

GUJARAT HIGH COURT

Lalsing Keshrising Rehvar

Vs.

Vallabhdas Shankerlal Thekdi

Appeal No. 476 of 1962, Palanpur, in Ele. Petition No. 2 of 1962.

(N.M. Miabhoy and N.K. Vakil, JJ.)

22.12.1965

JUDGMENT

N.M. Miabhoy, J.

1. This appeal is filed under section 116-A of the Representation of the People Act, 1951 (Act 43 of 1951), (hereinafter referred to as "the Act") by Lalsing Keshrising Rehvar whose election to a seat in the Gujarat Legislative Assembly has been declared, under section 100 (1) (b) read with section 123, sub-sections (2) and (3), to be void by Mr. A. A. Dave, the sole member of an Election Tribunal appointed under section 86 of the Act by his order, dated 29th December 1962, in an election petition filed by Vallabhdas Shankerlal Thekdi, respondent No. 1 herein, Sabarkantha District has been allotted one Parliamentary seat. This district consists of a number of talukas. These talukas were allotted between them six seats in the Gujarat State Legislative Assembly. In the elections held in 1962, one Pashabhai Patel was one of the candidates for the Parliamentary seat. He was fighting the election on the ticket of the Swatantra Party. We are not directly concerned with the election to the parliamentary seat. We are also not directly concerned with the elections to the assembly seats except a seat allotted to a constituency consisting of Malpur and Bayad talukas of Sabarkantha District. In the latter constituency, there were three candidates at the above election; (1) Lalsing, the appellant, (2) Madhuben K. Shah, respondent No. 2, and (3) Madhukarrao Fanse, respondent No. 3. Lalsing was contesting election on Swatantra party ticket, Madhuben on Congress party ticket and Madhukar on P. S. P. ticket. The polling for the parliamentary and the assembly seats in the above constituency was held on 21st February 1962 and the result of the assembly seat was announced on 26th February 1962. Lalsing was declared elected to the assembly seat. On 11th April 1962, Thekdi - respondent No. 1 - a voter in the constituency, filed an election petition before the Election Commission challenging the election of Lalsing to the above seat. This petition was referred to the Tribunal consisting of the sole membership of Mr. A. A. Dave. The election of Lalsing was challenged by Thekdi on a number of grounds, all of which do not now survive Thekdi contended, inter alia,

that corrupt practices described in sub-sections (2) and (3) were committed during the course of the aforesaid election and that, therefore, the election was liable to be declared void under section 100, sub-section (1), clause (b) of the Act and that the result of the election had been materially affected by reason of the above corrupt practices which were committed by Lalsing's agents and, therefore, also the election was liable to be declared as void under Section 100 (1) (d) (ii) of the Act. Broadly speaking, there were two sets of corrupt practices which were set up by Thekdi. The first set arose out of the publication of a printed pamphlet. Ex. 70, bearing the signature of one Goswami Dixitji Maharaj and a message of the same person published in the issue, dated 19th February 1962, of a paper entitled 'Lok Sevak' edited by witness Malvi, a copy of which is at Ex. 72. The copies of these two documents were distributed amongst the voters of the Constituency on the 18th and 19th February 1962, Thekdi alleged that a passage in Ex. 70 and the message Ex. 72 amounted to undue influences and were direct interference with the free-exercise of electoral rights that, in particular, the impugned passage and message induced or attempted to induce electors to believe that they would become or would be rendered objects of divine displeasure or spiritual censure. He also alleged that the aforesaid two publications amounted to an appeal by Lalsing or his agents to vote for Lalsing and to refrain from voting for the other two candidates on the ground of religion and thus amounted to a corrupt practice under section 123, sub-section (3) According to Thekdi the aforesaid two documents were prepared printed, published and distributed by agents of Lalsing with his consent and, therefore, directly fell within the purview of section 100, sub-section (1), clause (b) of the Act. The second set of corrupt charges was based on the allegation that Lalsing and his agents had used or made an appeal to the symbol of 'dhruv' star for the furtherance of the prospects of Lalsing's candidature or for prejudicially affecting the election of the other two candidates. Lalsing admitted the use of the symbol of 'dhruv' star but denied that it was a religious symbol. Lalsing also denied that the other corrupt practices based on the alleged publication of Exs. 70 and 72 had been committed by him or by his agents with his consent. On the aforesaid pleadings, a number of issues were raised by the Tribunal for its decision. The Tribunal came to the conclusion that Exs. 70 and 72 were published and distributed by Lalsing's agents; that these two publications amounted to corrupt practice described in section 123, sub-section (2), proviso (a) (ii); that the aforesaid pamphlet and message were distributed with the consent of Lalsing and that, therefore, came within the mischief of section 100 (1) (b) of the Act. He also came to the conclusion that the use of the symbol of 'dhruv' star by Lalsing and his agents amounted to a corrupt practice under section 123, sub-section (3) and that the use by the agents was with Lalsing's consent and that, therefore, the same fell within the purview of section 100 (1) (b) of the Act. The Tribunal, however, held that the publication of the two documents, Exs. 70 and 72, did not amount to the commission of a corrupt practice within the meaning of section 123, sub-section (3) of the Act. On the above two grounds, the Tribunal held the election of Lalsing to be void and made a declaration to that effect. Aggrieved by the aforesaid decision, Lalsing came to this Court in appeal, his appeal being First Appeal No. 476 of 1962. A Division Bench of this Court by its judgment pronounced on 14th and 15th March 1968 held that the decision of the Tribunal that the use of the 'dhruv' star was the use of a religious symbol was correct and that the same was

made use of by Lalsing's agents with Lalsing's consent and that, therefore, the decision of the Tribunal that the election was void on that ground was correct. On this finding, the Division Bench did not feel called upon to record its own findings in regard to the corrupt practices found by the Tribunal to have been committed in regard to the 2 documents, Exs. 70 and 72. Basing itself upon the above finding in regard to the use of a religious symbol, the Division Bench dismissed First Appeal No. 476 of 1962. Aggrieved by that decision, Lalsing went to the Supreme Court and was granted special leave by that Court to appeal against the decision of this Court. The Supreme Court by its judgment delivered on 3rd August 1965 reversed the decision of the Division Bench and held on the authority of *Ramanbhai v. Dabhi Ajitkumar, reported in¹* that the use of the 'dhruv' star was not the use of a religious symbol. Therefore, the Supreme Court allowed the appeal of Lalsing and as this Court had not recorded its findings on the other points in dispute, it remanded the first appeal to this Court with a direction that the same should be disposed of in accordance with law. That is how the present appeal comes to be reheard by this Court.

2. In this Court, Lalsing challenges the findings recorded by the Tribunal in regard to the aforesaid two publications, Exs. 70 and 72, namely, that they amounted to the commission of corrupt practice mentioned in section 123, sub-section (2) of the Act. Alternatively, he contends that even if the two publications do amount to such a corrupt practice, it does not come within the mischief of section 100, sub-section (1), clause (b) of the Act inasmuch as Thekdi had failed to prove that the two documents were published and distributed with his consent. Alternatively, he contends that, even if this Court comes to the conclusion that the aforesaid corrupt practice was committed and that it was practised by his agent or agents, the case, at the most, would fall for consideration under section 100, sub-section (1), clause (d), sub-clause (ii) and that Thekdi has failed to establish that the result of the election was materially affected and that, on that ground, this Court should record a finding that the case does not fall within the mischief of section 100, sub-section (1), clause (d), sub-clause (ii) aforesaid. On the other hand, Mr. Patwari, on behalf of Thekdi, supports the findings recorded by the Tribunal on the aforesaid grounds. Alternatively, he argues that even if the case under section 100, sub-section (1), clause (b) of the Act has not been made out, Thekdi has successfully established a case under section 100, sub-section (1), clause (d), sub-clause (ii) of the Act. Still alternatively, Mr. Patwari contends that, in any case, Thekdi has established that the aforesaid publications amounted to corrupt practices within the meaning of section 123, sub-section (3) On the ground that the aforesaid two documents amounted to soliciting votes on the ground of religion and that, therefore, the finding recorded by the Tribunal against Thekdi on that score is wrong and requires to be reversed Both the sides raised several contentions regarding the construction of section 123, sub-sections (2) and (3) and section 100, sub-section (1), clause (b) and sub-section (1) (d) (ii) of the Act. We shall refer to the rival contentions of the two sides regarding these and allied questions at their proper place in the course of this judgment.

3. Mr. Nanavati formulated three broad submissions for the decision of this Court. They are

(1) that no corrupt practice as contemplated by section 123, sub-section (2), proviso (a) (ii) was committed by publication and circulation of the pamphlet, Ex. 70. and/or of the message. Ex. 72;

(2) that there was no circulation of Exhibits 70 and 72 in Bayad-Malpur constituency; and
(3) that even if the publication and circulation of Exs. 70 and 72 are held to be by an agent or agents of Lalsing, the election was not liable to be declared void under section 100 (1) (d) (ii) inasmuch as Thekdi had failed to prove that the result of the election was materially affected by the commission of a corrupt practice by Lalsing's agents.

1 AIR 1965 SC 669

4. Before we deal with the points raised by the two sides for our decision, it will be convenient to dispose of certain questions of facts as regards which a controversy is raised by both the parties in this Court. Before undertaking this task, we propose to mention briefly the admitted or proved facts which constitute the background in which the controversial points require to be decided. Lalsing joined the swatantra party about three months prior to the polling day. He was given a ticket by that party to contest on its behalf the election in the Bayad-Malpur constituency. The headquarters of the swatantra party for Gujarat were at Nadiad. An executive committee was set up by the party for the Sabarkantha District. Though Lalsing does not admit in specific words, there is reason to believe that Lalsing was a member of that executive committee. The party had an office at Modasa. Witnesses Malvi and Kanubhai were working for the Swatantra party in the Sabarkantha District. Witness Malvi was publishing a weekly newspaper entitled 'Lok Sevak' which had, at the relevant time, a circulation of about 1800 copies, of which 1550 were meant for regular subscribers. His services were engaged by the swatantra party. The newspaper had some circulation in the area which constituted the Bayad-Malpur Constituency. Malvi was publishing pamphlets and articles on behalf of the swatantra party in the aforesaid paper. For doing this work, he was paid by the Gujarat swatantra party at the rate of Rs. 1,000 per month from November 1961 to February 1962. For the first two months, the remuneration was paid by the party itself and for the last two months, remuneration was paid by Pashabhai. Lalsing's headquarters were at Bayad. The swatantra party had no separate office at Bayad, but Lalsing's office was utilized by that party for its work. Lalsing had also organized a propaganda committee of which witness Somabhai and one Becharbhai were members. Lalsing did not receive any financial help from the swatantra party. He mainly relied upon a house-to-house election campaign. He had a number of workers of which the main workers were witnesses Somabhai and Juzarsing and the aforesaid Becharbhai. These persons also worked for the swatantra party. Swatantra party invited one Goswami Dixitji Maharaj, the religious head of the Vaishnav community, who was residing in Bombay, to Modasa for its propaganda work. That gentleman came to Modasa for its propaganda work. That gentleman came to Modasa on the 17th February 1962 and addressed three meetings. One of the grounds on which both the swatantra party and Lalsing attempted to solicit votes for themselves and to persuade the electors not to vote in favour of Congress was that the policy of congress had been to interfere with religion. Dixitji Maharaj stayed at Modasa also on 18th February 1962. During his stay at

Modasa, after the Modasa meetings had been addressed, the Maharaj wrote in his own handwriting Ex. 116. According to witness Malvi, it was written by Maharaj wrote in his own handwriting Ex. 115. constitutes the origin of the two allegedly offensive publications, Exs. 70 and 72. There is conflict of evidence as to who were present at the time when Ex. 115 was written. According to Lalsing's witness Kanubhai, he alone was present. According to Thekdi's witness Malvi, he, Pashabhai, Pashabhai's brother Naginbhai and some other persons were present including probably one Shambhu Maharaj. It is not necessary for us to resolve this conflict in the evidence because nothing turns on it. It is common ground that Ex. 70 was printed at his printing press by witness Punjalal Dalichand Shah and that it was got printed by witness Kanubhai. 2000 copies of that document were got printed and were paid for by Pashabhai. According to witness Punjalal, the printer, the charges for printing Ex. 70 were paid by Pashabhai on behalf of the swatantra party. However, this witness is not borne out by the documentary record. Ex. 77, which is an extract from that witness's ledger book of Pashabhai's Khata, shows that the amount of charges for Ex. 70 was debited to Pashabhai's personal account and also credited in the same account when the amount was paid. The copies were ready for delivery on 18th February 1962 and were taken delivery of by Kanubhai. However, Ex. 70 is not an exact replica of Ex. 115. There are two significant changes in Ex. 70. The heading in Ex. 116 was "a sincere and loving suggestion (appeal) to the Vaishnav community of Bayad and Demai". This heading is changed in Ex. 70 to read "a sincere and loving suggestion (appeal) to the Vaishnav community of Modasa, Malpur, Bayad, Meghraj Talukas". At the end of Ex. 116, it was stated "Therefore, give your full vote to Lalsing Rehvar, the swatantra party candidate, in your constituency". In Ex. 70, however, the last paragraph reads as follows : " Therefore, give your full vote to the Assembly candidates of the swatantra party in your constituencies and to Pashabhai Patel, the parliamentary candidate" There is no evidence whatsoever on record to show as to who made the aforesaid changes and why. From the aforesaid changes, it is quit clear that whereas the original Ex. 115 was meant to be an appeal only to the voters of Lalsing's constituency and an appeal to the voters thereof to vote for Lalsing, the appeal in Ex. 70 was expanded so as to take in two more assembly constituencies-Modasa and Meghraj- and constituted an appeal not only to the voters of Lalsing's constituency but also to the voters, both assembly and parliamentary, of those two other constituencies. It is also significant to notice that whereas the original Ex. 115 mentioned the name of Lalsing, the name of Lalsing was dropped in Ex. 70 and instead the name of Pashabhai was printed. As to what happened to the 2000 copies after they were taken delivery of by Kanubhai, there is conflict of evidence and we propose to discuss this just in a moment. Before doing we will refer to the evidence relating to the" publication of Ex. 72. Malvi says that, after Ex. 115 was written by Maharaj, it was handed over by him to Pashabhai and Pashabhai, in his turn, handed it over to him to publish it in his paper. The whole of Ex. 116 was not published in that paper. Only the last but one paragraph was published in the 'Lok Sevak' with the title "the message of Goswami Dixitji Maharaj to the people of the District". The evidence is not clear as to who selected this particular passage and who gave the new heading. Malvi's evidence is that the message was got printed by Dixitji Maharaj in his paper to make propaganda on behalf of the swatantra party throughout the District. The evidence discloses that there were subscribers to

'Lok Sevak' who were residing in the Bayad-Malpur Constituency. Some of these subscribers have been examined and they have deposed that they had received the issue of 'Lok Sevak' dated 19th February 1962, in which the aforesaid message was published. Now, the whole of Ex. 70 is not being challenged as a corrupt practice. Only the last but one paragraph in Ex. 70 is being challenged as such and, as already stated, that last paragraph was the only paragraph which was published as the message of Dixitji Maharaj to the people of Sabarkantha District. It will be convenient at this stage to reproduce the impugned paragraph. The same has been translated in the paper-book as follows. We are omitting the heading given to the passage published as a message in 'Lok Sevak'. "For Vaishnavas, there cannot be a worse sin than to vote for the Congress which took possession of the management of Shrinathji Mandir by coercion and by defaming and giving wrongful threats to Tilkayatji. I have full confidence that the Vaishnavas will not at all betray Shri Vallabhacharyaji by voting for the congress who has insulted Mahaprabhuji and who has by its treacherous orders sent the key of Shrinathji Temple to the house of M. G. Dalela while it was being kept on the throne of Shri Mahaprabhuji after the 'darshana' at night before going to bed." As already indicated, there is a controversy whether this passage does or does not constitute a corrupt practice within the meaning of the two clauses (2) and (3) of Section 123 of the Act. We propose to discuss this question after we have dealt with another question of fact on which there is a controversy and that is as to whether Ex. 70 was distributed by the agents of Lalsing and as to whether, on the assumption that the two Exs. 70 and 72 amount to corrupt practices, they were committed by Lalsing's agents.

5. Now, as regards the distribution of Ex. 70, the relevant allegations are to be found in paragraphs 3(b), (e), (f) and (g) and paragraph 3-a of the Election Petition. In these paragraphs, Thekdi has alleged that the impugned Ex. 70 was distributed by a number of persons whose names are mentioned in the paragraph and at villages the names of which are also mentioned in those paragraphs. Thekdi, however, did not lead evidence to prove all the allegations contained in the aforesaid paragraphs. The evidence that he has led is to the effect that copies of Ex. 70 were distributed by Lalsing's witness Somabhai at Bayad on 18th February 1962; that Lalsing's witness Juzarsing had distributed copies of the same at Sathamba, Gabat and some other places not named in the evidence; and that one Becharbhai distributed copies of the same at Demai. According to some of the above evidence, the distribution took place between 17th February 1962 and 19th February 1962. However, date 17th February 1962 appears to be a mistake. The evidence discloses that Ex. 70 was printed and taken delivery of only on 18th February 1962. But the aforesaid mistake cannot be a good ground for disbelieving the body of evidence led by Thekdi. As against the aforesaid evidence, Lalsing has denied that he had any knowledge about the publication and distribution of Ex. 70. We will discuss the veracity of this evidence a little later. However, Lalsing has examined Somabhai and Juzarsing, both of whom, he admitted, were his main workers and one of whom was a member of his propaganda committee. Becharbhai, however, has not been examined by either party. Somabhai and Juzarsing both deny to have distributed the copies of Ex. 70. Then there is the evidence of Lalsing's witness Kanubhai who says that he had distributed all the 2000 copies at Modasa proper, meaning thereby that none of

the copies of Ex. 70 was distributed in the Bayad Malpur Constituency. The question for consideration is which of the aforesaid two sets of evidence is to be preferred and whether the evidence led satisfies the high standard of proof which is necessary in regard to a corrupt practice. Witness Revashanker says that Somabhai had given copies of Ex. 70 to some boys and that a copy had come to his hand from one of these boys. In the cross-examination, he stated that it was not true that he had not seen Somabhai giving copies of Ex. 70 to the boys at Bayad. Dr. Ambalal says that he had seen Juzarsing distributing copies of Ex. 70 on 18th and 19th February 1962 at Sathamba and other places. Thekdi says that Juzarsing had distributed copies of Ex. 70 at Gabad. Witness Vithaldas Modi says that he had seen Becharbhai distributing copies of Ex. 70 at Demai. It is true that Thekdi, Revashanker and Dr. Ambalal are interested persons in the sense that Thekdi is the petitioner and that the other two persons were congress workers who were espousing the congress cause and, therefore, their evidence requires to be approached with caution. However, no such allegation can be made against witness Vithaldas who appears to us to be entirely an independent person. Moreover, there is nothing in the cross-examination of the aforesaid witnesses which would throw any doubt as regards the veracity of their evidence on the aforesaid point. The Tribunal which had the opportunity of observing the demeanour of these witnesses was prepared to believe them. On the other hand, there is also no doubt whatsoever that the witnesses Somabhai, Juzarsing and Kanubhai are highly interested in Lalsing. On the whole, some of the features of their evidence do not strike us as true. The probabilities are in favour of the copies of Ex. 70 having been distributed in Malpur-Bayad constituency. We will assume for a moment that Lalsing had no direct or indirect hand in the preparation, printing and publication of Ex. 70. But the evidence which we have already summarized on these points does not have any doubt that Ex. 70 was prepared, printed and published. There is a strong probability that Pashabhai, the parliamentary candidate, had a hand in the printing and publication of that pamphlet. The pamphlet contained an appeal from a respectable religious leader whose followers undoubtedly were voters in the district. Dixitji Maharaj was specially invited to address audiences at Modasa. The expectation probably was that his appeal would influence the votes of Vaishnavas. If, under these circumstances, Ex. 70 came to be printed, it stands to reason that the same was distributed at least amongst the places where the voters to whom the appeal was addressed resided. Kanubhai's evidence that he had exhausted all the 2000 copies at Modasa does not strike us as probable at all. Ex. 70 is addressed to the voters of two assembly constituencies other than Modasa. Maharaj had already addressed three meetings at Modasa. Obviously, the swatantra party or Pashabhai was not likely to miss the opportunity of seeing that the appeal reaches to the voters in the other two talukas where Dixitji Maharaj was not personally able to proceed to appeal to the voters. Ex. 70 having been printed for the purpose of appealing to the voters in the three assembly constituencies, it is hardly probable that all the 2000 copies would be allowed to be exhausted at Modasa. The evidence given by Kanubhai is unsatisfactory in more than one respect. Kanubhai, at first, tried to say that Ex. 70 was printed only for the purpose of distributing in Modasa town proper. He was unable to answer the question then as to why the heading had been changed. He also stands contradicted by the fact that the original Ex. 115 was meant to be circulated amongst the voters of Malpur-Bayad Constituency. The witness also

stands contradicted by an independent witness like Punjalal Shah in the matter of the part played by Pashabhai in regard to the publication of Ex. 70. A perusal of the evidence of Kanubhai shows that he was making an attempt to protect both Pashabhai and Lalsing in regard to the consequences arising out of the publication of Ex. 70. Under the aforesaid circumstances, in our judgment, the learned Tribunal was right in holding that Ex. 70 was distributed amongst voters by witnesses Somabhai, Juzarsing and one Becharbhai.

6. From the aforesaid discussion, it is quite clear that Thekdi had proved beyond any reasonable doubt that Ex. 115 was written by Dixitji Maharaj; that the original of Ex. 70 was prepared from out of Ex. 115 with some changes; that the same was given for printing by Kanubhai to witness Punjalal; that 2000 copies of Ex. 70 were printed and taken delivery of by Kanubhai and that some of these copies were distributed at Bayad, Sathamba, Gabat and some other places situated within the Malpur-Bayad Constituency. Though this is so, there is no doubt whatsoever that there is not a tittle of evidence to show that Lalsing had any hand either in the preparation of the document Ex. 115 or the preparation of the original of Ex. 70 or the printing of Ex. 70 or that he himself distributed copies of Ex. 70 amongst the voters. The document was undoubtedly distributed amongst the voters of Malpur-Bayad Constituency by the aforesaid three persons-Somabhai, Juzarsing and Becharbhai -and we have already indicated that these three persons were the main workers of Lalsing.

7. The aforesaid evidence also establishes that Ex. 72 was published in the issue dated 19th February 1962 of the weekly paper 'Lok Sevak' and that this was done on the basis of Ex. 115 and at the instance of Pashabhai. There is also no doubt whatsoever that the copies of this issue came into the hands of the subscribers of the paper in Bayad-Malpur talukas. But, at the same time, there is no doubt whatsoever that Lalsing did not have any hand direct or indirect in the printing and the publication of the message, Ex. 72. There is not a tittle of evidence in this case on this subject. The question as to whether Malvi was or was not an agent in the eye of law in regard to the publication of Ex. 72, we will discuss a little later.

8. The next question for consideration is as to whether the impugned passage is or is not a corrupt practice within the meaning of sub-section (2) or sub-section (3) or both of section 123 of the Act. Before we undertake this question for discussion, it will be convenient to reproduce the relevant parts of the two sub-sections.

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

(1).....

(2) Undue influence, that is to say, any direct or indirect interference or attempt to interfere on the part of the candidate or his agent, or of any other person with the consent of the candidate or his election agent with the free exercise of any electoral right :
Provided that -

(a) without prejudice to the generality of the provisions of this clause any such person as is referred to therein who-

(i) . . .

(ii) induces or attempts to induce a candidate or an elector to believe that he or any person in whom he is interested, will become or will be rendered an object of divine displeasure or spiritual censure shall be deemed to interfere with the free exercise of the electoral right of such candidate or elector within the meaning of this clause;

(b).....

(3) The appeal by a candidate or his agent or by any other person with the consent of a candidate or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or the use of, or appeal to, religious symbols or the use of, or appeal to, national symbols, such as the national flag or the national emblem, for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate."

Thekdi's contention is that the impugned passage directly falls within the mischief of the proviso (a) (ii) of sub-section (2) and, in the alternative, that, in any case, it falls within the mischief of the main part of sub-section (2). Secondly, he contends that, in any case, the impugned passage is hit by sub-section (3) of section 123 of the Act. In our judgment, none of the two sub-sections presents any serious problem of construction. The language used by the Legislature appears to be quite clear and unambiguous. Sub-section (2) deals with the corrupt practice of undue influence. Sub-section (3) deals with the corrupt practice of an appeal to vote or to refrain from voting on certain grounds or to the use of religious or national symbols. The main part of sub-section (2) deals with undue influence in general terms and that the latter part of that sub-section defines what undue influence means. Proviso (a) to sub-section (2) appear to be illustrations or species or extensions of the concept of undue influence defined in the main section. We have not quoted proviso (a) (i) because it is common ground that the same is not applicable to the facts of the present case. But we have quoted (a) (ii) in full because it is the contention of Mr. Patwari that the present case directly comes within that proviso. It is quite clear that if petitioner is able to satisfy the ingredients of proviso (a) (ii), then the corrupt practice mentioned in sub-section (2) must be held to have been committed and we need not consider the question as to whether the case does or does not fall within the main part of sub-section (2). On the other hand, it is equally clear that even if the case does not fall within the purview of proviso (a) (ii), it is still open to petitioner to show that the case comes within the mischief of the main part of sub-section (2). According to the main part and the proviso, the corrupt practice may be committed by a candidate or his agent or a third person with the consent of the candidate or his election agent. According to proviso (a) (ii), if any of the aforesaid persons induces or attempts to induce in a candidate or an elector a belief of the kind mentioned in that proviso, he will be guilty of the corrupt practice of undue influence. The belief that is required to be generated is that the candidate or the elector or any person in whom the candidate or elector is interested will become or will be rendered an object of divine displeasure or spiritual censure. The proviso hits against that species

of undue influence which has been described as spiritual intimidation. The main part of sub-section (2) is designed to ensure a free exercise of the franchise. The Legislature has enacted that if a person of the kind mentioned in sub-section (2) induces or attempts to induce a belief that divine displeasure or spiritual censure will visit either the candidate or an elector or any person in whom such candidate or elector is interested, then, that will amount to interference with the free exercise of the franchise. Therefore, in order that the case may be brought within proviso (a) (ii), it is necessary for petitioner to prove that a belief was created or attempted to be created in the person concerned that he will become an object of divine displeasure or spiritual censure or that he will be rendered an object of that kind. Before we consider the impugned documents in the light of the aforesaid proviso (a) (ii), we may mention the ingredients of the main part of sub-section (2). 'Undue influence' has been defined by sub-section (2) as an interference or attempted interference with the free exercise of an electoral right. An electoral right has been defined in section 79, clause (d) of the Act as meaning the right of a person, inter alia, to vote or to refrain from voting at an election. Interference may be either direct or indirect. Therefore, the core of the definition appears to be a direct or indirect interference or an attempt to interfere with the free exercise of the right to vote or refrain from voting for a candidate. The act which the sub-section is designed to reach is an act which will prevent the voter from choosing a candidate of his own choice. Any act which is done which interferes with the free choice of a candidate by elector comes within the mischief of sub-section (2). Mr. Nanavati, however, contends that in order that the section may apply, the electorate must be illiterate or must be such whose mind would be influenced by an appeal to religion. We are unable to agree with this submission of Mr. Nanavati for more than one reason. In the first place, there is nothing in the language used in the section which has any reference to the literacy or the illiteracy of the electorate. In the second place, the main part of the sub-section is not confined only to spiritual undue influence. It may be that, in a given set of circumstances, the aforesaid two points may play an important part in persuading a Judge to hold that undue influence has been committed and, in suitable cases, reasonable inferences may be drawn from the fact that the electorate appealed to was mainly illiterate or that in the case of spiritual undue influence, the electorate was such as would be influenced by an appeal on the ground of religion. But, this is something quite different from saying that the educational qualification of the electorate or its susceptibility to religious appeal is a condition precedent for bringing an not within the purview of sub-section (2) of section 123 of the Act. In support of his aforesaid proposition, Mr. Nanavati relies upon the case, reported in AIR 1965 Supreme Court 669. He relies upon the observations made by Their Lordships at page 675, which are as follows :

" If, for instance, the illiterate, the orthodox or the fanatical electors are told that their religion would be in danger or they will suffer miseries or calamities unless they cast their vote for a particular candidate, that would be quite clearly an appeal to the religious sentiment of the people."

In the first instance, the aforesaid observations were made by Their Lordships in a case under

section 123, sub-section (3) of the Act. Secondly, as the expression "for instance" suggests, Their Lordships could not have intended to lay down that the condition of illiteracy, orthodoxy or fanaticism should be applicable in all cases. In our judgment, sub-section (2) is designed to ensure freedom to the elector to choose a candidate of his own choice. It is designed to prevent persons from deflecting the elector from enjoying that freedom by influencing him in a manner which would be regarded to be undue, that is, by creating an atmosphere or situation in which the choice of candidates will be made not on the merits of the candidates or their parties or their programmes and instead selecting them on extraneous considerations-such that a selection would affect spiritually adversely them or their kith and kin or persons in whom they are interested or would create a feeling in them that they would personally stand to gain or lose in matters which do not relate to policies or programmes on which Governments are run, if they cast their votes in favour or against a particular candidate. Secondly, Mr. Nanavati contends that, in order that sub-section (2) may apply, it is necessary that the appeal must be of such a character that it does not leave any choice whatsoever to the elector to act in the manner desired by the person committing the corrupt practice. In support of this proposition, Mr. Nanavati relies upon the case of *Ram Dial v. Sant Lal in*² This was a case under proviso (a) (ii) to section 123 (2) of the Act. It was a case in which a religious leader had given a mandate that the voters should vote in favour of a particular candidate. In regard to the facts of that particular case. Their Lordships observed as follows at page 860 :

" but it will amount to an abuse of his great influence if the words, he uses in a document, or utters in his speeches, leave no choice to the persons addressed by him, in the exercise of their electoral rights. "

That is a decision on the facts of that particular case and it does not represent the ratio of the case. In that case. Their Lordships after comparing the corrupt practice of undue influence under the English law with the same corrupt practice under the Indian Law reached the following conclusion :

"The Indian law, on the other hand, does not emphasize the individual aspect of the exercise of such influence, but pays regard to the use of such influence as has the tendency to bring about the result contemplated in the clause. What is material under the Indian law, is not the actual effect produced, but the doing of such acts as are calculated to interfere with the free exercise of an electoral right."

2 AIR 1959 SC 855

This passage represents the ratio of the case and it clearly shows that what is hit by sub-section (2) of section 123 is the effect which the impugned action has on the free exercise of the electoral right.

9. Section 123 (3) provides, inter alia, that an appeal by any of the aforesaid kinds of persons "to vote or refrain from voting for any person on the ground of his religion. . . . for the furtherance of

the prospects of the election of that candidate or for prejudicially affecting the election of any candidate" will be a corrupt practice. Therefore, in order that sub-section (3) may apply, it is necessary, so far as the present case is concerned, for Thek-kdi to prove (i) that there was an appeal by any of the persons of the type mentioned; (ii) that the appeal was on the ground of his religion; and (iii) that the appeal was made with one of the two objects mentioned in the section. Now, the controversy in our Court centred round the proper interpretation of the pronoun "his" used in the following expression on the ground of his religion, race, caste, community or language". A Division Bench of this Court has decided that the pronoun "his" is referable to the candidate and not to the voter. This decision was given in the judgment delivered on 11th and 12th of March, 1963, in First Appeal No. 428 of 1962 . However, Mr. Patwari contends that the pronoun "his" is not only referable to a candidate but also to an agent, so that if an appeal is made by an agent persuading an electorate to vote in favour of a particular candidate on the ground that the agent's religion, the action of the agent would come within the mischief of sub-section (3) of section 123. In our judgment, there is no merit in this submission. The aforesaid part of sub-section (3) enacts that the appeal must be to vote or refrain from voting for any person on the ground of his religion. Therefore, in order that the sub-section may apply, the appeal must be to vote or refrain from voting for any person on the ground of his religion. The pronoun "his" in the aforesaid phraseology is clearly referable to the person preceding the words "on the ground of" and the person referred to is the person in whose favour the vote is to be cast or not to be cast. In order to make an effective appeal, an agent must necessarily appeal to the electorate to vote for or to refrain from voting for a candidate. He cannot ask the voters to vote for himself. Such an appeal would be futile. Therefore, it cannot be said that when an agent asks an elector to vote on the ground of agent's religion, he comes within the mischief of the aforesaid sub-section.

10. That brings us to the question as to whether the impugned passage does or does not contravene the provisions of the aforesaid two sub-sections. That presents a problem of the construction of the passage. The passage impugned in Ex. 70 is one out of several paragraphs in that document. In Ex. 72, that impugned paragraph appears by itself alone with a different heading. In a recent decision *Kultar Singh v. Mukhtiar Singh*³, Their Lordships have pointed out the correct approach to a problem of the aforesaid kind. At page 144, Their Lordships have observed as follows :

" The principles which have to be applied in construing such a document are well settled. The document must be read as a whole and its purport and effect determined in a fair, objective and reasonable manner. In reading such documents, it would be unrealistic to ignore the fact that when election meetings, are held and appeals are made by candidates of opposing political parties, the atmosphere is usually surcharged with partisan feelings and emotions and the use of hyperboles

³ AIR 1956 SC 141

or exaggerated language, or the adoption of metaphors, and the extravagance of expression in attacking one another, are all a part of the game; and so, when the question

about the effect of speeches delivered or pamphlets distributed at election meetings is argued in the cold atmosphere of a judicial chamber, some allowance must be made and the impugned speeches or pamphlets must be construed in that light. In doing so, however, it would be unreasonable to ignore the question as to what the effect of the said speech or pamphlet would be on the mind of the ordinary voter who attends such meetings and reads the pamphlets or hears the speeches."

Approaching the question of the construction of Ex. 70 in the light of the aforesaid principles, it is quite clear that the impugned passage should not be read in isolation, but that it should be read in the context of the other items in the document as a whole. In the first paragraph, Maharaj states that, during the Congress regime, religion, agriculture and commerce were in stringent bondage that the commercial community had been constricted by licences, permits and quotas and business had been disrupted. Then Maharaj states that the Congress regime had, by introducing the new experiment of co-operative farming, girded up its loins to make agriculturists miserable. In the next paragraph, the last point is elaborated further by stating that the Congress intends to make agriculturists labourers by introduction of co-operative farming and intends to snatch away, by force of law, by such introduction, the natural rights of the farmer given to him by God. In the third paragraph, Maharaj says that it is necessary for the farmers to ponder that, by the introduction of co-operative farming, their condition would be as worse as that of the refugees from Sind and Punjab. Then, in the fourth paragraph, Maharaj states that, in order to understand stand how the Congress has invaded religion, it is very much necessary to understand what crooked intrigues have been done by the Government. Then comes the impugned passage which we have already reproduced above. Finally, the document Ex. 70 contains an appeal to the voters to vote for the assembly candidates and the Parliamentary candidate Pashabhai Patel-all of the swatantra party. Now, the argument of Mr. Nanavati is that, if the document is fairly and objectively read as a whole, then it embodies a legitimate appeal to the voters to vote for the swatantra party, implying thereby that they should not vote for the Congress on the ground that the policy of the Congress Government was prejudicial to tile cause of religion, agriculture and commerce. He contends that this is quite a legitimate appeal. In fact, we may mention that it is not Mr. Patwari's case that in so far as the document appeals the voters on the score of the Congress policy in regard to agriculture and commerce, it offends any of the provisions relating to corrupt practice. We may also mention that Mr. Patwari does not say that any part of the appeal based on the Congress policy in regard to religion, in the paragraphs preceding the impugned paragraph contravenes any of the provisions relating to corrupt practice. It cannot be denied that a religious leader has a right to participate in an election campaign and that he has a right to exercise his influence in favour of a particular candidate. In doing so, a religious leader has a right to attack the policy of a candidate in regard to any religion. The Supreme Court in Ram Dial's case AIR 1959 Supreme Court 855, already referred to, has made the following observations at page 860 on this topic, which are relevant :

" In other words, the religious leader has a right to exercise his influence in favor of any

particular candidate by voting for him and by canvassing votes of others for him. He has a right to express his opinion on the individual merits of the candidates. Such a course of conduct on his part, will only be a use of his great influence amongst a particular section of the voters in the constituency." After making these observations, Their Lordships have pointed out the limitations of the religious leader's right. They further observe :

" But it will amount to an abuse of his great influence if the words he uses in a document, or utters in his speeches, leave no choice to the persons addressed by him, in the exercise of their electoral rights. If the religious head had said that he preferred the appellant to the other candidate, because, in his opinion, he was more worthy of the confidence of the electors for certain reasons good, bad or indifferent, and addressed words to that effect to persons who were amenable to his influence, he would be within his rights, and his influence, however, great, could not be said to have been misused. "

Basing himself upon this particular passage, Mr. Nanavati contends that the confidence expressed by Maharaj in the impugned passage must be put on a par with the appeal which he had made in the earlier parts of the documents by attacking the policy of the Congress in the matters of religion, agriculture and commerce. Mr. Nanavati contends that we should not take Maharaj literally when he expresses the view that there could not be a greater sin for a Vaishnav than to vote for the Congress and that he was fully confident that the Vaishnavas will not betray Shree Vallabhacharyaji by voting for that institution. In our judgment, the appeal in the impugned passage is not couched in the same tenor in which the appeal in the earlier parts of the document is made. As we have already pointed out, in order that an appeal may come within the mischief of sub-section (2) of section 123, it must impinge upon the voter's freedom of the choice of a candidate. Whether the appeal has or has not this effect would depend upon the effect which the impugned passage when read in the context in which it occurs has upon the mind of the voter. In deciding as to how the mind of the voter would be swayed by the appeal, in some cases, the kind of voter to whom the appeal is made would be relevant. We will assume in the present case that the Vaishnav community to which the appeal is addressed was fairly literate. But the matter is also not to be tested from the point of view of a highly intelligent and sophisticated voter. It has necessarily to be tested from the point of view of an ordinary voter, subject to be swayed, specially if an appeal happens to be made by a religious leader by notions of his future, spiritual welfare or ultimate salvation. In the impugned passage, there are two facts which have been mentioned. The first fact is that the Congress had wrenched the management of Shreenathji Temple from Tilkayat Maharaj by creating fear and giving threats to him. Secondly, Shree Mahaprabhuji had been insulted by the Congress by the despatch of the key of the temple to the house of one Dalela. If these two facts alone had been mentioned and an appeal made that, on account of those two acts, the voter may not vote for the Congress party and may vote for the swatantra party, the matter may have stood on a different footing. But, Maharaj does not rest there. In fact, he urges that, on account of the aforesaid two acts, it would be a sin and a betrayal of Mahaprabhuji on the part of Vaishnavas to vote for the Congress. It is true that the mere use of the word "sin" or "betrayal" of Mahaprabhuji should not be overemphasised. In a given context,

the use of these words may be regarded to be an exaggeration. But, as already stated, the question to be decided is what impact the reading of the aforesaid passage would make on an ordinary Vaishnav upon his freedom to vote at the election. In deciding this question, a number of factors must be borne in mind. In the first instance, the author of the document is a religious leader and the evidence discloses that he was respected amongst the Vaishnavas. Secondly, two sacrileges are attributed to the ruling party. Thirdly, a religious leader of the aforesaid type has expressed his own strong feeling that there cannot be a greater sin for an ordinary Vaishnav than to vote for the Congress and it would be a betrayal of Mahaprabhuji to vote for the same party which has been guilty of such sacrileges. Reading the aforesaid appeal emanating as it did from a religious leader, a Vaishnav voter is most likely to form the opinion that he would be committing a sin if he votes for the Congress under the aforesaid circumstances and it would not be a far-fetched inference to say that he would carry the impression that he would be incurring divine displeasure or would be the object of one if he were to vote for the party of the aforesaid type. In our judgment, such an impression on the part of a Vaishnav would certainly undermine his freedom of choice of candidate. Whatever may be the views which such a person may form, based upon the policy or the programme of the Congress party or on the individual merit of the candidate standing for the party, there is a strong likelihood that, to an ordinary Vaishnav, subject to religious influence, he is likely to decide not to vote for the Congress party on the ground that, by doing so, he would be betraying a great religious leader or that he would be committing a sin and thereby endangering his ultimate salvation. This conclusion must bring the case within the purview of proviso (a), clause (ii) to sub-section (2) of section 123 of the Act. In any case, even if this is not so, the matter would come within the purview of the main part of section 123. A perusal of the aforesaid passage would interfere with the free choice of candidate at the aforesaid election and was a direct attempt on the part of Maharaj to do so. In that view of the matter, the corrupt practice mentioned in Section 123 (2) of the Act was committed and a finding to that effect must be recorded in favour of Thekdi. In view of the aforesaid conclusion, it must also necessarily follow that corrupt practice also had come to be committed by distribution of the copies of Lok Sevak in its issue dated 19th February 1962 amongst the voters of Bayad-Malpur constituency. In fact, the case in regard to distribution of the copies of the issue of which Ex. 72 is one, stands on a stronger footing than the case in regard to Ex. 70. In Ex. 72, the only matter which is published is the impugned passage. By publishing the impugned passage simpliciter without the preceding paragraphs to found in Ex. 70, the impression likely to be created on the reader that he would be committing the sin if he voted for the Congress is likely to be created more strongly than when it is read in the context of the other paragraphs.

11. Then the next question for consideration is as to whether the impugned passage comes within the mischief of sub-section (3) of Section 123 of the Act. In our judgment, the Tribunal was right in arriving at the conclusion that the passage does not fall within its mischief. Mr. Patwari contends that the impugned passage embodies an appeal on the ground of religion. Even if we assume that this is so, -a matter which is not free from doubt,-as already pointed out by us, in order to come within the mischief of sub-section (3), the impugned passage must be an appeal on

the ground of candidate's religion. There is nothing in the impugned passage which would show that an appeal to vote for Lalsing and not to vote for other candidates was made on the ground of his or their religion. Mr. Patwari, in fact, concedes this. But, his argument is that the section covers not only an appeal on the ground of candidate's religion, but also on the ground of agent's religion. For the reasons which we have already given, this construction of sub-section (3) is not correct. Therefore, we have come to the conclusion that the corrupt practice mentioned in sub-section (3) of section 123 of the Act has not been proved.

12. From the aforesaid discussion, it is quite clear that in order that an act may amount to a corrupt practice within the meaning of sub-sections (2) and (3) of section 123, it is not merely enough that the act as described must be committed but it must be committed by one of the different persons mentioned in the section. Both the sub-sections (2) and (3) of section 123 of the Act mention three kinds of persons, viz., (i) a candidate; (ii) his agent; and (iii) any other person. If a candidate commits any of the two acts described in the two sub-sections, then, a corrupt practice as described in both or any of the two sub-sections does take place. If an agent also commits both or any of the two acts, then also a corrupt practice takes place within the meaning of the relevant sub-section. The term "agent" has been defined in Explanation (1) to section 123 and that Explanation is as follows :-

" Explanation : (1) In this section the expression "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."

It may be noticed that the definition is an inclusive one and not an exhaustive definition. Secondly, it may be noticed that the definition is only for the purposes of the section. From the Explanation, it is quite clear that an election agent and a polling agent both are included in the term "agent". Therefore, if an act is committed as described in sub-section (2) or sub-section (3) by an election agent or a polling agent, then, the act would amount to a corrupt practice. This is quite clear from the definition itself. But, if an act happens to be committed by a person other than an election agent or a polling agent, the Court or the Tribunal concerned has to determine whether the person concerned is an agent of the candidate. The Explanation says that person would be an agent also if he "is held to have acted as an agent in connection with the election with the consent of the candidate' Before we mention the ingredients of this part of the definition, we may say that even if a person does not answer the aforesaid description, still it is open to a person alleging corrupt practice to show that he is otherwise an agent of the candidate. Though as to who is an agent for the purposes of an election has come up for consideration in a large number of cases, Judges have been reluctant to frame a definition which would be applicable to all cases. All that the judicial authorities have so far decided with certainty on this subject is that the term "agent", when used in connection with election law, has not the same connotation as that term has in the law of contract. Under the law of contract, in order that the person may be an agent, it is necessary that the agency must arise out of a contract between the principal and the

agent and that the same must be supported by consideration. The judicial authorities have laid down that these two ingredients are not required to be satisfied when determining a question as to whether a person is or is not an agent of a candidate in the field of election. However, it is not necessary for us to pursue this aspect of the matter any further at this stage of the judgment because, in our judgment, the question will not arise in respect of some of the persons who have committed the acts relating to the publication of the impugned passage, for, there is no doubt whatsoever that at least some of them do come within the purview of the last part of the definition aforesaid. If it is necessary to do so at a later stage of the judgment to ascertain the meaning of the term "agent" and to consider whether the other persons who have committed the aforesaid act are or are not agents under the general term "agency" as used in the election law, we would do so. But, for the present, we propose to concentrate our attention on the last para of the aforesaid definition. We have already held that the persons who committed the acts in connection with the publication of the impugned passage are (1) Maharaj, (2) Pashabhai, (3) Kanubhai, (4) Malvi, (5) Somabhai, (6) Juzarsing, and (7) Becharbhai. Of these persons, the last three would come within the last part of the definition. In one respect, that part of the definition is strange inasmuch as it says that that person is an agent who "is held to have acted as an agent". The definition does not make it clear as to what person or authority is to so hold. Probably the intention appears to be to enact that the finding shall be recorded by the Tribunal or the Court concerned. If that is so, then, it appears to be a redundant feature of the definition. Secondly, it is important to notice that, under the definition, an agent as understood in the election law is certainly excluded inasmuch as the definition provides that the person concerned must act "with the consent of the candidate". That brings in one of the elements of a contract into play and may raise the question as to whether, by implication, an agent as generally understood in the election law is or is not excluded from the "agent" as used in the aforesaid two sub-sections. But, as we have already indicated there is no doubt whatsoever that the three persons viz., (i) Somabhai, (ii) Juzarsing, and (iii) Becharbhai, can easily be held to have acted as agents in connection with Lalsing's election with Lalsing's consent. It may be noticed that, for the purposes of this Explanation, the consent of an election agent is not enough. The person concerned must act with the consent of the candidate and the consent of no other person is included in the definition. From the facts, already found by us, there is no doubt that the aforesaid three persons were the main workers in Lalsing's election. Two of them were members of his propanganda committee. Juzarsing was in charge of the printing arrangement of the election literature of Lalsing. There is no doubt whatsoever that all these persons were acting with the consent of Lalsing. Under the circumstances, we have no difficulty in holding that the aforesaid three persons were acting with the consent of Lalsing in connection with the election and that, therefore, in so far as these three persons committed the acts aforesaid, their acts would amount to corrupt practice within the meaning of sub-section 2 of section 123. As already indicated, a corrupt practice under sub-section (2) can also be committed by any other person. But, in order that an act may amount to corrupt practice by a third person, it must be committed with the consent of the candidate or his election agent. If the aforesaid other four persons, viz., (1) Maharaj, (2) Pashabhai, (3) Kanubhai, and (4) Malvi are considered to be third persons and not agents, then, Thekdi will have to prove

that they committed the acts attributed to them with the consent of Lalsing or his election agent. In our judgment, this question of consent is of considerable importance in the present case because, as we shall presently show, even though petitioner may show that a corrupt practice within the meaning of section 123 of the Act has been committed, that will not entitle a Tribunal or Court to declare the election as void. Merely from the proof of the commission of the corrupt practice as described in section 123, an election cannot be set aside. It can be set aside only on the grounds mentioned in section 100 which we propose to mention just in a moment and, as we shall presently show, under clause (b) of that section, which is relevant even if a corrupt practice happens to be committed by an agent other than an election agent, even then, the consent of the candidate or his election agent is required to be proved. It is only when such a consent is established that an election can be declared to be void on the ground of the commission of a corrupt practice. Therefore, whether the aforesaid four persons were or were not agents and the fact that the other three persons have been held to be agents are not of any vital consequence for the purposes of the present petition. In either case, petitioner has to prove that there was consent of Lalsing in the matter of the commission of the various acts by the aforesaid persons which we have held to be acts coming within the purview of sub-section (2) of section 123 of the Act.

13. However, Mr. Patwari very seriously challenges that the consent of a candidate is required to be proved when an act which amounts to a corrupt practice happens to be committed by an agent. Therefore, it is necessary to turn to this aspect of the election petition.

14. The relevant part of section 100 of the Act is as follows :-

" 100, Grounds for declaring election to be void-

(1) Subject to the provisions of sub-section

(2) if the Tribunal is of opinion- (a).....

(b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent:

(c).....;

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected-

(ii) by any corrupt practice committed in the interests of the returned candidate by an agent other than his election agent, or

(iii).....;

(iv).....; the Tribunal shall declare the election of the returned candidate to be void.

(2) If in the opinion of the Tribunal, a returned candidate has been guilty by an agent, other than his election agent, of any corrupt practice, but the Tribunal is satisfied-

(a) that no such corrupt practice was committed at the election by the candidate or his election agent, and every such corrupt practice was committed contrary to the orders, and without the consent of the candidate or his election agent;

(b)

(c) that the candidate and his election agent took all reasonable means for preventing the commission of corrupt practices at the election; and

(d) that in all other respects the election was free from any corrupt practice on the part of the candidate or any of his agents, then the Tribunal may decide that the election of the returned candidate is not void."

For the present, we shall omit clause (d) of sub-section (1) of section 100 of the Act from consideration. Thekdi prays for a declaration that Lalsing's election is void in the first instance on the basis of clause (b) of sub-section (1) aforesaid. Now, analyzing that section, it is quite clear that, in order that a declaration to the aforesaid effect may be made, it is necessary that the corrupt practice must be committed either by a returned candidate or by his election agent or by any other person with the consent of a returned candidate or his election agent. If a corrupt practice is committed by a returned candidate, the election can be declared to be void straight off without the Tribunal or the Court having to record any further finding. Similarly, if a corrupt practice is committed by the returned candidate's election agent, then also, by the express provision of clause (b) aforesaid, the election can be held to be void. There is no difficulty on these two points. If a corrupt practice is committed by any other person, meaning thereby a person other than a returned candidate or his election agent, then, the section says, in express terms, that the corrupt practice must be committed "with the consent of a returned candidate or his election agent". Now, comparing sub-section (2) of section 123 and clause (b) of sub-section (1) of section 100, in so far as these two provisions relate to the persons who are described as capable of committing; corrupt practice, we find that the two provisions do not use a uniform language in so far as they relate to an agent. In sub-section (2) of section 123, the persons mentioned are (i) candidate, (ii) his agent, and (iii) any other person; whereas in clause (b) of sub-section (1) of section 100, the persons mentioned are (i) candidate, (ii) his election agent, and (iii) any other person. In sub-section (2) of section 123, the word "agent" would include an election agent by force of the definition contained in Explanation (1). But, having regard to the fact that an election agent has been expressly mentioned in clause (b) of sub-section (1) of section 100 and an agent is not so expressly mentioned, the question for consideration may be raised as to whether an agent is altogether excluded from the purview of clause (b) of sub-section (1) of section 100 of the Act. However, such an extreme position is not taken up either by Mr. Nanavati or by Mr. Patwari. Mr. Patwari cannot take up such a position because that would mean an end of Thekdi's case as based on clause (b) of section 100 (1). Mr. Nanavati's contention is that, though an agent is mentioned expressly in sub-section (2) of section 123 of the Act, he is not so expressly mentioned in clause (b) of sub-section (1) of section 100 because he is included in the expression "any other person" and that, therefore, in the case of commission of a corrupt practice by an agent, the consent of the returned candidate or an election agent is necessary. Having regard to the express language used in clause (b) of section 100 (1), and having regard to the fact that the Legislature could not have, after having included an agent in sub-section (2) of section 123 for the purpose of commission of a corrupt practice, excluded him from the purview

of clause (b) of section 100 (1), Mr. Nanavati's contention appears to us to be unanswerable. That is the view which is taken by a number of judicial authorities. We may mention only one of them which, with great respect, summarizes the legal position succinctly and correctly and it is the case of *Inder Lall Yugal Kishore v. Lal Singh Mukund Singh reported in*⁴ Mr. Patwari is unable to quote any authority in favour of his contention. We may shortly summarize the contention which is urged by him. Mr. Patwari's contention is that an agent has not been expressly mentioned in clause (b) because, in the view of the Legislature, the commission of a corrupt practice by an agent is the commission of a corrupt practice by a returned candidate. Therefore, Mr. Patwari contends that when Clause (b) states that a corrupt practice by a returned candidate shall lead to the declaration of his election to be void, it means that the corrupt practice may have been committed either by a returned candidate personally or by his agent in the business of election. This contention of Mr. Patwari is sought to be supported in more than one way. In the first instance, Mr. Patwari contends that the corrupt practice mentioned in sub-section (2) of section 123, though committed by a candidate's agent or by any other person with his consent, is really the corrupt practice of the candidate himself and the sin of the agent must be visited on the candidate himself in the first case on account of the fact that he made the person his agent and in the second case that he gave his consent to the commission of the corrupt practice. Mr. Patwari supports this reasoning by reference to the phraseology used by the Legislature in sub-section (2) wherein it has referred to the corrupt practice of an agent as the corrupt practice of a candidate by an agent. In sub-section (2) of Section 100, the Legislature has used the phraseology". ... a returned candidate has been guilty by an

⁴ AIR 1961 Raj 122

agent, ... of any corrupt practice". There are two serious flaws in the aforesaid line of reasoning. In the first instance, if Mr. Patwari's contention is correct that a corrupt practice committed by any of the persons mentioned in sub-section (2) of section 123 of the Act is really the corrupt practice of the candidate, then, there was no reason why the Legislature should have mentioned an election agent or any other person in clause (b) of sub-section (1) of section 100. In any case, if an agent was intended to be included by the term "returned candidate" in clause (b) aforesaid, then, there was no reason for the Legislature to mention an election agent in that clause. In our judgment, the mention of "election agent" in clause (b) and non-mention of "agent" in that clause can only be explained on the ground that the Legislature did not wish to attribute the action of an agent to a returned candidate. It is true that the Legislature has used the phraseology that a corrupt practice may be committed by a returned candidate by an agent. But, in our judgment, the use of that phraseology cannot have any repercussions on the construction of the language used in clause (b) aforesaid. Mr. Patwari reinforces his argument by contending that it would be odd for the Legislature to prescribe for the consent of a candidate for the corrupt practice of an agent for the purposes of section 100, sub-section (1), clause (b) when the Legislature had already prescribed for consent of the candidate under Explanation (1) to section 123 of the Act for the purpose of holding a person to be an agent. He contends that it is hardly necessary that there should be a second consent of the candidate when the very basis of the agency is the consent of the candidate. There is a fallacy underlying this argument. In the first instance, the

consent which is provided for by the Explanation is not the consent for the commission of the corrupt act. The consent is for acting as an agent, whereas the consent which is required under section 100 (1) (b) is for the commission of the corrupt practice. Reading section 123 with the Explanation and section 100 (1) (b) and section 100 (1) (d) (ii) of the Act together, it is quite clear that the Legislature has kept the two concepts of the commission of a corrupt practice and the invalidity of an election quite distinct. Although a corrupt practice may come to be practised within the meaning of section 123, it does not in all cases lead to a declaration that the election is void. If a corrupt practice happens to be practiced by the candidate himself or with his consent, it always leads to the invalidity of an election. But the Legislature has not introduced the principle of vicarious liability when a corrupt practice happens to be committed by a person other than a candidate in all cases. The principle of vicarious liability is introduced only in the case of a corrupt practice committed by an election agent. In the case of other agents, the principle of corrupt practice is not introduced except in one case. It is introduced only in those cases where the corrupt practice happens to be committed with the consent of the candidate's election agent. In the case of a corrupt practice committed by an agent otherwise than with the consent of a candidate or his election agent, the corrupt practice so committed can lead to a declaration of the invalidity of the election only if, as provided in section 100 (1) (d) (ii) of the Act, the result of the election has been materially affected.

15. To summarize, the legal position appears to be this. If a corrupt practice is committed by an election agent, it always leads to the invalidity of the election. If a corrupt practice is committed by an agent other than, an election agent, then, it can lead to a similar result only if it is committed with the consent of the candidate or his election agent. In all other cases, including a polling agent the commission of corrupt practice cannot lead to the invalidity of an election unless side by side it is also further proved that, on account of the commission of the corrupt practice, the result of the election has been materially affected.

16. The second contention of Mr. Patwari is that there is authority for the proposition that sub-section (2) of section 100 of the Act is an exception to clause (b) of sub-section (1) of section 100. In support of this, Mr. Patwari cites the cases in AIR 1961 Rajasthan 122, at page 126, and *Maganlal Radhakishan v. Hari Vishnu*⁵, at p. 367. Mr. Patwari contends that, if this is so, then, the latter part of clause (a) of sub-section (2) of section 100 would be redundant. He says that, that part casts a duty upon the returned candidate to satisfy the Tribunal or the Court that the corrupt practice was committed without his or his election agent's consent. He contends that it would be a contradiction in terms to say that, for the purposes of clause (b) of sub-section (1) of section 100, proof must be adduced that corrupt practice was committed with his consent and, then, to say that the Court or the Tribunal must be satisfied that it was done without his consent. There is some force in this argument of Mr. Patwari. However, judicial opinion is not unanimous as to the applicability of sub-section (2) of section 100 to a case arising under clause (b) of sub-section (1) of section 100. Two cases were cited before us wherein the view is taken that sub-section (2) of section 100 is intended to be an exception to subclause (ii), clause (d) of sub-section (1) of section 100 of the Act. The cases cited were *Sudhir Laxman v. Shripat Amrit*⁶, at

page 262, and *Krishna Kumar v. Krishna Gopal*⁷, at p. 24. In our judgment, it is not necessary for us to resolve this particular controversy in the present case. We are not called upon to decide the aforesaid question directly at all. What we are called upon to decide is as to the true interpretation of clause (b) aforesaid and there cannot be any doubt that the true construction of that clause is that, in order that the case of a corrupt practice committed by an agent may be brought within the purview of that clause, it is necessary that the consent of the returned candidate or his election agent must be established. If this leads to the conclusion that sub-section (2) of Section 100 is excluded from application to clause (b), effect should be given to that conclusion rather than that clause (b) aforesaid should be construed in a manner which would violate the express language thereof.

17. For the aforesaid reasons, we have come to the conclusion that, although Thekdi has been able to establish that corrupt practices were committed by the aforesaid seven persons, in order that a declaration may be given to him that Lalsing's election was void, it is necessary for him to prove further that the corrupt practices were committed by the aforesaid persons with the consent of Lalsing. Unless this ingredient is satisfied, a declaration to the aforesaid effect cannot be made.

18. Now, we have no doubt whatsoever that there is not a tittle of evidence in the case, direct or circumstantial, to prove that Lalsing had given his consent either to the preparation of Ex. 115, the original of Ex. 70 or the original of the message Ex. 72 and the printing of Exs. 70 and 72. Mr. Patwari does not contend that there is any direct evidence on this point. But he seriously argues that there is enough circumstantial evidence which goes to establish that Lalsing had a hand both in the preparation of the aforesaid documents and their printing. We cannot agree with this submission. It is true that Lalsing was fighting the election on the swatantra party ticket and that Maharaj was invited to do propaganda for the swatantra party. Even assuming that swatantra party was an agent of Lalsing, there is nothing on record to show that the invitation to Maharaj was extended or was accepted by him with the consent of Lalsing. In fact, there is nothing on

⁵ AIR 1960 Mad Pra 362 ⁷ AIR 1964 Raj 21

⁶ AIR 1960 Bom 249

record to show that Lalsing had any hand in these two matters. The mere fact that Maharaj came at the instance of the swatantra party and delivered lectures at Modasa cannot mean that this was done with the consent of all the assembly candidates who were fighting elections on the swatantra party ticket. No attempt has been made by Thekdi to prove that Lalsing was present at Modasa on the two days on which Maharaj stayed at Modasa or that he was present at any of the three meetings which Maharaj addressed or that he received, met or even went for the purpose of paying respects to Maharaj at Modasa. But Mr. Patwari's main argument was that Ex. 115 was written by Maharaj only for the purpose of appealing to voters in the Bayad-Malpur Constituency and for advocating the cause of Lalsing's candidature. Mr. Patwari contends that it is hardly probable that this could have been done by Maharaj unless

Lalsing had a hand in that matter. There is some force in this argument. But, the argument is not conclusive. In any case, the subsequent events as a result of which Ex. 115 underwent changes and bloomed into Ex. 70 are certainly circumstances which require consideration before one can infer from the aforesaid circumstance alone that Maharaj was acting with the consent of Lalsing in the matter of publication of Ex. 70. We have already indicated the changes which Ex. 115 underwent before it assumed the shape of Ex. 70. It is true that the core of the appeal for the Bayad-Malpur Constituency remained as before. From one point of view, Ex 70 only extended the appeal to two more assembly constituencies and also made an appeal to the Parliamentary voters. But, at the same time, there is no doubt whatsoever that an appeal which was originally intended for Lalsing's candidature alone was diluted inasmuch as Lalsing's name was completely dropped and that name was relegated to the limbo of a general appeal in which two other assembly candidates were equally included. Not only this, but the names of the Parliamentary candidates were mentioned in bold type. Mr. Nanavati is right in posing the question whether this could have at all happened if Maharaj had drafted the appeal at the instance or with the consent of Lalsing. In that case, there is a strong likelihood of Lalsing's name, in any case, being retained even though the name of Pashabhai may be permitted to be added. Moreover, it is not possible to draw an inference of the kind for which Mr. Patwari contends in view of the definite evidence of Malvi himself - Thekdi's own witness-to the effect that Maharaj had written Ex. 115 of his own accord. Thekdi has not been able to adduce any evidence as to why Ex. 115 underwent the aforesaid changes. The reason for these changes remains a mystery on record. A suggestion was made to the witness Kanubhai in his cross-examination on behalf of Thekdi that the original appeal Ex. 115 was drafted by Maharaj because he was unable to fulfil his original programme of addressing a meeting at Bayad. The suggestion has been denied by Kanubhai. But, even if one proceeds on the basis that that suggestion appears to be the only explanation for drafting Ex. 115, it does not follow that Ex. 115 was written with Lalsing's consent or at his instance. It is not improbable that swatantra party itself or even the Parliamentary candidate might have thought that, having regard to the number of Vaishnav voters in the Bayad constituency, it would be helpful to the party if Maharaj were to address that constituency. It does not follow from this that because such an opinion was entertained by the swatantra party, the same was done at the instance or with the consent of Lalsing. The swatantra party having chalked out a programme of its own without consulting Lalsing cannot be overruled. The circumstantial evidence cannot lead to the conclusion that Lalsing had any knowledge of the fact that Maharaj was likely to address the Bayad constituency. If this was so, then, there would be at least some evidence of Lalsing having gone to Modasa, if nothing else, to make a formal request to Maharaj to visit his constituency or, in any case, to fetch him to Bayad. Then, so far as the evidence relating to the printing of Ex. 70 is concerned, Thekdi's own evidence does not leave any doubt that all the positive steps in that particular direction were taken by Pashabhai. Though there is no direct evidence as to who made the changes in Ex. 115 which gave Ex. 70 its present shape, the probability appears to be that this was done at the instance and with the consent of Pashabhai. Kanubhai gave the original of Ex. 70 for printing. Even if it is assumed that Kanubhai was the agent of Lalsing, there is no reason to believe that Kanubhai in the matter of giving the original

of Ex. 70 for printing was acting with the consent of Lalsing. In any case, Ex. 115 was still in possession of Pashabhai when it was given to Malvi for being printed as a message. Even if Pashabhai is assumed to be an agent of Lalsing, there is nothing to show that Pashabhai was acting as the agent of Lalsing in the matter of printing. All the aforesaid acts could have been and are bound to have been done by Pashabhai in the interest of his own candidature and, as a good party-man, he was also bound to introduce an appeal in Ex. 70 which would benefit his colleagues fighting the assembly elections. There is no doubt that the charges for printing Ex. 70 were paid by Pashabhai. Under the aforesaid circumstances, even if we assume that all the aforesaid persons who had a hand in the preparation and printing of Ex. 70 were agents of Lalsing within the meaning of the general election law, it cannot be said that they had acted in the aforesaid matters with the consent of Lalsing. All the aforesaid acts could have been done by all the aforesaid persons - Maharaj, Kanubhai, Pashabhai and Malvi-in the interests of the party itself and without any knowledge or consent on the part of Lalsing at least at the time when the original of Ex. 70 was prepared and published.

19. Then comes the evidence relating to the distribution of the copies of Ex. 70 in the Bayad-Malpur Constituency by the aforesaid three persons Somabhai, Juzarsing and Becharbhai. That these three persons were the workers of Lalsing has been held to be proved by us. That these three persons were the agents of Lalsing within the meaning of the Explanation has also been held by us to be proved. But the question for consideration is, whether, when the aforesaid persons distributed the pamphlets on 18th and 19th, they did so with the consent of Lalsing. Mr. Patwari seems to contend that from the aforesaid facts alone, we can infer consent. No controversy is raised by any party before us as to the connotation of the term "consent". Though the definition as given in Section 13 of the Indian Contract Act of the term "consent" may not be applicable to election law, it may be taken as a guide for the purpose of determining whether, in a given case, consent is or is not proved. The definition says that two or more persons are said to consent when they agree upon the same thing in the same sense. Therefore, in order that an act may be said to have been done by one with the consent of another, it is necessary to determine that the two persons were ad idem on the act done. There is also no controversy that consent need not be express. Implied consent is enough. In fact, in a majority of cases, it may be imprudent to expect proof of express consent. In all such cases, all that a reasonable person can expect from the petitioner would be evidence which would show that there was consent by implication. Necessarily, the evidence on the latter subject is bound to be circumstantial rather than direct. In considering a question of the aforesaid type, it may be legitimate for a Tribunal or a Court to draw all reasonable inferences which flow from facts established. But, even approaching the case in the aforesaid manner, it is difficult to agree with Mr. Patwari that the mere fact that the aforesaid three persons were the main workers of Lalsing and that they had distributed copies of Ex. 70, consent must be presumed or inferred therefrom. Perhaps, realising that the aforesaid evidence may not be enough, Mr. Patwari very rightly tried to press into service a few other circumstances which, he submits, were if taken with the aforesaid other circumstances, would go to establish consent of Lalsing. Firstly, Mr. Patwari contends that neither Lalsing, nor his

aforesaid two main worker witnesses Somabhai and Juzarsing has been of any help whatsoever in enquiring into the aforesaid question. He submits that if once we hold that Thekdi's witnesses have told the truth in regard to the distribution of pamphlets by the aforesaid two persons and Becharsing, it necessarily follows that the aforesaid two persons have not told the truth on that topic. Even Lalsing's evidence can be subjected to some criticism on a number of points on which one would have expected him to have knowledge. Lalsing has gone the wholehog and denied all the events which had taken place at Modasa. Mr. Patwari contends that if Ex. 70 was published for distribution, inter alia, in Bayad-Malpur Constituency, it stands to reason that the copies would be sent from the Modasa end, in the first instance, to the headquarters of the constituency at Bayad which was in Lalsing's own premises. He says that it does not stand to reason that the aforesaid three persons and possibly some more would get copies of Ex. 70 separately and through different channels. There is some force in this reasoning. But, at the same time, even if one assumes that this is so, it does not necessarily mean that Lalsing had given his consent to the distribution of Ex 70. There is not an iota of evidence to prove that Lalsing was at Bayad on the two crucial dates 18th and 19th when the impugned pamphlets could have been brought in the office for the purpose of being distributed. In fact, Lalsing does not appear to have been cross-examined on this crucial question at all. Mr. Patwari relies upon that part of the evidence of Lalsing wherein he speaks about his practice of being acquainted with the work done by his workers at the end of the day. He contends that, in any case, even if Lalsing was not present at the time when the copies of pamphlets were received for distribution and that the copies were taken away for distribution before the arrival of Lalsing, Lalsing would receive report about the same on the 18th or on the 19th. Mr. Patwari contends that the appeal embodied in Ex. 70 was of vital importance and one which was made by a religious leader respected by a body of voters constituting about 15 to 20 percent of the voters. He says that it does not stand to reason that such an important point could not have been mentioned to Lalsing at any time. Lalsing has denied any knowledge about the existence of Ex. 70 or its distribution. Mr. Patwari seems to be right when he says that this part of the evidence of Lalsing ought not to be relied upon. But, a distinction must be made between consent and knowledge. It is true that, in given circumstances, if a candidate receives knowledge about the commission of a corrupt practice and also knows that the same is going to be repeated, if he does not take steps for the purpose of prevention of the repetition of the corrupt practice, then, the candidate may be said to have consented to the commission of the corrupt practice which was repeated (vide *Sheopat Singh v. Harish Chandra*⁸). But, if a corrupt practice is committed and after its commission, it comes to the knowledge of the candidate and there is no reasonable ground for belief that the same is repeated or likely to be repeated afterwards then from those facts, it cannot be inferred that the candidate had given his consent to the commission of the corrupt practice, (vide *Biswanath Upadyaya v. Harilal Das*⁹). He cannot be said to have given his consent to the commission of the earlier corrupt practice because ex hypothesi he had no knowledge about the same prior to its

⁸ AIR 1960 SC 1217

⁹16 Ele LR 405 at p. 406

commission. May be, in some cases, the commission of a corrupt practice may be ratified and the question may arise for consideration as to whether the ratification of the commission of the corrupt practice does or does not amount to consent. But there is neither evidence, nor any circumstances from which it can be said that the corrupt practices committed by the aforesaid persons were ratified by Lalsing. In fact, that is not the pleading. Consent can be inferred, as already stated, in regard to those corrupt practices which were repeated after knowledge is derived in respect of the commission of the earlier corrupt practice. But, having regard to the fact that there is no evidence whatsoever on record that Lalsing was at Bayad either on the 18th or the 19th when the pamphlets were received for distribution or when they were actually distributed, and having regard to certain other circumstances to be presently mentioned, it is not possible to say that the standard of proof which is prescribed for proof of a corrupt practice has been satisfied in the present case. Having regard to our conclusions that Lalsing had no hand whatsoever in the invitation extended to Maharaj, in the preparation of Ex. 115 or the preparation of the original of Ex. 70 and the printing of Ex. 70 and the receipt of the copies for distribution, the following further circumstances must be given their due weight. Pashabhai was one of the Parliamentary candidates. The aforesaid three persons who distributed the copies of Ex. 70, though they were working mainly for Lalsing, were also working for and on behalf of swatantra party. Pashabhai having given the shape which he had done to Ex. 70 was highly interested in seeing that the copies of Ex. 70 were also distributed in the Bayad-Malpur Constituency. The probability of these persons having received the copies either from Kanubhai or Pashabhai directly without the copies having come to the Bayad head quarters cannot be overruled. In any case, these persons having assumed that the copies embodied an appeal from an important religious personage, having acted in the belief that the same could be usefully distributed amongst the voters without waiting for the consent of Lalsing, also cannot be overruled. Having regard to the short interval between the days on which the copies of Ex. 70 were distributed and the date of the election and having regard to the fact that Lalsing was carrying on a house-to-house propaganda, it cannot be stated with confidence that Lalsing was present at the Bayad headquarters on the two days in question. Besides the aforesaid circumstances, there is one more circumstance which may be borne in mind and that is that, on 19th February 1962, Lalsing had got printed and distributed a mass appeal embodied in Ex. 92, the number of copies distributed by him being 20,000. If really Lalsing had knowledge or a hand in the distribution of Ex. 70, then, it would stand to reason that at least on the 19th of February 1962, copies of Exs. 70 and 92 would be distributed simultaneously. There is not a shred of evidence in the case to show that this was so done. The evidence led by Thekdi is all one way to the effect that copies of Ex. 70 were distributed by the aforesaid three persons. But there is no reference by the witnesses to the simultaneous distribution of the copies of Ex. 92. In *Jagdev Singh v. Pratap Singh Daulta*¹⁰, Their Lordships of the Supreme Court have indicated the high standard of proof which is necessary to achieve before recording a finding of commission of a corrupt practice. Their Lordships have pointed out that a mere preponderance of probability is not enough, but the proof must be such that a finding can be recorded that the impugned act must have been committed beyond reasonable doubt. Applying this standard, which we must, we must come to the

conclusion that Thekdi has failed to prove beyond reasonable

¹⁰ AIR 1965 SC 183

doubt that Lalsing had consented to the distribution of the copies of Ex. 70 by the aforesaid three persons. If this is so with respect to the aforesaid three persons, then, the same finding must necessarily be recorded in regard to the roles played by the other four persons in regard to the preparation and printing of the copies of Ex. 70. In that view of the matter, as already indicated by us, we do not propose to decide as to whether those four persons were or were not agents of Lalsing for the purposes of Section 123 of the Act.

20. But Mr. Patwari makes another submission. He contends that the standard of proof which Their Lordships have indicated in the aforesaid case applies only to the determination of the question as to whether a corrupt practice under Section 123 of the Act has or has not been committed. He says that, though this is so, the same standard of proof does not require to be applied when determining the question of consent under Clause (b) of sub-section (1) of Section 100 of the Act. The argument is that the enquiry under Section 123 is of a quasi criminal nature and the aforesaid standard of proof may be prescribed for determining the commission of a corrupt practice under that enquiry. But the enquiry which is made under that part of Clause (b) which enjoins the determination of the question of consent of a candidate or his election agent does not partake of that character but is more or less an enquiry of a civil nature for the purpose of determining the civil question as to whether the election is valid or void. We are unable to agree with this distinction which Mr. Patwari seeks to make. There is no doubt that, under the Act, the proof of the consent of a candidate for the commission of the corrupt practice would not only lead to the consequence of the election being declared void, but also lead to the penal consequences, such as disqualification prescribed by Section 141 of the Act. Under the circumstances, in determining the question of consent under Section 100, sub-section (1), Clause (b) of the Act, the same standard of proof is necessary to be enforced as is required to be enforced for the purpose of determining the question of corrupt practice under Section 123 of the Act.

21. The next question for consideration is as to whether Lalsing had consented to the corrupt practice committed by Pashabhai and Malvi by the publication of the message Ex. 72 in the issue of 'Lok Sevak' dated 19th February 1962. On the facts of the present case, there cannot be any doubt whatsoever in reaching the conclusion that Lalsing had not given his consent to the publication of the message Ex. 72 or its distribution. There is not an iota of evidence in the case to show that the message Ex. 72 which was extracted from Ex. 115 was done with the consent or in the presence of Lalsing. The evidence is that this was done at the instance of Pashabhai. The printing work was done at Modasa. Even if we assume that the printing work was done on the 18th, having regard to our aforesaid findings, there cannot be any doubt whatsoever that Lalsing was not present at Modasa, so that he could not have given his consent to any of the acts done by either Pashabhai or Malvi. Nor could Lalsing have any hand in the distribution of the message Ex. 72. Once the issue of 'Lok Savak' aforesaid was printed, it is quite natural that the same

would be despatched to its subscribers in the normal course and the moment the issue comes to the hand of a subscriber, the corrupt practice would be committed and even if one proceeds on the basis that Lalsing came to know about the publication of the aforesaid message and its distribution at a subsequent stage, for the reasons which we have already given, the same cannot be regarded as having been done with the consent of Lalsing. Under the aforesaid circumstances, in our judgment, in the case of Ex. 72 also, the finding must be recorded that Thekdi had failed to prove that that message was published with the consent of Malvi. In that view of the matter, as already indicated, we do not propose to consider the question as to whether Malvi was or was not an agent of Lalsing within the meaning of Section 123 of the Act.

22. We have already held that the impugned message embodied in Exs. 70 and 72 does not contravene the provision of sub-section (3) of Section 123 of the Act. But, even if our finding had been in favour of Thekdi, in our judgment, Thekdi, for the reasons already given, must fail on the ground that he failed to prove that Exs. 70 and 72 were distributed amongst the Bayad-Malpur voters with the consent of Lalsing.

23. For the aforesaid reasons, the case as set up by Thekdi under Section 100, sub-section (1), Clause (b) of the Act must fail.

24. The only other point which survives for consideration is the one under Section 100 (1) (d) (ii) of the Act. Having regard to our findings that corrupt practices were committed by the aforesaid three persons and on the assumption that the other four persons were Lalsing's agents, it is quite clear that, in order to succeed, Thekdi must prove that the corrupt practices were committed in the interests of Lalsing and that the result of the election was materially affected. Having regard to the fact that the first set of persons were the main workers of Lalsing and that the other set of workers were working for and on behalf of the swatantra party, we do not have any difficulty in recording the finding that the aforesaid corrupt practices were committed in the interest of Lalsing. But the recording of that finding is not enough. Thekdi must further prove that the result of the election had been materially affected. Now, no data have been supplied by Thekdi on the basis of which such a finding can be recorded. We do not know what was the total number of votes obtained by Lalsing and his rival candidates and what was the margin by which Lalsing won. Though we have general evidence to the effect that the total number of Vaishnav voters was 15 to 20 percent, the evidence does not disclose as to what percentage of these voters had received the impugned message Ex. 70 or Ex. 72 and as to what was the likelihood of the impact which this appeal had made on the mind of voters. In fact, we have the positive evidence of witness Natverlal C. Sheth to the effect that Vaishnav voters at Gabat had mostly voted for respondent No. 2. Although the evidence discloses that Maharaj was a religious leader respected by the Vaishnav followers, it is not possible from the evidence to form any opinion as to what was the extent of the influence which Maharaj had over his Vaishnav followers in the aforesaid constituency. It is true that Thekdi's witnesses had generally deposed that, in their opinion, because of the aforesaid appeal of Maharaj, the Vaishnavas had voted for the Swatantra Party.

But, a mere expression of opinion on the part of the witnesses can hardly be regarded as sufficient evidence on the subject of the impact of the message on the election result. The aforesaid witnesses do not claim to be experienced in the matter. In any case, in the absence of any data given by the aforesaid witnesses, it is impossible to act upon their aforesaid evidence. The acceptance of the aforesaid evidence is also clouded by another fact. The opinion expressed by the aforesaid witnesses is not merely based upon the distribution of Exs. 70 and 72 but is also based upon the publication of literature bearing 'Dhruv' star and its use as a symbol. Having regard to the fact that the Supreme Court has held that the latter was not a corrupt practice, the opinion expressed by the aforesaid witnesses on the alleged conjoint commission of the aforesaid two kinds of corrupt practices must be considerably distorted.

25. For the aforesaid reasons, we record the findings that corrupt practice was committed under sub section (2) of Section 123 of the Act by the distribution of Ex 70 by the agents of Lalsing, but without his consent; that no corrupt practice was committed under sub-section (3) of Section 123 of the Act. We also record the finding that though corrupt practice has been committed under sub-section (2) of Section 123 of the Act, Thekdi has failed to prove that the result of the election was materially affected thereby. For the aforesaid reasons, we must allow the appeal and dismiss the petition with costs both before the Tribunal and in this Court.

26. We allow the appeal and dismiss the petition with costs, both before the Tribunal and in this Court, Respondent No. 1 (original petitioner) to pay the costs of the appellant (opponent No. 1 before the Tribunal) of this Court and the Tribunal as aforesaid. Costs of this Court quantified at Rs. 750. We direct that the substance of the decision be communicated forthwith to the Election Commission and the Speaker of the Gujarat Legislative Assembly and that an authenticated copy of the decision be sent to the Election Commission.

27. At this stage, Mr. Patwari seeks leave to appeal to the Supreme Court. Having regard to the number of important questions involved in this matter, we propose to grant the oral request. Leave granted to appeal to the Supreme Court under Article 133 (1) (c) of the Constitution.

Appeals allowed and leave to appeal to Supreme Court granted.