

MORESHWAR SAVE

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v.

DWARKADAS YASHWANTRAO PATHRIKAR

DECEMBER 11, 1995

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

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*Representation of the People Act, 1951 :*

*Sections 98, 99, 100, 123(3) and 123(3A)—Corrupt practices—Speeches made by leaders supporting a particular candidate—High Court accepting the pleadings and setting aside the election of the returned candidate—On appeal held, since no notices issued to the leaders who delivered the alleged speeches this defect vitiates the impugned Judgment—Since the leaders were not the candidate's election agents dispensing with consent not possible—In view of the facts and circumstances of the case held, remand would be futile and sheer waste of time.*

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The appellant was a candidate from Aurangabad parliamentary constituency and he was declared elected. An Election petition was filed by the respondent, alleging certain corrupt practices viz. that the appellant had appealed on the basis of religion to the Hindus by canvassing that the Hindu religion was in danger and Hindus should awake and meet the challenge posed by the minority specially the muslims: that Manohar Joshi in his speech at Aurangabad had said that the candidate of BJP-Shiv Sena belongs to the Hindutva faction and that 85% Hindus want a government at the Centre which pleases the minority they should vote for the appellant; and that Bal Thackeray also made a speech to the same effect.

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The High Court set aside the election of the appellant on the ground of corrupt practices under Sections 123(3) and 123(3A) of the Representation of the People Act. Hence this appeal.

Allowing the appeal, this Court

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HELD : 1. The election petitioner having abandoned the case based on the alleged speech of Chhagan Bhujbal at the stage of trial itself in the High Court, the only basis for the corrupt practice found proved against the appellant is the two speeches by others, namely, on 6.5.1991 by

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A Manohar Joshi and on 12.5.1991 by Bal Thackeray and not any speech by  
 the appellant himself. Thus, the liability fastened on the appellant is  
 vicarious on the basis of the two alleged speeches of Manohar Joshi and  
 Bal Thackeray. No notice under Section 99 of the Representation of the  
 People Act was given either to Manohar Joshi or Bal Thackeray. A com-  
 B bined reading of Sections 98 and 99 of the R.P. Act leaves no doubt that  
 the final order holding the candidate guilty of corrupt practice in such a  
 situation vicariously, cannot be made under Section 98 of the Act without  
 simultaneously complying with the requirement of Section 99. This is  
 obviously for the reason that in such a situation a simultaneous verdict  
 against the noticee under Section 99 and the candidate has to be given at  
 C one time while deciding the election petition after proper compliance of  
 Section 99 of the R.P. Act. A combined reading of Sections 98 and 99 leaves  
 no doubt that in such a situation, the High Court has no option to ignore  
 the allegation against the person for whose act the candidate is held liable  
 vicariously; and the court also cannot proceed to decide the case of the  
 D candidate and the noticee separately or piecemeal. This defect of want of  
 notice to Manohar Joshi or Bal Thackeray is alone sufficient to vitiate the  
 impugned judgment requiring it to be set aside. [519-G-H, 520-A-C]

*Manohar Joshi v. Nitin Bhaurao, Patil & Anr.*, [1995] Suppl. 6 SCR,  
 E relied on.

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2. Ordinarily the matter requires to be remanded for a fresh decision  
 of the election petition after notice to the persons to be named for com-  
 mission of the corrupt practice in accordance with Section 99; or the  
 decision of this appeal may be deferred and in the meantime notice may  
 F be given under Section 99 to these persons and after the requisite inquiry  
 by the High Court its finding in respect of those persons be called for  
 deciding the case against the candidate and the noticee at one time while  
 deciding the appeal in this Court, However, the second course does not  
 appear to be appropriate in the present case. There is no clear pleading  
 or finding of the appellant's consent which is a constituent part of the  
 G corrupt practice resulting from an act of any person other than the  
 candidate or his agent. This alone would indicate the absence of one of the  
 constituent parts of the alleged corrupt practice. Case in the election  
 petition is based only on the ground contained in Section 100(1)(b) and  
 not Section 100(1)(d)(ii) of the R.P. Act. Admittedly, neither Manohar  
 H Joshi nor Bal Thackeray were the election agents of the appellant to

dispense with the requirement of consent for the ground under Section 100(1)(b) to declare the election void. Any further inquiry into this matter is, therefore, futile and sheer waste. [520-D-G] A

3. There is nothing pleaded or proved in the alleged speeches of Manohar Joshi and Bal Thackeray in the present case to attract the corrupt practice under sub-section (3A) of Section 123 by bringing therein the element of promotion of or attempt to promote feelings of enmity or hatred as envisaged in that provision. The allegations as well as the attempted proof are all very vague. Similar vagueness is there even with regard to the requirement of Section 123(3) since that requires an appeal for votes on the ground of 'his' religion. The general statement attributed in the speeches of Manohar Joshi and Bal Thackeray as pleaded in the election petition are too vague to constitute the requisite appeal which is a corrupt practice under Section 123(3). In spite of the averment in the election petition of a more critical speech by Chhagan Bhujbal, no attempt was made to prove the same and it was not relied on even in the High Court to support the petition. This factor has significance for assessing the credibility of the version of the election petitioner and the probative value to be attached to it for the case pursued in the election petition. What is attributed to Manohar Joshi and Bal Thackeray in the averments made in this election petition, keeping in view the fact that the consent of the appellant is neither clearly pleaded nor duly considered for a finding of its proof, does not merit any further consideration or trial. [520-H, 521-A-D] B C D E

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1977 of 1992.

From the Judgment and Order dated 16.4.92 of the Bombay High Court in E.P. No. 4 of 1991. F

Ram Jethmalani, A.M. Khanwilkar, Ms. Punam Kumari, B.T. Sheth, V. Dhankh and P.H. Parekh for the Appellant.

Mukul Mudgal for the Respondent. G

The Judgment of the Court was delivered by

J.S. VERMA, J. This is an appeal under Section 116A of the Representation of the People Act, 1951 (for short "the R.P. Act") against the judgment dated 16.4.1992 in Election Petition No. 4 of 1991 by A.A. Halbe, H

A J. of the Bombay High Court by which the election of the returned candidate Moreswar save from 33- Aurangabad Parliamentary Constituency to the Lok Sabha held on 12.6.1991 has been set aside on the ground under Section 100(1)(b) for commission of corrupt practices under Sections 123(3) and 123(3A) of the R.P. Act.

B The relevant paras of the election petition relating to the pleading of corrupt practices are paras 6, 10, 11, 13 and 15. Para 6 contains a general averment without pleading the relevant material facts therein that the respondent had appealed on the basis of religion to the Hindus by canvassing that the Hindu religion was in danger and the Hindus should awaken and meet the challenge posed by the minority specially the Muslims. In  
 C paras 10 and 11, it is pleaded that Manohar Joshi gave a speech on 6.5.1991 at Aurangabad in which he said that the candidate of BJP-Shiv Sena belongs to the Hindutva faction and that 85 per cent Hindus want to live with self-respect and if they do not want a government at the Central which pleases the minority they should vote for the appellant (respondent in the  
 D election petition). Then in para 13, it is pleaded that Bal Thackeray gave a speech on 12.5.1991 to the effect mentioned therein. At this stage, it is common ground that the only relevant portion of pleading which was attempted to be proved by evidence is as under :

E (1) ..... taking the saffron flag march forward with the slogan Har Har Mahadev.

(2) Hindutva was not wave but it was the breath and if Hindutva was to stop the breath will also stop.

F (3) Hindutva is the third eye of Lord Shankar and if it opens it will reduce every thing to ash.

Then in para 15, it is pleaded that Chhagan Bhujbal had in his speech stated *inter alia* as under :

G "..... He further said that we are first Hindus and then Brahmin, Maratha, Koli, Mali, Sali etc. For the Hindus to stay alive it is necessary to elect a Government headed by BJP, Shiv Sena. He further states that to bring the culture of Shriram who was Ekvachni EK Patne. It is necessary to erect the Ram temple and  
 H show the people who oppose to it their place. ...."

It may be motioned at the outset that no evidence was led to prove the allegation of corrupt practice based on the speech of Chhagan Bhujbal and, therefore, the pleading in that respect, particularly in para 15 of the election petition, has to be ignored as it was not relied on by the election petitioner and for the reason it also does not form the basis of the impugned judgment .

Shri Ram Jethmalani, learned counsel for the appellant submitted that this stand of the election petitioner in the High Court as also in this appeal is evidently on account of the fact that Chhagan Bhujbal has, since then, shifted his allegiance from Shiv Sena to its political opponents. There can be no doubt that the pleadings of the three speeches by Manohar Joshi, Bal Thackeray and Chhagan Bhujbal on which alone the election petition is based show that the speech of Chhagan Bhujbal is comparatively the harshest of all these speeches, irrespective of the fact whether it too constitutes a corrupt practice or not. It cannot also be doubted that if the speech of Chhagan Bhujbal does not amount to an appeal for votes on the ground of religion to constitute a corrupt practice under Section 123(3) then the other two speeches being comparatively mild cannot fall within its ambit. In such a situation, the election petitioner having abandoned the case based on the alleged speech of Chhagan Bhujbal at the stage of trial itself in the High Court, the criticism made by Shri Jethmalani cannot be said to be baseless. At any rate, the credibility of the version of the election petitioner with regard to the remaining two speeches which alone were pressed into service to support the election petition does appear to be considerably shaken. However, there is another more important aspect to which we shall now advert.

The only basis for the corrupt practice found proved against the appellant is the two speeches by others, namely, on 6.5.1991 by Manohar Joshi and on 12.5.1991 by Bal Thackeray and not any speech by the appellant himself. Thus, the liability fastened on the appellant is vicarious on the basis of the two alleged speeches of Manohar Joshi and Bal Thackeray. No notice under section 99 was given either to Manohar Joshi or Bal Thackeray. We have already held in the connected Civil appeal No. 4973 of 1993 *Manohar Joshi v. Nitin Bhaurao Patil & Anr.*, decided today, that a combined reading of Sections 98 and 99 of the R.P. Act leaves no doubt that the final order holding the candidate guilty of corrupt practice in such a situation vicariously, cannot be made under Section 98 of the Act

A without simultaneously complying with the requirement of Section 99. This is obviously for the reason that in such a situation a simultaneous verdict against the noticee under Section 99 and the candidate has to be given at one time while deciding the election petition after proper compliance of Section 99 of the R.P. Act. Combined reading of Sections 98 and 99 leaves no doubt that in such a situation, the High Court has no option to ignore the allegation against the person for whose act the candidate is held liable vicariously; and the court also cannot proceed to decide the case of the candidate and the noticee separately or piecemeal. This defect of want of notice to Manohar Joshi or Bal Thackeray is alone sufficient to vitiate the judgment requiring it to be set aside.

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C The question now is of the course to adopt in such a situation. ordinarily the matter may require to be remanded for a fresh decision of the election petition after notice to the persons to be named for commission of the corrupt practice in accordance with Section 99; or the decision of this appeal may be deferred and in the meantime notice may be given under Section 99 to those persons and after the requisite inquiry by the High Court its finding in respect of those persons be called for deciding the case against the candidate and the noticees at one time while deciding the appeal in this Court. However, the second course does not appear to be the appropriate in the present case for the reasons given hereafter.

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E There is no clear pleading or finding of the appellant's consent which is a constituent part of the corrupt practice resulting from an act of any person other than the candidate or his agent. This alone would indicate the absence of one of the constituent parts of the alleged corrupt practice.

F Case in the election petition is based only on the ground contained in Section 100(1)(b) and not Section 100(1)(d)(ii) of the R.P. Act. Admittedly, neither Manohar Joshi nor Bal Thackeray were the election agents of the appellant to dispense with the requirement of consent for the ground under Section 100(1)(b) to declare the election void. Any further inquiry into this matter is, therefore, futile and sheer waste for the only ground on which the election petition and the judgment are based.

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H Moreover, there is nothing pleaded or proved in the alleged speeches of Manohar Joshi and Bal Thackeray in the present case to attract the corrupt practice under sub-section (3A) of Section 123 by bringing therein the element of promotion of or attempt to promote feelings of enmity or

hatred as envisaged in that provision . The allegations as well as the attempted proof are all very vague. Similar vagueness is there even with regard to the requirement of Section 123(3) since that requires an appeal for votes on the ground of 'his' religion. The general statements attributed in the speeches of Manohar Joshi and Bal Thackeray as pleaded in the election petition are too vague to constitute the requisite appeal which is a corrupt practice under Section 123(3). In this context, it is not insignificant that in spite of the averment in the election petition of a more critical speech by Chhagan Bhujbal, no attempt was made to prove the same and it was not relied on even in the High Court to support the appellant. This factor has significance for assessing the credibility of the version of the election petitioner and the probative value to be attached to it for the case pursued in the election petition. In our opinion, what is attributed to Manohar Joshi and Bal Thackeray in the averments made in this election petition, keeping in view the fact that the consent of the appellant is neither clearly pleaded nor duly considered for a finding of its proof, this election petition does not merit any further consideration or trial.

It is indeed surprising that pleading of corrupt practice in the election petition made so vaguely and casually occasioned a serious trail thereof and ultimately was accepted by the High Court to set aside the electoral verdict and that too in clear contravention of Section 99 of the R.P. Act. This appeal must, therefore, be allowed.

Consequently, the appeal is allowed. The impugned judgment of the High Court is set aside and the election petition is dismissed. The appellant would get his costs throughout from the respondent.

G.N.

Appeal allowed.