

(2008) 01 BOM CK 0110
In the Bombay High Court
Case No : Election Petition No. 13 of 2004

Shri Tukaram S. Dighole

APPELLANT

Vs

Shri Manikrao Shivaji Kokate

RESPONDENT

Date of Decision : 25-01-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 5
Conduct of Elections Rules, 1961 — Rule 93(2)
Evidence Act, 1872 — Section 76
Representation of the People Act, 1950 — Section 21, 22, 23
Representation of the People Act, 1951 — Section 100(1)

Citation : (2008) 2 ALLMR 370 : (2008) 3 BomCR 141 : (2008) 2 MhLj 281

Hon'ble Judges : Nishita Mhatre, J

Bench : Single Bench

Advocate : Pradeep Rajgopal, instructed by Mandar Goswami, for the Appellant;
M.M. Vashi, instructed by S.M. Sabrad, for the Respondent

Final Decision : Dismissed

Judgement

Nishita Mhatre, J.—This election petition challenges the declaration of the respondent as the elected candidate from 69, Sinnar constituency at the election held on 13.10.2004. It has been filed by a candidate of the NCP-Congress and R.P.I. alliance who unsuccessfully contested the elections. The petitioner has alleged that the respondent has indulged in corrupt practices thereby materially affecting the result of the election for the Sinnar constituency. The petitioner has prayed that the election of the respondent be declared void u/s 100(1)(b), 100(1)(d)(ii), 100(d)(iv) of the Representation of the People Act, 1950 (for short, hereinafter referred to as the Act).

2. The petitioner has alleged that the returned candidate had flagrantly violated the provisions of the Act and the election rules framed thereunder. He has also alleged that the returned candidate had violated several orders of the election commission issued under the provisions of the Act. The petitioner has pointed out in his election petition that 135065 votes were cast. The respondent secured

67556 votes while the petitioner managed 47593 votes. The respondent was therefore, declared elected by the returning officer on 16.10.2004. The Petitioner has contended that the respondent had caused deletion of names of a particular community from the voters list and voters from another community who supported the respondent were included in the electoral rolls by 10.7.2003. Bogus names were included in the voters list at the behest of the respondent with the connivance of the Talathi and the Tehsildar of the constituency. The petitioner claims to have complained, on 11.7.2003, to the Minister of State for Revenue and Forest, bringing to light the illegal deletion and addition of names to the voters list. The petitioner then claims that the respondent issued a pamphlet elucidating details of the work undertaken by the latter, who was a sitting MLA. The pamphlet had details about the inauguration of a welfare centre and about a bhoomi-puja being performed for the schools. The petitioner on 7.9.2004 addressed a letter to the Divisional Commissioner (Revenue) Nasik Road, complaining against the Tehsildar who had deleted the names of the voters from the Vanzari community as well as other voters from the minority community. According to the petitioner, a letter/pamphlet was circulated in his constituency purported to be authored by him. This pamphlet which was allegedly signed by the petitioner exhorted the voters to cast their vote for the petitioner who belonged to the Vanzari caste. According to the petitioner copies of this letter were distributed amongst the members of the Maratha community in order to prejudice them. Reliance is placed on a copy of the letter/pamphlet dated 28.9.2004 by annexing it to the election petition at Exhibit E and E1. The petitioner claims to have complained about this false propaganda to the election commissioner on 11.10.2004, by a written communication, which is annexed at F and F1. The Election Commissioner was to identify the real author of the document by making the necessary investigations. The petitioner issued a public notice in the local newspaper clarifying to the effect that he had not issued the letter/pamphlet. This document has been annexed at Exhibit G and G1. An FIR was lodged by the petitioner with Sinnar police station and the case was registered as CR No. I-180/2004 on 12.10.2004 under Sections 465, 467, 471, 419, 420, 500 of the Indian Penal Code. The FIR was lodged against an unknown person on the basis of the letters/pamphlets. A representation was also sent to the Deputy Chief Minister by the petitioner seeking an enquiry into the issue.

3. The Petitioner has then alleged that the private secretary of the respondent had issued a press release stating that the employees of Bhairavnath Path Sanstha were working against the respondent and that the respondent had not complained against them. A news item was published in the local newspaper Deshdhoot mentioning that the respondent would initiate an enquiry against the petitioner, if elected, and that the existing Board of Directors of the Sanstha of which the petitioner was the Chairman, would be dissolved. A copy of the news item published on 12.10.2004 has been annexed to the petition. A representation was submitted to the Deputy Chief Minister again by the petitioner complaining of illegal and unauthorised work which was being carried out by the respondent

when the model code of conduct was in force. A copy of this representation has also been annexed to the petition. The petitioner has further alleged that the respondent had published a special supplement to a local newspaper Gavkari on 3.9.2004 describing the work that he supposedly had carried out, despite the code of conduct being in force from 24.8.2004 till 25.10.2004. According to the Petitioner, this publication was issued to mislead the voters into believing the bogus claims about the work allegedly carried out by the respondent.

4. The next allegation against the respondent is that on 25.11.2004, he had given a speech threatening that villages which did not support his candidature would be neglected by him, in the event he was returned as the candidate for the constituency. These villages according to the petitioner consist of a majority of persons from the Vanzari community to which the petitioner belongs. A copy of the news report about this speech which appeared in the newspaper Sakal is annexed to the petition.

5. The other allegation is that the voters in certain booths were misguided by the Presiding Officers, their staff and polling agents into pressing the first button on the electronic voting machine, thereby benefitting the respondent. According to the petitioner, the voters were asked to press this button and thereafter the button corresponding to the candidate of their choice.

6. The petitioner has stated in para 23 of his petition that it was being filed alongwith the VHS cassette furnished by the Collector of Nasik containing video recordings of the speeches delivered by the respondent and by others on his behalf. The Respondent had appealed for votes on a communal basis through these speeches according to the petitioner. The petitioner has relied on these recordings in support of his allegations in the petition. The results of the election held on 13.10.2004 were declared on 16.10.2004.

7. The respondent i.e. the returned candidate has filed his written statement denying the allegations contained in the petition. The respondent has contended that the petition was not maintainable as it was not in the prescribed format. The respondent has submitted that no details of the communal appeals allegedly made by him and his supporters were mentioned in the election petition or in the annexures thereto. The respondent therefore sought dismissal of the election petition as a copy of the VHS cassette and its transcript alongwith the petition was not furnished to him. The respondent has alleged non-compliance of the provisions of Section 86 of the Act since the cassette which was one of the exhibits on which the petitioner relied was not verified. The respondent has then contended that no cause of action has been made out in the election petition and, therefore, it was required to be dismissed. Besides this, it was contended that the allegations in the petition were totally vague and could not be relied on for setting aside his election to the Sinnar constituency.

8. The petitioner produced several documents alongwith an affidavit of documents on record as also a Compact Disk (hereinafter referred to as CD)

which according to the petitioner was a reproduction of the speeches delivered by the respondent and his supporters during the election period when the code of conduct was in force. However, out of the 20 documents produced, only three documents have been exhibited. Exhibit P2 is the FIR dated 12.10.2004, exhibit P3 is the complaint dated 29.10.2004. Exhibit P4 is the special supplement issued in the newspaper Gavkari on 3.9.2004. None of the other documents including the VHS cassette and the CD have been exhibited as they have not been admitted in evidence or proved.

9. The petitioner and the respondent examined themselves before this Court in support of their contentions. Neither party led evidence of any other person on his behalf.

10. The evidence will have to be considered in the light of the issues framed by this Court which are answered as follows:

ISSUES

1) Whether the Petitioner proves that the election of the Respondent is liable to be quashed and set aside for having made communal appeals in his speeches recorded on the VHS cassette produced by the Petitioner in Court?

NO

2) Whether the Petitioner proves that the election of the respondent is liable to be quashed and set aside u/s 100(1)(d)(ii) and 100(1)(d)(iv) of the Representation of People Act 1951 for the reasons set out in paragraphs 9 to 18 of the Election Petition?

NO

3) Whether the Petitioner proves that the Respondent had deliberately issued the letter at Exhibit E page 42 dated 28.9.2004 in the name of the Petitioner with a view to misguide the voters?

NO

4) Whether the Respondent proves that he has not addressed communal and racial speeches as alleged in VHS Cassette filed by the Petitioner?

Does not arise

REASONS

10. Issue Nos. 1 and 4: The main plank on which the petitioner has challenged the election of the returned candidate is that the latter had delivered speeches which contained a communal appeal thereby violating the provisions contained in Section 123(3) of the Act. The contention is that the VHS cassette which was produced in Court contains speeches which indicate that the respondent had indulged in corrupt practices by appealing to the communal sentiments of the electorate. The petitioner has examined himself to justify this allegation. An

affidavit of evidence has been filed by him at Exhibit P1. A perusal of this affidavit shows that it is almost a reproduction of the petition, but in the first person. The petition refers to the communal speeches delivered by the Respondents and his supporters in paragraphs 19 and 23, in the affidavit of evidence. The petitioner has sought to prove this allegation by the averments made in para 19 and the last sentence contained in para 20. The Petitioner has not been cross-examined on these speeches at all on behalf of the respondent.

11. It was submitted by Mr. Rajgopal, appearing for the petitioner, that the VHS cassette containing these speeches had been produced in Court as required, as evidence, after filing the election petition. He submits that this cassette is a public document and, therefore, need not be proved. According to the learned Counsel, Section 169 of the Act empowers the Central Government in consultation with the election commission to frame rules under the Act. The Central Government has, therefore, framed the conduct of election rules 1961. Rule 93(2) of the Conduct of Election Rules stipulates certain criteria for production of such cassettes. He submits that under the Instructions for the Conduct of Elections found in the Compendium of Instructions of Conduct of Elections, the election commission is expected to record all speeches of the contesting candidates. These speeches are maintained by the election commission as public documents. Copies of such cassettes are issued by the election commission on payment of the requisite charges. Item No. 177 of this Compendium of Instructions indicates that these video recordings are to be maintained in order to have a true, faithful and contemporaneous record of the violations of the election law and instructions of the commission. The video film recorded by the election commission is to be viewed by the returning officer, immediately, to ascertain whether any of the organisers/speakers or other participants in public meetings had committed infractions of the statutory provisions and the directions of the commission or the model code of conduct. The learned Counsel submits that these tapes are to be maintained in a certain manner as specified, indexed and accompanied by a number of explanatory note of the infringement. Instruction 13.5 for the Conduct of Elections indicates that in pursuance of rule 93(2) framed under the Act r/w Section 76 of the Indian Evidence Act, the election commission has directed that a VHS cassette recording of speeches may be made available for inspection or a certified print may be issued on payment of requisite charges. The instructions also stipulate that no guarantee for the authenticity and veracity of the cassettes is undertaken by the election commission. The learned Counsel submits that the VHS cassette which is on record has been obtained from the office of the election commission on payment of a fee. He relies on the receipt issued by the election commissions office, indicating the payment of the requisite charges. The learned Counsel further submits that the VHS cassette and the receipt together prove that the VHS cassette is a public document, obtained from the custody of a public officer i.e. the election commissioner and, therefore there was no need for the petitioner to prove the contents of the VHS cassette. The learned Counsel further submits

that the contents of the VHS cassette had been replicated for convenience on a CD which is produced as Item 12 in the affidavit of documents. The transcripts of the speeches have also been produced according to the learned Counsel and therefore, there is ample proof to believe that the communal speeches delivered by the respondent exhorted the Marathas to vote for the respondent and not the petitioner who belongs to the Vanzari community. The learned Counsel then submits that a public document such as the VHS cassette is not required to be proved nor is it necessary to plead the contents of the document. Reliance is placed on the following judgments in support of this submission.

12. To buttress this argument, the learned advocate has relied on the judgments in *Madamanchi Ramappa and Another Vs. Muthalur Bojjappa*, ; AIR 1931 1 (Privy Council) AIR 1952 271 (Nagpur); *Dalim Kumar Sain and Others Vs. Smt. Nandarani Dassi and Another*, ; *Kabul Singh and Another Vs. Ram Singh and Others*, ; *Thatithoi Chiru and Others Vs. Ningampao Kabui (deceased by L.Rs.) and Others*, ; *Fazal Sheikh and Ors. v. Abdur Rahman Mea and Ors.* AIR 1991 ORI 17 and *Naladhar Mahapatra and Another Vs. Seva Dibya and Others*, besides other judgments.

13. Mr. Vashi, learned Counsel appearing for the respondent, submits that the petitioner, despite being given ample opportunity by the Court, has not proved the contents of the VHS cassette. He submits that there is no evidence to prove that the contents of the VHS cassette are the same as the CD produced at serial No. 12 of the affidavit of documents. He points out that there is not even a shred of evidence to establish that the transcripts of the speeches produced on record were a true reproduction of the speeches delivered by the respondent and his supporters in the meetings held during the period when the model code of conduct was in force. The learned Counsel submits that it would be wrong to accept the submissions on behalf of the petitioner that the VHS cassette was a true reproduction of the speeches delivered over a period of time on several dates in the Sinnar constituency. He further submits that the petitioner had failed to prove that he had obtained the VHS cassette by applying for it to the Election Commission and that it was a public document. Therefore, according to the learned Counsel there was no need to cross-examine the witness i.e. the petitioner herein, on the speeches which according to the petitioner were communal in nature. He relies on the judgments in the cases of *Ziyauddin Burhanuddin Bukhari Vs. Brijmohan Ramdass Mehra and Others*, *Gajanan Krishnaji Bapat and another Vs. Dattaji Raghobaji Meghe and others*, *Quamarul Islam Vs. S.K. Kanta and others*, *Rajendra Singh Yadav Vs. Chandra Sen and Others*, *Amar Nath Agarwalla Vs. Dhillon Transport Agency*, and *Dr Ramesh Yeshwant Prabhoo Vs. Prabhakar Kashinath Kunte and Others*, besides the other judgments in support of his contentions.

14. It is no doubt true that the petitioner has produced the VHS cassette on record. This cassette was produced on 30.11.2004. However, the petitioner has produced no evidence on record to indicate that this VHS cassette was a true

reproduction of the original speeches. The submission of the learned Counsel for the petitioner, that the VHS cassette is a public document as defined u/s 76 of the Indian Evidence Act, cannot be accepted. There is no evidence to indicate that the VHS cassette was obtained from the election commission. The petitioner who examined himself has not adverted to this video recording in his examination in chief. There is no averment in the affidavit filed in lieu of examination in chief to the effect that he had obtained the cassette from the office of the election commission and that he had paid the requisite charges for the same. At the time of the arguments, the learned Counsel for the petitioner pointed out that this cassette was in fact issued to the petitioner by the election commissions office. But this is not sufficient. A public document need not be proved under the Indian Evidence Act. However, it must be brought on record as evidence. It must be admitted in evidence as a certified copy of the original before any presumption can be drawn regarding its genuineness. I am fortified in my view by the decision of the Supreme Court in the case of Amarnath Agarwal (supra) where the Supreme Court has held that the mere production of the documents alongwith the written submissions without exhibiting them at the trial would be sufficient for the Court to look into those documents as they were not in evidence and the defendant had no opportunity to reply to those documents. The petitioner has not proved the receipt issued by the election commissions office and has thus failed to prove that the VHS cassette was a public document. That being the position, it is not possible to rely on the contents of the VHS cassette.

15. If one considers the cassette to be a private document, it was necessary for the petitioner to prove its contents by examining the videographer. Mere production of the cassette cannot lead to the inference that the cassette is a public document and, therefore, it need not be proved. Despite, the representative for the petitioner being told on several occasions that it was necessary for the petitioner to prove the cassette, the petitioner chose not to examine other witnesses on his behalf to establish that the VHS cassette contained a true depiction of the meetings held between 6th and 11th October, 2004. The respondent has specifically denied the contents of the VHS cassette and, therefore, it was all the more necessary for the petitioner to either prove the contents of the VHS cassette or to have the cassette admitted in evidence as a public document for the genuineness of the contents to be presumed.

16. The transcripts produced by the petitioner have not been proved to be those of the video recordings. There is not even a single statement made either in the affidavit filed by the petitioner by way examination in chief or in the cross-examination to indicate that the document produced at serial numbers 13 and 14 represented the contents of the video recordings. The petitioner has not examined the person who had transcribed the speeches. There is no evidence to indicate when the transcription was done, whether it was done while the speech was being delivered or after the recording was made. These details have not been proved by the petitioner. In such circumstances, it is impossible to hold that

the petitioner had proved that the respondent had appealed to the communal sentiments of the community or electorate of Sinnar.

17. In *Madamanchi Ramappa (supra)*, the Supreme Court has observed that a document which is a certified copy of a public document need not be proved by calling a witness. The submission of the learned Counsel is that since the VHS cassette is a public document which need not be proved by calling a witness. It is true that a public document need not be proved. However, in the present case, the VHS cassette though produced has not been admitted in evidence. The affidavit filed in lieu of examination in chief makes no mention of this VHS cassette. Thus, the mere production of the cassette with the petition would not lead to the inference that it has been produced in evidence and since it is a public document, it need not be proved.

18. Similarly, in the case of *Secretary, Cantonment Committee (supra)*, the Privy Council has held that an entry in the register maintained is admissible in evidence. In the present case, the petitioner has failed to show through his evidence that the cassette had been obtained from the election commission and that it was being produced in Court with the election petition. Even the election petition is silent on this issue. Mere production of a receipt allegedly issued by the office of the election commission, which is again not brought on record through the evidence, would not suffice to show that that receipt was issued against the payment made by the petitioner for obtaining a certified copy of the VHS cassette. All the other judgments cited by the learned Counsel for the petitioner do not advance the petitioners case as the petitioner has failed to indicate the source of the VHS cassette in his evidence. The only reference to the cassette in his affidavit is as follows: "I say that Respondent has given some communal speeches, a cassette of which is annexed to the petition." This statement is absolutely vague. In the case of *Ziyauddin Bukhari v. Brijmohan R. Mehra (supra)*, the Apex Court considered the provisions of the Representation of People Act, 1950. The Supreme court laid down certain conditions which are required to be satisfied for tape records of speeches to be admissible in evidence. The Supreme Court has held that (i) the voice of the person alleged to be speaking must be identified by the maker of the record or others who recognise it; (ii) the accuracy of what was actually recorded must be proved either by direct or circumstantial evidence so as to rule out the possibilities of tampering with the recording and (iii) the subject matter recorded had to be shown as relevant. As regards the transcripts of the tape records, the evidence of the makers of the transcripts must be available to the Court as the transcripts are corroborative evidence to confirm what the tape records contain. In the present case, as discussed earlier, none of these criteria have been fulfilled by the petitioner on the ground that the VHS cassette is a public document. The transcripts of the speeches have also not been proved by the petitioner. Similarly in the case of *Quamarul Islam v. S.K. Kanta (supra)*, the Supreme Court has considered a case where the cassette containing a speech of a returned candidate was recorded by a police officer which was tendered by the election

petitioner in order to prove a corrupt practice against the returned candidate u/s 123(2), 123(3) and 123(3A). The Supreme Court held that though this cassette was tendered in evidence by the election petitioner, there was no evidence as to how it came to be recorded, why it was preserved and how the election petitioner came to know about its existence. In the present case, the VHS cassette has not even been tendered in evidence by the election petitioner. It has merely been produced alongwith the petition. This in my opinion, would not be sufficient to prove the contents of the VHS cassette, even assuming it is a public document.

19. It is submitted by the learned Counsel for the petitioner that the contents of the VHS cassette forms a part of the petition. The contents of the petition and annexures thereto must be specifically denied or else they must be presumed to be admitted. It is submitted that since the VHS cassette forms part of the petition, it was necessary for the respondent to deny the contents of the recordings; not having done so, the recordings are uncontroverted. The learned Counsel has drawn my attention to Order VIII and Rule 5 of the Code of Civil Procedure. He submits that since the contentions in para 23 have not been specifically traversed they must be deemed to have been admitted. The learned Counsel relies on *Badat and Co. Vs. East India Trading Co.*, and *Sambhaji Laxmanrao Pawar Vs. Abdul Wahed*, to buttress his submission.

20. This submission of the learned Counsel cannot be accepted. By my earlier order dated 27.10.2005. I had held that the VHS cassette does not form part of the petition but is produced as evidence which was required to be proved. In fact the respondent had requested that the petition should be dismissed since the VHS cassette did not form a part of the petition and a copy of the same was not served on him. I had accepted the submissions advanced on behalf of the petitioner that the VHS cassette would only be one of the "documents" which the petitioner would rely on as evidence and, therefore, it need not be a part of the petition. I am informed that the Apex Court has dismissed the SLP filed by the Respondent against the order dated 27.10.2005. The submission made to today on behalf of the petition is exactly contrary to the one made earlier in respect of the cassette. In my opinion, since it has already been held that the cassette is a "document" which must be proved in accordance with the rules of the evidence, the submission of the learned counsel for the petitioner cannot be accepted in view of the decision of the Supreme Court in the case of *Amarnath Agarwal* (supra).

21. The learned Counsel for the petitioner also submitted that the parties had gone to the trial knowing full well that the petitioner had alleged that the respondent had made communal appeals through his speeches and that the supporters of the respondent had also canvassed on his behalf by appealing to the communal sentiments of the Maratha community. He submits that although there may not be any specific pleadings in the election petition or there was an omission to frame a particular issue when the parties had gone to trial with full knowledge of the rival case and had led evidence not only in support of their

contention but in refutation of the other side, it cannot be said that the absence of an issue was fatal to the case. He relies on the judgment of the Supreme Court in *Nedunuri Kameswaramma Vs. Sampati Subba Rao*, ; *Kunji Kesavan v. M.M. Philip* AIR 1974 SC 164; *Girdharsingh and Another Vs. Gokul and Others*, and *R.B. Bharatha Charyulu Vs. R.B. Aivelu Manga Thayaru*, . However, all these cases deal with civil suits. It is well settled that pleadings in an election petition must be strictly construed and the issues framed must be precise in order that the respondent in an election petitioner or the returned candidate can meet the charges levelled against him. Therefore, these judgments would not be of any assistance to the petitioner.

22. In *Rajendra Singh Yadav Vs. Chandra Sen and Others*, the Supreme Court was dealing with a case under the Representation of People Act. It has held that the allegation of corrupt practices have to be made and proved in an election petition like a charge in a criminal case. The Court has further observed that what is not pleaded cannot be allowed to be the subject matter of evidence and that the allegations must be proved beyond reasonable doubt and not merely on the basis of preponderance of probabilities. Therefore, in my opinion, the submissions of the learned Counsel on behalf of the petitioner cannot be accepted. The learned Counsel relied on the judgment of the Rajasthan High Court in the case of *Khilumal Topandas Vs. Arjundas Tulsidas*, in support of his contention that the appeal made by the respondent constitutes a communal appeal. In this case, the Rajasthan High Court has observed that the word community used in Section 123(3) of the Act is to be confined to an organisation which in effect divides the citizens of the country into groups sometimes opposed to one another. It is only when such an organisation of the community aims to divide the citizens of the country and release forces in antagonistic to the unity of the country that it comes within the purview of Section 123(3). The learned Counsel has also relied on the judgment of the Supreme Court in the case of *Kultar Singh v. Mukhtiar Singh* AIR 1965 SC 144; *Dr. Das Rao Deshmukh Vs. Kamal Kishore Nanasaheb Kadam and others*, and *Dr Ramesh Yeshwant Prabhoo Vs. Prabhakar Kashinath Kunte and Others*, where the Supreme Court has discussed what could constitute a corrupt practice as prescribed u/s 123(3).

23. As I have already held that the contents of the cassette and the transcripts have not been proved, the allegations of the petitioner that the respondent has indulged in corrupt practices, by wooing the Maratha community on the basis of a communal appeal, has not been proved. Thus, Issue No. 1 is answered in the negative. In view of this, Issue No. 4 need not be answered.

24. Issue No. 2. The learned Counsel for the petitioner then submits that the Respondent had indulged in corrupt practices u/s 123(3) of the Act. He points out that the contents of the supplement to the Gavkari and the news item in the *Deshdhoot* must be deemed to be admitted since there is no specific denial of the contents in the written statement. It is submitted that under Order 8 Rule 5, the documents annexed to the petition have been verified and therefore, form

part of the petition. The learned counsel submits that it is therefore obligatory on the part of the respondent to deny the contents of the documents specifically if the respondent does not admit the documents. It is submitted that a part of para 17 of the petition speaks about the special supplement of Gavkari having been issued and circulated on 3.9.2004. According to the petitioner the supplement contains tall claims about the work carried out by the respondent. It is contended on behalf of the petitioner that these claims had misled people into believing that the respondent had in fact carried out the work as published in the supplement. It is submitted on behalf of the petitioner that the special supplement depicts religious symbols in an extremely conspicuous place to attract votes for the respondent. It is therefore submitted that this amounts to a corrupt practice, indulged in by the respondent, as stipulated in Section 123(3) of the Act. Apart from this, according to the learned Counsel for the petitioner, the statements contained in the special supplement are false to the knowledge of the respondent and have been made only to prejudice the prospects of the petitioner at the election which is a corrupt practice as defined u/s 123(3). The judgments in the case of *Badat & Co., v. East India Trading Co.*, (supra) and *Sambhaji Laxmanrao Pawar* (supra) are pressed into service by the learned Counsel to submit that the contents of paragraphs 15 & 17 of the petition must be deemed to be admitted as they have not been specifically traversed in the written statement. The documents referred to in these paragraphs must be also taken as admitted and therefore do not require further proof.

25. Para 17 of the petition contains an allegation that the respondent had circulated a special supplement in the Gavkari on 3.9.2004 giving wide publicity to the work carried out by him. It is alleged that this publication was issued during the time when the model code of conduct was in force and that the publication was deliberately issued to impress the voters by giving details of the work and several bogus projects allegedly conducted by the respondent. The respondent has denied this allegation in his written statement. The petitioner has reproduced almost verbatim the contents of para 17 of the petition in his affidavit filed by way of examination in chief. In his cross-examination, the petitioner has been questioned by the advocate for the respondent on the special supplement in the Gavkari issued on 3.9.2004. This document is marked as Exhibit P4. The respondent has stated in his examination in chief that the contents of the special supplement of Gavkari are in respect of the works carried out by him in his constituency. The witness has stated that he did not remember the name of the printer and the publisher of exhibit P4. He has stated that he bore the expenses for the special publication. The allegation is that this publication of the supplement had been made at the behest of the respondent and with his consent. It is further alleged that the respondent was aware that the contents of the publication were false and had been circulated calculatedly, to prejudice the prospects of the petitioner at the elections. This constitutes an offence u/s 123(3), according to the learned Counsel for the petitioner.

26. In the case of *Gajanan Krishnaji Bapat* (supra), the Supreme Court held that

the standard of proof required to prove that a returned candidate has indulged in corrupt practices as defined u/s 123 of the Act is like that of the proof required in a criminal trial. The charge must be proved beyond reasonable doubt and the burden of proof is on the petitioner in an election petition and that burden does not shift. The Court has observed that though the election of a successful candidate is not to be interfered with lightly, one of the essentials of the election law is to safeguard the purity of the election process. This is because the election petition is not a dispute only between the candidates who contested the elections. The public is also substantially interested in it. The Court observed that it was equally well settled that a charge of corrupt practice is in the nature of quasi criminal charge and, therefore, any evidence to prove a corrupt practice must not only be cogent and definite but must establish the charge against the returned candidate beyond reasonable doubt and the proof of corrupt practices u/s 123(3) as held in the case of *Quamarul Islam v. S.K. Kanta* (supra). It also considered the effect of newspaper reports, advertisement messages and the standard of proof required in respect of these documents. The Apex Court has held that the newspaper reports by themselves are not evidence of the contents thereof. At best, they can be secondary evidence of the contents and, therefore, are not admissible in evidence without proper proof. The Apex Court held that when an advertisement or a message published in a newspaper or news report is relied upon by the petitioner in an election petition to prove that the returned candidate had appealed to the electorate on the ground of religion, the original manuscript must be produced on record. There must be reliable evidence to prove the receipt of the manuscript of the advertisements or messages or the publication of the same in accordance with the manuscript. Besides this, there must be satisfactory and reliable evidence on record to establish that the same were issued by or at the instances of the returned candidate. The evidence of the election petitioner himself or of the editor and publisher of the newspaper must be on record to prove the contents of the messages and advertisements in the newspaper. Without such evidence being on record, the messages, advertisements or news reports could not be admitted and relied upon as evidence of the contents of the statements contained therein and could not be used against a returned candidate.

27. Bearing in mind the aforesaid judgements, on a perusal of the petition, I find that there are no specific pleadings in this regard. In my opinion, the evidence on record does not indicate that the claims made in the special supplement Exhibit P4 are false. There is no direct evidence on record of the petitioner that these claims are incorrect or were made calculatedly, to misguide the voters. Although a list of works not carried out by the Respondent has been culled out from the special supplement by the Petitioner and produced at the time of arguments, no specific questions in this regard were put to the Respondent in his cross-examination. The Respondent has admitted that there might be certain projects listed in Exhibit P4 which had been undertaken at his instance while he was the President of the Panchayat Samiti and when he was a member of the Zilla

Parishad as well. The Respondent held these offices prior to being elected as Member of the Legislative Assembly. But this admission would not be sufficient to prove that the Respondent had indulged in the corrupt practice alleged against him. In such circumstances, it cannot be said that the petitioner had proved that the contents of the special supplement issued by Gavkari amounted to a corrupt practice u/s 123(4).

28. As regards the publication Deshdhoot, the petitioner has stated that the threats contained in the news published on 12.10.2004 in this newspaper amounted to a corrupt practice under 123(2)(a)(i). According to the petitioner, the threat contained in the statement issued by the respondent indicates social ostracism and ex-communication or expulsion of the petitioner. However, this entire argument of the learned Counsel for the petitioner cannot be accepted since the publication in Deshdhoot is not proved. Merely because the petitioner has produced this publication on record it cannot be said that the petitioner had proved the contents of the publication and had therefore proved that there was a corrupt practice committed under 123(2)(a)(i). Apart from this, assuming the news item had been proved, there is no evidence on record indicating that the Respondent had indeed issued such statements.

29. The next allegation against the respondent is that the special supplement issued with the Gavkari depicts photographs of Hindu deities, including those of Lord Ganesh and Lord Kaal Bhairavnath. Lord Kaal Bhairavnath admittedly is the presiding deity of the Respondents village. The respondent in his evidence has stated that photographs of Lord Ganesh was published because before any new venture is commenced, a pooja is offered to Lord Ganesh. He has conceded that the photographs have not been depicted on exhibit P4 because they are his family deities. As regards the photograph of the idol of Lord Kaal Bhairavnath, the respondent has explained that it was published because he is the reigning deity of the village. He has denied, categorically, the suggestion that these pictures had been depicted on the supplement as religious symbols. During the cross-examination of the respondent, Mr. Vashi had objected to this line of cross-examination adopted on behalf of the petitioner by contending that there were no allegations in para 17 of the petition or any other paragraph to indicate that the respondent had made a communal appeal to the electorate to vote him into power on the basis of religious symbols. The learned counsel had drawn my attention to the fact that the allegations against the respondent for making a communal appeal to the electorate were contained in para 23. He points out that this paragraph speaks only about the VHS cassette and not about the special supplement of Gavkari. It is true that the allegation that the respondent had indulged in communal appeals to the electorate have not been specified in any other paragraph but para 23 of the petition. Para 23 speaks only about the video recording, which I have already held has not been proved before this Court. In these circumstances, I do not find that the depiction of the photographs of the deities would by itself lead to the conclusion that the respondent had sought votes on the basis of a communal appeal, especially when there is no such

allegation in the petition. Apart from this, it is well settled that the election petition must be framed precisely and the acts complained of against the respondent must be one of those corrupt practices which are contained in Section 123. As rightly pointed out by the learned advocate for the respondent, para 17 of the petition which relates to the special supplement of the newspaper Gavkari is only in respect of the allegedly false claims made by the respondent which would attract 123(4). There is no allegation contained in the petition that the respondent had by issuing the publication indulged in corrupt practices under 123(3) which relates to appeals for votes on the ground of religion, race, caste, community or by using religious symbols. In such circumstances, the petitioner has failed to prove any corrupt practices on the part of the respondent u/s 123(3). Thus, it must be concluded that the petitioner has been unable to establish a corrupt practice on the part of the Respondent u/s 123(4) of the Act because the news report in Deshdhoot has not been proved. The allegations regarding the communal appeal contained in Gavkari are not made in the petition and, therefore, it cannot be said that the respondent had indulged in corrupt practices u/s 123(3).

30. The petitioner has been unable to establish that the names of certain voters had been added or deleted from the list at the behest of the respondent. There is nothing on record to demonstrate that the addition or deletion of names has affected the outcome of the elections. The allegation in the petition is that by addition and/or deletion of names, the result of the election has been materially affected by non-compliance with the provisions of the Constitution and of the Act. The allegation in the petition is that the election of the respondent should be declared as void u/s 100(1)(d)(iv). However, addition or deletion of names to the electoral roll is governed by the provisions of Section 21 of the Representation of the People Act 1950. If the petitioner was aggrieved by the addition or deletion of the names found on the electoral rolls, he could have applied for correction of the rolls either u/s 22 or 23 of the Act. An appeal has also been provided under the Act and the petitioner could have preferred an appeal had his application u/s 22 or 23 been rejected.

31. On considering the totality of the charges levelled against the Respondent, in my view, the petitioner has failed to prove any of them. The corrupt practices alleged against the Respondent have not been established. Hence, issue No. 2 must also be answered in the negative.

32. Issue No. 3. The petitioner has then alleged that the respondent had caused a letter/pamphlet dated 28.9.2004 to be circulated. It is annexed at exhibit E to the petition purporting to have been signed by the petitioner. This letter exhorts the voters of the Vanzari caste to vote for the petitioner. According to the petitioner, the copies of the letter/pamphlet were deliberately distributed to voters of the Maratha community by the respondent so as to prejudice them against the petitioner. The petitioner claims that the distribution of this letter/pamphlet was wilfully designed by the respondent to malign him. The petitioner

thereafter complained to the election commission that the letter had not been issued by him but by somebody else in order to mar his chances at the polls. The petitioner had also immediately issued a public notice in the local newspaper indicating that he had not issued the letter at exhibit E to the writ petition. An FIR was lodged by the petitioner on 12.10.2004 u/s 465, 467, 471, 419, 420 and 500 of the Indian Penal Code. Significantly, this FIR was lodged against unknown persons who, according to the petitioner, had circulated the letter/pamphlet, purportedly written by him, in order to defame him. This letter/pamphlet, again, has not been proved by the petitioner. The FIR which is dated 12.10.2004 and marked as exhibit P2 is filed against unknown persons.

Therefore, if according to the petitioner, it was the respondent who had issued the letter/pamphlet falsely under the petitioners signature, he ought to have stated so in the FIR which would then have been directed against the respondent. For reasons best known to the petitioner, he has not implicated the respondent. Even in the complaint dated 29.10.2004 sent to the Home Minister who belongs to the same party as the petitioner there is no indication that the respondent was responsible for the circulation of that letter/pamphlet. The complaint of the petitioner to the Home Minister has been marked as exhibit P3. Thus the petitioner has been unable to prove, both, that the Respondent had issued the letter/pamphlet and that its contents were false. Issue No. 3 has therefore not been proved by the Petitioner.

33. The petitioner has thus not proved that the election of the Respondent is liable to be set aside under the Representation of People Act, for having indulged in corrupt practices as set out in the election petition. The election petition is therefore dismissed with costs quantified at Rs. 10,000/-. The security for costs deposited by the petitioner shall be paid over to the respondent towards the costs quantified at Rs. 10,000/-.