Manohar Joshi vs Nitin Bhaurao Patil & Anr on 11 December, 1995

Equivalent citations: 1996 AIR 796, 1996 SCC (1) 169, AIR 1996 SUPREME COURT 796, 1996 AIR SCW 145, (1995) 8 JT 646 (SC), (1996) 1 ALLMR 256 (SC), 1996 (1) ALL MR 256, 1996 (1) SCC 169, 1995 (8) JT 646, (1996) 1 SCJ 359

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Bench: Jagdish Saran Verma, N.P Singh, K Venkataswami

PETITIONER:
MANOHAR JOSHI

Vs.

RESPONDENT:
NITIN BHAURAO PATIL & ANR.

DATE OF JUDGMENT11/12/1995

BENCH:
VERMA, JAGDISH SARAN (J)
BENCH:
VERMA, JAGDISH SARAN (J)
SINGH N.P. (J)
VENKATASWAMI K. (J)

CITATION:
1996 AIR 796 1996 SCC (1) 169
JT 1995 (8) 646 1995 SCALE (7)30

ACT:

HEADNOTE:

JUDGMENT:

JUDGMENT J.S. VERMA, J. :

This is an appeal under Section 116A of the Representation of the People Act, 1951

(for short "the R.P. Act") against the judgment dated 26.4.1993 by S.N. Variava, J. of the Bombay High Court in Election Petition No. 24 of 1990 whereby the election of the appellant Manohar Joshi to the Maharashtra Legislative Assembly from 32, Dadar Constituency of Greater Bombay held on 27.2.1990 has been declared to be void on the ground under Section 100(1)(b) of the R.P. Act.

Manohar Joshi was the candidate of the BJP-Shiv Sena alliance at that election while the original election petitioner Bhaurao Patil (now dead), was the candidate of the Congress (I) Party. Manohar Joshi secured the highest number of votes i.e. 47,737, while Bhaurao Patil secured 24,354 votes. Accordingly, Manohar Joshi was declared duly elected on 1.3.1990.

Admittedly, the last date for filing the election petition according to the limitation prescribed in sub- section (1) of Section 81 of the R.P. Act was 14.4.1990 but the election petition was actually presented in the Bombay High Court on 16.4.1990 was a Saturday on which date the High Court as well as its office was closed on account of a public holiday and 15.4.1990 was Sunday on which date also the High Court as well as its office was closed and, therefore, the election petition could not have been presented on either of these two dates. The first question which arises, relates to compliance of which renders the election petition liable for dismissal under Section 86 of the R.P. Act.

The election petition alleged the commission of corrupt practices under sub-sections (3) and (3A) of Section 123 of the R.P. Act and sought declaration of the election of Manohar Joshi to be void on the ground under Section 100(1)(b) of the R.P. Act. The corrupt practices alleged were, in substance, speeches on 24.2.1990 at Shivaji Park by the returned candidate Manohar Joshi and leaders of the BJP- Shiv Sena alliance,namely, bal Thackeray, Chhagan Bhujbal and Pramod Nawalkar; and some audio and video cassettes played during the election campaign alleged to contain material constituting these corrupt practices. Any further reference to the audio cassettes is unnecessary since none was either produced or relied on at the trial. The petition was supported only on the ground of the said speeches and video casettes. Further details of the same would be given later at the appropriate stage.

The High Court rejected the contention that the election petition was time barred and, therefore, liable to be dismissed under Section 86 of the R.P.Act. The High Court has held that the corrupt practices alleged have been proved. Consequently, the election petition has been allowed and the election of the returned candidate Manohar Joshi has been declared to be void on the ground under Section 100(1)(b) of the R.P. Act. Hence this appeal.

It would be appropriate to first deal with the contention of Shri Ram Jethmalani relating to non-compliance of Section 81 of the R.P. Act which, if correct, renders the election petition liable to the dismissed under Section 86 thereof. The arguments of

Shri Jethmalani in this respect have to be considered with reference to Sections 81, 83 and 86(1) which are as under :-

"81. Presentation of petitions.- (1) An election petition calling in question any election may be presented on one or more of the grounds specified in [sub- section (1)] of section 100 and section 101 to the [High Court] by any candidate at such election or any elector [within forty-five days from, but not earlier than, the date of election of the returned candidate, or if there are more than one returned candidate at the election and the dates of their election are different, the later of those two dates.] Explanation.- In this sub-section, "elector" means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.

#[xx xx xx ##[(3) Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition ### and every such copy shall be attested by the petitioner under his own signature to be a true coy of the petition.]

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*Sub. by Act 27 of 1956, s.44, for "sub- sections (1) and (2)".

**Subs. by Act 47 of 1966, s.39, for "Election commission" (w.e.f. 14-12- 1966).

***Subs. by Act 27 of 1956, for certain words, i.e., "in such form and within such time but not earlier than the date of publication of the name or names of the returned candidate or candidates at such election under Section 67, as may be prescribed."

#Sub-section (2) omitted by Act 47 of 1966, s. 39 (w.e.f. 14-12-1966).

##Ins. by Act 40 of 1961, s. 17 (w.e.f.

20-9-1961).

###Certain words omitted by Act 47 of 1966, s. 39 (w.e.f. 14-12-1966)."

"83. Contents of petition.- (1) An election petition -

(a) shall contain a concise statement of the material facts on which the petitioner relies;

(b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date of place of the commission of each such

practice; and

(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:

Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.

(2) Any Schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition."

"86. Trial of election petitions.- (1) The High Court shall dismiss an election petition which does not comply with the provisions of section 81 or section 82 or section 117.

Explanation. - An order of the High Court dismissing an election petition under this sub-section shall be deemed to be an order made under clause (a) of section 98.

xxx xxx xxx Shri Jethmalani contended that the election petition should have been dismissed by the High Court in accordance with Section 86(1) of the R.P. Act for non-compliance of sub-section (1) of Section 81 because it was not presented within the prescribed limitation; and it ought to have been dismissed thereunder, also for non-compliance of sub-section (3) of Section 81. For the second part of the submission, Shri Jethmalani contended that sub-section (3) of Section 81 must be read along with Section 83 and, therefore, the copy of the election petition must be the copy of a petition satisfying the requirement of Section 83(1) of the R.P. Act. These are the two parts of the argument for invoking Section 86 for dismissal of the election petition at the threshold. The question, therefore, is: Whether there has been non- compliance of any part of Section 81 to attract Section 86 of the R.P. Act ? We will consider this argument at the outset.

NON-COMPLIANCE OF SUB-SECTION (1) AND/OR SUB-SECTION (3) OF

---------- SECTION 81 OF THE R.P. ACT

Re: Sub-section (1) of Section 81

In substance, the point for decision is whether the election petition filed on 16.4.1990 was presented within 45 days from the date of election of the returned candidate as required by sub-section (1) of Section 81, since the last day of limitation, so reckoned, fell on 14.4.1990. Admittedly, the High Court and its office was closed on 14.4.1990 as well as 15.4.1990 on account of which the election petition could not have been presented in the High Court on any of these two days. Incidentally,

even 13.4.1990 was a holiday when the High Court and its office was closed, but that is not of any significance since the last day of limitation was 14.4.1990. There is no controversy that the provisions of the Limitation Act, 1963 are not applicable to the election petitions required to be presented under the R.P. Act and, therefore, Section 4 of the Limitation Act is of no avail. The only question is whether Section 10 of the General Clauses Act, 1897 applies to an election petition to permit filing of the election petition on the date when the High Court opened after the holidays. If Section 10 of the General Clauses Act is applicable then the election petition presented on 16.4.1990 was within the time prescribed by sub-section (1) of Section 81 and there would be no non-compliance of that provision to attract Section 86(1) of the R.P. Act requiring dismissal of the election petition as time barred.

The submission of Shri Jethmalani is that the R.P. Act is a self-contained Code and, therefore, no provision outside the Act can be imported for the purpose of computing the limitation for presentation of an election petition. On this basis, he submitted that Section 10 of the General Clauses Act has no application. In reply, Shri Ashok Desai, learned counsel for the respondents submitted that the scheme of the R.P. Act and the legislative history of the limitation prescribed by the Act for presentation of an election petition clearly show that Section 10 of the General Clauses Act applies for computing limitation for presentation of an election petition. Shri Desai also relied on the legal maxim - `lex non kojit ad impossibillia' - which means `the law does not compel a man to do that cannot possibly perform.' Shri Desai submitted that the election petitioner was entitled as of right to present the election petition on the last day of limitation which fell on 14.4.1990, but that day and the next day being holidays when the High Court and its office was closed, the election petition presented on 16.4.1990, the first day on which the Court and its office opened after the holidays, was presented within the prescribed period of limitation. On this basis, Shri Desai submitted, there was no non- compliance of sub-section (1) of Section 81 of the R.P. Act.

Section 10 of the General Clauses Act, 1897 is as under:-

> "10. Computation of time.- (1) Where, by any Central Act or Regulation made after the commencement of this Act, any act or proceeding is directed or allowed to be done or taken in any Court or office on a certain day or within a prescribed period, then, if the Court or office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open:
>
> Provided that nothing in this section shall apply to any act or proceeding to which the Indian Limitation Act, 1877, applies. (2) This section applies also to all Central Acts and Regulations made on or after the fourteenth day of January, 1887."

A brief reference to the legislative history of the limitation prescribed by sub-section (1) of Section 81 is relevant. The limitation of 45 days from the date of election of the returned candidate for the presentation of an election petition, has been prescribed in sub-section (1) of Section 81 itself by an amendment by substitution of certain words by Act 27 of 1956. Prior to it, the period of limitation was required to be prescribed by the Rules framed under the R.P. Act according to the words then

used in sub- section (1) of Section 81. Rule 119 of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951 (for short "1951 Rules"), prescribed that period. The 1951 Rules also contained Rule 2(6) which expressly provided for the application of the General Clauses Act to the provisions in the Rules.

A similar question relating to applicability of Section 10 of the General Clauses Act arose when the limitation was prescribed by the Rules as required by the then existing sub-section (1) of Section 81 in, H.H. Raja Harinder Singh vs. S. Karnail Singh, 1957 SCR 208. It was held by this Court that Section 10 of the General Clauses Act is applicable to the presentation of election petitions. Thereafter, the same view has been taken in Hukumdev Narain Yadav vs. Lalit Narain Mishra, 1974 (3) SCR 31; Hari Shankar Tripathi vs. Shiv Narayana Rao vs. M. Budda Prasad and Others, 1994 Suppl. (1) SCC 449 = 1991 (1) SCJ 281. The later decisions were in relation to election petitions filed after amendment of Section 81(1) by Act 27 of 1956 prescribing the limitation in this Section itself. Shri Jethmalani tried to distinguish those decisions on the ground that the earlier decision in H.H. Raja Harinder Singh vs. S. Karnail Singh, 1957 SCR 208 was followed without noticing the legislative change by amendment of sub-section (1) of Section 81. In view of the fact that this point was not raised in the manner it has been done by Shri Jethmalani before us, it is appropriate that we consider the merit of this submission.

It is settled by the decision of this Court in Ramlal, Motilal and Chhotelal vs. Rewa Coalfields Ltd., 1962 (2) SCR 762 at page 767 that the litigant has a right to avail limitation upto the last day and his only obligation is to explain his inability to present the suit/petition on the last day of limitation and each day thereafter till it is actually presented. This being the basic premise, it cannot be doubted that the election petitioner in the present case was entitled to avail the entire limitation of 45 days upto the last day, i.e., 14.4.`990 and he was required to explain the inability of not filing it only on 14.4.1990 and 15.4.1990 since the petition was actually presented in the High Court on 16.4.1990. If Section 10 of the General Clauses Act applies, the explanation is obvious and the election petition must be treated to have been presented within time.

The question now is : Whether the applicability of Section 10 of the General Clauses Act to the presentation of election petitions under the R.P. Act is excluded ? No doubt the R.P. Act is a self-contained Code even for the purpose of the limitation prescribed therein. This, however, does not answer the question. It has to be seen whether the context excludes the applicability of Section 10 of the General Clauses Act which is in the part therein relating to the General Rules of Construction of all Central Acts. The legislative history of prescribing limitation for presentation of election petitions in accordance with sub- section (1) or Section 81 is also significant for a proper appreciation of the context. Admittedly, Section 10 of the General Clauses Act applied when by virtue of the requirement in the then existing sub-section (1) of Section 81, the period of limitation was prescribed by Rules framed under the R.P. Act, in Rule 119 of the 1951 Rules. This was expressly provided by Rule 2(6) of the 1951 Rules. There is nothing to indicate that providing the period of limitation in sub-section (1) of Section 81 itself by substitution of certain words by Act 27 of 1956 instead of prescribing the limitation by Rules, was with a view to exclude the applicability of Section 10 of the General Clauses Act. The change appears to have been made to provide for a fixed period in the Act itself instead of leaving that exercise to be performed by the rule making authority. An

express provision in Rule 2(6) of the 1951 Rules was required since the General Clauses Act ipso facto would not apply to Rules framed under the Central Act, even though it would to the Act itself. The context supports the applicability of Section 10 of the General Clauses Act instead of indicating its exclusion for the purpose of computing the limitation prescribed in sub-section (1) of Section 81 for presentation of election petition.

In view of the basic premise that the election petitioner is entitled to avail the entire limitation of 45 days for presentation of the election petition as indicated by Ramlal (supra), if the contrary view is taken, it would require the election petitioner to perform an impossible task in a case like the present, to present the election petition on the last day of limitation on which date the High Court as well as its office is closed. It is the underlying principle of this legal maxim which suggests the informed decision on this point, leading to the only conclusion that Section 10 of the General Clauses Act applies in the computation of the limitation prescribed by sub-section (1) of Section 81 of the R.P. Act for presentation of an election petition. So computed, there is no dispute that the election petition presented in the present case on 16.4.1990 was within limitation and there was no non-compliance of sub-section (1) of Section 81 of the R.P. Act.

We have reached the above conclusion independent of the above decisions of this Court rendered on petitions presented subsequent to the amendment of sub-section (1) of Section 81. It may straightaway be said that in all these cases applicability of Section 10 of the General Clauses Act was either not doubted or was taken for granted. This is how the position has been understood for all these years and no case taking the contrary view has been cited at the Bar. This settled position is in conformity with the view we have taken on this point. There is no basis is law to take a different view.

Re: Sub-section (3) of Section 81

Sub-section (3) of Section 81 requires `every election petition to be accompanied by as many copy thereof' as there are respondents, obviously for the purpose of a copy of the election petition being served upon each respondent along with the notice of the election petition. The submission of Shri Jethmalani is that the election petition and, therefore, its accompanying copy in accordance with Section 81(3) should satisfy the requirement of sub-section (1) of Section 83 as to the contents of the petition. He argues that if the contents of the election petition which has been filed and the copy accompanying it do not satisfy the requirement of Section 83(1), there is non-compliance of Section 81(3) attracting Section 86 for dismissal of the election petition. The argument is that the defect in such a case is in the accompanying copy of the election petition which is dificient in its contents as required by Section 83(1). For this reason, he submits, it results in non- compliance of Section 81(3) which attracts Section 86 of the R.P. Act.

In the present case, there is reference in paras 32 and 33 of the election petition to certain video cassettes, the contents of which are deemed to be incorporated by reference in the election petition, and since the video cassettes or a transcript of its contents was not filed along with the election

petition and was not supplied with the copy of the election petition to the respondent (returned candidate), it is argued, that it has resulted in non-compliance of Section 81(3) which attracts Section 86. No further reference to the audio cassettes is necessary since the audio cassettes were not produced even at the trial and were not relied on by the election petitioner for proof of the corrupt practice. These video cassettes were later produced at the trial but the subsequent production of the video cassettes at the trial, it is urged, does not cure the defect of non-compliance of Section 81(3). In reply, Shri Ashok Desai submitted that the video cassettes did not form part of the election petition as the contents thereof are not incorporated by reference in the election petition and, therefore, non-production of the video cassettes or their transcript with the election petition and failure to annex the same to the copy of the election petition served on the returned candidate did not amount to non-compliance of Section 81(3). Shri Desai submitted that Section 81(3) merely requires the copy to conform with the election petition as presented in the court and not an election petition as required to be drafted according to Section 83(1) of the R.P. Act. He further submitted that any defect or deficiency in the contents of the election petition found with reference to Section 83(1) of the R.P. Act may have any other consequence requiring the court to act under Order 7 Rule 11 C.P.C. or order 6 Rule 16 C.P.C., but there is no non-compliance of Section 81(3) if the copy accompanying the election petition which is served on the respondent is identical with the election petition as it is actually presented in the court. In short, Shri Desai submitted that non-compliance of Section 83(1) of the R.P. Act is not visited with the consequence of dismissal of the election petition at the threshold under Section 86 and, therefore, the non-compliance of Section 81 which attracts Section 86 has to be seen without reference to Section 83 of the R.P. Act. Both sides have placed reliance on the same set of decisions to support the rival contentions.

There is no dispute that the election petition as presented in the court, was accompanied by as many copies thereof as there were respondents in the election petition; and the copy of the election petition served on the returned candidate with the notice of the election petition was identical with the election petition as it was presented in the court. The requirement of the plain language of Section 81(3) was, therefore, fully met. The object of the provision is clearly to ensure that each respondent to the election petition gets an identical copy of the election petition as presented in the court to acquaint the respondent with the actual and full contents of the election petition as it is presented in the court. On the basis of the idential copy the respondent can prepare his defence and also take the plea of deficiency, if any, in the contents of the election petition with reference to Section 83 of the R.P. Act, in order to apply in the court for action being taken under order 7 Rule 11 or Order 6 Rule 16, C.P.C., as the case may be. These provisions are attracted only after the election petition survives the liability for dismissal at the threshold under Section 86 of the R.P. Act.

Section 86 empowers the High Court to dismiss an election petition at the threshold if it does not comply with the provisions of Section 81 or Section 82 or Section 117 of the Act, all of which are patent defects evident on a bare examination of the election petition as presented. Sub- section (1) of Section 81 requires the checking of limitation with reference to the admitted facts and sub- section (3) thereof requires only a comparison of the copy accompanying the election petition with the election petition itself, as presented. Section 82 requires verification of the required parties to the petition with reference to the relief claimed in the election petition. Section 117 requires verification of the deposit of security in the High Court in accordance with rules of the High Court. Thus, the

compliance of Section 81, 82 and 117 is to be seen with reference to the evident facts found in the election petition and the documents filed along with it at the time of its presentation. This is a ministerial act. There is no scope for any further inquiry for the purpose of Section 86 to ascertain the deficiency, if any, in the election petition found with reference to the requirements of Section 83 of the R.P. Act which is a judicial function. For this reason, the non-compliance of Section 83, is not specified as a ground for dismissal of the election petition under Section 86.

Acceptance of the argument of Shri Jethmalani would amount to reading into Section 86 an additional ground for dismissal of the election petition under Section 86 for non- compliance of Section 83. There is no occasion to do so, particularly when Section 86 being in the nature of a penal provision, has to be construed strictly confined to its plain language.

We may now refer to the decisions of this Court on which reliance is placed by both sides to support the rival contention on this point. In Sahodrabai Rai vs. Ram Singh Aharwar, 1968 (3) SCR 13, a translation in English of the pamphlet annexed to the election petition was incorporated in the body of the election petition and it was stated in the petition that it formed part of the petition. Along with the copy of the election petition which contained the entire transcript in English of the pamphlet, a copy of the pamphlet had not been annexed. The respondent raised the objection that the copy of the election petition served on him was not a copy of the election petition presented in the High Court and, therefore, the election petition was liable to be dismissed under Section 86 of the R.P. Act. It was held by this Court that the pamphlet which was filed as an annexure to the election petition must be treated as a document filed with the election petition and not a part of the election petition in so far as the everments are concerned. Obviously, this view was taken because the contents of the pamphlet were incorporated in the body of the election petition of which a copy was duly served on the respondent. Accordingly, it was held that there was no non- compliance of Section 81(3) and the petition was not liable to be dismissed under Section 86 of the R.P. Act. In A. Madan Mohan vs. Kalavakunta Chandrasekhara, 1984 (2) SCC 288, the earlier decision in Sahodrabai Rai (supra) was followed. It was held that failure to furnish copy of schedules and documents which did not form an integral part of the election petition was not fatal to the petition and it was not liable to be dismissed under Section 86 of the R.P. Act. An earlier decision in M. Karunanidhi etc. etc. vs. Dr. H.V. Hande and others etc. etc., 1983 (2) SCC 473 was distinguished and it was pointed out that M. Karunanidhi (supra) did not depart from the ratio laid down in Sahodrabai Rai (supra). Para 15 of the decision in A. Madan Mohan (supra) is as under:-

> "This decision in no way departs from the ratio laid down in Sahodrabai case. The aforesaid case, however, rested on the ground that the document (pamphlet) was expressly referred to in the election petition and thus became an integral part of the same and ought to have been served on the respondent. It is, therefore, manifest that the facts of the case cited above are clearly distinguishable from the facts of the present case. Furthermore, the decision in M. Karunanidhi case has noticed the previous decision and has fully endorsed the same."

(at page 292) This decision by a 3-Judge Bench also indicated that this stringent provision must be construed literally and strictly. Para 13 of the decision is as under:

> "It is a well settled principle of interpretation of statute that wherever a statute contains stringent provisions they must be literally and strictly construed so as to promote the object of the Act. As extracted above, this Court clearly held that if the arguments of the appellant (in that case) were to be accepted, it would be stretching and straining the language of Section 81 and 82 and we are in complete agreement with the view taken by this Court which has decided the issue once for all."

(at page 291) Another decision referred is U.S. Sasidharan vs. K. Karunakaran and Another, 1989 (4) SCC 482. That was a case in which a document was incorporated in the election petition by reference and was filed with the election petition in a sealed over but a copy was not supplied to the returned candidate along with a copy of the election petition. In such a situation, it was held to be non- compliance of Section 81(3) rendering the election petition liable for dismissal under Section 86(1) of the R.P. Act. This conclusion was reached on the view that non-supply of copy of the document with a copy of the election petition was a fatal defect because the document was filed in the High Court with the election petition and it formed an integral part of the election petition. This decision also indicates the distinction between a document forming an integral part of the election petition and being produced merely as evidence of an averment made in the election petition.

The distinction brought out in the above decisions is, that in a case where the document is incorporated by reference in the election petition without reproducing its contents in the body of the election petition, it forms an integral part of the petition and if a copy of that document is not furnished to the respondent with a copy of the election petition, the defect is fatal attracting dismissal of the election petition under Section 86(1) of the R.P. Act. On the other hand, when the contents of the document are fully incorporated in the body of the election petition and the document also is filed with the election petition, not furnishing a copy of the document with a copy of the election petition in which the contents of the document are already incorporated, does not amount to non-compliance of Section 81(3) to attract Section 86(1) of the R.P. Act. In other words, in the former case the document filed with the election petition is an integral part of the election petition being incorporated by reference in the election petition and without a copy of the document, the copy is an incomplete copy of the election petition and, therefore, there is non-compliance of Section 81(3). In the other situation, the document annexed to the petition is mere evidence of the averment in the election petition which incorporates fully the contents of the document in the body of the election petition and, therefore, non-supply of a copy of the document is mere non-supply of a document which is evidence of the everments in the election petition and, therefore, there is no non-compliance of Section 81(3). In U.S. Sasidharan (supra), this distinction is clearly brought out as under:-

> "..... The material facts or particulars relating to any corrupt practice may be contained in a document and the election petitioner, without pleading the material facts or particulars of corrupt practice, may refer to the document. When such a reference is made in the election petition, a copy of the document must be supplied inasmuch as by making a reference to the document and without pleading its contents in the election petition, the document becomes incorporated in the election petition by reference. In other words, it forms an integral part of the election petition.

> Section 81(3) provides for giving a true copy of the election petition. When a document forms an integral part of the election petition and a copy of such document is not furnished to the respondent along with a copy of the election petition, the copy of the election petition will not be a true copy within the meaning of Section 81(3) and, as such, the court has to dismiss the election petition under Section 86(1) for non-compliance with Section 81(3)."
>
> "On the other hand, if the contents of the document in question are pleaded in the election petition, the document does not form an integral part of the election petition. In such a case, a copy of the document need not be served on the respondent and that will not be non-compliance with the provision of Section 81(3). The document may be relied upon as an evidence in the proceedings. In other words, when the document does not form an integral part of the election petition, but has been either referred to in the petition or filed in the proceedings as evidence of any fact, a copy of such a document need not be served on the respondent along with a copy of the election petition."

(paras 15 and 16 at page 489) It may be mentioned that in all the above decisions cited at the Bar, the document in question had been filed in the court along with the election petition, but a copy of that document was not supplied to the respondent with the copy of the election petition. In those cases wherein the annexed document was treated to be incorporated by reference in the election petition forming an integral part of the election petition, non-supply of a copy of the document was held to be fatal warranting dismissal of the election petition under Section 86(1) for non-compliance of Section 81(3). In the other cases, the document was filed with the election petition, but the contents thereof were also incorporated in the body of the election petition, a copy of which had been supplied to the respondent even though copy of that document was not furnished in addition. In those cases, non-supply of a copy of the document was held not to be non-compliance of Section 81(3) because the document annexed to the election petition was treated as evidence of the averments contained in the body of the election petition, a copy of which had been furnished to the respondent. This is the gist of these decisions which also indicates that the question has to be answered with reference to the kind of use made of the document annexed to the petition, whether as an integral part of the election petition or merely as evidence of the pleadings contained in the body of the election petition.

In the present case, the video cassettes, non-supply of a copy of transcript of which is urged by Shri Jethmalani to be a ground for non-compliance of Section 81(3), were not even filed in the High Court with the election petition in the High Court. This is, therefore, not a case of non-supply of a copy of a document which was filed along with the election petition. What was supplied to the returned candidate in the present case, was a true copy of the election petition as it was presented in the court without the video cassettes of which mere mention was made without incorporating its contents by reference of enumerating it in the election petition. It is not the case of the election petitioner that the full contents of the video cassettes or their transcripts are incorporated by reference in the election petition in order to make the video cassettes an integral part of the election petition, inasmuch as no video cassette was filed along with the election petition as it was presented

in the High Court. Reliance is placed by the election petitioner on the video cassettes produced later during the trial as only evidence of the pleading in paras 32 and 33 of the election petition. It is, therefore, clear that the contents of the video cassettes except to the extent pleaded in paras 32 and 33 of the election petition, cannot be treated to be incorporated by reference in the election petition as a part of the pleadings and its use is sought to be made by the election petitioner only as evidence of the averments contained in paras 32 and 33 of the election petition. Admittedly, a true copy of the election petition as presented in the High Court was furnished to the returned candidate along with the notice of the election petition. There was thus no non-compliance of sub-section (3) of Section 81 of the R.P. Act. The election petition was, therefore, not liable to be dismissed under Section 86(1) even on the ground of non-compliance of section 81(3) of the R.P. Act.

26 The contention of Shri Jethmalani that the entire election petition is liable to be dismissed under Section 86(1) of the R.P. Act for non-compliance of subs-section (1) and/or sub-section (3) of Section 81 is, therefore, rejected.

Non-compliance of Section 83 (1) of the R.P. Act - its

---------- effect.

The next question now is : Whether the contents of the election petition are as required by Section 83 of the Act or there is any deficiency therein to attract Order 7 Rule 11 or Order 6 Rule 16, C.P.C. ? This question arises from the alternative submission of Shri Jethmalani who contended that the pleading of corrupt practice with reference to the use of video cassettes is deficient and is, therefore, liable to be struck out under Order 6 Rule 16, C.P.C. He submitted that this would leave for consideration only the speeches of Manohar Joshi, Bal Thackeray, Pramod Nawalkar and Chhagan Bhujbal on 24.2.1990 as the only basis for the charge of the corrupt practice under sub-section (3) and (3A) of Section 123 for consideration in the election petition. He urged that there is no pleading of any part of the speech of Chhagan Bhujbal in the election petition and, therefore, reference to his speech is innocuous. For the speeches of Manohar Joshi, Bal Thackeray and Pramod Nawalkar, he urged that the specific pleading contained in the body of the election petition alone requires consideration, excluding all other material brought on record during the trial which is an impermissible addition to the record on account of a serious mistrial resulting from the unusual procedure adopted by the learned trial Judge in the High Court. Shri Jethmalani referred copiously to the evidence to support his submission that the learned trial Judge himself directed a witness to search for certain documents and produce them in addition to extensively cross- examining that witness himself to bring on record a log of material which is wholly irrelevant and inadmissible. In sort, his submission is that on the basis of the only pleading contained in the body of the election petition and the admissible and relevant evidence alone, no corrupt practice under sub-section (3) or sub-section (3A) of Section 123 is made out.

Some other questions arising out of the remaining arguments of Shri Jethmalani and reply of Shri Ashok Desai which are referred later, have to be considered with reference to the pleadings of the

parties. It is, therefore, appropriate at this stage to quote the relevant pleadings in the election petition and the written statement of the returned candidate.

We must observe that the pleadings of the parties are frivolous and prolix of which only certain portions were relied at the hearing of the appeal by the learned counsel for the parties and, therefore, reference only to the relevant partitions of the pleadings is necessary. We may add that the failure to exclude from consideration the pleading which is prolix and irrelevant, has led to the reception of considerable evidence which too is irrelevant and inadmissible resulting in needless increase in the bulk of the record of the trial court and an excursion by the High Court into an irrelevant area. There has been a failure to invoke and apply the provisions in the Code of Civil Procedure at the pretrial stage which has led to an improper frame of the issues resulting in lack of focus on the real points in controversy alone confined to the actual pleadings.

According to Shri Ashok Desai, learned counsel for the respondents, the relevant pleadings relating to the allegation of corrupt practices pleaded in the election petition are in paras 2, 5 (o), 7, 8, 16, 17, 18, 30, 31, 32, 33 and the first sentence of para 35 as well as pars 59 and 60 of the written statement. According to Shri Jethmalani, learned counsel for the appellant, the relevant pleadings are only in paras 30, 31, 32, and 33 of the election petition. At any rate, nothing more has to be seen in the election petition for this purpose in addition to the portions pointed out by Shri Desai. These portions of the election petition and the written statement are as under:

> From Election Petition No.24/1990
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> ---------- (as typed in paper book) "(2) The Petitioner says that the petitioner had contested the general election to the Maharashtra Legislative Assembly held on 27/2/1990 (hereinafter referred to as "the said election') as a candidate of Indian National Congress (Congress-I) with the election symbol of "Hand". The Respondent was the candidate of Shiv Sena Party with the election symbol of "Bow & Arrow" put by the alliance of two parties viz. Shiv Sena and Bhartiya Janata Party (BJP). The other candidates were either independent candidates or belonging to other political parties like Janata Dal, etc."
>
> "5. The Petitioner states that before setting out the nature of corrupt practices committed by the first respondent, it is necessary to give certain facts which have transpired in India over the last one decade, which are as under:
>
> xxx xxx xxx
>
> (o) The petitioner states that all the aforesaid facts show that the said two parties, viz; BJP and Shiv Sena have systematically exploited various unfortunate disputes set out hereinabove so as to seek votes during the parliamentary election and the election in question in the name of `Hindutva' i.e. Hindu religion."

"7. The petitioner states that accepting a candidature in the election of the said alliance meant that the said particular candidate had accepted the basic concept and plank on which the said two parties were jointly contesting the elections for the Assembly. It further meant that the candidate accepted Bal Thackeray, Pramod Mahajan, Kirti Somaiya as their leaders and consented to the said leaders making an appeal to vote for the candidates of the said alliance. It further meant that the philosophy and ideology of the leaders of the alliance, and particularly Bal Thackeray, such as (a) Hindus are and Hindu religion is in danger, (b) that only the alliance can protect Hindus and Hindus religion, (c) that the Congress-I and Janata Dal have failed to protect, and will not protect Hindus and Hindu religion and their candidates are unfit to be elected, (d) that Hindus have suffered and will continue to suffer indignity, discrimination and unequal treatment, (e) that the problems in states like Kashmir, Punjab, Assam etc. have arisen because of the pampering of the minorities, (f) that Hindus must come together and fight the attack on them and their religion and say with pride that they are Hindus, (g) that Hindus owed a duty to their religion and if necessary must give their life for it, (h) that minorities, and particularly the Muslims, were treated more favourably for their votes than Hindus.

8. The petitioner states that the respondent being a candidate of the said alliance, has accepted the ideology and philosophy of the said alliance, some of which is set out hereinabove. The respondent also consented to the leaders of the said alliance such as Bal Thackeray, Pramod Mahajan, Kirit Somaiya, Gopinath Mundhe and others making appeals to the voters to vote for her. In fact, as more particularly set out hereinbelow the respondent herself has expressly made an appeal to vote for her to fight for Hinduism."

"16. The petitioner states that similarly another joint public meeting was held in the said constituency i.e. at Shivaji Park, Dadar on 24/2/1990. At the said meeting most of the candidates of the BJP-Shiv Sena alliance, including the Respondent herein, were present. The said meeting was addressed by the leaders of the said alliance. At the said meeting Bal Thackeray reiterated that the said alliance was contesting the elections sin the name of Hindu religion and to fight for Hindutva. The proceedings of the said meeting were widely reported in various dailies viz; `Mumbai Sakal', `Nava Kal', `Navshakti', `Maharashtra Times', `Navbharat Times', `Loksatta', `Sunday Observer', `The Times of India', `Indian Express' all dated 25/2/1990 and `Samma' dated 25/2/1990 and 26/2/1990. The petitioner craves leave to refer to and rely upon the said press reports as and when produced.

17. Some of the most offending statements made at the said meeting by the leaders of the said alliance are as under:-

(a) To handle the Congress-I hoodlums the Shiv Sainiks may take law in their hands and use firearms if necessary (Thackeray).

(b) To save `Hindutva' vote for BJP-sena Nominees (Pramod Mahajan, BJP- MP).

(c) Mr. Rajiv Gandhi does not know his own religion, and thus has no right to speak on Hinduism (Pramod Mahajan).

(d) The result of these elections will not only depend on the solution to the problem of food, cloth but the same will also decide whether in the state the flame of Hindutva will grow or will be extinguished. If in Maharashtra the flame of Hinduism is extinguished, then anti-national Muslims will be powerful and they will convert Hindustan into Pakistan. If the flame of Hindutva will grow then in that flame the anti-

national Muslims will be reduced to ashes (Pramod Mahajan).

(e) We must protect `Hindutva' at all costs and for that we must not allow the saffron (Bhagwa) of Shri Chhakravarthi Shivaji Maharaj to fall from our shoulders (Pramod Mahajan).

(f) Rajiv Gandhi speaking on Hindutva is like a prostitute lecturing on fidelity. The country is again heading for partition. It is, therefore, necessary that in these circumstances and to keep the flame of Hindutva aline, the alliance of BJP-Shiv Sena should be elected (Mahajan).

(g) (Referring to Rajiv Gandhi), wife Christian, mother Hindu, father a Parsee and therefore himself without any (Hindu) culture/teaching (vevarsi).

Pramod Mahajan).

18. The petitioner states that the proceedings of the said meeting were tape-recorded and taken down in shorthand by the police authorities. The petitioner craves leave to refer to and rely upon the said tape-recorded speeches and the speeches taken down in shorthand by the police authorities."

"30. The petitioner states that the respondent himself in his capacity as a candidate from the said constituency as well as a leader of the said alliance made appeals which offends the provisions of the said Act, For e.g. in the meeting held on 24.2.1990 at Shivaji Park, the respondent stated the first Hindu State will be established in Maharashtra Similarly in various other public meetings, the respondent herein made objectionable appeals. Some of the meetings were reported in newspapers. The petitioner states that such meetings were held at Khaddke Building, Dadar on 21.2.1990, Prabhadevi on 16.2.1990, at Kumbharwada on 18.2.1990, and Khed Galli on 19.2.1990. At all the said meetings, as well as meetings at other places, the other speakers who were present for e.g. Pramod Mahajan (M.P.-BJP) Dada Kondke (Marathi Actor) Jayantiben Mehta, Chandrika Kenia (MPs) made objectionable appeals to vote for the respondent.

31. In fact the speakers went on to say that on the respondent being elected and on the said alliance establishing a Hindu Government, we will give jobs to all Hindus. The petitioner craves leave to refer to and rely upon the election diaries maintained by the local police stations, the speeches recorded by the Special Branch-I on audio cassettes, video cassettes and the speeches recorded in Marathi shorthand. The petitioner also craves leave to refer to and rely upon the press reports of the said meetings.

32. The petitioner states that in addition to holding public meetings, the said alliance had also taken out video cassettes and audio cassettes. The video cassettes were titled "Challenge & Appeal "Shiv Sena" and the other called "Ajinkya". The said video cassettes and audio cassettes discloses promises, appeals, exhortations and inducements to the voters to vote for the said alliance and their candidates. The said cassettes show that the said alliance has scant respect for the religious beliefs and practices of other religions like Muslims, Christians etc. Not only the other religions are ridiculed but the followers thereof are termed as "traitors" and "betrayers". Under the guise of protecting Hindu religion/Hindutva the said cassettes attach other religions and whips up lowered instincts and animosities. The concept of secular democracy is totally eliminated. It generates powerful emotions by appealing to the Hindu voters to vote for the candidates of the alliance on a false impression given to voters that only the alliance and its candidates can protect Hindu religion. The petitioner will rely upon the visuals which have the aforesaid effect on the voters. The petitioner also craves leave to refer to and rely upon the said video cassettes as and when produced.

33. The petitioner states that the said alliance had also issued audio cassettes wherein the speeches of the leaders of the said alliance like Bal Thackeray, at various places in Maharashtra are recorded, e.g. Parbhani, Sely Aurangabad, Panvel, Girgaon, Vashi (New Bombay) etc. The said audio cassettes as well as the video cassettes were played in the said constituency, particularly at the Shakha offices, street corners after 6.30 p.m. They were regularly exhibited at or near the places of residence of some of the active workers of the said alliance in the said constituency. The exhibition and playing of the cassettes was on a large scale in the said constituency. The petitioner craves leave to refer to and rely upon the said audio cassettes as and when produced."

"35. The petitioner states that the aforesaid facts clearly prove that the respondent and his agents with his consent have indulged into corrupt practices listed under section 123 of the said Act. ....."

From Written Statement

(as typed in paper book) "59. With reference to para 32 of the Petition, it is true that the said alliance has taken two video cassettes known as "AJIMKYA" and "AVAHAN AND VAWHAN". However, it is totally false to the knowledge of the petitioner to allege that the said alliance and/or Shiv Sena party and/or I have and/or my election agent and/or any person has with my consent and/or election agent and/or any person has with my consent and/or knowledge has taken out any audio cassettes as alleged. This respondent denies that the said video cassettes disclose any promises and/or appeals and/or extortions and/or inducements which in any manner amount to corrupt practice and or any other offence under the Representation of People Act, 1951 as alleged or at all and puts the petitioner to the strict proof thereof.

This respondent denies that the said cassettes or either of them show any religious beliefs and/or practices as alleged. This Respondent categorically denies that the said cassettes or either of them show any scant respect for Muslims and/or Christian and/or any other religion as alleged or at all and puts the petitioner to the strict proof thereof. This Respondent categorically denies that any religion has been ridiculed and/or followers thereof are termed as "Traitors" and/or "Betrayers" as alleged or at all and puts the Petitioner to the strict proof thereof.

This Respondent denies that the said cassettes and/or either of them attach other religions and/or whips up lowered instincts and/or animosities as alleged or at all. This respondent denies that the said cassettes or either of them had appealed to the voters in the name of religion as alleged. This respondent submits that it has been held by the Supreme Court of India innumerable cases that whenever a reference is made in the election petition to a document, and the document includes an audio or video cassette, copy of such document must be supplied along with the Election Petition to the concerned Respondent inasmuch as by making a reference to the document and without pleading its contents in the Election Petition, the documents becomes incorporated in the Election Petition by reference. It becomes an integral part of the Election Petition under Section 81 and as required by Section 81 when document forms an integral part of the petition and the copy of the said document is not furnished to the Respondent alongwith the Election Petition, copy of the Election Petition will not be a true copy within the meaning of Section 81 and the same is liable to be dismissed under the provisions of Section 86.

paragraph 32 of the Petition does not give any material particulars about the allegations which are sought to be made.

It is submitted that the test to be applied where the pleadings discloses material facts and cause of action is that in absence of answer from the Respondent, would the court be in a position to give a judgment in favour of the petitioner. It is submitted that in the instant case, the answer is emphatically no and hence the entire contents of para 32 are wholly irrelevant, vexatious and abuse of this Hon'ble Court. The said pleadings, therefore, are not a complete cause of action and in breach of provisions of Sections 81, 82 and 86 of the Representation of People act and the election petition is liable to be and should be dismissed.

60. With reference to para 33 of the Petition, this Respondent categorically denies that the said alliance and/or Shiv Sena Party and/or B.J.P. Party issued any audio cassette as alleged and this

Respondent puts the petitioner to strict proof thereof. The said paragraph alleges that the said video and/or audio cassettes were played in the said constituency particularly at Shakha Office, Street, corners. The said paragraph does not state the place, date and time when the said cassettes are alleged to have been played. It further does not mention the names of the persons who are alleged to have played the said cassettes. This Respondent submits that it has been held by the Supreme Court of India that the allegations of corrupt practice are in the nature of criminal charges, and it is necessary that there should be no vagueness in the allegations so that the returned candidate may know how the case he has to meet. If the allegations are bogus and general and the particulars of corrupt practice are not stated in the petition then in such a case the petition does not disclose any cause of action and the Petition does not disclose any cause of action and the petition is liable to be and should be dismissed. Furthermore, as mentioned in the above paragraph, it has been held by the Supreme Court of India that when a reference has been made in the Petition to any document including a video or audio cassette, a copy of the said document, must be supplied along with the Election Petition because by making a reference to such a document the same forms integral part of the petition and therefore, without a copy of the said document the petition is incomplete.

This Respondent, therefore, submits that for the reasons mentioned above, the Petition is liable to be and should be dismissed with costs."

It would also be appropriate to quote the issues framed on 9.1.1992 by the High Court on these pleadings, as under -

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> "1. Whether the Respondent has committed any of the corrupt practices as defined in Section 123(3) of the Representation of Peoples Act, 1951 as alleged in the Petition ?
>
> 2. Whether the Election Agent or any other Agent of the Respondent has committed any of the corrupt practices as defined in Section 123(3) of the Representation of Peoples Act, 1951 as alleged in the Petition ?
>
> 3. Whether any other person with the consent of the Respondent or his Election Agent has committed any of the corrupt practices as defined in Section 123(3) of the Representation of Peoples Act, 1951 as alleged in the Petition ?
>
> 4. Whether the Respondent has committed any of the corrupt practices as defined in Section 123(3A) of the Representation of Peoples Act, 1951 as alleged in the Petition ?
>
> 5. Whether the Election Agent or any other Agent of the Respondent has committed any of the corrupt practices as defined in Section 123(3A) of the Representation of Peoples Act, 1951 as alleged in the Petition?
>
> 6. Whether any other person with the consent of the Respondent or his election Agent has committed any of the corrupt practices as defined in Section 123(3a) of the

Representation of Peoples Act, 1951 as alleged in the Petition ?

7. Whether the Petitioner proves that the Respondent has committed the corrupt practices as defined in Section 123(7) of the Representation of the Peoples Act 1951 as alleged in the Petition ?

8. Whether the Election of the respondent is to be set aside ?

9. Generally ?

It may be mentioned that issue No. 6(A) was framed suo motu by the High Court almost at the fag end of the trial, as under :-

"6.(A) Whether the Hindutva as used by the Shiv Sena Party during the Maharashtra Legislative Assembly Election 1990 is as alleged in the Petition or as alleged in the Written Statement ?"

After both sides closed their respective cases, on the submission of Shri Jethmalani, the following issues were also permitted to be raised by order dated 4th January, 1993:-

"1.(A) Whether the Petition is filed beyond the period of 45 days fixed by Section 81 of the Representation of Peoples Act, 1951 and requires to be peremptorily dismissed under Section 86 thereof ?

1.(B) Whether the Petition must be dismissed for its failure to plead or disclose under what part of Section 100 of the Act relief is claimed ?"

It was strenuously argued by Shri Desai that there is admission of the returned candidate in his written statement about the existence and use of the video cassettes during the election campaign in the constituency and even of its contents, the only dispute being related to the meaning of the contents. On this basis, it was urged that there is no deficiency in the pleading of the corrupt practice in the election petition and the requirement of its proof is reduced to a great extent by admission in the written statement. The High Court has taken this view which is supported and relied on by Shri Desai in his submission. The High Court's judgment proceeds on this basis. It is, therefore, necessary to examine this aspect at this stage.

Assuming the contents of the video cassette amount to the kind of speech or act which is a corrupt practice under sub-section (3) or sub-section (3A) of Section 123, in order to constitute that corrupt practice it must further be shown that the act was done during the election campaign between 8.2.1990 when the returned candidate became a `candidate' and 27.2.1990 the date of poll, and that it was the act of the candidate or his agent or any other person with his consent. Unless all these constituent parts of the corrupt practice are pleaded to constitute the cause of action raising a triable issue and are then proved by evidence, the corrupt practice cannot be held to be pleaded and proved. If the act attributed is by the display of a video cassette recorded some time earlier, the display being

between the above dates in the constituency, a mere display of the video cassette does not prove all the constituent parts of the corrupt practice, inasmuch as it must also be pleaded and proved that such display was by the candidate or his agent or any other person with his consent. Where the display of the cassette is attributed to any other person with the consent of the candidate, the liability of the candidate for commission of the corrupt practice results vicariously from the act of the other person done with the consent of the candidate. In such a case, the constituent part of the corrupt practice is the act done by any other person, not by the candidate himself or his agent for whose act the candidate's consent is assumed, with the authorisation for the act being done by any other person with the candidate's consent. This distinction between the act amounting to corrupt practice done by the candidate himself or his election agent and any other person with his consent has to be kept in view. This has relevance also for the purpose of Section 99 of the R.P. Act with reference to which one of the arguments has been addressed.

It was argued by Shri Ashok Desai that in case of the provocative and incendiary speeches given by acknowledged leaders of the political party the consent of the candidate set up by their party has to be assumed being implicit from the relationship of the candidate with the speaker through the medium of the party. On this basis, it was urged that a party candidate must be held to have consented to such speeches made by the leaders of that party and, therefore, if the speech of the leader satisfies the other requirements of the corrupt practice, the consent of the candidate which too is a constituent part of the corrupt practice, must be assumed to make out the ground under Section 100(1)(b) of the R.P. Act for declaring his election to be void. Shri Desai made a fervent emotive appeal that unless the law is so construed, a candidate of the party will get the benefit of appeal for votes on the ground of his religion on the basis that his consent has not been pleaded and proved, thereby frustrating the object of the enactment and adversely affecting the purity of elections which is of essence in a democracy. It was argued that leaders of the party must be assumed to be agents of the candidates of that party for the purpose of the ground of corrupt practice.

In our opinion, the fallacy in the argument i s that it overlooks certain other provisions of the R.P. Act. Section 100 of the R.P. Act is as under :-

> "100. Grounds for declaring election to be void. - (1) Subject to the provisions of sub-section (2) if the High Court is of opinion -
>
> (a) that on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution or this Act or the Government of Union Territories Act, 1963 (20 of 1963); or
>
> (b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent; or
>
> (c) that any nomination has been improperly rejected; or

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected -

(i) by the improper acceptance of any nomination, or

(ii) by any corrupt practice committed in the interests of the returned candidate by an agent other than his election agent, or

(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or

(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act, the High Court shall declare the election of the returned candidate to be void.

(2) If in the opinion of the High Court, a returned candidate has been quality by an agent, other than his election agent, of any corrupt practice but the High Court is satisfied -

(a) that no such corrupt practice was committed at the election by the candidate or his election agent, and every such corrupt practice was committed contrary to the orders, and without the consent, of the candidate or his election agent;

(b) Omitted.

(c) that the candidate and his election agent took all reasonable means for preventing the commission of corrupt practices at the election; and

(d) that in all other respects the election was free from any corrupt practice on the part of the candidate or any of his agents, then, the High Court may decide that the election of the returned candidate is not void."

The distinction between clause (b) of sub-section (1) and sub-clause (ii) of clause (d) therein is significant. The ground in clause (b) provides that the commission of any corrupt practice by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent by itself is sufficient to declare the election to be void. On the other hand, the commission of any corrupt practice in the interests of the returned candidate by an agent other than his election agent (without the further requirement of the ingredient of consent of a returned candidate or his election agent) is a ground for declaring the election to be void only when it is further pleaded and proved that the result of the election in so far as it concerns a returned candidate has been materially affected. This ground is further subject to sub- section (2) of Section 100 of which the onus is on the returned candidate.

It is, therefore, clear that if the corrupt practice is committed in the interests of the returned candidate by any other person, even if he be an agent other than his election agent, without the consent of the returned candidate or his election agent, the law provides for the election to be declared void under Section 100(1)(d)(ii) provided it is also pleaded and proved that the result of the election of the returned candidate has been materially affected thereby. The apprehension expressed by Shri Ashok Desai is, therefore, ill founded since the law clearly provides that the returned candidate would not get the benefit of a corrupt practice committed in his interests by anyone if the result of the election is shown to be materially affected thereby.

Apart from this aspect, it has also to be remembered that provision is made in the R.P. Act as well as in the general law to punish the makers of such incendiary speeches for the offences committed by them in the form of electoral offences e.g. under Section 125 of the R.P. Act and Sections 153A, 153B and 295A of the Indian Penal Code. Thus even if the acknowledged leaders of a party have committed any corrupt practice which results in benefit to the returned candidate then on proof of the benefit having materially affected the election result in favour of the candidate, his election would be set aside on the ground under Section 100(1)(d)(ii) of the R.P. Act. There is thus no occasion to read into the ground in Section 100(1)(b) or the definition of "corrupt practice" the implied consent of the candidate for any act done by a leader of that party to dispense with a clear pleading and proof of the candidate's or his election agent's consent as a constituent part of the corrupt practice for the ground under section 100(1)(b) of the R.P. Act.

It may also be mentioned that the proposition suggested in the argument of Shri Desai does not appear to be correct. Whenever the requirement is of consent, it must be free consent given by the giver of the consent, of his own volition. Ordinarily, it also implies a subservient role of the person to whom consent is given and the authority of the giver of the consent to control the actions of the agent. It is difficult to ascribe to an acknowledged leader of the party a role subservient to the candidate set up by that party inasmuch as the candidate is ordinarily in no position to control the actions of his leader. However, if even without giving his consent, the candidate has received benefit from the leader's act in a manner which materially affects his election favorably, on pleading and proof of such material effect on the election, the candidate's election is liable to be set aside on the ground under Section 100(1)(d)(ii) unless, as provided in sub-section (2) of Section 100 he further discharges the onus placed upon him that in spite of his opposition and taking due precautions that act had been committed for which he cannot be responsible.

Reliance in the election petition on the allegations of corrupt practices was for the ground under Section 100(1)(b) and not Section 100(1)(d)(ii); and it is under Section 100(1)(b) that the election has been declared to be void by the High Court. There was no attempt to plead and prove that the result of the election of the appellant was materially affected for these reasons to make out a ground under Section 100(1)(d)(ii) for declaring the election of the returned candidate to be void. It is in this manner the present case has to be viewed.

The pleading in paras 2, 5(o), 7 and 8 of the election petition is general relating to the party of which the appellant was a candidate, and the plank of Hindutva which in the election petition is equated with Hindu religion. We have already indicated in the connected matters - Civil Appeal No. 2835 of

1989 - Bal Thackeray vs Prabhakar K. Kunte & Ors. - (with Civil Appeal NO. 2836 of 1989), decided today, that the word "Hindutva" by itself does not invariably mean Hindu religion and it is the context and the manner of its use which is material for deciding the meaning of the word "Hindutva" in a particular text. It cannot be held that in the abstract the mere word "Hindutva" by itself invariably must mean Hindu religion. The so-called plank of the political party may at best be relevant only for appreciation of the context in which a speech was made by a leader of the political party during the election campaign, but no more for the purpose of pleading corrupt practice in the election petition against a particular candidate.

In para 16 of the election petition apart from some general pleading, there is reference to a speech at Shivaji Park, Dadar on 24.2.1990 by Bal Thackeray and some other leaders who have not been named therein except for the appellant (respondent in the election petition). In para 17, the alleged offending portions of the speeches of those leaders of the BJP-Shiv Sena alliance have been enumerated. These portions are from speeches alleged to have been made by Bal Thackeray of the Shiv Sena and Pramod Mahajan of the B.J.P. Thus para 17 contains allegation of specific portions of speeches by Bal Thackeray and Pramod Mahajan for the purpose of pleading the corrupt practice. Further reference to it would be made later. Para 18 merely says that the proceedings of the meeting were tape-recorded and taken down in shorthand by police authorities on which the petitioner would rely. Obviously this relates only to evidence of what is pleaded and does not amount to incorporation by reference of the contents of the alleged tapes and there is no enumeration of its contents in the election petition. Para 30 refers to the speech by the appellant himself and names some other speakers at different meeting. Further reference to para 30 would be made later. Para 31 is a general statement referring to speakers in general without naming any one of them and mentions the existence of certain audio and video cassettes of the speeches. Paras 32 and 33 then refer to certain video cassettes and audio cassettes giving merely the title of the video cassettes and generally their purport and say that the video cassettes were displayed in the constituency, particularly at Shaka offices, street corners after 6.30 p.m. and were regularly exhibited at or near the places of residence of some of the active workers of the said alliance in the said constituency. It is significant that neither these video cassettes and audio cassettes nor the transcript of their texts was reproduced in the election petition or annexed to the election petition so that the contents thereof were not pleaded in either of the required modes. That apart, there is nothing in the pleading to indicate the names of the persons who are alleged to have displayed the same or the dates on which they were displayed or in other words any other fact which would make the allegation clear and specific. The further requirement of consent of the returned candidate for those acts is not pleaded as required for the ground under Section 100(1)(b) of the R.P. Act and in the definition of the corrupt practices under sub-sections (3) and (3A) of Section

123. Para 35 is the only other para in the election petition which is relied on by Shri Desai in this context and it merely says that the `aforesaid facts clearly prove that the respondent (appellant in this appeal) and his agents with his consent have indulged into corrupt practice under Section 123 of the said Act.' This is a mere repetition of the statutory provision and not a pleading of any material fact.

We have no doubt that the requisite consent of the returned candidate or his election agent which is a constituent part of the corrupt practices under sub-sections (3) and (3A) of Section 123, and an ingredient of the ground under Section 100(1)(b) has nowhere been pleaded in the election petition either in connection with the allegations based on the speeches by Bal Thackeray, Pramod Mahajan and any other leader or the display of video and audio cassettes in the constituency, when this is an essential requirement for raising a triable issue of corrupt practice to bind the appellant with the consequences of such a corrupt practice and to invalidate his election. In our opinion, this alone is sufficient to ignore the entire pleading in the election petition relating to speeches by Bal Thackeray, Pramod Mahajan and any other leader as well as the display of video and audio cassettes since none of those acts is attributed to the appellant or his election agent. For this reason, it is also not necessary to consider the specific portions alleged to form parts of speeches of Bal Thackeray and Pramod Mahajan mentioned in paras 16 and 17 of the election petition. Same is the result of pleadings in paras 32 and 33 relating to the video and audio cassettes. In para 31 there is a general averment that the speakers went on to say that on the respondent (appellant in this appeal) being elected and the said alliance establishing a Hindu Government jobs would be given to all Hindus. No speaker is specifically named and what is alleged to have been said by the appellant in his speech in the meeting held on 24.2.1990 is contained only in para 30 of the election petition. Since the contents of para 31 cannot be related to the speech alleged to have been made by the appellant in that meeting, that too must be left out of consideration.

The only surviving allegation requiring consideration is in para 30 relating to the allegation made with reference to the speech made by the appellant himself. The portion in para 30 relating to the appellant (respondent in the election petition) which has to be considered is as under :-

> "The petitioner states that the respondent himself in his capacity as a candidate from the said constituency as well as a leader of the said alliance made appeals which offends the provisions of the said Act, For e.g. in the meeting held on 24.2.1990 at Shivaji Park, the respondent stated the first Hindu State will be established in Maharashtra. Similarly in various other public meetings, the respondent herein made objectionable appeals. Some of the meetings were reported in newspapers. The petitioner states that such meetings were held at Khaddke Building, dadar on 21.2.1990, Prabhadevi on 16.2.1990, at Kumbharwada on 18.2.1990, and Khed Galli on 19.2.1990. ....."

The High Court failed to appreciate that the only allegation of corrupt practice in this election petition which raised a triable issue is as indicated above and rest of the general averments deficient in requisite pleadings of all the constituent parts of the corrupt practice did not constitute a pleading of the full cause of action and, therefore, had to be ignored and struck out in accordance with Order 6, Rule 16, C.P.C. However, there being a specific allegation in para 30 of the election petition relating to the returned candidate himself based on his speech made on 24.2.1990, to that extent a triable issue had been raised and had to be decided.

It is this failure in the High Court which has led to an unnecessary protracted trial and reception of considerable irrelevant evidence which in turn has led to the errors found in the judgment. The

reason for this error appears particularly from para 32 of the judgment in which the High Court has indicated its perception of the nature of trial of the election petition as under:-

> It must be noted that this Election Petition is not based upon individual acts of Respondent or his Election Agent or any other person with his consent. This petition is based upon the above mentioned plank and/or policy decision of the Shiv Sena and B.J.P. and the campaigning by the party and the Respondent on the basis of that plank. ....."
>
> (emphasis supplied) In our opinion, it is this erroneous impression of the High Court which has led to the serious errors committed during the trial for which the parties are equally to blame inasmuch as both sides contributed to the expansion of the legitimate scope of the trial by introducing matters which have no relevance for the pleading and proof of the corrupt practices under sub-sections (3) and (3A) of Section 123 for the purpose of the ground under Section 100(1)(b) to invalidate the election, which is the true scope of this election petition.
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> Before we take up for consideration the corrupt practice attributed to the appellant himself in para 30 of the election petition based on his own speech on 24.2.1990, it would be appropriate at this stage to refer to the argument based on Section 99 of the R.P. Act. Non-compliance of Section 99 of the R.P. Act
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> Admittedly, no notice was given to Bal Thackeray, Pramod Mahajan or any other person against whom allegation was made of commission of corrupt practice in the election petition, even though the High Court has held those corrupt practices to be proved for the purpose of declaring the appellant's election to be void on the ground contained in Section 100(1)(b) of the R.P. Act. We would now indicate the effect of the combined reading of Sections 98 and 99 of the R.P. Act and the requirement of notice under Section 99 to all such persons before decision of the election petition by making an order under Section 98 of the R.P. Act.
>
> The combined effect of Sections 98 and 99 of the R.P. Act may now be seen. These provisions are as under:-
>
> "98. Decision of the High Court.- At the conclusion of the trial of an election petition the High Court shall make an order -
>
> (a) dismissing the election petition; or
> (b) declaring the election of all
>
> or any of the returned candidates to be void; or

(c) declaring the election of all or any of the returned candidates to be void and the petitioner or any other candidate to have been duly elected.

99. Other orders to be made by the High Court. - (1) At the time of making an order under section 98 the High Court shall also make an order -

(a) where any charge is made in the petition of any corrupt practice having been committed at the election, recording -

(i) a finding whether any corrupt practice has or has not been proved to have been committed at the election, and the nature of that corrupt practice; and

(ii) the names of all persons, if any, who have been proved at the trial to have been quality of any corrupt practice and the nature of that practice; and

(b) fixing the total amount of costs payable and specifying the persons by and to whom costs shall be paid:

Provided that a person who is not a party to the petition shall not be named in the order under sub-clause (ii) of clause (a) unless -

(a) he has been given notice to appear before the High Court and to show cause why he should not be so named; and

(b) if he appears in pursuance of the notice, he has been given an opportunity of cross-examining any witness who has already been examined by the High Court and has given evidence against him, of calling evidence in his defence and of being heard.

(2) In this section and in section 100, the expression "agent" has the same meaning as in section 123."

The opening words in Section 98 are "At the conclusion of the trial of an election petition the High Court shall make an order". There can be no doubt that Section 98 contemplates the making of an order thereunder in the decision of the High Court rendered `at the conclusion of the trial of an election petition'. Declaration of the election of any returned candidate to be void in accordance with clause (b) is clearly to be made in the decision of the High Court rendered at the conclusion of the trial of an election petition and not at an intermediate state. Clauses

(a), (b) and (c) in Section 98 contemplate the different kinds of orders which can be made by the High Court in its decision at the conclusion of the trial which has the effect of disposing of the election petition in the High Court. There is nothing in Section 98 to permit the High Court to decide the election petition piecemeal and to declare the election of any returned candidate to be void at an intermediate stage of the trial when any part of the trial remains to be concluded.

Sub-section (1) of Section 99 begins with the words "At the time of making an order under section 98 the High Court shall also make an order" of the kind mentioned in clauses

(a) and (b) therein. It is amply clear that the order which can be made under clauses (a) and (b) of sub-section (1) of Section 99 is required to be made `at the time of making an order under section 98'. As earlier indicated, an order under Section 98 can be made only at the conclusion of the trial. There can be no doubt that the order which can be made under sub-section (1) of Section 99 has, therefore, to be made only at the conclusion of the trial of an election petition in the decision of the High Court made by an order disposing of the election petition in one of the modes prescribed in clauses (a), (b) and (c) of Section 98. This alone is sufficient to indicate that the requirement of Section 99 is to be completed during the trial of the election petition and the final order under Section 99 has to be made in the decision of the High Court rendered under Section 98 at the conclusion of the trial of the election petition.

Clause (a) of sub-section (1) of Section 99 provides for the situation "where any charge is made in the petition of any corrupt practice having been committed at the election". In that case, it requires that at the time of making an order under Section 98, the High Court shall also make an order recording a finding whether any corrupt practice has or has not been proved to have been committed at the election and the nature of that corrupt practice; and the names of all persons, if any, who have been proved at the trial to have been quality of any corrupt practice and the nature of that corrupt practice. Clause (b) further requires the fixing of the total amount of costs payable and specifying the person by and to whom costs shall be paid. The net result is that where any charge is made in the petition of any corrupt practice having been committed at the election, the High Court shall `at the time of making an order under section 98' also make an order recording a finding whether any corrupt practice has or has not been proved to have been committed at the election and the nature of that corrupt practice; and where the charge of corrupt practice has been found proved, it must also record the names of all persons, if any, who have been proved at the trial to have been quality of any corrupt practice and the nature of that practice. thus the trial is only one at the end of which the order made by the High Court must record the names of all persons, if any, who have been proved at the trial to have been quality of the corrupt practice and the nature of that practice.

It follows that the High Court cannot make an order under Section 98 recording a finding of proof of corrupt practice against the returned candidate alone and on that basis declare the election of the returned candidate to be void and then proceed to comply with the requirement of Section 99 in the manner stated therein with a view to decide at a later stage whether any other person also is quality of that corrupt practice for the purpose of naming him then under Section 99 of the R.P. Act. It is equally clear that the High Court has no option in the matter to decide whether it will proceed under Section 99 against the other persons alleged to be quality of that corrupt practice along with the returned candidate inasmuch as the requirement of Section 99 is mandatory since the finding recorded by the High Court requires it to name all persons proved at the trial to have been quality of the corrupt practice. The expression "the names of all persons, if any, who have been proved at the trial to have been quality of any corrupt practice" in sub-clause (ii) of clause (a) of sub-section (1) of Section 99 clearly provides for such proof being required `at the trial' which means `the trial of an election petition' mentioned in Section 98, at the conclusion of which alone the order contemplated

under Section 98 can be made. There is no room for taking the view that the trial of the election petition for declaring the election of the returned candidate to be void under Section 98 can be concluded first and then the proceedings under Section 99 commenced for the purpose of deciding whether any other person is also to be named as being quality of the corrupt practice of which the returned candidate has earlier been held quality leading to his election being declared void.

The rationale is obvious. Where the returned candidate is alleged to be quality of a corrupt practice in the commission of which any other person has participated with him or the candidate is to be held vicariously liable for a corrupt practice committed by any other person with his consent, a final verdict on that question can be rendered only at the end of the trial, at one time, after the inquiry contemplated under Section 99 against the other person, after notice to him, has also been concluded. Particularly, in a case where liability is fastened on the candidate vicariously for the act of another person, unless that act is found proved against the doer of that act, the question of recording a finding on that basis against the returned candidate cannot arise. Viewed differently, if the final verdict has already been rendered against the returned candidate in such a case, the opportunity contemplated by Section 99 by an inquiry after notice to the other person is futile since the verdict has already been given. On the other hand, if the question is treated as open, a conflicting verdict after inquiry under Section 99 in favour of the notice would lead to an absurdity which could not be attributed to the legislature.

The plain language of Section 98 and 99 of the R.P. Act indicates the construction thereof made by us and this is also supported by the likely outcome of a different construction which is an absurd result and must, therefore, be rejected. The High Court has overlooked the obvious position in law in taking a different view. No notice under Section 99 was given by the High Court before making the final order under Section 98 of the R.P. Act declaring the election to be void. This is a fatal defect.

This alone is sufficient to indicate that apart from the reasons given earlier, the election of the appellant in the present case could not be declared void by making an order under Section 98 on the ground contained in Section 100(1)(b) of the R.P. Act without prior compliance of Section 99. Absence of notice under Section 99 of the R.P. Act vitiates the final order made under Section 98 by the High Court declaring the election to be void.

However, in the present case, the remaining pleadings being ignored for the reasons already given, no further question arises of the effect of non-compliance of Section 99 in respect of these other persons because the finding of corrupt practices against the appellant based on the speeches of these other persons and the video and audio cassettes has to be set aside for the reasons already given. This is yet another instance of a serious defect in the trial of this election petition by the High Court. Speech of appellant

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We would now consider the only surviving question based on the pleading in para 30 of the election petition. The specific allegation in para 30 against the appellant is that in the meeting held on 24.2.1990 at Shivaji Park, Dadar, he had stated that "the first Hindu State will be established in

Maharashtra". It is further pleaded therein that such meetings were held at Khaddke Building, Dadar on 21.2.1990, Prabhadevi on 16.2.1990, at Kumbharwada on 18.2.1990, and Khed Galli on 19.2.1990. These further facts are unnecessary in the context because the maximum impact thereof is to plead that the same statement was made by the appellant in the other meetings as well, even though such an inference does not arise by necessary implication. In our opinion, a mere statement that the first Hindu State will be established in Maharashtra is by itself not an appeal for votes on the ground of his religion but the expression, at best, of such a hope. However, despicable be such a statement, it cannot be said to amount to an appeal for votes on the ground of his religion. Assuming that the making of such a statement in the speech of the appellant at that meeting is proved, we cannot hold that it constitutes the corrupt practice either under sub-section (3) or sub-section (3A) of Section 123, even though we would express our disdain at the entertaining of such a thought or such a stance in a political leader of any shade in the country. The question is whether the corrupt practice as defined in the Act to permit negation of the electoral verdict has been made out. To this our answer is clearly in the negative.

As indicated by us, the only triable issue raised in the election petition is limited to this extent, which did not require the consumption of the considerable time, energy and expense involved in the trial of the election petition and the hearing of this appeal in this Court. However, the lack of proper perception of the limited scope of the trial and the election petition being filed and contested in the manner in which unfortunately the elections are being fought, contributed to the trial being converted into an electoral battle which misled even the High Court to commit several errors in conducting the trial. The erroneous perception of the position in law and the scope of the election petition also contributed to this end. Obviously, it was much ado about nothing when viewed in proper perspective after ignoring from consideration the copious unnecessary, frivolous or vexatious pleading in the election petition and consequently in the written statement which was liable to be struck out under Order 6, Rule 16, C.P.C.

We may refer to the decision in Jamaat-e-Islami Hind etc. vs Union of India, (1995) 1 SCC 428, wherein the requirement of valid adjudication by the Tribunal under Section 4 of the Unlawful Activities (Prevention) Act, 1967 was indicated for the purpose of confirming the declaration made by the Central Government under sub-section (1) of Section 3 that Jamaat-e-Islami hind is an unlawful association as defined in the said Act. The Tribunal's order confirming the declaration made by the Central Government was quashed on the ground that the entire material on which the declaration was based, was inadequate for the purpose, even though the Tribunal is not required to confine itself only to strict legal evidence admissible under the Evidence Act.

A 3-Judge Bench, speaking through one of us (J.S. Verma, J.), held as under:-

> "..... The only material produced by the Central Government to support the notification issued by it under Section 3(1) of the Act, apart from a resume based on certain intelligence reports, are the statements of Shri T.N. Srivastava, Joint Secretary, Ministry of Home Affairs and Shri N.C. Padhi, Joint Director, IB. Neither Shri Srivastava nor Shri Padhi has deposed to any fact on the basis of personal knowledge. Their entire version is based on official record. The resume is based on

> intelligence reports submitted by persons whose names have not been disclosed on the ground of confidentiality. In other words, no person has deposed from personal knowledge whose veracity could be tested by cross-examination. ....."

(at page 450) It is significant that the mere production of the official record including the literature of Jamaat-e-Islami Hind depicting its philosophy and aims, and the intelligence reports without examining any witness who could depose from personal knowledge to the alleged unlawful activities of the Association was held to be inadequate to support the declaration that Jamaat-e-Islami Hind is an unlawful association as defined in the said Act. It need hardly be mentioned that the requirement of proof of a corrupt practice at the trial of an election petition is higher and confined to strict legal evidence, in comparison to the material on which the tribunal can rely for its decision under Section 4 of the Unlawful Activities (Prevention) Act, 1967 to confirm the declaration by the Central Government of an association as unlawful.

The High Court misdirected itself by starting on a wrong premise in trying an allegation not in the pleading and then in admitting and relying on material which is not legal evidence for the proof of a corrupt practice. The error was aggravated by an incorrect appreciation of the legal principles and overlooking the meaning of certain terms explained in earlier decisions. The significance of the trial of a corrupt practice and the consequence of the finding thereon, appears to have been missed in the High Court.

As a result of the aforesaid discussion, the finding recorded by the High Court against the appellant that charge of corrupt practices under sub-section (3) and (3A) of Section 123 of the R.P. Act has been proved to declare his election to be void on the ground contained in Section 100(1)(b) of the R.P. Act, is contrary to law and is, therefore, set aside. The result is that no ground is made out for declaring the appellants election to be void. Accordingly, this appeal is allowed with costs resulting in dismissal of the election petition.