

Guruji Shrihari Baliram Jivatode

Vs

Vithalrao and Others

Civil Appeal No. 1778 (NCE) of 1967

(K. S. Hegde, G. K. Mitter JJ)

19.11.1968

JUDGMENT

HEDGE, J. –

The appellant is the returned candidate from the Rajura Constituency of the Maharashtra State Legislative Assembly in the General Election held in February, 1967. In that election he secured 21, 435 votes as against 17, 521 votes secured by his nearest rival, the first respondent herein, the nominee of the Indian National Congress. The first respondent was representing that constituency prior to the said General Election. The first respondent challenged the validity of the appellant's Election Petition No. 14 of 1967 in the High Court of Judicature at Bombay (Nagpur Bench), on two grounds namely (1) that the appellant was disqualified to be a candidate in that election and (2) that he was guilty of corrupt practices under Section 123(4) of the Representation of the People Act, 1951 (to be hereinafter referred to as the Act). The High Court allowed the petition and set aside the election of the appellant on the ground that he was guilty of publishing statements of facts which are false and which he neither believed to be false or did not believe them to be true, in relation to the personal character and conduct of the first respondent. It did not uphold the contention of the first respondent that the appellant was disqualified to be a candidate.

(2) Though at one stage Mr. Hazarnavis, learned Counsel for the first respondent attempted to support the judgment of the trial court on the ground that the appellant was disqualified to be a candidate, he finally gave up that contention. Therefore it is not necessary to examine the same.

(3) The High Court has found that the appellant was responsible for the publication of Exs. 55 and 56 which according to it contained statements of facts relating to the personal character and conduct of the first respondent and those statements were either false to his knowledge or at any rate he did not believe them to be true. It further came to the conclusion that in some of the election meeting the appellant had falsely stated that the first respondent had a share in the contract secured by him for one Abid Hussain.

(4) The bulk of the evidence adduced in this case relates to the controversy whether the appellant was responsible for the printing and publication of Exs. 55 and 56. The High Court has accepted the case of the first respondent that the appellant was responsible for printing and publishing those pamphlets. We have been taken that evidence and we agree with the that that High Court on that aspect of the case. It is not necessary to deal with that evidence as we are of opinion the statement contained

in those pamphlets do not amount to corrupt practice under Section 123(4) of the Act. Section 123(4) reads :

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

(5) The ingredients of the corrupt practice mentioned in this section are (1) the publication by a candidate or his election agent or by any other person with the consent of that candidate or his election agent or any statement of fact; (2) which statement is false and which was believed by the candidate to be false or at any rate was not believed by him to be true; (3) the said statement relates to the personal character or conduct of a candidate or in relation to his candidature or withdrawal and (4) the same being a statement reasonably calculated to prejudice the prospects of that candidate's election.

(6) As explained by this Court in *Sheopat Singh v. Ram, Pratap* (1965) 1 S.C.R 175) section 123(4) is designed to achieve the dual purpose of protecting freedom of speech and prevention of malicious attack on the personal character and conduct of rivals. A statement which reflects on the mental or moral character of a person is one relating to his personal character or conduct, whereas any criticism of a person's political or public activities and policies is outside it. Section 123(4) further requires that the candidate who made a false statement should have believed it to be false or did not believe it to be true and lastly it should be a statement reasonably calculated to prejudice the prospects of the election of the candidate against whom it was made. The word 'calculated' means designed : it denotes more than mere likelihood and imports a design to affect voters.

(7) The election law in this country as in England guarantees freedom of criticism of political nature at the time of election. It is true that the freedom of criticism given might be sometime misused. The political history of even countries like England shows that sensational false election propaganda against a political party, particularly on the eve of election might upset the party's electoral fortune. But the advantage gained from free criticism-though sometimes it may turn out to be irresponsible-in the long run outweighs the disadvantages. It is in the interest of democracy that such criticism should be allowed. This is the view of political thinkers. A political party's reputation is not built on shifting sands. It has, at any rate, it should have firmer foundation and should not be affected by passing winds. But in the case of individuals a different approach is necessary. A campaign of slander is likely to create prejudice in the mind of the people against him. It cannot be put down as cynicism when it is sometimes said that the bigger the lie the greater is the chance of its being accepted as true. There is unfortunately a tendency in the minds of the unwary public to believe the worse about individuals. Democracy will be a farce if interested person are allowed to freely indulge in character assassination during election. Section 123(4) as we understand it embodies the two principles discussed above. Every false allegation does not come within the mischief of Section

123(4). When any false allegation of fact pierce the politician and touches the person of the candidate then Section 123(4), is contravened.

(8) Dealing with meaning of the expression 'personal character and conduct' found in Section 123(4), Subba Rao, J., speaking for the Court in T. K. Gangi Reddy v. M. C. Anjaneya Reddy and others (XXII,ELF 266) observed at p. 266 of the report :

"the words 'personal character or conduct' are so clear that they do not require further elucidation or definition. The character of a person may ordinarily be equated with his mental or moral nature, conduct connotes a person's actions or behaviors."

(9) Dealing with a provision similar to Section 123(4), Darling, J., in Cumberland ((901) 5,0.'M & H, 155) (Cookermouth Division) case observed :

"What the Act forbids is this. You shall not make or publish any false statement of fact in relation to the personal character or conduct of such candidate; if you do, it is an illegal practice. It is not an offence to say something which may severe about another person nor which may be unjustifiable nor which may be derogatory unless it amounts to a false statement of fact in relation to the personal character or conduct of such candidate; and I think the Act says that there is a great distinction to be drawn between a false statement of fact which affects the personal character or conduct of a candidate and a false statement of fact which deals with the political position or reputation or action of the candidate. If that were not kept in mind, this statute would simply have prohibited at election times all sorts of criticism which was not strictly true relating to the political behaviour and opinions of the candidate. That is why it carefully provides that the false statement, in order to be an illegal practice, must relate to the personal character and personal conduct."

(10) The language of Section 123(4) is 'any statement of fact which is false and that language must be used in contrast to a false statement of opinion. The language used is not merely a 'false statement' but a 'statement of fact which is false'. The statement in question must be in relation to the personal character or conduct of candidate, which means a false statement of fact bearing on the personal character or conduct of a candidate. Further one of ingredients of the corrupt practice under Section 123(4) is that the statement complained of must be one reasonably calculated to prejudice the prospects of the election of the person against whom it is made. It may be noted that the section does not merely say 'being a statement calculated to prejudice the prospects of the candidate's election' but on the other hand it says 'being a statement reasonably calculated to prejudice the prospectus of that candidate's election. The meaning of that expression is as held by a Division Bench of the Bombay High Court in Dattatray Narayan Patil v. Dattatray Krishnaji Khanvikar and others (AIR 1964 Bom 244) that the publication of false statement of fact relating to the personal character or conduct must be such as would, in the estimation of the court, having regard to the nature of the publication, the evidence tendered in Court and the surrounding circumstances have its natural and probable consequence of prejudicing the prospectus of the candidate relating to whose personal character or conduct the publication has been made. So far as the last limb of Section 123(4) is concerned, the emphasis is not so much on the intention of the publisher but on the probable effect on the election of the candidate against whom those statement are directed.

(11) It is trite to say that burden of proving every one of the ingredients of the corrupt practice alleged is on him who alleges it. If he fails to establish any one of them to the satisfaction of the Court he must fail.

(12) We shall now proceed to consider whether the statements of facts contained in Exs. 55 and 56 fall within the mischief of Section 123(4). Before doing so it is necessary to give the background under which the Statements complained of were made. As mentioned earlier the first respondent was representing the constituency in question prior to the General Election in 1967. Sometimes before the election the cultivators in the Rajura Constituency as in other places were required to deliver to the Government a portion of the juwar crop raised by them in pursuance of the levy orders made. This circumstance must have undoubtedly caused dissatisfaction to the ryots. Rajura Taluka was previously a part of the Nizam's State and thereafter the State of Hyderabad till formation of the Maharashtra State. We understand that in that Taluka, the boundary stones had not been fixed. The State of Maharashtra appears to have directed the land-owners to fix the necessary boundary stones for their property within a certain period. As some of them did not comply with that direction, the Government took upon itself the responsibility of fixing those boundary stones at the cost of those ryots. That work was given on contract to one Abid Hussain. It was suggested that charges fixed were excessive. It may be mentioned at this stage that during the time when juwar levy was imposed and the contract for fixing the boundary stones was given (as also at present), the Congress Party was in power in the State of Maharashtra. The first respondent was a Congress M.I.A. In the past tolls were levied on every vehicle entering the municipal limits of Rajura but some years before the election that levy had been abolished but the same was again re-imposed, sometime before the election. At the time of the re-imposition of that levy Shri Shankerrao Deshmukh, a Congressman was the Chairman of the Rajura Municipality. Having mentioned these facts we shall now proceed to examine the Statements in Exs. 55 and 56.

(13) Ex. 55 is a Marathi poem composed by the appellant's election agent Dr. Suresh Vishvanathrao Upaganlawar (R.W. 3). Its English rendering is as follows :

REQUEST TO VOTERS

Rise rise oh voters awake at least now understood and begin to word.

You have suffered for five years, auspicious day has dawned now, truthful to your conscience, wake to vote, oh brother wake to vote.

Today kick off (this) slavery in the freedom (and) you should expose; you should expose the sins of Vithalrao.

He held out to be the leader of the people (but) he put burden of stones (on the people). By those very stones (you) build his grave brothers built his grave.

For recovery of levy (from us) unlimited force used against us.

They take white juwar and give red-millow (to us) and now confront him (with this).

Today our luck has dawned (in that) we got a great leader.

For protecting the interest of poor people, see this Guruji has take in Avatar.

(His, name is Jivtode Shrihari, has responded to our immediate call.)

By giving your invaluable vote to Jivtode and Kaushik Pleader. Elect them this time, begin working today.

Seeing Lion Symbol, by affixing rubber stamp on it we will show to the word, Brother we will show our candidates that success garlands (him.)"

(14) Ex. 56 is a pamphlet published in Marathi. It purports to be an appeal by one Ganpat Patil Dhote. The English translation of it is found at pp. 563-565 of the paper-book. It reads thus :

"VOTERS BE CAREFUL

In the forthcoming General Elections the sitting M.L.A. Shri Vithalrao Dhote is standing for Maharashtra Legislative Assembly on behalf of Congress. The poor people have had experience of Shri Vithalrao Dhote as M.L.A.

Having been elected in the First General Elections, Shri Vithalrao Dhote would work for the benefit of the people and develop the backward Rajura Taluka was our expectation. But the People of Rajura Taluka have been utterly disappointed by Shri Vithalrao Dhote. In this Taluka the High School which was there in the times of Nizam the High School is there is whole of Rajura Taluka till today. Shri Vithalrao Dhote could not construct a single Pucca Road. Could not supply electricity to any village anywhere. Could not make arrangement for watering agriculture. In this Taluka though there is thousands of acres of fallow land, for distributing it to landless no effort was made by Shri Vithalrao Dhote. In the last five years no work for the benefit of the people has been done by Vithalrao Dhote.

On the contrary, through his selfish and fraudulent companion Shri Shankarrao Deshmukh, the Municipal President of Rajura (he got) imposed the stopped toll tax on the bullock-cart (Rengi and Bandi) of poor people coming to Rajura. Its effect has been surely felt by every poor man in the Taluka. Similarly by fixing boundary stones on the Dhuras of the cultivators in Rajura Taluka and by recovering price of stones Shri Vithalrao Dhote has worked for the benefit of Abid Hussain Thekadar alone. In this Taluka the cultivators could not get Taqavi loans without giving bribe at the time of distributing taqavi. Shri Vithalrao Dhote could not check bribery. Shri Vithalrao Dhote has neglected the poor people by looking to the interests of Thekadar (contractor) alone. By this, the poor people are very much harassed. When I, myself moved in the village in this Taluka, I found that public opinion is inclined against Shri Vithalrao Dhote.

People are organised as Shri Vithalrao Dhote has harassed the proper for furthering interests of his selfish and deceitful companion. Because of this and with great reluctance and keeping interests of public in view I am publishing this pamphlet against Amdar Vithalrao Dhote to keep the true facts before the public. The man who is proving dangerous to the majority in the society and poorer section of the public has to be pulled down from his office (and) except this, there is no other way is my belief.

Hence I humbly request the voters in Rajura Constituency that they should not vote for the Congress candidate Shri Vithalrao Dhote. Contesting candidate from Rajura Constituency Shri Jiotode Guruji had worked for spread of education by opening Janata High Schools. Shri Jiotode Guruji has benefited the poor people by opening all kinds of colleges of Chanda. 'Shri Jiotode Guruji' will bring about the development of backward Rajura Taluka positively.

Hence by putting a cross on the Lion Symbol of Vidarbha joint Front's Shri Jiotode Guruji, Shri Jiotode Guruji be elected by a large majority is my humble and earnest request to the voters.

#Yours humbly Ganpat Symbol of Lion but cross Patil Dhote only on Lion.-----
-----In small type Publish : Ganpat Patil Chote, r/o (Shivshakti of
Nimani T. Rajura Chandrapur".-----##

(15) The various statements contained in these two pamphlet are summarised by the learned Trial Judge thus :

"(a) (The Petitioner) has imposed the toll tax on poor citizens on their bullock-carts through his selfish and bogus companion Shri Shankarrao Deshmukh, President of Rajura Municipality, which has caused undue suffering to every poor citizen residing in this part.

(b) Vithalrao Dhote has only secured advantage for Abid Hussain, Contractor, by imposing the burden of paying for the border stones which were compulsorily ordered to be fixed.

(c) In this Taluq no cultivator has been able to get taqavi without payment of bribe and Vithalrao is unable to prevent it.

(d) Vithalrao Dhote has solely protected the interest of the contractor and neglected the poor citizens and on that account Vithalrao Dhote has forfeited confidence of poor persons in Rajura Taluq.

(e) The poor population is simply harassed and I have found that the inclination of the people is against Vithalrao Dhote when I went around in the village.

(f) Poor persons are simply harassed on account of exploitation and ruin caused by Vithalrao Dhote solely for the benefit of his selfish and bogus companions.

(g) Persons (meaning the petitioner) who is menace to the majority of the community and poor persons must be sacked from the officer is my final conviction."

(16) None of the aforementioned allegations can be held to relate to the personal character or conduct of the first respondent. They are undoubtedly criticism, true, false or exaggerated of the first respondent's roll as a politician. Those statements do not make any reflection on the moral or mental qualities of the first respondent. As mentioned earlier a Congressman was the President of Rajura Municipality at the time the tolls were re-imposed. It may be that the first respondent had no hand in the matter of re-imposition of the tolls and that the accusation that he got it re-imposed is not true but that in no manner can be said to reflect on the personal character or conduct of the first respondent. Similarly the accusation that the first respondent

secured advantage for Abid Hussain by imposing a burden on the land owners by making them pay for the boundary stones cannot be said to reflect on the private character of the first respondent whether the statement in question is true or false. The appellant had right to hold the first respondent responsible for the actions of the Government as he was a member of the party in power. The allegation that in the Rajura Taluka cultivator had been able to get Taqavi loans without payment of bribe and that the first respondent was unable to prevent it, is undoubtedly a legitimate criticism. The allegation that he solely protected the interest of the contractor and ignored that of the poor citizens and on that account he has forfeited the confidence of the poor persons in his constituency is an expression of an opinion, whether the same is true or not. The allegation that the poor population is simply harassed and that the signatory to the pamphlet found that the inclination of the people is against the first respondent when he went around in the village, is merely an opinion and not a statement of fact. Similarly the allegation that the poor persons are being harassed on account of the exploitation and ruin caused by the first respondent solely for the benefit of his selfish and bogus companions is an expression of an opinion and it is a permissible criticism in a political debate. The assertion that the first respondent is a menace to the majority as also to the poor and therefore he must be sacked from the office is as stated in the pamphlet itself, is purported to be the conviction of the person who issued the statement. He is entitled to hold that opinion and propagate it. It must be remembered that during election time passions are roused; election propaganda should not be tested by the standards to be adopted in a debate carried on by intellectuals. It may be that many of the charges levelled against a candidate as regards his political past or about his capacity to be useful representative are not true. It is for electorate to judge those accusations. So long as those accusations do not affect the personal character or conduct of the candidate, the election law will not take note of it. That is why it is said that a political must be thick-skinned and more so at election time. As mentioned earlier it is not a corrupt practice to say something which may be severe about another person, nor which may be unjustifiable, nor which may be derogatory unless it amounts to a false statement of fact in relation to his personal character or conduct.

(17) It is unfortunate that the High Court exclusively focussed its attention on the question whether or not the appellant caused to get Exs. 55 and 56 printed and published and completely ignored the true effect of the statements contained therein. It proceeded on the erroneous impression that every false or unjustified criticism of a candidate amounts to a contravention of Section 123 (4). Dealing with Exs. 55 and 56 this is what the learned Trial Judge observed :

"To say against any body that he is responsible for imposition of a tax without justification through that person's selfish and pretentious friend like the President of the Municipal Council is, to say the least, to suggest that that such person is the direct cause of harassment on account of such taxation on poor people. It is said in the third paragraph of the pamphlet and then there is a direct allegation against the petitioner that is the petitioner who caused the cultivators in the Rajura Taluqa to be burdened with the expense of fixing the border stones and that in doing so the petitioner Vithalrao Dhote has solely secured an advantage for Abid Hussain, Thekedar. In the fourth paragraph, it is categorically alleged that the petitioner Vithalrao Dhote has exploited and harassed poor people in the order to benefit his, i.e. Vithalrao's selfish

pretentious friends and such harassment has caused untold miseries. That these allegations are scurrilous does not admit of any doubt. They are defamatory per se. Every citizen is entitled to be presumed to be innocent until contrary is proved. If therefore an allegation of a personal character is made against anyone, it is the maker of the allegation who has to establish that there is truth in the allegation."

(18) It is clear that the High Court failed to examine the effect of the statement contained in Exs. 55 and 56 by the tests prescribed in Section 123(4). Further there is no proof in this case that the statements contained in Exs. 55 to 56 reasonably calculated to prejudice the election of the respondent. The trial Court did not give any finding to that effect.

(19) This leaves us with the question whether the appellant had announced in his election meetings that the first respondent had a share in the profits earned by Abid Hussain in the matter of fixing boundary stones. The High Court has held that the appellant made that accusation while addressing election meeting at two places. If that finding is correct then undoubtedly there is a contravention of Section 123(4) but after carefully examining the material on record we have come to the conclusion that that finding is unsustainable.

(20) The election petition was filed on April 11, 1967. That petition merely set out what according to the petitioner are the contents of Exs. 55 and 56. It is not stated therein that apart from the statements contained in those pamphlets any other false statement of fact relating to the personal character or conduct of the first respondent had been made either by the appellant or his supporters. The allegation that the appellant in his election meeting has stated that the first respondent had a share in the profits earned by Abid Hussain in the manner of fixing the boundary stones is not mentioned there. An application to amend the election petition was made on June 24, 1967.

(21) In that application also there is no reference to the allegation in question. The election petition was again amended on 3-7-1967. It was only then the following allegation was made :

"He (the appellant) was falsely alleging that the petitioner was or had actively helped Abid Hussain for his selfish ends to make illegal gains and thus allege falsely corrupt motives to him."

(22) Even this allegation is vague. That apart, it is a highly belated allegation. It appears to be an after thought. It is not necessarily for us decide in this case whether such an amendment could have been permitted after the limitation for filing the election petition had expired. But the very circumstances that the allegation in question was made several months after the election petition was filed by itself casts serious doubt on the veracity that allegation. This circumstance was completely overlooked by the High Court.

(23) The witness who spoke in support of the said allegation are the first respondent (P.W. 2), P.W. 9, Arjan Kashinath Masirkar and P.W. 12 Nazir Hussain Akbar Ali. So far as P.W. 2 is concerned he is undoubtedly an interested witness. In the

circumstances mentioned above, his evidence can have very little persuasive value. So far as P.W. 9 is concerned on his own showing he was highly interested in the first respondent and the Congress Party. As elicited during his cross-examination he was a Congress candidate for election as Sarpanch and as a member of the Panchayat Samiti. The appellant's cousin was his rival in that election. Admittedly during the last election he canvassed for the first respondent. Under these circumstances much reliance cannot be placed on the testimony of this witness. Then we come to the evidence of P.W. 12. During his cross-examination this is what he stated :

"I have not received as summons. Vithalrao had asked me to produce the register where the hire of cycles is noted and that is how the chits which I have filed came with the register"

(24) His evidence is to the effect that the appellant while presiding over the meeting at Rajura on February 13, 1967, stated that the first respondent has a share in the contract for fixing of border stones which was procured for him by Vithalrao. When he was cross-examined about that meeting this is what he stated :

"I don't remember who was the President of the meeting. I will not be able to name at this distance of time the names of persons from the town or the villagers who were listening at the meeting. I will not be able to name a single person from amongst these".

(25) Obviously he is a procured witness. No reliance can be placed on his evidence.

(26) For the reasons mentioned above we hold that the election petitioner (first respondent herein) has failed to make out that the appellant had contravened Section 123(4). Hence this appeal succeeds and the election petition stands dismissed. We are of opinion that we should not award any costs to the appellant. He had come forward with a false case and had protracted the trial of the case by adducing voluminous false evidence. Hence we direct the parties to bear their own costs both in this Court as well as in the High Court.

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