KERALA HIGH COURT

Abdul Majeed

Vs.

Bhargavan

Election Appeal No. 4 of 1961

(S. Velu Pillai and T.C. Raghavan, JJ.)

23.03.1962

JUDGMENT

Velu Pillai, J.

1. This is an appeal under section 116-A of the Representation of the People Act, 1951, against the order of the Election Tribunal, Quilon, by which it dismissed the appellant's election petition, for declaring him to have been duly elected to the State Assembly from Chadayamangalam Constituency on holding the election for the first respondent or the respondent for short, the returned candidate, to be void. The electoral roll was compiled under the provisions of the Representation of the People Act, 1950 and the Representation of the People (Preparation of Electoral Rolls) Rules, 1956, which may be referred to hereafter as the 1950 Act and the Rules respectively, the qualifying date being January 1, 1959. The election and the trial of the election petition were held under the provisions of the Representation of the People Act, 1951 as amended in the year 1958, which may be referred to as the Act. The respondent was declared elected by a majority of 122 votes, having secured 25412 votes as against the appellant's 25290 votes. Respondents 2 and 3 are the two other candidates who were also defeated, but they have not taken part in the proceedings in this appeal. The election of the respondent was impugned chiefly on two grounds, first, that a large number of votes polled were minor votes, to use a compendious term, that is, votes of those who, though registered as electors on the electoral roll, had not completed twenty one years of age on the qualifying date, and second, that the respondent has been guilty by his agent, of having committed the corrupt practice defined in section 123 (4) of the Act, with his consent and in his interests. On the first, the Tribunal found only 35 minor votes to be proved, which was inadequate to upset the result of the election, and on the second, it held that the charge of corrupt practice was not proved. The above two grounds were reiterated before us in support of the appeal.

2. The appellant specified 315 instances of minor votes in the annexure to his petition but examined 172 voters. The evidence tendered with respect to them consisted of their school admission registers and in a few cases, also of their applications for admission to the schools. The tribunal classified these 172 instances into three groups. The first group comprised 32

instances, in which the voters admitted that they were minors and which were therefore conceded for the respondent to be of minor votes and 21 more which, the appellant contended, ought to be held to be similar to the 32 instances on a scrutiny of the evidence relating to them. The Tribunal, however, accepted only one out of the 21 to be a minor vote. Of the rest, it rejected 4 instances in which, though minority was admitted, the electors deposed that they had not voted, and which were therefore treated as cases or personation, for which the appellant had not laid the requisite foundation in the pleadings, 11 instances on the ground that the parents or guardians were alive but were not examined, and the remainder on defects in the evidence. The second group comprised 74 instances out of which two alone were found to be minor votes, 55 being instances in which the parents or guardians were alive and were not examined, 4 being cases in which the supporting admission registers were of private schools which were not admissible in evidence, and the rest being cases in which the proof tendered was not up to the requisite standard. The third group, which comprised 45 instances was wholly excluded, as the relative admission registers were all of private schools. This was how the Tribunal held 35 alone to be minor votes.

3. The appellant's learned counsel pressed for the acceptance of the rejected 20 instances in the first group and the 72 instances in the second group, and in particular, complained against the rejection, of the 4 proved minor votes, whoever may have cast such votes, on the ground of defective pleading in the election petition, and of the 11 instances in the first group and the 55 instances in the second on the ground that the parents or guardians of the concerned voters were not examined. We also feel that the rejection of these instances on the grounds stated is not supportable. The admission registers of government schools being admissible under section 35 of the Evidence Act, could not be discarded on the short ground that the appellant failed to examine the parents or guardians in support of the school records, though we cannot help observing, that their evidence might have proved useful in establishing identity wherever it was in dispute or in adding to the weight of the evidence; counsel urged, that if in addition to the 35 proved minor votes, the requisite number can be found to be proved so as to displace the majority of 122 votes in favour of the respondent, the appellant ought to succeed. He therefore invited us to act upon the admission registers of government schools, supported in a few cases also by the relative applications. In addition to the 172 voters, the headmasters were examined to prove the admission registers. The evidence that the voters gave for the most part was either, that the entries as to their date of birth in the admission registers were erroneously made or that their age was intentionally understated at the time of admission to the school.

We think that oral evidence of the voters alone, who according to the electoral roll were adults and most of whom have voted, that the relevant entries in the school registers are erroneous or incorrect is as unsafe to be acted upon, and as undependable, as the evidence of those who after voting as adults come forward and say that they were minors and rely on the registers. Counsel however wanted to rely on the oral evidence only to support the admission registers on which he depended entirely for proving the case. In these circumstances, granting that the admission registers have been duly proved, and that the identity of the voters in relation to them has been duly established, the question that arises in final analysis is only whether the entries as to the date of birth in the admission registers standing by themselves can prevail over the entries as to adulthood on the qualifying date in the electoral roll. If the answer to this is in the negative, it would be unnecessary to consider the oral evidence in the case of individual voters. On this precise question a division bench of this court of which one of us was a party, has already given the answer in the following terms in *Kunhiraman v. Krishna Iyer*[1],

> "Having regard to the circumstances in which an entry regarding the date of birth of an admitted pupil is made in school registers, and the temptation of the person taking the child for admission (whose statement is the sole basis for the entry) to take a year or two, or as much as is possible, off the child's real age, we consider that entries in the school registers are of far less evidentiary value than the entries in the electoral roll and are therefore of little avail to show that age shown in the electoral roll is wrong."

Considerations are different in the case of entries in birth registers. The entries in the electoral roll being not conclusive, as held by a Full Bench of this court in *Kunhiraman v. Krishna Iyer*[2], the division bench observed as follows, with respect to entries in birth registers :

> "In the generality of cases these entries therefore, furnish the best evidence of the date of the birth and can safely be accepted unless they are shown to be wrong. If the entry in the birth register relating to a particular elector is produced, and that entry shows his age to be different from that shown in the electoral roll, then that entry must prevail, and, if according to it, an elector whose vote has been cast is below the age of 21 on the qualifying date, then a case of minor vote is established."

It is indeed strange, that not one birth register extract has been tendered in evidence in this case and the appellant had no convincing explanation to offer for the omission, though at one stage it was faintly suggested that registration of births is not a common feature of the particular locality. No attempt was made even to prove this. We cannot presume, not only that the whole population of a constituency, but also the concerned departmental officers have been unmindful of their duties and obligations under the birth and death registration regulations in the maintenance of vital statistics.

4. We should have treated the question formulated as concluded by the dictum aforesaid, had it not been for the insistence with which the learned counsel pressed for its reconsideration on the ground of possible repercussions. But on a close study of the relevant provisions of the Travencore Education Code pursuant to which entries were made in the admission registers relied on, and of the 1950 Act, and of the Rules framed thereunder, through which we were taken, we have also come to same conclusion. Rule 69-A of the Travencore Education Code reads as follows : 69-A (i). "No pupil shall be admitted into a recognized school for the first time, unless a written application in the prescribed form (vide Appendix) for his admission is made by his parent or guardian. In the case of an application presented by a guardian it shall be deemed to be valid for the purpose of this rule only if he attaches thereto a written

[1]1962 Ker LJ 289 at p. 298

[2]1961 Ker LJ 1400 : AIR 1962 Ker190 (FB)

authority signed by the father of the child if at the time the application is presented the father is alive or by the mother of the child in case at the time the father is dead and the mother is alive, or by the nearest relation if both the father and mother are at the time not alive, and unless such authority contains the date of the child's birth.

> (ii) The declaration of a child's age made by his parent or guardian on his first admission to any school is a declaration of age for a public purpose; the entries regarding age made

in the school records on the basis of such a declaration cannot be subsequently altered on any account. Heads of schools should impress this rule upon the attention of parent or guardian of the child at the time of his first admission to a school."

Though applications for admission were not forthcoming in all but a few of the cases, learned counsel contended on the strength of the presumption in favor of the regularity of official acts, that every one of the admission registers must be presumed to be supported by the relative application and declaration in terms of Rule 69-A. This was the only provision in the Code to which our attention was invited. The electoral roll as conceived by the Constitution was prepared in pursuance of the provisions of the 1950 Act and the Rules. Under that Act, there shall be a Chief Electoral Officer for every State whose duty it is to supervise the preparation, revision and correction of all the electoral rolls in the State, and an Electoral registration officer for every constituency to prepare and revise the electoral roll for that constituency. Section 19 of that Act has laid down, as one of the two conditions of registration as an elector in the electoral roll, that he shall not be less than 21 years of age on the qualifying date. So this is" the issue for decision before the officers in the preparation of the electoral roll. Section 31 of the 1950 Act has enacted, as contrasted with Rule 69-A aforesaid, that the making of a false statement or declaration in a claim for inclusion or in an objection to an entry in the electoral roll, is punishable with imprisonment or with fine or with both, and by section 32 officers are liable to punishment for breach of official duty in connection with the preparation of electoral rolls. Under the Rules, the electoral registration officer is empowered to send letters of request in the prescribed form to the occupants of dwelling houses every one of whom is bound to furnish the information called for to the best of his ability, in the form prescribed is a column as to the age on a date prescribed, in preparing the electoral roll and in deciding any claim for inclusion or any objection to an entry therein, the officers may have access to the register of births and deaths, and under the latest Registration of Electors Rules 1960, to school registers also. The departmental instructions go further, and even the horoscope may be looked into, the idea apparently being to get at all available materials which may have some value. The draft of the roll has to be published at the office and at such places as may be specified by the electoral registration officer, and shall be available for inspection for all concerned. There are provisions in the Rules to ensure greater publicity for the draft roll and what is even more important, two copies of each separate part of the electoral roll are to be furnished to every political party to which a symbol has been allotted by the Election Commission. Objections to entries may be taken within thirty days of the date of the publication of the draft roll, which would be entered in the Register of claims and objections. The revising authority as may be appointed shall, after giving notice to the persons affected, hold a summary enquiry into every objection and communicate his decision to the electoral registration officer. After the claims and objections have been disposed of, the electoral registration officer has to order the final publication of the electoral roll and the roll so published is the final electoral roll for that constituency. Even then, under Section 22 of the 1950 Act, the electoral registration officer may suo motu or on application correct the entries or delete any entry on the ground that the person concerned is not entitled to be registered in the roll, but only after giving him a reasonable opportunity of being heard. Elaborate instructions to the enumerators and others concerned in the task of preparation and revision of electoral rolls have been issued by the department, some of which are to be found in the Kerala Election Mannual,

5. Apart from 'ordinary residence' in a constituency, which is the other condition of registration in

the electoral roll under Section 19 of the 1950 Act, as observed the issue to be decided in the preparation of the electoral roll is certainly the age of the elector on the qualifying date Enumeration of voters by contacting every one who may be supposed to be of full age, verification of age with reference to records or materials which may have some value, giving wide publicity to the draft roll and opportunity to interested parties to prefer objections, a machinery for deciding objections, are some of the safeguards which have been devised to arrive at a correct decision. There is also sanction for punishment against the making of false statements or declarations and against dereliction of duty on the part of the officers. Suffice it to state, that as against these, the prescriptions in Rule 69A of the Travencore Education Code do not stand comparison. If in actual working, these provisions are not translated into action and the intendment of the law or of the provision in the Education Code is not fully realised, the presumption of regularity relied on, applies equally to the one as to the other. If in making declarations as to age for the electoral roll, there is a temptation to overestimate the age on the part of those for whom their real age is of no vital concern, as observed by the bench in the earlier case, there is also a temptation to underestimate the age on the part of the declarant at the time of admission of the child to the school. There is however the difference that in the former, the declaration is made in the limelight of publicity, is exposed to public attention and scrutiny and is liable to challenge by interested parties, while in the latter, none but the declarant or those immediately connected with him might ever know what was declared. We make it plain, that we are not to be understood as laying down that under no circumstance entries as to the date of birth in admission registers have any value. Often, the admission register where available is the sole evidence or reliable evidence as to a man's age on which a court of law might choose to act, depending on the facts and circumstances of the case. In our opinion, the birth register extracts are certainly the most dependable evidence as to age, as they are seldom if ever, subject to the infirmities suggested above. But in determining whether a person had completed 21 years of age on the qualifying date or not, as between the competing entries in the electoral roll and the admission register, unaided and uncorroborated by anything else, and in the absence of anything to the contrary, the former is entitled to greater probative value than the latter. We might also mention, that the learned counsel for the respondent even took the stand that in view of the provisions in the 1950 Act and the Rules, the electoral roll must be held to be conclusive on the question of age on the qualifying date, but in the light of the decision of the full bench referred to above this could not be maintained and we leave it at that. We repel the appellant's contention as to minor votes.

6. The next ground relates to the alleged commission of a corrupt practice as defined in Section 123 (4) of the Act, by the editor of a newspaper called 'Janayugom' in which was published on January 24, 1960 the facsimile of a letter said to have been addressed by Shahul Hameed, the appellant's brother, to one Padmanabhan Muthalali, the English translation of which, as accepted by both parties is as follows :

"Nilamel,
27-12-1959.
My dear Padmanabhan Muthalali, If the fifty rupees you had received for hoisting the flag has been spent out, I shall pay you the balance also. Things must not suffer for want of money. You must pay money to whomsoever you deem necessary. From Abdul Kareem Kakka I learnt that Raman Kutty Channar has undertaken to present arecanut trees. Money should be paid only to those on whom you have confidence that they would vote for us. As was the experience last time

we must not suffer defeat after paying money. Nothing more. Rest in person,

P. Shahul Hameed."

This is Ext. P-1(a), and was published under the headline "Must not suffer defeat by paying money". There is a foot-note to this in the same issue of the newspaper, Ext. P-1(c), which said that Ext. P-1 (a) is a photostat copy of a letter from Shahul Hameed, the younger brother of the appellant, who is the United Front candidate for election in Chadayamangalam constituency, to one of his friends and that the letter which is self-explanatory, points to the decision of the United Front to purchase votes. In the issue of 'Janayugom' dated January, 26, 1960, was published Ext. P-2 (a) which purported to be by way of correction that Shahul Hameed was the elder and not the younger brother. It was contended for the appellant, that 'Janayugom' being the organ of the Communist Party which set up the respondent as its candidate for the constituency and having supported his cause in the election, was in law an agent of the respondent in his election, that Shahul Hameed wrote no such letter at all, and that the statements in it related to the appellant as a candidate or to his candidature and were false to the knowledge of the editor. Section 123(4) of the Act defines the particular corrupt practice in the following terms :-

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

The Tribunal has found that 'Janayugom' was not the agent of the respondent, that the publication was not made with the consent of the respondent express or implied, and was not reasonably calculated to prejudice the prospects of the appellant's election and that the statements in it were not in relation to the personal character or conduct of the appellant or to his candidature.

7. Section 100(1) of the Act has laid down the grounds for declaring an election to be void, and may be quoted so far as it is relevant :-

> (1) "Subject to the provisions of sub-section (2), If the Tribunal is of opinion -
> (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; or
> (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,
> ... ...

the Tribunal shall declare the election of the returned candidate to be void."

Analyzing sub-sections (1) (b) and (1) (d) (ii), under the former the corrupt practice must have been committed by (a) the returned candidate or (b) his election agent or (c) any other person with the consent of the returned candidate or his election agent and under the latter, (a) it must have been committed in the interests of the returned candidate, (b) by an agent other than his election agent, and (c) the result of the election must have been materially affected thereby, in order that the election may be declared to be void. In this case it was argued that sub-section 1(b) applies, because 'Janayugom' was the respondent's agent, an agent is comprehended by the term 'any other person' and the corrupt practice, was committed by the agent with the respondent's consent and sub-section (1) (d) (ii) applies, because 'Janayugom' as such agent committed the corrupt practice in the interests of the respondent and the result of the election has been materially affected thereby. Agency in election law is a wider concept than under the common law or the Indian Contract Act. Explanation (1) to Section 123 of the Act says :

> "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" and this is adopted for the purpose of Section 100 as well, by the force of Section 99(2) of the Act.

It may be assumed for the present purpose without deciding, that 'Janayugom' was an agent of the respondent within the meaning of the Explanation. The term 'agent' is employed in Section 100(1) (d) (ii) but not in Section 100 (1) (b) which uses the general term 'any other person' which according to its plain meaning would include an agent. To leave out an agent from the ambit of the term 'any other person' would involve the consequence, that the commission of a corrupt practice by an agent with the consent of the returned candidate or his election agent, would not per se nullify the election, while the commission of such an act by a non-agent with such consent would. It is not enough to say, that the case of an agent is covered specifically by sub-section (1) (d) (ii), because under it the election could be set aside only on discharge of the onus, which is very heavy, of proving that the result of the election has been materially affected. In the Act as passed in the year 1951 and before it was amended in the year 1956, the commission of a corrupt practice by an agent without more, regardless of consent, was sufficient to render the election void. Under the 1956 Amendment also, sub-section (1) (b) was in the same terms as in the Act, though sub-section (1) (b) (ii) was not so. In cases decided under the 1956 Amendment there was general consensus of opinion that the term 'any other person' in sub-section (1) (b) would Include an agent. See *M. A. Muthiah Chettiar v. S. A. Ganesan*[3], *Nani Gopal v. Abdul Hameed*[4], *Anjaneya Reddy v. Gangi Reddy*[5], and *Badri Narain Singh v. Kamdeo Prasad Singh*[6], We are aware that in defining the several corrupt practices, Section 123 has used the term 'agent' in contradistinction with 'any other person', but this might well be to clarify that the consent of the candidate or his election agent is not a necessary element in the definition of corrupt practice by an agent. However, it seems to us that more appropriate language might be employed in sub-section (1) (b), in view of the luxtaposition of Sections 100 and 123. Even if there is an anomaly on this account, we think the greater anomaly would be to exclude an agent from the scope of the expression 'any other person' in sub-section (1) (b).

8. Consent of the returned candidate or his election agent to the actual commission of corrupt practice by any other person, is part of the specification in sub-section (1) (b) of the ground for nullifying the election. If as we have held, the term 'any other person' includes an agent, sub-

section (1) (b) would come into play only if the agent commits the corrupt practice with the requisite consent. This follows from the plain language of the provision. Consent to the actual commission of the corrupt practice under sub-section (1) (b) must be differentiated from consent which is part of the definition of the term 'agent' in the Explanation to Section 123, which is consent given to a person by the candidate, and never, be it noted, by the election agent, to act "as an agent in connection with the election". The latter consent is part of the make-up or the constitution of an agent, and without such consent, which may be either express or implied, there could be no agency even in the law of election. Similarly the consent referred to in sub-section (1) (b) has also to be differentiated from consent which is part of the several definitions in Section 123 and which is related to 'any other person' as distinguished from an agent, as noticed above. Despite the distinction in the definitions in Section 123, it must follow from our conclusion that the term 'any other person' in sub-section (1) (b) includes an agent, that sub-section (1) (b) and sub-section (1) (d) (ii) between them make a distinction in prescribing the conditions for nullification of an election. The reason for the distinction is not far to seek and lies in the greater measure of responsibility of the returned candidate for what the agent does with consent, than for what the latter does without it but in the interests of the former. We consider that this is the, reasonable way to interpret sub-section (1) (b). To accept the contention, that no consent to an agent is necessary under sub-section (1) (b), would be to do away with this distinction and to fender sub-section (1) (d) (ii) otiose.

9. That consent contemplated by sub-section (1) (b) to the commission of corrupt practice is different from consent which goes to constitute agency, has been held in Badri Narain Singh's case, AIR 1961 Patna 41, referred to above. The same view has been accepted by the Assam High Court in *Biswanath Upadhaya v. Haralal Das*[7],

[3] 14 ELR 432 : AIR 1958 Mad 553 [5] 21 ELR 247 (Mys) [7] AIR 1958 Ass 97
[4] AIR 1959 Ass 200 at p. 203 [6] AIR 1961 Pat 41

and by the Bombay High Court in *Sudhir Hendre v. Shripat Dange*[8], But in Nani Gopal's case, AIR 1959 Assam 200, Sarjoo Prasad, C. J. observed, that when corrupt practice is attributed to an agent, there is a

> "strong presumption that it was done at the instance or with the express or implied consent, of the candidate himself".

The learned Chief Justice did not apparently treat the question as one of fact, for he also said that

> "the candidate is himself vicariously responsible for the act and conduct of his 'agent' during the election. The language of sub-section (2) of section 100 strengthens the above inference."

As we shall show, sub-section (2) of section 100, does not in our view, support this position. The agent's relationship to the candidate vis-a-vis the relationship of a non-agent to the candidate, which seems to be the basis of the above reasoning, has no relevance once it is recognized, that between sub-section (1) (b) and (1) (d) (ii), the case of the agent is fully covered subject to the conditions imposed, and a distinction is made between them only in the conditions for declaring the election to be void. This does not necessarily impinge on any general principle which may govern the candidate's liability for the acts of his agent. The competency of the legislature is

undoubted to introduce a gradation, as it were, touching the gravity of the corrupt practice which may be proved to be committed. The Mysore High Court in Anjaneva Reddy's case, 21 ELR 247 (Mys), adopted another interpretation which we find great difficulty to follow. It was held in that case, that the term 'consent' in sub-section (1) (b) means 'consent in law' in relation to an agent, as distinguished from 'consent in fact' in relation to any other person excluding also an agent. The anomaly in having to interpret the same word in the same provision in two different senses was however recognized but the situation was considered to be inevitable. It strikes us, that if consent to the commission of a corrupt practice by an agent is not a requisite condition or may be equated to what is called 'consent in law', as distinct from 'consent in fact', there was no need for substituting for the term 'agent' as it occurred in the corresponding provision in the Act as enacted in 1951, the term 'election agent' in sub-section (1) (b) by the amending Act of 1956, the former being comprehensive to include the latter. We prefer to adopt with respect, the following observations in the judgment of the Bombay High Court in Sudhir Hendre's case, AIR 1960 Bombay 249 cited, which also related to a publication in a newspaper :

> "Just as Mr. Atre would be an agent for the returned candidates in respect of the propaganda carried on in the Maratha in their favor, he would also be an agent for the other candidates set up by the Samyukta Maharashtra Samiti. In an election of this type, the newspaper is bound to publish statements and appeals and everything that may be published in the newspaper would not bind the candidate, unless it is proved that there was either implied or express consent of either the candidate or his election agent."

[8] AIR 1960 Bom 249 at 259

We therefore come to the conclusion, that consent of the returned candidate or his election agent to the actual commission of the corrupt practice by an agent must be proved, before the election can be declared void on that ground, under sub-section (1) (b). It is unnecessary to state that such consent need not be express but may be inferred from circumstances.

10. It was then argued, that the consent of the respondent to the offending publication may be inferred. The appellant examined a few witnesses P.Ws. 7 to 13 who gave evidence of a general nature, that the respondent's workers or agents in the election campaign made use of the publication afterwards to induce the voters not to vote for the appellant except for payment and that as a result, the appellant lost several votes the number of which was differently estimated by the witnesses, and in particular P.W. 10, said that one Prabhakaran who afterwards became the respondent's polling agent at one of the polling stations also acted likewise. The testimony of these witnesses was not accepted by the Tribunal. To our minds, evidence of this type is of no value for inferring consent of the respondent or his election agent to the commission of corrupt practice, which means consent to the act of publishing and is therefore anterior to it. The distinction between such consent and subsequent knowledge about the publication has been drawn by the Assam High Court in AIR 1958 Assam 97, the following words :

> "If it could have been established from the circumstances that the petitioner had knowledge of the fact that such an article was going to be published in the paper and that the article contained certain imputations against the personal conduct of a candidate and if he did not take any steps to stop publication, his consent to the publication may be inferred.

But from the fact, even assuming that it has been proved, that he had knowledge of the contents subsequent to its publication, no duty is cast on him to go and publish some repudiation of the allegations contained in the publication..... Any subsequent knowledge of the contents of the publication cannot be relevant for the purpose of determining the consent of the candidate prior to the publication." We think that the facts in *Bhagwan Datta v. Ram Ratanji*[9], from which the Supreme Court drew an inference of consent are distinguishable from those of the present case. It was complained that the editor of the 'Janayugom' was not allowed to be examined. He was not in the first list of witnesses for the appellant. Afterwards on an application of the appellant being allowed for amendment of the election petition by the specification of more tendered votes, application was also made for the acceptance of an additional list of witnesses to be examined touching the tendered votes. A list was filed afterwards for more than 50 witnesses, the 50th witness being the editor of the 'Janayugom', against whose name in the list it was noted that he was to be examined touching the publication. This was not in accordance with the application aforesaid and the Tribunal did not find its way to allow him to be called. We are not satisfied, that in this there has been any irregularity in procedure. As a result we hold, that the appellant has not succeeded in proving that the publication was made with the consent of the respondent, either express or implied.

[9] AIR 1960 SC 200

11. The learned counsel for the appellant then advanced a further contention based on section 100, sub-section (2) of the Act. This sub-section as it now stands, reads as follows :

> "(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;.
> (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."

The contention was that sub-section (2) is in the nature of a proviso or an exception not only to sub-section (1) (d) (ii) as it is clearly, but also to sub-section (1) (b) and that therefore the burden lay upon the respondent to prove the exceptions, including lack of consent to the publication. The opening words of sub-section (1), "Subject to the provisions of sub-section (2)" do suggest, that sub-section (2) is a proviso or an exception to sub-section (1) but, dealing as it does, specifically with the case of an agent, the only provisions in sub-section (1) to which it can attach if at all, are in sub-section (1) (b) and (1) (d) (ii). The logical result of the prescription in clause (a) of sub-section (2) viz., "that every such corrupt practice was committed contrary to the orders and without the consent of the candidate or his election agent", is indeed the negation of any connection between sub-section (1) (b) and sub-section (2). The two cannot stand together and are therefore mutually exclusive. This was so held by the Patna High Court in Badri Narain Singh's case, AIR 1961 Patna 41, referred to above and also by Patel, J., in the Bombay case of

AIR 1960 Bombay 249, though the learned Judges felt some difficulty in reconciling sub-section (2) even with sub-section (1) (d) (ii) as it was before the amendment of 1958. Patel, J. felt that reconciliation was impossible, but the Patna High Court reconciled them though at the risk of some anomaly. The difficulty or anomaly arose from the language of sub-section (1) (d) (ii) as it was under the 1956 amendment and has now been removed by the 1958 amendment under which this case falls to be decided, by which sub-section (1) (d) (ii) refers specifically to the case of an agent and is even restricted to it.

At the same time, speaking with respect, we find ourselves wholly unable to follow the process of reasoning by which the Mysore High Court reached the conclusion in Anjaneya Reddy's case, 21 ELR 247 (Mys), that under the 1956 amendment, sub-section (2) is a proviso not only to sub-section (1) (d) (ii) but also to sub-section (1)(b). The learned Judges reached this conclusion with very great hesitation and finally observed thus :

> "From what I have said before it is clear that it has not been a plain sailing for me. It is possible to complain that these exercises in mental gymnastics could easily have been avoided if the draftsmen had bestowed a little more care in drafting an important section like section 100".

We respectfully adopt the reasoning and the conclusion of the Patna High Court in the case cited so far as they apply to the provisions of the Act as amended in 1958. We therefore repel the contention of the appellant that sub-section (1) (b) must be read subject to sub-section (2) We agree that sub-section (1) (d) (ii) is subject to sub-section (2) of section 100.

12. It has to be observed, that the respondent did not make out the exceptions in clauses (a), (c) and (d) of sub-section (2). Assuming other points in the definition in section 123 (4) to be established, the case would call for the application of sub-section (1) (d) (ii) of section 100. Here again, the appellant is confronted by another difficulty. He has to prove, that the "result of the election..... has been materially affected." The meaning of this was stated thus by the Supreme Court in *Vashist Narain Sharma v. Dev Chandra*[10],

> "the result should not be judged by the mere increase or decrease in the total number of votes secured by the returned candidate but by proof of the fact that the wasted vote would have been distributed in such a manner between the contesting candidates as would have brought about the defeat of the returned candidate." Their Lordships proceeded to observe :
>
> "We are not prepared to hold that the mere fact that the wasted votes are greater than the margin of votes between the returned candidate and the candidate securing the next highest number of votes must lead to the necessary inference that the result of the election has been materially affected.

Should the petitioner fail to adduce satisfactory evidence to enable the court to find in his favour on this point, the inevitable result would be that the Tribunal would not interfere in his favour and would allow the election to stand."

The evidence adverted to above and furnished by P.Ws. 7 to 13, that as a result of the publication several hundreds of votes, each witness giving a figure as far as he could guess, had been lost to

the petitioner, cannot be accepted. For one thing, it is based on inferences and for another, it does not come up to that standard which is necessary for establishing that the result of the election has been materially affected. Hidayatullah, C. J., as he then was, observed thus in *Inayatullah Khan v. Diwanchand Mahajan*[11],

> ".....it is therefore clear that general evidence of a likelihood, such as has been tendered in this case, is not decisive of the matter under Section 100 of the Representation of the People Act. What the party who wishes to get an election declared void has to establish is that the result of the poll had in fact been materially affected by the improper acceptance of a nomination paper. To do this, it has to be demonstrated that the votes would have been divided in such a way that the returned candidate would have been unsuccessful."

In this view, the appellant cannot succeed even by invoking section 100 (1) (d) (ii).

[10] AIR 1954 SC 513

[11] AIR 1959 Mad Pra 58

13. It was also debated, whether or not the statements in Ext. P-1 (a) were made in relation to the appellant as a candidate or to his candidature. There is in Ext. P-1 (a) and the foot-note to it no statement of fact directly related to the appellant, but it may be suggested that statements are not wanting by way of insinuation, that the United Front had decided to bribe the voters. An imputation against a political party has been held not to constitute an imputation in relation to the personal character or conduct of the candidate in *Sarla Devi v. Birendra Singh*[12], Even otherwise, in the same case the term 'candidature' has been interpreted as meaning "the state of being a candidate". In any view, it is difficult to hold that the imputations in Ext. P-1 (a) related to the appellant's candidature. The learned counsel were not agreed that 'Janayugom' can be considered to be an agent of the respondent. However, in the view we have taken, it is unnecessary to consider the point

14. It remains to dispose of the third and the last contention advanced for the appellant, that the prayer in the election petition for a recount of the ballot papers ought to have been allowed by the Tribunal. Of course the margin of difference in the votes secured by the appellant and the respondent was only 122. In the election petition the chief ground relied on for recount was that a large number of counting assistants employed by the Returning Officer were sympathisers of the Communist Party and since the candidates were allowed only one counting agent for three tables to supervise the sorting and counting of ballot papers, manipulation by interested counting assistants was not impossible. The allegation against the counting assistants has not been sustained. On the evidence of the Returning Officer, it is seen that for every two counting assistants to a table there was a supervisor, and the Officer himself was seated on a platform facing the counting assistants. The seating arrangement was according to a plan or diagram supplied with instructions by the Election Commissioner. On the same day, the same counting assistants had been engaged in the counting of ballot papers in the Kottarakara constituency where, as sworn to by P.W. 6, a P. S. P. candidate had contested. What was pressed before us chiefly was, that the total number of counting agents sanctioned to a candidate was inadequate. Section 47 of the Act provides, that a contesting candidate may appoint one or more persons but not exceeding such number as may be prescribed, to be present as his counting agent or agents at the counting of votes. Under Rule 54 of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1956, the number of counting agents that a candidate may appoint

is not to exceed 12 : In our opinion, so long as the allegation of partiality or bias has not been made out, it has to be presumed that these assistants and supervisors, who were departmental officers conducted themselves properly. It does not appear to be the intendment of the law or the rules, that counting agents must themselves be enabled to scrutinise every ballot paper, their right being only to supervise. If any difficulty was experienced in the matter of supervision, it was open to them to bring it to the notice of the Returning Officer. The appellant had also a right to move for a recount at the time. It is entirely discretionary for the Court now to order a recount on an election petition (See *Abdul Majeed v. Shamsuddin*[13],). In the circumstances, we are not prepared to accede to the prayer for recount.

[12] AIR 1961 Mad Pra 127
[13]1961 Ker LJ 328

15. On the findings recorded above, we do not think it necessary to consider the evidence tendered on an instance of alleged double-voting. The appellant cannot succeed in this appeal, which is dismissed with costs to the respondent (the first respondent) including advocate's tee Rs. 200/-.
Appeal dismissed.