

THEME 6

ELECTION IRREGULARITIES

EXTRACT
of
Judgement of Supreme Court
dated 9th August, 1994
In Election Petition No 2 of 1991
Shri C. Narayanswamy

v

Shri C. K. Jaffar Shariff

ELECTION COMMISSION OF INDIA
ASKOKA ROAD
NEW DELHI

Elections – Corrupt practice – Large-scale mass free-feeding for electors – Proof of corrupt practice.

Background facts

The appellants challenged the election of the respondent primarily on the grounds (i) that the respondent arranged large-scale mass free-feedings for electors during the election; (ii) that the said respondent incurred expenditure at the election which amounted to a corrupt practice; and (iii) that the declaration of the result of the respondent was in violation of the provisions of the Act in as much as several thousand votes which should not have been counted in favour of the respondent, which materially affected the result of the election of the respondent and as such his election was liable to be declared void.

Held

That, on the special facts of the case, it was not possible to hold the respondent guilty of the charge of bribery by arranging mass-feeding.

Cases cited in Judgement

Kanwor Lal Gupta v Amar Nath Chawla (1975) 3 SCC 646

P. Nalla Thampy Terah v Union of India (1985) Supp. SCC 189

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No 7194 of 1993

C Narayanaswamy Appellant

versus

C. K. Jaffar Shariff & Others Appellant

with

Civil Appeal No 2543 of 1993

Smt. Pramila Nesargi Appellant

versus

C K Jaffer Shariff & Others Respondents

JUDGEMENT

N. P. Singh J:

These appeals have been filed against the judgement of the High Court dismissing two election petitions filed on behalf of the appellants, questioning the validity of the election of respondent C. K. Jaffar Shariff (hereinafter referred to as "the respondent") to the Lok Sabha from Bangalore North Lok Sabha Constituency.

The appellants challenged the election of the respondent, primarily on the grounds (i) that the respondent arranged large-scale mass free-feedings for the electors during the election which amounted to a corrupt practice within the meaning of Section 123 (1) (A) of the Representation of the People Act 1951 (hereinafter referred to as "the Act"); (ii) that the said respondent incurred expenditure at the said election in contravention of Section 77 of the Act which amounted to a corrupt practice within the meaning of Section 123 (6) of the Act; and (iii) that the declaration of the result of the respondent was in violation of the provisions of the Act in as much as several thousand votes, which should not have been counted in his favour and ought to have been rejected as invalid, were counted in favour of the respondent, which has materially affected the result of the election of the respondent and as such his election is liable to be declared void under Section 100(1) (d) (iii) & (iv) of the Act.

The relevant part of Section 123 (1) is as follows:

"Corrupt practices – The following shall be deemed to be corrupt practices for the purpose of this Act:

- (1) "Bribery", that is to say
 - (A) any gift, offer or promise by a candidate or his agent or by any other person with the consent of a candidate or his election agent or any gratification, to any person whomsoever, with the object, directly or indirectly of inducing
 - (a)
 - (b) an elector to vote or refrain from voting at an election

Explanation – for the purposes of this clause the term "gratification" is not restricted to pecuniary gratifications or gratifications estimable in money and it includes all forms of entertainment and all forms of employment for reward but it does not include the payment of any expenses bona fide incurred at, or for the purpose of, any election and duly entered in the account of election expenses referred to in section 78." (Emphasis supplied.)

In view of Section 123 (1)(A)(b), any gift, offer or promise by a candidate or his agent or by any other person with the consent of a candidate or his election agent, of any gratification, with the object of "directly or indirectly" inducing a voter to vote, shall be deemed to be "bribery" and as such shall amount to a corrupt practice. Mass feeding of the electors after the process of election has commenced and before the date of poll may induce directly or indirectly the electors to vote in favour of the candidate who has arranged such a feast for them in course of the election. In the case of *Moham Singh v Bhanwarlal* (A.I.R. 1964 SC 1366), a Constitution Bench of this Court, while commenting on the expression "gratification" in Section 123 (1) (A), held that:

"....."Gratification" in its ordinary connotation means satisfaction. In the context in which the expression is used, and its delimitation by the Explanation, it must mean something valuable which is calculated to satisfy a person's aim, object or desire, whether or not that thing is estimable in terms of money....."

It was further stated that Explanation to sub-section (1) of Section 123 of the Act extends the expression "gratification" to include all forms of entertainment.

In the case of *Rajendra Prasad Jain v Sheel Bhadra Yajee & Others* (A.I.R. 1967 SC 1445), this Court said:

"...In our opinion, when considering the scope of the words "offer of bribery" in the Election Law, we should not place a narrow construction on that expression. In fact, the scope of that expression should be extended in order to ensure that elections are held in an atmosphere of absolute purity, and a wide meaning should be given to the expression "offer of bribery".

The Explanation of sub-section (1) of Section 123 says specifically that the term "gratification" includes all forms of entertainment. Even Explanation to Section 171-E of the Indian Penal Code says that "treating" means that form of bribery where the gratification consists of food, drink, entertainment or provision.

In view of the Explanation of Section 123(1) of the Act, there should be no difficulty in holding that, after the process of election has commenced and before the electors have exercised their right of franchise, mass-feeding of electors arranged by the candidate or his agent or any other person with the consent of the candidate or his election agent or order to induce directly or indirectly the electors to vote shall be a corrupt practice within the meaning of the said Section. Particularly with the existing economic conditions prevailing in the country, feeding of electors may induce them to vote in favour of the candidate arranging it. As such, if the Court is satisfied that mass-feeding had been arranged in order to directly or indirectly induce the electors to vote for the candidate in question, the charge of 'bribery' shall be deemed to have been established.

The next aspect which needs examination is as to whether, before arranging any such mass-feeding, or in course thereof, the factum of any negotiation between the electors on one side, and the candidate or his agent or any person arranging such mass-feeding on behalf and with the consent of the candidate or his election agent on the other side, has to be proved. The framers of the Act while specifying as to what shall be deemed to be "bribery", did not provide that the negotiation between the candidate or his agent or any other person with the consent of such candidate or his election agent on the one hand and the electors on the other should be proved. Section 123(1)(A) says that any gift, offer or promise by a candidate or his agent or any other person with the consent of such candidate or his election agent, of any gratification made to the elector "with the object, directly or indirectly of inducing" such an elector to vote, shall be deemed to be 'bribery'. Section 123(1)(A) does not require the electors to express or convey their acceptance or assurance that they shall vote for such candidate. On the material on record, of course, the court has to be satisfied that such gift, offer or promise of any gratification has been made to the electors with the object, directly or indirectly, to induce the electors to vote in favour of such candidate. A nexus between the gift, offer or promise of gratification and the inducement to vote has to be established. This can be established even by circumstantial evidence. The Election petitioner is not required to prove any direct negotiation between the candidate or his agent on the one hand and the electors on the other.

Mr Prashant Bhusan, learned counsel appearing for one of the appellants rightly pointed out that in the case of *Laxmi Narayan Nayak v Ramratan Chaturvedi & Others* (1990 (2) S.C.C. 173), the attention of the two learned Judges of this Court was not drawn to the case referred to above and because of that, an observation was made viz "element of 'bargaining' is completely absent in the present case". If an election petitioner is required to prove that the gift, offer or promise of gratification was accepted by the electors by assuring to vote in favour of such a candidate, the provisions of Section 123(1)(A)(b) shall become redundant and shall have to be read as a pious wish to the framers of the Act to eliminate the role of 'bribery' in the elections. The framers of the Act were quite conscious that in many cases it would be difficult to get direct evidence of inducement to the electors to vote, and because of that they provided that inducement to voter may be indirect as well. This is so even where before poll, cash, clothes, cycles, blankets, etc., are distributed amongst the electors, by the candidate or his agent. Once the Court comes to the conclusion that such gifts were made to induce the electors to vote in favour of the candidate concerned, a corrupt practice within the meaning of Section 123(1)(A) shall be deemed to have been committed.

But before the charge of bribery, as contemplated in Section 123(1)(A) of the Act, is held to have been proved, against the candidate concerned, because of mass-feeding arranged by him or his agent or any other person with his consent or the consent of his election agent, it must be established that the object of such mass-feeding was directly or indirectly to induce the electors to vote in favour of such candidate. In some cases, on material being produced, this charge can be established directly if the candidate or his agent, or any other person with the consent of the candidate or his election agent, as such mass-feeding of the electors, seeks their support and votes

at the election in question. But there may be cases, where the inducement to vote is not a direct one but only an indirect one. The candidate or his agent or any other person who has arranged such mass feedings with the consent of the candidate or his election agent, may not make a direct appeal to the electors either before, during or after the feast.

The High Court has rightly come to the conclusion that in the special facts and circumstances of the present case, it is not possible to hold the respondent guilty of the charge of bribery, by arranging mass-feeding.

Section 123(6) says that the incurring or authorising of expenditure in contravention of Section 77 shall be deemed to be a corrupt practice, for the purpose of the said Act. The relevant part of Section 77 is as follows:

Section 77(1) "Account of election expenses and maximum thereof. – (1) Every candidate at an election shall, either by himself or by his election agent, keep a separate and correct account of all expenditure in connection with the election incurred or authorized by him or by his election agent between the date on which he has been nominated and date of declaration of the result thereof, both dates inclusive.

Explanation, 1. Notwithstanding any judgement, order or decision of any court to the contrary, any expenditure incurred or authorized in connection with the election of candidate by a political party or by any other association or body of persons or by any individual (other than the candidate or his election agent) shall not be deemed to be, and shall not ever be deemed to have been, expenditure in connection with the election incurred or authorized by the candidate or his election agent for the purposes of this sub-section:

Explanation (1) aforesaid was introduced by Act No 58 of 1974 w.e.f. 19.10.1974. It may be mentioned that this Court on 3.10.1974, in the case of *Kanwar (a) Gupta v. Amar Nath Chawla*, (1975) 3 SCC 646, while examining the scope of section 77(1) had observed:

"When the political party sponsoring a candidate incurs expenditure in connection with his election, as distinguished from expenditure on general party propaganda, and the candidate knowingly takes advantage of it or participates in the programme of activity or fails to disavow the expenditure or consents to it or acquiesces in it, it would be reasonable to infer, save in special circumstances, that he impliedly authorised the political party to incur such expenditure and he cannot escape the rigour of the ceiling by saying that he has not incurred the expenditure, but his political party has done so. A party candidate does not stand apart from his political party and if the political party does not want the candidate to incur

the disqualification, it must exercise control over the expenditure which may be incurred by it directly to promote the poll prospects of the candidate.

The same proposition must also hold good in case of expenditure incurred by friends and supporters directly in connection with the election of the candidate. This is the only reasonable interpretation of the provision which would carry out its object and intendment and suppress the mischief and advance the remedy by purifying our election process and ridding it of the pernicious and baneful influence of big money."

To take away the effect of the judgement of this Court in the case of *Kanwar Lal Gupta (supra)* the explanation aforesaid was introduced saying that notwithstanding any judgement, order or decision of any Court on the contrary, any expenditure incurred or authorised in connection with the election of a candidate by a political party or by any other association or body of persons or by any individual (other than the candidate or his election agent) shall not be deemed to have been, expenditure in connection with the election, incurred or authorised by the candidate or by his election agent for the purposes of the said sub-section.

The validity of the said explanation was questioned before this Court. A Constitution bench of this Court in the case of *P. Nalla Thampy Terah v Union of India* (1985) Supp. SCC 189, observed that petitioner in that case was not unjustified in criticising the provision contained in Explanation 1 as diluting the principle of free and fair elections, which is the cornerstone of any democratic polity, but it was not for the Court to lay down policies in matters pertaining to election. As the said amendment in sub-section 1 of Section 77 of the Act did not violate the constitution, it could not be declared to be invalid although this Court may not approve the policy which underlines it. It was further said:

"While we are on this question, we would like to point out that if any expenditure which purports to have been incurred, for example, by a political party, has in fact been incurred by the candidate or his election agent, Explanation 1 will not be attracted. It is only if the expenditure is in fact incurred or authorised by a political party or any other association or body of persons, or by an individual (other than the candidate or his election agent) that the Explanation will come into play. The candidate cannot place his own funds in the power or possession of a political party, or a trade union or some other person and plead for the protection of Explanation 1. The reason is that, in such a case, the incurring of the expenditure by those others, is a mere façade. In truth and substance, the expenditure is incurred by the candidate himself because the money is his. What matters for the purpose of Explanation 1 is not whose hand it is that spends the money. The essence of the matter is, whose money it is."

It is true that right to elect or to be elected is pure and simple a statutory right and in the absence of the statutory right and in the absence of the statutory provision neither a citizen has a right to elect nor has he a right to be elected, because such right is neither a fundamental right nor a common law right. The same is the position so far as the right to challenge an election is concerned. It flows from the provisions of the Act itself. As such, the right of a person to question the validity of an election is dependent on the conditions prescribed in the different sections of the Act and the rules framed thereunder. It was open to the parliament to say that any expenditure incurred by a political party or by any other association or body of persons or by any individual other than the candidate or his election agent, shall not be deemed to be expenditure in connection with the election, incurred or authorised by the candidate or his election agent for the purpose of sub-section (1) of Section 77 read with rule 90 aforesaid.

At the same time we cannot resist from observing that sub-section (6) of Section 123 which makes incurring or authorising expenditure in contravention of Section 77, a corrupt practice because of the aforesaid Explanation 1 to Section 77(1) has become nugatory and redundant. Sub-section (6) of Section 123 read with Section 77 and rule 90, purports to restrict the unlimited flow of money power, and makes expenditure in excess of the limit fixed, a corrupt practice, but legality and sanctity has been given to such excess expenditure by explanation 1 aforesaid, which fixes no limit on the expenditure in connection with the election of a candidate. Neither the candidate nor the political party nor the persons who incur such huge expenditure for the candidate are required to disclose the same to anyone. It need not be impressed that it is not always possible for the election petitioner to prove or even for the Courts to record a finding that the fantastic expenditure in the election has been incurred or authorised by the candidate concerned or by his election agent, although the court is satisfied on the material on record that the limit fixed by the Act and the rules has been far exceeded in any particular case.

As the law stands in India today anybody, including smuggler, criminal or any other anti-social element may spend any amount over the election at any candidate in whom such person is interested, for which no account is to be maintained or to be furnished and any such expenditure shall not be deemed to have been expenditure in connection with the election, incurred or authorised by the candidate or by his election agent for the purpose of sub-section (1) of Section 77, so as to amount to a corrupt practice within the meaning of sub-section (6) of Section 123. It is true that, with the rise in the costs of the mode of publicity for support of the candidate concerned, the individual candidates cannot fight the election without proper funds. At the same time, it cannot be accepted that such funds should come from hidden sources which are not available for public scrutiny. According to us, sub-section (6) of Section 123 declaring "incurring or authorising of expenditure in contravention of Section 77" a corrupt practice has lost its significance and utility with the introduction of the Explanation 1 aforesaid which encourages corruption by underhand methods. If the call for "purity of elections" is not to be reduced to a lip service or a slogan, then the persons investing funds, in furtherance of the prospect of the election of a candidate must be identified and located. The candidate should not be allowed to

plead ignorance about the persons, who have made contributions and investments for the success of the candidate concerned at the election. But this has to be taken care of by the Parliament.

ELECTION COMMISSION OF INDIA

Nirvachan Sadan, Ashoka Road, New Delhi 110 001,
Dated 6th January, 1994/16 Pausa, 1915 (SAKA)

NOTIFICATION

No. 82/MT-HP/2/91 (Aurangabad). In pursuance of clause (b) of sub-section (2) of section 116C of the Representation of the People Act, 1951 (43 of 1951), the Election Commission of India hereby publishes the Order, dated 19th November 1993 of the Supreme Court of India in Civil Appeals Nos. 2115, 1758, 2116 and 2444 of 1993 filed against the judgement dated 30th March, 1993 of High Court of Judicature at Bombay (Aurangabad Bench) in Election Petition No. 2 of 1991.