

Shivajirao B. Patil Kawekar

Vs

Vilasrao D. Deshmukh

Civil Appeal No. 6512 of 1997

(CJI Dr. A. S. Anand, S. Rajendra Babu, R. C. Lahoti JJ)

03.12.1999

JUDGMENT

R.C. LAHOTI, J.:-

1. This is an appeal under Section 116-A of the Representation of the People Act, 1951 (hereinafter RPA for short) preferred by a candidate successful at the election but against whom an election petition file by a candidate who had lost at the election has been allowed by the High Court on the ground of commission of corrupt practices as defined in sub-sections (3-A) and (4) of Section 123 of RPA. For the sake of convenience the parties will be referred to as they are arrayed before this Court in this appeal, that is to say, Vilasrao Dagdojirao Deshmukh who had filed the election petition and is arrayed as respondent in this appeal shall be referred to as the respondent and Shivajirao Balwantrao Patil Kawekar who was arrayed as defendant-respondent before the High Court and is appellant before us shall be referred to as the appellant.

2. Elections to the Maharashtra State Legislative Assembly from 206, Latur Assembly Constituency took place on 9-2-1995. The respondent was a candidate sponsored by the Congress (I). The appellant was sponsored by the Janata Dal. Result of the election was declared on 12-3-1995. The respondent got 79,077 votes while the appellant secured 1,12,901 votes. The appellant was thus declared elected.

3. The election petition alleged commission of several corrupt practices. As many as 28 issues were framed by the learned Designated Election Judge based on the pleadings of the parties. As the judgment under appeal shows the learned Designated Election Judge has found Issues (6) to (10) and (11) to (15) proved. On the rest of the issues the findings recorded are in the negative. The subject-matter of this appeal are the affirmative findings recorded on Issues (6) to (15). The finding on Issue (3) is also the subject-matter of challenge laid by the appellant before us. These issues are extracted and reproduced hereunder:

(3) Is it proved by the respondent that the petition is liable for dismissal for non-compliance with Rule 94-A read with Rule 25 of the Conduct of Elections Rules?

(6) Does the petitioner prove that Prof. Mohan Kamble has published in a daily Jan Jagran dated 25-1-1995 the statement that the petition is having MAMULI opposition and the petitioner be opposed by MAMULI?

(7) Does the petitioner prove that Prof. Mohan Kamble published the said statement in Jan Jagran dated 25-1-1995 with the consent of the respondent?

(8) Does the petitioner prove that Prof. Mohan Kamble and the respondent published the said statement in Jan Jagran dated 25-1-1995 for promotion or attempting to promote feelings of hatred and enmity between different communities of Latur Constituency on the ground of religion, caste and communities of Latur Constituency on the ground of religion, caste and community for prejudicially affecting the election of the petitioner and thereby committed corrupt practice under Section 123(3-A) of the Act?

(9) Does the petitioner prove that the respondent made a statement on 20-2-1995 in a meeting held at Town Hall, Latur that the respondent's victory at the election is as a result of the magic played by the words "Mamuli" and thereby accepted the commission of corrupt practice under Section 123(3-A) of the Representation of the People Act?

(10) Does the petitioner prove that Prof. M. B. Pathan, Editor of the weekly Lawa Lawi published an article on 5-2-1995 under heading "Vilasrao's father Dagdoji Deshmukh and his relatives inhumanely attacked on Muslims", as stated in Paras 12 and 13 and Exhibit 'C' of the petition?

(11) Does the petitioner prove that Prof. M. B. Pathan published the said article with the consent of the respondent?

(12) Does the petitioner prove that Prof. M. B. Pathan and the respondent published the statement of facts in the said article which is false and which the respondent and Prof. M. B. Pathan believed to be false or do not believe to be true?

(13) Does the petitioner prove that the statement of facts published in the said article are in relation to the personal character and conduct of the petitioner and was reasonably calculated to prejudice the prospects of the petitioner's election and thereby committed corrupt practice under Section 123(4) of the Act?

(14) Does the petitioner prove that as a result of the said article dated 5-2-1995 in the weekly Lawa Lawi, communal tension was created in the constituency and Muslim voters had gathered in groups and thereby ultimately complaint under Section 125 of the Representation of the People Act and Section 153-A of the Indian Penal Code bearing No. 9 of 1993 was filed with Gandhi Chowk Police Station, Latur?

(15) Does the petitioner prove that Prof. M. B. Pathan and the respondent published the said article for promotion or attempting to promote feeling of enmity and hatred against the petitioner amongst the Muslim voters of Latur Constituency on the ground of religion and community for prejudicially affecting the election of the petitioner and thereby committed corrupt practice under Section 123(3-A) of the Representation of the People Act?

4. Preliminary objections were raised in the written statement filed before the High Court by the appellant submitting that material facts and particulars relating to the alleged corrupt practices were not fully and adequately set out in the election petition and that the verification of the election petition as also the affidavit filed in support of the election petition did not satisfy the requirements of the law i.e., Section 83 of RPA and Rule 94-A of the Conduct of Elections Rules, 1961 and

therefore the petition was liable to be dismissed without being tried. These objections were overruled by the learned Designated Election Judge by order dated 17-4-1996. The appellant had approached this Court by filing Special Leave Petition (Civil) No. 13996 of 1996 which was disposed of by order dated 23-4-1996 by this Court observing that in the event of the election petition being allowed by the High Court it will be open to the appellant (petitioner before the Supreme Court in the SLP) to raise all the questions which have been raised in that SLP. Thus, the appellant's plea putting in issue the deficiencies and defects in the pleadings, verification and affidavit filed by the respondent are available to be raised by the appellant and to be considered by this Court. We will refer to the same at appropriate places.

5. A perusal of the above-quoted issues shows that there are three corrupt practices forming the subject-matter of this appeal and they are referable to the three publications namely Ext. 'A', Ext. 'B' and Ext. 'C'. Insofar as the statement made by the appellant in the meeting dated 20-2-1995 forming the subject-matter of Issue (9) is concerned, it is not relied on as a corrupt practice by itself; from the contents of the statement so made support is sought to be drawn for proving the corrupt practices forming the subject-matter of Issues (6), (7) and (8).

6. We now proceed to briefly set out the pleadings insofar as relevant to the issues surviving for decision and forming the subject-matter of appeal before us. The three corrupt practices which form the subject-matter of the above-quoted issues have been so alleged as is stated in the succeeding paragraphs.

7. According to the respondent, the appellant and with his consent his agents and workers got published in the daily Sanchar an article by Raja Mane who is a special reporter of the newspaper for Latur District based on a report dated 31-1-1995. The newspaper was having circulation in Latur Constituency. It is stated in the report that the word MAMULI has a hidden meaning. MA means Marawadi; MU means Muslims; LI means Lingayats; and RE means Reddy. Exhibit A is the copy of the daily Sanchar newspaper dated 31-1-1995.

8. The daily Jan Jagran dated 25-1-1995 published by the Editor, Professor Mohan Kamble has quoted the respondent to be against "MAMULI RE" communities and pleaded for MAMULI to oppose the respondent. The publisher was an active canvasser of the appellant during the election process. The article was published to promote feelings of enmity and hatred between different classes of citizens and voters of the constituency. The publication by Mr. Mohan Kamble was with the consent of the appellant for the furtherance of his election prospects and for prejudicially affecting the election of the respondent.

9. The appellant spoke in a public meeting at Town Hall, Latur on 20-2-1995 soon after he was declared elected. Therein he stated that his victory was as a result of the magic played by the word MAMULI.

10. Professor M. B. Pathan, an active worker and supporter of the appellant was the Editor of the Weekly Lawa Lawi. With the consent of the appellant he published a news report in the issue dated 5-2-1995 under the heading and caption -- "Vilasrao's father Dagdoji Deshmukh and his relatives unhumanly attacked on Muslims". The report then quotes an incident wherein the father and uncle of the respondent with a view to take possession of some land at Nilanga which was in possession of Pasha Sahib Bagwan and his family members for last sixty years resorted to threat by gun and also molested the ladies of the said Muslim family. The report was totally false and frivolous to the knowledge of the publisher and the appellant. The publication was intended to promote or attempt

to promote the feelings of communal hatred amongst the Muslim voters. Copies of Lawa Lawi dated 5-2-1995 were widely circulated in Latur Constituency with the consent of the appellant. There was communal tension in the constituency and Muslim voters had gathered in groups. This constituted corrupt practice under Section 123(3-A) RPA.

11. It is not necessary to reproduce verbatim the contents of Exhibits A, B and C. It would suffice to briefly set out the gist of the three documents with necessary extracts therefrom to the extent necessary.

As to Ext. 'A'

12. The news item in Sanchar dated 31-1-1995 is titled as - "Insistence of MA. MU. LI. RE". It states inter alia---

... In this constituency MA-MU-LI-RE has become a magic word What is in this word that makes it so important. Let me reveal. MA -- means Marawadi, MU -- means Muslim, LI -- means Lingayat and RE -- means Reddy. The equation of assembly election of every party is based on MA-MU-LI-Re. Though one feels this word MAMULI (OF LESS IMPORTANCE), it carries much meaning as far as caste set-up is concerned. But the persons who use this word as their election gimmick are playing with fire. They must be prevented forthwith. If these persons intend to bring us home their caste calculation we must destroy their game

- Raja Mane

As to Ext. 'B'

13. The news item in Jan Jagran dated 25-1-1995 is titled as - "MA-MU-Li oppose of Vilasrao":

"A new 'pattern' of speaking true has been developed in Latur Assembly Constituency in the election period.... Vilasrao faces a MMULI (LESS IMPORTANT) opposition. That is why Shivaji Kawekar is bound to win. The abbreviation of MA-MU-LI is as under:

MA -- MARAWADI, MAHAR, MANG

MU -- MUSLIM

LI -- LINGAYAT

Abbreviation of the support on which MR KAWEKAR is going TO BE MLA is as under.

M -- MARATHA, MAHAR, MANG

L -- LINGAYAT

A -- AND ALL

IS IT NOT THEN THAT VILASRAO FACES MAMULI"

As to Ext. 'C'

14. The reporting in Lawa Lawi dated 5-2-1995 is titled as - "Unhuman attack on Muslims by Dagdoji Deshmukh; father of Vilasrao and relative". The opening paras read as under:

"Mr. Dagdoji Vyankatrao Deshmukh, father of Revenue Minister, Shri Vilasrao Deshmukh incited some goons with guns to beat the family of Shri Elahi Pashasab Bagwan with sticks to deprive him of his possession on the farm he had since 60 years. The goons also tried to molest a Muslim female.

Ibrahim Fakirsab Bagwan (Chaudhari) was tried to be assassinated by immolating him after pouring kerosene. All the males and females were arranged to be put in confinement for two days.

Police protection is sought for by the Bagwan family in fear of threat to their lives from Mr. Dagdoji, father of Vilasrao, Rajaji, husband of Vilasrao's aunt and others. A crime also has been registered with Ist Class Judicial Magistrate, Nilanga.

Following is the information our representative received after personally meeting the Bagwan family."

15. It is then stated that "following information" was received by the reporting representative of the newspaper "after personally meeting the Bagwan family". The story narrated is that Pashasab Bagwan was possessed of some land since before 1935. The land was taken on batai from the father-in-law of the aunt of Mr. Vilasrao. Rajaji Deshmukh initiated legal proceedings for taking possession of the land but did not succeed because of the legal protection available to the tenants of the land. The matter was taken to the Court of the Commissioner. A special Commissioner was appointed to deal with this case only because it related to Mr. Vilasrao Deshmukh. For the same reason, Bagwan's advocate refused to plead for Bagwan and returned the file with an apology. In such circumstances, Bagwan lost the case. Thereafter, forcible possession was taken. The article goes on to allege that though the Congress Party assured the security of the minorities but the father of Mr. Vilasrao Deshmukh, a Minister of the Congress Party was acting contrary to such principles. "The members of Elahi Pashasab told this sad story with tears in their eyes ... father of Vilasrao used all the methods by hook or crook and made us homeless, they narrated."

16. In the written statement filed by the appellant all the material averments made in the election petition have been denied. the appellant has completely denied any association with or responsibility for the said publications. It is denied that any one of the persons associated with the three publications was a worker or canvasser for the appellant. The appellant has denied his consent to any of the said publications.

17. Before we may proceed to deal with the charges of corrupt practices levelled against the appellant by reference to the above said three publications - Ext. 'A', Ext. 'B' and Ext. 'C', it will be useful to keep in view a few well-settled legal propositions in the field of election jurisprudence and relevant for the purpose of this appeal. This Court very recently in the case of Jeet Mohinder Singh v. Harminder Singh Jassi [(1999) 9 SCC 386 : JT (1999) 8 SC 432] summed up such principles on a review of the decided case as under:

"(i) The success of a candidate who has won at an election should not be lightly interfered with. Any petition seeking such interference must strictly conform to the requirements of the law. Though the purity of the election process has to be

safeguarded and the court shall be vigilant to see that people do not get elected by flagrant breaches of law or by committing corrupt practices, the setting aside of an election involves serious consequences not only for the returned candidate and the constituency, but also for the public at large inasmuch as re-election involves enormous load on the public funds and administration.

(ii) Charge of corrupt practice is quasi-criminal in character. If substantiated it leads not only to the setting aside of the election of the successful candidate, but also of his being disqualified to contest an election for a certain period. It may entail extinction of a person's public life and political career. A trial of an election petition though within the realm of civil law is akin to trial on a criminal charge. Two consequences follow. Firstly, the allegations relating to commission of a corrupt practice should be sufficiently clear and stated precisely so as to afford the person charged a full opportunity of meeting the same. Secondly, the charges when put to issue should be proved by clear, cogent and credible evidence. To prove charge of corrupt practice a mere preponderance of probabilities would not be enough. There would be a presumption of innocence available to the person charged. The charge shall have to be proved to the hilt, the standard of proof being the same as in a criminal trial.

* * * *

41. Section 83 to the RPA requires every election petition to contain a concise statement of the material facts on which the petitioner relies. If the election petition alleges commission of corrupt practice at the election, the election petition shall set forth full particulars of any corrupt practice 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. Every election petition must be signed and verified by the petitioner in the manner laid down for the verification of pleadings in CPC. An election petition alleging corrupt practice is required to be accompanied by an affidavit in Form 25 read with Rule 94-A of the Conduct of Elections Rules, 1961. Form 25 contemplates the various particulars as to the corrupt practices mentioned in the election petition being verified by the petitioner separately under two headings: (i) which of such statements including particulars are true to petitioner's own knowledge, and (ii) which of the statements including the particulars are true to information of the appellant. It has been held in *Gajanan Krishnaji Bapat v. Dattaji Raghobaji Meghe* [(1995) 5 SCC 347 : JT (1995) 5 SC 410] that the election petitioner is also obliged to disclose his source of information in respect of the commission of the corrupt practice so as to bind him to the charge levelled by him and to prevent any fishing or roving inquiry, also to prevent the returned candidate from being taken by surprise."

18. In *Harasingh Charan Mohanty v. Surendra Mohanty* [(1974) 3 SCC 680 : AIR 1974 SC 47] this Court has held: (SCC p. 686, para 12)

"12. In order to establish a corrupt practice under the above provisions the petitioner must prove -

(i) For the purposes of corrupt practice under sub-section (3) of Section 123 of the Act that the statement is an appeal to the religious symbol and has been made (a) for

the furtherance of the prospects of the election of that candidate; or (b) for prejudicially affecting the election of any candidate; and

(ii) For the purposes of corrupt practice under sub-section (4) of Section 123 of the Act that the publication of a statement of fact is by (a) the candidate, or (b) his agent, or (c) any other person with the consent of the candidate or his election agent; (d) that the statement is false and the candidate believes it to be false or does not believe it to be true; (e) that it relates to personal character or conduct of a candidate; and (f) that the statement is reasonably calculated to prejudice the prospects of the candidate's election.

The word 'agent' under the Explanation to Section 123 of the Act 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. If the corrupt practice is committed by the returned candidate or his election agent, under Section 100(1)(b) of the Act the election is void without any further condition being fulfilled. But if the petitioner relies on a corrupt practice committed by any agent other than an election agent, the petitioner must prove that it was committed by him with his consent or with the consent of his election agent."

19. In the case of Harasingh Charan Mohanty case [(1974) 3 SCC 680 : AIR 1974 SC 47] the Court quoted and followed the following statement of law from Samant N. Balkrishna v. George Fernandez [(1969) 3 SCC 238 : AIR 1969 SC 1201] while dealing with different burdens of proof as to whether an offending statement was made by the candidate himself or by his agent other than an election agent: (SCC p. 687, para 13)

"There are many kinds of corrupt practices. 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 the election was materially affected. We may attempt to put the same 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."

20. With so much statement of law, we now proceed to deal with each of the three publications.

Re: daily Sanchar dated 31-1-1995 Ext. 'A'

21. Vide para 9 of the election petition, the respondent has averred that the appellant and with his consent his agents and workers have got published in the local newspapers, having circulation in Latur Constituency i.e. the daily Sanchar, a special article of Raja Mane, a report dated 31-1-1995. The respondent has not named the alleged agents and workers. There are no particulars given of the

dates and places where the local newspaper carrying the impugned publication is said to have been distributed. Names of even a few persons by way of illustration to whom the newspaper might have been delivered are not given.

22. The averments made in para 9 of the election petition have been verified as "based on information received by me from the persons and newspapers mentioned in the said paras which I believe to be true". Para 9 does not mention the name of any person; only the name of the newspaper is given. In the affidavit filed in support of the petition, vide para 2 the said article has been stated to have been contributed by Raja Mane who is a special reporter for Latur District. Thus, so far as the contents of the election petition, verification thereon and the supporting affidavit are concerned, the only person who would speak in support of the averments is indicated to be Raja Mane and none else. Needless to say, the averments in this regard are not claimed by the respondent to be based on his personal knowledge.

23. Raja Mane has appeared in the witness box as PW 2. In the examination-in-chief itself he has stated that the article was his own creation based on the discussions which were going on in the constituency about the word "MAMULI". He has further stated -- "the very object in writing this article was that I felt that the campaign in elections should not be on the basis of communal footing and the constituency and the voters should not adopt such culture".

24. Raja Mane was neither an election agent nor an agent of the respondent (sic appellant). He was "any other person" a charge of corrupt practice by reference to sub-section (4) of Section 123 of RPA cannot be said to have been brought home to the respondent unless it was proved that the said publication was with the consent of the candidate i.e. the appellant or his election agent. There is no evidence adduced in this regard. Thus the appellant cannot be connected with the publication in the daily Sanchar dated 31-1-1995.

25. Shri V. A. Mohta, the learned Senior Counsel for the appellant has submitted that the contents of the publication Ext. 'A' do not even prima facie make out a case of corrupt practice. There is no reference to either of the two candidates in the publication. There is no "appeal" as such to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language as such. On the contrary, the article condemned the activity or tendency on the part of any person to use castes/community formulae/equations in the election. The charge of corrupt practice against the appellant in this regard cannot be said to have been made out even prima facie.

Re: daily Jan Jagran dated 25-1-1995 Ext. 'B'

26. Vide para 10 of the election petition Prof. Mohan Kamble, the Editor of the daily Jan Jagran has been alleged to be an "active canvasser" of the appellant "during election process". It is also alleged that "the said publication by Mr. Mohan Kamble is with the consent of the respondent (i.e. the appellant before us) for the furtherance of his election prospects and for prejudicially affecting the election of the petitioner (i.e. the respondent before us)". Prof. Mohan Kamble was not an election agent of the appellant. An inference as to Prof. Mohan Kamble being an agent of the appellant is supposed to be drawn from the allegation that he was an active canvasser of the appellant during the election process.

27. The averment so made in the election petition is verified "on information received by me from the persons and newspapers mentioned in the said paras" and believed to be true. Vide para 3 of the affidavit filed in support of the election petition, it is again stated that the publisher was "active

canvasser of respondent during election campaign" and that "the said publication by Mr. Mohan Kamble is with the consent of the respondent for furtherance of his election prospect and for prejudicially affecting the election of me". The respondent does not claim the averment made in this regard to be based on his personal knowledge. The pleadings, the verification and the affidavit give an indication only of Prof. Mohan Kamble being the person who would substantiate the averments made in the petition. Prof. Mohan Kamble has not been examined in the Court.

28. There is no other evidence, much less satisfactory evidence, available on record to hold that Prof. Mohan Kamble was an active canvasser of the appellant as alleged in the petition. Vide para 11 of the election petition, it is alleged that after the election a public meeting was addressed by the respondent on 20-2-1995 at Town Hall, Latur. From what the appellant spoke at the public meeting some link between the appellant and the two reporting Ext. 'A' and Ext. 'B' was sought to be established. The petition itself alleges the proceedings of the meeting having been video-recorded on a cassette by Madhav Pachare. The said video recording has not been produced in the Court. When the best evidence available in respect of the issue has been withheld, an adverse inference has to be drawn and the issue cannot be held to have been proved.

29. In *Manohar Joshi v. Nitin Bhaurao Patil* [(1996) 1 SCC 169] this Court noticed the distinction between clauses (b) of sub-section (1) of sub-clause (ii) of clause (d) sub-section (1) of Section 100 of RPA and stated that under the former provision the commission of any corrupt practice by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent by itself is sufficient to declare the election to be void; while under the latter provision the commission of any corrupt practice in the interests of the returned candidate by an agent other than his election agent (without the further requirement of the ingredient of consent of a returned candidate or his election agent) is a ground for declaring the election to be void only when it is further pleaded and proved that the result of the election insofar as it concerns a returned candidate has been materially affected. It was further held: (SCC p. 197, paras 41 and 42)

"[E]ven if the acknowledged leaders of a party have committed any corrupt practice which results in benefit to the returned candidate then on proof of the benefit having materially affected the election result in favour of the candidate, his election would be set aside on the ground under Section 100(1)(d)(ii) of the RP Act. There is thus no occasion to read into the ground in Section 100(1)(b) or the definition of 'corrupt practice' the implied consent of the candidate for any act done by a leader of that party to dispense with a clear pleading and proof of the candidate's or his election agent's consent as a constituent part of the corrupt practice for the ground under Section 100(1)(b) of the RP Act.

Whenever the requirement is of consent, it must be free consent given by the giver of the consent, of his own volition. Ordinarily, it also implies a subservient role of the person to whom consent is given and the authority of the giver of the consent to control the actions of the agent. It is difficult to ascribe to an acknowledged leader of the party a role subservient to the candidate set up by that party inasmuch as the candidate is ordinarily in no position to control the actions of his leader. However, if even without giving his consent, the candidate has received benefit from the leader's act in a manner which materially affects his election favourably, on pleading and proof of such material affect on the election, the candidate's election is liable to be set aside on the ground under Section 100(1)(d)(ii) unless, as provided in sub-section (2) of Section 100 he further discharges the onus placed upon him that in spite of his

opposition and taking due precautions that act had been committed for which he cannot be responsible."

The Court observed that in the case of pleadings it would not suffice to merely repeat the language of the statutory provision in the pleadings; material facts have to be pleaded. General averments suffering from deficiency of requisite pleading of all the constituent parts of the corrupt practice would not constitute a pleading of the full cause of action and small have to be ignored and struck out in accordance with Order 6 Rule 16 CPC.

30. In Prof. Ramchandra G. Kapse v. Haribansh Ramakbal Singh [(1996) 1 SCC 206] a leader of the political party to which the respondent returned candidate belonged addressed a meeting during the election in which the said leader made some statements on the ground of religion amounting to corrupt practice under Sections 123(3) and (3-A) of RPA. The returned candidate was alleged to be present at the time of speech by the said leader and he had also invited and welcomed the political leader at the meeting. It was held that an inference as to implied consent of the returned candidate to the contents of the speech by the leader of the party could not be drawn. In Chandrakanta Goyal v. Sohan Singh Jodh Singh Kohli [(1996) 1 SCC 378] it was held that the leader of the political party to which the candidate belongs was not an election agent of the candidate. Implied consent of the candidate to the speeches made by such leader could not be inferred. The factum of consent of the candidate or his election agent had to be specifically pleaded and proved. So is the view taken in Moreswar Save v. Dwarkadas Yashwantrao Pathrikar [(1996) 1 SCC 394] and Ramakant Mayekar v. Celine D'Silva [(1996) 1 SCC 399]. In Charan Lal Sahu v. Giani Zail Singh [(1984) 1 SCC 390] the Constitution Bench has drawn a distinction between the concepts of "connivance" and "consent". The two cannot be equated. It has been held that connivance may in certain situations amount to consent but consent implies that parties are ad idem.

31. In the case at hand, there are neither facts alleged nor any evidence adduced wherefrom an inference as to agency of Mohan Kamble or his having acted with the consent of the appellant could be drawn. Section 100(1)(b) is not therefore attracted. There are no averments nor evidence attracting applicability of Section 100(1)(d)(ii) and to hold the corrupt practice having been committed in the interest of the returned candidate and consequent thereupon the result of the election having been materially affected. The upshot of the above said infirmities in the pleadings and the evidence is that the charge of corrupt practice by reference to the reporting in the daily Jan Jagran dated 25-1-1995 Ext. 'B' can also not be said to have been proved against the appellant as required by law.

Re. reporting in the weekly Lawa Lawi dated 5-2-1995 Ext. 'C'

32. Dr A.M. Singhvi, the learned Senior Counsel for the respondent assisted by Shri A.M. Khanwiolkar, Advocate has during the course of hearing heavily laid emphasis on the findings recorded by the learned Designated Election Judge as regards the corrupt practice committed by the appellant referable to publication Ext. 'C' and submitted that even if the alleged corrupt practices referable to two documents Ext. 'A' and Ext. 'B' were not proved, the charge of corrupt practice referable to publication Ext. 'C' was certainly made out beyond any shadow of doubt against the appellant and all the ingredients contemplated by sub-sections (3-A) and (4) of Section 123 of RPA were also made out. Dr. Singhvi submitted that the very title of the article was -- "unhuman attack on Muslims". The contents suggested old, aged and helpless members of the Muslim family having been brutally attacked. The modesty of female members of a Muslim family was alleged to have been violated. Such allegations were aimed at promoting feelings of enmity or hatred against the

respondent (who is a non-Muslim) in the minds of the Muslim population of voters. The perpetrators of the criminal assault were referred to as the father of the respondent and his relations. Thus, the publication was aimed at prejudicially affecting the election of the respondent. The contents were partly false as also highly exaggerated. The incident was of December 1994 published in the issue dated 5-2-1995 of the weekly Lawa Lawi and widely circulated soon after publication. The date of publication strategically preceded the date of polling i.e. 9-2-1995 which was just three days hence. Ample evidence has been adduced proving the factum of publication and circulation of the weekly newspaper in Latur Constituency. Thus, the charge of corrupt practice at least by reference to Ext. 'C' was undoubtedly brought home to the appellant.

33. The respondent's case as regards Ext. 'C' is set out in para 12 of the election petition. The verification states the contents of para 12 were based on "information received" by the appellant from the persons and newspapers mentioned therein. The only name mentioned in this para 12 is of Prof. M. B. Pathan and the newspaper mentioned is obviously Lawa Lawi. In the affidavit filed in support of the petition, vide para 5, it is stated that Prof. M.B. Pathan, Editor of the weekly Lawa Lawi was an active worker, during the election campaign, and supporter of the appellant. The oral evidence adduced in this regard consists of the statements of the respondent himself (PW 1) and Mahboob Khan Pathan (PW 3). In rebuttal, there is the testimony of the appellant Pradeep Patil (DW 2) and Jagdish Suryavanshi, a legal practitioner (DW 4).

34. As already stated, the respondent Vilasrao Deshmukh has not claimed any personal knowledge about the publication Ext. 'C' though he did state that the contents were false, highly exaggerated and motivated with the idea of assassinating his character. He also stated that M. B. Pathan was an active campaigner for the appellant though he has not given any particulars or such facts based whereon the Court could draw an inference that M. B. Pathan was an active campaigner for the appellant.

35. Mahboob Khan (PW 3) stated that he was a professor and also the proprietor and Editor of the Weekly Lawa Lawi. As to the source of information by which he prepared the article, he has stated that he had visited the office of the Janata Dal where the officers of the Janata Dal were discussing the matter. He heard the story and prepared his notes. On reaching home he put down the story in a narrative form. He also stated that the contents of his writing were true and correct. He was specifically asked if he had obtained anybody's consent for the publication. His reply was that the question did not arise "because it was already discussed with the candidate and other workers". In the latter part of cross-examination, the witness stated that he was not sure if the contents of his writing published on 5-2-1995 in the weekly Lawa Lawi were the same facts as were told to him by Elahi Pasha Bagwan. Obviously, this part of the statement is false in the light of the contents of the news item Ext. 'C' which itself stated that the reporting was based on the information collected by personally meeting the Bagwan family.

36. Pradeep Patil (DW 2) is himself a journalist and Editor of a newspaper Jan Morcha. He had accompanied M. B. Pathan when the latter was collecting information about the incident. The inference which flows from the testimony of this witness is that M. B. Pathan had taken care to ascertain the correctness of the facts narrated in the news item and then only he had made the reporting.

37. A criminal complaint appears to have been filed in the Court relating to the incident referred to in the news item Ext. 'C'. The counsel for the complainant was the witness Jagdish Suryavanshi (DW 4). He has stated that what was published in the newspaper was similar to the facts stated in

the complaint which was filed by Elahi Pasha through this witness.

38. It is clear from the evaluation of the evidence adduced by the parties that the contents of the news item were substantially correct. They were based on the information collected by M. B. Pathan from the various witnesses specially members of the Bagwan family. The version of the witness M. B. Pathan that the reporting was based on the information gathered from the talks which were going on in the office of the Janata Dal whereat the appellant was also present does not appear to be correct. Such evidence is also liable to be excluded from consideration because such is not the case set out in the election petition. The incident had formed the subject-matter of a criminal prosecution. The complainant had set out his version in the criminal complaint filed before a criminal court and the contents of the news item were substantially the same as set out in the criminal complaint. Neither has the respondent stated in his deposition nor was it suggested to the appellant during his cross-examination that the contents of the publication were false and believed to be false or not believed to be true by the appellant. The ingredients of sub-section (4) of Section 123 of RPA were therefore not satisfied. Though truth is no defence under sub-section (3-A) of Section 123 if the impugned activity has the requisite consequence as its result, but Prof. M. B. Pathan is not proved to have made the publication with the consent of the appellant or his election agent.

39. On the material available on the record, an inference as to the publication having been made with the consent of an appellant cannot at all be drawn merely because Mahboob Khan Pathan has been alleged to be the canvasser of the appellant. As we have already pointed out, from the statement of Mahboob Khan Pathan (PW 3) himself, it is clear that he as a journalist and owner of a newspaper, was, of his own, collecting information relating to the incident covered by Ext. 'C'. Having collected the facts, also having verified the correctness thereof, he of his own wrote out the facts collected in a narrative form so as to give it the shape of a news report and then published the same in his newspaper. The publication was neither sponsored by nor made with the express consent of the appellant. There are no facts and circumstances brought on record to draw an inference as to the existence of even the implied consent of the appellant in the publication. No evidence has been adduced to prove how many copies of Lawa Lawi and on which date to whom and by whom were distributed.

40. A careful appraisal of the evidence shows that the respondent has failed to establish the charge of corrupt practice against the appellant. The judgment has proceeded more on "assumptions" and "surmises" than on any established facts.

41. For the foregoing reasons we are of the opinion that the High Court was not right in holding Issues (6) to (15) proved. The High Court was also not right in holding that the petition did not suffer from the infirmity of non-compliance with Rule 94-A read with Form 25 of the Conduct of Elections Rules. In fact, a substantial part of the allegations made in the election petition could not and should not have been put to trial at all on account of such non-compliance. The findings of the High Court on all the issues i.e. Issue (3) and Issues (6) to (15) being erroneous are hereby set aside. The appeal is allowed. The election petition filed by the respondent is directed to be dismissed with costs throughout. The costs incurred in this Court are quantified at Rs. 10,000.