Anvar P.V vs P.K.Basheer & Ors on 18 September, 2014

Equivalent citations: AIR 2015 SUPREME COURT 180, 2014 AIR SCW 5695, 2014 (4) AIR KANT HCR 580, 2014 (6) AIR BOM R 511, (2015) 1 ICC 402, 2014 (10) SCC 473, (2014) 6 ALLMR 951 (SC), (2014) 10 SCALE 660, AIR 2015 SC (CIV) 198, (2014) 4 CIVILCOURTC 535, (2014) 3 GUJ LH 305, (2015) 1 KANT LJ 547, (2014) 4 KER LT 104, (2015) 2 MAH LJ 135, (2015) 1 MPLJ 507, (2014) 59 OCR 744, (2014) 4 PAT LJR 334, (2015) 129 REVDEC 112, (2014) 6 ANDHLD 203, (2014) 4 RECCIVR 504, (2014) 4 JLJR 593, (2014) 5 GAU LT 62, (2015) 111 ALL LR 811, (2015) 2 ALL RENTCAS 350, (2015) 1 ALL WC 156, 2015 (1) SCC (CRI) 24, 2015 (109) ALR SOC 51 (SC), 2015 (146) AIC (SOC) 11 (SC)

Bench: Rohinton Fali Nariman, Kurian Joseph, R. M. Lodha

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4226 OF 2012

Anvar P.V. … Appellant (s)

Versus

P.K. Basheer and others … Respondent (s)

J U D G M E N T

KURIAN, J.:

Construction by plaintiff, destruction by defendant. Construction by pleadings, proof by evidence; proof only by relevant and admissible evidence. Genuineness, veracity or reliability of the evidence is seen by the court only after the stage of relevancy and admissibility. These are some of the first principles of evidence. What is the nature and manner of admission of electronic records, is one of the principal issues arising for consideration in this appeal.

In the general election to the Kerala Legislative Assembly held on 13.04.2011, the first respondent was declared elected to 034 Eranad Legislative Assembly Constituency. He was a candidate supported by United Democratic Front. The appellant contested the election as an independent candidate, allegedly supported by the Left Democratic

Front. Sixth respondent was the chief election agent of the first respondent. There were five candidates. Appellant was second in terms of votes; others secured only marginal votes. He sought to set aside the election under Section 100(1)(b) read with Section 123(2)(ii) and (4) of The Representation of the People Act, 1951 (hereinafter referred to as 'the RP Act') and also sought for a declaration in favour of the appellant. By order dated 16.11.2011, the High Court held that the election petition to set aside the election on the ground under Section 123(2)(a)(ii) is not maintainable and that is not pursued before us either. Issues (1) and (2) were on maintainability and those were answered as preliminary, in favour of the appellant. The contested issues read as follows:

"1) xxx xxx xxx

2) xxx xxx xxx

3) Whether Annexure A was published and distributed in the constituency

on 12.4.2011 as alleged in paragraphs 4 and 5 of the election petition and if so whether Palliparamban Aboobacker was an agent of the first respondent?

4) Whether any of the statements in Annexure A publication is in relation to the personal character and conduct of the petitioner or in relation to the candidature and if so whether its alleged publication will amount to commission of corrupt practice under section 123(4) of The Representation of the People Act?

xxx xxx xxx

6) Whether the Flex Board and posters mentioned in Annexures D, E and E1

were exhibited on 13.4.2011 as part of the election campaign of the first respondent as alleged in paragraphs 6 and 7 of the election petition and if so whether the alleged exhibition of Annexures D, E and E1 will amount to commission of corrupt practice under section 123(4) of The Representation of the People Act?

7) Whether announcements mentioned in paragraph 8 of the election petition were made between 6.4.2011 and 11.4.2011, as alleged in the above paragraph, as part of the election propaganda of the first respondent and if so whether the alleged announcements mentioned in paragraph 8 will amount to commission of corrupt practice as contemplated under section 123(4) of The Representation of the People Act?

8) Whether the songs and announcements alleged in paragraph 9 of the election petition were made on 8.4.2011 as alleged, in the above paragraph, as part of the election propaganda of the first respondent and if so whether the publication of the alleged announcements and songs will amount to commission of corrupt practice under section 123(4) of The Representation of People Act?

9) Whether Mr. Mullan Sulaiman mentioned in paragraph 10 of the election petition did make a speech on 9.4.2011 as alleged in the above paragraph as part of the election propaganda of the first respondent and if so whether the alleged speech of Mr. Mullan Sulaiman amounts to commission of corrupt practice under section 123(4) of The Representation of the People Act?

10) Whether the announcements mentioned in paragraph 11 were made on 9.4.2011, as alleged in the above paragraph, as part of the election propaganda of the first respondent and if so whether the alleged announcements mentioned in paragraph 11 of the election petition amount to commission of corrupt practice under section 123(4) of The Representation of the People Act?

11) Whether the announcements mentioned in paragraph 12 of the election petition were made, as alleged in the above paragraph, as part of the election propaganda of the first respondent and if so whether the alleged announcements mentioned in paragraph 12 of the election petition amount to commission of corrupt practice under section 123(4) of The Representation of the People Act?

12) Whether the alleged announcements mentioned in paragraph 13 of the election petition were made as alleged and if so whether it amounts to commission of corrupt practice under section 123(4) of The Representation of the People Act?

13) Whether the alleged announcements mentioned in paragraph 14 of the election petition were made as alleged and if so whether it amounts to commission of corrupt practice under section 123(4) of The Representation of the People Act.

14) Whether the election of the first respondent is liable to be set aside for any of the grounds mentioned in the election petition?" By the impugned judgment dated 13.04.2012, the High Court dismissed the election petition holding that corrupt practices pleaded in the petition are not proved and, hence, the election cannot be set aside under Section 100(1)(b) of the RP Act; and thus the Appeal.

Heard Shri Vivek Chib, learned Counsel appearing for the appellant and Shri Kapil Sibal, learned Senior Counsel appearing for the first respondent.

The evidence consisted of three parts – (i) electronic records, (ii) documentary evidence other than electronic records, and (iii) oral evidence. As the major thrust in the arguments was on electronic records, we shall first deal with the same.

Electronic record produced for the inspection of the court is documentary evidence under Section 3 of The Indian Evidence Act, 1872 (hereinafter referred to as 'Evidence Act'). The Evidence Act underwent a major amendment by Act 21 of 2000 [The Information Technology Act, 2000 (hereinafter referred to as 'IT Act')]. Corresponding amendments were also introduced in The Indian Penal Code (45 of 1860), The Bankers Books Evidence Act, 1891, etc. Section 22A of the Evidence Act reads as follows:

"22A. When oral admission as to contents of electronic records are relevant.- Oral admissions as to the contents of electronic records are not relevant, unless the genuineness of the electronic record produced is in question." Section 45A of the Evidence Act reads as follows:

"45A. Opinion of Examiner of Electronic Evidence.-When in a proceeding, the court has to form an opinion on any matter relating to any information transmitted or stored in any computer resource or any other electronic or digital form, the opinion of the Examiner of Electronic Evidence referred to in section 79A of the Information Technology Act, 2000(21 of 2000)., is a relevant fact.

Explanation.--For the purposes of this section, an Examiner of Electronic Evidence shall be an expert." Section 59 under Part II of the Evidence Act dealing with proof, reads as follows:

"59. Proof of facts by oral evidence.—All facts, except the contents of documents or electronic records, may be proved by oral evidence." Section 65A reads as follows:

"65A. Special provisions as to evidence relating to electronic record: The contents of electronic records may be proved in accordance with the provisions of section 65B." Section 65B reads as follows:

"65B. Admissibility of electronic records:

(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely: -

(a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether –

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say, -

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section, -

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation: For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process." These are the provisions under the Evidence Act relevant to the issue under discussion.

In the Statement of Objects and Reasons to the IT Act, it is stated thus:

"New communication systems and digital technology have made drastic changes in the way we live. A revolution is occurring in the way people transact business." In fact, there is a revolution in the way the evidence is produced before the court. Properly guided, it makes the systems function faster and more effective. The guidance relevant to the issue before us is reflected in the statutory provisions extracted above.

Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed under Section 65B. Section 65B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the Section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub- Section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65B(2). Following are the specified conditions under Section 65B(2) of the Evidence Act:

(i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or

process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;

(ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;

(iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and

(iv) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.

Under Section 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

(a) There must be a certificate which identifies the electronic record containing the statement;

(b) The certificate must describe the manner in which the electronic record was produced;

(c) The certificate must furnish the particulars of the device involved in the production of that record;

(d) The certificate must deal with the applicable conditions mentioned under Section 65B(2) of the Evidence Act; and

(e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

Only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45A – opinion of examiner of electronic evidence.

The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65B of the Evidence Act are not complied with, as the law now stands in India.

It is relevant to note that Section 69 of the Police and Criminal Evidence Act, 1984 (PACE) dealing with evidence on computer records in the United Kingdom was repealed by Section 60 of the Youth Justice and Criminal Evidence Act, 1999. Computer evidence hence must follow the common law rule, where a presumption exists that the computer producing the evidential output was recording properly at the material time. The presumption can be rebutted if evidence to the contrary is adduced. In the United States of America, under Federal Rule of Evidence, reliability of records normally go to the weight of evidence and not to admissibility.

Proof of electronic record is a special provision introduced by the IT Act amending various provisions under the Evidence Act. The very caption of Section 65A of the Evidence Act, read with Sections 59 and 65B is sufficient to hold that the special provisions on evidence relating to electronic record shall be governed by the procedure prescribed under Section 65B of the Evidence Act. That is a complete code in itself. Being a special law, the general law under Sections 63 and 65 has to yield.

In State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru[1], a two-Judge Bench of this Court had an occasion to consider an issue on production of electronic record as evidence. While considering the printouts of the computerized records of the calls pertaining to the cellphones, it was held at Paragraph-150 as follows:

> "150. According to Section 63, secondary evidence means and includes, among other things, "copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies". Section 65 enables secondary evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable. It is not in dispute that the information contained in the call records is stored in huge servers which cannot be easily moved and produced in the court. That is what the High Court has also observed at para 276. Hence, printouts taken from the computers/servers by mechanical process and certified by a responsible official of the service-providing company can be led in evidence through a witness who can identify the signatures of the certifying officer or otherwise speak of the facts based on his personal knowledge. Irrespective of the compliance with the requirements of Section 65-B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely, Sections 63 and 65. It may be that the certificate containing the details in sub-

section (4) of Section 65-B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, Sections 63 and 65." It may be seen that it was a case where a responsible official had duly certified the document at the time of production itself. The signatures in the certificate were also identified. That is apparently in compliance with the

procedure prescribed under Section 65B of the Evidence Act. However, it was held that irrespective of the compliance with the requirements of Section 65B, which is a special provision dealing with admissibility of the electronic record, there is no bar in adducing secondary evidence, under Sections 63 and 65, of an electronic record.

The evidence relating to electronic record, as noted herein before, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Generalia specialibus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65A and 65B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this court in Navjot Sandhu case (supra), does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.

The appellant admittedly has not produced any certificate in terms of Section 65B in respect of the CDs, Exhibits-P4, P8, P9, P10, P12, P13, P15, P20 and P22. Therefore, the same cannot be admitted in evidence. Thus, the whole case set up regarding the corrupt practice using songs, announcements and speeches fall to the ground.

The situation would have been different had the appellant adduced primary evidence, by making available in evidence, the CDs used for announcement and songs. Had those CDs used for objectionable songs or announcements been duly got seized through the police or Election Commission and had the same been used as primary evidence, the High Court could have played the same in court to see whether the allegations were true. That is not the situation in this case. The speeches, songs and announcements were recorded using other instruments and by feeding them into a computer, CDs were made therefrom which were produced in court, without due certification. Those CDs cannot be admitted in evidence since the mandatory requirements of Section 65B of the Evidence Act are not satisfied. It is clarified that notwithstanding what we have stated herein in the preceding paragraphs on the secondary evidence on electronic record with reference to Section 59, 65A and 65B of the Evidence Act, if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence, without compliance of the conditions in Section 65B of the Evidence Act.

Now, we shall deal with the ground on publication of Exhibit-P1-leaflet which is also referred to as Annexure-A. To quote relevant portion of Paragraph-4 of the election petition:

> "4. On the 12th of April, 2011, the day previous to the election, one Palliparamban Aboobacker, S/o Ahamedkutty, Palliparamban House, Kizhakkechathalloor, Post Chathalloor, who was a member of the Constituency Committee of the UDF and the

Convenor of Kizhakkechathalloor Ward Committee of the United Democratic Front, the candidate of which was the first respondent, falling within the Eranad Mandalam Election Committee and was thereby the agent of the first respondent, actively involved in the election propaganda of the first respondent with the consent and knowledge of the first respondent, had got printed in the District Panchayat Press, Kondotty, at least twenty five thousand copies of a leaflet with the heading "PP Manafinte Rakthasakshidhinam – Nam Marakkathirikkuka April 13" (Martyr Day of P P Manaf - let us not forget April 13) and in the leaflet there is a specific reference to the petitioner who is described as the son of the then President of the Edavanna Panchayat Shri P V Shaukat Ali and the allegation is that he gave leadership to the murder of Manaf in Cinema style. The name of the petitioner is specifically mentioned in one part of the leaflet which had been highlighted with a black circle around it specifically making the allegation that it was the petitioner under whose leadership the murder was committed. Similarly in another part of the leaflet the name of the petitioner is specifically mentioned with a black border in square. The leaflet comprises various excerpts from newspaper reports of the year 1995 highlighting the comments in big letters, which are the deliberate contribution of the publishers. The excerpts of various newspaper reports was so printed in the leaflet to expose the petitioner as a murderer, by intentionally concealing the fact that petitioner was honourably acquitted by the Honourable Court. ..." The allegation is that at least 25,000 copies of Exhibit-P1-leaflet were printed and published with the consent of the first respondent. Exhibit-P1, it is submitted, contains a false statement regarding involvement of the appellant in the murder of one Manaf on 13.04.1995 and the same was made to prejudice the prospects of the appellant's election. Evidently, Exhibit-P1 was got printed through Haseeb by PW-4-Palliparamban Aboobakar and published by Kudumba Souhrida Samithi (association of the friends of the families), though PW-4 denied the same. The same was printed at District Panchayat Press, Kondotty with the assistance of one V. Hamza.

At Paragraph-4 of the election petition, it is further averred as follows:

"4. ... Since both the said Aboobakar and V. Hamza are agents of the first respondent, who had actively participated in the election campaign, the printing, publication and distribution of annexure-A was made with the consent and knowledge of the first respondent as it is gathered from Shri P V Mustafa a worker of the petitioner that the expenses for printing have been shown in the electoral return of the first respondent. ..." At Paragraph-18 of the election petition, it is stated thus:

"18. ... As far as the printing and publication of annexure-A leaflet is concerned, the same was not only done with the knowledge and connivance of the 1st respondent, it was done with the assistance of the his official account agent Sri V. Hamza, who happened to be the General Manager of the Press in which the said leaflets were printed. ..." PW-4-Palliparamban Aboobakar has completely denied the allegations. Strangely, Shri Mustafa and Shri Hamza, referred to above, have not been examined.

Therefore, evidence on printing of the leaflets is of PW-4- Aboobakar and PW-42. According to PW-4, he had not seen Exhibit-P1-leaflet before the date of his examination. He also denied that he was a member of the election committee. According to PW-42, who was examined to prove the printing of Exhibit-P1, the said Hamza was never the Manager of the Press. Exhibit-X4-copy of the order form, based on which the leaflet was printed, shows that the order was placed by one Haseeb only to print 1,000 copies of a supplement and the order was given in the name of PW-4 in whose name Exhibit-P1 was printed, Exhibit-X5-receipt for payment of printing charges shows that the same was made by Haseeb. The said Haseeb also was not examined. Still further, the allegation was that at least 25,000 copies were printed but it has come out in evidence that only 1,000 copies were printed.

It is further contended that Exhibit-P1 was printed and published with the knowledge and consent of the first respondent. Mere knowledge by itself will not imply consent, though, the vice-versa may be true. The requirement under Section 123(4) of the RP Act is not knowledge but consent. For the purpose of easy reference, we may quote the relevant provision:

"123. Corrupt practices.—The following shall be deemed to be corrupt practices for the purposes of this Act:— (1) xxx xxx xxx xxx (2) xxx xxx xxx xxx (3) xxx xxx xxx xxx (4) The publication by a candidate or his agent or by any other person with the consent of a candidate or his election agent, of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, or in relation to the candidature, or withdrawal, of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate's election." In the grounds for declaring election to be void under Section 100(1)(b), the court must form an opinion "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". In other words, the corrupt practice must be committed by (i) returned candidate, (ii) or his election agent (iii) or any other person acting with the consent of the returned candidate or his election agent. There are further requirements as well. But we do not think it necessary to deal with the same since there is no evidence to prove that the printing and publication of Exhibit-P1-leaflet was made with the consent of the first respondent or his election agent, the sixth respondent. Though it was vehemently contended by the appellant that the printing and publication was made with the connivance of the first respondent and hence consent should be inferred, we are afraid, the same cannot be appreciated. 'Connivance' is different from 'consent'. According to the Concise Oxford English Dictionary, 'connive' means to secretly allow a wrong doing where as 'consent' is permission. The proof required is of consent for the publication and not connivance on publication. In Charan Lal Sahu v. Giani Zail Singh and another[2], this Court held as under:

"30. ... 'Connivance' may in certain situations amount to consent, which explains why the dictionaries give 'consent' as one of the meanings of the word 'connivance'. But it is not true to say that 'connivance' invariably and necessarily means or amounts to consent, that is to say, irrespective of the context of the given situation. The two cannot, therefore, be equated. Consent implies that parties are ad idem. Connivance does not necessarily imply that parties are of one mind. They may or may not be, depending upon the facts of the situation. ..." Learned Counsel for the appellant vehemently contends that consent needs to be inferred from the circumstances. No doubt, on charges relating to commission of corrupt practices, direct proof on consent is very difficult. Consent is to be inferred from the circumstances as held by this Court in Sheopat Singh v. Harish Chandra and another[3]. The said view has been consistently followed thereafter. However, if an inference on consent from the circumstances is to be drawn, the circumstances put together should form a chain which should lead to a reasonable conclusion that the candidate or his agent has given the consent for publication of the objectionable material. Question is whether such clear, cogent and credible evidence is available so as to lead to a reasonable conclusion on the consent of the first respondent on the alleged publication of Exhibit-P1- leaflet. As we have also discussed above, there is no evidence at all to prove that Exhibit-P1-leaflet was printed at the instance of the first respondent. One Haseeb, who placed the order for printing of Exhibit-P1 is not examined. Shri Hamza, who is said to be the Manager of the Press at the relevant time, was not examined. Shri Mustafa, who is said to have told the appellant that the expenses for the printing of Exhibit-P1 were borne by the first respondent and the same have been shown in the electoral return of the first respondent is also not examined. No evidence of the electoral returns pertaining to the expenditure on printing of Exhibit-P1 by the first respondent is available. The allegation in the election petition is on printing of 25,000 copies of Exhibit-P1. The evidence available on record is only with regard to printing of 1,000 copies. According to PW-24- Sajid, 21 bundles of Exhibit-P1 were kept in the house of first respondent as directed by wife of the first respondent. She is also not examined. It is significant to note that Sajid's version, as above, is not the case pleaded in the petition; it is an improvement in the examination. There is further allegation that PW-7-Arjun and PW-9-Faizal had seen bundles of Exhibit-P1 being taken in two jeeps bearing registration nos. KL 13B 3159 and KL 10J 5992 from the residence of first respondent. For one thing, it has to be seen that PW-7-Arjun was an election worker of the appellant and Panchayat Secretary of DYFI, the youth wing of CPI(M) and the member of the local committee of the said party of Edavanna and Faizal is his friend. PW-29 is one Joy, driver of jeep bearing registration no. KL 10J 5992. He has completely denied of any such material like Exhibit-P1 being transported by him in the jeep. It is also significant to note that neither PW-7-Arjun nor PW-9-Faizal has a case that the copies of Exhibit-P1 were taken from the house of the first respondent. Their only case is that the vehicles were coming from the house of the first respondent and PW-4- Palliparamban Aboobakar gave them the copies. PW-4 has denied it. It is also interesting to note that PW-9-Faizal has stated in evidence that he was disclosing the same for the first time in court regarding the

> receipt of notice from PW-4. It is also relevant to note that in Annexure-P3-complaint filed by the chief electoral agent of the appellant on 13.04.2011, there is no reference to the number of copies of Exhibit-P1-

leaflet, days when the same were distributed and the people who distributed the same, etc., and most importantly, there is no allegation at all in Annexure-P3 that the said leaflet was printed by the first respondent or with his consent. The only allegation is on knowledge and connivance on the part of the first respondent. We have already held that knowledge and connivance is different from consent. Consent is the requirement for constituting corrupt practice under Section 123(4) of the RP Act. In such circumstances, it cannot be said that there is a complete chain of circumstances which would lead to a reasonable inference on consent by the first respondent with regard to printing of Exhibit-P1-leaflet. Not only that there are missing links, the evidence available is also not cogent and credible on the consent aspect of first respondent.

Now, we shall deal with distribution of Exhibit-P1-leaflet. Learned counsel for the appellant contends that consent has to be inferred from the circumstances pertaining to distribution of Exhibit-P1. Strong reliance is placed on the evidence of one Arjun and Faizal. According to them, bundles of Exhibit-P1-leaflet were taken in two jeeps and distributed throughout the constituency at around 08.00 p.m. on 12.04.2011. To quote the relevant portion from Paragraph-5 of the election petition:

> "5. ... Both the first respondent and all his election agents and other persons who were working for him knew that the contents of Annexure A which was got printed in the manner stated above are false and false to their knowledge and though the petitioner was falsely implicated in the Manaf murder case he has been honourably acquitted in the case and declared not guilty. True copy of the judgment in S.C. No. 453 of 2001 of the Additional Sessions Court (Adhoc No.2), Manjeri, dated 24.9.2009 is produced herewith and marked as Annexure B. Though this fact is within the knowledge of the first respondent, his agents referred to above and other persons who were working for him in the election on the 12th of April, 2011 at about 8 AM bundles of Annexure A which were kept in the house of the first respondent at Pathapiriyam, within the constituency were taken out from that house in two jeeps bearing Nos KL13-B 3159 and KL10-J 5992 which were seen by two electors, Sri V Arjun aged 31 years, Kottoor House, S/o Narayana Menon, Pathapiriyam Post, Edavanna and C.P. Faizal aged 34 years, S/o Muhammed Cheeniyampurathu Pathapiriyam P.O., who are residing in the very same locality of the first respondent and the jeeps were taken around in various parts of the Eranad Assembly Constituency and Annexure A distributed throughout the constituency from the aforesaid jeeps by the workers and agents of the first respondent at about 8 PM that night. The aforesaid publication also amounted to undue influence as the said expression is understood in Section 123(2)(a)(ii) of The Representation of the People Act, in that it amounted to direct or indirect interference or attempt to interfere on the part of the first respondent or his agent and other persons who were his agents referred to below with the consent of the first respondent, the free exercise of the

> electoral right of the voters of the Eranad Constituency and is also a corrupt practice falling under Section 123(4) of The Representation of the People Act, 1951. ..." The allegation is on distribution of Exhibit-P1 at about 08.00 p.m. on 12.04.2011. But the evidence is on distribution of Exhibit-P1 at various places at 08.00 a.m., 02.00 p.m., 05.00 p.m., 06.30 p.m., etc. by the UDF workers. No doubt, the details on distribution are given at Paragraph-5 (extracted above) of the election petition at different places, at various timings. The appellant as PW-1 stated that copies of Exhibit-P1 were distributed until 08.00 p.m. Though the evidence is on printing of 1,000 copies of Exhibit-P1, the evidence on distribution is of many thousands. In one panchayat itself, according to PW-22-KV Muhammed around 5,000 copies were distributed near Areakode bus stand. Another allegation is that two bundles were entrusted with one Sarafulla at Areakode but he is not examined. All this would show that there is no consistent case with regard to the distribution of Exhibit-P1 making it difficult for the Court to hold that there is credible evidence in that regard.

All that apart, the definite case of the appellant is that the election is to be declared void on the ground of Section 100(1)(b) of the RP Act and that too on corrupt practice committed by the returned candidate, viz., the first respondent and with his consent. We have already found that on the evidence available on record, it is not possible to infer consent on the part of the first respondent in the matter of printing and publication of Exhibit-P1-leaflet. There is also no evidence that the distribution of Exhibit-P1 was with the consent of first respondent. The allegation in the election petition that bundles of Exhibit-P1 were kept in the house of the first respondent is not even attempted to be proved. The only connecting link is of the two jeeps which were used by the UDF workers and not exclusively by the first respondent. It is significant to note that there is no case for the appellant that any corrupt practice has been committed in the interest of the returned candidate by an agent other than his election agent, as per the ground under Section 100(1)(d)(ii) of the RP Act. The definite case is only of Section 100(1)(b) of the RP Act.

In Ram Sharan Yadav v. Thakur Muneshwar Nath Singh and others[4], a two- Judge Bench of this Court while dealing with the issue on appreciation of evidence, held as under:

> "9. By and large, the Court in such cases while appreciating or analysing the evidence must be guided by the following considerations:
>
> [pic](1) the nature, character, respectability and credibility of the evidence, (2) the surrounding circumstances and the improbabilities appearing in the case, (3) the slowness of the appellate court to disturb a finding of fact arrived at by the trial court who had the initial advantage of observing the behaviour, character and demeanour of the witnesses appearing before it, and (4) the totality of the effect of the entire evidence which leaves a lasting impression regarding the corrupt practices alleged." On the evidence available on record, it is unsafe if not difficult to connect the first respondent with the distribution of Exhibit-P1, even assuming that the allegation on distribution of Exhibit-P1 at various places is true.

Now, we shall deal with the last ground on announcements. The attack on this ground is based on Exhibit-P10-CD. We have already held that the CD is inadmissible in evidence. Since the very foundation is shaken, there is no point in discussing the evidence of those who heard the announcements. Same is the fate of the speech of PW-4-Palliparamban Aboobakar and PW-30-Mullan Sulaiman.

We do not think it necessary to deal with the aspect of oral evidence since the main allegation of corrupt practice is of publication of Exhibit-P1- leaflet apart from other evidence based on CDs. Since there is no reliable evidence to reach the irresistible inference that Exhibit-P1-leaflet was published with the consent of the first respondent or his election agent, the election cannot be set aside on the ground of corrupt practice under Section 123(4) of the RP Act.

The ground of undue influence under Section 123(2) of the RP Act has been given up, so also the ground on publication of flex boards.

It is now the settled law that a charge of corrupt practice is substantially akin to a criminal charge. A two-Judge Bench of this Court while dealing with the said issue in Razik Ram v. Jaswant Singh Chouhan and others[5], held as follows:

> "15. ...The same evidence which may be sufficient to regard a fact as proved in a civil suit, may be considered insufficient for a conviction in a criminal action. While in the former, a mere preponderance of probability may constitute an adequate basis of decision, in the latter a far higher degree of assurance and judicial certitude is requisite for a conviction. The same is largely true about proof of a charge of corrupt practice, which cannot be established by mere balance of probabilities, and, if, after giving due consideration and effect to the totality of the evidence and circumstances of the case, the mind of the Court is left rocking with reasonable doubt — not being the doubt of a timid, fickle or vacillating mind — as to the veracity of the charge, it must hold the same as not proved." The same view was followed by this Court P.C. Thomas v. P.M. Ismail and others[6], wherein it was held as follows:
>
> "42. As regards the decision of this Court in Razik Ram and other decisions on the issue, relied upon on behalf of the appellant, there is no quarrel with the legal position that the charge of corrupt practice is to be equated with criminal charge and the proof required in support thereof would be as in a criminal charge and not preponderance of probabilities, as in a civil action but proof "beyond reasonable doubt". It is well settled that if after balancing the evidence adduced there still remains little doubt in proving the charge, its benefit must go to the returned candidate. However, it is equally well settled that while insisting upon the standard of proof beyond a reasonable doubt, the courts are not required to extend or stretch the doctrine to such an extreme extent as to make it well-nigh impossible to prove any allegation of corrupt practice. Such an approach would defeat and frustrate the very laudable and sacrosanct object of the Act in maintaining purity of the electoral process. (please see S. Harcharan Singh v. S. Sajjan Singh)" Having regard to the

admissible evidence available on record, though for different reasons, we find it extremely difficult to hold that the appellant has founded and proved corrupt practice under Section 100(1)(b) read with Section 123(4) of the RP Act against the first respondent. In the result, there is no merit in the appeal and the same is accordingly dismissed.

There is no order as to costs.

.....CJI.

(R. M. LODHA) .....J. (KURIAN JOSEPH) .....J. (ROHINTON FALI NARIMAN) New Delhi;

September 18, 2014.

(2005) 11 SCC 600
[2] (1984) 1 SCC 390
[3] AIR 1960 SC 1217
[4] (1984) 4 SCC 649
[5] (1975) 4 SCC 769
[6] (2009) 10 SCC 239

REPORTABLE
