

## Subhash Desai Vs Sharad J. Rao and Others

**Court:** Supreme Court of India

**Date of Decision:** March 31, 1994

**Acts Referred:** Constitution of India, 1950 " Article 25

Representation of the People Act, 1950 " Section 23(3)

Representation of the People Act, 1951 " Section 100(1), 117, 123(3A), 124(5), 34

**Citation:** AIR 1994 SC 2277 : (1994) 3 JT 39 : (1994) 2 SCALE 391 : (1994) 2 SCC 446 Supp : (1994) 3 SCR 271

**Hon'ble Judges:** N. P. Singh, J; M. M. Punchhi, J; A. M. Ahmadii, J

**Bench:** Full Bench

**Advocate:** G.I. sanghi, Harish Salve, A. Khanwilkar, Punam Kumari, Ramachandran and Vikas C. Rele, for the Appellant; Ashok Desai, Abhishek Singhvi, Jaya Shree Wad, Tamali Wad and Pallav Sisodia, for the Respondent

**Final Decision:** Allowed

### Judgement

@JUDGMENTTAG-ORDER

N.P. Singh, J.

The election of the appellant from Goregaon Legislative Assembly Constituency, has been set aside by the High Court, on

an election petition filed on behalf of the respondent No. 1 (hereinafter referred to as the "respondent"). The appellant had contested the election as

a candidate of Shiv Sena, whereas the respondent as of Janata Dal.

2. The respondent in his election petition stated that between 18.12.1989 and 2.1.1990 about 12,000 applications for inclusion of names in the

electoral roll, were received and ultimately on 15.1.1990, the final electoral roll was published with inclusion of the names of several thousand

persons, many of them were bogus voters. Thereafter the details of the corrupt practices committed by the appellant, Shiv Sena, Bhartiya Janta

Party, between 18.1.1990 and 27.2.1990 were stated. It was also alleged that they falsely propagated in February, 1990 that Pandal erected

specifically for offering prayers by Hindu women at the cost of Rs. 50,000 was demolished at the instance of socialists viz. Mrinal Gore and K.R.

Nevrekar, and as such, the Hindu traitors should be shown their place, for that reason it was necessary to vote for the appellant, who had brought

the message of "Hindu Hridaya Samrat" Shri Balsaheb Thackeray. The aforesaid statements were exhibited on several boards in different localities

in Goregaon constituency between 21.1.1990 and 27.2.1990.

3. It was then alleged that there is a Sankalpasiddhi Ganesh Mandir at Goregaon. On 14.2.1990, between 11.00 A.M. and 3.00 P.M.,

Mahaprasad ceremony was to be celebrated. The trustees had invited thousands of prominent citizens of Goregaon for that celebration including

the respondent and his colleagues. The respondent visited the said temple at about 1.00 P.M. with Shri K.R. Nevrekar (PW-3) and 50 workers.

The respondent met the trustees and offered his obeisance to the deity. The respondent learnt that the appellant had also attended the said function

with his workers an hour before. After accepting the Mahaprasad, the respondent along with his workers left the function at about 2.30 P.M. To

the utter surprise of the respondent, the appellant, who was the printer and publisher of the Marathi daily "Samana", published a false report of

respondent's visit to the said function, in the issue of "Samana" dated 15.2.1990. the heading of the publication was : "Riotous behaviour of Janata

Dal 'green Goondas during Shri Ganesh Mahaprasad function at Goregaon.'" The relevant part of the news item translated in English is as follows :

During the ceremony of Mahaprasad of Sankalpasiddhi Ganesh Temple at Motilal Nagar in Goregaon, the Janata Dal workers wearing green scarf

created a mess by shouting "Allah Ho Akbar" repeatedly and indulged in indecent gestures....The volunteers of Ganesh Mandir Trust,

accompanied by the Shiv Sena and B.J.P. workers, were distributing Mahaprasad. There were women workers of the Mahila Front also present

at that time. At this moment the Janata Dal candidate Sharad Rao came there with his followers. The supporters accompanying him had tied green

scarf around their heads. These workers came as if dancing in a fair, while the devotees of Ganesh were dining during the Mahaprasad

ceremony. These devotees were made to vacate highway...."Allah Ho Akar" slogan shouting, these people came to this most disciplined function

of the Hindus capable of provoking an evil eye. repeatedly shouting "Allah Ho Akbar", performing indecent dances in an ugly manner and left after

creating a pandemonium. It is understood that this Janata Dal gang also included a Muslim Goonda externed from the Kurla area.

4. The respondent in the election petition asserted that the aforesaid publication was false, deliberately published to blackmail the said respondent

and his party. This was an attempt to create communal division between Hindus and Muslims and to promote the feeling of enmity or hatred

between different classes of citizens of India on grounds of religion for the furtherance of the prospects of the election of the appellant and for

prejudicially affecting the election prospects of the respondent. Copies of the news report aforesaid in Marathi as well as with English translation,

were annexed to the election petition. It was stated by the respondent that aforesaid publication had an impact, in view of the conditions prevailing

in Jammu & Kashmir and in the background of the dispute regarding Ram Janma Bhoomi and Babri Masjid.

5. Lastly, it was alleged that a public meeting was held at Shivaji Park, Dadar, on 24.2.1990 in which the appellant and all other candidates of Shiv

Sena-B.J.P. alliance were present. The said meeting was addressed by Bal Thackeray and other leaders, at which Bal Thackeray reiterated that he

was ""contesting the election in the name of Hindu religion (Hindutva)"". The proceedings of the said meeting were reported in various dailies, and

even the voters of the constituency in question, read the press reports.

6. In the written statement a stand was taken on behalf of the appellant, that the charge that appellant had contested the election on the ground of

Hindutva or Hinduism was of no consequence, because since time immemorial this country was known as Hindustan and the inhabitants of this

country were known as Hindus. It was further asserted that Shiv Sena-B.J.P. were never against any religion and the said parties had always

considered all people ""faithful to this country as Hindus, irrespective of their religion. The said parties have always been against antinationals

whether they are Hindus or not"". The appellant denied that Shiv Sena and/or B.J.P. at any time propounded the cause of Hinduism as their goal for

the election. He also denied that he or B.J.P. and/or Shiv Sena at any time propagated religious hatred amongst the communities, as alleged, or that

he had made any statement, saying ""show these Hindu traitors their place, vote in the interest of Hindus for Subhash Desai"".

7. In respect of the allegation of the respondent regarding publication of the false report in the issue of ""Samana"" dated 15.2.1990 about the visit of

the respondent to the function on 14.2.1990, it was said :

With reference to paragraph 50A of the petition, this respondent categorically denies that this respondent has published any false and/or perverted

and/or incriminatory account of the petitioner's alleged visit to the said function as alleged. This respondent states that, this respondent published a

News Item submitted to him by his News Reporter. This respondent categorically denies that the News Item published in the Daily Newspaper

Samana"" was in any manner and/or perverted and/or incriminatory as alleged. This respondent in good faith published the said News Item

submitted to him by News Reporter.

8. It was further stated in the said written statement :

...this respondent categorically denies that the report published in the Newspaper ""Samana"" on 15th February, 1990 was a false and/or fraudulent

report and/or that the same was deliberately published to blackmail the petitioner and/or his party Janata Dal as alleged,....

9. The High Court on the materials produced before it held that the appellant had committed the corrupt practices : (i) u/s 123(3) of the

Representation of the People Act, 1951 (hereinafter referred to as the "Act") by making appeal to the voters to vote in his favour, because he was

a Hindu, (ii) u/s 123(3A) of the Act by creating feeling of hatred between the different classes of electors, on ground of religion, (iii) u/s 123(4) of

the Act, by publishing statements of fact, which were false, which the appellant believed to be false or did not believe to be true, in relation to the

personal character and conduct of the respondent, calculated to prejudice the prospects of the election of the respondent. The High Court also

examined the grievance made by the respondent regarding registration of electors in the electoral roll in contravention of the provisions of the

Representation of the People Act, 1950 and held that those who had been mechanically added to the electoral roll, without following the

procedure prescribed for inclusion of the names of the electors, could not have exercised their right to vote and as such those votes had to be

treated as void. After setting aside the election of the appellant, the High Court appointed one Mr. Ajitlal Prantal Jainik, Ex-Prothonotary and

Senior Master, as Commissioner, to ascertain the names of the persons, whose names were added in the electoral roll on 15-1-1990. the

Commissioner thereafter was to find out the persons who had voted from that list, after scrutinising their ballot papers. A direction was given to

recount the votes after eliminating all those votes by persons, who had been included in the electoral roll on 15.1.1990. After recount, it was to be

ascertained as to whether the appellant or the respondent had secured the highest number of valid votes at the said election. However, the

direction for recount was stayed by this Court during the pendency of the appeal.

10. Mr. Sanghi, the learned Senior Counsel appearing for the appellant, referred to different paragraphs of the election petition as well as the

affidavit, supporting the statements made therein. According to him, the election petition was liable to be dismissed at the threshold because it

neither contains statements of material facts nor full particulars of the corrupt practices alleged to have been committed by the appellant, as

required by Section 83(1) of the Act. The statements had not been verified in the manner transcribed by the Code Procedure, and by proviso to

Sub-section(1)(c) of Section 83 of the Act.

11. Section 86 vests power in the High Court to dismiss an election petition which has not been properly presented as required by Section 81; or

where there has been non-compliance of Section 82 i.e, non-joinder of the necessary parties to the election petition; or for non-compliance of

Section 117 i.e. non-deposit of the required amount as security for the costs of the election petition. Section 86 does not contemplate dismissal of

the election petition for non-compliance of the requirement of Section 83 of the Act. But Section 83 enjoins that an election petition shall contain

concise statement of material facts, and shall set forth full particulars of any corrupt practice that the petitioner alleges, which should be verified and

supported by affidavit, so far the allegations of corrupt practices are concerned. This provision is not only procedural, but has an object behind it;

so that a person declared to have been elected, is not dragged to court to defend and support the validity of his election, on allegations of corrupt

practice which are not precise and details whereof have not been supported by a proper affidavit. Apart from that, unless the material facts and full

particulars of the corrupt practices are set forth properly in the election petition, the person whose election is challenged, is bound to be prejudiced

in defending himself of the charges, which have been levelled against him. In view of the repeated pronouncements of this Court, that the charge of

corrupt practice is quasi criminal in nature, the person challenging an election on the ground of corrupt practice, cannot take liberty of making any

vague or reckless allegation, without taking the responsibility about the correctness thereof. Before the Court proceeds to investigate such

allegations, the Court must be satisfied, that the material facts have been stated along with the full particulars of the corrupt practice, alleged by the

petitioner, which have been duly supported by an affidavit. In cases where the Court finds that neither material facts have been stated, nor full

particulars of the corrupt practice, as required by Section 83, have been furnished in the election petition, the election petition can be dismissed,

not u/s 86, but under the provisions of the CPC, which are applicable, read with Section 83(1) of the Act, saying that it does not disclose a cause

of action. This aspect has been examined by this Court in detail in the cases of Azhar Hussain v. Rajiv Gandhi 1986 Supp SCC 315: (1986) 2

SCR 782 and Hardwari Lal v. Kanwal Singh (1972) 1 SCC 214: (1972) 2 SCR 742 .

12. From the perusal of the election petition, it shall appear that respondent has stated about the corrupt practices alleged to have been committed

by the appellant in Paragraphs 47 to 52. It has been alleged that the appellant was a candidate of Shiv Sena, and had the support of B.J.P. and

Vishwa Hindu Parishad at the election in question. He has stated about the atmosphere created, because of the Ayodhya and Babri Masjid

dispute. Then statement has been made regarding putting up of boards in different places in the constituency in question, requesting the voters to

vote in the interest of Hindus and to show the traitors their place. Then the details of the celebration on 14-2-1990 at the aforesaid Sankalpasiddhi

Ganesh Mandir, where the respondent is alleged to have come to receive Prasad with his workers, have been stated. Thereafter respondent has

stated about publication in ""Samana"" the next day, 15-2-1990, relevant part whereof has been quoted above. Lastly, about the public meeting,

held at Shivaji Park on 24.2.1990, which was attended by the appellant and other candidates of Shiv Sena-B.J.P. alliance, where Bal Thackeray

reiterated that the said alliance was contesting election in the name of Hindu religion, has been stated.

13. The scope of Section 83(1) has been recently examined in the case of F.A. Sapa v. Singoral , where it was pointed out that the underlying idea

in requiring the election petition to set out in a concise manner all the "material facts" as well as the "full particulars", where the complaint is in

respect of commission of corrupt practice, is to "delienate the scope, ambit and limits of the inquiry at the trial by the election petition". In the

present case, the allegations made, in the election petition, may be true or false, but it is not possible to hold that the election petition does not

disclose any material fact or give the material particulars of any of the corrupt practices. It need not be pointed out that even if the Court is satisfied

that, in respect of one of the corrupt practices alleged, material facts and full particulars thereof have not been stated, still the election petition

cannot be dismissed, if in respect of another corrupt practice the material facts and full particulars have been stated in accordance with the

requirement of Section 83(1) of the Act.

14. In respect of the contention that the affidavit, supporting the corrupt practices alleged to have been committed by the appellant, is not as

required by Section 83(1)(c) proviso, it was pointed out that reference has been made in the affidavit to Paragraph 74G, which contains the

grounds for declaring the election of the appellant to be void and has no relation to the paragraphs giving particulars of corrupt practices. It is true

that instead of saying that the statements, made in paragraph 74G of the election petition about the commission of corrupt practices, were true to

the knowledge of the appellant, it should have been stated that the statement, made in Paragraphs 49, 50, 50A, 51 and 52 of the said petition were

true to his knowledge. But, from bare reference to the other part of the affidavit, it shall appear that it has also been said that making of religious

appeal to people and the particulars of the corrupt practices mentioned in Paragraphs 49, 50, 50A, 51 and 52 of the said election petition and the

exhibits referred thereto, were true to the knowledge of the appellant. According to us, it cannot be held, in the facts and circumstances of the

present case, that there was no affidavit supporting the allegations of corrupt practices, as required by Section 83(1)(c) proviso.

15. Coming to merit, according to the appellant, any call given to the voters to vote for a candidate, who serves the interest of the Hindus, cannot

be held to be a corrupt practice. It was urged that if it is held to be corrupt practice within the meaning of Sub-sections (3) or (3A) of Section 123

of the Act, then those sub-sections have to be declared ultra vires Article 25 of the Constitution. According to the appellant, Article 25 of the

Constitution, subject to the public order, morality and health and other provisions of the said part of the Constitution, guarantees all persons right

freely to profess, practice and propagate religion"". As such when a candidate at an election propagates his religion and asks the voters to profess

and practice a particular religion, which may include Hinduism, that right cannot be restricted by any Act or statute. If the framers of the

Constitution, have guaranteed that right to every citizen of this country, then any person who is a candidate at any election, can also propagate his

religion and ask the voters to do or not to do an act, which may be in the interest of such religion, including not to vote a person, whose election

will prejudicially affect the propagation of the religion in question.

16. When the framers of the Constitution guaranteed every citizen, right to freely profess, practice and propagate his religion, that right does not

extend to creating hatred amongst two groups of persons, practising different religions. Sub-section (3) and Sub-section (3A) of Section 123,

never purport to curb the right guaranteed by Article 25 of the Constitution. They only purport to curb the appeal on the ground of religion or

propagating religion for creating, feeling of enmity or hatred between different classes of citizens of India during the election campaign by the

candidate or his agent or any person with his consent for furtherance of the prospects of the election of that candidate or for prejudicially affecting

the election of any other candidate. Sub-sections (3) and (3A) of Section 123, in no way are in conflict with Article 25 of the Constitution - both

can co-exist. Article 25 enables every citizen of India to profess, practice and propagate his religion, whereas Sub-sections (3) and (3A) of

Section 123 purport to ensure that an election is not influenced by considerations for religion, race, caste community or language. Sub-sections (3)

and (3A) of Section 123 merely prescribe the conditions, which must be observed, if a candidate wants to enter in Parliament or Legislative

Assembly. The right to stand for an election is a special right created by a statute and can be exercised on the conditions laid down by the said

statute. Keeping in view that the election should not be contested on the ground of religion, race, caste, community, or language and result of an

election is not affected by promoting feelings of enmity or hatred between different classes of citizens of India on grounds of religion, race, caste,

community, or language; the framers of the Act, have declared appeal on ground of religion, race, caste, community or language and propagating

religion, race, caste, community or language for creating feeling of enmity or hatred between different classes of citizens as corrupt practices, which

shall vitiate the election.

17. On behalf of the appellant, reference was made to the case of Jagdev Singh Sidhanti v. Pratap Singh Daultal (1964) 6 SCR 750: AIR 1965

SC 183 , where this Court had to consider whether an appeal made to the electorate to vote for a particular candidate on ground of his language,

was covered by Section 123(3). It was said that the expression "'on the ground of his language'" must be read in the light of the fundamental right

which is guaranteed by Article 29(1) of the Constitution. It was pointed out that the said expression cannot be read as trespassing upon the

fundamental right guaranteed by Article 29(1); political agitation for conservation of the language of a section of the citizens cannot therefore be

regarded as a corrupt practice within the meaning of Section 123(3) of the Act. But at the same time, it was said :

The corrupt practice defined by Clause (3) of Section 123 is committed when an appeal is made either to vote or refrain from voting on the ground

of a candidate's language. It is the appeal to the electorate on a ground personal to the candidate relating to his language which attracts the ban of

Section 100 read with Section 123(3). therefore it is only when the electors are asked to vote or not to vote because of the particular language of

the candidate that a corrupt practice may be deemed to be committed. Where however for conservation of language of the electorate appeals are

made to the electorate and promises are given that steps would be taken to conserve that language, it will not amount to a corrupt practice.

In the case of Jumuna Prasad Mukhariya v. Lachhi Ram AIR 1954 SC 686 :(1955) 1 SCR 608 , Sections 123(5) and 124(5) of the Act, as they

then stood, were challenged, as infringing the fundamental right of freedom of expression under Article 19(1) of the Constitution. This Court

rejected the contention, saying that the provisions of the Act do not stop a man from speaking: they merely prescribe conditions which have to be

observed for being elected.

18. On behalf of the appellant, it was then pointed out that in election petition, while alleging corrupt practices, reference has been made in respect

of the speeches and publications, of period prior to 31.1.1990, which was the date when nomination papers were filed. The publications and



speeches alleged to have made prior to 31.1.1990 have to be ignored because the framers of the Act, required the High Court to judge the

conduct of the candidate, his agent or persons with the consent of the candidate or his election agent, only after a person becomes a candidate for

the particular election. A person becomes a candidate for the election in question only after filing the nomination paper. In this connection,

reference may be made to Section 79(b) of the Act which defines "candidate" to mean a person, who has been or claims to have been duly

nominated as a candidate at any election. Section 34 of the Act says that a candidate shall not be deemed to be duly nominated for election from a

constituency unless he deposits or causes to be deposited the amounts prescribed in the said section. When a person becomes a candidate, was

examined by this Court in the well known case of The State of Assam Vs Bhubhan Chandra Dutta and Another , and it was held :

The 1951 Act uses the expression ""candidate"" in relation to several offences for the purpose of affixing liability with reference to a person being a

candidate. If no time be fixed with regard to a person being a candidate it can be said that from the moment a person is elected he can be said to

hold himself out as a candidate for the next election.

Recently, this Court in the case of Mohan Rawale v. Damodar Tatyaba @ Dadasaheb, (Special Leave Petition (Civil) No. Mohan Rawale Vs

Damodar Tatyaba alias Dadasaheb and Others disposed of on August 6, 1992), has said :

We hold that all the averments in paragraphs 1 to 20 of the memorandum of election petition in so far as they refer to a period prior to 23.4.1991

cannot amount to allegations of corrupt practice.

This cut off date 23.4.1991 was fixed with reference to the date when nomination papers were filed by the appellant concerned, because since that

date the appellant will be deemed to have legally acquired the status of a candidate. According to us, any allegation of corrupt practice against the

appellant, made by the respondent in respect of the period prior to the filing of nomination by the appellant on 31.1.1990, cannot be taken into

consideration for judging the legality or validity of his election.

19. The corrupt practices alleged against the appellant after filing of the nomination paper, are (i) appellant published a News Item in the issue of

Samana"" on 15.2.1990 which was a statement of fact, which was false and appellant believed it to be false or did not believe it to be true in

respect of personal character and conduct of the respondent to prejudice his prospect at the said election, which is covered by Section 123(4) of

the Act; (ii) Bhartiya Janta Party, the election rally of Shiv Sena, propagated in last week of February, 1990 that authorised Pandal erected for

offering prayers by Hindu women was demolished at the instance of Mrinal Gore and K.R. Nevrekar, and several boards in different localities in

Goregaon between 21-1-1990 and 27-2-1990 were exhibited, saying show these Hindu traitors their place; (iii) a public meeting was held at

Shivaji Park, Dadar, on 24.2.1990 in which the appellant and other candidates of Shiv Sena-B.J.P. alliance were present. That meeting was

addressed by Bal Thackeray and others. Bal Thackeray reiterated that the said alliance was "contesting the election in the name of Hindu religion

(Hindutva)". The proceedings of the said meetings were reported in various dailies.

20. We propose first to examine the charge regarding publication by the appellant in the issue of ""Samana"" dated 15-2-1990, the relevant part of

the said publication has already been quoted above. In the said publication, it was said that during the ceremony of Mahaprasad of Sankalpasiddhi

Ganesh Temple, the Janata Dal workers wearing green scarf~Â¿Â½s created a mess and shouted "Allah Ho Akbar" and repeatedly indulged in

indecent gestures; these workers came as if dancing in a fair. The devotees of Ganesh, who were dining during the Mahaprasad ceremony, had to

vacate the highway. These people came to the most disciplined function of the Hindus, shouting "Allah Ho Akbar" slogan repeatedly, in which a

Muslim Goonda externed from the Kurla area was also there.

Section 123(4) is as under :

123. Corrupt practices.- The following shall be deemed to be corrupt practices for the purposes of this Act :

...

(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.

21. On a plain reading, the requirements of Section 123(4) shall be satisfied when the publication is held: (i) a statement of fact; (ii) which was

false; (iii) which the appellant either believed to be false or did not believe to be true; (iv) which relates to the personal character or conduct of the

respondent; (v) the statement was reasonably calculated to prejudice the prospect of the election of the appellant.

22. If the publication is held to be false and it is established that it was the appellant who published the same believing it to be false or not believing

it to be true, then for the other two ingredients: relating to personal character or conduct and that it was calculated to prejudice the prospects of the

election of the respondent, not much evidence is required. During the election tempo, because of the serious nature of charge levelled against the

respondent, in respect of his conduct, the effect of the said publication on his election prospects can be easily assumed. It cannot be disputed that

the publication aforesaid must have prejudicially affected the election prospect of the respondent, because he is alleged to have entered with his

workers, dancing and shouting "Allah Ho Akbar", during a solemn religious ceremony of Mahaprasad of Sankalpasiddhi Ganesh Mandir. This

publication has direct reflection on the character and conduct of the respondent, at whose instance a pandemonium was created in the temple of

Sankalpasiddhi Ganesh, during Mahaprasad ceremony.

23. It has been asserted on behalf of the respondent that the statement of fact, published in the said issue of ""Samana"", was false. The respondent

or his workers never shouted slogans of "Allah Ho Akbar", during the Mahaprasad ceremony of Sankalpasiddhi Ganesh Mandir. They did not

create any pandemonium by indecent dances or ugly gestures. He has also denied that when he had gone to attend the said Mahaprasad

ceremony, any Muslim Goonda externed from the Kurla area, had accompanied him.

24. The object of Sub-section (4) of Section 123 is not only to protect any candidate at the election from character assassination and vilification,

but to aintain the purity and fairness of the election. The framers of the Act were conscious of the fact that some candidate or his agent or persons

on his behalf, may publish facts in respect of the personal character of the candidate concerned, which are false, with an object to malign such

candidate in public during the election in order to affect his prospect at the election. The momentum, the mood and the emotional upsurge during

the elections are well-known and even small things which in normal times may not assume much significance, have serious consequences during the

election and affect the minds of the electors and in some cases may be a decisive factor, to seal the fate of one candidate or the other. Sub-section

(4) of Section 123 maintains the delicate balance between the freedom of speech of an individual, the interest of the public to get full information

about the candidate concerned, but not to affect the prospect of the candidate concerned by publishing facts about his personal character or

conduct which are false.

25. The charge of the corrupt practice being quasi criminal in nature, had to be proved to the satisfaction of the court by the election petitioner-

respondent. In the present case, the controversy can be: (i) whether the appellant published the statement of fact referred to above in the issue of

Samana" on 15.2.1990; (ii) whether that statement of fact was false; (iii) whether appellant either believed it to be false or did not believe it to be

true. So far the other ingredients of Sub-section (4) of Section 123 i.e. (i) whether it relates to the personal character or conduct of the appellant;

(ii) whether such statement was reasonably calculated to prejudice the prospect of the election of the appellant, according to us, there should not

be much controversy, because in view of allegation that the appellant along with his workers, during Mahaprasad celebration of Sankalpasiddhi

Ganesh Mandir created ugly scene with repeated shouting of "Allah Ho Akbar" along with a Muslim criminal; it will amount to a statement relating

to the personal character and conduct of the appellant, and in the atmosphere prevailing during the election, it was calculated to prejudicially affect

the prospect of the election of the appellant. As such it has only to be examined as to whether the respondent has been able to prove (i) that the

statement of fact, regarding the Mahaprasad ceremony of Sankalpasiddhi, had been published by the appellant or his agent or any person with his

consent; (ii) that such publication was false, because no such incident had taken place; (iii) that the appellant published it, believing it to be false or

not believing it to be true. The onus of proving the ingredients of Sub-section (4) of Section 123 is on the respondent, who alleged the commission

of the corrupt practice under said sub-section.

26. The respondent has stated on oath not only in his election petition, but also in his evidence that the report in the issue of "Samana" dated 15-2-

1990, that he along with his workers had shouted "Allah Ho Akbar" in the Ganesh temple, was a false report and the said news had been printed

and published by the appellant to malign him in the eyes of the Hindu voters who were in majority in his constituency. He has further stated that he

on the invitation given by the Sankalpasiddhi Ganesh Mandir Trust, along with his election agent and few other activists, at about 1.00 P.M., went

to the Ganesh Mandir. He was received warmly by the trustees. He had Darshan and Mahaprasad and after an hour left with Nevrekar (PW-3),

his election agent, and others. He was surprised to see the publication in the "Samana" of 15.2.1990, containing the report about his visit to Ganesh

temple. It appears, a protest was lodged by a communication dated 17-2-1990 to "Samana" in respect of the publication aforesaid, saying that it

was incorrect and false. Nevrekar (PW-3) has fully supported respondent in his evidence in respect of the visit of the respondent to the

Sankalpasiddhi Ganesh Mandir.

27. On behalf of the appellant, a stand was taken before this Court that merely because appellant was the publisher of "Samana", he shall not be

deemed to have published the New Item and in this connection reference was made to the Press Act and Rules framed thereunder. It was urged

that names of the Editor, printer and publisher on the newspaper in question, only raises a presumption, but contrary can be proved in facts and

circumstances of a case. Reliance was placed on the judgment of this Court in the case of Haji C.H. Mohammad Koya Vs T.K.S.M.A.

Muthukoya . But the remarkable aspect to the present case is that the appellant admitted that he had published the report aforesaid in the

Samana"" on 15-2-1990, as alleged by the respondent. He also asserted, that the facts stated in the publication in question, were correct. He said

in the written statement that ""he published a News Item submitted to him by his News Reporter....This respondent in good faith published the said

News Item submitted to him by News Reporter."" The appellant categorically denied in the written statement ""that the report published in the

Newspaper ""Samana"" on 15-2-1990, was a false and/or fraudulent report...."" Having admitted in the written statement that he had published that

News Item, in his evidence he stated :

On 1.2.1990 I had gone to Sankalpa Siddhi Ganesh Mandir festival on invitation. I went there at about 12.00 noon. I took darshan. I took

Mahaprasad. I went away at about 12.30 p.m. I do not know what happened thereafter. On that day, in the evening as I was coming from the

Fort area, Bombay, I dropped in the office of Samna. One reporter by name Sanjay Dahale showed me a hand-written copy of a news item. He

showed me this in the corridor as he was about to go out. That news about Sankalpa Sidhi Ganesh Mandir festival. Since I was in hurry, I could

not read the same fully. I told him to verify and if it is true, have it printed. I then went away.

28. In the written statement he admitted the fact that he had published the News Item in question, submitted to him by his News Reporter, but in

the evidence he has taken a stand, saying that he had seen that News Item before publication in hurry and could not read the same fully and had

asked the Reporter, namely, Sanjay Dahale, to verify whether it was true and then to print it. In the written statement he categorically denied that

the report published in the newspaper ""Samana"" on 15-2-1990, was a false report. In other words, he took a stand that what was published was a

correct statement of fact; in evidence he never asserted that the publication regarding respondent's going to the temple with his workers and

creating ugly scene was not false or at least he believed it to be true. He simply pleaded ignorance about the alleged report and publication

regarding the respondent's going to the said temple with his workers. There is no suggestion given on behalf of the appellant to the respondent or

to his witnesses, who had challenged the correctness and had asserted the falsity of the report published in ""Samana"" on 15.2.1990, that the News

Item published was correct and not false. So far the burden of proving to the satisfaction of the court that the publisher thereof believed to be false

or believed not to be true, was on the respondent being the election petitioner. But, in the facts and circumstances of the present case, according to

us, once the respondent asserted and stated on oath that the statement of fact published in the ""Samana"" was false and the said statement had been

published by the appellant, knowing it to be false or believing not to be true, it will be deemed that the respondent has discharged the initial onus

which rests on him. Then the onus shifts to the other side i.e. to the appellant. In the case of Kumara Nand v. Brijmohan Lal Sharma (1967) 2

SCR 127: AIR 1967 SC 808 , it was pointed out that the onus to prove the charge of a corrupt practice u/s 123(4) was on the election petitioner,

but the onus on him to prove that the maker of the statement believed it to be false or believed it not to be true, is very light and can be discharged

by complaining candidate swearing to that effect; once that is done the burden shifts to the candidate making false statement of fact to show what

was his belief Wanchoo, J. (as he then was) speaking for the said :

...But though the onus is on the election petitioner to show all these things, the main things that the election petitioner has to prove are that such a

publication was made of a statement of fact and that that statement is false and is with respect to the personal character or conduct of the election

petitioner. The burden of proving that the candidate publishing the statement believed it to be false or did not believe it to be true though on the

complaining candidate is very light and would be discharged by the complaining candidate swearing to that effect. Thereafter it would be for the

candidate publishing the statement to prove otherwise.

Recently in the case of Gadakh Yashwantrao Kankarrao v. E. V. alias Balasaheb Vikhe Patil (1994) 1 SCC 682: JT (1993) 6 SC 345 , it was

pointed out that it is very difficult for the election petitioner to prove by any direct evidence that the person, who is alleged to have made a false

statement or published the same, believed it to be false or believed it to be not true, because belief of the maker is related to the state of mind of

the maker which can be found to have been established only on basis of the surrounding circumstances and the materials on the record. When a

charge has been levelled that while publishing the statement of fact which was false, the appellant either believed it to be false or did not believe it

to be true, he should have come out with the justification for publishing such a News Item. In the instant case, no justification has been given by the

appellant, except what has already been mentioned above, that the News Item was shown to him by the Reporter while he was in hurry and he

told him to print and publish the same after verifying the correctness thereof. This statement in his evidence runs counter to or is at variance with the

statement made by him in his written statement, admitting that he had published that News Item, submitted to him by his News Reporter. He also

denied that the said News Report was false, meaning thereby that it was a correct report. But, at the stage of evidence, neither the appellant has

asserted nor any witness on his behalf has come forward to state before the court that any such incident, as mentioned in the News Item, had

actually happened. In such a situation, the irresistible conclusion is that the respondent has been able to establish that the publication by the

appellant of the statement of the fact regarding his personal conduct at the Sankal-pasiddhi Ganesh Mandir was not only false, but the appellant

believed it to be false or did not believe it to be true. In view of the serious nature of the allegations published, it was not even urged before us that

they do not relate to the personal character or conduct of the appellant or that such publication was not reasonably calculated to prejudice the

prospect of the election of the respondent. Once it is proved that the aforesaid News Item was published by the appellant and it was false and the

appellant believed it to be false or did not believe it to be true; then certainly it related to the personal character or conduct of the respondent,

calculated to prejudice his prospects at election. because of that publication, the appellant has not only committed a corrupt practice u/s 123(4) but

also under Sub-section (3A) of Section 123. By publishing the News Item, he shall be deemed to have promoted felling of enmity and hatred

between different classes of citizens on ground of religion for the furtherance of his prospects at the election and for prejudicially affecting the

prospects of the election of the respondent.

29. We are in agreement with the finding of the High Court that on the materials on record the charge of corrupt practices under Sub-section (3A)

and Sub-section (4) of Section 123, has been established against the appellant, vitiating his election to the Legislative Assembly. In view of the

finding aforesaid, we do not consider it necessary to examine as to whether corrupt practice under Sub-section (3) of Section 123 of the Act, has

also been established.

30. Now the question which remains to be considered is as to whether the High Court was justified in examining the acts and omissions on the part

of the Electoral Registration Officer before the final publication of the electoral roll and in direction to verify whether the names of several persons

had been included in the electoral roll before final publication of the electoral roll, in accordance with the provisions of the Representation of the

People Act, 1950 or not, and to recount the votes polled in favour of the appellant and the respondent, after ignoring the votes of persons who

were not entitled to be included in the electoral roll and then to declare the result of the election afresh. In the election petition from paragraph 8 to

46, grievance has been made regarding the preparation of the electoral roll, alleging that the authorities entrusted with the preparation of the

electoral roll and revision thereof have failed to perform their duties as enjoined by the Representation of the People Act, 1950. According to the

respondent, the draft electoral roll was published on 17-12-1989. Between 18-12-1989 and 2-1-1990 about 12,000 applications were received,

for inclusion of names in the electoral roll. The objections were to be filed upto 9-1-1990. On 15-1-1990, the final electoral roll was published

including the names of 11,057 persons. It appears that on 24.1.1990 a writ petition was filed on behalf of PW-3, the election agent of the

respondent, challenging the inclusion of 11,057 persons in the electoral roll. On 1-2-1990, the said writ petition was disposed of by the High

Court, directing the Assistant Registration Officer to verify the list of 5,002 voters, submitted by the writ petitioner. Pursuant to that direction the

names of the persons, who had been included in the electoral roll, were verified and 1499 names were deleted. The names of 1,499 persons were

deleted, before the last date of filing the nomination papers. In this background, we do not appreciate as to how in an election petition, challenging

the election of the appellant, the respondent could have raised the same issue regarding the inclusion of the names of the electors contrary to the

provisions of the Representation of the People Act, 1950. Apart from that, Section 62(1) of the Act says "No person who is not, and except as

expressly provided by this Act, every person who is, for the time being entered in the electoral roll of any constituency shall be entitled to vote in

that constituency". In Sub-sections (2) to (5) restrictions have been provided when the right to vote under Sub-section (1) of Section 62 of the Act

can not be exercised. Section 100(1)(d)(iii) says, that the result of the election, in so far it concerns a returned candidate has been materially

affected, by improper reception, refusal or rejection of any vote or the reception of any vote which is void. While hearing an election petition, on

the aforesaid ground, the High Court has to examine as to whether there has been improper reception, refusal or rejection of any vote or reception

of any vote which is void. In the case of Baidyanath Panjiar v. Sitaram Mahto (1970) 1 SCR 839: AIR 1970 SC 314 , in spite of the bar



prescribed u/s 23(3) of the Representation of the People Act, 1950 that no amendment shall be made or direction for inclusion of a name in the

electoral roll of a constituency shall be given, after the last date for making nominations, names of several persons were included after filing of the

nomination papers. An objection was taken in the election petition that such persons were not entitled to vote. While referring to Section 62(1) of

the Act it was said :

That provision no doubt stipulates that every person who is for the time being registered in the electoral roll of any constituency except as expressly

provided by the Act shall be entitled to vote in that constituency. The question is which is the electoral roll referred to in that section? Is it the

electoral roll that was in force on the last date for making nominations for an election or is it the electoral roll as it stood on the date of the polling?

For answering that question we have to go back to Section 23(3) of the 1950 Act. In view of that provision the electoral roll referred to in Section

62(1) of the Act must be understood to be the electoral roll that was in force on the last day for making the nominations for the election.

According to the aforesaid judgment of this Court, reference in Section 62(1) to the electoral roll, shall mean electoral roll in force on the last day

for making the nominations for the election and votes by persons added after last day for making the nominations, in contravention of Section 23(3)

of the Representation of the People Act, 1950, shall be deemed to be void and as such covered by Section 100(1)(d) of the Act. In the present

case the names had been included and final publication had been made before making of the nominations. As such the direction by the High Court,

after declaring the election of the appellant to be void, to verify as to whether the final publication of the electoral roll on 15-1-1990 with inclusion

of names of electors was in accordance with law and if the said inclusion was not in accordance with the procedure prescribed by the

Representation of the People Act, 1950, then to exclude their votes after opening the ballot boxes and to recount the valid votes polled in favour of

the respondent and the appellant for purpose of fresh declaration of the election result, cannot be upheld.

31. Accordingly, the civil Appeal No. 1745 of 1991 against the order of the High Court, declaring the election of the appellant void, is dismissed.

The civil Appeal No. 2194 of 1991 against the direction given by the High Court, to scrutinise the valid votes for purpose of recount and to declare

the result afresh is allowed. In the facts and circumstances of the case, there will be no order as to costs.

32. Before we part with this judgment, we may point out that of late, it has been noticed that many applications for inclusion of names in the

electoral roll of the constituency concerned, are made on the eve of the election. It need not be impressed that names of only such persons are to

be included, who satisfy the Electoral Registration Officer that they are entitled to be included in the electoral roll. If proper verification and scrutiny

is not done while revising the electoral roll, the process of revision may vitiate the sanctity and the purity of the election itself. Let a copy of this

judgment be forwarded to Election Commission.