

DR. RAMESH YESHWANT PRABOO

v.

SHRI PRABHAKER KASHINATH KUNTE AND ORS.

DECEMBER 11, 1995

[J.S. VERMA, N.P. SINGH AND K. VENKATASWAMI, JJ.]

*Election Laws :*

*Representation of the people Act, 1951—Sections 116A, 100(1)(b), 123(3) & (3A),—Petition for setting aside the election on account of corrupt practices—Use of religion for soliciting votes by successful candidate and his agent—Appeal to vote or refrain from voting prohibited.*

*'Hindutva' Meaning of—Indicates way of life of Indian people—Not to be confined to describing people practicing Hindu religion.*

*Corrupt practice—All references to 'Hindutva' or 'Hinduisim', in speeches need not be corrupt practice—Speech to preserve own language, religion, culture etc. not forbidden by the Act—The type of reference and meaning sought to be conveyed in the speech to be considered before arriving at the decision.*

*Positive appeal—Appeal made on ground of candidates' religion.*

*Negative Appeal—Appeal to refrain from voting on ground of other candidates' religion.*

*Both positive and negative appeals prohibited under the Act—Inference that may lead to the conclusion of the existence of such appeals is sufficient—The manner in which common man understands the speech to be kept view.*

**The election of the Appellant, who was returned successful from Vile Parle constituency to the Maharashtra Assembly in 1987, was challenged by the respondent under Section 116A of the R.P. Act, alleging corrupt practice under Ss.123(3) & (3A), of the R.P. Act. It was pleaded that both the Appellant as well as his agent Mr. Bal Thackery not only appealed for votes on the basis of the candidate's own religion but also promoted or tended to arouse ill feelings between the people of different communities**

A and the election petitioner relied on certain speeches made during the election meetings.

B The High Court came to the finding that three public speeches of Mr. Thackery in the election meeting of the Appellant were appeals to vote for the Appellant in the name of his religion, and were also in the nature of arousing communal feelings. Thus the High Court upheld the charge of corrupt practice on the ground of S.100(1)(b) of the R.P. Act and set aside the election of the Appellant and also named Mr. Thackery in accordance with s.99 of the R.P. Act.

C Before this court the plea taken by the Appellants was, *inter-alia*, that s.123(3) & (3A) were constitutionally invalid and violative of Article 19(1)(a) of the Constitution, since the freedom of speech guaranteed in the said Article is absolute, the words 'decency' and 'morality' refer to sexual morality only, to get the protection of Article 19(2), the provisions of s.123(3) & (3A) have to be read as reasonable restriction, only a direct appeal on the ground of the candidate's religion which also has a tendency to affect public order will fall within the purview of Section 123(3) & (3A), *inter-alia* because the object of introducing the term 'his' in the substituted sub-Section (3) is only to restrict the scope to cases of direct appeal on the basis of the candidate's religion, a speech where religion is referred to but does not directly appeal to voters on the ground of religion is not hit by s.123(3) or (3A), that the speeches to 'Hindutva', which is a reference to Indian culture and not only to Hindu religion, the speeches were a criticism of the Congress party's attitude which was to favour the minorities against the Hindus.

F On behalf of Mr. Thackery, it was submitted that there was non-compliance with the requirements of s.99 since he was not informed of the precise charges against him nor he was supplied with the particulars. In general it was also pleaded that the election petition was lacking in material particulars and the particulars which were brought in at the stage of evidence were to be excluded, that the High Court has arrived at the decision based on mere impressions and had not Limited its enquiry to the legally admissible evidence.

H On behalf of the Respondent it was pointed out that the question of constitutional validity of s.123(3) & (3A) is already settled by *Jamuna Prasad Mukhariya And Others v. Lachhi Ram And Others*, [1955] 1 SCR

608. It was also pointed out that freedom of speech does not include the type of speeches given by Mr. Thackery at the election meetings, that both the substance and the main thrust of the speeches are to be examined to arrive at the conclusion whether there was an appeal in the name of religion and the term 'Hindutva' used in an election speech refers to the 'Hindu' religion, that it was not necessary that the speech must be direct though it was conceded that the word 'his' has significance but should not be held to restrict the meaning of the section. In fact one of the speeches was an appeal to voters to vote for the candidate because he was a Hindu and it also tended to promote enmity between the communities and therefore corrupt practice.

Dismissing the appeals, this Court

HELD : 1. All the three speeches of Bal Thackery amount to corrupt practice under sub-section (3), while the first speech is a corrupt practice also under sub-section (3A) of S123 of the R.P. Act. Since the appeal made to voters in these speeches was to vote for the Appellant on the ground of his religion as a Hindu and the appeal was made with the consent of the candidate, he is guilty of these corrupt practices. For the same reason, Bal Thackery also is guilty of these corrupt practices and, therefore, liable to be named in accordance with Section 99 of the R.P. Act of which due compliance has been made in the present case. There is no ambiguity in sub-section (3) and it clearly indicates the particular religion on the basis of which an appeal to vote or refrain from voting for any person is prohibited under sub-section (3). [419-G-H]

2.1. There can be no doubt that the word 'His' used in sub-section (3) must have significance and it cannot be ignored or equated with the word 'any' to bring within the net of sub-section (3) any appeal in which there is any reference to religion. The religion forming the basis of the appeal to vote or refrain from voting for any person, must be of that candidate for whom the appeal to vote or refrain from voting is made. This is clear from the plain reading of sub-section (3) and this is the only manner in which the word 'His' used therein can be constructed. [387-F-G]

2.2. When the appeal is to vote on the ground of 'his' religion for the furtherance of the prospects of the election of the candidate, that appeal is made on the basis of the religion of that candidate for whom the votes are solicited. On the other hand when the appeal is to refrain from voting for

**A** any person on the ground of 'his' religion for prejudicially affecting the election of any candidate, that appeal is based on the religion of the candidate whose election is sought to be prejudicially affected. [387-H, 388-A]

**B** 2.3. It is thus clear that for soliciting votes for a candidate, the appeal prohibited is that which is made on the ground of religion of the candidate for whom the votes are sought, and when the appeal is to refrain from voting for any candidate, the prohibition is against an appeal on the ground of the religion of that other candidate. The first is a positive appeal and the second is a negative appeal. [389-B-C]

**C** 2.4. The substance of the speech and the manner in which it is meant to be understood by the audience determines the nature, and not the camouflage by the artistic use of the language. For understanding the meaning and effect of the speech, the context has to be found in the speech itself and not outside it with reference to any other background unless the speech itself imports any earlier fact in the context of the speech. The **D** speech has also not be construed in the abstract or in the manner in which it would be construed after an academic debate. Care must be taken to remember that the public speeches during election campaign are ordinarily addressed to audience comprised of common men and therefore, the manner in which it would be understood by such an audience has to be kept **E** in view. [388-F-G]

**F** 3. An appeal of the kind forbidden by sub-section (3) based on the religion of a candidate, need not necessarily be prejudicial to public order and, therefore, the further element of likelihood of prejudice to the public order is unnecessary, on account of which it is not implicit in the provision. This is the meaning and the correct construction of sub-section (3) of S123. [389-D]

**G** 4.1. The clarification given in the speech of the Law Minister clearly shows that a speech for the protection of fundamental rights, preservation of own language, religion and culture, etc., are not forbidden by sub-section (3) of section 123. [392-A]

Parliamentary debates, referred to.

**H** 4.2. A speech with a secular stance alleging discrimination of any particular religion and promising removal of the imbalance cannot be treated as an appeal on the ground religion as its thrust is for promoting

secularism. In other words, mention of religion as such in an election speech is not forbidden by sub-section (3) so long as it does not amount to an appeal to vote for a candidate on the ground of his religion or to refrain from voting for any other candidate on the ground of his religion. [392-B-C] A

4.3. An election speech made in conformity with the fundamental right to freedom of religion guaranteed under Articles 25 to 30 of the Constitution, cannot be treated as anti-secular to be prohibited by sub-section (3) of section 123, unless it falls within the narrow net of the prohibition. It is obvious that a speech referring to religion during election campaign with a secular stance in conformity with the fundamental right to freedom of religion can be made without being hit by the prohibition contained in sub-section (3), if it does not contain an appeal to vote for any candidate because of his religion or to refrain from voting for any candidate because of his religion. [393-B-C] B  
C

4.4. When it is said that politics and religion do not mix, it merely means that the religion of a candidate cannot be used for gaining political mileage by seeking votes on the ground of the candidate's religion or alienating the electorate against another candidate on the ground of the other candidate's religion. It also means that the State has no religion and the State practises the policy of neutrality in the matter of religion. It obviously does not mean that even such permissible political speeches are forbidden. This the meaning and true scope of sub-section (3) of section 123 of the Act. [392-D-393-D] D  
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*Dr. M. Ismail Faruqui and Others Etc, Etc. v. Union of India and Others etc.*, [1994] 6 SCC 360 (Ayodhya case), referred to. F

5. In sub-section (3A), the element of prejudicial effect on public order is implicit. This is the logical inference to draw on proof of the constituent parts of sub-section (3A). Whether the act complained of falls within the net of sub-section (3A) is a question of fact in each case to be decided on the basis of the evidence led to prove the alleged act. [397-H] G

*Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra & Ors.*, [1995] Suppl. SCR 281, relied on.

6.1. The heads specified in clause (2) of Article 19 are several and H

A they are intended to cover the entire area within which the absolute freedom to say anything which the speaker may like would not extend, in keeping with the standards of a civilized society, the corresponding rights in others in an orderly society, and the constitutional scheme. The expression 'in the interests of' used in clause (2) of Article 19 indicates a wide amplitude of the permissible law which can be enacted to provide for reasonable restrictions on the exercise of this right under one of the heads specified therein, in conformity with the constitutional scheme. Two of the heads mentioned are decency and morality. Thus any law which imposes reasonable restrictions on the exercise of this right in the interests of decency and morality is also saved by clause (2) of Article 19. In view of the expression 'in the interest of' and the context of election campaign for a free and fair poll, the right to contest the election being statutory and subject to the provision of the statute, the words 'decency' and 'morality' do not require a narrow or pedantic meaning to be given to these words. The ordinary dictionary meaning of 'decency' indicates that the action must be in conformity with the current standards of behaviour or propriety, etc. [398-F-H, 399-A-C]

6.2. In a secular polity, the requirement of correct behaviour or propriety is that an appeal for votes should not be made on the ground of the candidate's religion which by itself is no index of the suitability of a candidate for membership of the House. Seeking votes at an election on the ground of the candidates' religion in a secular State, is against the norms of decency and propriety of the society. The saving in clause (2) of Article 19 permits the imposition of reasonable restrictions on the exercise of the right conferred by Article 19(1)(a) by making any law in the interests of decency and morality, and sub-section 3 of Section 123 of the R.P. Act has the protection of clause (2) of Article 19 under the head 'decency' therein. This conclusion is reached even if it is assumed that the provision is not saved merely as a condition subject to which the statutory right of contesting an election is available to the candidate. The fact that the scheme of separate electorates was rejected in framing the constitution and secularism is the creed adopted in the constitutional scheme, are relevant considerations to treat this as a reasonable restriction on the freedom of speech and expression, for maintaining the standard of behaviour required in conformity with the decency and propriety of the societal norms. Viewed in any manner, sub-section(3) of section 123 cannot be held to be unconstitutional. [399-C, F-H, 400-A-B]

*Jamuna Prasad Mukhariya and Others v. Lachhi Ram and Others.*, [1955] 1 SCR 608 and *Knuller (Publishing, Printing and Promotions) Ltd. and Others v. Director of Public Prosecutions.*, [1972] 2 ALL ER 898, referred to.

7.1 Mere use of the word 'Hindutva' or 'Hinduism' or mention of any other religion in an election speech does not bring it within the net of sub-section (3) and/or sub-section (3A) of section 123, unless the further elements indicated are also present in that speech. It is also necessary to see the meaning and purport of the speech and the manner in which it was likely to be understood by the audience to which the speech was addressed.

[400-G]

7.2. Ordinarily, Hindutva is understood as a way of life or a state of mind and it is not to be equated with, or understood as religious Hindu fundamentalism. The word 'Hindutva' is used and understood as a synonym of 'Indianisation' i.e., development of uniform culture by obliterating the differences between all the cultures co-existing in the country. Unless the context of a speech indicates a contrary meaning or use, in the abstract these terms are indicative more of a way of life of the Indian people and are not confined merely to describe person practicing the Hindu religion as a faith. Whether a particular speech in which reference is made to Hindutva and/or Hinduism falls within the prohibition under sub-section (3) or (3A) of section 123 is, therefore, a question of fact in each case. [407-G, 408-C, 411-A,H, 412-A]

*Sastri Yagnapurushadji and Others v Muldas Bhudardas Vaishya and Another*, [1966] 3 SCR 242; *Commr. of Wealth Tax. Madras & Ors. v. Late R. Sridharan*, by L. Rs. [1976] Supl. SCR 478; *Bhagwan Koer v. J.C. Bose & Ors.*, (1904) ILR 31 Cal. 11; *Dr. M. Ismail Faruqui and Ors. Etc. Etc. v. Union of India Etc.*, [1994] 6 SCC 360 (Ayodhya case); *Kultar Singh v. Mukhtiar Singh*, [1964] 7 SCR 790 and *Jagdev Singh Sidhanti v. Pratap Singh Daulta and Ors.*, [1964] 6 SCR 750.

'Gitarahasaya'- by B.G. Tilak, referred to.

7.3. Considering the terms 'Hinduism' or 'Hindutva' *per se* as depicting hostility, enmity or intolerance towards other religious faiths or professing communalism, proceeds from an improper appreciation and perception of the true meaning of these expressions. Misuse of these expressions to promote communalism cannot alter the true meaning of these of

**A** terms. The mischief resulting from the misuse of the terms by anyone in his speech has to be checked and not its permissible use. [411-B-C]

**B** 8. The noticee Bal Thackery had the same opportunity which the returned candidate Dr. Ramesh Yeshwant Prabhoo got as a respondent to the petition. The notice was given the opportunity to cross-examine any witness who had already been examined by the High Court and the witnesses who were considered to have given evidence against him, were also enumerated in the notice; and he was given an opportunity to call evidence in his defence and to be heard. The allegation against the noticee was in respect of the three speeches made by him, the particulars of which were given and the text of those speeches also was available to the noticee which he did not even deny. On these facts, there is no ground to allege non-compliance of section 99 of the R.P. Act. [415-B, D]

**D** 9. The appeal made to the voters by Bal Thackery in his aforesaid speeches was a clear appeal to the Hindu voters to vote for the Appellant because he is a Hindu. The clear import of the above extracts in each of the three speeches is to this effect. The first speech also makes derogatory reference to Muslims. The language used in the context, amount to an attempt to promote feelings of enmity or hatred between the Hindus and the Muslims on the ground of religion. The first speech therefore also constitutes the corrupt practice under sub-section (3A). The third speech also constitutes corrupt practice under sub-section (3). Also, the offending speeches in the present case discarded the cherished values of our rich cultural heritage and tended to erode the secular polity. [419-C, D, 420-D]

**F** CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2836 of 1989 etc.

From the Judgment and Order dated 7.4.89 of the Bombay High Court in E.P. No. 1 of 1988.

**G** D.P. Gupta, Solicitor General, Venugopal Reddy, B.A. Desai, Ashok H. Desai, , Ram Jethmalani, Rana Jois, A.M. Khanwilkar, Yatender Sharma, Rajiv Malhotra, V.D. Joshi, Ms. V.D. Khanna, M.P. Vashi, Pallav Shishodia, M.N. Shroff, Ms. Reema Bhandari, P. Parmeshwaran, R.P. Srivastava and Navin Prakash for the Appearing parties.

**H** The Judgment of the Court was delivered by

**J.S. VERMA, J.** Both these appeals are under Section 116A of the Representation of the People Act, 1951 (hereinafter referred to as "the Act/R.P. Act") against the judgment dated 7th April, 1989 of the Bombay High Court in Election Petition No. 1 of 1988 by which the election of Dr. Ramesh Yeshwant Praboo, the returned candidate from 38, Vile Parle Constituency to the Maharashtra State Legislative Assembly, held on 13th December, 1987, has been declared to be void on the ground under Section 100(1)(b) of the Act. The appellant has been found guilty of the corrupt practices prescribed by sub-section (3) and (3A) of Section 123 of the Act at the election, in that he and his agent Bal Thackeray with his consent appealed for votes on the ground of the returned candidate's religion and that they promoted or tended to promote feelings of enmity and hatred between different classes of the citizens of India on the grounds of religion and community. Consequently, Bal Thackeray, after a notice issued under section 99 of the Act to him, has also been named for commission of these corrupt practice. Civil Appeal No. 2836 of 1989 is by the returned candidate Dr. Ramesh Yeshwant Praboo and Civil Appeal No. 2835 of 1989 is by Bal Thackeray against that judgment.

The said election was held on 13th December, 1987 and the result was declared on 14th December, 1987, at which Dr. Ramesh Yeshwant Praboo was declared to be duly elected. The charge of these corrupt practices is based on three public speeches delivered by Bal Thackeray : on 29.11.1987 at Parle (opposite Shiv Sena Shaka No. 84), on 9.12.1987 at Khar-Danda near Shankar Temple, and on 10.12.1987 at Jaltaran Maidan, Vile Parle (East). The public speech given on 9.12.1987 has been held to amount to the corrupt practice under sub-section (3) of Section 123, while public speeches delivered on 29.11.1987 and 10.12.1987 have been held to be corrupt practices under sub-sections (3) and (3A) of Section 123 of the Act. The relevant pleading relating to these corrupt practices is contained in paras 6 and 8 of the election petition. Sub-paras (a) to (d) of para 6 relate to first speech, sub-para (e) of para 6 relates to second speech and sub-para (f) of para 6 relates to third speech. Para 8 of the election petition then says that returned candidate indulged in the corrupt practices provided by sub-sections (3) and (3A) of Section 123 of the act and, therefore, his election is void.

After the election petitioner closed his evidence, the returned candidate Dr. Praboo examined only himself in rebuttal. After close of the

A evidence of the purities and hearing arguments of both sides, the High Court ordered issue of notice under Section 99 of the Act to Bal Thackeray who filed an affidavit in reply to the notice. The election petitioner and his three witnesses were recalled for cross-examination by counsel for the noticee, Bal Thackeray. The noticee did not examine himself or any other witness in rebuttal. The decision of the High Court is based on this material.

Dr. Prabhoo was not set up as candidate of the Shiv Sena which was then not a recognised political party for purposes of the Legislative Assembly elections and, therefore, Dr. Prabhoo's candidature was shown as "Shiv Sena - Independent". Bal Thackeray is the top leader of Shiv Sena and he participated in the election campaign of Dr. Prabhoo as the main speaker in his capacity as the leader of Shiv Sena. The status of Bal Thackeray as the top leader of Shiv Sena has never been disputed. The gist of election petitioner's case which has been found proved by the High Court is that the three public speeches of Bal Thackeray in the election campaign of Dr. Prabhoo were all in very intemperate language and incendiary in nature which were appeals to the voters to vote for Dr. Prabhoo because of his religion, i.e., he being a Hindu, and the speeches also promoted or tended to promote enmity and hatred between different classes of the citizens of India on the ground of religion. The High Court has held this charge of the alleged corrupt practice proved against the returned candidate Dr. Prabhoo and Bal Thackeray. Accordingly, the election of the returned candidate has been declared to be void on the ground contained in Section 100(1)(b) of the Act, and Bal Thackeray has been named in accordance with Section 99 of the Act. Hence these appeals by them.

The averments in para 6 of the election petition alleging the commission of corrupt practice within the meaning of Section 123 of the Act are in sub-paras (a) to (f) which are as under :

G "(a) The Petitioner states that respondent No. 1 during his election campaign indulged in corrupt practices by appealing himself, or by his election agents, or by his supporters with his consent to vote him and refrain from voting other candidates on the grounds of religion. The whole tenor of election propaganda of the respondent No. 1 was that he is a candidate of Hindu and

Hindus should vote him alone. The details of this appeal are given in the later part of this petition. A

(b) The respondent No. 1, his election agents and his supporters with the consent of the candidate respondent No. 1. also indulged in corrupt practice by promoting and by attempting to promote feelings of enmity and hatred between different classes of citizens of India on grounds of religion, community and language. The examples of this corrupt practice are also listed in the later part of this petition. B

(c) The campaign for the election of respondent No. 1 was headed by Shri Balasaheb Thackeray, the leader of the Shiv Sena, who had put up respondent No. 1 in this election. Shri Thackeray addressed several meetings and also issued press statements during the course of the election in question. Out of these meeting Shri Thackeray spoke on 29.11.1987 at a meeting held at Shiv Sena Shaka No 84 at Vile Parle, which took place from 9 P.M. to 12 midnight. In this meeting Shri Balasaheb Thackeray, Suryakant Mahadik Pramod Navalkar, Ramesh Mehta, Madhukar Sarpotdar and the candidate respondent No. 1 Dr. Ramesh Prabhoo himself were also present. Shri Thackeray uttered the following words during this meeting. The words are quoted in Marathi and they are followed by the English translation. C D E

Translation : "We are fighting this election for the protection of Hinduism. Therefore, we do not care for the votes of the Muslims. This country belongs to Hindus and will remain so." F

Since the petitioner was all throughout in the constituency for his election campaign, he came to know about the said meeting having been held and attended by Shri Bal Thackeray. Subsequently, he also came to know about the speeches made in the meeting from his friends and active workers of the Party. The petitioner has reliably learnt that the police reporters also attended the meeting and they have taken down the report of the speeches made. The petitioner craves leave to call for the record of the speeches from the Police Department and to prove the point by examining the police reporters who have taken down the speeches. The petitioner craves leave to rely upon the said police report in the custody of H

A the Police. A report regarding the said meeting and the speeches appeared in the newspaper "Mumbai Sakal" (A Marathi daily) dated 1.12.1987 with the photographs under the title "Hindu Dev-Devtavareel Teeka Sahan Karnar Nahi Thackeray" (We will not tolerate the criticism of Hindu gods and goddesses - Thackeray).

B From the said photograph it is clear that respondent No. 1 was also present in the said meeting. Thus all the utterances regarding the speeches made by Bal Thackeray to appeal to voters in the name of Hindu religion are with the consent and connivance of the first respondent. The same meeting was also reported in 'Sanj Tarun Bharat' (an evening daily) dated 30.11.87 with the photograph of Shri Thackeray, respondent No. 1 and others on the dias. The said photograph further shows that a banner was put up on the dias which reads as under :

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"Garva Say Kaho (OM) Ham Hindu Hai"

D The said meeting was also reported in 'Sandhyakal', another Marathi daily, on 1.12.87. Hereto annexed and marked Exhibit 'A' and 'A1' is a copy of the report appearing in the 'Mumbai Sakal' with english translation, hereto annexed and marked Exhibit 'B' and 'B-1' is the original report appearing in 'Sanj Tarun Bharat' with english translation and hereto annexed and marked Exhibit 'C' and 'C-1' is the said report appearing in 'Sandhyakal' with english translation.

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(d) The petitioner says that a report regarding the said meeting also appeared in the 'Urdu Times', an Urdu daily published from Bombay in its issue dated 1.12.87. The petitioner does not know how to read and write Urdu. However, he got the said report translated. In the said 'Urdu Times' the report appeared with the title 'Shiv Sena ko Musalmano ke votonki zarurat nahin hai' (Shiv Sena did not need the votes of Muslims). A true English translation of the said news item is annexed hereto and marked Exhibit 'D' and 'D-1' with a zerox copy of the report in Urdu.

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(e) Again on 9.12.87 there was another election meeting which took place from 9 a.m. to about 12 midnight at Khar-Danda, near Shankar Temple. This meeting was addressed by Shri Bal Thackeray, respondent No. 1, Harishchandra Dattaji Salvi (a Shiv Sena

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leader) and Shambhoo Maharaj, a religious leader from Gujarat. A  
In the said meeting Shri Bal Thackeray, while addressing the  
audience stated as under :

Translation : "Hinduism will triumph in this election and we must  
become hon'ble recipients of this victory to ward off the danger  
on Hinduism, elect Ramesh Prabhoo to join with Chhagan Bhujbal B  
who is already there. You will find Hindu temples underneath if  
all the Mosques are dug out. Anybody who stands against the  
Hindus should be showed or worshipped with shoes. A candidate  
by name prabhoo should be led to victory in the name of religion."

The petitioner says that the proceedings of the said meeting were  
recorded by the police. Newspaper reports regarding the meeting  
also appeared. The petitioner will crave leave to and rely upon the  
records of the police and also the press report giving the version  
of the said meeting appearing in various newspapers. C

(f) The petitioner says that on 10.12.87 a meeting was held from  
9 p.m. to about 12 midnight at Vile Parle (East) at Shahaji Raje  
Marg. This was addressed by S/Shri Bal Thackeray, Shambhoo  
Maharaj, Ramesh Mehta, Rishi Kapoor, Jitendra Madhukar Joshi  
and Ramesh Prabhoo, respondent No. 1. In this meeting Shri  
Thackeray uttered the following words while addressing the meet- E  
ing :

Translation : "We have come with the ideology of Hinduism. Shiv  
Sena will Implement this ideology. Though this country belongs to  
Hindus, Ram and Krishna are insulted. (They) valued the Muslim  
votes more than your votes; we do not want Muslim Votes. A snake  
like Shahabuddin is sitting in the Janata Party, man like Nihal  
Ahmed is also in Janata Party. So the residents of Vile Parle should  
bury this party (Janata Party)." F

The above utterances in these three meetings are the examples  
of promoting the feelings of enmity between different classes of  
citizens of India. The sole purpose in doing so and making the  
appeal was to canvas votes in favour of the first represent on the  
ground of religion and make it appear to the voters that respondent  
No. 1 was the only person who could respondent the Hindu H

- A community. The effect of the said speeches was to promote the feelings of enmity and hatred between Hindus and non-Hindus on the ground of religion, race, caste, community etc. As such the petitioner and most of the respondents from 1 to 13 are Hindus, having full faith in the Hindu religion. The main ground of objection on the way of canvassing for votes by respondent No. 1 and his supporters was to bring the element of religion into politics endangering the very foundation of the Constitution of India, viz. secularism. The petitioner honestly believes that it is one thing to follow one's own religion according to his own conviction and another thing to appeal to the voters to vote in the name of the religion."

- Reliance was placed by the election petitioner on certain news items wherein the public speeches were published and also on certain reports alleged to have been made by some police officers who reported the making of the speeches raising some controversy relating to sufficiency of pleadings and use of material for proving the contents of the speeches in excess of the exact words pleaded in the election petition. Details of this controversy would be mentioned later while considering that point. However, it may be mentioned that the extent to which there is specific pleading and the returned candidate himself admitted the contents of the public speeches can safely be considered subject to the objection raised of the alleged legal infirmities including want of a valid notice under Section 99 of the Act to the noticee Bal Thackeray. More details of the evidence would be mentioned at the appropriate stage.

- F Broadly stated, the contentions of Shri Ram Jethmalani, learned counsel for the appellants in these appeals are : (1) Sub-sections (3) and (3A) of Section 123 of the Act are constitutionally invalid being violative of guarantee of free speech in Article 19(1)(a) of the Constitution; (2) To save both these provisions from constitutional invalidity, they must be read as reasonable restrictions in the interest of public order to get the protection of Article 19(2) of the Constitution. In other words, unless the speech is prejudicial to the maintenance of public order, it cannot fall within the net of either sub-section (3) or sub-section (3A) of Section 123 of the Act; (3) In Sub-section (3) of Section 123, the emphasis is on the word "his" preceding the word "religion" and its significance must be understood in the light of the restricted scope of the provision indicated by the Union

Law Minister during the Parliamentary debates to explain the object of introduction of the word "his" in the provision. In other words, only a direct appeal for votes on the ground of "his" religion subject to its tendency to prejudice the maintenance of public order is contended to be the limited scope of sub-section (3) of Section 123; (4) A speech in which there be a reference to religion but no direct appeal for votes on the ground of his religion, does not come within the net of sub-section (3) of Section 123; (5) The public speeches in question did not amount to appeal for votes on the ground of his religion and the substance and main thrust thereof was "Hindustava" which means the Indian culture and not merely the Hindu religion; (6) The public speeches criticized the anti-secular stance of the Congress Party in practicing discrimination against Hindus and giving undue favour to the minorities which is not an appeal for votes on the ground of Hindu religion; (7) on behalf of the noticee Bal Thackeray, it was further contended that there was no compliance of the requirements of Section 99 of the Act, inasmuch as the notice contemplated by the provision was not given and the noticee was never informed of the precise charge against him. It was submitted that the notice given was not in conformity with the law and particulars required to be given by the court were never given, the High Court having merely asked the petitioner to indicate the particulars of the charge of the corrupt practice; and (8) that the pleadings in the election petition are deficient being devoid of the material particulars and, therefore, the material brought in at the stage of evidence and relied on to prove the charge of corrupt practice has to be excluded from consideration. Learned counsel for the appellants also made the grievance that the High Court had decided that election petition mainly on the basis of the general impressions and Vague assertions made by the election petitioner instead of confining the decision to the precise pleadings and the legally admissible evidence examined in the light of the true meaning and scope of sub-sections (3) and (3A) of Section 123 of the Act.

In reply, Shri Ashok Desai, learned counsel for the respondent refuted these contentions. He submitted that the question of constitutional validity of the provisions is no longer *res integra* being concluded by the decision of the Constitution Bench in *Jamuna Prasad Mukhariya and Others v. Lachhi Ram and Others*, [1955] 1 SCR 608. Alternatively, he contended that the freedom of speech guaranteed in the Constitution does not extend to giving speeches of the kind given by Bal Thackeray and at any rate, these provisions impose reasonable restrictions on the freedom of speech which

A are saved by Article 19(2) of the Constitution. Shri Desai also submitted that the substance and main thrust of the speech, not merely the form, has to be seen in its context to determine if it amounts to an appeal for votes on the ground of 'his' religion, and such appeal need not necessarily be only direct. Learned counsel submitted that each one of the speeches in question was highly incendiary containing appeal to vote for Dr. Ramesh Prabhoo because he is a Hindu; and it also tended to promote enmity and hatred between Hindus and Muslims. According to him, each one of the speech amounted to the corrupt practice both under sub-sections (3) and (3A) of Section 123 of the Act.

C *Meaning of sub-sections (3) and (3A) of Section 123 of the R.P. Act.*

Sub-sections (3) and (3A) of Section 123 of the R.P. Act are as under:

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

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E (3) The appeal by a candidate or his agent or by any other 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 :

F Provided that no symbol allotted under this Act to a candidate shall be deemed to be a religious symbol or a national symbol for the purpose of this clause.

G (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.

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The submission of Shri Ram Jethmalani, learned counsel for the appellants is that the appeal to vote or refrain from voting for any person on the ground of 'his' religion, etc. for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate, means a direct appeal to vote or refrain from voting on the ground of 'his' religion, etc.; and the appeal must also be provocative in nature to adversely affect public order. The further element of adverse effect on public order, it is urged, is implicit in the provision to save it from constitutional invalidity, which argument is considered separately. Shri Jethmalani laid emphasis on the word 'his' which was inserted by Act 40 of 1961 w.e.f. 20.9.1961 when the existing sub-section (3) was substituted for the old sub-section (3). Shri Jethmalani contended that the object of insertion of the word 'his' in the newly substituted sub-section (3) was to restrict the meaning of the provision and confine it only to a direct appeal based on 'his' religion. Learned counsel placed strong reliance on the statement of the Law Minister during the debates in the Parliament to support this submission. In reply, Shri Ashok Desai, learned counsel for the respondent contended that the word 'his' no doubt has significance, but its use does not confine the meaning of sub-section (3) only to a direct appeal on the ground of 'his' religion, etc. and extends to an appeal of which the main thrust in the context is no the religion of the candidate. Shri Desai submitted that an unduly restricted meaning cannot be given to sub-section (3) since the object of the provision is to prohibit appeal for votes during the election on the ground of religion of the candidate.

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There can be no doubt that the word 'his' used in sub-section (3) must have significance and it cannot be ignored or equated with the word 'any' to bring within the net of sub-section (3) any appeal in which there is any reference to religion. The religion forming the basis of the appeal to vote or refrain from voting for any person, must be of that candidate for whom the appeal to vote or refrain from voting is made. This is clear from the plain language of sub-section (3) and this is the only manner in which the word 'his' used therein can be construed. The expression 'the appeal ..... to vote or refrain from voting for any person on the ground of his religion, ..... for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate' lead clearly to this conclusion. When the appeal is to vote on the ground of 'his'

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- A religion for the furtherance of the prospects of the election of that candidate, that appeal is made on the basis of the religion of the candidate for whom votes are solicited. On the other hand when the appeal is to refrain from voting for any person on the ground of 'his' religion for prejudicially affecting the election of any candidate, that appeal is based on the religion of the candidate whose election is sought to be prejudicially affected. It is thus clear that for soliciting votes for a candidate, the appeal prohibited is that which is made on the ground of religion of the candidate for whom the votes are sought; and when the appeal is to refrain from voting for any candidate, the prohibition is against an appeal on the ground of the religion of that other candidate. The first is a positive appeal and the second a negative appeal. There is no ambiguity in sub-section (3) and it clearly indicates the particular religion on the basis of which an appeal to vote or refrain from voting for any person is prohibited under sub-section (3).

- The argument that such an appeal must be a direct appeal, such as 'Vote for A because he is a Hindu' or 'Do not vote for B because he is a Christian', and that no other appeal leading to that conclusion is forbidden, does not appeal to reason. What is forbidden by sub-section (3) is an appeal of this kind and, therefore, any appeal which amounts to or leads to this inference must necessarily come within the prohibition in sub-section (3). Whether a particular appeal is of this kind, is a question of fact in each case. Where the words used in the appeal are clear and unambiguous amounting to a direct appeal, the exercise of construing the speech is not needed. However, where a reasonable construction of the appeal leads to that conclusion, the result must be the same. The substance of the speech and the manner in which it is meant to be understood by the audience determines its nature, and not the camouflage by an artistic use of the language. For understanding the meaning and effect of the speech, the context has to be found in the speech itself and not outside it with reference to any other background unless the speech itself imports any earlier fact in the context of that speech. The speech has also not to be construed in the abstract or in the manner in which it would be construed after an academic debate. Care must be taken to remember that the public speeches during election campaign ordinarily are addressed to audience comprised of common men and, therefore, the manner in which it would be understood by such an audience has to be kept in view.

- H We are unable to accept the submission of shri Jethmalani that a

further element of prejudicial effect on public order, is implicit in sub-section (3). We do not find anything in the language of the provision to read this further element into it. Sub-section (3) in substance forbids appeal for votes for any candidate on the ground of 'his' religion and appeal to refrain from voting for any other candidate on the ground of the religion of that other candidate. Obviously the purpose of enacting the provision is to ensure that no candidate at an election gets votes only because of his religion and no candidate is denied any votes on the ground of his religion. This is in keeping with the secular character of the Indian polity and rejection of the scheme of separate electorates based on religion in our constitutional scheme. An appeal of the kind forbidden by sub-section (3) based on the religion of a candidate, need not necessarily be prejudicial to public order and, therefore, the further element of likelihood of prejudice to public order is unnecessary, on account of which it is not implicit in the provision. This, according to us, is the meaning and the correct construction of sub-section (3). The question of constitutional validity of the provision on this meaning is considered later.

Reference may now made to the Parliamentary debates in which the reason ascribed by the Law Minister Shri A.K. Sen for adding the word 'his' in sub-section (3) and its purpose was stated, thus -

"Shri A.K. Sen : *I added the word 'his' in the Select Committee in order to make quite clear as to what was the mischief which was sought to be prevented under this provision.*"

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"*Shri A.K. Sen : The apprehension was expressed if one's right was going to be curbed by this section. If such a right was going to be curbed by the section, I would have been against such an amendment, because after all, it is the right of a person to propagate his own language, his own particular culture and various other matters. But that does not mean villifying another language or creating enmity between communities.*"

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"*Shri A.K. Sen : .....*"

I am pained to hear Shri Hynniewta giving expression to an

A apprehension, which to me seems entirely baseless. That apprehension is to the effect that clause 23 will deprive him of his right to propagate his language or preserve his language, which cannot be taken away from him as he himself has quoted the relevant article of the Constitution. *If that right is taken away by the Bill, it will be struck down as contravening article 19 and the section will not be given effect to by any court.* Fortunately, this country is still governed by the rule of law and the courts of law have the last say in these matters."

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C "Shri A.K. Sen : That is a different matter. With due respect to the hon. member, he has not really appreciated the rationale of the Supreme Court's decision. With regard to election matters, Parliament is free to enact such legislation as it thinks best and Chapter III does not come in. That is the decision of the Supreme Court. *But in the guise of framing an electoral law, no fundamental right of the citizen can be taken away. That is what I am saying. The right to preserve one's language cannot be taken away by an election law. That is as clear as daylight.*"

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E "Shri A.K. Sen : You cannot make it an election issue say, 'Do not vote for him. He is a Bengali' or 'Do not vote for him. He is a Khasi'. I made it unequivocally clear that it is the purpose and design of this House and of the country to ensure that. *No man shall appeal only because he speaks a particular language and should get voted for that reason; or no man shall appeal against a particular person to the electorate solely because that opponent of his speaks a particular language.*"

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G "Shri A.K. Sen : They are entitled to do so. The Constitution gives them the right to do so. *But we are on a very narrow point, whether we shall extend the right to a person, to a voter, to say : vote for me because I speak Hindi, I Speak Gharwali, or I speak Nepali or I speak Khasi; or in the alternative, do not vote for my opponent because he is a man who speaks this particular language, his own*

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*language. It is on that sole narrow point that prohibition is sought to be made.*

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*But we are not here on the aesthetics of language of the philosophy of language; nor are we here to debate the fundamental rights of a citizen to preserve his own language and culture. Fortunately, that is guaranteed to every man and woman in this country as it not elsewhere. ...."*

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*"Shri A.K. Sen ...."*

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*But the problem is, are we going to allow a man to go to the electorate and ask for votes because he happens to speak a particular language or ask the electorate to refrain from voting for a particular person merely on the ground of his speaking a particular language or following a particular religion and so on ? If not, we have to support this. The preservation of the minority's rights and so on is a different and a wider question."*

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*"Shri A.K. Sen : ..... But, if you say that Bengali language in this area is being suppressed or the schools are being closed, as Shri Hynniewta was saying, because they bore a particular name, then, you are speaking not only to fight in an election but you are also really seeking to protect your fundamental rights, to preserve your own language and culture. That is a different matter.*

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*But, if you say. 'I am a Bengali, you are all Bengalis, vote for me', or 'I am an Assamese and so vote for me because you are Assamese speaking men', I think, the entire House will deplore that as a hopeless form of election propaganda. And, no progressive party will run an election on that line. Similarly, on the ground of religion. In the olden days, what speeches we used to hear in Muslim League gatherings! They were purely appeals on the ground of religion. So, the issue is too narrow and not a wide issue in which the life and death of minorities are involved as Shri Hynniewta sought to make out. It is not at all in question. ...."*

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(emphasis supplied)

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- A The clarification given in the speech of the Law Minister clearly shows that a speech for the protection of fundamental rights, preservation of own language, religion and culture, etc. are not forbidden by sub-section (3) of Section 123, and the limit is narrow to the extent indicated.
- B It cannot be doubted that a speech with a secular stance alleging discrimination against any particular religion and promising removal of the imbalance cannot be treated as an appeal on the ground of religion as its thrust is for promoting secularism. Instances given in the speech of discrimination against any religion causing the imbalance in the professed goal of secularism, the allegation being against any individual or any political party, cannot be called an appeal on the ground of religion forbidden by sub-section (3). In other words, mention of religion as such in an election speech is not forbidden by sub-section (3) so long as it does not amount to an appeal to vote for a candidate on the ground of his religion or to refrain from voting for any other candidate on the ground of his religion.
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- D When it is said that politics and religion do not mix, it merely means that the religion of a candidate cannot be used for gaining political mileage seeking votee on the ground of the candidate's religion or alienating the electorate against another candidate on the ground of the other candidate's religion. It also means that the State has not religion and the State practises the policy of neutrality in the matter of religion.
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In *Dr. M. Ismail Faruqui and Others etc. etc. v. Union of India and Others etc.*, [1994] 6 SCC 360 (Ayodhya case), the Constitution Bench, after a detailed discussion, summarised the true concept of secularism under the Indian Constitution as under :

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- G "It is clear from the constitutional scheme that it guarantees equality in the matter of religion to all individuals and groups irrespective of their faith emphasising that there is no religion of the State itself. The Preamble of the Constitution read in particular with Articles 25 to 28 emphasises this aspect and indicates that it is in this manner the concept of secularism embodied in the constitutional scheme as a creed adopted by the Indian people has to be understood while examining the constitutional validity of any legislation on the touchstone of the Constitution. The concept of secularism is one facet of the right to equality woven as the central
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golden thread in the fabric depicting the pattern of the scheme in our Constitution." A

(at page 403)

It cannot be doubted that an election speech made in conformity with the fundamental right to freedom of religion guarantee under Articles 25 to 30 of the Constitution, cannot be treated as anti-secular to be prohibited by sub-section (3) of section 123, unless it falls within the narrow net of the prohibition indicated earlier. It is obvious that a speech referring to religion during election campaign with a secular stance in conformity with the fundamental right to freedom of religion can be made without being hit by the prohibition contained in sub-section (3), if it does not contain an appeal to vote for any candidate because of his religion or to refrain from voting for any candidate because of his religion. When it is said that politics and religion do not mix, it obviously not mean that even such permissible political speeches are forbidden. This is the meaning and true scope of sub-section (3) of Section 123 of the Act. B  
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We would now consider the meaning of sub-section (3A) of Section 123. This sub-section also was inserted along with the substituted sub-section (3) by Act 40 of 1961 w.e.f. 20.9.1961. The meaning of this sub-section is not much in controversy. Sub-section (3A) is similar to section 153-A of the Indian Penal Code. In sub-section (3A), the expression used is "the promotion of, or attempt to promote, feelings of enmity or hatred" as against the expression "Whoever ..... promotes or attempts to promote ..... disharmony or feelings of enmity, hatred or ill-will ..... " in Section 153-A, I.P.C. The expression 'feelings of enmity or hatred' is common in both the provisions but the additional words in Section 153-A, I.P.C. are 'disharmony ..... or ill-will'. The difference in the plain language of the two provisions indicates that mere promotion of disharmony or ill-will between different groups of people is an offence under Section 153-A, I.P.C. while under sub-section (3A) of Section 123 of the R.P. Act, it is only the promotion of or attempt to promote feelings of enmity or hatred, which are stronger words, that is forbidden in the election campaign. E  
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The provision is made with the object of curbing the tendency to promote or attempt to promote communal, linguistic or any other factional enmity or hatred to prevent the divisive tendencies. The provision in the I.P.C. as well as in the R.P. Act for this purpose was made by amendment H

A at the same time. The amendment in the R.P. Act followed amendments made in the Indian Penal Code to this effect in a bid to curb any tendency to resort to divisive means to achieve success at the polls on the ground of religion or narrow communal or linguistic affiliations. Any such attempt during the election is viewed with disfavour under the law and is made a corrupt practice under sub-section (3A) of Section 123.

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 C Shri Jethmalani is right that in sub-section (3A), the element of prejudicial effect on public order is implicit. Such divisive tendencies promoting enmity or hatred between different classes of citizens of India tend to create public unrest and disturb public order. This is a logical inference to draw on proof of the constituent parts of sub-section (3A). The meaning of sub-section (3A) is not seriously disputed between the parties and, therefore, it does not require any further discussion. However, whether the act complained of falls within the net of sub-section (3A) is a question of fact in each case to be decided on the basis of the evidence led to prove the alleged act.

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 E The decision in *Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra & Ors.*, [1995] Suppl. SCR 281, lends assurance to the correctness of the construction made by us of these provisions. The returned candidate Bukhari was the candidate of Muslim League while the defeated candidate Shauket Chagla was the Congress candidate at the election. Both were Muslims. The returned candidate Bukhari in his appeal to the voters said that Chagla was not true to his religion while he himself was a true Muslim and that Chagla was neither a good Hindu nor a true Muslim. The clear implication of the appeal was that Chagla was not true to his religion whereas Bukhari was, and, therefore, the voters should prefer Bukhari. In short, the appeal for votes was made on the ground that Bukhari was a staunch believer of the muslim religion as against Chagla who did not. It was this clear appeal based on the ground of the candidate's religion which was held to constitute the corrupt practices defined by sub-sections (3) and (3A) of Section 123 of the R.P. Act. For this purpose, the true ambit and scope of these provisions was considered and indicated as under : -

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 H "We propose to indicate, at this stage, what mischief the provisions were designed to suppress 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. A

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. B C D

*It seems to us that Section 123, sub s.(2), (3) and (3A) were enacted so as to eliminate, from the electoral 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 our own religions, 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 group 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 interpreted in the context in which the statements or acts complained of were made.* E F G

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*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 H*

A *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.*

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B ..... 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.*

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D 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 bigotry and intolerance.*

E *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 Jawharlal Nehru once said, 'self discipline'. For such a spirit to prevail, candidates at elections have to try to persuade electors by showing them the light of reason and not by inflaming their blind and disruptive passions. Heresy hunting propaganda or 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 permitted here, it would injure 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*

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*even during elections. Indeed, such prohibitions are necessary in the interests of elementary public peace and order.* A

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*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 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."* B C

(emphasis supplied)

The meaning of sub-sections (3) and (3A) of Section 123 was understood and indicated in this decision, in the above manner.

*Constitutional Validity of subsection (3) and (3A) of Section 123.* D

The next question now relates to the constitutional validity of these provisions on the meaning ascribed to them.

Sub-section (3A) of Section 123 is undoubtedly a provision made in the interests of public order or incitement to an offence because the promotion or attempt to promote feelings of enmity or hatred between different classes of the citizens of India on any of the grounds specified therein, apart from creating divisive tendency, would also be prejudicial to the maintenance of public order and may amount to incitement to commission of offences. The freedom of speech and expression guaranteed to all citizens under Article 19(1)(a), which is the basis of the constitutional challenge to this provision, is subject to clause (2) of Article 19 which permits the making of any law imposing reasonable restrictions on the exercise of this right in the interests of public order or incitement to an offence. For this reason, no further attempt was made to press the argument of challenge to the constitutional validity of sub-section (3A) on the construction we have made of that provision. E F G

The question now is of the constitutional validity of sub-section (3) of Section 123. We have already rejected the argument that the element of prejudicial effect on public order is implicit also in sub-section (3) as it is H

**A** in sub-section (3A). According to Shri Ram Jethmalani, unless this element also is read into sub-section (3), it is violative of Article 19(1)(a) inasmuch as clause (2) of Article 19 does not save its validity under any of the other heads specified therein.

**B** We have construed sub-section (3) of Section 123 as a restriction only to the extent that votes cannot be sought for a candidate on the ground of his religion, etc. and similarly there can be no appeal to refrain from voting for any person on the same ground. In other words, an appeal to vote for a candidate or not to vote for him on the ground of his religion, etc. is the restriction imposed by sub-section (3). This restriction is in the law enacted to provide for the conduct of elections, the qualifications and disqualifications for membership of the Houses, the corrupt practices and other offences at or in connection with such elections. The right to contest the election is given by the statute subject to the conditions prescribed therein. The restriction is limited only to the appeal for votes to a candidate during the election period and not to the freedom of speech and expression in general or the freedom to profess, practice and propagate religion unconnected with the election campaign.

**C** It is true, as argued by Shri Jethmalani, that the freedom of speech and expression guaranteed to all citizens under Article 19(1)(a) is absolute subject to the reasonable restriction imposed by any law saved by clause (2) of Article 19, under of the heads specified therein. The heads specified in clause (2) of Article 19 are, therefore, several and they are intended to cover the entire area within which the absolute freedom to say anything which the speaker may like would not extend, in keeping with the standards of a civilized society, the corresponding right in others in an orderly society, and the constitutional scheme.

**D** The expression "in the interests of" used in clause (2) of Article 19 indicates a wide amplitude of the permissible law which can be enacted to provide for reasonable restrictions on the exercise of this right under one of the heads specified therein, in conformity with the constitutional scheme. Two of the heads mentioned are : decency or morality. Thus any law which imposes reasonable restrictions on the exercise of this right in the interests of decency or morality is also saved by clause (2) of Article 19. Shri Jethmalani contended that the words 'decency or morality' relate to sexual morality alone. In view of the expression "in the interests of" and the context

of election campaign for a free and fair poll, the right to contest the election being statutory and subject to the provisions of the statute, the words 'decency or morality' do not require a narrow or pedantic meaning to be given to these words. The dictionary meaning of 'decency' is correct and tasteful standards of behaviour as generally accepted; conformity with current standards of behaviour or propriety; avoidance of obscenity; and the requirements of correct behaviour" (The Oxford Encyclopedic English Dictionary); "conformity to the prevailing standards of propriety, morality modesty, etc. : and the quality of being decent" (collins English Dictionary).

Thus, the ordinary dictionary meaning of 'decency' indicates that the action must be in conformity with the current standards of behaviour or propriety, etc. In a secular polity, the requirement of correct behaviour or propriety is that an appeal for votes should not be made on the ground of the candidate's religion which by itself is no index of the suitability of a candidate for membership of the House. In *Knüller (Publishing, Printing and Promotions) Ltd. and Others v. Director of Public Prosecutions*, [1972] 2 All ER 898, the meaning of 'indecent' was indicated as under :

"..... Indecency is not confined to sexual indecency; indeed it is difficult to find any limit short of saying that it includes anything which an ordinary decent man or woman would find to be shocking, disgusting and revolting ...."

(at page 905)

Thus, seeking votes at an election on the ground of the candidate's religion in a secular State, is against the norms of decency and propriety of the society.

In our opinion, the saving in clause (2) of Article 19 permits the imposition of reasonable restrictions on the exercise of the right conferred by Article 19(1)(a) by making any law in the interests of decency or morality; and sub-section (3) of Section 123 of the R.P. Act, as construed by us, has the protection of clause (2) of Article 19 under the head 'decency' therein. This conclusion is reached by us even if it is assumed that the provision is not saved merely as a condition subject to which the statutory right of contesting an election is available to the candidate. The fact that the scheme of separate electorates was rejected in framing the Constitution and secularism is the creed adopted in the constitutional

- A scheme, are relevant considerations to treat this as a reasonable restriction on the freedom of speech and expression, for maintaining the standard of behaviour required in conformity with the decency and propriety of the societal norms. Viewed at in any manner, sub-section (3) of Section 123 cannot be held to be unconstitutional. This view is also in accord with the nature of right to contest an election, as understood in *Jamuna Prasad Mukhariya and Others v. Lachhi Ram and Others*, [1955] 1 SCR 608.

The argument assailing the constitutional validity of sub-sections (3) and/or (3A) Section 123 is rejected.

C *Meaning of 'Hindutva' and 'Hinduism'*

The next contention relates to the meaning of 'Hindutva' and 'Hinduism' and the effect of the use of these expressions in the election speeches.

- D We have already indicated the meaning of sub-section (3) of Section 123 of the R.P. Act and the limit of its operation. It may be said straightaway that any speech wherein these expressions are used, irrespective of their meaning, cannot by itself fall within the ambit of sub-section (3) of Section 123, unless the speech can be construed as an appeal to vote for a candidate on the ground that he is a Hindu or to refrain from voting for a candidate on the ground of his religion, i.e., he not being a Hindu.
- E We have also indicated that mere reference to any religion in an election speech does not bring it within the net of sub-section (3) and/or sub-section (3A) of Section 123, since reference can be made to any religion in the context of secularism or to criticise any political party for practising discrimination against any religious group or generally for preservation of the Indian culture. In short, mere use of the word 'Hindutva' or 'Hinduism' or mention of any other religion in an election speech does not bring it within the net of sub-section (3) and/or sub-section (3A) of Section 123, unless the further elements indicated are also present in that speech. It is also necessary to see the meaning and purpose of the speech and the manner in which it was likely to be understood by the audience to which the speech was addressed. These words are not to be construed in the abstract, when used in an election speech.

- H Both sides referred copiously to the meaning of the words 'Hindutva' and with reference to several writings. Shri Jethmalani referred to them for

the purpose of indicating the several meanings of these words and to emphasise that the word 'Hindutva' relates to Indian culture based on the geographical division known as Hindustan, i.e., India. On the other hand, Shri Ashok Desai emphasised that the term 'Hindutva' used in election speeches is an emphasis on Hindu religion bearing no relation to the fact that India is also known as Hindustan, and the term can relate to Indian culture.

The Constitution Bench in *Sastri Yagnapurushadji and Others v. Muldas Bhudardas Vaishya and Another*, [1966] 3 SCR 242 held thus :

"Who are Hindus and what are the broad features of Hindu Religion, that must be the first part of our enquiry in dealing with the present controversy between the parties. *The word historical and etymological genesis of the word "Hindu" has given rise to a controversy amongst indologists; but the view generally accepted by scholars appears to be that the word "Hindu" is derived from the river Sindhu otherwise known as Indus which flows from the Punjab.* "That part of the great Aryan race", say Monier Williams, "which immigrated from Central Asia, through the mountain passes into India, settled first in the districts near the river Sindhu (now called the Indus). The Persians pronounced this word Hindu and named their Aryan brethren Hindus. The Greeks, who probably gained their first ideas of India from the Persians, dropped the hard aspirate, and called the Hindus "Indoi" ("Hinduism" by Monier Williams, p. 1).

The Encyclopedia of Religion and Ethics, Vol. VI, has described "Hinduism" as the title applied to that form of religion which prevails among the vast majority of the present population of the Indian Empire (p.686). As Dr. Radhakrishnan has observed; "The Hindu civilization is so called, since its original founders or earliest followers occupied the territory drained by the Sindhu (the Indus) river system corresponding to the North West Frontier Province and the Punjab. This is recorded in the Rig Veda, the oldest of the vedas, the Hindu scriptures which give their name to this period Indian history. *The people on the Indian side of the Sindhu were called Hindu by the Persian and the later western invaders*" ("The Hindu View of Life" by Dr. Radhakrishnan, p. 12).

A *That is the genesis of the word "Hindu".*

*When we think of the Hindu religion, we find it difficult. If not impossible, to define Hindu religion or even adequately describe it. Unlike other religions in the world, the Hindu religion does not claim any one prophet; it does not worship any one God; it does not subscribe to any one dogma; it does not believe in any one philosophic concept; it does not follow any one set of religious rites or performances; in fact, it does not appear to satisfy the narrow traditional features of any religion or creed. It may broadly be described as a way of life and nothing more.*

C ..... *The term 'Hindu', according to Dr. Radhakrishnan, had originally a territorial and not a credal significance. It implied residence in a well-defined geographical area. Aboriginal tribes, savage and half-civilized people, the cultured Dravidians and the Vedic Aryans were all Hindus as they were the sons of the same mother. The Hindu thinkers reckoned with the striking fact that the men and women dwelling in India belonged to different communities, worshipped different gods, and practised different rites (Kurma Purana) (Ibid p. 12).*

E Monier Williams has observed that "it must be borne in mind that Hinduism is far more than a mere form of theism resting on Brahmanism. It presents for our investigation a complex congeries of creeds and doctrines which in its gradual accumulation may be compared to the gathering together of the mighty volume of the Ganges, swollen by a continual influx of tributary rivers and rivulets, spreading itself over an ever-increasing area of country and finally resolving itself into an intricate Delta of tortuous streams and jungly marshes.....*The Hindu religion is a reflection of the composite character of the Hindus, who are not one people but many. It is based on the idea of universal receptivity. It has ever aimed at accommodating itself to circumstances, and has carried on the process of adaptation through more than three thousand years. It has first borne with and then, so to speak, swallowed, digested, and assimilated something from all creeds.*" ("Religious Thought & Life in India" by Monier Williams, p. 57).

H *We have already indicated that the usual tests which can be*

*applied in relation to any recognised religion or religious creed in the world turn out to be inadequate in dealing with the problem of Hindu religion.* Normally, any recognised religion or religious creed subscribes to a body of set philosophic concepts and theological beliefs. Does this test apply to the Hindu religion ? In answering this question, we would base ourselves mainly on the exposition of the problem by Dr. Radhakrishnan in his work on Indian philosophy. ("Indian Philosophy by Dr. Radhakrishnan, Vol. I. pp. 22-23). Unlike other countries, India can claim that philosophy in ancient India was not an auxiliary to any other science or art, but always held a prominent position of independence. .... "In all the fleeting centuries of history", says Dr. Radhakrishnan, "in all the vicissitudes through which India has passed, a certain marked identity is visible. It has held fast to certain psychological traits which constitute its special heritage, and they will be the characteristic marks of the Indian people so long as they are privileged to have a separate existence". *The history of Indian thought emphatically brings out the fact that the development of Hindu religion has always been inspired by an endless quest of the mind for truth based on the consciousness that truth has many facets. Truth is one, but wise men describe it differently. (..) The Indian mind has, consistently through the ages, been exercised over the problem of the nature of godhead the problem that faces the spirit at the end of life, and the interrelation between the individual and the universal soul. "If we can abstract from the variety of opinion", says Dr. Radhakrishnan, "and observed the general spirit of Indian thought, we shall find that it has a disposition to interpret life and nature in the way of monistic idealism, though this tendency is so plastic, living and manifold that it takes many forms and expresses itself in even mutually hostile teachings". (..)*

..... *Naturally enough, it was realised by Hindu religion from the very beginning of its career that truth was many-sided and different views contained different aspects of truth which no one could fully express. This knowledge inevitably bred a spirit of tolerance and willingness to understand and appreciate the opponent's point of view. That is how "the several views set forth in India in regard to the vital philosophic concepts are considered to be the branches of the self-same tree. The short cuts and blind alleys are somehow*

A reconciled with the main road of advance to the truth." (..) *When we consider this broad sweep of the Hindu philosophic concepts, it would be realised that under Hindu philosophy, there is no scope for ex-communicating any notion or principle as heretical and rejecting it as such.*

B xxx xxx xxx

C *The development of Hindu religion and philosophy shows that from time to time saints and religious reformers attempted to remove from the Hindu thought and practices elements of corruption and superstition and that led to the formation of different sects. Buddha started Buddhism; Mahavir founded Jainism; Basava became the founder of Lingayat religion, Dnyaneshwar and Tukaram initiated the Var-kari cult; Guru Nanak inspired Sikhism; Dayananda founded Arya Samaj, and Chaitanya began Bhakti cult; and as a result of the teachings of Ramakrishna and Vivekananda, Hindu religion flowered into its most attractive, progressive and dynamic form. If we study the teachings of these saints and religious reformers, we would notice an amount of divergence in their respective views; but underneath that divergence, there is a kind of subtle indescribable unity which keeps them within the sweep of the broad and progressive Hindu religion.*

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F ..... It is somewhat remarkable that this broad sweep of Hindu religion has been eloquently described by Toynbee. Says Toynbee: "When we pass from the plane of social practice to the plane of intellectual outlook, Hinduism too comes out well by comparison with the religions and ideologies of the South-West Asian group. In contrast to these Hinduism has the same outlook as the pre-Christian and pre-Muslim religions and philosophies of the Western half of the old world. Like them, *Hinduism takes it for granted that there is more than one valid approach to truth and to salvation and that these different approaches are not only compatible with each other, but are complementary*" ("The Present-Day Experiment in Western Civilisation" by Toynbee, pp. 48-49).

H *The Constitution-makers were fully conscious of this broad and*

*comprehensive character of Hindu religion; and so, while guaranteeing the fundamental right to freedom of religion, Explanation II to Art. 25 has made it clear that in sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly."*

(emphasis supplied)  
(from pages 259-266)

In a later Constitution Bench decision in *Commr. of Wealth Tax, Madras & Ors. v. Late R. Sridharan by L. Rs.*, [1976] Supp. SCR 478, the meaning of the term 'Hinduism' as commonly understood is stated thus :

"..... *It is a matter of common knowledge, that Hinduism embraces within self so many diverse forms of beliefs, faiths, practices and worship that it is difficult to define the term 'Hindu' with precision.*

The historical and etymological genesis of the word "Hindu" has been succinctly explained by Gajendragadkar, C.J. in *Shastri Yagnapurushdasji & Ors. v. Muldas Bhundardas Vaishya & Anr.*, A.I.R. (1966) S.C. 1119.

In Unabridged Edition of Webster's Third New International Dictionary of the English language, *the term 'Hinduism' has been defined as meaning "a complex body of social, cultural and religious beliefs and practices evolved in and largely confined to the Indian subcontinent and marked by a caste system, an outlook tending to view all forms and theories as aspects of one eternal being and truth, a belief in ahimsa, karma, dharma, sansara and moksha, and the practice of the way of works, the way of knowledge, or the way of devotion as the means of release from the bound of rebirths; the way of life and form of thought of a Hindu".*

*In Encyclopaedia Britannica (15th Edition), the term 'Hinduism' has been defined as meaning "the civilization of Hindus (originally, the inhabitants of the land of the Indus River). It properly denotes the Indian civilization of approximately the last 2,000 years, which*

A gradually evolved from Vedism, the religion of the ancient Indo-European who settled in India in the last centuries of the 2nd millennium BC. *Because it integrates a large variety of heterogeneous elements, Hinduism constitutes a very complex but largely continuous whole, and since it covers the whole of life, it has religious, social, economic, literary, and artistic aspects.* As a religion, Hinduism is an utterly diverse conglomerate of doctrines, cults, and way of life .....

B *In principle, Hinduism incorporates all forms of belief and worship without necessitating the selection or elimination of any. The Hindu is inclined to revere the divine in every manifestation, whatever it may be, and is doctrinally tolerant, leaving others - including both*

C *Hindus and non-Hindus - whatever creed and worship practices suit them best. A Hindu may embrace a non-Hindu religion without ceasing to be a Hindu, and since the Hindu is disposed to think synthetically and to regard other forms of worship, strange gods, and divergent doctrines as inadequate rather than wrong or objectionable, he tends to believe that the highest divine powers complement each other for the well-being of the world and mankind.* Few religious ideas are considered to be finally irreconcilable. The core of religion does not even depend on the existence or non-existence of God or on whether there is one god or many. *Since religious truth is said to transcend all verbal definition, it is not conceived in dogmatic terms. Hinduism is, then both a civilization and a conglomerate of religions, with neither a beginning, a founder, nor a central authority, hierarchy, or organization. Every attempt at a specific definition of Hinduism has proved unsatisfactory in one way or another, the more so because the finest Indian scholars of Hinduism, including Hindus themselves, have emphasized different aspects of the whole".*

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In his celebrated treatise "Gitarahasaya", B.G. Tilak has given the following broad description of the Hindu religion :

G "Acceptance of the Vedas with reverence; recognition of the fact that the means or ways of salvation or diverse; and realisation of the truth that the number of gods to be worshipped is large, that indeed is the distinguishing feature of Hindu religion".

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In *Bhagwan Koer v. J.C. Bose & Ors.*, (1904) ILR 31 Cal. 11, it was held that Hindu religion is marvellously catholic and elastic. Its theology is marked by eclecticism and tolerance and almost unlimited freedom of private worship. ....

This being the scope and nature of the religion, it is not strange that it holds within its fold men of divergent views and traditions which have very little in common except a vague faith in what may be called the fundamentals of the Hindu religion."

(emphasis supplied)  
(at pages 481-482)

These Constitution Bench decisions, after a detailed discussion, indicate that no precise meaning can be ascribed to the terms 'Hindu', 'Hindutva' and 'Hinduism'; and no meaning in the abstract can confine it to the narrow limits of religion alone, excluding the content of Indian culture and heritage. It is also indicated that the term 'Hindutva' is related more to the way of life of the people in the sub-continent. It is difficult to appreciate how in the face of these decisions the term 'Hindutva' or 'Hinduism' *per se*, in the abstract, can be assumed to mean and be equated with narrow fundamentalist Hindu religious bigotry, or be construed to fall within the prohibition in sub-sections (3) and/or (3A) of Section 123 of the R.P. Act.

Bharucha, J. in *Dr. M. Ismail Faruqui and Ors. etc. etc. v. Union of India & Ors. Etc.*, [1994] 6 SCC 360, (Ayodhya case), in the separate opinion for himself and Ahmadi, J. (as he then was), observed as under :

"..... Hinduism is a tolerant faith. It is that tolerance that has enabled Islam, Christianity, Zoroastrianism, Judaism, Buddhism, Jainism and Sikhism to find shelter and support upon this land....."

(at page 442)

Ordinarily, Hindutva is understood as a way of life of a state of mind and it is not be equated with, or understood as religious Hindu fundamentalism. In "Indian Muslims - The Need For A Positive Outlook" by Maulana Wahiduddin Khan, (1994), it is said:

The strategy worked out to solve the minorities problem was,

A although differently worded, that of Hindutva or Indianisation. This strategy, briefly stated, aims at developing a uniform culture by obliterating the differences between all of the cultures coexisting in the country. This was felt to be the way to communal harmony and national unity. It was thought that this would put an end once and for all to the minorities problem.

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(at page 19)

C The above opinion indicates that the word 'Hindutva' is used and understood as a synonym of 'Indianisation', i.e., development of uniform culture by obliterating the differences between all the cultures co-existing in the country.

D In *Kultar Singh v. Mukhtiar Singh*, [1964] 7 SCR 790, the Constitution Bench construed the meaning of sub-section (3) of Section 123 prior to its amendment. The question there was whether a poster contained an appeal to voters to vote for the candidate on the ground of his religion; and the meaning of the word 'Panth' in the poster was significant for the purpose. It was held as under :

E "It is true that a corrupt practice under s.123(3) can be committed by a candidate by appealing to the voters to vote for him on the ground of his religion even though his rival candidate may belong to the same religion. If, for instance, a Sikh candidate were to appeal to the voters to vote for him, because he was a Sikh and add that his rival candidate, though a Sikh in name, was not true to the religious tenets of Sikhism or was a heretic and as such, outside the pale of the Sikh religion, that would amount to a corrupt practice under s. 123(3), and so we cannot uphold the contention that s.123(3) is inapplicable because the appellant and the respondent are Sikhs. ....

G The corrupt practice as prescribed by s. 123(3) undoubtedly constitutes a very healthy and salutary provision which is intended to serve the cause of secular democracy in this country. In order that the democratic process should thrive and succeed, it is of utmost importance that our elections to Parliament and the different legislative bodies must be free from the unhealthy influence of appeals to religion, race, caste, community, or language. If these

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considerations are allowed any sway in election campaigns, they would vitiate the secular atmosphere of democratic life, and so, s. 123(3) wisely provides a check on this undesirable development by providing that an appeal to any of these factors made in furtherance of the candidature of any candidate as therein prescribed would constitute a corrupt practice and would render the election of the said candidate void.

In considering the question as to whether the distribution of the impugned poster by the appellant constitutes corrupt practice under s. 123(3), there is one point which has to be borne in mind. The appellant had been adopted as its candidate by the Akali Dal party. *This Party is recognised as a political party by the Election Commission notwithstanding the fact that all of its members are only Sikhs. It is well-known that there are several parties in this country which sub-scribe to different political and economic ideologies, but the membership of them is either confined to, or predominantly held by, members of particular communities or religions. So long as law does not prohibit the formation of such parties and in fact recognises them for the purpose of election and parliamentary life, it would be necessary to remember that an appeal made by candidates of such parties for votes may, if successful, lead to their election and in an indirect way, may conceivably be influenced by considerations of religion, race, caste, community or language. This infirmity cannot perhaps be avoided so long as parties are allowed to function and are recognised, though their composition may be predominantly based on membership of particular communities or religion. That is why we think, in considering the question as to whether a particular appeal made by a candidate falls within the mischief of s. 123(3) courts should not be astute to read into the words used in the appeal anything more than can be attributed to them on its fair and reasonable construction.*

That takes us to the question of construing the impugned poster. The principles which have to be applied in construing such a document are well-settled. *The document must be read as a whole and its purport and effect determined in a fair, objective and reasonable manner. In reading such documents, it would be unrealistic to ignore the fact that when election meetings are held and appeals*

A *are made by candidates of opposing political parties, the atmosphere is usually surcharged with partisan feelings and emotions and the use of hyperboles or exaggerated language, or the adoption of metaphors, and the extravagance of expression in attacking one another, are all a part of the game, and so, when the question about the effect of speeches delivered or pamphlets distributed at election meetings is argued in the cold atmosphere of a judicial chamber, some allowance must be made and the impugned speeches or pamphlets must be construed in that light.* In doing so, however, it would be unreasonable to ignore the question as to what the effect of the said speech or pamphlet would be on the mind of the ordinary voter who attends such meetings and reads the pamphlets or hears the speeches. It is in the light of these well-established principles that we must now turn to the impugned pamphlet."

(emphasis supplied)  
(at pages 793-795)

D The test applied in the decision was to construe the meaning of the word 'Panth' not in the abstract but in the context of its use. The conclusion reached was that the word 'Panth' used in the poster did not mean Sikh religion and, therefore, the appeal to the voters was not to vote for the candidate because of his religion. Referring to an earlier decision in *Jagdev Singh Sidhanti v. Pratap Singh Daulta and Ors.*, [1964] 6 SCR 750, it was reiterated as under :

F "..... political issues which form the subject-matter of controversies at election meetings may indirectly and incidentally introduce considerations of language or religion, but in deciding the question as to whether corrupt practice has been committed under s.123(3), care must be taken to consider the impugned speech or appeal carefully and always in the light of the relevant political controversy. ...."

G (at page 799)

H Thus, it cannot be doubted, particularly in view of the Constitution Bench decisions of this Court that the words 'Hinduism' or 'Hindutva' are not necessarily to be understood and construed narrowly, confined only to the strict Hindu religious practices unrelated to the culture and ethos of

the people of India, depicting the way of life of the Indian people. Unless the context of a speech indicates a contrary meaning or use, in the abstract these terms are indicative more of a way of life of the Indian people and are not confined merely to describe persons practising the Hindu religion as a faith. A

Considering the terms 'Hinduism' or 'Hindutva' *per-se* as depicting hostility, enmity or intolerance towards other religious faiths or professing communalism, proceeds from an improper appreciation and perception of the true meaning of these expressions emerging from the detailed discussion in earlier authorities of this Court. Misuse of these expressions to promote communalism cannot alter the true meaning of these terms. The mischief resulting from the misuse of the terms by anyone in his speech has to be checked and not its permissible use. It is indeed very unfortunate, if in spite of the Liberal and tolerant features of 'Hinduism' recognised in judicial decision, these terms are misused by anyone during the elections to gain any unfair political advantage. Fundamentalism of any colour or kind must be curbed with a heavy hand to preserve and promote the secular creed of the nation. Any misuse of these terms must, therefore, be dealt with strictly. B C D

It is, therefore, a fallacy and an error of law to proceed on the assumption that any reference to Hindutva or Hinduism in a speech makes it automatically a speech based on the Hindu religion as opposed to the other religions or that the use of words 'Hindutva' or 'Hinduism' *per-se* depict an attitude hostile to all persons practising any religion other than the Hindu religion. It is the kind of use made of these words and the meaning sought to be conveyed in the speech which has to be seen and unless such a construction leads to the conclusion that these words were used to appeal for votes for a Hindu candidate on the ground that he is a Hindu or not to vote for a candidate because he is not a Hindu, the mere fact that these words are used in the speech would not bring it within the prohibition of sub-section (3) or (3A) of Section 123. It may well be, that these words are used in a speech to promote secularism or to emphasise the way of life of the Indian people and the Indian culture or ethos, or to criticise the policy of any political party as discriminatory or intolerant. The parliamentary debates, including the clarifications made by the Law Minister quoted earlier, also bring out this difference between the prohibited and permissible speech in this context. Whether a particular speech in E F G H

A which reference is made to Hindutva and/or Hinduism falls within the prohibition under sub-section (3) or (3A) of Section 123 is, therefore, a question of fact in each case.

B This is the correct premise in our view on which all such matters are to be examined. The fallacy is in the assumption that a speech in which reference is made to Hindutva or Hinduism must be a speech on the ground of Hindu religion so that if the candidate for whom the speech is made happens to be a Hindu, it must necessarily amount to a corrupt practice under sub-section (3) and/or sub-section (3A) of Section 123 of the R.P. Act. As indicated, there is no such presumption permissible in law  
C contrary to the several Constitution Bench decisions referred herein.

*Non-compliance of Section 99 of the R.P. Act.*

D The contention that the notice given to Bal Thackeray under Section 99 of the R.P. Act was not in conformity with that provision and that there is non-compliance of the requirements of Section 99, has no merit. The notice was given after the entire evidence had been recorded and the learned trial judge formed the *prima facie* opinion that the corrupt practices alleged to have been committed under sub-sections (3) and (3A) of Section 123 appeared to have been proved and Bal Thackeray was likely  
E to be named along with the returned candidate to be guilty of those corrupt practices. The notice given was accompanied by copies of pleadings and the entire evidence adduced at the trial for proving those corrupt practices. The notice clearly stated that the noticee had the opportunity to cross-examine such witnesses as had already been examined and of calling evidence  
F in his defence and of being heard. The noticee raised objection to the notice alleging that it was vague, which was rejected by the High Court. That order was challenged by a special leave petition in this Court which was dismissed granting liberty to the noticee to apply in the High Court for the precise particulars claimed by him. Ultimately certain portions from the material on record were indicated by the petitioner on such a direction  
G being given by the High Court. In view of the direction of this Court in the special leave petition, it would have been more appropriate for the High Court to indicate the precise portions. However, there is no prejudice caused, inasmuch as the portions were indicated by the election petitioner on the High Court's direction. The election petitioner Prabhakar Kashinath  
H Kunte (PW-1) was called for cross-examination on behalf of the noticee.

The noticee was given full opportunity to cross-examine the witnesses already examined and to adduce evidence in his defence and to argue his case in the High Court. The noticee Bal Thackeray did not choose to enter the witness box and, therefore, the material present has to be examined without any denial by the noticee as a witness in the case. A

There is no dispute that no material which was not given to the noticee Bal Thackeray was used against him. We have already indicated that the finding of proof of the corrupt practices alleged in the election petition is based on the three speeches of Bal Thackeray which are not denied either by Dr. Ramesh Prabhoo or by Bal Thackeray. Copy of the text of those speeches is also undisputed. All this was furnished to the noticee Bal Thackeray. It is difficult to visualise what prejudice could be caused to the noticee on these facts and how there could be any non-compliance of Section 99 of the R.P. Act in this situation. B C

In order to examine the contention of non-compliance of Section 99, it is necessary to examine the requirements of that provision. Section 99 reads as under : D

"99. Other orders to be made by the High Court. - (1) At the time of making an order under section 98 the High Court shall also make an order - E

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

(i) a finding whether any corrupt practice has or has not been proved to have been committed at the election, and the nature of that corrupt practice; and F

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

(b) fixing the total amount of costs payable and specifying the persons by and to whom costs shall be paid : G

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

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

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

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

C Sub-section (1) requires that at the time of making an order under Section 98, the High Court shall also make an order recording the names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt practice and the nature of that practice. In other words, while deciding the election petition at the conclusion of the trial and making an order under Section 98 disposing of the election petition in one of the ways specified therein, the High Court is required to record the names of all persons guilty of any corrupt practice which has been proved at the trial. Proviso to sub-section (1) then prescribes that a person who is not a party to the petition shall not be so named unless the condition specified in the proviso is fulfilled. The requirement of the proviso is only in respect of a person who is not a party to the petition and is to be named so that he too has the same opportunity which was available to a party to the petition. The requirement specified is of a notice to appear and show cause why he should not be named and if he appears in pursuance of the notice, he has to be given an opportunity of cross-examining any witness who has already been examined by the High Court and has given evidence against him and also the opportunity of calling evidence in his defence and of being heard. In short, the opportunity which a party to the petition had at the trial to defend against the allegation of corrupt practice is to be given by such a notice to that person of defending himself if he was not already a party to the petition. In other words, the noticee has to be equated with a party to the petition for this purpose and is to be given the same opportunity which he would get if he was made a party to the petition.

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This is the pragmatic test to be applied for deciding the question of compliance of Section 99 of the R.P. Act. If the noticee had the opportunity which he would have got as a party to the petition, then there can be no case of non-compliance of Section 99. The opportunity required to be given

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by the proviso to sub-section (1) of section 99 is the same and not more than that available to a party to the petition to defend himself against the charge of corrupt practice. Applying the above test, there can be no doubt that there is no non-compliance of Section 99 in the present case. The noticee Bal Thackeray had the same opportunity which the returned candidate Dr. Ramesh Yeshwant Prabhoo got as a respondent to the petition. The noticee was given the opportunity to cross-examine any witness who had already been examined by the High Court and the witnesses who were considered to have given evidence against him, were also enumerated in the notice; and he was given an opportunity to call evidence in his defence and to be heard.

In this situation, the grievance made that specific portions of the material which formed the record at the trial was not precisely indicated to the noticee has no merit. It was clear from the pleading that the allegation against the noticee was in respect of the three speeches made by him, the particulars of which were given and the text of those speeches also was available to the noticee which he did not even deny. On these facts, there is no ground to allege non-compliance of Section 99 of the R.P. Act. This contention on behalf of the noticee Bal Thackeray is, therefore, rejected and the objection raised in the appeal of Bal Thackeray of non-compliance of Section 99 of the R.P. Act has no merit.

We would now proceed to examine the facts of this case.

### *Speeches*

It is in the light of the above discussion and the meaning of sub-sections (3) and (3A) of Section 123 that the effect of the alleged offending speeches has to be examined. The three speeches were made on 29.11.1987, 9.12.1987 and 10.12.87. The High Court has held that the speeches of 29.11.1987 and 10.12.1987 amount to corrupt practices under sub-sections (3) and (3A) of Section 123, while the speech of 9.12.1987 is a corrupt practice only under sub-section (3) thereof. The returned candidate Dr. Ramesh Yeshwant Prabhoo was present in all the three meetings in which these speeches were given by Bal Thackeray. The consent of Dr. Prabhoo for these speeches is implied from his conduct including his personal presence in all the three meetings.

Certain extracts from the alleged speeches of Bal Thackeray, trans-

A lated in english, are expressly pleaded in the election petition, as under :

*From Speech of 29.11.1987*

"We are fighting this election for the protection of Hinduism. Therefore, we do not care for the votes of the Muslims. This country belongs to Hindus and will remain so."

B

*From Speech of 9.12.1987*

"Hinduism will triumph in this election and we must become hon'ble recipients of this victory to ward off the danger on Hinduism, elect Ramesh Prabhoo to join with Chhagan Bhujbal who is already there. You will find Hindu temples underneath if all the mosques are dug out. Anybody who stands against the Hindus should be showed or worshipped with shoes. A candidate by name Prabhoo should be led to victory in the name of religion."

C

D

*From Speech of 10.12.1987*

"We have gone with the ideology of Hinduism. Shiv Sena will implement this ideology. Though this country belongs to Hindus, Ram and Krishna are insulted. (They) valued the Muslim Votes more than your votes : we do not want the Muslim votes. A snake like Shahabuddin is sitting in the Janata Party, man like Nihal Ahmed is also in Janata Party. So the residents of Vile Parle should bury this party (Janata Party)."

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It has been pleaded in the election petition that the above utterances in the three meetings are examples to show that the appeal to voters emphasised that Dr. Ramesh Prabhoo was the only person who could represent the Hindu community and, therefore, the voters should vote for Ramesh Prabhoo in the name of religion. The full text of the speeches were adduced in evidence and the contents thereof are not disputed. It may be mentioned that a notice under Section 99 of the R.P. Act was issued to Bal Thackeray who merely filed an affidavit but did not enter the witness box. The true import and impact of these speeches has, therefore, to be adjudged in the light of the evidence including the state of Dr. Ramesh Yeshwant Prabhoo without the version in evidence of Bal Thackeray.

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The case was argued even before us on a demurer treating the

contents of the speeches as reproduced in the full text in evidence, of which the specific portions pleaded in the election petition are extracts. The question is : Whether these speeches amount to corrupt practices under sub-section (3) and/or (3A) of Section 123 as held by the High Court ?

We may now quote certain extracts from the three speeches of Bal Thackeray on which reliance has been placed in particular by Shri Ashok Desai to support the judgment of the High Court that they constitute the said corrupt practices. These are :

*First speech on 29.11.1987*

"All my Hindu brothers, sisters and mothers gathered here. .... Today Dr. Prabhu has been put up as candidate from your Parle. .... But here one cannot do anything at anytime about the snake in the form of Khalistan and Muslim. .... The entire country has been ruined and therefore we took the stand of Hindutva and by taking the said stand we will step in the legislative Assembly. .... Unless we step forward strongly it would be difficult for us to live because there would be war of religion. .... Muslims will come. What will you Hindu (people) do. Are you going to throw 'Bhasma' (i.e. ashes) on them. .... We won't mind if do not get a votes from a single Muslim and we are not at all desirous to win an election with such votes. .... therefore, there is a dire need of the voice of Hindutva and therefore please send Shiv Sena to Legislative Assembly. .... who are (these) Muslims. Who are these 'lande'. Once Vasant Dada had called me when he was a Chief Minister. He told me that rest is O.K. But asked me as to why I was calling them Lande. But is it correct if they call us 'Kafer' (i.e. traitor) then we will certainly call them 'Lande'. .... They should bear in mind that this country is of Hindus, the same shall remain of Hindus. .... if Shiv-Sena comes to power and if the morchas come ---- first of all (we) shall make them come. Everybody will have to take 'diksha' (i.e. initiation) of Hindu religion. ...."

*Second speech of 9.12.1987*

"..... The victory will not be mine or of Dr. Prabhu or of Shiv-Sena but the victory will be that of Hinduism. You will be instrumental in victory and you should become instrument for the

A same. At last you have the right to get rid of the difficulties faced by your caste, creed, gods deities and Hindu religion. .... Therefore, I want to say that today we are standing for Hinduism. ....  
 B Whatever Masjids are there, if one starts digging the same, one will find Hindu temples under the same. .... If any body stands against Hindustan you should show courage by performing pooja (i.e. worship) with shoes. .... And a person by name Prabhu who is contesting the election in the name of religion said ahead (in the assembly). A 'Jawan' - like Prabhu should go there (in the assembly). ...."

C *Third speech of 10.12.1987*

"..... It will do, if we do not get a vote from any Muslim. If anybody from them is present at this place he should think for himself. I am not in need of their votes. But I want your vote. .... You must sent only Dr. Ramesh Prabhu of Shiv -Sena, otherwise Hindus will be finished. It will not take much take for Hindustan to be green (i.e. Pakistan ?). ...."

E As earlier stated, the three speeches of Bal Thackeray from which the above extracts have been quoted are admitted. Similarly the interview of Dr. Ramesh Yeshwant Prabhoo and its text published in Janmabhoomi Prawasi is admitted. Dr. Prabhoo was the Mayor of Bombay. Dr. Prabhoo (RW-1) admitted his presence in the meetings held on 29.11.1987, 9.12.1987 and 10.12.1987 in which the above speeches were given by Bal Thackeray. He admitted speaking himself also in these meetings. He has said nothing in his statement to suggest that he did not consent to the contents of the speeches of Bal Thackeray. In his deposition, he has expressly admitted that the speeches of Bal Thackeray were according to his election campaign. The element of the candidate's consent for the appeal to the voters made by Bal Thackeray in his speeches is, therefore, adequately proved. About his interview published in the Janmabhoomi  
 F Prawasi, issue of 9.12.1987, he said that the report is substantially correct, even though the first paragraph of that news item is incorrect. Omitting the first paragraph of the news item which he denied, certain portions, translated into english, from the remaining news item publishing the interview are as under :

H "..... Dr. Prabhu told me that there was a Hindu wave in Parle.

The battle is between Hindus and Muslims i.e. to say between nationalist and anti-nationalist. .... A

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Supremely confident about his victory in the Vile Parle bye-election, Dr. Prabhu discounted any possibility of his defeats but he added that if he loses, it will mean that Hinduism has lost, ..... B

The appeal made to the voters by Bal Thackeray in his aforesaid speech was a clear appeal to the Hindu voters to vote for Dr. Ramesh Prabhoo because he is a Hindu. The clear import of the above extracts in each of the three speeches is to this effect. The first speech also makes derogatory reference to Muslims by calling them 'snake' and referring to them as 'lande' (derogatory term used for those practising circumcision). The language used in the context, amounted to an attempt to promote feelings of enmity or hatred between the Hindus and the Muslims on the ground of religion. The first speech, therefore, also constitutes the corrupt practice under sub-section (3A). C D

The High Court has held the second speech to fall only under sub-section (3) and not sub-section (3A), but the third speech has been held to fall both under sub-sections (3) and (3A). We have already held the third speech also to constitute the corrupt practice under sub-section (3). The correctness of the english translation of a part of the third speech was found to be defective at the hearing and, therefore, an agreed fresh translation thereof was taken on record. Reading the speech in the light of the fresh agreed translation of the defective portion, it appears to us that the High Court's finding that the third speech amounts also to the corrupt practice under sub-section (3A) cannot be affirmed, even though this variation is of no consequence to the ultimate result. E F

Our conclusion is that all the three speeches of Bal Thackeray amount to corrupt practice under sub-section (3), while the first speech is a corrupt practice also under sub-section (3A) of Section 123 of the R.P. Act. Since the appeal made to the voters in these speeches was to vote for Dr. Ramesh Prabhoo on the ground of his religion as a Hindu and the appeal was made with the consent of the candidate Dr. Ramesh Prabhoo, he is guilty of these corrupt practices. For the same reason, Bal Thackeray also is guilty of these corrupt practices and, therefore, liable to be named G H

A in accordance with Section 99 of the R.P. Act of which due compliance has been made in the present case.

B We cannot help recording our distress at this kind of speeches given by a top leader of a political party. The lack of restraint in the language used and the derogatory terms used therein to refer to a group of people in an election speech is indeed to be condemned. The likely impact of such language used by a political leader is greater. It is, therefore, a greater need for the leaders to be more circumspect and careful in the kind of language they use in the election campaign. This is essential not only for maintaining decency and propriety in the election campaign but also for the preservation of the proper and time honoured values forming part of our cultural heritage and for a free and fair poll in a secular democracy. The offending speeches in the present case discarded the cherished values of our rich cultural heritage and tended to erode the secular polity. We say this, with the fervent hope that our observation has some chastening effect in the future election campaigns.

D For the aforesaid reasons, both the appeals must fail. We may observe that considerable irrelevant material was brought on record during the trial at the instance of both the parties which, apart from needlessly enlarging the scope of the trial, has led to needless extra expense and wastage of time even in the hearing of these appeals. In these circumstances, it is appropriate to direct the parties to bear their own costs in this court. Accordingly, both the appeals are dismissed.

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L.M.A.

Appeals dismissed.