

MADHYA PRADESH HIGH COURT

Habib Bhai

Vs.

Pyarelal

First Appeal No. 37 of 1963, decided on 26.9.1963., from decree of member, Election Tribunal and Dist. J., Rajnandgaon (Shiv Dayal and S.P. Bhargava, JJ.)

26.03.1963. 26.09.1963

JUDGMENT

Bhargava, J.

1. This appeal under Section 116-A of the Representation of the People Act, 1951, (hereinafter described as the 'Act') arises out of an elections petition filed by the appellant-petitioner Habib Bhai challenging the validity of the election of the first respondent Pyarelal on several grounds. The appellant is an elector in the Barpali Constituency and the election which had led to the present petition was held in the month of February 1962 for the Madhya Pradesh Legislative Assembly from the said Constituency. As a result of the election, the first respondent was declared duly elected. He secured 5,671 votes. On recounting of votes made under the direction of the Tribunal, he was found to have secured 5,662 votes. The third respondent Banwarilal was his nearest rival. He was declared to have got 4,716 votes. On recounting, this number increased by five votes. The result remained unchanged.

2. The appellant's case is that the election of the first respondent Pyarelal was invalid inasmuch as he had practiced corrupt practices at the said election. He prayed that the election of the first respondent be declared void and that the third respondent who had secured the next largest number of votes be declared duly elected.

3. Respondents 1 and 4 contested the election as independent candidates; respondent 2 Premsingh was the official candidate of the Jan Sangh at the election and third respondent Banwarilal was the official candidate of the Congress Party. Respondent 2 filed his written statement supporting the 1st respondent. He admitted all those

allegations to be correct which were urged by the appellant to have been made against his personal character by the 1st respondent. The third respondent filed his written statement supporting the petitioner and took part in the proceedings before the Election Tribunal. After filing his written statement, respondent 2 remained absent. Respondent 4 remained ex parte from the very beginning.

4. The Election Tribunal held that the several allegations made by the appellant attributing corrupt practices to the 1st respondent were not proved. In the result, therefore, the election petition was dismissed.

5. The election of the first respondent was sought to be set aside on several grounds which included charges of corrupt practices under Section 123(3) and (4) of the Act alleged to have been committed by the 1st respondent. The material allegations of corrupt practices are those mentioned in paragraphs 7, 8 and 9 of the petition and the question for determination is whether respondent 1's election can be held to be vitiated on account of the corrupt practices alleged in these paragraphs.

6. It would be useful to quote paragraphs 7, 8 and 9 of the petition. They read thus :

"7. The respondent No. 1 got printed, published and widely distributed and got distributed throughout the constituency, during the days of election, a poster (filed herewith as Enclosure I). In the said poster, the respondent No. 1 displayed that he was a member of the Kanwar community and solicited votes for himself inducing and intending to induce thereby the electors belonging to the Kanwar community to vote for respondent No. 1 who belonged to their community. In the said poster, the petitioner, by necessary implication suggested that the respondent No. 3 was distributing money to the electors for securing votes for the (respondent No. 3). The respondent No. 1 and his agent and canvassers published this statement which was false and baseless and, which they knew to be false and had no reason to believe to be true. The statement was calculated to prejudice and did prejudice, the prospects of the election of respondent No. 3. The necessary particulars of these corrupt practices are given in Schedule A filed herewith.

"8. The respondent No. 1 himself, and through his agents and canvassers made a systematic appeal to the electors of the constituency belonging to. the Kanwar community that they should cast their votes in his favour as he belonged to their caste. He also dissuaded the said electors from voting in favor

of the respondent No. 2 who was the only other candidate belonging to the Kanwar community by falsely imputing that he was illiterate, that he had been convicted and sentenced by the Court for having committed an offence, that he is collecting money from the residents of the constituency by making misrepresentations to them, that he would openly rob and loot anybody. The respondent No. 1, his agents and canvassers, also made false statements against the respondent No. 3 that he is a foreigner and would never be of any help to the people, and that foreigners (such as he) had always exploited them. The aforesaid statements against the personal character or conduct of the respondents Nos. 2 and 3 were false and the respondent No. 1, and his agents and canvassers referred to above knew them to be false and had no reason to believe them to be false and they were calculated to, and did, prejudice the prospects of the election of the respondent No. 3. The necessary particulars of the above corrupt practices are given in Schedule B filed herewith.

"9. The respondent No. 1 got printed, published and widely distributed and got distributed throughout the constituency, during the days of election a handbill (filed herewith as Enclosure II). In the said handbill the respondent No. 1 appealed to the electors to refrain from voting for the respondent No. 3 on the ground of his being a foreigner who has always been exploiting them. In the said handbill, the respondent No. 1 described the respondent No. 2 as a criminal and an illiterate person. The imputations made in the said handbill against the personal character and conduct of the respondents Nos. 2 and 3 were false and the respondent No. 1, his agents and canvassers knew them to be false and had no reason to believe them to be true. The said statements were calculated to prejudice and did prejudice the prospects of the election of respondent No. 3. The necessary particulars of the above corrupt practices are given in Schedule C filed herewith." The pamphlet, referred to in paragraph 7 of the petition, is annexure-1 on record, and the pamphlet referred to in paragraph 9 of the petition is annexure-2 on record.

7. The first respondent did not deny the publication of both these pamphlets. He did not dispute that fact in his written statement and in his evidence, he clearly admitted responsibility for the distribution of both the pamphlets, which, on the face of them, show that he had published them.

8. The portions stated to be objectionable in annexures 1 and 2 have been reproduced

in Schedules A and C as under:

308456

The remaining portion which has been objected to in this Schedule refers to the Jan Sangh Candidate Premisingh, who in his reply admitted that what was said against him was correct and, therefore, it is wholly unnecessary to reproduce that portion.

9. It has been urged in paragraph 8 of the petition that

"the respondent No. 1 himself and through his agents and canvassers made a systematic appeal to the electors of the constituency belonging to the Kanwar community that they should cast their votes in his favors as he belonged to their caste."

It was further urged that

"the respondent No. 1, his agents and canvassers also made false statements against the respondent No. 3 that he is a foreigner and would never be of any help to the people, and that foreigners (such as he) had always exploited them". The necessary particulars of the alleged corrupt practice have been given in Schedule 'B' and the objectionable portion of the speeches alleged to have been delivered by the respondent No. 1 and his workers have been mentioned as under :

308456

Then follows a portion of the speech referring to the Jan Sangh Candidate Premisingh which is not being reproduced for the reason already stated. Then, it is stated :

2. That in the last portion of paragraph 7 or the counter-statement of the first respondent, the allegations made in paragraph 7 of the petition were not specifically denied and thus, there was no issue raised with regard to the contents of annexure-1 being required to be proved false.

3. That the issue of falsity of the contents of annexure-1 not having been raised by the 1st respondent, it was not necessary for the third respondent to go into the witness-box to say that the allegations made against him were false.

4. That, in any case, due to the non-specific denial made in the written statement, the 3rd respondent was misled and, therefore, did not examine

himself before the Election Tribunal, and that this evidence, therefore, should be recorded in this Court under the provisions of Order 41, Rule 27 of the Code of Civil Procedure.

5. That as the 1st respondent mentioned his caste 'kanwar' at the top of annexure-1 while mentioning his name and also at the bottom, it was clear that he was attracting votes by making an appeal to the members of his community to vote for him on the ground of caste. It was thus suggested that annexure-1 amounted to a corrupt practice on behalf of the 1st respondent both under Sections 123(4) and 123(3) of the Act.

11. Sri Y.S. Dharmadhikari, learned counsel for the respondent 1, contended that none of the contentions raised by Shri R.S. Dabir on behalf of the appellant were worthy of acceptance. He stressed that the contents of annexure-1 did not impute distribution of money for the collection of votes to the third respondent. It was urged that, in fact, nothing was contained in annexure-1 which amounted to statement of fact, much less an allegation against the honour, reputation or integrity of the third respondent. It was pleaded that what was said in the pamphlet was in the nature of a warning to the electors without any aspersion being cast on the third respondent. It was argued that, in any event, the imputations, if any, contained in annexure-1 were too general and could not be referred to the third respondent solely on a proper construction of the language used and the pleadings made. It was stressed that the allegation of the appellant being of defamation by innuendo, it should have been supported by extrinsic facts or matters in the pleadings which had not been done and, therefore, in the absence of the secondary meaning of the words used being indicated, there was no foundation laid for examining the defamatory meaning which the words were alleged to have conveyed. In connection with the allegations made in paragraph 7 of the petition and their denial, it was urged that the allegations made in para 7 of the petition were themselves general in character and, therefore, their denial in the manner made was never to put the matter in issue. It was also contended that the parties having gone to the trial with a definite issue framed on the point and both the parties having adduced their evidence, knowing the true scope of the dispute between them, the petitioner was not entitled to ask this Court to decide the question on the basis of an admission by non-denial under Order 8, Rule 5 of the Code of Civil Procedure at this late stage.

12. The question whether the statements contained in the pamphlet (annexure-1) are

statements of facts and further the question whether they relate to the personal character or conduct of Banwarilal were discussed at length before us. The learned counsel for the parties cited a number of rulings on the points; in particular, they referred to *Kanhaiyalal Tiwari v. Shyam Sunder Narayan*,¹

Sudhir Laxman v. Shripat Amrit Dange,² *Sarla Devi v. Birendra Singh*,³
Gangi Reddy v. Anjaneya Reddy,⁴ *Khubchand Baghel v. Vidyacharan Shukla*,⁵
Mohansingh v. Bhanwar Lal,⁶ *Inderlal v. Lalsingh*,⁷ and *Sheo Mahadeo Prasad v. Deva Sharan*,⁸

13. In order that the publication of statement may be of corrupt practice under Section 123(4) of the Act, the statement must be one of fact, not one of opinion and comment, as to political conduct as distinguished from personal conduct, does not fall within the mischief of the said section. A statement of opinion, however, unjust or harsh it may be, without reference to any concrete fact, does not come within the said Section. The mere statement of a defamatory opinion, unless coupled with the grounds upon which it is formed, is not a statement of fact. A distinction has always to be drawn between a criticism of a candidate as a politician or a public man and statements in relation to his personal character or conduct. It is significant that criticism of candidate's public or political activities, however ill-mannered, unfair or exaggerated it may be, is not forbidden. It is only when the man underneath the politician is attacked and his honour, integrity or veracity assailed in the statement, that the statement becomes offensive within the meaning of Section 123(4) of the Act. (See : *Devasharan Sinha v. Sheo Mahadev Prasad*,⁹ (Ele Tri Pat). The leading case on this subject followed in all the election cases before the Tribunals is the English case of *North Louth*, (1910) 6 O'M and H 103 where Gibson, J., observed at page 162 :

"A politician for his public conduct may be criticized, held up to obloquy; for that the Statute gives no redress. But when the man beneath the politician has his honor, veracity and purity assailed he is entitled to demand that his constituent shall not be poisoned against him by false statements containing such unfounded imputations."

The observations made by their Lordships in AIR 1962 Supreme Court 1156 in paragraphs 12 and 13 of the judgment may usefully be quoted:

"But the position with regard to the private or personal character of the

candidate is very different. Circulation of false statements about the private or personal character of the candidate during the period preceding elections is likely to work against the freedom of election itself inasmuch as the effect created by false statements cannot be met by denials in proper time and so the Constituency has to be protected against the circulation of such false statements which are likely to affect the voting of the electors. That is why it is for the protection of the constituency against acts which would be fatal to the freedom of election that the statute provides for the inclusion of the circulation of false statements concerning the private character of a candidate amongst corrupt practices. Dissemination of false statements about the personal character of a candidate thus constitutes a corrupt practice. "Though it is clear that the statute wants to make-a broad distinction between public and political character on the one hand and private character on the other, it is obvious that a sharp and clear-cut dividing line cannot be drawn to distinguish, the one from the other. In discussing the distinction between the private character and the public character, sometimes reference is made to the "man beneath the politician" and it is said that if a statement of fact affects the man beneath the politician, it touches private character and if it affects the politician, it does not touch his private character. There may be some false statements of fact which clearly affect the private character of the candidate. If, for instance, it is said that the candidate is a cheat or murderer there can be no doubt that the statement is in regard to his private character and conduct and no if the statement is shown to be false, it would undoubtedly be a corrupt practice. Similarly, if the economic policy of the party to which the candidate belongs or its political ideology is falsely criticized and in strong words, it is suggested that the said policy and ideology would cause the ruin of the country, that clearly would be criticism, though false, against the public character of the candidate and his political party and as such, it would be outside the purview of the statute. But, there may be cases on the borderline where the false statement may affect both the politician and the man beneath the politician and it is precisely in dealing with cases on the border-line that difficulties are experienced in determining whether the impugned false statement constitutes a corrupt practice or not. If, for instance, it is said that in his public life, the candidate has utilized his position for the selfish purpose of securing jobs for his relations, it may be argued that it is criticism against the candidate in his public character and it may also be suggested that it nevertheless affects his private character. Therefore, it is clear

that in drafting with corrupt practices alleged under section 123(4) where we are concerned with border-line cases, we will have to draw a working line to distinguish private character from public character and it may also have to be borne in mind that in some cases, the false statement may affect both the private and the public character as well."

14. Keeping the principles enunciated in these cases in mind, we shall now proceed to examine the contentions advanced by Sri Dabir in connection with annexure-1 in the order they are stated :

15. Point No. 1 : Sri Dabir contended that the only correct way to find out the meaning of annexure-1 was to read it in the back-ground of the existing circumstances. He urged that at the time when this pamphlet was published, the sitting member of the Constituency was Banwarilal, that he was the person who had won the last election and whatever was achieved or failed to be achieved was naturally attributable to the sitting member in the Constituency. In support of his contentions, he relied on *Cassidy v. Daily Mirror Newspapers, Ltd.*,¹⁰ and *Tulley v. J.S. Fry and Sons, Ltd.*,¹¹ In the former case, it has been held :

"A person is liable for the reasonable inferences to be drawn from the words he used, whether he foresaw them or not, and if he scatters two-edged and ambiguous statements broadcast without knowing or making inquiry about facts material to the statements he makes, and the inferences which may be drawn from them, he must be liable to persons who, knowing those facts, draw reasonable inferences from the words he publishes. A statement which on the face of it is not defamatory may become so when published to persona who know of certain circumstances, and it matters not that the publisher did not know the facts which enabled persons to whom the libel was published to draw an inference defamatory of the plaintiff. Words may be published with reference to such circumstances, and to such persona knowing the circumstances as to involve an inference in regard to someone not in terms mentioned in the statement, which would not be involved by the publication of the same words either in different circumstances or to persons ignorant of the particular circumstances which occasion be inference."

White, in the latter decision, 1931 All England Reporter 131 it has been held :

".....that which was prima facie innocent might become capable of a defamatory meaning by reason of the circumstances surrounding its publication.,....."

16. On the other hand, Shri Y.S. Dharmadhikari, learned counsel for respondent 1, relied on the decision in *Grabb v. Bristol United Press, Ltd.*,¹² and *Lewis v. Daily Telegraph, Ltd.*,¹³ In the latter case, the view taken in Grubb's case, 1902-2 All England Reporter 380 was approved and their Lordships held that 'where words are defamatory in their natural and ordinary meaning, an innuendo does not constitute a separate cause of action unless it is an innuendo that requires the support of extrinsic facts. At page 171, Lord Devlin observed :

"The consequence of all this is, I think, that there will have to be three paragraphs in a statement of claim where previously two have served. In the first paragraph, the defamatory words will be set out as hitherto. It may be that they will speak for themselves. If not, a second paragraph will set out those innuendoes or indirect meaning that go beyond the literal meaning of the words but which the pleader claims to be inherent in them. Thirdly, if the pleader has the necessary material, he can plead a secondary meaning or legal innuendo supported by particulars under R.S.C., Ord. 19, 6(2)....."

17. In view of these decisions, it is obvious that an innuendo is simply an averment that such a one, means such a particular person; or that such a thing, means such a particular thing : and, when coupled with the introductory matter, it is an averment of the whole connected proposition by which the charge may be brought home to the person concerned. The whole attempt of the learned counsel for the appellant before us was to suggest that the words, though not per se defamatory of the third respondent, were definitely so in their secondary meaning read in the context of circumstances. But, as no attempt was made in the pleadings to plead the extrinsic facts to show by those facts as to how the allegations contained in annexure-1 were related to the third respondent, we are of opinion that it must be held that by referring to any possible meaning of the words used, no imputation could be read in the words as against him.

18. Annexure-1 on its plain reading does not show that there is any allegation to the effect that In our opinion, Sri Dharmadhikari is correct when he raised the contention

that the appellant Habib Bhai was not a competent witness to offer an opinion. All that he could legitimately depose to would have been that the imputation as contained in annexure-1 was understood by persons of the locality to refer to Banwarilal and he should have given the grounds on the basis of which the annexure-1 was so interpreted. His bald statement, even if taken to be admissible, has failed to impress us. It is further significant to note that if ordinary persons connected the imputation with Banwarilal, the appellant could have no dearth of witnesses to corroborate his view. It is amazing that out of the twelve other witnesses produced by him, no one has risked his oath in support of the meaning of the imputation suggested by Habib Bhai.

19. It is further significant that if there are two interpretations possible of any allegedly defamatory publication, the meaning which is defamatory should not be seized upon and that which is not defamatory should be preferred, (see *H.K.M.P. Hales v. H. Smiles*,¹⁴ and *Board of Directors v. R.H. Niblett*,¹⁵ . In AIR 1937 Rangoon 105, it has been held that the words from which an innuendo is to be extracted must be fairly susceptible of the meaning sought to be put upon them by the innuendo. In *Knupffer v. London Express Newspaper Ltd.*¹⁶, it has been held that when defamatory words are written or spoken of a class of persons, it is not open to a member of that class to say that the words were spoken of him unless there was something to show that the words about the class refer to him as an individual.

20. We are in agreement with the view of the Election Tribunal in holding that the contents of the pamphlet (annexure) do not contain anything to attack the personal, character of the third respondent. In our opinion, the statement therein cannot be taken to be a statement of fact. It is merely a statement of opinion of the 1st respondent coupled with a warning to the electorate that in his opinion, particular consequences would follow if they acted in a particular manner. In our opinion, the appellant has failed to prove that the imputation stated in annexure-1 related to anybody, much less the respondent 3.

21. The 1st respondent to his counter-statement replied in paragraph 7 of the written statement to para 7 of the petition. Therein he said :

"As to the allegations contained in para 7 of the petition, the respondent No. 1 admits having got the poster (referred to as enclosure 1 in the petition) printed and published in the Constituency but it is denied that he thereby solicited votes

by virtue of being member of the Kanwar community or induced the voters of his community to vote for him, by reason of his being a member of the Kanwar community. It is also denied that the said poster implied the suggestion or that the respondent ever intended to suggest, thereby that the respondent No. 3 was offering gratification for securing votes for himself. The respondent denies that he or his agents or other persons with his consent published any false statement against the respondent No. 3 or his candidature. The alleged particulars as given in Schedule 'A' of the petition are false, hence denied."

There cannot be any doubt that the last sentence of para 7 of the written statement is not happily worded. It is capable of being read in at least three ways; it is possible to read it as denial of the publication of the pamphlet itself or a denial of the pamphlet amounting to a statement; it can also be read as the denial of the pamphlet being false. This portion, therefore, unmistakably suffers from vice which, in English Law, is called "negative pregnant". But, when read in the context of the immediately preceding sentence in paragraph 7 of the counter-statement, it becomes obvious that the 1st respondent has denied that the said poster implied the suggestion or that he ever intended to suggest thereby that respondent 3 was offering gratification for securing votes for himself. The effect of this sentence, in our opinion, clearly is to deny that the poster imputed any false statement of fact to the third respondent and this effect in our view, cannot be taken away by the last sentence which contains a complex denial.

Sri Dabir stressed that the first respondent had failed to raise any issue with regard to the imputations contained in annexure-1 being false. He further urged that by the mere framing of an issue, the defect of not raising an issue could not be cured. He argued that if an issue was not raised, which could only be by proper denial in pleadings, mere framing of an issue did not put the petitioner to prove that matter and he would be entitled to ask the Court to decide the issue even if framed, on the basis of non-traverse in the counter-statement. Reliance was placed by the learned counsel on the two authorities of this Court, namely, *Rishab Kumar v. Singai Motilal*,¹⁷ and *Govindram v. Gulabrao*,¹⁸ In the former case, the defendant denied the plaintiff's allegation of the fact of his adoption and his being a minor in these terms

"it is denied that the plaintiff is an adopted son as alleged by him and paragraph 1 of the plaint is denied."

It was held by the Court that this denial was not sufficient to import a specific denial of the fact of minority. In the other case, their Lordships referred to Bullen and Leake's Pleadings (7th Edition), pages 444 and 445, for illustrating that the defendant who wishes to deny must traverse all the allegations separately and deal with each and should not try to deny them merely by repeating the words in which the allegation is made. It was stressed by the Court (in Govindram's Case, ILR (1949) Nag 478 : AIR 1949 Nagpur 394) that if in a particular paragraph of the plaint, various facts are joined by the use of the word "and", each of the facts should either be dealt with separately or the sentences should be broken up by the use of word "or" and the denial should be by using that word instead of "and".

22. In 20 Ele LR 275 : AIR 1961 Madhya Pradesh 127 (sup. cit.), it was held by a different Division Bench of this Court that when an issue was actually framed and tried, it could not be urged that the issue should be answered in favors of the one party on the ground that the defendant in his written statement did not controvert properly within the meaning of Order VIII, Rule 5, of the Code of Civil Procedure. As in our opinion, the penultimate sentence in paragraph 7 of the written statement amounts to a denial of falsity of the contents of annexure-1, no advantage can be gained by the appellant on the basis of the decision in ILR (1948) Nag 299 : AIR 1949 Nagpur 21 (sup. cit.); or ILR (1949) Nag 478 : AIR 1949 Nagpur 394 (sup. cit.).

23. In *Nilkanth v. Gopaldas*,¹⁹ one of us (Shivdayal, J.), pointed out that "in Rule 5 of Order 8, the words "denied specifically" are followed by "necessary implication" which means that if from the written statement a denial must be inferred it must be taken as a denial. Where traversing one allegation necessarily and unmistakably traverses another as well, the latter allegation is denied by necessary implication. (See : Orders on Pleading and Practice (16th Edition) pp. 133-134). On the same principle, it has been held in *Grocott v. Lovatt*,²⁰ that the words "The defendants deny the facts alleged in para 3 of the statement of claim" used in pleading to a number of highly material allegations, were held by the Court of Appeal to be a sufficient traverse of those facts, though such pleading was criticized as being drawn "in a loose and irregular form".

24. Further, when paragraph 7 of the petition is read, it is found to contain merely a general assertion of annexure-1 being false and it has not been made clear in that

paragraph, as to how the petitioner connects the annexure with the 3rd respondent. In this situation, the position that we get is that the petition contains the general assertion which has been denied also in the written statement in a general manner. In such a situation, it has been held in *Union of India v. Pandurang Kashinath More*,²¹ that when an improper conduct is alleged, it must be set out with all particulars. A plaintiff cannot complain if general allegations made by him in the plaint are answered by equally general allegations in the written statement. In the statement of the pleadings, their Lordships in that case held that it could not be said that the defendant had admitted the fact of discrimination which was generally alleged in the plaint.

25. We, therefore, in the circumstances of this case, hold that the denial made in paragraph 7 of the written statement is sufficient for the purposes of putting the petitioner to proof of this fact that the imputations made in annexure-1 were false. We may further observe that if rules of pleadings are to be applied with strictness, then para 7 of the petition itself suffers from the defect that condemnation of the 3rd respondent by innuendo has not been brought out by alleging extrinsic facts. Due to this reason, even if a very strict view is taken of the respondent's pleadings, no advantage can be gained by the petitioner-appellant.

26. Points 3 and 4 :- These points raised by Sri Dabir may be taken together. We have already held while dealing with the second point that it could not be inferred in this case that the 1st respondent had admitted the contents of annexure-1 to be false. In an election petition, the burden of proof lies entirely on the petitioner who has alleged corrupt practices to have been committed by the respondent. Charges of corrupt practices are quasi-criminal in character and the standard of proof required for establishing any corrupt practice is that the corrupt practice should be established beyond reasonable doubt, (See : 22 Ele LR. 261 (SC) (sup. cit.) and *Shankaragouda v. Veerabhadrappa*,²² no doubt, it has been pointed out that when the person against whom a false imputation has been made examines himself and states that he has not committed the alleged act and proved circumstances indicating motive on the part of the respondent to make false allegations, against him, the Court is entitled to accept his evidence and if he does so, the onus would shift to the respondent to prove the circumstances, if any, to dislodge the assertions made by the petitioner. In this view, it was essential for the third respondent Banwarilal to depose on oath that imputations, which, he thought, were made against him, were false but he has failed to discharge this obligation.

27. Faced with this difficulty, Sri Dabir relied on the decision in *Bhim Rao v. Ankush Rao*,²³ and urged that the ordinary presumption of law that a person must be presumed to be innocent would apply even in an election dispute and the burden would be upon the person, who had made defamatory allegations against the character of another to prove that they were true. However, it has been explained by a Division Bench of this Court (to which one of us, Bhargava, J., was a party) in F.A. No. 23 of 1963, D/-23-04-63 : AIR 1963 Madhya Pradesh 306 that the observations made in 22 Ele LR 385 (Bom) (sup. cit.) were not in substantial conflict with Gangi Reddy's case, 22 Ele LR 261 (SC) (supra). In fact, when the facts of Bhim Rao's case, 22 Ele LR 385 (Bom) are seen, it becomes clear that in that case, the person against whom imputation was made had stepped into the witness-box to deny the truth of the adverse allegations. Thus, in our opinion, there was no justification for the third respondent's omission in giving evidence.

28. In this connection, it was urged that considering the confusion which might have prevailed, it was necessary to examine Banwarilal (respondent No. 3) as a witness in this Court and it was stated by the learned counsel for the appellant that he was ready and willing to have his statement recorded in this Court. However, we are not inclined to adopt the course of examining him in this Court under the provisions of Order 41 Rule 27 of the Code of Civil Procedure. The provisions of Order 41 Rule 27 of the Code are very stringent. The true test for permitting additional evidence is whether the appellate Court is able to pronounce the judgment on the material before it without taking into consideration the additional evidence sought to be adduced. Such an opportunity cannot be given merely to fill up lacuna in the evidence of one of the parties. Where a party on whom the onus of proving a certain point lies has failed to discharge the onus, he is not entitled to a fresh opportunity to produce evidence. (See *Indrachand v. Bhagwandas*,²⁴ and *Sonabai v. Gotiram*,).²⁵

In our opinion, both the appellant and respondent 3 had ample opportunity before the Election Tribunal to get the statement of Banwarilal (respondent No. 3) recorded and as that opportunity was not availed of by anyone of them, we refuse to record his statement in this Court. Further, we do not require his evidence for rendering a satisfactory judgment in this Court.

29. Point No. 5 :- We may now pass on to consider the objection that annexure-1 contains an appeal on the ground of caste to vote for the 1st respondent because in that

pamphlet at two places, the caste of Pyarelal has been mentioned. So far as this objection is concerned, suffice it to say that the mere mention of a person's caste cannot in our opinion, amount to making an appeal on the ground of caste. As Pyarelal belonged to the 'Kanwar' community, it was his right to describe himself as 'Kanwar' as and when he liked, and merely on this ground, it cannot be reasonably urged that an appeal on the ground of caste was made. Further, we may briefly say that not a single witness has come forward to say that the mere description of Pyarelal's caste as 'Kanwar' in the pamphlet (annexure-1) was understood by any ordinary person as an appeal on the ground of caste. For these reasons, agreeing with the Tribunal, we hold that the appellant has failed to prove that annexure-1 in any way offended against the provisions of Section 123(3) or 123(4) of the Act.

30. The allegation of corrupt practice contained in paragraph 9 of the petition may now be considered. The objectionable portion from the relevant Schedule 'C' has already been reproduced above. It is alleged that the objectionable portion offends against both the provisions of Sections 123(3) and 123(4) of the Act. It is urged that inasmuch as it was stated with regard to the 1st respondent that

308456 and by commenting figuratively on him as such

308456 does not amount to making an appeal to vote for him on the ground of caste or community. These words only suggest that those who describe the 1st respondent in this manner had an affection or interest in him of such quality as if he was a member of their family. In our view, the petition is clearly misconceived inasmuch as an attempt has been made to bring the contents of annexure-2 within the mischief of the corrupt practice alleged in Sections 123(3) and 123(4) of the Act.

32. Now, the allegations of corrupt practice contained in paragraph 8 of the petition may be examined. We have quoted already the said paragraph and the relevant portion in Schedule 'B'. The contention of the appellant is that the first respondent and some other workers of his whose names have been mentioned in Schedule 'B' canvassed for votes for him in the various villages by making an intensive appeal to the members of the 'Kanwar' community to vote for him on the ground of his being a member of the same community.

33. There cannot be any doubt that if the entire portion reproduced in Schedule 'B' as objectionable were established, it would be required to be held that an appeal on the

ground of caste or community was made to the members of the 'Kanwar' community to vote for the 1st respondent but in the evidence adduced, the gist of speeches mentioned in Schedule 'B' has not been proved to a very great extent. All that the witnesses have admitted to have said is that in the speeches delivered, it was said with respect to the third respondent 308456 and should, therefore, vote for him. He further told that he assured Pyarelal and others that he would vote for Pyarelal because he was 40. Someshwarsingh Thakur (P.W. 5) was the Sub-Inspector of Police posted at Station House Korba at the election time. He stated that one Jhangloo had submitted a written report that 'Kanwars' were threatening to outcast those who would not vote Pyarelal. He stated that the report had been sent by him to his higher authority. It is significant that no attempt was made to put the said report on record and an attempt was made to establish the contents of the report by his oral evidence. It is clear that as no case was made out for reception of secondary evidence, his oral testimony about the contents of the report in question was inadmissible in evidence. It is further worthy of note that Jhangloo who is alleged to have made that report is not examined although he is admitted by many witnesses to have worked for the third respondent. His testimony, therefore, appears to be worthless.

41. Samarsingh (witness No. 6) has given evidence about the first report telling him to call his caste people to vote for him and that he was told that if votes were not given to Pyarelal, they would not remain in the caste. He stated that out of fear, he and the other members of the 'Kanwar' community of the village said that they would vote for Pyarelal. He also produced in Court a document (Ex. P-1) which is said to have come in his possession when he was asked to canvass for Pyarelal. Even if no importance is attached to the late production of the document (Ex. P-1), which, in the words of the Election Tribunal, came as "a surprise document at the late stage of evidence", there is nothing in this document which contains an appeal to vote for the 1st respondent on the ground of his being a member of the 'Kanwar' caste. He deposed that he had not shown the document (Ex. P-1) to Banwarilal and the appellant at any time before its production and still it was produced in Court because the appellant had asked him to bring it. Though he claims to be a relation of Pyarelal, it appears that his relations with Pyarelal must be strained. He admitted the fact that Pyarelal's paternal uncle was the leader of one party and he himself was the leader of the rival party.

42. The testimony of Pitambarsingh. (No. 7) is to the effect that a conference of 'Kanwars' of the village Panchpeid and also other caste people was held and Pyarelal

told there that vote should be given to him as he was a member of their community. On the face of it, to statement seems to be unbelievable because Pyarelal could not make a request to the members of the other caste to vote for him on the ground of his being a member of 'Kanwar' community. He also has not hesitated to give evidence in regard to the threat of excommunication. His testimony also does not impress us.

43. Patait Ram (No. 8) is a satnami by caste and Tannilal (No. 9) is a sunar by caste. There is nothing in their evidence to show that Pyarelal sought votes on the ground of his caste or community. The testimony of Kartikram (No. 20), Itwarsingh (No. 11) and Kunjram (No. 12) is no better and does not, in any sense, improve the case.

44. In paragraphs 28 to 44 of its order, the Tribunal has closely examined the evidence led by the petitioner-appellant, with regard to the verbal statements alleged to have been made by the first respondent and his workers. In our view, the evidence of all these witnesses has been fairly and fully appreciated by the Tribunal. The learned counsel for the appellant was unable to point out any special feature in their evidence to induce us to a contrary opinion. The testimony of some of these witnesses appears to be opposed to the natural probabilities of the case. We may now examine this evidence briefly. It is very significant that almost all the witnesses examined on behalf of the appellant have tried in the witness-box to prove the threat of excommunication being given by the first respondent. The unanimity on this point in their testimony affects their credibility, because we feel that if there were any truth in the threat of excommunication, the appellant would not have failed to allege it in the petition.

45. We may now consider the evidence of the petitioner Habib Bhai himself. It is significant that he did not examine himself at the initial stage of the trial and chose to be the last witness in the case on his side. It cannot be doubted that he had a very deep interest in Banwarilal (respondent No. 3). He has not made a secret of the fact that he filed the present petition for the benefit of Banwarilal. He is the solitary witness on record to connect the allegations made in annexure 1 with Banwarilal positively.

In Schedule 'B', he alleged that Pyarelal and several others solicited votes on the ground of caste for him. But, it is significant that no evidence at all has been adduced in the case to show that any person other than Pyarelal canvassed for votes for him on the ground of caste or community. He has figured in the case more or less as a substitute for Banwarilal and, therefore, we have no hesitation in agreeing with the

Election Tribunal when it felt the necessity of some proper corroboration of his statement of a sweeping range. The Supreme Court has pointed out in the case of *Sri Baru Ram v. Smt. Prasanni*,²⁶ that when the finding of the Tribunal rests only on appreciation of oral evidence, importance should be attached to it. In our opinion, unless the appellant is able to show that, upon consideration of the evidence as a whole, there is substantial balance in his favor, the Tribunal's appraisal should not be reversed.

46. The evidence of the petitioner has been completely rebutted by the testimony of Pyarelal (respondent No. 3). It was not necessary for him to examine other witnesses in rebuttal when the evidence led by the petitioner himself was not convincing. In our opinion, therefore, it could not be held on the evidence adduced in the case that respondent I is guilty of any corrupt practice of publishing a statement of fact which is false relating to the character or conduct of the candidate and/or of making any appeal by himself or his agents or any other person with his consent to vote for him on the ground of caste or community. The corrupt practices alleged under Sections 123(4) and 123(3) of the Act are, in our judgment, not established against him.

47. For all these reasons, in the result this appeal fails and is hereby dismissed. Apart from the costs awarded to the first respondent by the Tribunal, he will be entitled to his costs in this Court which we fix at Rs. 300/-. There shall be no order as to costs so far as respondent 3 is concerned. The other respondents remained ex parte in this Court and, therefore, we make 10 order as to costs so far as they are concerned.

Shiv Dayal, J.

48. Shri Dabir's argument that the word "PHIR SE" referred to Banwarilal who was a sitting member and was again contesting the election from the same constituency and that "CHAND CHANDIKE TUKDE" conveyed the imputation that the voters would be offered illegal gratification, at first appeared attractive and impressive, but on rejection it has been found to be without substance. The question has already been discussed in paragraphs 18 to 20 above. It is not as if the impugned expression conveys that and that meaning alone which Sri Dabir attaches to it. In the setting of facts and the background which then existed, it can reasonably be said that there is yet another intelligible meaning which that expression "CHAND CHANDI KE TUKDE....." admits of for being conveyed to the electors through the poster. The

Congress is the ruling party, it gives money in various forms, e.g., loans, relief in cash, Taccavi etc., you are susceptible to fall a prey to the temptation that if you vote for a Congress candidate, you will get monetary aid from the Government : ("CHAND CHANDI KE TUKDON KE LALACH MEN ANE PAR"); but you must remember that if you succumb to such temptations, you will have to repent and will have to suffer your miserable plight for another five years : ("PHIR SE AAP KO PANCH SAL TAK DUKH BHOGNA PADEGA"). If this is also a probable and reasonable interpretation, then, firstly, it was merely to canvass against the Congress and it cannot be said that it necessarily conveyed an insinuation against Banwarilal in relation to his personal character, namely, that he was out to pay cash for votes. Secondly, the insinuation had reference to temptations of getting money; after the elections not to temptations of getting money for casting vote in favor of a certain candidate. This is only to demonstrate the necessity for the petitioner to prove, with cogency, how the electors understood it.

49. The expression "PHIR SE", when it is carefully read, does not refer to the cause (falling a prey to the temptation), but refers to the consequence (continuance of suffering).

50. This I have said only to reinforce what is already said in regard to the poster. My learned brother has pronounced all the findings and the result which we have concurrently reached.

Appeal dismissed.

Cases Referred.

1. 15 Ele LR 284 (MP)
2. 17 Ele LR 373
- 3.20 Ele LR 275: AIR 1961 MP 127
4. 22 Ele LR 261 (SC)
5. F.A. No. 23 of 1963, D/-23-04-63: AIR 1963 MP 306
6. 1963 MPLJ 498
7. AIR 1962 SC 1156
8. AIR 1955 Pat 81
9. 10 Ele LR 561

10. 1929 All England Reporter 117
11. 1931 All England Reporter 131
12. 1962-2 All England Reporter 380
13. 1963-2 All England Reporter 151
14. AIR 1937 Ran 105
15. AIR 1957 All 219
16. 944-1 All England Reporter 495
17. ILR (1948) Nag 295: AIR 1949 Nag 21
18. ILR (1949) Nag 478: AIR 1949 Nag 394
19. 1961 MPLJ 135: AIR 1963 Mad Pra 230
20. 1916 WN 317
21. AIR 1962 SC 630
22. AIR 1963 Mysore 81, In 22 Ele LR 261 (SC) (sup cit)
23. 22 Ele LR 385 (Bom)
24. AIR 1952 Nag 248
25. AIR 1956 Bom 160
26. 1959 SCR 1403