Samant N. Balkrishna and Another

Vs

George Fernandez and Others

Civil Appeal Nos. 895 and 896 (N.C.E.) of 1968

(CJI M. Hidayatullah,G,K. Mitter JJ)

12.02.1969

JUDGMENT

HIDAYATULLAH, C.J. -

1. In the last General Election to Parliament from the Bombay South Parliamentary constituency eight candidates had offered themselves. The answering respondent Mr. George Fernandez secured 1,47,841 votes as against his nearest rival Mr. S. K. Patil who secured 1,18,407 votes. The remaining candidates secured a few thousand votes between them. The result of the poll was declared on February 24, 1967 and Mr. George Fernandez was returned. An election petition was filed by Mr. Samant N. Balakrishna, an elector in the constituency. It challenged the election of Mr. Fernandez and was ostensibly in the interest of Mr. S. K. Patil. The election petition was keenly contested and Mr. S. K. Patil gave his full support to the petition. The election petition failed and it was dismissed with an order for costs against the election petitioner and Mr. S. K. Patil. Two appeals have now been filed against the judgment of the Bombay High Court, one by the election petitioner and the other by Mr. S. K. Patil. They have been heard together and this judgment will dispose of both of them.

2. The petition was based on numerous grounds which were set out in Paragraph 2 of the petition. These grounds were shown separately in sub-paragraphs A to J. Sub-paragraphs A to D dealt with the invalidity of the election for non-compliance with Section 62 of the Representation of Peoples Act and Articles 326 and 327 of the Constitution. These concerned the secrecy of ballot (A), registering of some voters in two constituencies (B), omission of qualified voters from electoral rolls (C) and impersonation by persons for dead or absent voters (D). These four grounds were given up in the High Court itself and we need not say anything about them. Sub-paragraphs E to J. contained allegations of corrupt practices. The petition was accompanied by four annexures Nos. A to D which were extracts from newspapers on which the charge of corrupt practices was based. The grounds may now be noticed in detail.

3. Sub-paragraph E dealt with statements made at a meeting dated February 16, 1967 at Shivaji Park by Jagadguru Shankaracharya charging Mr. S. K. Patil with complicity in arson of November 7, 1966 at New Delhi and attack on the residence of the Congress President with injuries caused to people. In these articles from the 'Maratha' and the Blitz extracts of which were quoted and annexed as Annexure A, Mr. Patil was described as hypocrite, insincere and dishonest. Similar speeches by Mr. Madhu Limaye, (another candidate of the S. S. P. by which party Mr. Fernandez was sponsored) were relied upon. The statements of Jagadguru Shankaracharya and Mr. Madhu Limaye were said to be "inspired by Mr. Fernandez" and "with his consent and for his benefit". It was said that they amounted to a corrupt practice under Section 123(4) of the Representation of Peoples Act.

4. In Sub-paragraph F, a statement of Jagadguru Shankaracharya on cow-slaughter was made the ground of attack. It was to the effect that Mr. S. K. Patil only pretended to support the anti-cow-slaughter movement but had done nothing in furtherance of it. It was contended that the cow was used as a religious symbol and the speeches offended against the Election Law as stated in Section 123(3). These statements were also said to be inspired by Mr. Fernandez and were made with his consent and for his benefit.

5. Sub-paragraph G referred to speeches of Mr. Fernandez and his workers with his knowledge and consent. In those speeches Mr. Fernandez is said to have described Mr. S. K. Patil as the enemy of Muslims and Christians who only professed to discourage slaughter of cows and he was charged with interfering with the articles of faith of the Muslims and Christians and seeking expulsion of Muslims to Pakistan. This was said to offend against Section 123(3-A) of the Representation of Peoples Act.

6. In Sub-paragraph H it was alleged that the 'Maratha' published a false statement to the effect that Mr. S. K. Patil had paid Rupees 15 lacs to Mr. Jack Sequeira to undo the efforts of Maharashtrians for incorporation of Goa in Maharashtra. The extract from the 'Maratha' of January 25, 1967 was annexed as Ex. B. The speech of Mr. H. R. Gokhale who published a similar statement, was also referred to. These were made the grounds of complaint under Section 123(4) of the Representation of the Peoples Act.

7. In Sub-paragraph I four issues of the 'Maratha' of the 5th and 31st January, 1967 and 5th and 8th of February, 1967 were exhibited as Ex. C. It was stated in the first two that the Shiv Sena supported the Maharashtra traitor Sadoba Patil and that the Shiv Sena was really Sadoba Sena. A cartoon showing Mr. S. K. Patil as Vishwamitra and the leader of Shiv Sena as Menka with the caption "Sadoba denies that he has no connection with Shiv Sena like Vishwamitra Menka episode", was the third. The last of these articles was headed "harassment from Gondas of Sadoba Patil Shiv Sena in the service of Sadhshiv (S. K. Patil)". These statements were said to be false and made by the 'Maratha' in favour of respondents other than respondent No. 2 (Mr. S. K. Patil) or at any rate on behalf of Mr. Fernandez. These were said to prejudice the minority communities and thus to offend Section 123(4) of the Representation of the Peoples Act. The statements were said to be made with the knowledge and consent of Mr. Fernandez and for his benefit.

8. In Sub-paragraph J three issues of 'Maratha' of the 24th, 28th and 31st December, 1966 were referred to. In the first it was stated that "Shri S. K. Patil will go to Sonapur in the ensuing election. Fernandez says in his Articles Patil mortgaged India's Freedom with America by entering into P. L. 480 agreement and Mr. Patil had no devotion, love, respect for this country at all." In the second Mr. Patil was described as Nagibkhan of Maharashtra. The third was a cartoon in which Shankaracharya was depicted as saying "Cow is my mother. Do not kill her" and S. K. Patil as saying "Pig is my father". These extracts were annexed as Ex. D. Then followed a paragraph in which was said : "Similar false statements in relation to Respondent No. 2's character and conduct were published in several issues of Maratha Daily" from December 12, 1966 to February 21, 1967 and 33 issues were mentioned by the date. These were also said to be Ex. D.

9. This was the original material on which the petition filed on April 7, 1967 was based. Mr. Fernandez filed his written statement on June 14, 1967 and Mr. S. K. Patil on July 4, 1967. Later five amendments were asked for. By the first amendment, which was orally asked and allowed, reference to the 33 articles was altered and they were said to be contained in Ex. E instead of Ex. D. Ex. E was then introduced and gave the list of 33 articles in the 'Maratha' and one article in the

Blitz, and the extracts on which reliance was placed. On July 4, 1967 an application for amendment was made seeking to add Sub-paragraphs 2-K and 2-L. 2-K is not pressed now and need not be mentioned. By 2-L the petitioner asked for addition to the list of corrupt practices or a reference to an article dated November 5, 1966 in the Blitz. This article was written by Mr. Fernandez. On September 12, 1967, an application was made for seven additions to Paragraph 2-J. Seven incidents were sought to be included. Of these four were ordered by the Court to be included in 2-J on September 15, 1967 as Sub-sub-paragraphs (i) to (iv) and three were rejected. In the first of the sub-paragraphs so included, a speech at a public meeting at Shivaji Park by Mr. Fernandez on January 31, 1967 was pleaded in which Mr. Fernandez is said to have made a statement that even God could not defeat the second respondent (Mr. S. K. Patil) because unlike the second respondent God was not dishonest. It was also alleged that Mr. S. K. Patil won elections by "tampering with the ballot boxes or substituting the same". These statements were said to be made by Mr. Fernandez deliberately and maliciously and that he believed them to be false or did not believe them to be true. The report of the speech was quoted from the 'Maratha' of February 1, 1967 and was included as part of Ex. E. In the second Sub-paragraph a Press Conference at Bristol Grill Restaurant on February 9, 1967 addressed by Mr. Fernandez was referred to. At that Conference Mr. Fernandez charged Mr. S. K. Patil with "unfair and unethical electioneering practices" and as illustrations of his methods mentioned the release of 70 dangerous characters from Jail on parole and the suspension of externment orders against some and the allowing of some other externed persons to return, were alleged. It was also said that these persons were being used by Mr. Patil in his campaign. Extracts from the issues of the 'Maratha' of the 10th and 11th February, 1967 were made part of Annexure E. In the third sub-paragraph a public meeting at Sabu Siddik Chowk, of February 10, 1967 was referred to. At that meeting, it was alleged Mr. Fernandez described Mr. Patil as an "American Agent, Dada of Capitalists and Creator of Shiv Sena". All these statements were said to be false and to reflect upon personal character and conduct of Mr. Patil and thus to be corrupt practices under Section 123(4) of the Representation of Peoples Act. In the fourth paragraph a meeting of January 8, 1967 at Chowpati, presided over by Mr. Fernandez was referred to. Mr. Madhu Limaye was said to have addressed that meeting and referred to the incident of November 7, 1966. These statements were also said to be false and to materially affect the prospects of Mr. Patil. In this sub-paragraph it was also alleged that Mr. S. K. Atrey, Editor and Proprietor of the 'Maratha' Jagadguru Shankaracharya and Mr. Madhu Limaye were agents of Mr. Fernandez and had made these statements in his interest and with his consent.

The petitioner also asked for addition of three other grounds of corrupt practices, which the Court did not allow to be included. Paragraph 2-L to which we have referred was an article by Mr. Fernandez. It was captioned as a fight against "political thuggery" and included the following passage which was made the basis of the following charge :

> "These men (including the 2nd Respondent) from the hard core of the coterie which control the destinies of the nation, even decides who should be the Prime Minister and who should not be, bounds out the few honest Congressmen from Public life, props up the Aminchand Pyarelal and Chamanlal and supports them in all their misdeeds and puts a premium on dishonest businessmen and industrialists."

10. This allegation was said to suggest dishonesty in Mr. Patil. The other amendments which were disallowed referred to a speech at Dr. Vigas Street on February 27, 1967, a speech by Dr. Lohia at Chowpati on January 1, 1967 published in 'Andolan' of January 9, 1967 and a Press Conference by Mr. Madhu Limaye at Bristol Grill Restaurant on December 10, 1966.

11. Prior to the application for amendment certain events happened to which it is necessary to refer. On April, 7 1967 the office objected the originals of Exs. A, B, C and D had not been filed. The remark of the office is as follows :

> "Exhibits A, B, C, D are mere repetitions of what is mentioned in the body of the petition. It is not necessary to annex the original copies of the said news paper ?"
>
> Mr. Kanuga, one of the Advocates for the petitioner replied to the objection as follows :
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> "We undertake to file the original issues and official translations later as the same (sic) with the Chief translator, High Court, Bombay before the service of Writ of Summons."

12. Till July 3, 1967 on effort seems to have been made to file the originals. On that date the Rozanama read as follows :

> "Mr. Jathmalani applies for leave to amend the petition by pointing out that 'D' in last sentence of Paragraph 2 on Page 12 of the petition be corrected and read as 'E' and to annex reports in original P. C. leave to amend granted."

13. The issues were settled on the same day and particulars were asked for. On July 7, 1967 the 'Rozanama' read as follows :

> "Mr. Gurushani tenders the original of the exhibits A (Coll) to Exhibit E (Coll) mentioned in Para 2J of Page 11 of the petition."

A chamber summons was taken out because the particulars were not supplied and on August 5, 1967 the particulars were furnished. It was then on September 12, 1967 that the application for seven amendments was made, four of which were allowed and three were rejected. This was by an order dated September 15, 1967.

14. Before dealing with this appeal it is necessary to clear the question of the amendments and whether they were properly allowed. This questions consists of two parts; the first is one of fact as to what was exhibited with the petition as materials on which the petition was based. The case of the petitioner before us is that in support of 2J copies of relevant newspapers were filed with the petition. This is denied on behalf of the answering respondent.

15. Mr. Daphtary's contention is that if the originals of the 'Maratha' had not been filed an objection would have been taken in the court and none was taken. Even witnesses were examined and cross-examined with reference to the statements and the originals must have been in court. This, in our opinion, is not decisive. The first witness to be examined was the petitioner himself. Evidence commenced on August 25, 1967. The petitioner proved the copies of the newspapers and they were marked as exhibits. By that date the copies of the 'Maratha' had already been filed and the petitioner in his evidence referred to all of them. The cross examination, therefore, also referred to these documents. Nothing much turns upon the want of objection because (as is well-known) objection is not taken to some fatal defect in the case of the other side since the party, which can take the objection, wants to keep it in reserve. It is true that if the objection had been taken earlier and had been decided the petitioner would have had no case to prove on the new allegations and might not have led some evidence. But we cannot hold from this that any prejudice was caused to him. After

all it was his responsibility to complete his allegations in the petition by inclusion of the copies of the 'Maratha' and the other side cannot be held to have waived its objection since that objection was in fact raised and has been answered in the High Court. The Rozanamas clearly show that the copies of the 'Maratha' were not filed with the election petition but much later and in fact beyond the period of limitation. Mr. Daphtary characterises the Rozanamas as inaccurate but the internal evidence in the case shows that the Rozanamas were correctly recorded.

16. The petition quoted some of the offending statements in the newspapers and exhibited them as Exs. A to D. In the petition these 10 extracts are to be found in sub-paragraphs 2E, H, I and J. The change of Exs. D to E and the filing of E show that the extracts which were with the translator were referable to those extracts already mentioned in the petition and not those mentioned in the last paragraph of 2-J. If will be noticed that that paragraph refers to 33 number of the 'Maratha'. Extracts from those were furnished only on July 3, 1967 when Ex. E was separately filed and according to the Rozanama, the originals were filed on July 7, 1967. Mr. Kanuge could not have referred to all the 33 issues of the 'Maratha'. Only 10 extracts from the 'Maratha' were in Exs. A to D and of these eight are included in the list of 33 numbers of the 'Maratha' in the last paragraph of 2J. If they were already filed, Mr. Kanuge, would have said so and not promised to file them later. He mentions in his note that they were with the 'Maratha' were already filed there would be no occasion for the office objection and the reply of Mr. Kanuge could apply to two numbers only. They were the issues of 25th January and 5th February, 1967. The office noting shows that not a single original was filed with the petition. This appears to us to be correct. We are satisfied that 10 issues of the 'Maratha' from which extracts were included in the petition in Exs. A to D were the only numbers which were before the translator. Mr. Kanuge's remark applies to these 10 issues. The other issues which were mentioned in the last paragraph of 2-J numbering 33 less 8 were neither in the translator's office nor exhibited in the case. Hence the amendment of the second reference to from D to E and the request to file original issues.

17. It seems that when the petition was filed a list was hurriedly made of all the issues of the 'Maratha' to which reference was likely and that list was included in the last portion of 2J. But no attempt was made either to specify the offending portions of the newspapers or to file the extracts or the original issues. All this was done after the period of limitation. No incorporation of the contents of the articles by reference can be allowed because if a newspaper is not exhibited and only the date is mentioned, it is necessary to point out the exact portion of the offending newspaper to which the petition refers. This was not done. We have to reach this conclusion first because once we hold that the issues of the 'Maratha' or the extracts referred to in the petition were not filed, the plea as to what was the corrupt practice is limited to what was said in the body of the petition in paragraph 2J and whether it could be amended after the period of limitation was over. The attempt today is to tag on the new pleas to the old pleas and in a sense to make them grow out of the old pleas. Whether such an amendment is allowable under the Election Law is therefore necessary to decide.

18. Mr. Daphtary arguing for the appellant contends that he was entitled to the amendment since this was no more than an application of the ground of corrupt practice as defined in Section 123(4) and that the citation of instances or giving of additional particulars of which sufficient notice already existed in 2J as it originally stood, is permissible. According to him, under Section 100 the petition has to show grounds and under Section 83 there should be a concise statement of material facts in support of the ground and full particulars of any corrupt practice alleged. He submits that under Section 83(5) particulars can be amended and amplified, new instances can be cited and it is an essence of the trial of an election petition that corrupt practices should be thoroughly investigated. He refers us to a large body of case law in support of his contention.

19. On the other hand, Mr. Chari for Mr. Fernandez contends that there was no reference to the speeches by Mr. Fernandez in the petition. The cause of action was in relation to the publication in the 'Maratha' and not in relation to any statement of Mr. Fernandez himself and that the amendment amounts to making out a new petition after the period of limitation.

20. To decide between these rival contentions it is necessary to analyse the petition first. Paragraph 2J as it originally stood read as follows :

> "The petitioner says that false statements in relation to character and conduct of the Respondent No. 2 were made by the 1st Respondent and at the instance and connivance of the 1st Respondent, Maratha published the following articles, as set out hereinafter. The petitioner says that the said allegations are false and have been made with a view to impair and affect prospects of respondent No. 2's elections to Lok Sabha. Some of the extracts are : etc."

Here three issues of the 'Maratha' of 24th, 28th and 31st December, 1966 were referred to. Of the extracts, the last two make no reference to Mr. Fernandez. The first spoke thus :

> "Maratha Dated 24-12-66. Pages 1 and 4. "Shri S. K. Patil will go to Sonapur in the ensuing election. Fernandez says in his Articles Patil mortgaged India's Freedom with America by entering into P. L. 480 agreement and Mr. Patil had no devotion, love, respect for this country at all."

The followed this paragraph :

> "Similar false statements in relation to Respondent No. 2's character and conduct were published in Maratha Daily dated 12th December, 1966, 17th December, 23th December, 24th December, 28th, 29th and 31st December issues, January issues dated 4th, 5th, 7th, 10th, 18th, 20th, 21st, 28th, 30th and 31st, February issues, 1st, 2nd, 3rd, 6th, 7th, 8th, 10th, 11th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st..... These reports in original are filed and true translation are marked Ex. D to the petition."

We have already held that the newspapers mentioned in the last paragraph were not filed with the petition but on April 7, 1967 after the period of limitation was over. The allegations thus were that Mr. Fernandez made the false statements and they were published in the 'Maratha' at his instance and with his connivance. There is no mention of any speech at Shivaji Park, or at Sabu Saddik Chowk are at Dr. Vigas Street or the Press interview at Bristol Grill Restaurant. All these statements which are now referred to were said to be made by Mr. Fernandez himself. By the amendment a charge of corrupt practice was sought to be made for the first time in this form. In the original petition (Sub-paragraph 2J) there was no averment that Mr. Fernandez believed these statements to be false or that he did not believe them to be true and this was also sought to be introduced by an amendment. It may, however, be mentioned that in an affidavit which accompanied the election petition this averment was expressly made and the appellants desire us to read the affidavit as supplementing the petition. By another application for amendment the petitioner sought to add a paragraph that the 'Maratha', Jagadguru Shankaracharya and Mr. Madhu Limaye were agents of Mr. Fernandez within the Election Law. By yet another application reference to an article in the 'Blitz' was sought to be included as Sub-paragraph 2-L.

21. At the conclusion of the arguments of this part of the case we announced our decision that the amendment relating to the speeches of Mr. Fernandez at Shivaji Park, Sabu Siddik Chowk and Dr. Vigas Street and his Press Conferences at Bristol Grill Restaurant and the article in the 'Blitz' ought not to have been allowed but that the amendment relating to the agency of the 'Maratha' etc., and that seeking to incorporate the averment about the lack of belief of Mr. Fernandez were proper. We reserved our reasons which we now proceed to give.

22. The subject of the amendment of an election petition has been discussed from different angles in several cases of the High Courts and this Court. Each case, however, was decided on its own facts, that is to say, the kind of election petition that was filed, the kind of amendment that was sought, the law at the time and so on. These cases do furnish some guidance but it is not to be thought that a particular case is intended to cover all situations. It is always advisable to look at the statute first to see alike what it authorises and what it prohibits.

23. Section 81 of the Representation of the Peoples Act, 1951 enables a petitioner to call in question any election on one or more of the grounds specified in Section 100(1) and Section 101 of the Act. The petition must be made within 45 days from the date of election. Section 100 and 101 enumerate the kind of charges which, if established, lead to the avoidance of the election of a returned candidate and the return of some other candidate. The first sub-section of Section 100 lays down the grounds for declaring an election to be void. Theses include corrupt practices committed by the candidate, his election agent and any person with the consent of the returned candidate or his election agent. The second sub-section lays down an additional condition which must be satisfied before the election can be declared to be void even though the corrupt practice is committed by an agent other than the election agent. Section 101 sets forth the grounds on which a candidate other than the returned candidate may be declared to have been elected. Section 101 actually does not add to the grounds in Section 100 and its mention in Section 81 seems somewhat inappropriate. Sections 100 and 101 deal with the substantive law on the subject of elections. These two sections circumscribe the conditions which must be established before an election can be declared void or another candidate declared elected.

24. The heads of substantive rights in Section 100(1) are laid down in two separate parts : the first dealing with situations in which the election must be declared void on proof of certain facts, and the second in which the election can only be declared void if the result of the election in so far as it concerns the returned candidate, can be held to be materially affected on proof of some other facts. Without attempting critically to sort out the two classes we may now see what the conditions are. In the first part they are that the candidate lacked the necessary qualification or had incurred disqualification, that a corrupt practice was committed by the returned candidate, his election agent or any other person with the consent of a returned candidate or his election agent or that any nomination paper was improperly rejected. These are grounds on proof of which by evidence, the election can be set aside without any further evidence. The second part is conditioned that the result of the election, in so far as it concerns a returned candidate, was materially affected by the improper acceptance of a nomination or by a corrupt practice committed in his interest by an agent other than an election agent or by the improper reception, refusal or rejection of votes or by any non-compliance with the provisions of the Constitution or of the Representation of Peoples Act or rules or orders made under it. This condition has to be established by some evidence direct or circumstantial. It is, therefore, clear that the substantive rights to make an election petition are defined in these section and the exercise of the right to petition is limited to the grounds specifically mentioned.

25. Pausing here, we may view a little more closely the provisions bearing upon corrupt practices in Section 100. There are many kinds of corrupt practices. They are defined in Section 123 of the Act and we shall come to them later. But the corrupt practices are viewed separately according as to who commits them. The first class consists of corrupt practices committed by the candidate or his election agent or any other person with the consent of the candidate or his election agent. These, if established, avoid the election without any further condition being fulfilled. Then there is the corrupt practice committed by an agent other than an election agent. Here an additional fact has to be proved that the result of matter in easily understandable language. The petitioner may prove a corrupt practice by the candidate himself or his election agent or someone with the consent of the candidate or his election agent, in which case he need not establish what the result of the election would have been without the corrupt practice. The expression "Any other person" in this part will include an agent other than an election agent. This is clear from a special provision later in the section about an agent other than an election agent. The law then is this : If the petitioner does not prove a corrupt practice by the candidate or his election agent or another person with the consent of the returned candidate or his election agent but relies on a corrupt agent, he must additionally prove how the corrupt practice affected the result of the poll. Unless he proves the consent to the commission of the corrupt practice on the part of the candidate or his election agent he must face this additional burden. The definition of agent in this context is to be taken from Section 123 (Explanation) where it is provided that an agent "includes an election agent, a polling agent and any person who is held to have acted as an agent in connection with the election with the consent of the candidate." In this explanation the mention of "an election agent" would appear to be unnecessary because an election agent is the alter ego of the candidate in the scheme of the Act and his acts are the acts of the candidate, consent or no consent on the part of the candidate.

26. Having now worked out the substantive rights to the making of the petition, we may now proceed to see what the corrupt practices are. Since we are concerned only with one such corrupt practice, we need not refer to all of them. For the purpose of these appeals it is sufficient if we refer to the fourth sub-section of Section 123. It reads :

> "123. The following shall be deemed to be corrupt practice for the purpose of the Act :
>
> #X X X X##
>
> (4) The publication by a candidate or his agent or by any other person, with the consent of a candidate or his election agent, of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, or in relation to the candidature, or with-drawal, of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate's election.
>
> # X X X X".##
>
> This corrupt practice may be committed by :
>
> (a) the candidate
>
> (b) his agent, that is to say -
>
> (i) an election agent

(ii) a polling agent

(iii) any person who is held to have acted as an agent in connection with the election with the consent of the candidate.

(c) by any other person with the consent of the candidate or his election agent.

We are concerned in this appeal with (a) and (b) (iii) mentioned in our analysis. In the original petition the allegations were made on the basis of corrupt practices committed by a person alleged to have acted as an agent with Fernandez's consent. In the amendment application the allegation is that the candidate himself committed the corrupt practice under this subsection.

27. As we pointed out earlier the difference between the original petition and the amendments will lie in the degree of proof necessary to avoid the election. If the corrupt practice is charged against an agent other than the election agent, a further burden must be discharged, namely, that the result of the election was materially affected. If, however, the corrupt practice is charged against the candidate personally (there is no election agent involved here), this further proof is not required. Another difference arises in this way. In Section 100(1)(b) the word 'agent' is not to be found. Therefore an agent other than an election agent will fail to be governed by the expression 'any other person'. To get the benefit of not having to prove the affect of the corrupt practice upon the election the consent of the candidate or his election agent to the alleged practice will have to be established.

Again for the establishment of the corrupt practice under Section 123(4), from whatever quarter it may proceed, the election petitioner must establish :

(a) publication of a statement of fact, and

(b) the statement is false or the person making it believes it to be false or does not believe it to be true, and

(c) that the statement refers to the personal character and conduct of the candidate, and

(d) is reasonably calculated to prejudice the candidate's prospects.

28. It appears, therefore, that it is a question of different burdens of proof as to whether the offending statement was made by the candidate himself or by an agent other than an election agent.

29. Having dealt with the substantive law on the subject of election petitions we may now turn to the procedural provisions in the Representation of Peoples Act. Here we have to consider Sections 81, 83 and 84 of the Act. The first provides the procedure for the presentation of election petitions. The proviso to sub-section alone is material here. It provides that an election petition may be presented on one or more of the grounds specified in sub-section (1) of Section 100 and Section 101. That as we have shown above creates the substantive right. Section 83 then provides that the election-petition must contain a concise statement of the material facts on which the petitioner relies and further that he must also set forth full particulars of any corrupt practice that the petitioner alleges including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice. The section is mandatory and requires first a concise statement of material facts and then requires

the fullest possible particulars. What is the difference between material facts and particulars ? The word 'material' shows that the facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad. The function of particulars is to present as full a picture of the cause of action with such further information in detail as to make the opposite party understand the case he will have to meet. There may be some overlapping between material facts and particulars but the two are quite distinct. Thus material facts will mention that a statement of fact (which must be set out) was made and it must be alleged that it refers to the character and conduct of the candidate that it is false or which the returned candidate believes to be false or does not believe to be true and that it is calculated to prejudice the chances of the petitioner. In the particulars the name of the person making the statement, with the date, time and place will be mentioned. The material facts thus will show the ground of corrupt practice and the complete cause of action and the particulars will give the necessary information to present a full picture of the cause of action. In stating the material facts it will not do merely to quote the words of the section because then the efficiency of the words 'material facts' will be lost. The fact which constitutes the corrupt practice must be stated and the fact must be co-related to one of the heads of corrupt practice. Just as a plaint without disclosing a proper cause of action cannot be said to be a good plaint, so also an election petition without the material facts relating to a corrupt practice is no election petition at all. A petition which merely cites the sections cannot be said to disclose a cause of action where the allegation is the making of a false statement. That statement must appear and the particulars must be full as to the person making the statement and the necessary information. Formerly the petition used to be in two parts. The material facts had to be included in the petition and the particulars in a schedule. It is inconceivable that petition could be filed without the material facts and the schedule by merely citing the corrupt particulars in a schedule. It is inconceivable that a petition could be filed without the material facts and the schedule by merely citing the corrupt practice from the statute. Indeed the penalty of dismissal summarily was enjoined for petitions which did not comply with the requirement. Today the particulars need not be separately included in a schedule but the distinction remains. The entire and complete cause of action must be in the petition in the shape of material facts, the particulars being the further information to complete the picture. This distinction is brought out by the provisions of Section 86 although the penalty of dismissal is taken away. Sub-section (5) of that section provides :

> "(5) The High Court may, upon such terms as to costs and otherwise as it may deem fit, allow the particulars of any corrupt practice alleged in the petition to be amended or amplified in such manner as may in its opinion be necessary for ensuring a fair and effective trial of the petition, but shall not allow any amendment of the petition which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition."

The power of amendment is given in respect of particulars but there is a prohibition against an amendment "which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition." One alleges the corrupt practice in the material facts and they must show a complete cause of action. If a petitioner has omitted to allege a corrupt practice, he cannot be permitted to give particulars of the corrupt practice. The argument that the latter part of the fifth sub-section is directory only cannot stand in view of the contract in the language of the two parts. The first part is enabling and the second part creates a positive bar. Therefore, if a corrupt practice is not alleged, the particulars cannot be supplied. There is, however, a difference of approach between the several corrupt practices. If for example the charge is bribery of voters and the particulars give a few instances, other instances can be added; if the charge is use of vehicles for

free carriage of voters, the particulars of the cars employed may be amplified. But if the charge is that an agent did something, it cannot be amplified by giving particulars of acts on the part of the candidate or vice versa. In the scheme of election law there are separate corrupt practices which cannot be said to grow out of the material facts related to another person. Publication of false statements by an agent is one cause of action, publication of false statements by the candidate is quite a different cause of action. Such a cause of action must be alleged in the material facts before particulars may be given. One cannot under the cover of particulars of one corrupt practice give particulars of a new corrupt practice. They constitute different causes of action.

30. Since a single corrupt practice committed by the candidate, by his election agent or by another person with the consent of the candidate or his election agent is fatal to the election, the case must be specifically pleaded and strictly proved. If it has not been pleaded as part of the material facts, particulars of such corrupt practice cannot be supplied later on. The bar of the latter part of the fifth sub-section to Section 86 then operates. In the petition as originally filed the agency of Jagadguru Shankaracharya, Mr. Madhu Limaye and the Maratha (or Mr. Atrey) was the basis of the charge and the candidate Mr. Fernandez was left out. No allegation was personally made against him. The only allegation against him personally were contained in paragraph 2G. There it was said that Mr. Fernandez had made certain speeches to the effect that Mr. Patil was against the Muslims and Christians. No evidence was led and they were not even referred to at the hearing before us. The next reference in 2J is to statements of Mr. Fernandez and published by the Maratha. These were specified and only three such statements were included. Since the gist of the election offence is the publication of false statements, the charge is brought home to the candidate through the publication by the Maratha. It is to be remembered that even the allegation that in doing so the Maratha acted as the agent of Mr. Fernandez, itself came by way of an amendment which we allowed as it completed the cause of action and is permissible. The bar of Section 86(5) (latter part) does not apply to it and under Order VI, Rule 17 of the Code of Civil Procedure which is applicable as far as may be, such an amendment can be made. Similarly the allegations that such statements were false of were believed to be false or were not believed to be true by the Maratha (i. e., Mr. Atrey) and that they were calculated to prejudice Mr. Patil's chances and did so, were allowed by us to be added as completing the cause of action relating to a corrupt practice already alleged. But we declined to allow to stand the amendments which had the effect of introducing new corrupt practices relating to the candidate himself which had not been earlier pleaded. This kind of amendment is prohibited under the law when the amendment is sought after the period of limitation.

31. The learned judge in the High Court did not keep the distinction between material facts and particulars in mind although the language of the statute is quite clear and makes a clear cut division between the two. He seems to have been persuaded to such a course by a reading of the rulings of this Court and the High Courts. These same rulings were presented before us and we may now say a few words about them.

32. The learned Judge in the High Court has relied upon Harish Chandra Bajpai v. Triloki Singh and deduced the proposition that where the petition sets out the corrupt practice as a ground, instances of the corrupt practices may be added subsequently and even after the period of limitation of filing the petition is over. Following that case the learned Judge has allowed the amendments as corrupt practice under Section 123(4) was alleged in the original petition. We shall come to that case last of all. It seems to have played a great part in moulding opinion in India on the subject of amendment of pleadings in the Election Law.

33. To begin with it must be realised that as is stated in Jagan Nath v. Jaswant Singh and Others the

statutory requirements of the law of Election in India must be strictly observed. It is pointed out in that case that an election contest is not an action at law or a suit in equity but a purely statutory proceeding unknown to common law and that the court possesses no common law power. Although the power of amendment given in the Code of Civil Procedure can be invoked because Section 87 makes the procedure applicable, as nearly as may be, to the trial of election petitions, the Representation of Peoples Act, itself enacts some rules which override the Civil Procedure Code. General power of amendment of the power derived from the Code of Civil Procedure must be taken to be overborne in so far as the election law provides. In a large number of cases it has been laid down by the High Courts in India that the material facts, must make out a charge and it is only then that an amendment to amplify the charge can be allowed or new instances of commission of corrupt practice charged can be given. If no charge is made out in the petition at all the addition of particulars cannot be allowed to include indirectly a new charge. This was laid down in Din Dayal v. Beni Prasad and Another, Balwant Singh v. Election Tribunal, Kanpur, and Others by the Allahabad High Court, in T. L. Sasivarna Thevar v. V. Arunagiri and Others by the Madras High Court and in Hari Vishnu Kamath v. Election Tribunal, Jaipur and Another by the Madhya Pradesh High Court. All these cases rely upon Harish Chandra Bajpai's case (Supra) to which we have referred. Harish Chandra Bajpai's case (Supra) was based on an English case Seal v. Smith. In that case it was held that under the Parliamentary Election Act of 1868 it was enough to allege generally in the petition that "the respondent by himself and other persons on his behalf was guilty of bribery, threatening and undue influence before, during and after the election." A summons was taken out calling upon the petitioner to deliver better particulars of "other persons". Willes J., after consulting Martin, B. and Blackburn, J., ordered better particulars. It was contended that the petition should be taken of the files since the particulars were lacking. Section 20 of that Act only provided that an election petition should be in such form and should state such matters as may be prescribed. Rule 2 prescribed that the petition should state (i) the right of the petitioner to petition and (ii) and should state the holding and result of the election and then should briefly state such facts and grounds relied on the sustain the prayer. Rule 5 prescribed the form which required facts to be state. Bovill, C. J., said that the form of the petition was proper and it was quite useless to state anything further. But in Bruce v. Odhama Press Ltd., the Court of Appeal distinguished 'material facts' from 'particulars' as they occurred in Order XXX of the Rules of the Supreme Court of England. The words there were material facts and particulars and the distinction made by Scott, L. J. bears out the distinction we have made between 'material facts' and 'particulars' as used in Section 83 of our statute. The same view was also expressed in Phillips v. Phillips. The observations of Brett, L. J., in that case also bear out the distinction which we have made.

34. It appears that this distinction was not brought to the notice of this Court in Harish Chandra Bajpai's case. The rules on the subject of pleading in the English stature considered in Seal's case (supra) were different. We have in our statute considered on a concise statement of material facts and the particulars of corrupt practice alleged. These expressions we have explained. However, it is not necessary to go into this question because even on the law as stated in Harish Chandra Bajpai's case the amendment allowed in this case cannot be upheld. We shall now notice Harish Chandra Bajpai's case a little more fully.

35. In that case the material allegation was that the appellants "could in the furtherance of their election enlist the support of certain government servants" and that the appellant No. 1 had employed two persons in excess of the prescribed number for his election purposes. No list of corrupt practices was attached. Thereafter names were sought to be added. The amendment was allowed by the Tribunal after the period of limitation and the addition was treated as mere particulars. It was held by this Court that an election petition must specify "grounds or charges" and

if that was done then the particulars of the grounds or charges could be amended and new instances given but no new ground or charge could be added after the period of limitation. The reason given was that the amendment "introducing a new charge" altered the character of the petition. Venkataraman Iyyar, J., emphasized over and over again that new instances could be given provided__ they related to a 'charge' contained in the petition. The result of the discussion in the case was summarised by the learned Judge at page 392 as follows : "(1) Under Section 83(3) the Tribunal has power to allow particulars in respect of illegal or corrupt practices to be amended, provided the petition itself specifies the grounds or charges, and this power extends to permitting new instances to be given. (2) The tribunal has power under Order VI, Rule 17 to order amendment of a petition, but that power cannot be exercised so as to permit new grounds or charges to be raised or to so alter its character as to make it in substance a new petition, if a fresh petition on those allegations will then be barred." What is meant by 'ground or charge' was not stated. By "ground" may be meant the kind of corrupt practice which the petitioner alleges but the word "charge" means inclusion of some material facts to make out the ground. Applying the same test (although without stating it) the learned Judge pointed out that the charge made in the petition was that the apllants 'could' in furtherance of their election enlist the support of certain government servants and it meant only in ability to enlist support but the 'charge' which was sought to be leveled against the candidate later was that he had in fact enlisted the said support. The learned Judge observed at page 393 as follows :

> "the charge which the respondent sought to level against the appellants was that they moved in public so closely with high dignitaries as to create in the minds of the voters the impression that they were favoured by them. We are unable to read into the allegations in para 7(c) as originally framed any clear and categorical statement of a charge under Section 123(8), or indeed under any of the provisions of the Election Law."

The allegation in the statement was described as worthless and further it was observed : at page 395 as follows :

> "But even if we are to read 'could' in para 7(c) as meaning 'did', it is difficult to extract out of it a charge under Section 123(8). The allegation is not clear whether the Government servants were asked by the appellants to support their candidature, or whether they were asked to assist them in furtherance of their election prospects, and there is no allegation at all that the Government servants did in fact, assist the appellants in the election. On these allegations, it is difficult to hold that the petition in fact raised a charge under Section 123(8). It is a long jump from the petition as originally laid to the present amendment, wherein for the first time it is asserted that certain Mukhias (on Mukhias are mentioned in the petition) assisted the appellants in furtherance of their election prospects, and that thereby the corrupt practice mentioned in Section 123(8) had been committed. The new petition, and it was not within the power of the Tribunal to allow an amendment of that kind."

It would appear from this that to make out a complete charge the facts necessary must be included in relation to a 'ground' as stated in the Act. Merely repeating the words of the stature is not sufficient. The petitioner must specify the ground i.e., to say the nature of the corrupt practice and the facts necessary to make out a charge. Although it has been said that the charge of corrupt practice is in the nature of quasi criminal charge, the trial of an election petition follows the procedure for the trial of a civil suit. The charge which is included in the petition must, therefore, specify the material

facts of which the truth must be established. This is how the case was understood in numerous other cases, some of which we have already referred. In particular see J. Devaiab v. Nagappa and Others, 1965 Mys 102; Babulal Sharma v. Brijnarain Brajesh and Others, 1958 Madh Pra 176 F. B.

36. Three other case of this Court were also cited. In Chandi Prasad Chokhani v. State of Bihar it was held that the powers of amendment were extensive but they were controlled by the law laid down in the Representation of Peoples Act. It was again emphasised that a new ground or charge could not be made the ground of attack as that made a new petition. In Bhim Sen v. Gopali and Others the scope of Harish Chandra Bajpai's case was considered and its narrow application was pointed out. Indeed in that case the observations in Harish Chandra Bajpai's case were not followed to the utter most limit. In Sheopat Singh v. Ram Pratap the only allegation was that the appellant Hariram got published through him and others a statement but there was no allegation that Hariram believed the statement to be false or did not believe it to be true. It was held that in the absence of such averment it could not be held that there was an allegation of corrupt practice against Hariram. The publication with guilty knowledge was equated to a kind of mens rea and this was considered a necessary ingredient to be alleged in the petition.

37. From our examination of all the cases that were cited before us we are satisfied that an election petition must set out a ground or charge. In other words, the kind of corrupt practice which was perpetrated together with material facts on which a charge can be made out must be stated. It is obvious that merely repeating the words of the statute does not amount to a proper statement of facts and the section requires that material facts of corrupt practices must be stated. If the material facts of the corrupt practice are stated more or better particulars of the charge may be given later, but where the material facts themselves are missing it is impossible to think that the charge has been made or can be latter amplified. This is tantamount to the making of a fresh petition.

38. Reverting therefore to our own case we find that the allegation in Paragraph 2-J was that Mr. Fernandez made some statements and the 'Maratha' published them. Extracts from the 'Maratha' were filed as Exhibits. Since publication of a false statement is the gist of an election offence the charge was against the 'Maratha'. If it was intended that Mr. Fernandez should be held responsible for what he said then the allegation should have been what statement Mr. Fernandez made and how it offended the election law. In 2J itself only three statements were specified and two of them which the 'Maratha' had published. There was no reference to any statement by Mr. Fernandez himself throughout the petition as it was originally filed. In fact there was no charge against Mr. Fernandez which could have brought the case within Section 101(b) of the Act. The attempt was only to make out the case under Section 101(d) against the 'Maratha' (or Mr. Atrey) pleading Mr. Atrey as agent of Mr. Fernandez. That too was pleaded in the amendments.

39. The result is that the case gets confined to that of a candidate responsible for the acts of his agent. In the argument before us Mr. Chari for Mr. Fernandez conceded the position that Mr. Atrey could be treated a the agent of Mr. Fernandez. We are therefore relieved of the trouble of determining whether Mr. Atrey could be held to be an agent or not. The trial Judge was also satisfied that Mr. Atrey could be held to have acted as the agent of Mr. Fernandez. The case as originally pleaded fell within Section 101(d) with the additional burden. Although Mr. Daphtary was content to prove that the consent of Mr. Fernandez was immaterial as the corrupt practice of his agent was equally fatal to the election and attempted to prove his case under Section 100(1)(d) of the Act. Mr. Jethamalani who took over the argument from him contended that the case fell to be governed by Section 101(b), i.e., to say of any person who did the act with the consent of Mr. Fernandez. It is therefore necessary to pause here to decide whether Mr. Atrey had the consent of

Mr. Fernandez to the publication in his newspaper.

40. The difference between M. Daphtary's argument and that of Mr. Jethamalani lies in this. In the letter the consent of the candidate must be proved to each corrupt practice alleged, in the former there is only need to prove that a person can be held to have acted as an agent with the consent of the candidate. An agent in this connection is not one who is an inter meddler but one acting with the consent, express or implied, of the candidate, According to Mr. Jethamalani when an agent works regularly for a candidate the consent to all his acts must be presumed and he contends that the court was wrong in requiring proof of prior consent to each publication. On the other hand, Mr. Chari's case is that when Mr. Atrey acted as an agent and when he did not act as an agent, is a question to be considered in respect of each publication in the 'Maratha'. According to him it is not sufficient merely to say that Mr. Atrey was an agent because Mr. Atrey was also editor of the newspaper and in running his newspaper his activities were his own and not on behalf of Mr. Fernandez. Mr. Jethamalani relies strongly upon the case of Rama Krishna (C. A. No. 1949 of 1967, decided on April 23, 1968) and Inder Lal Yugal Kishore v. Lal Singh. Rama Krishna's case was decided on its special facts. There the agent was one who had been employed regularly by Rama Krishna not only in the last election but also in two previous elections. Rama Krishna stated that the arrangements for his election were completely left in that agent's hands. The agent had got printed some posters which had defamed the candidate and these posters were exposed on the walls. Rama Krishna admitted that he had seen these posters and also that he had paid for the posters when the bill was presented to him. In fact he included the amount in his return of election expenses. It was from these combined facts that the consent of Rama Krishna to the corrupt practice of making false and defamatory statements was held proved. The case therefore is not one in which the person while acting in different capacity makes a defamatory statement.

41. In the case from Rajasthan the rule laid down was that the association of persons or a society or a political party or its permanent members, who set-up a candidate, sponsor his cause, and work to promote his election, may be aptly called the agent for election purposes. In such cases where these persons commit corrupt practice unless the exception in Section 100(2) apply the returned candidate should be held guilty. We shall consider this question later.

42. Before we deal with the matter further we wish to draw attention to yet another case of this Court reported in Kumara Nand v. Brijmohan Lal Sharma. In that case Section 123(4) was analysed. It was held that the belief must be that of the candidate himself. The word "he" in the subsection where it occurs for the first time was held to mean the candidate. This Court observed as follows :

> "The sub-section requires : (i) publication of any statement of fact by a candidate, (ii) that fact is false, (iii) the candidate believes it to be false of does not believe it to be true, (iv) the statement is in relation to the personal character or conduct of another candidate; and (v) the said statement is one being reasonably calculated to prejudice the prospects of the other candidate's election : (See Sheopat Singh v. Ram Pratap). This case thus lays down that the person with whose belief the provision is concerned is ordinarily the candidate who, if we may say so, is responsible for the publication. The responsibility of the candidate for the publication arises if he publishes the thing himself. He is equally responsible for the publication if it is published by his agent. Thirdly he is also responsible where the thing is published by any other person but with the consent of the candidate or his election agent. In all three cases ordinarily it is the candidate's belief that matters for this purpose. If the candidate either believes the statement to be false or does not believe it to be true he would be responsible

> under Section 123(4). In the present case the poem was not actually read by the appellant, but it was read in his presence at a meeting at which he was presiding by Avinash Chander. In these circumstances the High Court was right in coming to the conclusion that the recitation of the poem by Avinash Chander at the meeting amounted to the publication of the false statement of fact contained in it by another person with the consent of the candidate, and in this case, even of his election agent who was also present at the meeting. But the responsibility for such publication in the circumstances of this case is of the candidate and it is the candidate's belief that matters and not the belief of the person who actually read it with the consent of the candidate. What would be the position in a case where the candidate had no knowledge at all of the publication before it was made need not be considered for that is not so here. It is not disputed in this case that the statement that the respondent was the greatest of all thieves, was false. It is also not seriously challenged that the appellant did not believe it to be true. The contention that Avinash Chander's belief should have been proved must therefore fail."

43. From this case it follows that to prove a corrupt practice in an agent is not enough, the belief of the candidate himself must be investigated with a view to find out whether he made a statement which he knew to be false or did not believe to be true. When we come to the facts of the case in hand we shall find that most of the statements were made by a newspaper editor in the normal course of running a newspaper. Some of the passages which are criticised before us were made as news items and some others were put in the editorial. It is to be remembered that the newspaper ran a special column called "George Fernandez's Election Front". No article or comment in that column has been brought before us as an illustration of the corrupt practice. A newspaper published news and expresses views and these are functions normal to a newspaper. If the same news appeared in more than one paper, it cannot be said that each editor acted as agent for Mr. Fernandez and by parity of reasoning a line must be drawn to separate the acts of Mr. Atrey in running his newspaper and in acting as an agent. Mr. Atrey was not a wholetime agent of Mr. Fernandez so that anything that he said or did would be treated as bearing upon the belief of Mr. Fernandez as to the truth of the statements made by Mr. Atrey. Therefore, every act of Mr. Atrey could not be attributed to Mr. Fernandez so as to make the latter liable. We have therefore to analyse these articles to find out which of them answers the test which we have propounded here. But the fact remains that the case was pleaded on the basis of corrupt practices on the part of an agent but by the amendment the candidate was sought to be charged with the corrupt practices personally. As there was no such charge or ground in the original petition and as the application for amendment was made long after the period of limitation was over the amendment could not be allowed. Accordingly we ruled out the amendments concerning the personal speeches of Mr. Fernandez and the article in the 'Blitz.'

44. After we announced our conclusion about the amendments Mr. Daphtary with the permission of the Court left the case in the hands of Mr. Jethamalani and the argument to which we have already referred in brief was advanced by him. As pointed out already Mr. Jethamalani attempted to prove that the case would be governed by Section 100(1)(b) i.e. to say that the statements in the 'Maratha' were published with the consent of Mr. Fernandez. Mr. Jethamalani deduced this from the course of events and argued that on proof of the corrupt practices committed by the 'Maratha,' Mr. Fernandez would be personally liable. He based himself on the following facts. He pointed out that Mr. Fernandez had admitted that he desired that the newspapers should support his candidature and therefore must have been glad that the 'Maratha' was supporting him, and the articles in the 'Maratha' were uniformly for the benefit of Mr. Fernandez. Sampurna Maharashtra Samiti was also supporting the candidature of Mr. Fernandez and the 'Maratha' had made common cause with the

Sampurna Maharashtra Samiti, the offices of both being situated in the same building which was also Mr. Atrey's residence. Mr. Atrey was the editor of the 'Maratha' and Chairman of the Sampurna Maharashtra Samiti. Mr. Atrey was also a candidate supported by the Sampurna Maharashtra Samiti. Mr. Fernandez and Mr. Atrey had a common platform and they supported each other in their respective constituencies. The 'Maratha' carried a column "George Fernandez's Election Front" which was intended to be a propaganda column in favour of Mr. Fernandez. He contended that Mr. Fernandez could not be unaware of what Mr. Atrey was doing. He pointed out several statements of Mr. Fernandez in which he sometime unsuccessfully denied the knowledge of various facts. He contended lastly that Mr. Fernandez had social contacts with Mr. Atrey and could not possibly be unaware that Mr. Atrey was vociferously attacking Mr. Patil's character and conduct. Mr. Jethamalani therefore argued that there was knowledge and acquiescence on the part of Mr. Fernandez and as there was no repudiation of what the 'Maratha' published against Mr. Patil, Mr. Fernandez must be held responsible. The learned trial Judge in his judgment has given a summary of all these things at page 695 and it reads :

> "To sum up, it is clear from the above discussion that respondent No. 1 is a prominent member of the SSP, that the SSP is a constituent unit of the SMS, that both Acharya Atrey and respondent No. 1 participated in the formation of the SMS, that they both participated in the inauguration of the election campaign by the SMS, that the SMS carried on election propaganda for candidates supported by it including respondent No. 1, that Acharya Atrey was the president of the Bombay Unit of the SMS and was a prominent and a leading member thereof, that each of them addressed a meeting of the constituency of the other to carry on election propaganda for the other, that Acharya Atrey through the columns of his newspaper, Maratha, carried on intensive and vigorous campaign for success of candidates supported by the SMS including respondent No. 1. that Acharya Atrey started a special feature. in Maratha under the heading "George Fernandez Election Front." These factors amongst others show that Acharya Atrey had authority to canvass for respondent No. 1, that he made a common cause with respondent No. 1, for promoting his election, that to the knowledge of respondent No. 1, and for the purpose of promoting his election, he (Atrey) canvassed and did various things as tended to promote his election. This in law is sufficient to make Acharya Atrey an agent of respondent No. 1, as that term is understood under the election law."

45. Mr. Jethamalani contended in further support that there was a clear similarity in the statements and utterances of Mr. Fernandez and Mr. Atrey. He inferred a high probability of concert between them. In this connection he referred in particular to the speech of Mr. Fernandez at Shivaji Park and the conduct of Shanbhag, one of his workers, in following up what Mr. Fernandez had said. We shall refer to this last part later, on which a considerable part of the time of the Court was spent, although we had contention that consent in such circumstances may be assumed : Nani Gopal Swami v. Abdul Hamid Chaudhary and Another Adams and Others v. Hon. F. F. Leveson Gower Christie v. Grieve and W. F. Spencer; John Blundell v. Charles Harrison. There is no doubt that consent need not be directly proved and a consistent course of conduct in the canvass of the candidate may raise a presumption of consent. But there are cases and cases. Even if all this is accepted we are of opinion that consent cannot be inferred. The evidence proves only that Mr. Atrey was a supporter and that perhaps established agency of Mr. Atrey. It may be that evidence is to be found supporting the fact, that Mr. Atrey acted as agent of Mr. Fernandez with his consent. That however does not trouble us because Mr. Chari admitted that Mr. Atrey can be treated as an agent of Mr. Fernandez. It is however a very wide jump from this to say that Mr. Fernandez and consented to

each publication as it came or even generally consented to the publication of items defaming the character and conduct of Mr. Patil admitted that Mr. Atrey can be treated as an agent of Mr. Fernandez. It is however a very wide jump from this to say that Mr. Fernandez had consented to each publication as it came or even generally consented to the publication of items defaming the character and conduct of Mr. Patil. That consent must be specific. If the matter was left entirely in the hands of Mr. Atrey who acted solely as agent of Mr. Fernandez, something might be said as was done in Rama Krishna's case (supra) by this Court. Otherwise there must be some reasonable evidence from which an inference can be made of the meeting of the minds as to these publications or at least a tacit approval of the general conduct of the agent. If we were not to keep this distinction in mind there would be no difference between Section 100(1)(b) and 100(1)(d) in so far as an agent is concerned. We have shown above that a corrupt act per se is enough under Section 100(1)(b) while under Section 100(1)(d) the act must directly affect the result of the election in so far as the returned candidate is concerned. Section 100(1)(b) makes no mention of an agent while Section 100(1)(d) specifically does. There must be some reason why this is so. The reason is that an agent cannot make the candidate responsible unless the candidate has consented or the act of the agent has materially affected the election of the returned candidate. In the case of any person (and he may be an agent) if he does the act with the consent of the returned candidate there is no need to prove the consent of the returned candidate and there is no need to prove the effect on the election. Therefore, either Mr. Jethamalani must prove that there was consent and that would mean a reasonable inference from facts that Mr. Fernandez consented to the acts of Mr. Atrey or he must prove that the result of the election was seriously affected. If every act of an agent must be presumed to be with the consent of the candidate there would be no room for application of the extra condition laid down by Section 100(1)(d), because whenever agency is proved either directly or circumstantially, the finding about consent under Section 100(1)(b) will have to follow. We are clearly of opinion that Mr. Jethamalani's argument that Section 100(1)(b) applies can only succeed if he established consent on the part of Mr. Fernandez.

46. We have already pointed out that Mr. Atrey was also the editor of a newspaper which, as Mr. Patil has himself admitted, was always attacking him. Mr. Atrey had opened a column in his newspaper to support Mr. Fernandez's candidature. Although nine articles appeared in the column between December 3, 1966 to February 2, 1967, not a single false statement from this column has been brought to our notice. There was not even a suggestion that Mr. Fernandez wrote any article for the 'Maratha' or communicated any fact. It is also significant that although Mr. Atrey addressed meetings in the constituency of Mr. Fernandez, not a single false statement of Mr. Atrey was proved from his speeches on those occasions. The petitioner himself attended on such meeting on February 4, 1967 but he does not allege that there was any attack on his personal character or conduct. The learned trial Judge has also commented on this fact. We think that regard being had to the activities of Mr. Atrey as editor and his own personal hostility to Mr. Patil on the issue of Sampurana Maharashtra Samiti, we cannot attribute every act of Mr. Atrey to Mr. Fernandez. Mr. Chari is right in his contention that Mr. Atrey's field of agency was limited to what he said as the agent of Mr. Fernandez and did not embrace the field in which he was acting as editor of his newspaper. It is also to be noticed that Mr. Atrey did not publish any article of Mr. Fernandez, nor did he publish any propaganda material.

47. The meeting at Shivaji Park about which we shall say something presently, was not held in Mr. Fernandez's constituency. The similarity of ideas or even of words cannot be pressed into service to show consent. There was a stated policy of Sampurna Maharashtra Samiti which wanted to join in Maharashtra all the areas which had not so far been joined and statements in that behalf must have been made not only by Mr. Atrey but by several other persons. Since Mr. Atrey was not appointed

as agent we cannot go by the similarity of language alone. It is also very significant that not a single speech of Mr. Fernandez was relied upon and only one speech of Mr. Fernandez namely, that at Shivaji Park was brought into arguments before us by an amendment which we disallowed. The best proof would have been his own speech or some propaganda material such a as leaflets or pamphlets etc. but none was produced. The 'Maratha' was an independent newspaper not under the control of the Sampurna Maharashtra Samiti or the S. S. P. which was sponsoring Mr. Fernandez of Mr. Fernandez himself. Further we have ruled out news items which it is the function of the newspaper to publish. A news item without any further proof of what had actually happened through witnesses is of no value. It is at best a second-hand secondary evidence. It is well-known that reporters collect information and pass it on to the editor who edits the news item and then published it. In this process the truth might get perverted or garbled. Such news items cannot be said to prove themselves although they may be taken into account with other evidence if the other evidence is forcible. In the present case the only attempt to prove a speech of Mr. Fernandez was made in connection with the Shivaji Park meeting. Similarly the editorials state the policy of the newspaper and its comment upon the events. Many of the news items were published in other papers also. For example Free Press Journal, the Blitz and writers like Welles Hengens had also published similar statements. If they could not be regarded as agents of Mr. Fernandez we do not see any reason to hold that the 'Maratha' of Mr. Atrey can safely be regarded as agent of Mr. Fernandez when acting for the newspaper so as to prove his consent to the publication of the defamatory matter. We are therefore of opinion that consent cannot reasonably be inferred to the publications in the 'Maratha'. We are supported in our approach to the problem by a large body of case law to which our attention was drawn by Mr. Chari. We may refer to few cases here : Bishwanath Upadhaya v. Hardal Das and others; Abdul Majeed v. Bhargavan (Krishnan) and Others; Rustom Satin v. Dr. Sampoornanand and Others; Sarla Devi Pathak v. Birendra Singh and Others; Krishna Kumar v. Krishna Gopal; Lalsing Kesbrising Sehvar v. Vallabhdas Shankarlal Phekdi and Sarat Chandra Rabba v. Khagendranath Math and Others. It is not necessary to refer to these case is detail except to point out that the Rajasthan case dissents from the case from Assam on which Mr. Jethamalani relied. The principle of law is settled that consent may be inferred from circumstantial evidence but the circumstances must point unerringly to the conclusion and must not admit of any other explanation. Although the trial of an election petition is made in accordance with the Code of Civil Procedure, it has been laid down that a corrupt practice must be proved in the same way as a criminal charge is proved. In other words, the election petitioner must exclude every hypothesis except that of guilt on the part of the returned candidate or his election agent. Since we have held that Mr. Atrey's activities must be viewed in two compartments, one connected with Mr. Fernandez and the other connected with the newspaper we have to find out whether there is an irresistable inference of guilt on the part of Mr. Fernandez. Some of the English cases cited by Mr. Jethamalani are not a safeguide because in England distinction is made between "illegal practices" and "corrupt practices". Cases dealing with "illegal practices" in which the candidate is held responsible for the acts of his agent are not a proper guide. It is to be noticed that making of a false statement is regarded as "corrupt practice" and not an "illegal Practice" and the tests are different for a corrupt practice. In India all corrupt practices stand on the same footing. The only difference made is that when consent is proved on the part of the candidate or his election agent to the commission of corrupt practice, that itself is sufficient. When a corrupt practice is committed by an agent and there is no such consent then the petitioner must go further and prove that the result of the election in so far as the returned candidate is concerned was materially affected. In Bayley v. Edmunds, Byron and Marshall strongly relied upon by Mr. Daphtary, the publication in the newspaper was not held to be a corrupt practice but the paragraph taken from a newspaper and printed as a leaflet was held to be a corrupt practice. That is not the case here. Mr. Patil's own attitude during the election and after is significant. During the election he

did not once protest that Mr. Fernandez charged his workers with hooliganism. Even after the election Mr. Patil did not attribute anything to Mr. Fernandez. He even said that the Bombay election was conducted with propriety. Even at the filing of the election petition he did not think of Mr. Fernandez but concentrated on the 'Maratha'.

48. Mr. Daphtary sought to strengthen the inference about consent from the interconnection of events with the comments in the 'Maratha'. He refers to the news item appearing in the 'Times of India' of February 10, 1967 in which the letting loose of bad characters was alleged to be commented upon by Mr. Fernandez. He connected this with the activities of Shanbhag who wrote to the Election Commission and then pointed out that the 'Maratha' came out with it. But if the 'Times of India' cannot be regarded as the agent no more can the 'Maratha'. A newspaper reporting a meeting does so as part of its own activity and there can be inference of consent. What was necessary was to plead and prove that Mr. Fernandez said this and this. Then the newspaper reports could be taken in support but not independently. Here the plea was not taken at all and the evidence was not direct but indirect.

49. Mr. Jethamalani referred to some similarity in the reaction of the 'Maratha' and Mr. Fernandez to the events. The incident Babubhai Chinai of was said to be a fake by both the 'Maratha' and Mr. Fernandez, the Sayawadi meeting (not pleaded) was said to be followed by similar statements in the 'Maratha', the Bristol Grill Conference was reported in the 'Maratha'. All this shows that the rival party believed in certain facts but it does not show that the 'Maratha' was publishing these articles with Mr. Fernandez's consent. In fact this argument has been designed to get over our finding that the Amendments were wrongly allowed. Before this there was not so much insistence upon consent as thereafter.

50. Now it may be stated that mere knowledge is not enough. Consent cannot be inferred from knowledge alone. Mr. Jethamalani relied upon the Taunton's case where Blackburn, J., said that one must see how much was being done for the candidate and the candidate then must take the good with the bad. There is difficulty in accepting this contention. Formerly the Indian Election Law mentioned 'knowledge and connivance' but now it insists on consent. Since reference to the earlier phrase has been dropped it is reasonable to think that the law requires some concrete proof, direct or circumstantial of consent, and not merely of knowledge and connivance. It is significant that the drafters of the election petition use the phrase 'knowledge and connivance' and it is reasonable to think that they consulted the old Act and moulded the case round 'knowledge and connivance' and thought that was sufficient.

51. We cannot infer from an appraisal of the evidence of Mr. Fernandez that he had consented. His denial is there and may be not accurate but the burden was to be discharged by the election petitioner to establish consent. If Mr. Fernandez suppressed some other facts or denied them, there can be no inference that his denial about knowledge of the articles in the 'Maratha' was also false. Mr. Fernandez denied flatly that he saw the articles explaining that there was no time to read newspapers, a fact which has the support of Mr. Patil who also said that he had no time to read even cuttings placed by his secretary for his perusal. We may say here that we are not impressed by the testimony of Mr. Fernandez and we are constrained to say the same about Mr. Patil. We cannot an appraisal of all the materials and the arguments of Mr. Daphtary reach the conclusion that Mr. Fernandez was responsible for all that Mr. Atrey did in his newspaper or that his consent can be inferred in each case.

52. The most important argument was based on the meeting at Shivaji Park on January 31, 1967

where Fernandez spoke. As the subject of the charge in the original petition did not refer to this speech and we disallowed the amendment, Mr. Jethamalani attempted to reach the same result by using the speech as evidence of consent to the publication of the report in the 'Maratha'. Here we may say at once that the speech could not be proved because it was not pleaded. Much time was consumed to take us through the evidence of witnesses who gave the exact words of Mr. Fernandez. Mr. Fernandez was alleged to have said that Mr. Patil was not honest and won elections by changing ballot boxes. Mr. Fernandez did not admit having made the speech. Four witnesses Tanksale, Bhide, Khambata and Bendre who alleged that they were present at the meeting deposed to this fact. We have looked into their evidence and are thoroughly dissatisfied with it. Ramkumar, a reporter was also cited. He covered the meeting for the 'Indian Express' but his newspaper had not published this part and Ramkumar was examined to prove that it was deleted by Rao, the Chief Reporter. The evidence of Ramkumar was so discrepant with that of Rao that the trial Judge could not rely on it and we are of the same opinion. The fact that in Ex. 56 Mr. Fernandez had spoken of the 'ways and means' of winning election of Mr. Patil cannot be held to be proof nor the activities of Shanbhag in arranging for a watch of the ballot boxes. Every candidate is afraid that the ballot boxes may be tampered with and there is no inference possible that because Mr. Fernandez or Shanbhag, his worker, took precautions, Mr. Fernandez must have made a particular speech. It was said that Randive in his evidence admitted that Mr. Fernandez made such comments. We do not agree. His version was different. There is reason to think that there was an attempt to subborn witnesses and make them support this part of the case or to keep away from the witness box. One such attempt was made on Randive. We are not impressed by the witnesses who came to disprove the petitioner's case but that does not improve it either. It seems that attempts were being made to enlist support for such a contention and the evidence shows that the witnesses were not free from influence. It is not necessary to go into the evidence on the other side such as that of Dattu Pradhan and Prafulla Baxi. They do not impress us either. We are accordingly not satisfied that Mr. Fernandez made any such comment. If he did that would be a ground of the very first importance to an election petition. It is a little surprising that it was alleged so late and appears to be an after thought and intended to put into the mouth of Mr. Fernandez one of the statements of the 'Maratha'. Consent to the making of the statement in the 'Maratha' had, therefore, to be proved and there is no such proof.

53. For the same reasons we cannot regard Jagadguru Shankaracharya of Mr. Madhu Limaye as the agents of Mr. Fernandez. The evidence regarding their agency itself is non-existent and there is no material on which consent can be presumed or inferred.

54. The result of the foregoing discussion is that this case will have to be judged of under Section 100(1)(d) and not under Section 100(1)(b). In the arguments before us Mr. Chari conceded that some of the articles contain false statements regarding the character and conduct of Mr. Patil. He mentioned in this connection five articles.

55. It is not, therefore, necessary to examine each of the 16 articles separately. If the conditions required by Section 100(1)(d) read with Section 123(4) are satisfied, a corrupt practice avoiding the election will be established. The first condition is that the candidate's belief in the falsity of the statements must be established. That was laid down by this Court in Kumara Nand v. Brijmohan Lal Sharma (supra). The second condition is that the result of the election in so far as Mr. Fernandez in concerned must be shown to be materially affected. Thus we have not only to see (a) that the statement was made by an agent, (b) that it was false etc., (c) that it related to the personal character and conduct of Mr. Patil, (d) that it was reasonably calculated to harm his chances but also (e) that it in fact materially affected the result of the election in so far as Mr. Fernandez was concerned. Of these (a) and (c) are admitted and (d) is admitted by Mr. Fernandez because he said that he did not

believe that there was any truth in these statements. The question next is whether they were calculated to affect the prospects of Mr. Patil. Here there can be no two opinions. These articles cast violent aspersions and were false as admitted by Mr. Fernandez himself. The course of conduct shows a deliberate attempt to lower his character and so they must be held to be calculated to harm him in his election. So far the appellants are on firm ground. Even if all these findings are in favour of the appellants, we cannot declare the election to be void under Section 100(1)(d)(iii) unless we reach the further conclusion that the result of the election in so far as Mr. Fernandez was concerned had been materially affected. The section speaks of the returned candidate when it should have really spoken of the candidate who was defamed or generally about the result. However it be worded, the intention is clear. The condition is a per-requisite.

56. Mr. Jethamalani argued that the words "materially affected" refer to the general result and not how the voting would have gone in the absence of the corrupt practice. According to him, Section 94 of the Act bars disclosure of votes and to attempt to prove how the voting pattern would have changed, would involve a violation of Section 94. According to him the court can give a finding by looking to the nature of the attacks made, the frequency and extent of publicity, the medium of circulation and the kind of issue that was raised before the voters. He contends that to tell the Maharashtrians that Mr. Patil paid a bribe to the voters of Goa to keep it centrally administered, to call Mr. Patil a Najibkhan of Maharashtra i.e., a traitor, to dub him as the creator of Shiv Sena which terrorised the minorities, to describe him as a Goonda and leader of goondas who organized attacks on voters, to charge him with the responsibility of attack as Parliament and the Congress President's residence and to describe him as dishonest to the extent of switching ballot boxes, is to materially affect the result of the voting. According to him these circumstances furnish a good basis for the finding that the result of the election was positively affected and nothing more is needed. According to Mr. Jethamalani the capacity of Mr. Atrey when making these violet attacks was irrelevant as he was acting in support of the canvass of Mr. Fernandez.

57. Mr. Jethamalani further submits that different false statements were intended to reach different kind of voters. The Maharashtrians were affected by the Goa and border issues, the minorities by the Shiv Sena allegations, the law-abiding citizens by the allegations about goondaism. Thus there must have been a land-slide in so far as Mr. Patil was concerned and there must have been corresponding gain to Mr. Fernandez. He relies upon Hackney Case where Grove, J. made the following observations at pages 81 and 82 :

> "I have turned the matter over in my mind, and I cannot see, assuming that argument to express the meaning of that section, how the tribunal can by possibility say that would or might have taken place under different circumstances. It seems to me to be a problem which the human mind has not yet been able to solve, namely, if things had been different at a certain period, what would have been the result of the concatenation of events upon that supposed change of circumstances. I am unable at all events to express an opinion upon what would have been the result, that is to say, who would have been elected provided certain matters had been complied with here which were not complied with. It was contended that I might hear evidence on both sides as to how an elector thought he would have voted at such election. That might possibly induce a person not siting judicially to form some sort of vague guess, but that would be far short of evidence which ought to satisfy the mind of a Judge of what any individual who might express that opinion would really do under what might have been entirely changed circumstances. But, besides that, one of the principles of the Ballot Act is that voting should be secret, and voters are not to be

> compelled to disclose how they voted except upon a scrutiny after a vote has been declared invalid. Notwithstanding that, I am asked here, assuming the construction for which Mr. Bowen contends to be correct, to ascertain how either the 41,000 electors of this Borough, or any number of them, might have wished to vote had they had the opportunity of doing so, and what in that event would have been the result of the election. It seems to me that such an inquiry would not only have been entirely contrary to the spirit of the Act, but also that it would be a simple impossibility. I should, therefore, say that even if the wording of the Act, taking it literally and grammatically, required me to put such a construction upon it, it would lead to such a manifest absurdity (using now the judicial term which has generally been used with reference to the construction of statutes) that unless I were in some way imperatively obliged, and unless the Act could by on possibility admit of any other construction. I should not put a construction upon it which really reduced the reduced the matter to a practical impossibility. Such a construction would practically render it necessary, in the case of any miscarriage at an election, however great the miscarriage might be (if, that is to say, only a very small number of persons had voted, and all the rest of the Borough had been entirely unable to vote) that the Judge should then enquire as to how the election would have gone. As I ventured to remark in the course of the argument, where a miscarriage of this sort took place it would be virtually placing the election not in the hands of the constituency, but in the hands of the election judge, who is not to exercise a judgment as to who is to be the member, but who is only to see whether the election has been properly conducted according to law."

Justice Grover then gave the meaning of the provision at page 85 as follows :

> "If I look to the whole, and to the sense of it as a whole, it seems to me that the object of the Legislature in this provision is to say this - an election is not to be upset for an informality or for a triviality, it is not to be upset because the clerk of one of the polling stations was five minutes late, or because some of the polling papers were not delivered in a proper manner, or were not marked in a proper way. The objection result of the election. I think that that is a way of viewing it which is consistent with the terms of the section. So far as it seems to me, the reasonable and fair meaning of the section is to prevent an election from becoming void by trifling objection on the ground of an informality, because the judge has look to the substance of the case to see whether the informality is of such a nature as to be fairly calculated in a reasonable mind to produce a substantial effect upon the election."

Mr. Jethamalani invites us to apply the same test and in the light of his facts to say that the result of the election in so far as Mr. Fernandez is concerned was materially affected.

58. On the other hand, Mr. Chari relies upon the fact that there was a difference of 30,000 votes between the two rivals and as a many as 38,565 votes were cast in favour of the remaining candidates. He says that Mr. Patil had contested the earlier elections from the same constituency and the votes then obtained by him were not more, in fact less. He says it is impossible to say how much Mr. Patil lost or Mr. Fernandez gained by reason of the false statements and whether the affected voters did not give their votes to the other candidates. He argues that the best test would be to see what Mr. Patil's reactions were on hearing of his defeat. In this connection he referred to Ex. 120 in which Mr. Patil commented on the elections in Bombay being orderly. In Ex. 128 he said that the voters of Bombay had rejected him and that he has disappointed his supporters and they must

pardon him, and that he must have been punished for some sin committed by him. Mr. Chari says that never for a moment did Mr. Patil attribute his defeat to false propaganda by Mr. Fernandez or his supporters which if it had been a fact Mr. Patil would have lost no time in mentioning. All this shows that Mr. Patil maintained his position in this constituency. Mr. Fernandez had earlier announced that he would organise support for himself from those who had voted in the past for his rivals or had refrained from voting and this Mr. Fernandez was successful in achieving. Mr. Chari relies upon the rulings of this Court where it has been laid down how the burden of proving the effect on the election must be discharged. He referred to the case reported in Vashist Narain Sharma v. Dev Chandra and Surendra Nath Khosla v. Dalip Singh and the later rulings of this Court in which Vashist Narain's case has been followed and applied.

59. In our opinion the matter cannot be considered on possibility. Vashist Narain's case insists on proof. If the margin of votes were small something might be made of the points mentioned by Mr. Jethamalani. But the margin is large and the number of votes earned by the remaining candidates also sufficiently huge. There is no room, therefore, for a reasonable judicial guess. The law requires proof. How far that proof should go or what it should contain is not provided by the Legislature. In Vashist's case and in Inayatullah v. Diwanchand Mahajan, the provision was held to prescribe an impossible burden. The law has however remained as before. We are bound by the rulings of this Court and must say that the burden has not been successfully discharged. We cannot overlook the rulings of this Court and follow the English ruling cited to us.

60. To conclude and summarize our findings : We are satisfied that Mr. Atrey as the Editor of the 'Maratha' published false statements relating to the character and conduct of Mr. Patil, calculated to harm the prospects of Mr. Patil's election, that Mr. Atrey was the agent of Mr. Fernandez under the election law, but there is nothing to prove that he did so with the consent of Mr. Fernandez, nor can such consent be implied because in making the statements Mr. Atrey was acting as the editor of his own newspaper, the 'Maratha' and not acting for Mr. Fernandez. We are further satisfied that the petitioner has failed to establish in the manner laid down in this Court, that the result of the election was materially affected in so far as Mr. Fernandez was concerned. We are also satisfied that if the petitioner had pleaded corrupt practices against Mr. Fernandez personally (which he did not) the result might have been different. The election petition was ill-considered and left out the most vital charges but for that the petitioner must thank himself.

61. In the result the appeals fail and as already announced earlier they are dismissed with costs.

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