

(1991) 04 BOM CK 0006
In the Bombay High Court
Case No : Election Petition No. 14 of 1990

Saroj Sandesh Naik (Bhosale)

APPELLANT

Vs

Suryakant Venkatrao Mahadik

RESPONDENT

Date of Decision : 23-04-1991

Acts Referred:

Representation of the People Act, 1951 — Section 116(B), 117, 123(3), 123(3A), 3(A)

Citation : (1991) 4 BomCR 488

Hon'ble Judges : H. Suresh, J

Bench : Single Bench

Judgement

H. Suresh, J.—The petitioner, a candidate of the Indian National Congress (Congress-I) contested the election for the Maharashtra Legislative Assembly from Constituency No. 48, that is, Nehru Nagar Constituency. The elections were held on 27th February, 1990. the respondent is the candidate belonging to Shiv Sena. He won the election by a margin of about 7212 votes. He secured 40, 409 votes as against his nearest rival candidate one Shri Rashid, who secured 33, 197 votes, whereas the petitioner secured only 23,783 votes. The petitioner has challenged this election in this petition. She is only asking for a declaration that the election of the respondent be declared as null and void on the ground that the respondent and his election Agent and/or his party workers, with the consent of the respondent or his Election Agent, have committed corrupt practices as defined u/s 123(3) and 123(A) of the Representation of the People Act, 1951 (hereinafter referred to as "the Act of 1951)."

7. Now, in the affidavit-in-support, there is no denial of any of the material averments in the plaint, particularly, averments relating to the plank of Shiv Sena-BJP Alliance, the contents of the speeches made by Bal Thacker and others on 29-1-1990 and also on 24-2-1990. The fact that the video cassette AVHAN ANI AVAHAN was produced and displayed by Shiv Sena at number of places and that the said cassette had many objectionable materials as set out in the plaint

and also the fact that very many slogans were used, all in the cause of the Hindutva, has not been denied at all. Yet, in the written-statement, the respondent adopted a strange attitude, almost disowning his party, his alliance, above all his leader, only with a view to outwit the petitioner. It is in that sense the written-statement is patently unfair almost bordering on lack of bona fides, filed, perhaps on legal advice, with a lop-sided view pertaining to an Election Petition. The respondent thinks that in an election petition, as in a criminal trial, he is not to open his mouth and that his only plea is to deny every statement made in the petition, true, false or otherwise. In this view of the matter, he does not even enter the witness-box and I will comment upon it later on. He forgets that there is a basic difference between an election petition and criminal trial. In a criminal trial, the accused is not required to file a written-statement before the commencement of the trial. But no so in an election petition. If he does not file a written-statement, perhaps I can give a judgment for want of written-statement or perhaps I can proceed under Order VIII, Rule 5, sub-rule (2) of the CPC on the basis that the respondent admits the allegations in the petition. Similarly, he has a duty to be fair to the Court inasmuch as in an election petition/the object being purity in electoral process, the entire constituency is before the Court. He has a duty to tell the truth and particularly the facts which are within his knowledge. Of course, before holding that the alleged corrupt practice is proved, the Court will insist on better standard of proof than in a civil matter. But that does not mean that the respondent can keep his mouth shut on all matters which are within his knowledge and if he does so, the Court can draw such inferences as are permissible under the law, as against the respondent.

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ISSUE No. 1

26. This petition was lodged on 16-4-1990 being the last day of limitation for filing this petition. This petition was scrutinised by the office. The office noted down five objections "(1) Please annex proforma pages (2) Exh. "B" is very faint. So also the verification made therein. So also Exhibit "G" (3) Exhibit "C" is faint. (4) Declaration not proper (5) Please annex affidavit in support -see page 30." There is a further endorsement to the effect that all objections were removed on 19-4-1990. It says that proforma was annexed. Exhibit "B" and verification thereto were replaced and re-verification was done on 19-4-1990. With regard to Exhibit "C" the endorsement mentions that it was replaced by a better copy and a true translation thereto was annexed as Exhibit "C-1". Thereafter it says that declaration was done in the proper form and affidavit-in-support was annexed and duly verified on 19-4-1990. Thereafter on or about 6.6.1990 was placed before me when the petition was accepted and made returnable on 18-7-1990.

27. Mr. Bhandare submitted that the concept of substantial justice is foreign to election law in regard to presentation of the petition and the contents of the petition. In support of this, he relied on number of cases. In substance, his submission is that the petitioner having chosen to file this petition on the last day

of limitation, should suffer the consequences thereof if the petition had objections and objections were not removed on that very day itself. In other words, his submission is that by permitting the petitioner to remove the objections on 19-4-1990, the petitioner thereby got three days more than what was permissible under the law, namely 45 days from the date of the results of the election and the submitted the Court has no such power to accept any such petition beyond the period of limitation. He submitted that if the petitioner wants to file any such petition, all objections must be removed before the period of limitation. In support of his above submission, he mainly relied on the judgment of this Court in the case of Ashok Shankar Gholap Vs. Krishnarao H. Deshmukh and Another, . He also drew support for his contention from various other judgments of the Supreme Court. I will deal with all these cases presently.

28. In the above case of Ashok Shankar Gholap Vs. Krishnarao H. Deshmukh and Another, , what happened was that the petitioner filed the petition on the last day of limitation. u/s 81, sub-section(3) of Act, 1951, the petitioner was required to file as many copies of the petition as there were respondents mentioned in the petition, and u/s 86 of the Act, if the requirements of section 81 were not complied with, the petition becomes liable to be dismissed. In the said case what happened was that the petition was presented to the Assistant Prothonotary & Senior Master being the officer so appointed to receive such election petitions. The copies were not given to the said officer on that very day. It was contended that when the Clerk of the Advocate brought the copies on that very day, he found that the Office of the Assistant Prothonotary & Senior Master was crowded and, therefore, he went to the Assistant Prothonotary & Senior Master was crowded and, therefore, he went to the Board Department of the High Court, which is adjoining the office of the Assistant Prothonotary & Senior Master, and kept the bundle of papers containing the copies of the petition. On the next day, the Advocate found that there was an endorsement on the petition to the effect that the petitioner had not filed four copies of the petition and at that time it was pointed out that the copies had been kept in the Board Department and the copies were then added over to the Assistant Prothonotary & Senior Master and the objection was removed. When the petition appeared before the learned Judge, it was contended that the requirements of section 81, sub-section(3) were not complied with on or before the last day for lodging such petition and that, therefore, the petition should be dismissed. On behalf of the petitioner, the argument was that there was substantial compliance of the provisions. However, this argument was negated, inasmuch as, the provisions u/s 86 of the Act were considered mandatory. Mr. Bhandare submitted that in the above case the Court had taken such a strict view of the matter that it did not permit removal of objections after the last day of limitation. He relies, particularly, on the following passage in the judgment:---

"Before the expiry of the period of limitation the petition must be before the High Court without any objection relating to non-compliance with section 81(3). In other words, all such objections must be removed by the petitioner before the

period of limitation expires. This is the view expressed by the Supreme Court in the case reported in Satya Narain Vs. Dhuja Ram and Others, , and the petitioner has not seriously argued to the contrary."

29. In this case, the Court came to the conclusion that on the last day of the limitation the petition was without the necessary copies as required u/s 81, sub-section (3) of the Act, 1951. In other words, the petition related to non-compliance with a provision of Act, 1951. It was not an objection which could be outside the mandatory requirement of section 81, section 82 or section 83 of the Act, 1951. The passage, which Mr. Bhandare relied on , must be understood in that manner inasmuch as the learned Judge has made it clear that the petition must be before the High Court "without any objections relating to non-compliance with section 81(3). "The learned Judge has further stated that "all such objections" must be removed by the petitioner before the period of limitation expires, meaning thereby objections if any, pertaining to section 81, sub-section (3) of Act, 1951. That is because it has been repeatedly held by the Supreme Court that if the mandatory requirements of section 81, section 83 or section 117 are not complied with, the Court has no choice but to be to dismiss the petition. I am afraid, in the present case the objections cannot be said to be pertaining to any of the provisions of section 81 or section 83 of the Act, 1951.

30. In all the other cases cited by Mr. Bhandare, the principle is the same . The case of Satya Narain Vs. Dhuja Ram and Others, , pertaining to non-compliance with section 81, sub-section (3), in respect of which it is said, time cannot be extended by any rule of the High Court. The next case is the case of Charan Lal Sahu Vs. Nandkishore Bhatt and Others, , which again is the case of non-compliance with section 117 relating to deposit as required under that provisions, and the High Court cannot absolve the petitioner from making any security deposit or reduce the amount required to be deposited under the Act, and if the same is not complied with, the petition has to be dismissed. Another case cited by K. Venkateswara Rao and Another Vs. Bekkam Narasimha Reddi and Others, , is a case u/s 82 of the Act, and the question was whether the High Court could allow addition of parties after the period of limitation, and it was expressly held that neither order I, Rule 10, Code of Civil Procedure, nor any provision of the Limitation Act would apply and that, therefore, no such amendment could be done. The next case cited by Shri Bhandare is the case of Hukumdev Narain Yadav Vs. Lalit Narain Mishra, . It is again for the same purpose to show that the Court cannot extend the limitation for filing a petition and section 5 of the Limitation Act would not apply. In the case of Mohan Raj Vs. Surendra Kumar Taparia and Others, , The Supreme Court again observed that section 86(1) is a peremptory provision and admits of no exception. The question amongst others was one of non-compliance with the requirements of section 82 of the Act. In that case what happened was that certain allegations were made against a party who was not joined as such. Later on the petitioner sought to delete those allegations. This was not permitted because on such deletion of those allegations, in effect the objection relating to non-compliance of section 82,

would be obviated, thereby permitting removal of such objection beyond the period of limitation. So also the case of Shri Udhav Singh Vs. Madhav Rao Scindia, related to a question u/s 82(b) of the Act, which has no relevance, here. In the case of Sharif-ud-din Vs. Abdul Gani Lone, , the petitioner had not complied with the requirement of attesting every copy of the election petition as required u/s 81(3) of the Act. The Court was considering the Jammu & Kashmir Representation of the People Act). And again the Court held that the petition is liable to be dismissed.

31. Thus it is clear that if the Supreme Court as also the Bombay High Court had dismissed any election petition in limine, it is mainly because, those petitions had suffered from defects of non-compliance of the mandatory provisions of section 81, 83 or 117 of the Act. The Supreme Court has given reasons as to why section 86 of the Act should be considered as mandatory inasmuch as there should be no delay whatsoever, the proceeding with the hearing of an election petition. Of Course, it may sound strange today when despite all diligence, it is next to impossible for very many High Court to dispose of election petitions within the time schedule prescribed under the Act. But that is not for me to ponder about.

32. Mr. Bhandare seems to suggest that in all such matters the Supreme Court had taken a technical view irrespective of equity and substantial justice. I am afraid, I cannot accept such a proposition. Technical justice and substantial injustice, is no justice at all. And the Supreme Court could never be that complacent. If in all such matters, the petitions have been dismissed u/s 86 of the Act, it is not because the courts were concerned with doing technical justice, but because they were concerned with the compliance of the mandatory provisions of the Act. The Legislature in its wisdom made section 86 a mandatory provision. The Supreme Court construed it accordingly, and it is not for the courts to question that wisdom. It is, therefore, only in such cases where the requirements of sections 81, 83 or 117 were not complied with the Court dismissed the petitions, following the mandate u/s 86 of the Act. In the present case there are no such objections. The office objections were all in the nature of routine objections which maybe found on scrutiny of any plaint or petition lodged in the department, all for the purpose of seeing that the Court has a proper plaint or petition, in accordance with its rules. If the objections are removed, there can be no dismissal of the petition. If Mr. Bhandare's arguments are to be accepted, I will be doing exactly what no Court should do, viz, technical justice and substantial injustice. As observed by V.R. Krishna Iyer, J., in Shiv Chand Vs. Ujagar Singh and Another, "hyper-technicality, when the public policy of the statute is fulfilled, cannot be permitted to play the procedural tyrant to defeat a vital judicial process, namely, investigation into the merits of the election petition." I, therefore, find no substance in this contention raised by Mr. Bhandare.

33. It is true after removal of the office objections, the petitioner was asked to

reverify those Exhibits. But that does not mean that thereby the petition itself can be said to have been filed after the period of limitation. As the petition was lodged, there was no defect in the petition within the meaning of any of the provisions of the Act of 1951. If that is so, it cannot be said that just because a better copy of some of the Exhibits came to be furnished, as per the directions of the Office, the petition itself should be dismissed for the same.

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ISSUES Nos. 3 AND 4

39. The petitioner says that the respondent carried on the propaganda by means of slogans, strikers, posters, public meetings and by displaying video and audio cassettes. She has examined only her party workers. Mr. Bhandare therefore, submitted that there is no independent evidence in this case in respect of the case sought to be made out by the petitioner. He submitted that the witnesses being partisan witnesses, without an independent corroboration, the Court cannot act upon such evidence.

40. Mr. Bhandare submitted that there are one or two features in the present case which are very significant. Firstly, he submitted that in the petition, the petitioner has not given the names of any of the witnesses who could have disposed to the facts alleged in the petition. It is only for the first time these witnesses walk into the witness-box and give evidence in such manner as they like. With the result, the respondent has no means to check up whether these witnesses were really the witnesses to the incident referred to in their evidence. Secondly, submitted that in the petition, the petitioner had referred to various things, on information, but she has not disclosed the source of such information. With the result, she (the petitioner) was free to examine who so ever she liked and the witnesses were free to depose whatever they liked without any relation to reality. He relied on number of cases as to how the Court should appreciate evidence in matters of this type. They are : D. Venkata Reddy Vs. R. Sultan and Others, Kanhaiyalal Vs. Mannalal and Others, , M. Narayana Rao Vs. G. Venkata Reddy and Others, , Lakshmi Raman Acharya Vs. Chandan Singh and Others, and Amolakchand Chhazed Vs. Bhagwandas Arya and Another, . All these cases have been cited for the purpose of showing that the charge of commission of corrupt practice has to be proved and established beyond doubt like a criminal charge or a quasi-criminal charge and that the elections held and the results declared on choice of the voters should not be lightly interfered with or set aside by a Court law. It is, therefore, necessary that the evidence must be absolutely credible, trustworthy, natural and showing beyond doubt the commission of corrupt practice as alleged. Further election petitioner must not only plead all material particulars but also prove then by clear and cogent evidence. Mr. Bhandare submitted that such evidence is lacking in the present case. He also relied on certain other cases, namely, Ch. Razik Ram Vs. Ch. Jaswant Singh Chouhan and Others, , Abdul Hussain Mir Vs. Shamsul Huda and Another, , A. Younus Kunju Vs. R.S. Unni and Others, , Manmohan Kalia Vs. Yash and Others, , Azhar

Hussain Vs. Rajiv Gandhi, , Mr. Bhandare submitted that a charge of corrupt practice cannot be established merely by a balance of probabilities and if after giving due consideration and effect of the totality of the evidence and circumstances of the case, the mind of the Court is left rocking with a reasonable doubt, it must be held that the charge is not proved.

41. As against this, Mr. Vashi appearing for the petitioner, submitted that in this case many things were within the knowledge of the respondent and the respondent has not chosen to enter the witness-box. He submitted that the respondent had a duty to place before the Court the best evidence that he had in respect of the allegations in the petition. Since he had withheld those materials, the Court can draw adverse inference as against him. Mr. Vashi also submitted that on material evidence of the petitioner and her witnesses, there is no cross-examination whatsoever. The respondent has only given some suggestions here and there, but has not proved anything nor has he sought to lead evidence in respect of those suggestions. Mr. Vashi also submitted that if one analyses the written-statement, certain allegations have been admitted by the respondent. In the absence of any explanation or evidence from the respondent together with the admissions made by the respondent, there is no reason why the evidence led by the petitioner should not be accepted. He also submitted that the petitioner has proved that the respondent has used the plank of Hindutva or Hinduism. He submitted that the speeches of the leaders of the respondent, particularly, that of Bal , would be binding on the petitioner and the respondent has not given any special reasons why he would not be bound by what his leader had preached and stated. In these circumstances, he submitted that the Court can safely act or the evidence lead by the petitioner even though it could be said the evidence of the petitioner is of a partisan character. At worst, it could be said that it is weak evidence. But in the absence of any other evidence, which evidence the respondent ought to have led the Court must necessarily hold that the charge against the respondent stands proved.

42. Mr. Vashi drew my attention to the case of M. Chenna Reddy v. Ramchandra Rao, reported in Vol. XL E.L.R. 390, and the relevant passage is as follows :

"This Court has held in a number of cases that the trial of an election petition on the charge of commission of a corrupt practice partakes of the nature of a criminal trial in that the finding must be based not on the balance of probabilities but on direct and cogent evidence to support it. In this connection, the inherent difference between the trial of an election petition and a criminal trial may also be noted. At a criminal trial the accused need not lead any evidence and ordinarily he does not do so unless his case is to be established by positive evidence on his side, namely, his insanity or his acting in self-defence to protect himself or a plea of alibi to show that he could not have committed the crime with which he was charged. The trial of an election petition on the charge of commission of corrupt practice is somewhat different. More often than not proof of such corrupt practices depends on the oral testimony of witnesses. The

candidate charged with such corrupt practice invariably leads evidence to prove his denial; it becomes the duty of the Court to weigh the two versions and come to a conclusion as to whether notwithstanding the denial and the evidence in rebuttal, a reasonable person can form the opinion that on the evidence the charge is satisfactorily established. We cannot also lose sight of the fact that quite apart from the nature of the charge the trial itself goes on as if the issues in a civil suit were being investigated into. The petitioner has to give particulars of corrupt practice with details in default where of the allegations may be ignored; the petitioner has to ask for certain declarations and the procedure before the High Court is to be accordance with that applicable under the CPC to the trial of suits with the aid of the provisions of the Indian Evidence Act. Inference can therefore, be drawn against a party who does not call evidence which should be available in support of his version."

Mr. Vashi also relied on a Calcutta High Court case, being the case of A.E.G. Carapiet Vs. A.Y. Derderian, to contend that if the respondent has not put his case in cross-examination of the petitioner's witnesses, such a failure would amount to his accepting the petitioner's testimony in its entirety.

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49. In all these meetings, the respondent was present. The respondent has not denied his presence in any of these meetings. The allegation of the petitioner in the petition as also in the evidence is that in all these meetings, the respondent preached or appealed to voters on Hindutva. The respondent denied that he had made such an appeal. But he has set out anywhere, either in the written-statement or anywhere else as to what actually he had appealed to the voters.

50. As regards the meeting which took place on 11-2-1990, which is referred to in para 12(c)(i) of the petition, the respondent having admitted that such a meeting had taken place, the fact that the petitioner had actually seen the meeting or not loses its importance. It is true that in the witness-box, the petitioner sought to say that she had herself witnesses this particular meeting. She has stated that on that day as she was passing through Sarveshwar Mandir, she had seen a group of about 15 to 20 thousand persons or more. According to the petitioner there was a festival and in that festival meeting, the respondent was giving a speech. In her evidence, the petitioner has stated that the respondent was appealing to voters that for growth of Hinduism, people should vote for him. She was cross-examined to suggest that she could not have gone to the Sarveshwar Mandir at all. In her petition she has not stated that she had gone there personally. She has stated about that meeting on information, meaning thereby that she had not visited the site as such. I am prepared to hold that in all probability, the petitioner herself had not gone to that site at the time of the meeting. In all probability, the other witnesses had also not gone there at the time of this particular in that meeting. Here, we have the evidence of Police Sub-Inspector Namohari Bab Pol (P.W. 4). He has stated that during this election period, he was attached to Kurla Police Station. He had attended to the election

work and one of his duties was to make a report to his senior, everyday, about the important events during this election period. He has further stated that they had maintained an Election Dairy and also an Election N.C. Register. He was asked whether he could recall the meetings of the respondents which he (the witness) had attended. Plainly he could not have recalled inasmuch as, as a police officers, he had attended number of such meetings. He was not an investigating officer. His duty during the election period was to attend to such political meetings and make an entry of the events that had transpired during the particular period of election. He had, therefore, to be cautious. Mr. Bhandare found fault with the Election Diary being shown to the witness. I cannot appreciate as to what objection Mr. Bhandare could have raised. Certainly it was not a memory test. The question is whether the officer did attend such a meeting or not. If yes, did he make entries in respect of those meetings. The question is whether such entries were made immediately after the meetings were over or at a later date. I may mention here that though Mr. Bhandare seriously objected to my permitting the witness to go through the election diary to recall his having attended such meetings, and depose about to those meetings, not a single question was asked to the officer in respect of his manner of visiting such meetings, his making entries after such meetings. I have no hesitation in accepting the evidence of this Police Officer in respect of the visits that he had made in respect of each of the meetings that he had attended. He had not only attended the meetings with his assistants, but soon thereafter, within a short period, he had come back to the Police Station, and made necessary entries in the diary, which is kept in the regular course of the functions of the department. Therefore, this evidence is the most material evidence as far as the meetings are concerned.

51. Exhibit "M" is the entry dated 11-2-1990 made in the Election Diary produced by the witness P.W. 4. It is in respect of the meeting held on 11-2-1990. In this entry we find that day was the closing ceremony of the AKHAND HARINAM SAPTAH in the Sarveshwar Mandir. In that temple, the respondent, one Bhau Korgaonkar and Dr. Pednekar had gone there. Some 30 to 40 Shiv Sena workers were also there. All of them had attended this meeting. The election diary shows that in this closing ceremony the respondent and Dr. Pednekar emphasised the fact that to retain Hindutva and also for its growth, Shiv Sena was exteremely needed and that Shiv Sena would never back out for the sake of Hindutva. It then says that they sought blessings of the traditional people. There was no untoward incident in this meetings.

52. In the petition, the petitioner had stated that there was a gathering of about 20,000 to 30,000 people in this meeting. The petitioner was cross-examined to suggest that such a large number of persons could not have assembled in the quadrangle of the temple. It was also suggested that in the midst of such a huge crowd, the petitioner could not have seen the respondent speaking. Police Officer Pol was asked as to how many persons were there and he stated that there were about 30 to 40 workers and that there were about 15 to 20 other persons from

Harinam Saptah and that the respondent did not use any speaker for giving any speech. But he spoke in all for about half-an-hour. In his cross-examination, he admitted that there was no meeting as such at Sarveshwar Mandir which suggestion could not have been made by Mr. Bhandare, in view of the admission in the written statement. Mr. Bhandare, therefore, submitted that even assuming what the Police Officer (P.W. 4) says is right, still there is nothing to show what speeches the respondent gave at this function. The evidence shows that he spoke for half-an-hour. It was certainly the last day of the festival. The respondent had gone there with his workers. He had appealed to those who were there, whatever be the number. He had addressed the gathering there to vote for Shiv Sena for the purpose of retaining Hindutva and that Shiv Sena would never back out for the sake of Hindutva. In the absence of any evidence on the side of the respondent, I have to accept whatever the entry Exhibit "M" says. It is true the exact words are not there. But this is what the officer understood. Mr. Vashi submitted that the very fact the respondent had gone to the temple on the occasion of a festival and appealed to the voters to vote on the basis of Hindutva can be sufficient to bring home the charge within the meaning of section 123(3) of the Act of 1951. I am inclined to accept this submission. If a candidate belonging to a particular religion or community visits any place of public worship belonging to his community, that too during the time of festival, and seeks votes from the devotees who had gathered there, that would be the clearest instance of canvassing on the basis of one's community or religion, chargeable u/s 123(3) of the Act, 1951.

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62. Mr. Bhandare submitted that as far as this cassette is concerned, there is no report about this cassette at the Police Station. He also submitted that there is no entry in the Election Diary to show that this cassette cassette was displayed. He also submitted that the witnesses were all chosen witnesses and they are not independent witnesses. He, therefore, submitted that the Court cannot act upon the evidence of the petitioner and the petitioner's witnesses. He further submitted that this is a mixed locality. This is only a suggestion, and there is no definite evidence in that behalf.

63. The only limited question which I have to consider is the argument of Mr. Bhandare that there is no evidence relating to consent on the part of the respondent which is supposed to have been given by the respondent in respect of the many things that have been done in the constituency. In support he relied on the following cases to contend that consent should properly be pleaded and evidence in that behalf should also be led and it should be convincing evidence :

- (1) Ram Singh v. Col. Ram Singh, AIR S C 3 .
- (2) Sri Harasingh Charan Mohanty v. Surendra Mohanty, AIR S C 47 .
- (3) Laxminarayan and Another Vs. Returning Officer and Others, .

(4) Samant N. Balkrishna and Another Vs. V. George Fernandez and Others, .

(5) Shri Umed Vs. Raj Singh and Others, .

(6) Surinder Singh Vs. Hardial Singh and Others, , and

(7) Haji C.H. Mohammad Koya Vs. T.K.S.M.A. Muthukoya, .

In my view the question of consent does not arise in the present case. The allegation is that the respondent and his party workers have canvassed and appealed to the voters on the basis of religion and community. The respondent should have entered the witness box and said that the workers did on their own and he was not responsible for the same. The respondent should have entered the witness box and should have said that the video cassette (Article 1) was displayed without his consent. So also with regard to other items. There is no such evidence at all. The propaganda was done in the whole of the Constituency with banners, posters, etc. and there is nothing to indicate anywhere that the respondent had not consented to any of these.

66. In the result, I answer the issues as follows :

Issue No. 1 : In the negative.

Issue No. 2 : In the negative, It is not open to the respondent to reagitate this question.

Issue No. 3 : In the affirmative.

Issue No. 4 : In the affirmative.

Issue No. 5 : In the affirmative.

Issue No. 6 : See below.

ORDER

I declare the election of the respondent to Vidhan Sabha (Maharashtra legislative Assembly) held on 27-2-1990 as null and void on the ground that he, his Election Agent and workers have committed corrupt practice as defined u/s 123(3) and section 123(3-A), of the Representation of People Act, 1951.

I further direct that a substance of this decision be forwarded to the Election Commission and to them Speaker of the Maharashtra Legislative Assembly and thereafter an authentic copy of my judgment be forwarded to the Election Commission.

On the question of costs, Mr. Bhandare submitted that he has co-operated in the trial of this petition and that, therefore, no higher costs should be awarded to the petitioner than what is prescribed under the rules. As against this, Mr. Vashi submitted that since 1989 despite the fact that the Court had decided that the plank of Hindutva as canvassed by Shiv Sena and its leaders is a corrupt practice u/s 123(3) and 123(3-A) of the representation of the People's Act, 1951, the

Shiv Sena and BJP have participated in such propaganda, and that, therefore, there is no reason why higher costs should not be granted. Mr. Bhandare submits that the costs will ultimately fall upon the respondent, whatever be the party's stand. In any event, the judgment given by Bharucha, J., has been stayed and the matter is pending in the Supreme Court. In these circumstances, it is not necessary that I should grant any higher costs than the costs was prescribed under the rules, namely, a sum of Rs. 400/- per day, inasmuch as, the petitioner has been represented by more than one Advocate. Order accordingly.

At this stage, Mr. Bhandare makes an application that the operation of my order be stayed. Mr. Vashi submits that the respondent be directed to make a separate application. I am inclined to agree with Mr. Vashi inasmuch as, stay cannot be for the more asking. Section 116(B) of the Act of 1951 provides for stay of operation on "sufficient cause being shown and on such terms and conditions as the Court may think fit." Therefore, for the purpose of showing sufficient cause, the respondent has to take out a proper application. Thereafter, on such an application being made, after hearing both the sides, the merits of such an application would be decided. Hence the respondent to make a separate application, if he so desires.