

ORISSA HIGH COURT

Abdul Rahiman Khan

Vs

Radha Krushna Biswas Roy

Misc. Appeal No. 13 of 1958

(R.L. Narasimham, C.J. and G.C. Das, J.)

31.10.1958

JUDGMENT

G.C. Das, J.

1. This appeal under Section 116A of the Representation of the People Act (Act No. 43 of 1951) (hereinafter referred to as 'the Act') is directed against an order of Shri B.C. Das, sole member of the Election Tribunal, Berhampur (Ganjam), dated 8-1-1958, dismissing the appellant's petition challenging the election of the returned candidate (respondent) to the Orissa State Legislative Assembly on grounds of corrupt practices of bribery, undue influence by threat and intimidation, systematic appeal in the name of religion and the use of religious symbols and publication of several pamphlets on grounds of religion and community, containing false statements of fact affecting the personal character and conduct of the petitioner which he either believed to be false or did not believe to be true.

2. The appellant and the respondent were the only two candidates who contested the last general election held on 12-3-1957, from the Omerkote Constituency in the District of Koraput. In the aforesaid election the petitioner-appellant secured 6679 votes whereas the respondent, the returned candidate, secured 7190 votes. Thus, the difference was only 511. The appellant, admittedly was contesting the election on Ganatantra ticket, whereas the respondent was contesting on a Congress ticket. According to the appellant, the Congress has very little hold on the electors in that constituency and it is only because of the above corrupt practices that the respondent was declared elected. According to his calculations, he would have got 90 per cent of the votes if the corrupt practices as mentioned above were not practiced. It was further alleged that the returned candidate was guilty of contravention of Section 77 of the Act. This election case was first referred by the Election Commission in his notification No. 82/443/57 dated New Delhi, the 31st May, 1957, to the Election Tribunal, Puri, for trial; but subsequently by another notification N84/T.A. 57/443/57 dated 5-11-1957, it was transferred to the Election Tribunal, Berhampur, and was eventually tried there.

3. The tribunal framed as many as nine issues including a preliminary issue regarding the non-compliance with the requirements of the provisions of Section 117 of the Act. The Tribunal, on a

detailed discussion of the preliminary issue came to the conclusion that there has been full compliance with the requirements of Section 117 of the Act. The corrupt practice of bribery during the election was the second issue in the case. This issue was not pressed before the Tribunal and no evidence was led. Accordingly, the Tribunal decided it in favor of the returned candidate'. Hence, the only corrupt practices left were undue influence (issue No. 3) systematic appeal to the elections on grounds of community and religion and the use of religious symbols (issue No. 4), the publication of pamphlets containing false statements in relation to the personal character and conduct of the petitioner (issue No. 5), and contravention of the provisions of Section 77 of the Act (issue No. 6). The only other relevant issue was; Can the election of the respondent be declared void and can the petitioner be declared as duly elected in his place (issue No. 8)".

4. Broadly stated, the corrupt practice of undue influence covered instances of threat, meted out to the electors by and on behalf of the returned candidate. In paragraph 7 of the petition it was alleged that the respondent along with a large number of workers and agents especially along with Shri Raghunath Patnaik and ten other persons moved throughout the length and breadth of the Constituency practising undue influence, i.e., attempting both directly and indirectly to interfere with the free exercise of the right of franchise by the electors; and threatening them by saying that bombs would be dropped and people would be harassed in case they do not vote for the respondent.

They also threatened the petitioner himself by saying that in case the petitioner would continue to be a candidate then they would burn him, assault him and destroy him physically. Besides Raghunath Patnaik, who is the Secretary of the District Congress Committee and admittedly an agent of the respondent, the other agents who actively carried on the Eropaganda on behalf of the respondent were Sunadar Majhi, Subrat Ganda, Chamaru Majhi, Dambaru Naik Jayaram Gountia, Padam Kalar, Khenduram Naik, Sukru Bhatra, Ratan Haloba and Ghenua Majhi. Thus, they all carried on a regular propaganda threatening the electors by saying that the petitioner who is a Pa than and is a party-man of the Ganatantra Parishad is in league with Pakistan and is instrumental in influencing the latter to attack India and hence is grossly disloyal to the State and if the electors vote for him, they would be mercilessly beaten and no power on earth would save them. All these threats, it is alleged, were given out throughout the length and breadth of the constituency by the respondent and his aforesaid agents both at meetings held by the Congress party and also through pamphlets and booklets indiscriminately distributed amongst the electors by or on behalf of the respondent. Accordingly, it had seriously interfered with the free exercise of the electoral light of the voters.

5. As regards the systematic appeal on grounds of community and religion and the use of religions symbols, it is alleged that the respondent and his agents appealed to the electors by interpreting the Congress symbol of bullocks as 'Bahans' of Lord Shiva and as such they should cast their votes in the Congress box bearing that symbol. By done so, they would be voting for Lord Shiva who is the God of the Hindoos. What is more was that bullocks which were the 'Bahans' of Lord Shiva are not honoured by the Pathans and the petitioner being a Pathan should not be voted for whereas on the other hand the respondent who is a Hindu should secure all their votes. This systematic appeal was carried on both by oral propaganda and by circulation of pamphlets and booklets.

6. With regard to the publication of the booklet affecting the personal character and conduct of

the petitioner, it was alleged that he and his party men have been described as thieves, rascals and were disloyal being in league with Pakistan. The petitioner, it is alleged, was described as a drunkard and he along with his party-men was running a hotel in guest house of the Maharaja of Jeypore where transactions in liquor were taking place. It was further averred that the petitioner extracted forced labour commonly known as 'Bethi' and made illegal collections of money for starting a rebellion in the country by selling widows.

7. The respondent, inter alia, denied all the allegations in the petition. He, however, admitted the publication and distribution of the leaflets and booklets in question.

Further, he challenged the maintainability of the petition as stated earlier, on the ground that the requirement of Section 117 of the Act had not been complied with.

8. The findings of the Tribunal regarding the remaining corrupt practices were that there was no undue influence practised on the electors by the returned candidate. With regard to the systematic appeal on grounds of community and religion and the use of religious symbols, he came to the conclusion that there was neither any systematic appeal nor was there use of any religious symbol. Lastly, with regard to the publication of booklets containing false statements which the respondent either believed to be false or did not believe to be true in relation to the personal character and conduct of the petitioner, he found that the petitioner had failed to prove that the statements of fact were not in relation to any individual, much less the personal character and conduct of the petitioner and the systematic character of the appeal had not been particularised in the statements except by repetition of the words 'Systematic appeal'. While dealing with issue No. 6, the Tribunal observed that this issue does not arise in view of the order of the Tribunal, Puri, directing the deletion of paragraph 23 of the petition. Accordingly, in view of the above findings, the prayer that the petitioner be declared elected from the said constituency to the Orissa Legislative Assembly did not fall to be considered at all. In the result, he dismissed the petition with costs.

9. In appeal before this Court it was contended by Mr. Asok Das, learned counsel on behalf of the appellant that the petitioner had successfully proved all the allegations regarding the corrupt practices as contemplated under Sub-Sections (2), (3) and (4) of Section 123 of the Act. It was urged that any one of the corrupt practices enumerated above, if proved, is sufficient to avoid the election of the returned candidate. Apart from the oral evidence on the question of undue influence, Mr. Das also relied on Ext. 5, a booklet containing six poems. "Undue influence" has been defined under Sub-Section (2) of Section 123 and is in the following terms :

"Section 123 : (2) "Undue influence" that is to say, any direct or indirect interference or attempt to interfere on the part of the candidate or his agent or of any other person, with the free exercise of any electoral right :

Provided that :

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

(i) threatens any candidate or any elector, or any person in whom a candidate or an elector is interested, with injury of any kind including social ostracism and excommunication or expulsion from any caste or community; o

(ii) induces or attempts to induce a candidate or an elector to believe that he, or any person in whom he is interested, will become or will be rendered an object of divine displeasure or spiritual censure,

Shall be deemed to interfere with the free exercise of the electoral right of such candidate or elector within the meaning of this clause;

(b) a declaration of public policy, or a promise of public action, or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this clause."

10. It is now well settled that in order to constitute undue influence, a threat must be serious and deliberately uttered with the intention of carrying it into effect. It is the undue influence upon an individual voter that constitutes the corrupt practice. (Vide Nottingham Borough's case (1869) 10' M and H, 245). In an unreported decision of this Court in *Radhakanta Misra v. Nityananda Mohapatra*¹ this Court had taken the view that the definition of 'undue influence' in Section 123 of the Act is rather wide in its term and contemplates four distinct forms of interference with the free exercise of any electoral right, viz., direct interference, indirect interference, direct attempt at interference and indirect attempt at interference. There is nothing in the definition that such interference or attempt at interference should be by any method of compulsion. Evidently, the offence includes such interference or attempt to interfere by any method, and it definitely includes the method of inducement wherein there may not be any compulsion at all. The inducement again must be of such powerful type as would leave no free will to the voter in the exercise of his electoral right. In England, however, 'undue influence' has been used in rather a narrower sense. Section 101 of the English Act (The Representation of the People Act, 1949 (12, 13 and 14 Geo. 6 C. 68) defines undue influence :

"Section 101 (1). A person shall be guilty of a corrupt practice if he is guilty of undue influence.

2. A, person shall be guilty of undue influence :

(a) If he, directly or indirectly, by himself or by any other person on his behalf, makes use of or threatens to make use of any force, violence or restraint or inflicts or threatens to inflict by himself or by any other person, any temporal or spiritual injury, damage, harm or loss upon or against any person in order to induce or compel that person to vote or refrain from voting or on account of that person having voted or refrained from voting, or
(b) if, by abduction, duress or any fraudulent device or contrivance, he impedes or prevents the free exercise of the franchise of an elector or proxy for an elector, or thereby compels, induces or prevails upon an elector or proxy for an elector either to vote or to refrain from voting."

Thus, from the above definition it appears that Section 123 of the Act is wider in its connotation than Section 101 of the English Act. While the English Act contemplates a coercion and fraudulent device, the Indian Act under Sub-Section (2) of Section 123 intends to cover both

'coercion' and 'undue influence' as understood by 'the Statute law, that is, the Indian Contract Act (Act 9 of 1872). Thus, the question for consideration is whether there was any direct or indirect interference or attempt at interference on the part of the returned candidate or his agent or on the part of any other person with free exercise of the electoral right of the voters, and if the respondent or any of the persons enumerated above threatened any candidate or any elector or any person in whom the candidate was interested with injury of any kind Mr. Das for this purpose besides the petitioner (P.W. 8), relied upon the oral evidence of P.Ws. 1, 3, 4, 5, 6, 7 and on Ext. 5. Ext. 5 is a booklet entitled 'Ganatantra Dalaku Fade Adhe' (A word or two to the Ganatautra Party) and consisted of six poems the first poem undoubtedly relates to the Ganatantra Party. According to the Tribunal this poem is completely devoid of any personal reference to the petitioner and it merely recalls certain incidents which took place in 1942 in connection with the "Quit India" movement and refers to events as to how the Kalahandi Police force helped the British Army in carrying into effect several repressive measures. There is no serious denial of the fact that such incidents did take place and there is no reason to disbelieve the respondent who had been deputed by the Congress Party to enquire into these matters and submit a report thereon. The offending portion relied upon in this poem was its later portion, marked as Ext. 6/3 and Ext. F/1. To begin with, it no doubt refers to the Kaja of Kalahandi and the portions when translated into English mean that :

"Without any consideration for your own and others, you acted as a devil. Would anybody now be able to save you if you are beaten mercilessly ? Having done all the above mischiefs, now you are appealing to the electors for their vote as a shameless person. If there were a grain of shame left in you, you would not have progressed at all. You are a thief and a Badmas and you should not remain in our land. You who belong to the Ganatantra party are only fit for the gallows".

Ext. 5(5) is the other offending portion relating to the Raja of Kalahandi. What is stated in Ext. 5(5) is that

"The leader of your Party was making money by selling widows is well-known to the raiyats. Since there is not a bit of sense left in you are now seeking votes of those raiyats of Koraput. They will no longer be dissuaded by your words".

Accordingly, the Tribunal held that it relates to the Kaja of Kalahandi, who, according to Mr. A. Das, is a person in whom the candidate was interested and hence the provisions under Section 123(2)(a)(i) is clearly attracted.

11. The only other relevant offending portion in this connection is the last lines of the third poem in which it is said that the raiyats of this Constituency are bound to take revenge on you. How dare, you ask for their votes ? The evidence of P.Ws. 1, 3, 4, 5, 6 and 7 besides the petitioner himself (P.W. 8) is material in this connection. (After considering the oral evidence of these witnesses his Lordship concluded :) In view of the statements made in Ext. 5, the publication and circulation of which is admitted by the returned candidate, I see no reason why the evidence adduced on behalf of the petitioner should not be accepted. Thus, there is good deal of force in the contentions of Mr. Das. Accordingly, in my opinion, the returned candidate was clearly guilty

of the corrupt practices of undue influence as contemplated under Section 123(2)(a)(i) of the Act.

12. Mr. G. Rath, learned counsel appearing on, behalf of the respondent, however, argued that before the returned candidate can be held guilty of corrupt practices, it is necessary that corrupt practices as contemplated under Section 100(1)(b) must be proved. In that event, it must be shown that either respondent No. 1 himself or his agent was guilty of corrupt practice, and he referred to the old and the new Section 99(1)(a)(i). According to him consent of the respondent should have been expressly alleged and proved. In this connection, I would refer to paragraph 12 of the Election Petition in which the whole case of the petitioner was that the respondent along with even other persons mentioned in paragraph 8 published pamphlets in which they alleged deliberate false statements of fact in relation to the personal character and conduct of the petitioner and in relation to his candidature in the election, i.e. since the petitioner was a candidate from the Ganatantra Parishad, deliberate and false allegations were made against the party so as to illegally influence the electors against the petitioner, and the respondent and his supporter named in para 8 knew perfectly well that the statement they were making in the pamphlets were false. In view of the admission of the respondent himself as referred to above, this contention really does not arise, and cannot be accepted. I shall briefly advert to the authorities cited on behalf of the respondent in this connection. Mr. Rath first relied on a decision of the Supreme Court in *Harish Chimdra Bajpai v. Triloki Singh*², What was decided in that case was that when the grounds on which the election is sought to set aside, are stated in the petition, those grounds toeing the matters mentioned in Section 100 Sub-Sections (1) and (2) of Section 101 and Section 123 which is attracted by Section 100(2)(b), and the particulars in respect of those grounds, when they are charges of corrupt or illegal practices, fall within Section 83(2). There is nothing in the Election Law of England corresponding to Section 83(2), the question of particulars being left there to be dealt with under the Rules applicable to the trial of causes. The consequence is that while under the English practice, the petitioner is not obliged to state particulars of corrupt practices in his petition, under Section 83(2) a statement of those particulars must be made in the petition in a separate list annexed thereto. But this difference is more a matter of form than of substance, as Section 83(3) provides for particulars being called for and furnished in the course of the proceedings, and does not affect conclusion as to the power of the Tribunal to allow new instances to the pleadings. In the present case the particulars were appended to the election petition and specific allegations of gross undue influence have been mentioned

therein and evidence has been led. Reference in this connection may be made to item Nos. 1 to 3 of the particulars appended to the Election Petition. Hence the decision in AIR 1957 SC 444 does not apply to the instant case. Mr. Rath also relied upon two decisions by the Allahabad High Court reported in *Madan Lal v. Zargham*³, and *Ram Abhilakh Tewari v. Election Tribunal, Gonda*⁴, In the case at page 663 *Ram Abhilakh Tewari v. Election Tribunal, Gonda*, the learned Judges held that the language used in Section 100 renders an election void on the ground that the result of the election has been materially affected by non-compliance with the provisions of the Representation of the People Act or the Rules framed thereunder. It is not rendered void by non-compliance with the rules which may have materially affected the result. Consequently, whenever a petition is based on the provisions of Section 100(1)(s)(iv), there must be a clear allegation in the first instance that the result of the election has been materially affected and then in addition the petition should show that it has been materially affected by non-compliance with the provisions of the Representation of the People Art or the rules framed thereunder, Mere allegations of non-compliance with the provisions of Section 77 and the rules framed thereunder

cannot be held to constitute a ground for setting aside the election. This case is clearly distinguishable on the ground that there was no statement in the petition that corrupt practices were committed either by the returned candidate himself or by his agents. The other case relied upon is the case of AIR 1958 Allahabad 596. In this case also it was similarly held that Section 100 of the Representation of the People Act required that in addition to the proof of the commission of the corrupt practices, the election petition must also allege and establish that the result of the election has been materially affected by the commission of that corrupt practice. Pleadings regarding corrupt practices become irrelevant in the absence of an allegation that the corrupt practices have materially affected the result of the election and must be ignored. In the instant case, the facts being that the booklet in question was printed by the supporters and agents of the returned candidate with his previous knowledge and when it came to his notice, he did not stop the circulation thereof, this case does not help the contention of Mr. Rath, other. The only other case referred by him was the case of *Muthiah Chettiar v. Ganesam*⁵. It was held in that case that where a charge is made of the commission of corrupt practice of bribery, which would constitute one of the grounds for avoiding election under Section 100(1)(b) of the Representation of the People Act, it is for the Tribunal to decide in the first instance whether the averments are sufficient to disclose a triable issue. It has then to decide whether these averments have been proved with reference to the quantum of evidence and the sufficiency thereof. Next, the Tribunal will have to decide whether the evidence adduced will establish the charge of the commission of the bribery. All these will be within the jurisdiction of the Tribunal. Unless the High Court is satisfied that the Tribunal has overstepped the jurisdiction without deciding the issue before it, no interference under Article 226 of the Constitution will be justified. It was further held in that case that Section 100(1)(b) and Section 100(1)(d)(ii) of the Representation of the People Act deal with the distinct and separate grounds for avoiding the election. Something more than the commission of corrupt practice as is defined under Section 123 of the Act is required to bring it either under Section 100(1)(b) or Section 100(1)(d)(ii). What Section 100(1)(b) requires is to prove that specified corrupt practice was committed by the returned candidate himself or by any person with the consent of the returned

candidate. All agents other than the election agent would fall within the second category. The consent of the returned candidate would be specifically proved in such cases. Even accepting the principles as laid down in this case, in view of the evidence adduced on behalf of the petitioner and the admission of the respondent himself, it is abundantly clear that the returned candidate acted conjointly with his agents in publishing and circulating Ext. 5 as a result of which the election of the petitioner was materially affected and is therefore clearly guilty under Section 123(2) of the Act.

13. Turning now to the question of systematic appeal in the name of religion and the use of religious symbols it is alleged that the respondent along with his supporters carried on consistent propaganda through out the length and breadth of the constituency to the effect that since the petitioner is a Pathan, they should not vote for him, and the said propaganda was to further the prospects of the respondent's election who was a Hindoo, and to refrain from voting in favour of the petitioner who was a Pathan. These systematic appeals were carried on by the respondent through the use of religious symbols by giving that the Congress box carries the emblem of bullocks which are the carriers of Lord Mahadev and as such the electors should vote for him. On the contrary, the petitioner who is a Pathan and does not honour the bullocks should not be voted for. Mr. Das in this connection relied upon the evidence of P.W. 2, 3, 4, 5, 7 and 8. The only argument advanced by the respondent was that the Tribunal did not believe these witnesses

while coming to a conclusion that there had been no contravention of the provisions of Sub-Section (3) of Section 123 and this Court should not interfere with his findings. Mr. Rath urged that there was really no evidence that Ext. 5 was distributed by the respondent himself. He referred to the evidence of P.W. 4 and argued that even accepting the evidence of P.W. 4, Ext. 5 was neither distributed by the returned candidate nor was it distributed in his presence. P.W. 5 though stated that the booklet was distributed, did not refer to Ext. 5. Even according to him P.W. 7 had stated that Ex. 5 was distributed in the presence of the respondent. His whole argument was that P.W. 7 was an interested witness. True it is that P.W. 7 was working for the petitioner during the election, but in my opinion, that is not enough to discard the evidence of this witness. P.W. 6 had categorically stated that Ex. 5 was distributed after a speech was made by the respondent. As I have stated earlier, P.W. 5 is the only witness who deposed that Ext. 5 was distributed by the respondent himself. The offending portion in this behalf is the last stanza in the second poem marked Ext. 5(2), which when translated into English means :

"The bullock will pounce upon your bow and arrow (that being the symbol of the Ganatantra Party) and Lord Shiva is sitting on that bullock. We the raiyats tend the 'Bahan' (carrier) of Shiva. You better run away with your bow and arrow. We will live in prosperity if the bullocks continue to live amongst us. Therefore, do not mislead us by falsehood."

The only other offending portion is the last stanza of the sixth poem marked Ext. 5(1). In Ext. 5(1) it is stated : "O" My farmer brethren, listen to me and do not cast your votes in the box carrying the emblem of bow and arrow. The bullock is your deity in whom you should always have faith". Evidence is that the returned candidate asked the electors to vote for the Congress on the ground that bullocks are the symbol of that party and they are the 'Bahans' of 'Shiva' and it would be in conformity with our religion that we should not forsake this symbol (Vide P.W. 2.). Further, he said that if the Ganatantra whose candidate is a Pathan is returned he would convert the country into a Muslim country and that we would be leaving our religion. His party had 'the 'symbol of bullocks which are the Gods of the Hindoos and therefore his party would be supported (Vide P.W. 3). To the same effect is the evidence of P.Ws. 4, 6 and 7. These witnesses stand corroborated by the statements in Ext. 5 referred to above.

14. Mr. Das relied upon a decision of the Election Tribunal, Dharwar, in the case of *Desai Basawraj v. Dasankop Hassanali*⁶, What was decided in that case was that an appeal to vote or refrain from voting on the ground of caste, race, community or religion must be systematic. But an appeal to religious or national symbols need not be systematic. The facts in that case were that a picture of the bust of Mahatma Gandhi with folded hands was put up on the same board on which the words 'Vote for Dasankop' were written, making it appear that Mahatma Gandhi was himself appealing with folded hands to vote for the respondent (Dasankop). In the circumstances, it was held that the picture of Mahatma Gandhi was a national symbol and the respondent did commit the minor corrupt practice of appealing to a national symbol for canvassing support for his election. It was further held that an appeal to Basavanua or to Nandi would be an appeal to religion, but taking out a procession of bullocks would not amount to a corrupt practice. But in the present case, from the offending portions referred to above, it is clear that by publishing and circulating Ext. 5, a systematic appeal in the name of religion and by the use of religious symbol was carried on by the returned candidate and his agents. The circulation of at least five hundred

pamphlets was to the knowledge of the returned candidate, and according to him he did not ask his supporters to stop the said circulation. It was, however, contended by Mr. Rath that there must be some method in the appeal and it must be in accordance with a plan. Mr. Rath further contended that the bullock is not a religious symbol. In this connection it must be remembered that the appeal is in the name of religion or the use of religious symbol was not only made by oral propaganda, but by the publication and circulation of the booklet, Ext. 5. The circulation of a booklet in cold print cannot be said to be sporadic in nature. If anything, it is a planned and systematic appeal when it is distributed amongst the electors to the knowledge of the returned candidate. It will be sufficient to state that the bullock has been described as the 'Bahan' of Lord. Shiva in Ext. 5, and as such has been used as a religious symbol. According to the Tribunal, there was oral evidence that the booklet was distributed in three meetings but the Tribunal considered that evidence regarding the volume of circulation to be rather meagre and vague. It is admitted that one thousand copies of the booklet were printed and the returned candidate himself admits that when he first came to know about the publication of Ext. 5, about half of the copies were distributed and the other half was distributed subsequently. In view of this evidence, I am afraid, I cannot agree with the learned Member of the Tribunal that there was no systematic appeal in the name of religion. Regarding the use of religious symbol, the Tribunal only held that the Congress symbol had been recognized by the Election Commission and consists of a pair of bullocks with a plough. He, however, came to the conclusion that such an interpretation as alleged to have been placed before the electors might well be a religious appeal, if anything, but it cannot come within the scope of the words "the use of or appeal to religious symbol." I do not follow the reasoning adopted by the Tribunal. He has, I must say, failed to appreciate the full import of the expression used in the impugned booklet (Ext. 5). It is not the use of a particular word that matters, but what matters is the context in which it is used. Thus, in view of the evidence and the admission of the respondent, I am clearly of opinion that the offending portions in Ext. 5 do really amount to a systematic appeal in the name of religion and the use of religious symbol, for furtherance of the prospect of the election of the returned candidate.

15. The only other charge is regarding the publication by the returned candidate or his supporters of statement of facts which are false and which he either believed to be false or did not believe to be true in relation to the personal character or conduct of the petitioner and the said statement reasonably calculated to prejudice the prospects of the election of the petitioner. The offending portions in this connection are Exts. 5(3), 5(4), 5(5), and F(4). Mr. Bath's contention was that Ext. 5(3) and Ext. 5(5) relate to the Raja of Kalahandi and the Ganatantra party. He, however, concedes that Ext. 5(4) and Ext. F(4) directly relate to the personal character of the petitioner. If we accept this contention of Mr. Rath and there is no reason why we should not accept it - it is sufficient by itself to avoid the election. Ext. 5(4) is the filth stanza in poem No. 3 whereas Ext. F(4) is the second stanza of the last poem. Ext. 5(4) is a direct address to the petitioner, Abdul Rahiman Khan, who is a road contractor and a Pathan of village Taragaon. It is stated therein that he had been sucking the blood of the raiyats by employing 'Bethi' labour and is now seeking their votes. The next stanza relates to the mischievous acts of the Raja of Kalahandi and the petitioner as a contractor who aligned with Pakistan to create disturbances and it is due to the blessings of God that the petitioner was left with his life and how does he dare to create a revolution in the country. Since the petitioner was cheating the raiyats with various falsehoods, they are bound to take revenge on him. Ext. F(4) is similarly addressed to the petitioner, Rahiman Khan of Taragaon who was a contractor and was depriving the labourers of their rightful wages and is now seeking their votes in the name of Ganatantra Party.

16. Mr. Rath's whole argument was that the petitioner has failed to prove that it was false to the knowledge of the respondent or that he did not believe it to be true. R.W. 6, the respondent himself admitted in his evidence that he knew the petitioner from before the election and also knew his father, though added that he did not know about his personal affairs and occupation. P.W. 8, the petitioner, however, asserts that the respondent knew him and his family long since and that he was a P.W.D contractor and was working as such to the knowledge of the respondent who was a Minister in the previous Orissa Cabinet in charge of Public Works Department. There is abundant evidence on record to show that the petitioner was a P.W.D. contractor. As regards the employment of the 'Bethi' labour, R.W. 1 admitted the petitioner to be a contractor and had taken up a contract for the construction of the police building at Omarkote. According to him, some of the labourers had approached him with a petition complaining non-payment of the wages by the petitioner which he forwarded to the District Magistrate, Kornput. He does not depose regarding any personal enquiry by him into 'these allegations nor was any attempt taken by the District Magistrate. R.W. 3, however, admitted that the system of 'Bethi' labour was abolished since after the independence in 1947 due to the agitation of the Congress workers. R.W. 4 and R.W. 6 the respondent similarly admitted that there was "Bethi" system consisting of forced labour without wages or with nominal wages fill independence in 1947-48. Hence the statement in Ext. 5 regarding the employment of 'Bethi' labour and that the petitioner was cheating the workers of their rightful wages was false to the knowledge of the respondent and his nothing agent, Shri Raghunath Patnaik (R.W. 1). R.W. 1 admitted in his cross-examination that the last piece of poem in Ext. 5 specifically refers to the petitioner. Above all, the returned candidate (R.W. 6) admitted in his cross-examination that Exts. 5(4) and F(4) refer to the petitioner.

17. The law on this point had been well settled both in England and in India. I would only refer to the two classical English cases commonly known as North Louth case (1010) 6 O'M and H 103 and the Cumberland Cnckenrnuth Division Case, (1901) 5 O'M and H. 155) and the latest decision in the case of *Mast Ram v. Iqbal Singh*⁷, A similar question cropped up in the case of *Raghunath Misra v. Kishore Chandra Deo Bhanj*⁸, where a Division Bench of this Court relying on the aforesaid English decisions held that the imputation in that particular case did not affect the personal character or 'the conduct of the candidate. Before advertng to the aforesaid decision, I would like to refer to a passage in Halsbury's Laws of England, Vol. XIV, 3rd Edition, p. 226 which is as follows :

"It is an illegal practice if before or during an election any person for 'the purpose of affecting the return of any candidate at the election makes or publishes any false statement of fact in relation to the personal character or conduct of the candidate unless he can show that he had reasonable grounds for believing and did believe, the statement to be true."

In this case, sufficient material has been placed on record to show that the returned candidate, according to his own admissions, did not believe the statements to be true. In (1910) 6 O.'M. and H. 108 at p. 163 Gibson, J., observed as follows :

"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 honour, veracity

and purity as mailed, he is entitled to demand that his constituents shall not be poisoned against him by false statements containing such unfounded imputations." In the Cumberland, Cockeirmoirth Division case (1901) 5 O' M and H 155 referred to above, Mr. Justice Darling held -

"It must be noted that what the Act forbids is this : You should not make or publish any false statement of fact in relation to the personal character or conduct of the candidate. If you do, it is an illegal practice. It is not an offence to say something which may be severe about another person, nor which may be unjustifiable, nor which may be derogatory, unless it amounts to a false statement of fact in relation to the personal character or conduct of such candidate; and I think the Act says that there is a great distinction to be drawn between a false statement of fact, which affects the personal character or conduct of the candidate, and a false statement of fact which deals with the political position or reputation or action of the candidate. If that were not kept in mind, this statute would simply have prohibited at election times all sorts of criticism which was not strictly true, relating to the political behavior and

opinions of the candidate. That is why it carefully provides that the false statement, in order to be an illegal practice, must relate to the personal character and personal conduct. One can easily imagine this kind of thing. To say of a person that he was a fraudulent bankrupt it would be necessary probably to give examples; but that sort of thing would, undoubtedly be within this Statute."

In the case of 12 Ele LR 34, it was held that a distinction must be drawn between criticism of a candidate as a political or a public man and statements in relation to his personal character or conduct. Criticism of his 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(5). This Court had relied upon the above decisions in the case of *Dharanidhar Mohapatra v. Pradipta Kishore Das*⁹, These cases apply on all fours to the present case. Thus, having regard to this view of the law and the evidence adduced on behalf of the petitioner, and the admission by RWs. 1 and 6, it is clear that the statements were in relation to the personal character and conduct of the petitioner which the returned candidate believed to be false or did not believe to be true. Thus, he clearly comes within the mischief of Sub-Section (4) of Section 123 of the Act.

18. The only question yet remains to be considered is whether in view of our above findings, the petitioner is entitled to be declared elected. In a number of cases this question came up for decision by the Supreme Court. In the case of *T. Nagappa v. T.C. Basappa*¹⁰, the facts were that in an election to the Legislative Assembly. A obtained 8093 votes as against 8059 votes obtained by B. A was therefore declared duly elected. B filed a petition for setting aside the election on the ground that A had committed corrupt and illegal practices. The Election Tribunal found that in all 60 votes were recorded by the electors who were transported by one T in a service bus with the connivance of A and of them at least 47 were recorded for A. These voters would not have gone to the polling booth from their villages, but for the facilities furnished by J. Even if all these

votes were recorded in favour of the defeated candidate other than B, the lead of B would have remained unaffected. On these facts, it was held that this was in accordance with Section 101(b) which enacts that if the Tribunal is of opinion that but for the votes obtained by the returned candidate by corrupt or illegal practices, the petitioner would have obtained a majority of the valid votes, it could declare him duly elected. It is argued for the appellant that it cannot be said with certainty that the 47 votes recorded by the Muslim women would not have been recorded in favour of the appellant if corrupt practice had not been committed, and that it would be mere speculation to hold that they would not be, and therefore there is no legal basis for the findings that the first respondent got the majority of votes. Their Lordships after referring to the previous decisions of their Court in *Jamuna Prasad v. Lachhi Ram*¹¹, held that :

"In the present case, the finding is that in all 60 votes were recorded by the electors who were transported by Ahmed Jan and of them at least 47 were recorded for the returned candidate. There is also the further finding that the voters would, not have come to the polling booth from their village which was at a long distance but for the facilities furnished by Ahmed Jan, Even if all these votes were recorded in favor of the defeated candidate other than the first respondent, the lead to the latter would remain unaffected. On these facts, therefore the observations in AIR 1954 SC 686 have no application."

The observations in AIR 1954 SC 686 were :

"There is nothing to show why the majority of the first respondent's voters would have preferred the 6th respondent and ignored the 3rd and 4th respondents."

Hence, there must be some basis to show that the petitioner would have got the wasted votes. In another case, *T.C. Basappa v. T. Nagappa*¹², their Lordships of the Supreme Court held :-

"If the Tribunal had on the basis of the facts relating to late commencement of polling alone declared the petitioner to be the duly elected candidate holding that he could have secured more votes than the successful candidate, obviously that would have been an error apparent on the face of the record, as such conclusion would rest merely on a surmise and nothing else. But as the Tribunal declared the petitioner to be duly elected upon the specific finding that but for the corrupt practices of the successful candidate, the petitioner would have got majority of the votes it cannot be said that by the decision of the question relating to late commencement there was any error apparent on the face of record which would entitle the High Court to interfere by a writ of certiorari."

The Tribunal was entitled to consider the question whether there was any violation of the statutory rules and orders which would entitle it to declare the election of the successful candidate void under Section 100(2)(c) of the Representation of the People Act, 1951, and in doing so to take into consideration the circumstances and probabilities of the case." In the case of *Vashit Narain Sharma v. Dev Chandra*¹³ their Lordships held that :-

"It cannot be held 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. That is a matter which has to be proved and the onus of proving it lies upon the petitioner. Should the petitioner fail to adduce satisfactory evidence to enable the Court to find in his favor on this point, the inevitable result would be that the Tribunal would not interfere in his favor and would allow the election to stand."

In the present case, no attempt has been made by the petitioner to prove that he would have got all, the votes in difference if corrupt practices had not been taken recourse to by the returned candidate. Thus, according to the principles laid down in the above decisions of the Supreme Court, the petitioner must be held to have failed to adduce any satisfactory evidence to enable this Court to find in his favor that he should be declared elected. If we do so, we will only have to take recourse to certain speculations and surmises. Last of all, Mr. Das attempted to rely upon an English case in *Malcolm v. Parry*¹⁴, In that case the evidence was that a particular voter was guilty of corrupt practice by receiving coal from the candidate and accordingly it was held, on a special case stated by the Election Judge, by Lord Coleridge, C. J., and Brett and Grove, JJ. (Brett, J. doubting) that there was a prima facie case of corrupt practice against the voters in the absence of any explanation by them sufficient to justify their votes being struck off and that the petitioner was entitled to the seat upon the sufficient proof of such votes being struck off to put him in majority. According to the majority decision the vote can only be struck off under the 25th section of the Ballot Act when the voter has acted corruptly. In view of 'the definite findings in that case, I do not see how that decision can at all apply to the facts of the present case. Thus, there being no evidence that the petitioner would have got all the 511 votes or any part thereof exceeding at least 255, we cannot hold that the petitioner is entitled to be declared elected. Accordingly, in view of our findings that the returned candidate is guilty of corrupt practices under Sub-Sections (2), (3) and (4) of Section 123 of the Act, the appeal must succeed, and his election must be set aside.

19. In the result, the order of the Tribunal is set aside, the appeal is allowed with costs, the election of the returned candidate Shri Radhakrushna Biswasroy to the Orissa Legislative Assembly is declared void but the appellants are not entitled to be declared elected. Hearing fee Rs. one hundred.

R.L. Narasimham, C. J

20. I agree.

21. This is perhaps one of the few election appeals in which the frank admissions made in cross-examination by the respondent Sri Radhakrishnu Biswasroy (R.W. 6) and his important witness (Haghunath Patnaik (R.W. 9) who is the Secretary of Amarkote Anchal Congress Committee, have very much lightened our task in arriving at the various findings on facts.

22. The whole case rests practically on a construction of the Oriya pamphlet (Ext. 5). My learned brother has quoted the offending passages and shown that they amount to corrupt practice within

the meaning of Sub-Sections (2), (3) and (4) of Section 123 of the Representation of the People Act, I am in entire agreement with him. Appeal allowed.

Cases Referred.

¹ Misc. Appeal No. 1 of 1958

² AIR 1957 SC 444

³ AIR 1958 All 596

⁴ AIR 1958 All 663

⁵ 1958-2 Mad LJ 237

⁶ 4 Ele LR 380

⁷ 12 EB LR 34

⁸ Misc. Appeal No. 194 of 1957

⁹ (Misc. Appeal No. 50 of 1958 (Ori))

¹⁰ AIR 1955 SC 756

¹¹ AIR 1954 SC 686

¹² AIR 1954 SC 440

¹³ AIR 1954 SC 513

¹⁴ (1874) 9 CP 610