singh Daulta,* [1964] 6 SCR 750, where this Court had to consider whether an appeal made to the electorate to vote for a particular candidate on ground of his language, was covered by Section 123(3). It was said that the expression "on the ground of his language" must be read in the light of the fundamental right which is guaranteed by Article 29(1) of the Constitution. It was pointed out that the said expression cannot be read as treaspassing upon the fundamental right guaranteed by Article 29(1); political agitation for conservation of the language of a section of the citizens cannot therefore be regarded as a corrupt practice within the meaning of Section 123(3) of the Act. But at the same time, it was said :-

> "The corrupt practice defined by cl.(3) of s.123 is committed when an appeal is made either to vote or refrain from voting on the ground of a candidate's language. It is the appeal to the electorate on a ground personal to the candidate relating to his language

which attracts the ban of s.100 read with s.123(3). Therefore it is only when the electors are asked to vote or not to vote because of the particular language of the candidate that a corrupt practice may be deemed to be committed. Where however for conservation of language of the electorate appeals are made to the electorate and promises are given that steps would be taken to conserve that language, it will not amount to a corrupt practice."

In the case of *Jumuna Prasad Mukhariya* v. *Lachhi Ram,* [1955] 1 SCR 608, Sections 123(5) and 124(5) of the Act, as they then stood, were challenged, as infringing the fundamental right of freedom of expression under Article 19(1) of the Constitution. This Court rejected the contention, saying that the provisions of the Act do not stop a man from speaking: they merely prescribe conditions which have to be observed for being elected.

18. On behalf of the appellant, it was then pointed out that in election petition, while alleging corrupt practices, reference has been made in respect of the speeches and publications, of period prior to 31.1.1990, which was the date when nomination papers were filed. The publications and speeches alleged to have made prior to 31.1.1990 have to be ignored because the framers of the Act, required the High Court to judge the conduct of the candidate, his agent or persons with the consent of the candidate or his election agent, only after a person becomes a candidate for the particular election. A person becomes a candidate for the election in question only after filing the nomination paper. In this connection, reference may be made to Section 79(b) of the Act which defines 'candidate' to mean a person, who has been or claims to have been duly nominated as a candidate at any election. Section 34 of the Act says that a candidate shall not be deemed to be duly nominated for election from a constituency unless he deposits or causes to be deposited the amounts prescribed in the said section. When a person becomes a candidate, was examined by this Court in the well known case of *Indira Nehru Gandhi* v. *Raj Narain,* [1975] (Supp.) SCC 1, and it was held :-

"The 1951 Act uses the expression "candidate" in relation to several offences for the purpose of affixing liability with reference to a person being a candidate. If no time be fixed with regard to a person being a candidate it can be said that from the moment a person is elected he can be said to hold himself out as a candidate

A for the next election."

Recently, this Court in the case of *Mohan Rawale* v. *Damodar Tatyaba @ Dadasaheb,* (Special Leave Petition (Civil) No. 5594 of 1992 disposed of on August 6, 1992), has said :-

B "We hold that all the averments in paragraphs 1 to 20 of the memorandum of election petition in so far as they refer to a period prior to 23.4.1991 cannot amount to allegations of corrupt practice."

C This cut off date 23.4.1991 was fixed with reference to the date when nomination papers were filed by the appellant concerned, because since that date the appellant will be deemed to have legally acquired the status of a candidate. According to us, any allegation of corrupt practice against the appellant, made by the respondent in respect of the period prior to the filing of nomination by the appellant on 31.1.1990, cannot be taken into D condsideration for judging the legality or validity of his election.

19. The corrupt practices alleged against the appellant after filing of the nomination paper, are (i) appellant published a News Item in the issue of "Samana" on 15.2.1990 which was a statement of fact, which was false and appellant believed it to be false or did not believe it to be true in E respect of personal character and conduct of the respondent to prejudice his prospect at the said election, which is covered by Section 123(4) of the Act; (ii) Bhartiya Janta Party, the election rally of Shiv Sena, propagated in last week of February, 1990 that authorised Pandal erected for offering prayers by Hindu women was demolished at the instance of Mrinal Gore F and K.R. Nevrekar, and several boards in different localities in Goregaon between 21-1-1990 and 27-2-1990 were exhibited, saying show these Hindu traitors their place; (iii) a public meeting was held at Shivaji Park, Dadar, on 24.2.1990 in which the appellant and other candidates of Shiv Sena-B.J.P. alliance were present. That meeting was addressed by Bal Thackeray G and others. Bal Thackeray reiterated that the said alliance was 'contesting the election in the name of Hindu religion (Hindutva)'. The proceedings of the said meetings were reported in various dailies.

20. We propose first to examine the charge regarding publication by the appellant in the issue of "Samana" dated 15-2-1990, the relevant part H of the said publication has already been quoted above. In the said publi-

cation, it was said that during the ceremony of Mahaprasad of Sankalpasiddhi Ganesh Temple, the Janata Dal workers wearing green scarfs created a mess and shouted 'Allah Ho Akbar' and repeatedly indulged in indecent gestures; these workers came as if dancing in a fair. The devotees of Ganesh, who were dining during the Mahaprasad ceremony, had to vacate the highway. These people came to the most disciplined function of the Hindus, shouting 'Allah Ho Akbar' slogan repeatedly, in which a Muslim Goonda externed from the Kurla area was also there.

Section 123(4) is as under :-

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

.....

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

21 On a plain reading, the requirements of Section 123(4) shall be satisfied when the publication is held: (i) a statement of fact; (ii) which was false; (iii) which the appellant either believed to be false or did not believe to be true; (iv) which relates to the personal character or conduct of the respondent; (v) the statement was reasonably calculated to prejudice the prospect of the election of the appellant.

22. If the publication is held to be false and it is established that it was the appellant who published the same believing it to be false or not believing it to be true, then for the other two ingredients: relating to personal character or conduct and that it was calculated to prejudice the prospects of the election of the respondent, not much evidence is required. During the election tempo, because of the serious nature of charge levelled against the respondent, in respect of his conduct, the effect of the said publication on his election prospects can be easily assumed. It cannot be

A disputed that the publication aforesaid must have prejudicially affected the election prospect of the respondent, because he is alleged to have entered with his workers, dancing and shouting 'Allah Ho Akbar', during a solemn religious ceremony of Mahaprasad of Sankalpasiddhi Ganesh Mandir. This publication has direct reflection on the character and conduct of the B respondent, at whose instance a pandemonium was created in the temple of Sankalpasiddhi Ganesh, during Mahaprasad ceremony.

23. It has been asserted on behalf of the respondent that the statement of fact, published in the said issue of "Samana", was false. The respondent or his workers never shouted slogans of 'Allah Ho Akbar', C during the Mahaprasad ceremony of Sankalpasiddhi Ganesh Mandir. They did not create any pandemonium by indecent dances or ugly gestures. He has also denied that when he had gone to attend the said Mahaprasad ceremony, any Muslim Goonda externed from the Kurla area, had accompanied him.

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24. The object of sub-section (4) of Section 123 is not only to protect any candidate at the election from character assassination and vilification, but to aintain the purity and fairness of the election. The framers of the Act were conscious of the fact that some candidate or his agent or persons on his behalf, may publish facts in respect of the personal character of the E candidate concerned, which are false, with an object to malign such candidate in public during the election in order to affect his prospect at the election. The momentum, the mood and the emotional upsurge during the elections are well-known and even small things which in normal times may not assume much significance, have serious consequences during the elec- F tion and affect the minds of the electors and in some cases may be a decisive factor, to seal the fate of one candidate or the other. Sub-section (4) of Section 123 maintains the delicate balance between the freedom of speech of an individual, the interest of the public to get full information about the candidate concerned, but not to affect the prospect of the candidate concerned by publishing facts about his personal character or G conduct which are false.

25. The charge of the corrupt practice being quasi criminal in nature, had to be proved to the satisfaction of the court by the election petitioner-respondent. In the present case, the controversy can be: (i) whether the H appellant published the statement of fact referred to above in the issue of

"Samana" on 15.2.1990; (ii) whether that statement of fact was false; (iii) whether appellant either believed it to be false or did not believe it to be true. So far the other ingredients of sub-section (4) of Section 123 i.e. (i) whether it relates to the personal character or conduct of the appellant; (ii) whether such statement was reasonably calculated to prejudice the prospect of the election of the appellant, according to us, there should not be much controversy, because in view of allegation that the appellant along with his workers, during Mahaprasad celebration of Sankalpasiddhi Ganesh Mandir created ugly scene with repeated shouting of 'Allah Ho Akbar' along with a Muslim criminal; it will amount to a statement relating to the personal character and conduct of the appellant, and in the atmosphere prevailing during the election, it was calculated to prejudicially affect the prospect of the election of the appellant. As such it has only to be examined as to whether the respondent has been able to prove (i) that the statement of fact, regarding the Mahaprasad ceremony of Sankalpasiddhi, had been published by the appellant or his agent or any person with his consent; (ii) that such publication was false, because no such incident had taken place; (iii) that the appellant published it, believing it to be false or not believing it to be ture. The onus of proving the ingredients of sub-section (4) of Section 123 is on the respondent, who alleged the commission of the corrupt practice under said sub-section.

26. The respondent has stated on oath not only in his election petition, but also in his evidence that the report in the issue of "Samana" dated 15-2-1990, that he along with his workers had shouted 'Allah Ho Akbar' in the Ganesh temple, was a false report and the said news had been printed and published by the appellant to malign him in the eyes of the Hindu voters who were in majority in his constituency. He has further stated that he on the invitation given by the Sankalpasiddhi Ganesh Mandir Trust, along with his election agent and few other activists, at about 1.00 P.M., went to the Ganesh Mandir. He was received warmly by the trustees. He had Darshan and Mahaprasad and after an hour left with Nevrekar (PW-3), his election agent, and others. He was surprised to see the publication in the "Samana" of 15.2.1990, containing the report about his visit to Ganesh temple. It appears, a protest was lodged by a communication dated 17-2-1990 to "Samana" in respect of the publication aforesaid, saying that it was incorrect and false. Nevrekar (PW-3) has fully supported respondent in his evidence in respect of the visit of the respondent to the Sankalpasiddhi Ganesh Mandir.

A 27. On behalf of the appellant, a stand was taken before this Court that merely because appellant was the publisher of "Samana", he shall not be deemed to have published the New Item and in this connection reference was made to the Press Act and Rules framed thereunder. It was urged that names of the Editor, printer and publisher on the newspaper in
B question, only raises a presumption, but contrary can be proved in facts and circumstances of a case. Reliance was placed on the judgment of this Court in the case of *Haji C.H. Mohammad Koya* v. *T.K.S.M.A. Muthukoya,* [1979] 1 SCR 664. But the remarkable aspect to the present case is that the appellant admitted that he had published the report aforesaid in the "Samana" on 15-2-1990, as alleged by the respondent. He also asserted, that
C the facts stated in the publication in question, were correct. He said in the written statement that "he published a News Item submitted to him by his News Reporter..... This respondent in good faith published the said News Item submitted to him by News Reporter." The appellant categorically denied in the written statement "that the report published in the
D Newspaper "Samana" on 15-2-1990, was a false and/or fraudulent report....." Having admitted in the written statement that he had published that News Item, in his evidence he stated :-

> On 1.2.1990 I had gone to Sankalpa Siddhi Ganesh Mandir festival on invitation. I went there at about 12.00 noon. I took darshan. I
E took Mahaprasad. I went away at about 12.30 p.m. I do not know what happened thereafter. On that day, in the evening as I was coming from the Fort area, Bombay, I dropped in the office of Samna. One reporter by name Sanjay Dahale showed me a hand-written copy of a news item. He showed me this in the corridor as
F he was about to go out. That news about Sankalpa Sidhi Ganesh Mandir festival. Since I was in hurry, I could not read the same fully. I told him to verify and if it is true, have it printed. I then went away."

G 28. In the written statement he admitted the fact that he had published the News Item in question, submitted to him by his News Reporter, but in the evidence he has taken a stand, saying that he had seen that News Item before publication in hurry and could not read the same fully and had asked the Reporter, namely, Sanjay Dahale, to verify whether it was true and then to print it. In the written statement he categorically denied that
H the report published in the newspaper "Samana" on 15-2-1990, was a false

report. In other words, he took a stand that what was published was a correct statement of fact; in evidence he never asserted that the publication regarding respondent's going to the temple with his workers and creating ugly scene was not false or at least he believed it to be true. He simply pleaded ignorance about the alleged report and publication regarding the respondent's going to the said temple with his workers. There is no suggestion given on behalf of the appellant to the respondent or to his witnesses, who had challenged the correctness and had asserted the falsity of the report published in "Samana" on 15.2.1990, that the News Item published was correct and not false. So far the burden of proving to the satisfaction of the court that the publisher thereof believed to be false or believed not to be true, was on the respondent being the election petitioner. But, in the facts and circumstances of the present case, according to us, once the respondent asserted and stated on oath that the statement of fact published in the "Samana" was false and the said statement had been published by the appellant, knowing it to be false or believing not to be true, it will be deemed that the respondent has discharged the initial onus which rests on him. Then the onus shifts to the other side i.e. to the appellant. In the case of *Kumar Nand* v. *Brijmohan Lal Sharma,* [1967] 2 SCR 127, it was pointed out that the onus to prove the charge of a corrupt practice under Section 123(4) was on the election petitioner, but the onus on him to prove that the maker of the statement believed it to be false or believed it not to be true, is very light and can be discharged by complaining candidate swearing to that effect; once that is donet the burden shifts to the candidate making false statement of fact to show what was his believe Wanchoo, J. (as he then was) speaking for the said :-

> ..... But though the onus in on the election petitioner to show all these things, the main things that the election petitioner has to prove are that such a publication was made of a statement of fact and that that statement is false and is with respect to the personal character or conduct of the election petitioner. The burden of proving that the candidate publishing the statement believed it to be false or did not believe it to be true though on the complaining candidate is very light and would be discharged by the complaining candidate swearing to that effect. Thereafter it would be for the candidate publishing the statement to prove otherwise."

Recently in the case of *Gadakh Yashwantrao Kankarrao* v. *E.V. alias*

A *Balasaheb Vikhe Patil & Ors.,* JT (1993) 6 SC 345, it was pointed out that it is very difficult for the election petitioner to prove by any direct evidence that the person, who is alleged to have made a false statement or published the same, believed it to be false or believed it to be not true, because belief of the maker is related to the state of mind of the maker which can be found to have been established only on basis of the surrounding circumstances and the materials on the record. When a charge has been levelled that while publishing the statement of fact which was false, the appellant either believed it to be false or did not believe it to be true, he should have come out with the justification for publishing such a News Item. In the instant case, no justification has been given by the appellant, except what has already been mentioned above, that the News Item was shown to him by the Reporter while he was in hurry and he told him to print and publish the same after verifying the correctness thereof. This statement in his evidence runs counter to or is at variance with the statement made by him in his written statement, admitting that he had published that News Item, submitted to him by his News Reporter. He also denied that the said News Report was false, meaning thereby that it was a correct report. But, at the stage of evidence, neither the appellant has asserted nor any witness on his behalf has come forward to state before the court that any such incident, as mentioned in the News Item, had actually happened. In such a situation, the irresistible conclusion is that the respondent has been able to establish that the publication by the appellant of the statement of the fact regarding his personal conduct at the Sankalpasiddhi Ganesh Mandir was not only false, but the appellant believed it to be false or did not believe it to be true. In view of the serious nature of the allegations published, it was not even urged before us that they do not relate to the personal character or conduct of the appellant or that such publication was not reasonably calculated to prejudice the prospect of the election of the respondent. Once it is proved that the aforesaid News Item was published by the appellant and it was false and the appellant believed it to be false or did not believe it to be true; then certainly it related to the personal character or conduct of the respondent, calculated to prejudice his prospects at election. Becuase of that publication, the appellant has not only committed a corrupt practice under Section 123(4) but also under subsection (3A) of Section 123. By publishing the News Item, he shall be deemed to have promoted felling of enmity and hatred between different classes of citizens on ground of religion for the furtherance of his prospects

B C D E F G H

at the election and for prejudicially affecting the prospects of the election of the repondent. A

29. We are in agreement with the finding of the High Court that on the materials on record the charge of corrupt practices under sub-section (3A) and sub-section (4) of Section 123, has been established against the appellant, vitiating his election to the Legislative Assembly. In view of the finding aforesaid, we do not consider it necessary to examine as to whether corrupt practice under sub-section (3) of Section 123 of the Act, has also been established. B

30. Now the question which remains to be considered is as to whether the High Court was justified in examining the acts and omissions on the part of the Electoral Registration Officer before the final publication of the electoral roll and in direction to verify whether the names of several persons had been included in the electoral roll before final publication of the electoral roll, in accordance with the provisions of the Representation of the People Act, 1950 or not, and to recount the votes polled in favour of the appellant and the respondent, after ignoring the votes of persons who were not entitled to be included in the electoral roll and then to declare the result of the election afresh. In the election petition from paragraph 8 to 46, grievance has been made regarding the preparation of the electoral roll, alleging that the authorities entrusted with the preparation of the electoral roll and revision thereof have failed to perform their duties as enjoined by the Representation of the People Act, 1950. According to the respondent, the draft electoral roll was published on 17-12-1989. Between 18-12-1989 and 2-1-1990 about 12,000 applications were received, for inclusion of names in the electoral roll. The objections were to be filed upto 9-1-1990. On 15-1-1990, the final electoral roll was published including the names of 11,057 persons. It appears that on 24.1.1990 a writ petition was filed on behalf of PW-3, the election agent of the respondent, challenging the inclusion of 11,057 persons in the electoral roll. On 1-2-1990, the said writ petition was disposed of by the High Court, directing the Assistant Registration Officer to verify the list of 5,002 voters, submitted by the writ petitioner. Pursuant to that direction the names of the persons, who had been included in the electoral roll, were verified and 1499 names were deleted. The names of 1,499 persons were deleted, before the last date of filing the nomination papers. In this background, we do not appreciate as to how in an election petition, challenging the election of the C D E F G H

A appellant, the respondent could have raised the same issue regarding the inclusion of the names of the electors contrary to the provisions of the Representation of the People Act, 1950. Apart from that, Section 62(1) of the Act says 'No person who is not, and except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll of any constituency shall be entitled to vote in that constituency'. In
B sub-sections (2) to (5) restrictions have been provided when the right to vote under sub-section (1) of Section 62 of the Act can not be exercised. Section 100(1)(d)(iii) says, that the result of the election, in so far it concerns a returned candidate has been materially affected, by improper reception, refusal or rejection of any vote or the reception of any vote
C which is void. While hearing an election petition, on the aforesaid ground, the High Court has to examine as to whether there has been improper reception, refusal or rejection of any vote or reception of any vote which is void. In the case of *Baidyanath Panjira* v. *Sita Ram Mahto,* AIR (1970) SC 314, in spite of the bar prescribed under Section 23(3) of the Repre-
D sentation of the People Act, 1950 that no amendment shall be made or direction for inclusion of a name in the electoral roll of a constituency shall be given, after the last date for making nominations, names of several persons were included after filing of the nomination papers. An objection was taken in the election petition that such persons were not entitled to vote. While referring to Section 62(1) of the Act it was said :-

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> "That provision no doubt stipulates that every person who is for the time being registered in the electoral roll of any constituency except as expressly provided by the Act shall be entitled to vote in that constituency. The question is which is the electoral roll
> F referred to in that section? Is it the electoral roll that was in force on the last date for making nominations for an election or is it the electoral roll as it stood on the date of the polling? For answering that question we have to go back to Section 23(3) of the 1950 Act. In view of that provision the electoral roll referred to in Section 62(1) of the Act must be understood to be the electoral roll that
> G was in force on the last day for making the nominations for the election."

According to the aforesaid judgment of this Court, reference in Section 62(1) to the electoral roll, shall mean electoral roll in force on the last day
H for making the nominations for the election and votes by persons added

after last day for making the nominations, in contravention of Section 23(3) of the Representation of the People Act, 1950, shall be deemed to be void and as such covered by Section 100(1)(d) of the Act. In the present case the names had been included and final publication had been made before making of the nominations. As such the direction by the High Court, after declaring the election of the appellant to be void, to verify as to whether the final punblication of the electoral roll on 15-1-1990 with inclusion of names of electors was in accordance with law and if the said inclusion was not in accordance with the procedure prescribed by the Representation of the People Act, 1950, then to exclude their votes after opening the ballot boxes and to recount the valid votes polled in favour of the respondent and the appellant for purpose of fresh declaration of the election result, cannot be upheld.

31. Accordingly, the Civil Appeal No. 1745 of 1991 against the order the the High Court, declaring the election of the appellant void, is dismissed. The Civil Appel No. 2194 of 1991 against the direction given by the High Court, to scrutinise the valid votes for purpose of recount and to declare the result afresh is allowed. In the facts and circumstances of the case, there will be no order as to costs.

32. Before we part with this judgment, we may point out that of late, it has been noticed that many applications for inclusion of names in the electoral roll of the constituency concerned, are made on the eve of the election. It need not be impressed that names of only such persons are to be included, who satisfy the Electoral Registration Officer that they are entitled to be included in the electoral roll. If proper verification and scrutiny is not done while revising the electoral roll, the process of revision may vitiate the sanctity and the purity of the election itself. Let a copy of this judgment be forwarded to Election Commission.

R.S.K. Appeal dismissed.