A

N. C. ZELIANG

AJU NEWMAI & 2 ORS.

September 5, 1980

[Y. V. CHANDRACHUD, CJ., S. MURTAZA FAZAL ALI AND A. D. KOSHAL, JJ.]

B

Representation of the People Act 1951—*Section* 123(6)—*Scope of—Preponderance of probabilities—If sufficient to prove allegation of corrupt practice.*

In the elections to the State Assembly in 1977 the appellant was declared elected. The election petitioner, who was one of the defeated candidates, alleged in his petition that the appellant had filed a false return of the expenses and thereby committed corrupt practice within the contemplation of section 123(6) of the Representation of the People Act, 1951. Accepting the allegation the High Court set aside his election.

C

Allowing the appeal.

HELD : (1) The High Court has not made any attempt to determine whether there was any legal and acceptable evidence to prove corrupt practice alleged against the appellant. It is well settled that a charge under section 123 of the Act must be proved by clear and cogent evidence as a charge for a criminal offence. It is not open to the Court to hold that a charge of corrupt practice is proved merely on a preponderance of probabilities but it must be satisfied that there is evidence to prove the charge beyond a reasonable doubt. [635 B-D]

D

K. M. Mani v. *P. J. Antony & Ors.* [1979] 1 SCR 701 referred to.

E

(i) In the instant case the petitioner himself had no personal knowledge as to the actual expenses in hiring taxies and his source of information was based on what others said. The evidence led by the petitioner falls far short of the standards required by law. [636 D, 637 E]

(ii) The petitioner claimed that he maintained a diary of the electioneering. Yet he did not produce it in Court from which a natural presumption arises that if he had produced the diary it would have gone against his case. [637 G-H]

F

(2) Corrupt practice being in the nature of a fraud, it is not permissible to plead one kind of fraud or one kind of corrupt practice and prove another though they may be inter-connected. The High Court has rightly found that the petitioner pleaded that it was the appellant who had held a feast at which he invited his voters and exhorted them to vote for him. But the evidence shows that the appellant had not held the feast but it was hosted by one of his agents at which the appellant was present and, therefore, it could not be proved that the feast was held at the instance of the appellant. [638 G—639 A]

G

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1679 of 1979.

From the Judgment and Order dated 15-5-1979 of the Gauhati High Court in Election Petition No. 7/78.

H

S. S. Ray, N. R. Chowdhary and *Parijath Sinha* for the Appellant.

R. Karanjawala and *P. H. Parekh* for Respondent No. 1.

A The Judgment of the Court was delivered by

FAZAL ALI, J.—This election appeal is directed against a judgment dated May 15, 1979 of the Gauhati High Court by which the High Court accepted the election petition filed by the petitioner Aju Newmai and set aside the election of the appellant, N. C. Zeliang who had been B declared elected from the No. 6 Tening Assembly Constituency of the State of Nagaland. For short, the respondent No. 1, namely, the election petitioner in the High Court, shall be hereinafter referred to as the 'Petitioner' and N. C. Zeliang, who had won the election, as the 'appellant'.

C The elections were held in the year 1977 and were contested by the petitioner, the appellant and others. The appellant contested the election as a Congress candidate with the symbol of 'cow and a calf' whereas the petitioner contested on the ticket of the United Democratic Front (U.D.F.) whose election symbol was 'Cock'. The other candidates in the field were Jangkhosei and Paokholun. We are, however, D not concerned with these candidates. It appears that the appellant polled 2224 votes as against the 2207 votes polled by the petitioner and thus defeated the petitioner by a margin of 17 votes, the total votes in the constituency being only 5,000. The poll took place on 18-11-1977 and the last date for filing the nomination paper was 24-10-1977.

E Being aggrieved by the declaration of the appellant as having been duly elected to the Assembly, the petitioner filed an election petition on 5-1-1978 in the High Court challenging the election of the appellant on several grounds including the allegation that he had filed a false return of the expenses and had incurred much more expenses than F fixed by the authorities concerned. The petitioner also alleged a number of other corrupt practices which had been committed by the appellant in the course of the election.

The appellant in his written statement strongly refuted all the allegations made by the petitioner and submitted that he had committed no corrupt practice and that the return which he had filed to G the District Election Officer was absolutely correct and the expenses incurred by him were well below the permissible limit.

A large number of issues were framed by the High Court but the High Court appears to have accepted the election petition only on one issue, viz., issue No. 4, which related to the corrupt practice as H contemplated by s. 123(6) of the Representation of the People Act (hereinafter referred to as the 'Act') in incurring the expenditure exceeding the permissible limit which amounted to a contravention of

s. 77 of the Act. The other allegations made by the petitioner were held by the High Court as not proved. A

The learned counsel for the petitioner, who argued this case with tenacity and ingenuity, was unable to support the allegation made by the petitioner on any other issue framed by the court except issues No. 4 and 5. As the pivotal controversy in the instant case rests on issue No. 4, we would like to take up the finding of the High Court on this issue first. Issue No. 4, as framed by the High Court, may be extracted as follows :— B

> "Whether the Respondent No. 1 committed corrupt practice, as defined under sec. 123(6) of the Representation of the People Act, 1951, by incurring or authorising expenditure exceeding the permissible amount, in contravention of section 77 of the said Act, as alleged in paragraphs 10, 11 Ground No. (II) and Schedule B to the Petition? C
>
> If so, is the election of Respondent No. 1 liable to be set aside?" D

This issue was based on the plea taken by the petitioner in paragraph 10 and ground No. II as also Schedule B to the petition and it may be necessary to traverse the allegations made by the petitioner regarding this issue. Paragraph 10 appears to be an omnibus statement which contains a number of grounds including the question of incurring unauthorised expenditure with which alone we are concerned for the present, and may be extracted thus :— E

> "That the petitioner also states and contends that the election of Respondent No. 1 is liable to be declared void as he committed several corrupt practices, namely (1) the corrupt practice as defined in sub-section (6) of section 123 of the Act, that is to say, incurring or authorising expenditure in contravention of section 77 of the Act; (2) the corrupt practice of bribery as defined in sub-section (1) of section 123 of the Act; (3) the corrupt practice of hiring or procuring vehicles for the free conveyance of electors to and from certain polling stations within the said Assembly Constituency as defined in Section 123(5) of the Act. The material facts and particulars of these corrupt practices are set out hereunder." F G

Ground No. II of the petition may be extracted as follows :

> "For that the Respondent No. 1 committed the corrupt practice as set out in sub-section (6) of section 123 of the Act by incurring or authorising expenditure in contravention of section 77 of the Act." H

A The material particulars relating to the allegation made in Ground No. II are contained in Schedule B to the petition, the relevant portion of which may be extracted thus :—

"B-1. In his return of election expenses, the Respondent No. 1 returned the total expenditure of Rs. 1323.69.

B ... .

B-3. Expenses incurred in connection with hire charges of vehicles and petrol and mobil oil consumed on account of these vehicles and in purchasing accessories :—

C (i) The respondent hired a jeep bearing No. NLK 4308 from Wilubo of Dimapur and paid hire charge of Rs. 3000 including the cost of the driver to the said owner.

(ii) On 3-11-1977 the Respondent No. 1 purchased two tyres valued at Rs. 720 from the firm Motilal Dungarmall of Dimapur and one exide battery from the firm Bakliwal and D Gangwals of Dimapur at the cost of Rs. 540 for the purpose of the aforesaid vehicle No. NLK 4308.

(iii) On 28-10-1977 the Respondent purchased petrol worth Rs. 240 for the vehicle No. NLK 6284 used by him for the purpose of election from the firm of Pulchand Trilok- E chand, Dimapur under voucher No. 270800."

We have already mentioned that all the allegations made by the petitioner were stoutly denied by the appellant.

Thus, from the allegations made by the petitioner so far as issue F No. 4 is concerned, the gravamen of the charge against the appellant was that while he had shown a total expenditure of Rs. 1323.69 in his return filed before the District Election Officer yet he had incurred expenditure far exceeding the same Paragraphs B-3(i), (ii) and (iii) of Schedule B to the petition, extracted above, show that the appellant had incurred a total expenditure of Rs. 3960. According to the peti- G tioner these expenses were incurred on the hiring of jeeps and purchasing tyres and other accessories for jeep NLK 4308 which was used for the purpose of election campaign. The permissible limit being Rs. 2,500 only, the expenditure incurred, according to the petitioner, exceeded the limit by Rs. 1460. It was also alleged by the petitioner that jeep No. NLK 4308 was hired by the appellant from one Wilubo H of Dimapur who was paid hiring charges of Rs. 3,000. We might state here that according to the finding of the High Court, the petitioner himself admitted in his evidence that the expenditure incurred

for the purchase of tyres and battery (Rs. 720 and Rs. 540 respectively) were included in the amount of Rs. 3,000, the balance being the hire charges. The petitioner, therefore, contended that, at any rate, the appellant had exceeded the expenses incurred in the election by at least Rs. 500, a fact which, according to him, he had proved to the satisfaction of the court.

We have gone through the judgment of the High Court carefully and what we find is that the High Court has not made any attempt to determine whether there was any legal and acceptable evidence to prove the corrupt practice alleged against the appellant. It is now well settled by a large catena of authorities that a charge under s. 123 of the Act must be proved by clear and cogent evidence as a charge for a criminal offence. It is not open to the court to hold that a charge of corrupt practice is proved merely on a preponderance of probabilities but it must be satisfied that there is evidence to prove the charge beyond a reasonable doubt. The electoral process in this country is an extremely expensive one and by declaring the election of a candidate null and void, the entire process, so far as the candidate is concerned is set at naught resulting in re-election. Such a course should be adopted only when the allegation of corrupt practice is proved conclusively. In *K. M. Mani* v. *P. J. Antony & Ors.*(1), this Court while referring to a large number of cases observed as follows:—

> "An allegation regarding the commission of a corrupt practice at an election is a very serious matter not only for the candidate but for the public at large as it relates to the purity of the electoral process.
>
> ....
>
> In taking that view the trial court lost sight of the requirement that the allegation regarding the commission of a corrupt practice is in the nature of a quasi criminal proceeding which has to be established beyond reasonable doubt and not merely by preponderance of probabilities.
>
> ....
>
> In *Mohan Singh's* case (AIR 1964 SC 1366) it has been held that the onus of proving the commission of a corrupt practice is not discharged on proof of mere preponderance of probability as in a civil suit, and it must be established beyond reasonable doubt by evidence which is clear and unambiguous.

(1) [1979] 1 SCR 701.

A In *Balakrishna* (1969) (3 SCR 603) it has been held that while consent may be inferred from circumstantial evidence, the circumstances must point unerringly to the conclusion and must admit of no other explanation, for a corrupt practice must be proved in the same way as a criminal charge..... The election petitioner must therefore exclude every hypo-
B thesis except that of guilt on the part of the returned candidate or his election agent, and the trial court erred in basing its finding on a mere probability."

It is not necessary to multiply authorities on this point because the law has been fully crystallised on the subject.

C The petitioner who was examined as PW 1 has clearly stated in his evidence that he was told by Wilubo that the appellant had hired Jeep No. NLK 4308 from him for a lump sum of Rs. 3,000 which were the hire charges. The witness further admitted that Wilubo was his relation being the brother of his elder brother's wife and was
D staying at Dimapur. Thus, the petitioner himself had no personal knowledge as to the actual hiring charges paid to Wilubo by the appellant and his source of information is based on what he heard from Wilubo. Wilubo, however, who was examined as a witness for the appellant, has denied these allegations and has also denied having told the petitioner that his Jeep was hired by the appellant, much
E less for a sum of Rs. 3,000.

Mr. Karanjawala, appearing for the petitioner, vehemently contended that the manner in which Wilubo was examined by the appellant as his witness shows that he was not speaking the truth. It was pointed out that, to begin with, Wilubo was cited as a witness for
F the petitioner and summons were issued to Wilubo but he evaded service and ultimately a warrant had to be issued when the counsel for the appellant, informed the court that Wilubo would be examined as a witness for the appellant. Our attention was also drawn to the cash memos. which show that the tyres costing Rs. 720 and battery worth Rs. 540 were purchased. Even accepting this part of the case,
G all that has been shown is that a sum of Rs. 1260 was spent so far as jeep No. NLK 4308 was concerned. But this fact by itself was not sufficient to prove the allegations made by the petitioner against the appellant. It had further to be shown by the petitioner to the satisfaction of the court that Wilubo had charged a hiring charge of Rs. 3,000 or nearabout that from the appellant and that he himself had purchased
H the tyres and battery. Wilubo had denied this allegation, the evidence of the petitioner on this point is purely hearsay and, therefore, inadmissible in evidence. It was, however, argued by Mr. Karanjawala

that from the evidence of the witnesses produced by the petitioner, it would appear that Jeep No. 4308 was freely used for a large number of days from which it could be safely presumed that the charges for the jeep must have been in the region of Rs. 3,000. In the first place, there is no clear evidence of any of the witnesses examined by the petitioner to show the exact period for which the jeep was used or the distance which it had traversed nor is there anything to show that such an amount as Rs. 3,000 could have been paid as hiring charges to Wilubo by the appellant. The evidence merely shows that the jeep was used either on the election day, or a day after or a day before that. There is no evidence to show what were the customary hiring charges for jeeps or cars in the localities where the jeep is said to have been used by the appellant. It is, however, suggested by Mr. Karanjawala that as Wilubo appears to be a man of small means, it must be presumed that he must have made a lot of money by hiring out the jeep to the appellant. This is also a pure conjecture and cannot be pressed into service for unseating the appellant which can be done only if the evidence, even if it consists of circumstancial evidence must be clear and conclusive. We have been taken through the evidence of PWs 1, 5, 6, 13 and 20 but none of these witnesses gives us any idea of the prevailing rate of hire in the localities concerned which could have been paid by the appellant to Wilubo for the jeep. The evidence led by the petitioner falls far short of the standards required by law.

Another important circumstance that militates against the case of the petitioner is that while the petitioner admits in his evidence that he used to maintain some sort of a diary of his electioneering yet he had not produced it on the plea that he did not remember where he had kept the diary. In this connection, the petitioner deposed as follows :—

> "I had maintained some sort of a diary of my electioneering. The diary was of course not maintained regularly. I do not remember where I kept the diary. I have not filed the same in Court."

It is, therefore, manifest that the diary would have been the best evidence to show that as to how many days the jeep was used or for what distance and as also the hiring charges paid by the appellant to Wilubo. The petitioner has withheld the diary and has not filed the same in the court from which a natural presumption arises that if he had produced the diary it would have gone against his case. Even PW 6 who, according to the petitioner, was an independent witness, has merely said that he knew that the appellant had used a jeep but he does not

A either give the dates when the jeep was used or the distance which it had traversed. He, however, further admits that although he had seen the jeep he did not see the appellant, Zeliang in it. This, therefore, falsifies his allegation that the jeep was used by the appellant. The evidence of other witnesses on this point is also not helpful to the petitioner and is even more vague than the evidence of PW 6. In fact, B there is some evidence to show that the appellant had visited various places in his constituency even on foot. In the absence of such evidence it was not open to the High Court to accept the speculation of the petitioner that the appellant must have incurred hiring charges for the jeep exceeding Rs. 2,000 or so.

C The appellant has denied having incurred any expenditure on the purchase of tyres and battery but taking the case of the petitioner at the highest and assuming that an expenditure of Rs. 720 for the tyres and Rs. 540 for the battery was incurred as is proved from the cash memos, produced by the petitioner, there is no reliable or credible evidence to show that the appellant had himself met the cost of these D articles and used them for his election campaign. Thus, the expenses indicated above are not at all relatable to the jeep in question. In these circumstances, therefore, we are clearly of the opinion that there is no legal evidence to support the corrupt practice alleged by the petitioner in that he had incurred expenditure beyond Rs. 2,500 and thus the petitioner has not been able to prove that the return of E expenses filed by the appellant before the District Election Officer was wrong or inaccurate and in excess of the permissible limit. Hence, the finding of the High Court on this point cannot be sustained.

Realising this difficulty, Mr. Karanjawala strongly pressed issue No. 5 framed by the High Court on the basis of one of the allegations F made by the petitioner. The High Court has, however, clearly held that the allegation which formed the subject-matter of issue No. 5 has not been proved at all by the petitioner. Mr. Karanjawala assailed the finding of the High Court on this point and submitted that this allegation was clearly proved by the petitioner. There, however, appears to be an insurmountable obstacle in accepting the contention of the G counsel for the petitioner on this point. It is well settled that an allegation of corrupt practice must be clearly pleaded in the petition and the particulars given in the schedule. Corrupt practice being in the nature of a fraud, it is not permissible to plead one kind of fraud or one kind of corrupt practice and prove another though they may be inter-connected. The High Court has rightly found that as the H petitioner pleaded that it was the appellant himself who had held a feast, invited his voters and exhorted them to vote for him, the evidence shows that the appellant had not held the feast at all but it

was hosted by one of his agents in which the appellant was present and therefore it cannot be presumed that the feast was held at the instance of the appellant. The High Court held that the allegation pleaded was not proved by the evidence which in fact was contrary to the pleadings and therefore no notice of such a corrupt practice could be taken. With due respect, we find ourselves in complete agreement with the reasons given by the High Court on this aspect of the matter. Issue No. 5 may be extracted thus :—

> "Whether Respondent No. 1 committed corrupt practice of bribery, as defined under section 123(1)(a)(b) of the Representation of the People Act, 1951 by offering himself or by his agents with his consent, gratification by way of entertaining the electors of No. 6 Tening Assembly Constituency of the Nagaland Legislative Assembly with feasts, with the object, directly or indirectly, of inducing them to vote for the Respondent No. 1, as alleged in paragraphs 10, 11 (Ground No. III) and Schedule C to the petition?
>
> If so, is the election of Respondent No. 1 liable to be set aside?"

In Schedule C the particulars given show that the appellant gave a feast on 2-11-77 and on 31-10-77 and on 12-11-77 to the electorate and purchased a pig on all these occasions for hosting the voters. The evidence led, however, shows that no feast was hosted by the appellant at all but was done by some other person who was his agent while the appellant was present. It is, therefore, manifest that the exact corrupt practice pleaded by the petitioner in Schedule C was not proved but was in direct variance with the evidence which he led on this point. On this ground alone, therefore, the petitioner would have to be put out of court so far as issue No. 5 is concerned. No other point was pressed before us by the counsel for the parties.

For the reasons given above, we are satisfied that there is no legal evidence to prove the corrupt practice alleged against the appellant that he had exceeded the limit of expenditure fixed in using the jeep, even if he had taken it from Wilubo. Issue No. 5 also was rightly held by the High Court not proved. In this view of the matter, the appeal is allowed. The order of the High Court setting aside the election of the appellant and unseating him is hereby quashed. In the peculiar circumstances of the case, there will be no order as to costs.

P.B.R. *Appeal allowed.*