A

ABHIRAM SINGH

v.

C.D. COMMACHEN AND ORS.

APRIL 16, 1996

B [K. RAMASWAMY, S.P. BHARUCHA AND K.S. PARIPOORNAN]

Representation of People Act, 1951 : Section 99(1)—Election Petition—Show Cause Notice to person not party to the petition—Content and scope of—Decision by Supreme Court in one case that the notice must inter-
C *alia contain the portions of the petition written statement oral and documentary evidence, in support of the charges of corrupt practice and prima facie finding thereon—In a subsequent judgment Supreme Court held that the pragmatic question of deciding the question of compliance of requirements of the Section is that the noticee gets the same opportunity which he would get if he were made party, hence the communication of material not required—Held,*
D *the two decisions are conflicting hence matter referred to larger bench of five Judges.*

Sections 123 (3) & (3A)—Corrupt practice—Content and scope of—Held, requires to be clear laid down authoritatively, hence referred to Con-
E *stitution Bench for deciding the issue.*

Corrupt practice in speeches delivered by collaborators—Consent to, by the candidate—Held in one case by Supreme Court that it should be inferred—Held in other cases by Supreme Court that it should be proved—Held, the views are inconsistent—No specific law laid down as to when the case is
F *held proved—Authoritative decision required, hence referred to Constitution Bench.*

The appellant, a BJP candidate, and the respondent a Congress party candidate contested a legislative assembly election. Appellant was duly elected. Respondent filed election petition before High Court alleging
G **corrupt practices by the collaborators of the candidate while delivering speeches on certain dates. Appellant was not made party to the petition. High Court on finding *prima facie* evidence of use of corrupt practice sent noticee to the appellant u/s. 99 of Representation of People Act, 1951, without communicating to him, the pleadings of corrupt practices and**
H **evidence - oral and documentary in proof thereof.**

The Supreme Court held in *Manohar Joshi's* case that the notice required the extract of pleadings of corrupt practices, evidence, oral and documentary in proof thereof and the Judge is required to give his prima facie findings indicating the portions of speeches delivered by the speaker. In a later judgment, the Supreme Court held that the noticee gets the same opportunity which he would get if he were made party, hence communication of the material on record is not required.

The appellant in appeal to this Court challenging the order of the High Court contended that the speeches by the collaborators were not made with his consent; therefore, corrupt practices have not been proved and that the impugned judgment has not complied with the mandatory requirements of notice u/s 99 as held in *Manohar Joshi's* case 2 and that the findings u/s 123(3) and (3A) without compliance of requirements of notice and opportunity under Section 99 vitiate the declaration that the appellant's allegations are baseless.

Refering the matter to the Constitution Bench, this Court

HELD : 1.1. When and under what circumstances speeches of the leaders of the political party or the appeal or any other person with the consent by a candidate or his election agent to vote or refrain from voting on the ground of religion, race, caste or community or language, etc. or promotion or an attempt to promote feelings of enmity or hatred between different classes of citizens of India on the ground of religion, race, caste, community or language with the consent of the candidates or his election agent for the furtherance of prospects of the election of the candidate or prejudicially effect the election of any candidate, constitutes corrupt practice under sub-sections (3) or (3A) of Section 123 of the Representation of People Act. Its content and scope also require to be clearly laid down authoritatively lest miscarriage of justice in interpretation of "corrupt practice" involved in every election petition would ensue. The purity of election process gets fouled and be fraught with deleterious effect in a democratic polity. [347-G-H; 348-A-B]

Suryakant Venkatarao Mahadik v. *Smt. Saroj Sandesh Naik (Bhosale)*, [1996] 1 SCC 384; *Ramakant Mayekar* v. *Smt. Celine D'Silva*, [1996] 1 SCC 399, [1996] 1 SCC 378; *Prof. Ramchandra G. Kapse Etc.* v. *Haribansh Ramakbal Singh Etc.*, [1966] 1 SCC 206; *Moreshwar Save* v. *Dwarkadas Yashwantrao Pathrikar,* [1996] 1 SCC 394 and *Dr. Ramesh Yashwant*

A *Prabhoo* v. *Prabakar Kashinath Kunte and Ors.,* **[1996] (1) SCC 130, referred to.**

1.2. As to when the case is held proved in such cases has not been specifically laid as law. There appears to be some inconsistency in the view in *Dr. Prabhoo's Case* that consent to the speeches of collaborators, by the returned candidate should be inferred, and in other cases that consent is required to be proved. [347-E-F]

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1.3. The decision in *Manohar Joshi's case No. 2* and *Dr. Prabhoo's Case are mutually conflicting. Which of the two views is correct is the question required to be decided by a larger bench.* [347-D]

C

Manohar Joshi v. *Damodar Tatyaba and Dadasaheb Rupwate,* **[1991] 2 SCC 342 and *Dr. Ramesh Yashwant Prabhoo* v. *Prabhakar Kashinath Kunte & Ors.,* [1996] 1 SCC 130, referred to.**

D CIVIL APPELLATE JURISDICTION : Civil Appeal No. 37 of 1992.

From the Judgment and Order dated 24.12.91 of the Bombay High Court in E.P. No. 11 of 1991.

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A.M. Khanwilkar, Ramesh Singh and Ms. Bina Gupta for the Appellants.

B.A. Desai, M.N. Shroff and Ms. Reema Bhandari for the Respondents.

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The Judgment of the Court was delivered by

K. RAMASWAMY, J. After spending considerable time on diverse question canvassed across the bar, we are of the opinion that this appeal requires to be posted before a Constitution Bench for deciding the questions that arise in the appeal. We would, however, indicate in brief the facts, the findings recorded and the questions raised which impress us to refer the matter for decision by the Constitution Bench. This appeal under Section 116B of the Representation of the People Act, 1951 (for short, the 'Act') arises from the judgment dated December 24, 1991 of the Bombay High Court passed in Election Petition No. 11 of 1991.

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The respondent, since deceased, his legal representatives have been brought on record and a notice as required under the Act, was also duly published. He contested as a Congress Party candidate in the election to No. 40, Santacruz Legislative Assembly Constituency in 1990 for the Maharashtra State Assembly. The appellant is the returned candidate who filed his nomination on January 31, 1990 which was accepted on February 8, 1990. The poll was held on February 27, 1990. The result of the election was declared on March 1, 1990 declaring that the appellant was duly elected. The contested election as a BJP candidate and was also Vice President of the Bombay Unit of the said party. He secured single largest majority votes white the respondent secured second largest. By judgment dated December 19, 1991 the High Court allowed the election petition.

In paragraph 186, the High Court held that "the voluminous oral as well as documentary evidence leaves no room for doubt that the plank of Hindutva/Hunduism/Hindu was used". In Paragraph 187 it is held that "it is clear from the voluminous material on record that the campaign was on the basis of appealing for votes on the basis of 1st Respondent's community and religion. i.e., the Hindu community and religion and that there was an attempt to create enmity and hatred between different classes of citizens on the basis of religion, community and caste particularly between the Hindus and the Muslims". In paragraph 198 it is further held that "prima facie, it does appear that the leaders have appealed for votes for the Hindu candidates of the two parties on the basis of their religion and community. Prima facie, it does appear that the leaders did attempt to create enmity and hatred between different classes of citizen on the grounds of community and religion". In paragraph 197, it is held that "(I)n my view, it will have to be held that the tape recordings contain the speeches made at these meetings. This of course is subject to hearing the leaders of these two parties on the Notices under Section 99 of the Representation of the People Act, 1951 which have been issued to them in Election Petition No. 21 of 1990"

Shri A. M. Khanwilkar, learned counsel for the appellant, contended that in view of the decisions of this Court in *Suryakant Venkatarao Mahadik* v. *Smt. Saroj Sandesh Naik (Bhosale),* [1996] 1 SCC 384; *Ramakant Mayekar* v. *Smt. Celine D'Silva*, [1996] 1 SCC 399, [1996] 1 SCC 378; *Prof. Ramchandra G. Kapse Etc.* v. *Haribansh Ramakbal Singh Etc.*, [1996] 1 SCC 206; *Moreshwar Save* v. *Dwarkadas Yashwantrao Pathrikar*, [1996] 1 SCC 394 the findings recorded under Sections 123(3) and 123 (3A) of the Act

A without compliance of the requirements of notice and opportunity under Section 99 which was held to be a duty of the Court, vitiate the declaration that the appellant's allegations are baseless. The speeches made by the leaders on February 10, 1990, February 17, 1990, intervening night of February 20 and 21, February 23, 1990 within the constituency and on February 24, 1990 outside the constituency, were not made with his con-
B sent. Therefore, corrupt practices have not been proved. By reason of the ratio in *Manohar Joshi* v. *Damodar Tatyaba @ Dadasaheb Rupwate*, [1991] 2 SCC 342 (hereinafter referred to as "Manohar Joshi Case No. 2") this Court had held that the court has to extract pleadings of corrupt practices, evidence - oral and documentary in proof thereof and in the order the
C Judge is required to indicate portions of his *prima facie* findings of the speaker appealing to the voters on the basis of religion etc. The court should supply the pleadings, evidence - oral and documentary and the copy of the order so as to enable noticee to adequately meet the ground on which he is proposed to be named in the order. This mandatory require-
D ment has not been complied with. Therefore, the judgment is clearly illegal. He, therefore, requested to remit the matter for taking the proceedings under Section 99(1) proviso as interpreted in *Manohar Joshi* Case No.2, Shri, B.A. Desai, learned counsel for the respondent, has controverted the same.

E *Prima facie*, the following three questions which are interwoven, arise for decision in the case :

(i) whether the learned Judge who tried the case is required to record prima facie conclusions on proof of the corrupt practices committed by the returned candidate or his agents or collaborators (leaders of the
F political party under whose banner the returned candidate contested the election) or any other person on his behalf?

(ii) whether the consent of the returned candidate is required to be proved and if so, on what basis and under what circumstances the consent
G is held proved?

(iii) on reaching the conclusion that consent is proved and *prima facie* corrupt practices are proved, whether the notice under Section 99(1) proviso (a) should contain, like mini judgment extraction of pleadings of corrupt practices under Section 123, the evidence - oral and documentary
H and findings on each of the corrupt practices by each of the collaborators,

if there are more than one, and supply them to all of them for giving an opportunity to be complied with? A

There is a common thread that runs through many a decision of this Court which mandates as duty of the High Court under sub- section (1) of Section 99, requiring at the time of making an order under Section 98 to make an order recording the names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt practice and the nature of that practice. The High Court is required to refer names of all persons proved guilty of any corrupt practice which have been proved at the trial. Under proviso to sub-section (1), the person who has not been a party to the petition has to be given notice to appear before the High Court to show cause why he should not be named. If he appears pursuant to the notice, he should be given an opportunity of cross-examining any witness who has already been examined and given evidence and of calling evidence in his defence and of being heard. B C D

In *Dr. Ramesh Yeshwant Probhoo* v. *Prabhakar Kashinath Kunte & Ors.*, [1996] 1 SCC 130, the scope of the content of the notice under Section 99(1), proviso (a) came up for consideration. Background facts to the said decision are required to be stated here. In Election Petition No. 1 of 1988 which is the subject matter of the above appeal, at the close of the trial, by order dated September 23, 1988, the learned Judge while holding that notice under Section 99 was necessary, the Court reached *prima facie* finding that the charges alleged in the petition of the corrupt practices under Section 123(3) and 123(3A) have been proved against the named persons and directed notice to them to show cause why they should not be so named in the order of the election petition; the notice indicated that the named person shall have opportunity to cross-examine the witnesses already examined at the trial and gave evidence against him and of calling evidence in his defence and of being heard. Accompanying the notice, photocopies of the petition, written statement, the issues, the evidence - oral and documentary were supplied. In furtherance thereof, Shri Bal Thackeray had appeared on September 27, 1988 and contended that the notice was vague since the notice did not indicate as to which portions of the speeches were believed and relied upon to reach *prima facie* conclusion. By order dated October 10, 1988, the learned Judge overruled the objections by a written order which was challenged in Special Leave Petition No. 13163 of 1988. A Bench of two Judges of this Court by order E F G H

A dated December 1, 1988 dismissed the petition holding that notice under Section 99 was not required to specify all the portions of the speeches indicated to be corrupt practices under sub-sections (3) and (3A) of Section 123. However, liberty was given to Bal Thackeray to file an application before the High Court seeking to specify those portions which according to the Court *prima facie* come within the purview of sub-sections (3) B or (3A) of Section 123. If such an application was made, the High Court was directed to dispose of it in accordance with law.

Subsequently, an application came to be made and by order dated December 16, 1988 the learned Judge held that Section 99 does not require C the Court to analyse the evidence and specify either in the notice under Section 99 or at any time prior to hearing the persons to whom notice had been issued, "portion or portions thereof in its view *prima facie* to make out the case which the noticee is called upon to answer". His position can be no better than the elected candidate. It was held that the noticee is not D entitled to be specified by the Court of the portions of the speeches which according to it *prima facie* fall within the purview of sub-section (3) or (3A) of Section 123 either in the show cause notice under Section 99 or at any time prior to so showing cause. Accordingly, the High Court directed the counsel appearing for the election petitioner "to indicate on which portions of the speeches or evidence he seeks to place reliance at the hearing of the E election petition" and directed him to furnish to the noticee or his advocate xerox copy of those speeches, marking in the margin thereof the portions that are so stressed. Accordingly, it was done. The Special Leave Petition No. 507 of 1989 filed against that order came to be dismissed by order dated January 23, 1989 of another Bench of two Judges.

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In the light of the above background, an argument was raised in the appeal that the appellant was prejudiced for non-compliance of the procedure under Section 99. The Bench had held that "it is difficult to visualise what prejudice was caused to the noticee on these facts and how there should be any non-compliance of Section 99 of the Representation of the G People Act in this situation" and it was held that, in short, the opportunity which a party to the petition had at the trial to defend allegations of corrupt practices is to be given by such a notice to that person of defending himself if he was not already a party to the petition. In other words, the noticee has to be equated with a party to the petition for this purpose and has to H be given the same opportunity which he would get if he was made a party

to the petition. This is the pragmatic test to be applied for deciding the question of compliance of requirements of Section 99. The opportunity required to be given by virtue of proviso to sub- section (1) of Section 99 is the same and not more than that available to a party to the petition to defend himself in respect of corrupt practices. It was held, therefore, that the grievance that the portion of the material which formed the record at the trial was not purposely communicated to the noticee, had no merit.

The earlier Bench of three Judges in *Manohar Joshi Case No. 2* (supra) in the same situation arising out of Election Petition No. 9 of 1990 from the same Court had held that notice should contain that portions of the petition, written statement, oral and documentary evidence which is sought to be relied upon in support of the said charge or each of the said charges and the *prima facie* findings thereon which is the minimum safeguard. In other words, a mini judgment was required to be rendered. The orders referred to on the special leave petitions in *Dr. Prabhoo's* case were deemed to have been overruling . It would thus be seen that the decision in *Manohar Joshi's* case No. 2 and *Dr. Prabhoo's* case are mutually conflicting. If this Bench was to take yet another view, it would create yet another dimension. Which of the two views is correct is the question required to be decided by a larger Bench of five Judges.

In *Dr. Prabhoo's* case it was held that consent to the speeches of the collaborators by the returned candidate should be inferred and accordingly in paragraphs 53 and 57 the Court inferred such a consent but in other cases, it was held that consent is required to be proved. There appears to be some inconsistency in the above view. In any case as to when the case is held proved has not been specifically laid as law. This requires to be authoritatively decided.

As stated earlier, when and under what circumstances, speeches of the leaders of the political party or the appeal of any other person with the consent by a candidate or his election agent to vote or refrain from voting on the ground of religion, race, caste or community or language, etc. or promotion or an attempt to promote feelings of enmity or hatred between different classes of citizens of India on the ground of religion, race, caste, community or language with the consent of the candidate or his election agent for the furtherance of the prospects of the election of the candidate or prejudicially affect the election of any candidate, constitutes corrupt

A practice under sub-sections (3) or (3A) of Section 123. Its content and scope also require to be clearly laid down authoritatively lest miscarriage of justice in interpretation of "corrupt practice" involved in every election petition would ensue. The purity of election process gets fouled and be fraught with deleterious effect in a democratic polity.

B Thus, without expressing any opinion on these questions, we are of the view that the entire case requires to be heard and decided by a larger Bench of five Judges since the decision thereon impinges upon the purity of election process and requires to be decided authoritatively.

C We, therefore, direct the Registry to place the case before our learned brother, the Chief Justice for constituting a larger Bench of five Judges, and, if possible, at an early date so that all the questions arising in the present appeal could be decided authoritatively and expeditiously.

Thus, this reference order of in the above terms.

D K.K.T. Still pending.