

(1991) 04 BOM CK 0028

In the Bombay High Court

Case No : Notice No. 311 of 1991 with Notice No. 312 of 1991 And Notice No. 313 of 1991 In Election Petition No. 5 of 1991

Damodar Tatyaba alias Dadasaheb Rupwate

APPELLANT

Vs

Vamanrao Mahadik and Others

RESPONDENT

Date of Decision : 08-04-1991

Acts Referred:

Representation of the People Act, 1951 — Section 100, 11, 116, 8, 98

Citation : AIR 1991 Bom 373

Hon'ble Judges : S.N. Variava, J

Bench : Single Bench

Judgement

1. As the arguments have been common, these are being dealt with by this common Order.

2. Mr. Chinoy and Mr. Korde raise a Preliminary Issue as to the maintainability of the three Notices, issued pursuant to the Order dated 25th March 1991. They submit that the question of maintainability be decided first. In support of this contention reliance is placed upon the case of Samar Singh Vs. Kedar Nath alias K.N. Singh and Others, . Based on this it is submitted that the Court is bound to raise this and try this as a Preliminary Issue. Mr. Vashi has no objection to these submissions being heard and decided first. I have accordingly heard parties on the question of maintainability of the Notices.

3. The challenge as to maintainability of the Notices is on two grounds. Firstly, that no charge u/s 123 (3) and (3A) of the Representation of the People Act has been made out and that for that reason the Notices are not maintainable. Secondly, it is urged that the Notices do not comply with the directions of the Supreme Court in its Judgment dated 11th March 1991.

4. On the first ground it has been submitted by Mr. Chinoy and Mr. Korde that u/s 123(3) and 123(3A) there are a number of distinct charges and that it is necessary that the Notices must specify each and every charge against the Party.

They submit that in the notices issued by the Court, the charge is on the ground of (a) appealing themselves to vote for the candidate of Shiv Sena and B.J.P. on the ground of religion, race, caste and community; (b) appealing themselves to refrain from voting for the petitioner on the ground of religion, race, caste and community; (c) use of or appeal to religious symbols for furtherance of prospects of election of the candidate of the Shiv Sena and B.J.P. (This is only against Shri Bal Thackeray) and (d) attempting to promote feelings of enmity and hatred between different classes of citizens of India on the ground of religion, race, caste and/or community.

5. They submit that a Notice u/s 99 of the Representation of the People Act, 1951 (hereinafter for sake of convenience referred to as "the said Act") can only arise out of and in an Election Petition. They submit that the corrupt practice can only be one of those set out u/s 123 of the said Act. They submit that u/s 123 (3) and (3A) of the said Act, a corrupt practice could be (i) by a candidate, (ii) by his Agent or (iii) by any other person with the consent of the candidate or his Election Agent. They submit that from the Notices, it is clear that the charge against these persons is not in their capacity as a candidate, but in their capacity as "an agent" or "any other person". According to Mr. Chinoy and Mr. Korde, an act, even by "an agent" or "any other person", could be deemed to be a corrupt practice u/s 123 of the said Act, only provided it is done with the consent of the candidate or his election agent. They submit that it is not, any act, by any person, at any time which can be termed as a corrupt practice. It is submitted that many people may commit acts which strictly speaking could be termed as a corrupt practice. They submit that all of them would not constitute a corrupt practice under the said Act. They submit that this is clear from the wording of Section 123. They submit that Section 123 being clear and specific, no other interpretation can be put upon this Section. They submit that the element of consent is an essential part of the charge of corrupt practice. They submit that therefore the charge itself must show whether the alleged corrupt practice has been committed with the consent of "the candidate" or "his Election Agent". They submit that in as much as the Notice/s do not specify that the charges made out in the Notice/s have been committed with the consent of "the candidate" and/or "his Election Agent", no charge has been made out at all.

5A. In support of this contention, it has been argued that a charge of corrupt practice under the said Act, whether in a petition or in a Notice issued u/s 99 and proceedings resulting therefrom, are quasi-criminal in nature. It is submitted therefore that the person charged must be made aware of not only the charge itself, but also all relevant particulars necessary for sustaining that charge. Reference was made to the authority of the Supreme Court in the case of Daulat Ram Chauhan Vs. Anand Sharma, , wherein it has been held that charge must be clear and specific and that it should not be left for the Court to infer by adopting a process of involved reasoning. Based on this authority it is argued that an involved process of reasoning will be required to determine whether the alleged corrupt practice is with the consent of the t st Respondent or his election agent.

6. Reliance was also placed on the authority Supreme Court in the case of Surinder Singh Vs. Hardial Singh and Others, wherein a candidate was sought to be charged on the basis of alleged corrupt practices of his supporters. In that context the Supreme Court held that consent was the lifeline, which linked up the candidate with the other persons and that it was necessary to allege and prove that the corrupt practice was with the consent of the candidate or his election agent.

7. Reliance was also placed on the authority of the Supreme Court in the case of Dharti Pakar Madan Lal Agarwal Vs. Rajiv Gandhi, wherein it was held that charges of corrupt practices must not be vague and general.

8. There can be no dispute with any of the principles set out above. They however do not assist Mr. Chinoy and Mr. Korde in any manner. The submissions of Mr. Chinoy and Mr. Korde are unacceptable for more reasons than one.

9. As rightly submitted, by Mr. Chinoy and Mr. Korde, Notice/s under Sec. 99 of the said Act arise out of and in an Election Petition. The Notice/s must therefore be read in conjunction with the Petition in which they arise. They cannot be read out of context of that petition. In this Election Petition paras. 5(a) and (b), 14, 20, 25, 31, 32 and 42 make it clear that the charge against the 1st Respondent is, inter alia, that Mr. Bal Thackeray and other leaders of Shiv Sena, have committed the corrupt practices (alleged in the petition) as agents of or with the consent of the 1st Respondent. In the Petition it is not even alleged that these persons committed corrupt practices with the consent of the election agent of the 1st Respondent. Mr. Chinoy and Mr. Korde have conveniently ignored this fact.

10. Further the three Notice/s now issued clearly state that the Order dt. 25th March 1991 is to be read as having been incorporated into the Notice/s. The order dt. 25th March 1991 (as well as the order dt. 29th October 1990) clearly set out that the charges, of corrupt practices under Secs. 123(3) and (A), alleged in the petition, have been proved to have been committed. This against the 1st Respondent. The Orders also state that in the prima facie opinion of the Court, Mr. Bal Thackeray, Mr. Chhagan Bhujbal and Mr. Manohar Joshi are (to use the words of the Supreme Court) "collaborators" in the corrupt practices named in the Notice/s. This collaboration is with the 1st Respondent. In my view the term "collaborator" necessarily denotes consent. There can be no collaboration without consent. In any event, to leave no room for any further doubt or complaint, I hereby specify that the corrupt practices set out in the Notice/s are with the consent of the 1st Respondent.

11. There is therefore no substance in this argument of Mr. Chinoy and Mr. Korde and their contention stands rejected. However, they have raised an interesting question i.e. whether Notices u/s 99 should also specify that the corrupt practice was with the consent of "the candidate" or "his election Agent", As set out earlier, the Notices issued clearly indicate that the alleged corrupt practice was with the consent of the 1st Respondent. I however now proceed to deal with this

submission also on the basis that the Notice/s do not set out the element of consent.

12. It must be noted that all authorities relied upon by Mr. Chinoy and Mr. Korde deal with cases where the charge is against the candidate. So far as the candidate (in this case I st Respondent) is concerned, there can be no doubt that the corrupt practice could have been committed (a) by the candidate himself, (b) by his Election Agent or (c) by any other person with the consent of "the candidate" or "his election Agent". Thus, when the candidate is being charged and the act is committed "by any other person", then the candidate cannot be held responsible unless the "act of that person" is done with his consent or with the consent of his election Agent. In my view this is a completely different situation and cannot be equated to a case where a charge is being made against "an agent" or against "any other person." When a charge is made against "the Agent" or "any other person" the question of consent of the candidate or his Election Agent does not arise. To be immediately noted that u/s 99 of the said Act the Court must name "all persons" who have been proved guilty of corrupt practice. Very significantly there is no requirement that such persons should have committed the corrupt practice with the consent of the candidate or his election Agent.

13. It is correct that Section 123 lays down, what is a corrupt practice. However, the Section as framed deals with corrupt practices in the context of a candidate. Thus, only by way of an example, u/s 123(3), the corrupt practices would be an Appeal to vote or refrain from voting for any person on ground of religion, race, caste, community or language or the use of or appeal to, national symbols, such as flags or national emblem. These corrupt practices, so far as a candidate is concerned, can be committed by the candidate, his Agent, or any other person with the consent of the candidate or his election Agent. However, it is not a mere appeal to vote or refrain from voting or appeal to religious symbols etc. which is a corrupt practice. It becomes a corrupt practice when it is for the furtherance of the prospects of that candidate or for prejudicially affecting the election of any other candidate. Thus, u/s 123(3), so long as the practices named therein are for purposes of furtherance of prospects of election of a candidate or for prejudicially affecting the election of other candidates, they would be corrupt practices whether committed by the candidate, or his agent or any other person. The element of consent is only there when the charge is against the candidate.

14. This becomes very clear when one remembers the purpose of these provisions, the consequences provided therein and the accompanying Sections. These provisions have been incorporated to ensure that elections are held freely and fairly; that the process of electioneering is not tainted by elements of corrupt practice. An Election Petition will necessarily be against a successful candidate. Under Section, 98 of the said Act, at conclusion of trial, the Court shall make an Order (a) dismissing the Petition; (b) declaring the election void or (c) declaring election void and petitioner or any other person to have been duly elected.

Further, Section 99 of the said Act provides that, at the time of making an order u/s 98 (which would also include an Order dismissing the Election Petition), the Court shall record a finding whether any corrupt practice has or has not been proved and "name all persons who at the (rial have been proved guilty of any corrupt practice." To be noted that section 99 does not state that the persons to be named are the "candidate or his agent or any other person with consent of candidate or his election Agent." Section 99 uses the words "all persons". The Legislature has in its wisdom used words of a much wider connotation. The words "all persons" must necessarily include even those persons who are not agents and who have without the consent of the candidate or his election agent furthered the prospect of a candidate or prejudicially affected the prospect of some other candidate, by committing a corrupt practice named in Section 123 of the said Act.

15. That Section 99 has been purposely worded very widely and includes within its ambit even cases of persons who have acted without the consent of the candidate or his election agent is illustrated by the following example. An Election Petition is filed challenging the Election of a successful candidate on grounds of corrupt practice committed not by him but by other persons. In such a petition, it must be averred and proved that the third person/s were agents or committed corrupt practices with the consent of the" candidate or his election agent. In such a petition the Court may come to the conclusion that the element of "consent" is not proved and that therefore the charge against the candidate must fail. The Court may still come to the conclusion that third person/s have committed corrupt practices for purposes of furtherance of the prospect of the candidate and/or for purposes of prejudicially affecting the prospect of other candidate/s. In such cases the court musf, u/s 99, name "all such persons" irrespective of the fact that it may dismiss the petition.

16. The wording of Section 100(b) and (d) of the said Act are also very indicative and important. u/s 100(b) an Election can be declared void if Court is of opinion that a corrupt practice has been committed by a "returned candidate or his election agent or any other person with the consent of the candidate or his election agent". In such a case the election can be set aside irrespective of the fact that the result of election has not been materially affected. This because the corrupt practice is by the candidate or his election agent or with their consent. The election can also be set aside under Sec. 100(d) and (d) (iii) if the result of an election, in so far as it concerns a returned candidate, has been materially affected by any corrupt practice committed in the interest of the returned candidate, by an agent other than an election agent. In this case clearly the consent of the candidate or his election agent is not required. Thus where the result of an election of a candidate are materially affected, the election can also be set aside even though there is no consent of the candidate or his election agent. This is to ensure purity of elections, It is thus that Sec. 99 provides for notice to. "all. persons. "The language used by the legislature speaks volumes. This position is further clarified when one looks at Sees. 8, II and Chap. III of

Part VII of the said Act. Under Secs. 8. and 11 the disqualifications are of "every person" found guilty of a corrupt practice under Sec. 99. Thus the disqualification may be of the candidate or of all persons named by the Court under Sec. 99. Again the words "candidate or his agent or any other person with the consent of the candidate or his election agent" are significantly and rightly not used. Chapter III of Part VII of the said Act puts the controversy beyond any doubt. This contains penalties for "certain offenses and acts. In this Chapter in all sections words of wide connotation e.g. "any person", "no person" are used. It must be noted that many of the acts mentioned are corrupt practices under Sec. 123.

17. Thus the scheme of the said Act is very clear. An election of a successful candidate can only be set aside if the corrupt practice is by the "candidate or his election agent or by any other person with the consent of the candidate or his election agent". The elections can also be set aside, if the result of election gets materially affected, by an act of an agent, even without the consent of the candidate or his election agent. The Notice/s under Sec. 99 must be to "all persons" who have indulged in corrupt practice/s and the disqualifications and/or punishment can be of "any person". In such cases the question of alleging and/or proving consent cannot and does not arise. In this scheme of the Act, enacted to ensure elections free from the influences of corrupt practices, to accept the arguments of Mr. Chinoy and Mr. Korde, would be to render nugatory the works of wide import knowingly used by the legislature. To accept the arguments of Mr. Chinoy and Mr. Korde would tantamount to introducing in favour of third persons (found guilty of corrupt practices) an additional condition which is missing in the said Act and which the legislature chose not to grant. To do so would be to effectively grant to such third persons a license to commit corrupt practice with impunity and thus taint the whole process of elections.

18. I therefore hold that when a charge is against a candidate, it must be alleged and proved that the corrupt practice was committed by him or his agent or by any other person with the consent of the candidate or his election agent. However where the third person, who committed the corrupt practice, is being charged, the question of consent of the candidate or his election agent does not arise and there is no necessity to aver or prove consent of the candidate or his election agent. The Notice/s in question are on the basis that the corrupt practices are committed by the persons named therein. No question therefore arises of stating whether the same was with the consent of the 1st Respondent or his election agent.

19. The second ground is that the order of the Supreme Court dt. 11th March 1991 has not been complied with. It is urged that, even though directed to do so, this Court has not specified the charges. I see no substance in this submission. The charges have been clearly specified. It is next urged that the Supreme Court had directed this Court to point out portions of the petition, documentary evidence etc. relied upon to sustain the charges and against which of the

Appellants. In my view the Order and Notice/s fully comply with these directions. The Order and Notices set out the mode of resorting to corrupt practice. They also indicate the date and place. The evidence which is available to show that the speeches were made is clearly set out, It is next submitted that the Supreme Court has directed this Court to mark out portions of the Petition and the evidence and to correlate them to each head of charge. The portions of the petition have been set out. The petitioners have also been directed to mark out all portions, which according to them amount to corrupt practices.

20. It must also be pointed out that the 1st Respondent had taken out Chamber Summons No. 548 of 1990. In that Chamber Summons the 1st Respondent had approved that the petitioner be directed to pin-point the portions of speeches and co-relate them to heads of corrupt practices. This is exactly what Mr. Bal Thackeray, Mr. Manohar Joshi and Mr. Chhagan Bhujbal are now demanding. It must be set out that Chamber Summons No. 548 of 1990 was dismissed by a speaking order. In that speaking order, it was held that when an alleged corrupt practice is by means of speech, the effect and impact of the entire speech would have to be considered. It was held that on a consideration of the entire speech, the effect and impact ultimately may be that all or some portions of the speeches amounted to all or some corrupt practice u/s 123 (3) and (3 A) of the said Act. In that order, it was held that in such cases, at the initial stage, it was not possible to pin-point or correlate particular portions to particular charges. This could only be done after the overall impact and effect was considered. It was held that in such cases, full particulars could only be given by production of the entire speech. This has been done. Against that Order, the 1st Respondent had filed a Special Leave Petition. The SLP had been rejected. The Supreme Court, by its Judgment dt. 11th March 1991 has not set this aside. On the contrary, the Supreme Court has directed that these three persons be put in the same position as the 1st Respondent. These parties now cannot claim to be in a better position than the 1st Respondent.

21. As directed by the Supreme Court, Mr. Bal Thackeray, Mr. Chhagan Bhujbal and Mr. Manohar Joshi have now been placed in an identical position as the 1st Respondent. I may only add that these three persons are charged on the basis of speeches made by them. In cases of speeches, whether or not a corrupt practice has been committed, would depend not only on the overall effect and impression, but also on the emphasis on sentences, words manner of utterance, conjunction of sentences and words etc. Thus some times, depending on the context and manner in which it is said or emphasized, a sentence, which by itself may be innocuous, innocent or even laudable, may ultimately amount to a corrupt practice. To take a very simple example. The sentence, "Garva se kaho hum Hindu hain" (say with pride we are Hindus) by itself would be innocent. I would, in fact, say that it is a sentence, the sentiments of which are highly laudable and shared by all right minded citizens of India. There can be no doubt that the race and religion of Hindus has within it great virtues. One of the greatest being its tolerance, love and acceptance of all other races and religions. However, even a

sentence as innocent and laudable as above can be converted into a corrupt practice. If such a sentence is made at an Election time with the intention of furthering the prospect of election of a candidate or prejudicially affecting the prospect of another on the ground of religion, race, caste and/or community it would become a corrupt practice. This would necessarily depend on the context in which it is made, the context of the speech itself and to a certain extent the manner in which it is said and emphasised. For example at election time, the speaker talks about the superiority of Hindus. This may be in context of Hindus as a race, religion, caste or community. Persons other than Hindus may be termed inferior and/or 2nd class citizens. Depending on the context and emphasis this may again be on grounds of race, religion, caste or community. The speaker may call for the creation of a "Hindu Rashtra" and talk about either decimating or exporting all people of other races, religion, caste or community who refuse to accept such a "Hindu Rashtra". By the speech "Hindus" may be called upon to vote for a "Hindu" candidate or refrain from voting for a non-Hindu candidate. This again may be on grounds of race and/or religion and/or caste and/or community. By the speech it is made out, that for the protection of Hindus as a race and/or religion and/or caste and/or community it is absolutely necessary that people vote only for Hindus. In a speech such as this, even the laudable sentence "say with pride we are Hindus" could be made to completely change its context, depending on the manner in which and time at which it is said and emphasised. Whether the utterance of such a sentence is or is not a corrupt practice and/or whether it is a corrupt practice on grounds of appeals to Hindus as a race and / or religion and/or caste and/or community can only be finally decided after the full import and effect of the speech is analysed. How then can the Court at this stage mark this sentence or say which head, of corrupt practice it falls in. I clarify that the above is only by way of an example and that the same does not mean that that the Court has decided that the above amount to a corrupt practice.

22. So far the Court has only had before it, the context and emphasis placed by the petitioner and/or the 1st Respondent. The prima-facie opinion is therefore based on the impression of the speeches as a whole and on the basis of the emphasis, context and interpretation of persons other than those who made the speeches. The whole purpose of the notice/s is to have the context, emphasis and interpretation/s of the speeches by the persons making them. Thus, before the Court can come to any definite conclusion or pinpoint any sentence, the Court must have before it the emphasis, context interpretation and the evidence to be led by the person/s who made the speeches. At this prima facie stage to pin-point would be to prejudge the context, impact or effect of the speech. Thus, as is set out in my order dated 21st March 1991, at this stage, until the trial is finally over, and the evidence which may be led by these parties (including cross-examination of Petitioner's witnesses by these parties) is before this Court, it is not possible for this Court to correlate any portion to any charge.

23. Under these circumstances, the Preliminary objections are rejected.

23A. Mr. Chinoy and Mr. Korde apply for time to file an appeal to the Supreme Court. Mr. Vashi opposes on the ground that this is a Election Petition which must be disposed off expeditiously. He submits that this petition was filed in January 1990 that the earlier notices were issued in October 1990. That thereafter on one ground or the other, these parties obtained adjournment and purposely delayed the hearing of the Notices. He submits that these are merely delaying tactics. He also points out that Mr. Bal Thackeray, Mr. Chhagan Bhujabal and Mr. Manohar Joshi have served on the petitioner un-affirmed copies of their written statements as far back as 16th January 1991 and 29th January 1991. Mr. Vashi also submits that the petitioner has been directed to keep all witnesses present in Court. He submits that even today all the witnesses are present and grave prejudice is caused to the petitioner because he is finding it difficult to bring the witnesses on every occasion. Mr. Vashi finally submits that u/s 116-A of Representation of People's Act, an Appeal to the Supreme Court can only be filed against Order u/s 98 and 99. He submits that this Order is not under either of these Sections and, therefore, there is no question of Appeal to the Supreme Court.

24. Mr. Vashi is right when he states that these parties have, in the past adopted delaying tactics. However, an Order on an Election Petition and/or Notices u/s 99 of the said Act, has serious consequences. Also an interesting question of the law has been raised. If parties want to Appeal then a reasonable opportunity must be given to them. The question, whether an Appeal does or does not lie, can be agitated in the Supreme Court. I, therefore, direct that the Notices and the petition be placed on Board on 10th June 1991 for directions. It is clarified that if, by that time, an order of stay has not been obtained from the Supreme Court, the Notices and the petition will be placed for hearing and final disposal within a few days thereafter and be proceeded with.

25. Mr. Bal Thackeray. Mr. Manohar Joshi and Mr. Chhagan Bhujbal are also informed that if they wish to file any written statement/Reply (different from the un-affirmed copy supplied to the petitioner) they-must do so on or before 11th May 1991. Further, if they desire to rely upon any documents or material and wish to file any Affidavit of documents they must do so and furnish a copy thereof to the petitioner on or before 25th May 1991. The petitioner to forward copies of Written Statements, Affidavits of Documents so received to all other parties forthwith on receipt thereof. All parties wanting inspection of any document must ask for inspection on or before 1st June 1991. Parties to give inspection of all documents and material on which they rely and which are within their custody, power or possession on or before 7th June 1991. To leave no scope for doubt or ambiguity, it is clarified that no adjournment will be granted for purposes of filing Written Statements and/or Affidavit of Documents or on ground that inspection has not been given or taken. Clarified that if inspection of any document or material within the possession, power or custody of a party has been asked for within the time aforesaid and has not been given, then the party not giving inspection, will not be allowed to rely on the document or material

inspection of which was not given. Also clarified that if any party wants copies or inspection of any documents on record of this Court, they must apply for the same on or before 3rd May 1991.

Order accordingly.