

September 2004

Maharashtra Polls 2004

Citizens Campaign

Keep Religion Out of Politics !

Introduction

The Constitution of India amongst other things protects our right to freedom of speech enshrined under Article 19 (1)(a). However, the same has not been made absolute and there are certain reasonable restrictions placed on. The restrictions to which the freedom of speech is subject are:

- Restrictions in the interest of sovereignty and integrity of India
- Security of state
- Defamation or incitement of an offence.

This means that no person shall be allowed to exploit the freedom of speech in a manner that may cause a threat to the sovereignty and integrity of India or the security of state and in any such other manner which is likely to incite an offence.

With the declaration of the election dates for the legislative house of the state of Maharashtra there is a likelihood of inflammatory speeches being made by candidates on the basis of religion, race, language etc., in order to procure votes. Such practices continue to be rampant in spite of the Supreme Courts Decision wherein it held secularism to be the basic structure of the Constitution.¹

Such speeches are likely to fuel communal violence. This is in gross violation of the *Representation of the Peoples Act, 1951* (henceforth referred to as the RPA) which outlines the code of conduct that the candidates are bound to follow at the time of elections.

The RPA expressly prohibits candidates to canvass for votes on the basis religion, race, caste, community or language. The RPA not only prohibits such practices by the candidates but also classifies them as an electoral offence.

Therefore, under the RPA:

If any person who in connection with an election under this Act promotes or attempts to promote feelings of enmity or hatred on those basis between different classes of citizens of India and the same has been made punishable under

¹ S.R Bommai V. Union Of India
1994(3) SCC 1

section 125 with imprisonment for a term which may extend to three years, or with fine, or with both.

The accompanying note on *hate speech and hate* writing outlines sections of Indian penal law that expressly limit hate-driven speeches and pieces of writing that seek to *incite violence and hatred against sections of the people*. Hate speech and writing are time-tested tools at times of communal violence, being used by fanatical elements *to create a climate that allows widespread violence to receive societal sanction and complicity*. Hence it is critical that the law against hate speech is strictly enforced and loopholes in these sections rectified.

Objectives of the RPA

The RPA has been mainly enacted to provide for

- the conduct of elections of the houses of parliament and the houses of the legislature of each state,
- the scrutiny of qualifications and disqualifications for membership of those houses,
- avoidance of corrupt practices and
- regulation of other offences at or in connection with such elections and
- the adjudication of doubts and disputes arising out of or in connection with such elections.

How do we file an election petition?

It is **Part VI** of the said Act that deals with the **Disputes regarding Elections** and **Chap. II** gives details of the procedure required for the **presentation of an election petition in the High Court**. Sections 80 to 84 of the RPA lays down the procedure for the same. **Section 80** categorically states that **no election can be challenged except by means of an election petition presented in accordance with the provisions of the Act**.

It is **section 80A** that gives jurisdiction to the High Court to try an election petition. Ordinarily, a single judge of the High Court will hear the petition though the Chief Justice shall, from time to time, assign one or more judges for that purpose. One condition mentioned here is that when only one of the Judges of the High Court is hearing an election petition, he shall try all election petitions presented to that court. Also, the High Court, using its discretion may, in the interest of the justice or convenience, try an election petition, wholly or partly, at a place other than the place where the High Court is located.

Before we elaborate the procedure for the presentation of an election petition it would be necessary for us to understand the following terms as per that RPA:

- “Corrupt” or “illegal practice”
- Election petition
- Contents of an election petition.

Corrupt Practice

“**Corrupt practice**” as understood under **section 2(c)** of the Act means **any practices specified under section 123**. Bribery and undue influence on the part of a candidate or his agent are also defined as corrupt practices. At present, however, we are concerned only with sub-section (3) and (3-A).

Section 123(3) deals with “The appeal by a candidate or his agent or by any other person with the consent of a candidate or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or the use of, or appeal to religious symbols or the use of, or appeal to, national symbols such as the national flag or national emblem, for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.”

[There is an exception to the above-mentioned provision, which states that “no symbol allotted under this Act to a candidate shall be deemed to be a religious symbol or a national symbol for the purposes of this clause.”]

Similarly, **section 123 (3-A)** deals with “the promotion of, or attempt to promote, feelings of enmity or hatred between different classes of the citizens of India on grounds religion, race, caste, community or language, by a candidate or his agent or any other person with the consent of a candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.”

Amongst other speeches provoking people to disrupt communal harmony, example of a few have been given hereunder:

- Speeches made by Shri Praveen Togadia, international general secretary of the Vishwa Hindu Parishad (VHP)², whose speeches –unchecked by the administration --fuelled the communal polarisation in many parts of India. Fortunately, the vigilant Supreme Court imposed a check on the speeches of Shri Praveen Togadia in time wherein very strong statements were made in the Judgement by Justices Doraiaswamy Raju and Arjit Pasiath stating that ‘Religion cannot be mixed with secular activities of the State and fundamentalism of any kind cannot be permitted to masquerade as political philosophies to the detriment of a welfare State. It is, therefore, imperative that if any individual or group of persons, by their action or caustic and inflammatory speech are bent upon sowing seed of mutual hatred, and their proposed activities are likely to create disharmony and disturb equilibrium, sacrificing public peace and tranquility, strong action, and more so preventive actions are essentially and vitally needed to be taken. Any speech or action which would result in ostracization of communal harmony would destroy all those high values which the Constitution aims at. Welfare of the people is the

² Speech at a meeting of the Rashtriya Vichar Manch, Mumbai on 16th, 2003

ultimate goal of all laws, and State action and above all the Constitution. They have on common object, that is to promote well being and larger interest of the society as a whole and not of any individual or particular groups carrying any brand names.’³.

- Speeches made by agents of the candidates at electoral rallies exhorting workers of the Shiv Sena to disrobe Muslim women in *burkhas* to ascertain whether they were women were held by Justice Suresh to be clear threats to ensure that women would not participate in the voting⁴. In the same case Justices Suresh and Bharucha held that speeches and phrases like “*garva se kaho ham Hindu hai*” as also ten speeches where in the speaker made statements like the ‘saffron flag would fly over Kashmir and Islamabad’, the flame of Hindutva would be lit if one voted for the speakers party (a BJP/Shiv Sena candidate) and that the Congress was responsible for the desecration of temples and the molestation of Hindu women (Justice Halbe).
- In another case⁵, Justice Variava of the Bombay High Court made a very strong judgement thereby *debaring the candidate* (Shiv Sena MLA and Former Maharashtra Chief Minister, Manohar Joshi) *and declaring his election null and void*. In the same judgement it was held that the speeches made by Shri Bal Thackeray as an agent of the candidate wherein he invoked the *dream of Hindutva* were violative of the provisions of the Indian Election Law. However, the above Judgement of the Bombay High Court was substantively diluted by the Supreme Court⁶ thereby setting aside the Judgement of the Bombay High Court.
- Speeches of Shri Thackeray in December 1992 and January 1993 and also his writing in *Saamna* insinuating Shiv Sainiks to launch a full-fledged pogrom against the lives and property of Muslims clearly violated the law but unfortunately the same were justified by the Bombay High Court. With Due respect to the High Court it may be stated here that the Bombay High Court has erred in delivering its judgement inspite of clear evidence presented before it.⁷ Not merely that the special leave petition against this judgement filed by the petitioner in the SC was summarily dismissed by the apex court in

³ State of Karnataka and Anr. V. Dr. Praveen Togadia
Citation : 2004 SOL Case No. 258

⁴ Subhash Desai V. Sharad J. Rao
AIR 1994 SC 2277

⁵ Manohar Joshi V. Nitin Bhaurao Patil
Unreported Judgement of the Bombay High Court.

⁶ Manohar Joshi V. Nitin Bhaurao Patil
AIR 1996 SC 796

⁷ J.B.D’souza V. State of Maharashtra
1995 Cri LJ 1316 (Bom)

January 1995 leading constitutional experts and jurists to seriously question the judicial pronouncement.⁸

The Supreme Court in the case of ***Samant N. Balkrishna v. George Fernandez, AIR 1969 SC 1201***, dealing with degrees of the burden of proof to establish a direct connection between a statement or speech and a candidate himself or by his agent other than an election agent, has classified corrupt practices into two groups on grounds of who commits these practices:

1. The first category consists of corrupt practices committed by the candidate or his election agent or any other person with the *consent* of the candidate or his election agent. These, if established, but themselves could ensure that the election is declared null and void.
2. Then there is the corrupt practice committed by an agent other than an election agent. Here an additional fact has to be proved that the result of the election was materially affected by the corrupt practice.

To put it simply, in the first instance, it is not necessary to prove the fact that the corrupt practices materially affected result of the election. It is sufficient to prove the use of such corrupt practices by the candidate himself or the election agent in order to declare the election void. In the second instance, however, where the practice has not been committed by the candidate himself or by the election agent, but by an agent not being an election agent and the same has been committed with the consent of the candidate or election agent, then additional evidence to prove that the use of corrupt practices have materially affected the election result, is necessary.

We have already elaborated the term “corrupt practices”. Thereafter, it is important for us to understand the meaning of the term “election petition” as explained in the Act along with what needs to go into the drafting and filing of such a petition

Election Petition

It has been already stated in the beginning that an election can be challenged only by the way of an election petition (section 80)

While delivering the judgment in the case of *Makhan Lal Bangal V/S. Manas Bhunia, R.C. Lahoti, J.* stated that “An election petition is like a civil trial.”

Section 83 of the Act lays down the contents of an election petition. Section 83 may be stated as follows :

Contents of petition

An election petition must contain:

⁸ *Crime and Punishment, Communalism Combat*, January 1995

- (a) A concise statement of the material facts on which the petitioner relies;
 - (b) The details and full particulars of any corrupt practice that the petitioner alleges, including as full and complete a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and
 - (c) The petition shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908.) for the verification of pleadings:
[Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.]
- (2) Any annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition.

The material facts or particulars relating to *the misuse of religion and religious symbols* may be contained as an annexure/document contained in the election petition. This may then be referred to without the need to make any detailed written contentions regarding the same. To make the election petition substantive and effective, detailed documentation of the offence must therefore be included *either* as an annexure (your evidence of the corrupt practice could be a pamphlet, video tape, audio tape) to the petition or can be quoted verbatim in the petition itself.

Section 83 of the RPA requires every election petition to contain a concise statement of the material facts on which the petitioner relies. If the election petition alleges commission of corrupt practice at the election, the election petition must put forth the full details and particulars of any corrupt practice including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice.

Every election petition must be signed and verified by the petitioner in the manner laid down for the verification of pleadings in the CPC. An election petition alleging corrupt practice is required to be accompanied by an affidavit in Form 25 read with Rule 94A of the Conduct of Election Rules, 1961.

It is important to note that in the case of ***Gajanan Krishnaji Bapat v. Dattaji Raghobaji Megha, JT 1995(5) SC 410***, the Supreme Court has stated that the election petitioner is also obliged to disclose his source of information about the commission of the corrupt practice. This has been done to bind him to the charge levelled by him and to prevent any fishing or roving enquiry and also to prevent the returned candidate from being taken by surprise.

In ***F.A. Sapa etc. etc. v. Singora and others, etc., AIR 1991 SC 1557***, the Supreme Court has held :

"A charge of corrupt practice has a two dimensional effect its impact on the returned candidate has to be viewed from the point of view of the candidate's future political and public life and from the point of view of the electorate to ensure the purity of the election process. There can, therefore, be no doubt that such an allegation involving corrupt practice must be viewed very seriously and the High Court should ensure compliance with the requirements of Section 83 before the parties go to trial." This is effect means that neither should the affidavit supporting the petition be defective in any way nor should any of the facts contained within be unverified or unsubstantiated. The source and grounds of information are also critical.

In ***Azhar Hussain v. Rajiv Gandhi, 1986(2) SCR 782***,

This court held that dates and particulars of the meetings should be given so as to eliminate the possibility that witnesses could be procured later on for adducing evidence.

Thus it may be clearly understood from the above stated decisions that the defect in verification is not fatal in itself and can be cured. However, where the petitioner has persisted in pursuing the petition without proper verification it was held that unless the defect in verification was rectified, the petition could not be tried .

Presentation of the Election Petition

Section 81 provides as follows:-

"81. Presentation of petitions. - (1) An election petition calling in question any election may be presented on one or more of the grounds specified in [sub-section (1)] of Section 100 and Section 101 to the [High Court] by any candidate at such election or any elector [within forty-five days from, but not earlier than the date of election of the returned candidate or if there are more than one returned candidate at the election and the dates of their election are different, the later of those two dates.]

Explanation. - In this sub-section, 'elector' means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.

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

It is basic to the law of elections and election petitions that in a democracy, the mandate of the people as expressed at the hustings must prevail and be respected by the Courts and that is why the election of a successful candidate is not to be set aside lightly. Heavy onus lies on the election petitioner seeking setting aside of the election of a successful candidate to make out a

clear case for such relief both in the pleadings and at the trial. The mandate of the people is one as has been truly, freely and purely expressed.

The electoral process in a democracy such as ours is too sacrosanct to be permitted to be polluted by corrupt practices. If the court arrives at a finding of commission of corrupt practice by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent then the election of the returned candidate shall be declared to be void. The underlying principle is that corrupt practice having been committed, the result of the election does not echo the true voice of the people.

The above mentioned section 81 makes a reference to section 100 and 101 of the Act which states the grounds for declaring the elections to be void and grounds for which a candidate other than the returned candidate may be declared elected respectively.

The relevant provision under **Section 100** may be stated as follows:-

Section 100(1)(b) – Subject to the provisions of sub-section (2) if the High Court is of the opinion- that any corrupt practice has been committed by a returned candidate or his agent or by any other person with the consent of a returned candidate or his election agent; or

Section 100 (1)(d)(ii) by any corrupt practice committed in the interests of the returned candidate by an agent other than his election agent, the High Court shall declare the election of the returned candidate to be void.

Furtheron **Section 100(2)** states that if in the opinion of the High Court, a returned candidate has been guilty by an agent, of any, corrupt practice but the High Court is satisfied-

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

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

(d) that in all other respects the election was free from any corrupt practice on the part of the candidate or any of his agents,

then the High Court may decide that the election of the returned candidate is not void.

Section 101 states that **Grounds for which a candidate other than the returned candidate may be declared to have been elected.** If any person who has lodged a petition has, in addition to calling in question the election of the returned candidate, claimed a declaration that he himself or any other candidate has been duly elected and [the High Court] is of opinion- (a) that in fact the petitioner or such other candidate received a majority of the valid votes ; or (b) that but for the votes obtained by the returned candidate by corrupt practices the petitioner or such other candidate would have obtained a majority of the valid votes,

[the High Court] shall after declaring the election of the returned candidate to be void declare the petitioner or such other candidate, as the case may be, to have been duly elected.

Act within 45 Days

Section 81 lays down the time limit beyond which an election petition *cannot be filed*. An election petition will be entertained by the High Court only if it is filed within 45 days from the election of the returned candidate.

Case Histories

This Court very recently in the case of ***Jeet Mohinder Singh v. Harminder Singh Jassi, JT 1999(8) SC 432*** summed-up such principles on a review of the decided cases as under :

(i) The success of a candidate who has won at an election should not be lightly interfered with. Any petition seeking such interference must strictly conform to the requirements of the law. Though the purity of the election process has to be safeguarded and the Court shall be vigilant to see that people do not get elected by flagrant breaches of law or by committing corrupt practices, the setting aside of a election involves serious consequences not only for the returned candidate and the constituency, but also for the public at large inasmuch as re-election involves enormous load on the public funds and administration.

(ii) Charge of corrupt practice is quasi-criminal in character. If substantiated it leads not only to the setting aside of the election of the successful candidate, but also to his being disqualified to contest an election for a certain period. It may entail extinction of a person's public life and political career. A trial of an election petition though within the realm of civil law is akin to trial on a criminal charge. Two consequences follow. Firstly, the allegations relating to commission of a corrupt practice should be sufficiently clear and stated precisely so as to afford the person charged a full opportunity of meeting the same. Secondly, the charges when put to issue should be proved by clear, cogent and credible evidence. To prove charge of corrupt practice a mere preponderance of probabilities would not be enough. There would be a presumption of innocence available to the person charged. The charge shall have to be proved to hilt, the standard of proof being the same as in a criminal trial.

Where any of the above provisions are not complied with, being mandatory in nature, in that case section 86 of the Act shall come into operation which states that "86. Trial of election petition. - (1) The High Court shall dismiss an election petition which does not comply with the provisions of Section 81 or Section 82 or Section 117.

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

Section 86 empowers the High Court to dismiss an election petition at the threshold if it does not comply with the provisions of Section 81 or Section 82 or Section 117 of the Act, all of which are patent defects evident on a bare examination of the election petition as presented. Sub-section (1) of Section 81 requires the checking of limitation with reference to the admitted facts and sub-section (3) thereof requires only a comparison of the copy accompanying the election petition with the election petition itself, as presented. Section 82 requires verification of the required parties to the petition with reference to the relief claimed in the election petition. Section 117 requires verification of the deposit of security in the High Court in accordance with Rules of the High Court. Thus, the compliance of Sections 81, 82 and 117 is to be seen with reference to the evident facts found in the election petition and the documents filed along with it at the time of its presentation. This is a ministerial act. There is no scope for any further inquiry for the purpose of Section 86 to ascertain the deficiency, if any, in the election petition found with reference to the requirements of Section 83 of the R. P. Act which is a judicial function.

CONCLUSION

To conclude, it is necessary to mention the case of ***Sri Harasingh Charan Mohanty v. Surrendra, Mohanty, AIR 1974 SC 47***, in which Court has held that :

In order to establish a corrupt practice under the above provisions the petitioner must prove -

(I) For the purposes of corrupt practice under sub-s. (3) of S. 123 of the Act that the statement is an appeal to the religious symbol and as has been made (a) for the furtherance of the prospects of the election of that candidate; or (b) for prejudicially affecting the election of any candidate; and

(II) For the purposes of corrupt practice under sub-s. (4) of S. 123 of the Act that the publication of a statement of fact is by (a) the candidate, or (b) his agent, or (c) any other person with the consent of the candidate or his election agent; (d) that the statement is false and the candidate believes it to be false or does not believe it to be true; (e) that it relates to personal character or conduct of a candidate; and (f) that the statement is reasonably calculated to prejudice the prospects of the candidate's election. The word 'agent' under the Explanation to Section 123 of the Act includes an election agent, a polling agent and any person who is held to have acted as an agent in connection with the election with the consent of the candidate. If the corrupt practice is committed by the returned candidate or his election agent, under Section 100(1)(b) of the Act the election is void without any further condition being fulfilled. But if the petitioner relies on a corrupt practice committed by any agent other than

an election agent, the petitioner must prove that it was committed by him with his consent or with the consent of his election agent.

SUMMARY:-

Filing of an election petition:-

1. An election cannot be challenged other than by the way of an election petition.
2. The election petition should contain the full particulars of the corrupt practices alleged to have been committed therein, the names of the persons alleged to have committed the said corrupt practices and the details as regards the place and date of commission.
3. Related to sections 123 (3) and 123 (3-A) of the RPA, the petition must have detailed and substantive evidence of the corrupt practice *which is the misuse of religion and religious symbols* to garner votes.
4. The election petition should be signed and verified by the petitioner alongwith an affidavit supporting the allegations made in the petition.
5. The election petition challenging any election must be presented before the High Court on the grounds mentioned in section 100 and section 101 of the RPA.
6. The election petition should be presented within 45 days from the date of election of the returned candidate or where there are more than one candidate then from 45 days from the date of the election of the last candidate.
7. The election petition should be accompanied with as many copies of the petition as the number of respondents.