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JOSHBHAI CHUNIBHAI PATEL

v.

ANWAR BEG A. MIRZA

September 13, 1968

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[M. HIDAYATULLAH, C.J. AND G. K. MITTER, J.]

Representation of the People Act, 1951, s. 123(5)—Ingredients of the corrupt practice that must be proved—Prayer for general recount without pleadings on which it could rest—if can be granted.

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The appellant challenged the respondent's election to the Gujarat State Legislative Assembly in February 1967, on the ground, *inter alia*, that he had committed corrupt practice under s. 123(5) of the Representation of the People Act, 1951. It was alleged that a car was hired or procured by the returned candidate and on the date of the poll it was used for free conveyance of three ladies to the polling booth. The High Court dismissed the petition. In the appeal to this Court it was contended that an inference arose in the present case that the ladies must have been taken free to the polling booth and reliance was placed in this respect on certain findings given by the High Court. There was also a prayer that a general recount was wrongly disallowed by the High Court and that it should be ordered in the present appeal.

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HELD : Dismissing the appeal :

(i) S. 123(5) requires three things, (1) hiring or procuring of a vehicle; (2) by a candidate or his agent etc. and (3) for the free conveyance of an elector. [102 B-C]

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In the present case there was proof that the vehicles were procured; there was also proof that a particular vehicle was in fact used for the conveyance of the three lady voters to the polling booth; what was not proved was that there was free conveyance of the ladies in that vehicle. The burden of establishing that this fact was on the appellant-petitioner and it was not impossible of proof because the owner of the car or the driver or the ladies could have been examined to show that the ladies had travelled free in the vehicle. In the absence of this proof the ingredients of the section had not been established and there was therefore no room for interference with the High Court's decision though based on slightly different reasons. The High Court's finding that the ladies must have travelled free was a mere surmise because there was no evidence whatever on this part of the case. [100 H, 102 G, H]

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(2) A scrutiny of the pleadings showed that there was no plea on which the prayer for a recount could be rested though in the relief clause there was mention of a general recount. The pleas concerned the votes caste by impersonators and rejected votes and as these had already been considered, there was no room for a further count. [103 B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 788 of 1968.

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Appeal under section 116-A of the Representation of the People Act, 1951 from the judgment and order dated October 17, 18, 1967 of the Gujarat High Court in Election Petition No. 5 of 1967.

Bishan Narain and B. Datta, for the appellant,

S. V. Gupte, M. I. Patel, R. P. Kapur, M. N. Shroff for
I. N. Shroff, for the respondent.

The Judgment of the Court was delivered by

Hidayatullah, C.J. This is an appeal from the judgment dated 17/18 October, 1967 of the High Court of Gujarat in an election petition filed by the present appellant. The election petition was dismissed by the judgment under appeal.

The matter concerns the Petlad constituency in Kaira District from which election was to be held to the State Legislative Assembly Gujarat at the 4th General Election. The appellant was a candidate for the Swatantra Party and the respondent a candidate for the Congress Party. The poll was held on February 21, 1967 and the result of the election was declared on February 24, 1967. The appellant secured 23,795 votes and the respondent 23,981 votes. 1806 votes were declared invalid. The respondent was therefore declared elected to the seat.

The election petition set out a number of grounds on which the election of the returned candidate was challenged as void under the Representation of People Act. We are concerned in this appeal with only one such ground. There is also a prayer in the appeal that a general re-count was wrongly disallowed by the learned Judge who decided the election petition and that it should be ordered here. We shall come to the second ground in due course.

As regards the first ground, the contention was that a car No. GJH 108 was hired or procured by the returned candidate and on the day of poll, it was used for free conveyance of three ladies to the polling booth. In the election petition, the election petitioner had stated that the returned candidate had made extensive use of hired and procured vehicles for the purpose of free conveyance of voters to and from the various polling stations. Although another instance was cited in the election petition, no evidence was led to support that or any other instance of the user of this or other vehicle. The whole of the case therefore rested on the use of vehicle No. 108 and also its use on one occasion only, namely, when three lady voters were said to have been brought to the polling booth in it. According to the election petitioner, he was in the Sayagi Hospital compound wherein two polling booths Nos. 8 and 9 were situated. He was then accompanied by Suryakant Manilal Shah and Somabhai Chhotabhai Kachhia. At about 12.30 P.M., a taxi bearing No. GTG 9021 came to the gate of the hospital compound, and a lady got out of it. The election petitioner alleges that he immediately asked Suryakant Manilal Shah to request the Presiding Officer of

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A one of the booths to come out. Presiding Officer B. M. Bhatt came to the gate and saw the lady who had got out of the taxi. The lady had in her hand a voter's identity card with the congress symbol and her No. was Serial No. 535 of Electoral Unit 26/100 belonging to Ward No. 1 of Petlad. This part of the allegation in the election petition was not used as evidence of free conveyance of voters. This incident was recited as furnishing the immediate background of what followed. The allegation in regard to car No. 108 starts from this point. The allegation is that while the election petitioner was complaining to the Presiding Officer Bhatt about the other car, car No. 108 came to the gate of the compound and the petitioner along with his companion and Bhatt were standing there. Three ladies got out of this car bearing identity cards from the congress party and their numbers were 426, 424 and 386 of electoral unit 28/100. Bhatt then told the election petitioner that these voters would go to the other booth and that he was not concerned with that booth. The election petitioner says that he followed the three voters to the next booth and called out the presiding officer K. D. Trivedi and pointed out the three voters to him stating that they were brought by car No. 108. He asked him to verify this from Bhatt. The complaint of the election petitioner was then recorded by Trivedi and it appears from the evidence that he also questioned Bhatt who endorsed the statement of the election petitioner that he had seen them get out of the car.

E In support of this case witnesses were examined. The net result of the examination of these witnesses established the fact that the ladies came by this car and that a complaint followed. However no attempt was made to establish that these ladies had come in the car free. We need not traverse the entire evidence to establish the above conclusions which in our opinion, are quite clearly demonstrable from the evidence. There is evidence to show that the car did come, that the three ladies did get out of the same and went to polling booth No. 9 and also that they were holding identity cards issued by the Congress party. Presumably therefore they were brought in this car for voting on behalf of the Congress.

G Attempt was then made to establish connection between the returned candidate and this car. On this part of the case testimony of the returned candidate was extremely unsatisfactory. He first said that three cars were placed at his disposal by the congress party between January 15 and January 31, 1967. In another place he said that he had been given only two cars. Later he said that two of the cars were withdrawn from him and that after the withdrawal of the cars he had no other car from the congress party. He denied the use of the cars contrary to

the evidence of the purchase of petrol and also denied any connection between himself and one person by name H. I. Pathan, who had written requisition for petrol. It was however proved by cross-examination that this H. I. Pathan is probably one of his nephews, a fact which he denied also. It appears that before this car was used, the returned candidate opened a new account in the name of Mahendra Electric Company C/o Anwarbeg and petrol was bought for this car along with other cars right upto 21st February in the account of this Mahendra Electric Company and that was the returned candidate himself. Since the requisitions for petrol were issued by H. I. Pathan, the returned candidate was at great pains to deny any connection with him and even went to the length of denying the real names of his own nephews. However, this only proved that he had procured the car No. 108 from the Congress party or somebody else for his own use during the election propaganda and at the time of the poll. It also proved that he had purchased petrol not only previously but also on the day of poll because entries in respect of this car existed in the accounts of the petrol dealer's firm on 18, 19, 20 and 21 February. The evidence also proved that the three ladies did travel by this car on the date of poll and got out of it at the gate of the hospital compound where the polling booth was situated.

The question is whether all this evidence even taken in favour of the election petitioner goes to satisfy the requirement of the law under s. 123(5) of the Representation of the People Act. That section contains many ingredients and to them we shall come presently; one such ingredient is that the car must be used for the free conveyance of the voters to the poll. The learned Judge who heard the case gave a finding that the car was so used, that is to say, the three ladies were carried free to the booths in this car. There is no evidence to establish this. The owner of the car, the driver and the electors namely the three ladies were not examined and there is nothing to show whether they had travelled free or had paid for the privilege.

Mr. Bishan Narain argues in the alternative, firstly, that an inference arises in the present case that the ladies must have been taken free and he refers to the findings given by the High Court on this part of the case. Next, he argues that this is not the requirement of s. 123(5) and he interprets the section so as to save his case from the operation of that section.

As regards the finding of the High Court that the ladies must have travelled free, we can only say that it is a mere surmise because there is no evidence whatever on this part of the case. Mr. Bishan Narain stated that the best evidence could come from the returned candidate and that his client was not required to prove

- A a negative. In our opinion, the burden was upon the election petitioner to establish this fact, if it was a requirement of law. We do not think that it was an utter impossibility because the owner of the car, the driver or one of the ladies could have been questioned about it and something would have then come in evidence. Since no such attempt was made there is nothing on which we can say whether the ladies were brought free or on payment and regard being had to the strictness of the law on the subject of corrupt practice we must hold in favour of the returned candidate that the requirements of the section have not been met.

- C This brings us to the examination of s. 123(5) with a view to finding out what are its requirements. We have already indicated that in our opinion the election petitioner must prove in addition to the other ingredients of the section that the vehicle was used for free conveyance of voters which ingredient we have stated was not attempted to be established in the case. Section 123(5) of the Representation of People Act reads as follows :

- D “The hiring or procuring, whether on payment or otherwise, of any vehicle or vessel by a candidate or his agent or by any other person with the consent of a candidate or his election agent, or the use of such vehicle or vessel for the free conveyance of any elector (other than the candidate himself, the members of his family or his agent) to or from any polling station provided under section 25 or a place fixed under subsection (1) of section 29 for the poll :

- F Provided that the hiring of a vehicle or vessel by an elector or by several electors at their joint costs for the purpose of conveying him or them to and from any such polling station or place fixed for the poll shall not be deemed to be a corrupt practice under this clause if the vehicle or vessel so hired is a vehicle or vessel not propelled by mechanical power :

- G Provided further that the use of any public transport vehicle or vessel or any tramcar or railway carriage by any elector at his own cost for the purpose of going to or coming from any such polling station or place fixed for the poll shall not be deemed to be a corrupt practice under this clause.

- H *Explanation* : In this clause, the expression “vehicle” means any vehicle used or capable of being used for the purpose of road transport whether propelled by mechanical power or otherwise and whether used for drawing other vehicles or otherwise.”

This section defines one of the corrupt practices and it consists of the hiring and procuring whether on payment or otherwise of any vehicle. This hiring and procuring must be by a candidate or his agent or by any other person with the consent of the candidate or his election agent and the hiring according to the section must be for the free conveyance of any elector other than the candidate himself or members of his family or his agent and from any polling station. It will, therefore, appear that the section requires three things, (1) hiring or procuring of a vehicle; (2) by a candidate or his agent etc. and (3) for the free conveyance of an elector. It will be noticed that the section also speaks of the use but it speaks of the use of *such* vehicle which connects the two parts, namely, hiring or procuring of vehicle and the use. The requirement of the law therefore is that in addition to proving the hiring or procuring and the carriage of electors to and from any polling station, should also be proved that the electors used the vehicle free of cost to themselves. The contention of Mr. Bishan Narain that the requirement of free conveyance is not necessary is therefore not borne out by the words of the section. The two provisos also prove the same thing. The first proviso provides that it would not be a corrupt practice for any elector to hire a vehicle for himself or even a group of electors to join in hiring a vehicle and the second proviso lays down that the use of any public transport vehicle or vessel or any tramcar or railway carriage by any elector at his own cost is not a corrupt practice. In order words the electors, if they have to perform the journey by hired vehicle must pay for its hire themselves. They cannot be taken in a hired vehicle free of costs to themselves. In the same way if a procured vehicle is used, it must not be used for free conveyance of voters. The journey of the elector must be paid for by him. If a candidate hires or procures a vehicle for free conveyance of the electors that also is perhaps a corrupt practice but that aspect need not be considered here. The language seems capable of that interpretation though we express no final opinion.

In the present case there is proof that the vehicles were procured; whether they were supplied by the Congress party or were procured from private parties makes no difference. There is also proof that the vehicle numbered 108 was, in fact, used for the conveyance of three lady voters. What is not proved is that there was free conveyance of the ladies in that vehicle. Mr. Bishan Narain contends that this is very difficult of proof but as we stated earlier it is not impossible of proof because the owner of the car or the driver or the ladies could have been examined to show that the ladies had travelled free in the vehicle. This is not proved and therefore the ingredients of the section have not been established. In our opinion therefore there is no room for

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A interference although, our reasons are slightly different from those of the High Court.

B It was next contended that a general recount was demanded in the case and has been wrongly refused. We have scrutinized the pleadings on this point carefully and we find that no plea on which it could be rested was made although in the relief clause there is mention of a general recount. The pleas concerned the votes cast by impersonators and rejected votes. These have been considered already and therefore there is no room for further count. On the whole therefore we are of opinion that the judgment under appeal cannot be interfered with. The appeal fail and will be dismissed. In view however, of the prevarications C of the returned candidate which were not attempted to be explained by his learned counsel we are of opinion that we should not allow him any costs either here or in the High Court and we order accordingly.

R.K.P.S.

Appeal dismissed.