

Malicious Campaign through False Publications against Rivals during Elections: A Critical Analysis

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I. Introduction

Publication of false statements about a candidate by means of election speeches, pamphlets, booklets, handbills, posters or through media, print or electronic, is a corrupt practice under Section 123(4) of the Representation of the People Act, 1951, which reads as follows:

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.

Once proved to be committed, a corrupt practice under Section 123 (5) renders the election of a returned candidate void under Section 100² of the Representation of the People Act, 1951.

II. Object and Constitutionality of the Provision

Questions have arisen before the Supreme Court of India that such a provision is violative of the fundamental right of freedom of speech and expression under Article 19 (1) (a) of the Constitution of

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² Section 100 (1) (b) empowers the High Court to declare void an election if any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent. Section 100 (1) (d) (ii) provides that if the High Court is of opinion that the result of the election, in so far as it concerns a returned candidate, has been materially affected by any corrupt practice committed in the interests of the returned candidate by an agent other than his election agent, it may declare the election of the returned candidate to be void.

India. In *Jamuna Prasad Mukhariya v. Lachi Ram*,³ the contention was that Article 245(1) prohibits the making of laws which violate the Constitution and that Section 123 (4) {then 123 (5)} interferes with a citizen's fundamental right to freedom of speech and expression and as such is *ultra vires* Article 19 (1) (a) of the Constitution. Rejecting the contention, a five-Judge Bench observed:

..The right to stand as a candidate and contest an election is not a common law right. It is a special right created by the statute and can only be exercised in the condition laid down by the statute. The Fundamental Right Chapter has no bearing on a right like this created by statute. The appellants have no fundamental right to be elected members of Parliament. If they want that, they must observe the rules. If they prefer to exercise their right of free speech outside these rules, the impugned sections do not stop them. We hold that these sections are *intra vires*.⁴

Thus, Clause (4) of Section 123 maintains the delicate balance between the freedom of speech of an individual and the interest of the public to get full information about the candidate concerned but not to affect the prospects of the candidate concerned by publishing facts about his personal character or conduct which are false. The right to contest an election being statutory right can only be exercised on the conditions laid down by the statute.⁵

In *Sheopat Singh v. Ram Pratap*,⁶ Justice Subba Rao, speaking for the Court on behalf of himself and Hidayatulalh, J., pointed out the object of the provision and explained its scope as follows:

An election is the expression of the popular will. It shall be so conducted that the popular will shall be reflected on the basis of the policy of the party which the candidate represents and on his merits. The object cannot be achieved unless freedom of speech is assured at the election and the merits and demerits of a candidate, personal as well as political, are prominently brought to the notice of the voters in the constituency. At the same time it shall not be allowed to degenerate into a vilification campaign aimed at bringing down the personal character or conduct, etc. of the candidates without any

³ 10 ELR 120.

⁴ *Id.* at 123.

⁵ *Subhash Desai v. Sharad J. Rao*, AIR 1994 SC 2277.

⁶ AIR 1965 SC 677.

basis whatsoever. The Sub-section is designed to achieve this dual purpose, namely, freedom of speech and prevention of malicious attack on personal character or conduct, etc. of rivals. The purity of an election is sought to be maintained without affecting the freedom of expression.⁷

In *Guruji Shrihari Baliram Jivatode v. Vithalrao*,⁸ the Supreme Court, reiterating the above view, held that democracy will be a farce if interested persons are allowed to freely indulge in character assassination during election. A political party may not be affected by passing winds but a campaign of slander against an individual is likely to create prejudice in the dual purpose of protecting freedom of speech and prevention of malicious attack on the personal character of the rival.⁹

III. Essential Ingredients of Section 123(4)

In order to make out the charge of corrupt practice under Section 123(4), the essential ingredients which are required to be proved are:

- (I) that there is publication of any statement of fact by a candidate or his agent or by any other person with the consent of that candidate or his agent,
- (II) that the impugned statement of fact is false and the above said maker of the statement either believes it to be false or does not believe it to be true,
- (III) that the statement is in relation to the personal character or conduct of another candidate, and
- (IV) that the said statement is reasonably calculated to prejudice the election prospects of the other candidate against whom it is made.

III.I. Publication of Statement

Meaning of Publication

Publication may take any of the forms like the word of mouth, i.e., speech or writing, pictures, etc. Publication refers to publication amongst the electors. Sometimes publication may be done orally, for

⁷ *Id.* at 678.

⁸ AIR 1970 SC 1841.

⁹ *Id.* at 1843.

example, at meeting or announcement made otherwise such as by beat of drum, or in songs or poems or by distributing leaflets, pamphlets or posters or through media, print or electronic. The said publication must be at the instance or with the consent, of the candidate or his election agent.¹⁰ Even though the authorship of a pamphlet is not known, if it contains false statements relating to the personal character of a candidate, and another candidate knowing that such statements are false, or not believing that they are true, reads it in a public meeting or circulates printed copies of it, the latter will be guilty of a corrupt practice under section 123(4).¹¹ However, when the person against whom a false statement is said to have been made is not ascertainable with certainty, it cannot be said that there was any publication in relation to the personal character or conduct of any candidate. Thus if the said person is not identifiable, a case under Section 123(4) is not made out. In *Joseph M. Puthussery v. T.S. John*,¹² the Supreme Court held that unlike defamation, 'republication' does not amount to 'publication' under Section 123(4) when there is a failure of the respondent to initiate any legal action against the previous publication in a reputed magazine.

Relevance of Consent for Publication

The publication of a false statement under Section 123 (4) offers a ground to set aside the election only if it is by the returned candidate or his election agent or by any other person with the consent of the returned candidate or of his election agent. If the publication is by some person other than the candidate or his election agent, the consent of the candidate or his election agent, must be proved. In *B. R. Rao v. N. G. Range*,¹³ the Supreme Court observed:

Mere commission of a corrupt practice is not sufficient; it is proof of consent of the commission of corrupt practice which requires the court to declare the election void. In the matter of publication of statements which are false and are reasonably calculated to prejudice the prospects of the candidate's election, proof of consent not infrequently assumes great importance, for, even if it be proved that the publication has been made unless it is shown that it was with the consent of the candidate or his election

¹⁰ Nani Gopal Swami v. Abdul Hamid Choudhary, 19 ELR 175 at 191 (Assam H. C.).

¹¹ Magan Lal v. Hari Vishnu Kamath, 15 ELR 205 at 206 (M P High Court).

¹² Civil Appeal No. 5310 of 2005 decided on December 1, 2010.

¹³ AIR 1971 SC 267.

agent, the corrupt practice may not be held to the committed so as to invalidate the election.¹⁴

The ‘consent’ as required for purposes of Section 123(4) of the Act may be express or implied. It is implied when it is inferred from acts and conduct of the candidate or from other facts and circumstances. In this context, the court specified two situations in which an inference of consent can be drawn:

Prior knowledge of the contents and the knowledge that it is likely to be published may raise inference of consent, if the candidate deliberately keeps quiet and does not stop the publication if it be within his power. Where the offending matter has already been published and thereafter it comes to the knowledge of the candidate at the election and he does not take steps to repudiate it, the consent may not necessarily be inferred unless the candidate or his election agent permits or aids in publication.¹⁵

III.II. Statement to be False and Maker’s Belief of Falsehood and Truthfulness

A “statement of fact” to fall within the mischief of Sec. 123(4) must be ‘false’ and which the maker either ‘believed to be false’ or “did not believe to be true” at the time of making it. These are essential requirements without which the “statement of fact” is not the one contemplated by Sec. 123(4). A ‘statement of fact’ can be proved to be ‘false’ only if it relates to an event which has happened and not to a hypothetical future possibility. Similarly, the belief of the maker about its falsity or the lack of belief in its truth relates to an existing fact and not to a hypothetical future apprehension howsoever honestly one may believe in its likelihood. It is clear that any statement made which is a conjecture or a likelihood in future would not come within the ambit of the expression ‘statement of fact’ used in Section 123(4). This is also supported by the fact that another requirement of Sec. 123(4) is that the statement of fact made should be reasonably calculated to prejudice the prospects of that candidate’s election. This future requirement cannot be satisfied by merely stating a likely apprehension for the future and if the event does not happen, this requirement cannot be tested.

¹⁴ *Id.* at 275.

¹⁵ *Ibid.*

Where the statement is true, this provision is not attracted. In *Ram Chandra Bhatia v. Hardayal*,¹⁶ it was held that it is not enough to prove that the statement of fact was false. It is further necessary to prove that the statement was made believing it not to be true. Before an election is set aside on the ground of a false statement, it is necessary that the Court must record a finding that the statement regarding the personal character or conduct of the candidate was false and that the candidate or his agent or anybody with his consent has made the statement believing it to be false or not believing it to be true. Hence, even if a false statement is published, the publisher can escape from the operation of this provision if he can prove that there were sufficient reasons to believe that the statement is true. The Supreme Court in *Sheopat Singh v. Ram Pratap*¹⁷ made it clear that a statement of fact relating to the personal character or conduct etc. of a candidate can be made if it is true. Even if it is false, the candidate making it is protected, unless he makes it believing it to be false or not believing it to be true, that is to say, statements which are not true but made *bonafide* are also outside the ambit of the provision.¹⁸

Thus, the expression “which he either believes to be false or does not believe to be true” in section 123(4) refers to the belief of the candidate publishing the statement or who is in the eyes of law responsible for it and not the belief of the person who actually made the false statement. In *Mohan Singh v. Bhanwarlal*,¹⁹ the Supreme Court held that the test in cases under section 123(4) is whether the imputation besides being false in fact was published with the object of lowering the candidate in the estimation of electors and is calculated to prejudice his prospects at the election. And in ascertaining whether the candidate is lowered in the estimation of the electorate, the imputation made must be viewed in the light of matters generally known to him.

False Statement of ‘Fact’ and not False Statement of ‘Opinion’

To fall within the mischief of Section 123(4), there must be a false statement of fact and not a false statement of opinion. The expression ‘statement of fact’ used in Section 123(4) cannot be given

¹⁶ AIR 1986 SC 717.

¹⁷ *Supra* note 5.

¹⁸ The same view was taken in *Mangilal v. Krishnaji Rao*, AIR 1971 SC 1943; *Raghunath Singh v. Krishna Chandra*, AIR 1971 SC 1839; *Madan Gopal v. Mamraj*, AIR 1976 SC 461; *Badri Narayan v. Kamdeo Prasad*, AIR 1961 Pat 41; *P.K. Sukumaran v. K.J. Munadasseri*, AIR 1959 Ker 120.

¹⁹ AIR 1964 SC 1366. (Justice J.C. Shah for himself and P.B. Gajendragadkar, K. Subba Rao, K.N. Wanchoo and Raghubar Dayal, JJ.).

such a wider meaning as to include opinion or expression about the future conduct of the candidate. In order to come within the ambit of this provision, there must be a false statement of fact by a candidate or his agent made in relation to the personal character or conduct of any other candidate. An opinion may be ill-founded or incorrect but it is more or less a subjective thing. Adverse criticism, however severe, however undignified or ill-mannered, however regrettable in view of the standards of purity and decency of public life, in relation to the political views, position, reputation or action of a candidate, will not fall within the mischief of the statute. What is objectionable is a false statement of fact, and not a false statement of opinion however unfounded or however unjustified. An opinion may differ from person to person whereas a fact may be true or false. The statement of fact to be a corrupt practice should be false. It is something of which falsity can be judged. It is only when the person beneath the politician is thought to be assailed and his honour, integrity and veracity are challenged and such a statement is false that it can be said that a false statement of fact about his personal character and conduct is made; and once it is established that such a statement was made the question whether there was malice or not is immaterial.

In ascertaining the true nature of the statement made, the court must take into consideration all the surrounding circumstances including the occasion when it was published or made, the person against whom it was published or made, the person publishing it or making it, the audience or readers to whom it was addressed as also the precautions or care taken by the publisher to verify the truth or otherwise of the statement challenged.²⁰

In *Sarla Devi v Birendra Singh*,²¹ the following statements published by a newspaper were in question:

- (i) that the workers of the Praja Socialist Party have been so foolish as to threaten to shoot even Jawahar Lal Nehru, the great leader of India,
- (ii) that the Praja Socialist Party, by coming to an understanding with the Muslim league, is following the footsteps of Mir Jafar, Jaichand and Mohammad Ali Jinnah and making common cause with Pakistanis, and
- (iii) that to vote for such a party is to sell the country and nothing but treason.

²⁰ See *Sudhir Laxman Hendre v. Shripat Amrit Dange*, AIR 1960 Bom 249.

²¹ AIR 1961 MP 127. See also *Bansidhar Parashar v. Saligram Srivastava*, 55 ELR 131; *Habib Bhai v. Pyarelal*, AIR 1964 MP 62.

The Madhya Pradesh High Court held that the first two statements did not relate to the personal character or conduct of the candidate or to his candidature, and the third was not a statement of fact but only an opinion and thus the impugned statements did not fall within the mischief of Section 123(4).

In *N.S. Varadachari v. G.V. Pai*,²² a false propaganda was carried on by the returned candidate that his rival candidate did not hold the qualification to be elected to the Legislative Assembly. The Supreme Court held that it was an opinion on a question of law and not a statement of fact, hence no corrupt practice. A false statement of opinion could not be treated as corrupt practice.

In *Kumara Nand v. Brij Mohan Lal Sharma*,²³ the Supreme Court held that if a candidate is called the greatest of all thieves, the person saying so is making a statement of fact. The statement that a person is a thief or the greatest of all thieves cannot be a mere opinion, and when the respondent was called the greatest of all thieves a statement of fact was being made as to his personal character or conduct.²⁴ Laying down the difference between a mere expression of opinion and the false statement of fact, the Court observed:

..The question whether a particular statement with respect to a candidate at an election is a statement of fact or is a mere expression of opinion would depend on the facts of each case and will have to be judged in the circumstances in which the statement was made and in the context of the writing in which it appears, in case it is part of a writing. But it is not in our opinion correct to say that a statement with respect to a candidate can never be a statement of fact, unless it is accompanied by particulars as to time, place and date which one finds (for example) in a charge-sheet in a criminal case. Whether in a particular setting a bald statement without particulars would be a mere expression of opinion or would amount to a statement of fact would depend upon the circumstances of each case. The Court will have to consider the setting in which the

²² AIR 1973 SC 38.

²³ AIR 1967 SC 808. It was alleged that one Avinash Chander had composed and written a poem in a manner that people understand it as a prayer by the election petitioner, who was referred as '*Sab Choron Ka Sartaj*' (greatest of all the thieves). The poem was recited in the public meeting, which the returned candidate was presiding. It was contended that the statement containing the poem is merely an opinion.

²⁴ *Id.* at 810.

statement was made and the entire writing in the context of which it appears and the nature of the statement itself before it comes to the conclusion that it is a statement of fact or an expression of opinion.²⁵

In the case of *Gadakh Yeshwantrao Kankarrao v. Balasaheb Vikhe Patil*,²⁶ the allegation was that the appellant and also the Chief Minister of Maharashtra, Mr. Sharad Pawar, in the presence of appellant, had made certain false statements in his speeches relating to personal character of the respondent. The impugned statements were summed up by the Supreme Court as follows: (1) Petitioner was to spend Rs. 3 crore for his election; (2) petitioner had paid Rs. 50 lakh to Janata Dal; (3) petitioner had paid Rs. 20 lakh to Janata Dal candidate for withdrawing from Ahmad Nagar constituency and to contest from Beed constituency; (4) petitioner proposed to take out a rally of 5000 cycles and had distributed the cycles amongst the participants; (5) he proposed to spend for repairs of Chawadies and had spent Rs. 500 for repair of a Chawadi at Ganga Nagar; (6) he proposed to distribute Sarees, Dhoties, liquor amongst the workers obviously with a view to attract them.²⁷

The Supreme Court held that allegation No. (1), (2), (4), (5) and (6) could not be treated as corrupt practices. But the statement No. (3) that the petitioner had paid Rs. 20 lakh to Janata Dal candidate was held to be a false statement of fact in relation to the personal character and conduct of the respondent. Other allegations were found to be vague and were regarded as merely the expression of apprehension. It was not proved that such a rally was ever taken out or such distribution of the articles was made by a candidate during campaign. That means that it was at best an apprehension which did not materialize and, therefore, there was no reasonable likelihood of any impact thereof on the mind of the voters.²⁸

III.III. Statement to be in Relation to the Personal Character or Conduct of another Candidate

In *T. K. Gangi Reddy v. M.C. Anjaneya Reddy*,²⁹ one of the allegations was that two leaflets were published and circulated either

²⁵ *Id.* at 811.

²⁶ AIR 1994 SC 678.

²⁷ *Id.* at 690.

²⁸ *Id.* at 700-701.

²⁹ 22 ELR 261. In this case, the appellant was elected to Mysore Legislative Assembly. The respondent had called in question the election of the appellant by an election petition on various grounds.

by or at the instance of the appellant containing statements relating to the instigation of murder and throwing of stones at public meetings by the respondent. It was contended that the said statements were false allegations attacking the personal character and conduct of the respondent and, therefore, the election was void under Section 100(1) (b) of the Act.

Clarifying the expression “personal character or conduct”, Subba Rao, J.,³⁰ speaking for the Court, observed:

The words “personal character or conduct” are so clear that they do not require further elucidation or definition. The character of a person may ordinarily be equated with his mental or moral nature. Conduct connotes a person’s actions or behaviour.³¹

The Court held that a statement which attributes acts of violence (e.g., instigation of murder, throwing of stones at public meetings) to a candidate even though such acts are done during his political career is a statement relating to the personal character and conduct of the candidate, and if such statements are published a few days before the polling, such statement must be held to be reasonably calculated to prejudice the prospects of that candidate’s election, and the candidate publishing such statement would be guilty of a corrupt practice within the meaning of Section 123(4) of the Act. Dismissing the appeal, Subba Rao, J., observed:

What is more damaging to a person’s character and conduct than to state that he instigated a murder and that he was guilty of violent acts in his political career. We, therefore, have no hesitation in holding that the allegations in the two leaflets.... are in relation to the personal character and conduct of the... respondent.³²

In *Inder Lal v. Lal Singh*,³³ the validity of the election of respondent No. 1, Lal Singh, was challenged by the appellant by way of election petition on the ground of pamphlet issued by the respondent on the eve of election, the impugned portion of which read as follows:

P, Maharawal of Dungarpur, Shri Laxman Singh who was defeated in the last election by thousands of votes, has come to mislead the people of Chittor, has come to push

³⁰ On behalf of himself. Gajendragadkar and Das Gupta, JJ.

³¹ *Supra* not 28 at 266.

³² *Ibid.*

³³ AIR 1962 SC 1156. Gajendragadkar, J., on behalf of himself, Sarkar and Wanchoo JJ.

back the backward district of Chittor by 100 years, has come to destroy the peace and tranquility of Chittor under cover of communal organisation, has come to provide means to the public to spend their hard earned money on drinking orgies, has come to intensify again the tyranny of *Raja Maharajas* in Rajasthan, has come to make a gift of Kashmir to the aggressor Pakistan, has come to enslave India again by collaborating with Pakistan and Pakistan's friends, he is friend of *Raja Maharajas* and an enemy of cultivators and labourers. He wants to grant land to *Bhuswamis* and thereby oust the cultivators and wants to establish once more his parent by exploitation of the hard labour of cultivators.³⁴

He was called "Enemy of Democracy. Agent of the foreigners strangling the freedom of Bharat,..."

Another allegation was that the returned candidate described the defeated candidate as a purchaser of voters by means of money.

The Supreme Court, laying down the distinction between private character and public character, observed:

In discussing the distinction between the private character and the public character, sometimes reference is made to the "man beneath the politician" and it is said that if a statement of fact affects the man beneath the politician it touches private character and if it affects the politician it does not touch his private character.³⁵

However the Court, expressing difficulty in dealing with borderline cases, observed:

But there may be cases on the borderline where the false statement may affect both the politician and the man beneath the politician and it is precisely in dealing with cases on the borderline that difficulties are experienced in determining whether the impugned false statement constitutes a corrupt practice or not.³⁶

Regarding borderline cases, the Court observed:

If, for instance, it is said that in his public life, the candidate has utilised his position for the selfish purpose

³⁴ *Id.* at 1158.

³⁵ *Id.* at 1159.

³⁶ *Ibid.*

of securing jobs for his relations, it may be argued that it is criticism against the candidate in his public character and it may also be suggested that it nevertheless affects the private character. The Court held that working line is to be drawn to distinguish private character from public character and it may also have to be borne in mind that in some cases, the false statement may affect both the private and the public character as well.³⁷

The Supreme Court held that the impugned pamphlet is criticism made against the respondent in his public and political character and as such, Section 123(4) cannot be invoked. Having regard to the moral turpitude involved in the offering of the bribe, the statement was held by the Court affecting the public image of the candidate and undoubtedly affecting his private character as well.³⁸

The Supreme Court gave examples to clarify the distinction between the private character and the public character. If, for instance, it is said that the candidate is a cheat or murderer, there can be no doubt that the statement is in regard to his private character and conduct and so if the statement is shown to be false, it would undoubtedly be a corrupt practice. If economic policy of the party to which the candidate belongs or its political ideology is falsely criticised and in strong words it is suggested that the said policy and ideology would cause the ruin of the country, that clearly would be criticism, though false, against the public character of the candidate.

In *Jagjit Singh v. Kartar Singh*,³⁹ the Supreme Court explained the reason for excluding the public character from the purview of Section 123 (4) as follows:

“The policy underlying the present provision is that in the matter of elections, the public and political character of a candidate is open to scrutiny and can be severely criticised by his opponents, but not so his private or personal character. In order that the election in a democratic country should be freely and fearlessly conducted, considerable latitude has to be given to the respective competing candidates to criticise their opponent’s political or socio-economic philosophy or their antecedents and character as public men. That is why even false statements as to the public character of

³⁷ *Id.* at 1159-60.

³⁸ *Id.* at 1160.

³⁹ AIR 1966 SC 773.

candidates are not brought within the mischief of section 123(4) because the Legislature thought that in the heat of election it may be permissible for competing parties and candidates to make statements in relation to the public character of their opponents, and even if some of the statements are false, they would not amount to corrupt practice.⁴⁰

Similar views have been expressed in a number of other cases by Courts that criticism of public activities, even though ill-mannered, unfair or exaggerated, does not come within the mischief of law.⁴¹ Thus, the boundary between personal character and conduct and public character and conduct is well drawn, though sometimes, it is very thin. A statement may appear to touch both the candidate's personal as well as public character. But a deeper scrutiny enables a Court to ascertain whether there is a reflection on his personal character or on his public character.

In those cases where the intention of the maker of the statement was to defame the private character of the candidate and to project him as a man lacking in integrity or morality as a private individual or to expose to ridicule his political views and affiliations, or to impute acts of violence against him etc., the Courts have held that such accusations, if proved false, are covered within the purview of section 123(4).⁴²

In *Guruji Shrihari Baliram Jivatode v. Vithalrao*,⁴³ the Supreme Court held that the election law in India guarantees freedom of criticism of political nature at the time of elections. It is in the interest of democracy that such criticism should be allowed. But, the Court observed that when any false allegation of fact pierces the politician, and touches the person of the candidate then Section 123(4)

⁴⁰ *Id.* at 780 (Gajendragadkar, J. for himself and for M. Hidayatullah and V. Ramaswami JJ.).

⁴¹ *Bansi Lal Kahistani v. Rishi Kumar Kaushal*, AIR 1971 SC 1262; *B.P. Maurya v. Prakash Vir Shastri*, AIR 1970 SC 522; *Manikrao v. Babbu Rao*, AIR 1973 Mys 271; *Sudhir Hendre v. Sripat Dange*, *supra* note 19; *Bhagirath v. Rishabh Kumar*, AIR 1964 MP 1; *Ram Chandra v. Hardayal*, AIR 1986 SC 717.

⁴² In *Magan Lal Bagdi v. Hari Vishnu Kamath*, 15 ELR 205 it was held that even a statement that the respondent had called Pandit Nehru "*Nakabil*" (worthless Prime Minister) would affect the personal character and conduct of the candidate in the estimation of vast majority of people and circulation of a pamphlet containing such a statement would come within Section 123(4).

⁴³ *Supra* note 7.

is contravened. Any campaign of slander against a candidate is likely to create prejudice in the mind of the people against him. Thus, in the case of individuals a different approach is necessary. Further, the Court held that the false statements are to be judged keeping in view the election time where passions are roused and also the other candidates have opportunity to counter the propaganda and level their own allegations too.

However, a fair comment about the public activities of a candidate including financial irregularities or corruption may not amount to a corrupt practice, since the public or political activities are open to criticism.

In *D.K. Barooah v. G. C. Baruah*,⁴⁴ the appellant was declared elected to the Assam Legislative Assembly in 1967. G. C. Baruah, one of the respondents, filed an election petition challenging the election of the appellant to the Assam Legislative Assembly on various grounds, including a charge that false statements about the personal character and conduct of the respondent had been published in a leaflet in Assamese with the consent of the appellant. The contents of the leaflet were as under:

- (i) that Golok Chandra Baruah after “rolling from several colleges” failed to pass the IAS examination and had first become a copyist at a *Katchery* and thereafter a clerk;
- (ii) that in 1952 the Congress Party refused to nominate him, as in the 1942 Movement, he helped the British;
- (iii) that during his tenure as the Chairman of the Nowgang Municipality, several thousand rupees were taken away from the treasury unlawfully on signatures resembling those of his signatures. The matter was pending for hearing;
- (iv) that when a huge amount of money, withdrawn from the National Savings was misappropriated, the Government Examiner of Accounts declared Golok Chandra alone as guilty;
- (v) that on account of corruption in the Municipality alone the then Head Clerk of his time had to commit suicide;
- (vi) that one night he, when he was a Chairman, went at night to ex-chairman Dr. B.K. Guha’s home like a drunkard, and not finding him, behaved with his wife and daughter unmannerly. After that he assaulted Dr. Guha with shoes in

⁴⁴ AIR 1970 SC 1231.

presence of many persons... and consequently Golok was compelled to resign from Chairmanship.

The appellant contended before the Supreme Court that the statement in the leaflet did not relate to the personal character and conduct of the respondent and those which did were proved to be true so that Section 123(4) was not attracted.

Regarding the statement that the respondent did move from one college to another, the Court found it true. Bhargava, J., speaking for the Court on behalf of himself and Sikri, J., held that in an election, it is always open to a candidate to show that his rival candidate is lacking in knowledge, in education and is not capable of managing the affairs properly in any public body.⁴⁵

Regarding the nomination, the finding of the High Court was that in 1942 the respondent was in government service working as a clerk and it was only later on after 1943 that he actively participated in the business of his brother of taking military contracts for the British. In this connection the Supreme Court held that the evidence showed that the respondent's brother has been carrying on the military contract business even earlier than 1943. The Court observed that it appears to be quite likely that, even before he actually resigned government service and joined the business of his brother, he may have been assisting him, so that the allegation that he helped the British in 1942 movement by taking Military Contracts cannot be said to be a false statement. On the aspect that he was helping the British by taking military contracts, the Court observed, it relates to a reflection on his political conduct in siding with the British Government rather than joining the Congress which was carrying on a movement against the British for achieving independence of this country.⁴⁶

Regarding respondent's administration of the municipality, the Court held that the impression that would be expected to be created was that his administration as Chairman was so unsatisfactory that corruption and chaos prevailed in the affairs of the municipality; it was not stated that the respondent himself was corrupt.

Regarding withdrawal of money, The Supreme Court upheld the finding of the High Court which had observed that the auditor's report showed that the respondent alone was responsible for the loss of money withdrawn from the National Savings which occurred during his tenure of office and had held that the statement, being true, was not hit by Section 123 (4).

⁴⁵ *Id.* at 1234.

⁴⁶ *Id.* at 1235.

Similarly, the Supreme Court accepted the finding of the High Court that the respondent had visited Dr. Guha's house and had misbehaved with the latter and his family.

The allegation regarding suicide was found by the Supreme Court to be substantially but not literally true, as the suicide was committed not "at the time" when the respondent was Chairman but after he had tendered his resignation. However, it was noted that the opportunity for the Head Clerk to misappropriate the money occurred only because of an order which had been passed earlier by the respondent while he was Chairman of the municipality. There was no suggestion that the respondent himself was corrupt and that the suicide was the result of his personal corruption. Thus, this statement also cannot constitute corrupt practice.⁴⁷

Where amounts have been collected for any public purpose, asking the person collecting those amounts or those who were responsible for their collection, to give an account cannot amount to an imputation against his personal character.⁴⁸ "Men in public life particularly those who collect monies for public or charitable purposes ought not to be sensitive when there is a demand to account for those amounts. Such a demand may hurt the vanity or the ego of the person from whom accounts are asked, but it is far from being an imputation against the personal character or conduct of the person concerned."⁴⁹

Thus, the courts do not treat the statements made in election speeches in relation to the character or conduct of a person unless the allegation is very specific and has the nature of character assassination. In *Mahendra Singh v. Gulab*,⁵⁰ the Supreme Court reiterated this view. In this case the allegation was that in a public meeting the respondent had made the following statement against his opponent:

I have learned that he has indulged in unfair practice at college examinations and, therefore he is raw in his studies.

The Supreme Court observed that "on reading that sentence in the context of the speech made, it could not be said that it was any specific allegation against the appellant that he had indulged in unfair practices in his examinations in his college days."⁵¹ The Court held that

⁴⁷ *Id.* at 1237.

⁴⁸ *H.C. Mohanty v. Surendra Mohanty*, AIR 1974 SC 47 at 48.

⁴⁹ *Ibid.*

⁵⁰ AIR 2005 SC 2515.

⁵¹ *Id.* at 2520

the statement does not constitute a corrupt practice under Section 123(4).

Statements against Political Parties

Any false statement made in relation to the character of a candidate or his candidature is covered under Section 123(4). A false statement, however, in relation to the activities of a political party of which the candidate is a member is not covered by the provision. Candidates set up by a political party have to face false allegations about their political party and its leaders during election campaigns. In a democracy any imputation against a political party should be allowed since criticism is the life blood which sustains a democracy.⁵²

In *Abdul Jalil v. Rathindra Nath*,⁵³ the allegation was that at the instance of the returned candidate an article published in a news paper was read in a public meeting which stated that if the leftists were allowed to be elected, the Muslims would be driven out of India. The Court refused to treat it as a corrupt practice coming under Section 123(4). This view is reiterated by other High Courts too.⁵⁴ One of the reasons for allowing the criticism of a political party seems to be that the party can resist any sort of allegation by its organizational solidarity.

In *Guruji Shrihari Baliram Jivatode v. Vithalrao*,⁵⁵ the Supreme Court observed in this context that the election law guarantees freedom of criticism of political nature at the time of election. A political party's reputation is not built on shifting sands. It has at any rate, it should have, firmer foundation and should not be affected by passing winds. But in the case of individual, a different approach is necessary.

Statement that a party paid a bribe to an independent candidate for withdrawal was held not to be covered under this provision, being a political allegation.⁵⁶

Innuendo

In *M.J. Zakharia Sait v. T.M. Mohammed*,⁵⁷ the Supreme Court observed that when it is alleged that the particular words used have a

⁵² Prananath v. Banamali, AIR 1958 Ori 228.

⁵³ AIR 1958 Ass 51.

⁵⁴ Abdul Majeed v. Bhargavan, AIR 1963 Ker 18; Shankaragouda v. Veerbhadrappa, AIR 1963 Mys 81.

⁵⁵ *Supra* note 7.

⁵⁶ *Supra* note 51.

meaning different than the ordinary one or that the reference to the person is actually to some other person, then such an innuendo will have to be specifically pleaded along with the extrinsic material. It is immaterial in such cases as to whether the action is for defamation or for corrupt practice in an election matter, for in both cases, it is the words complained of together with extrinsic facts which constitute the cause of action. When there is no direct reference to the candidate, whose character is assailed and innuendo is used, the facts and material which would prove that people knowing those facts would identify the candidate by such reference, will have to be specifically pleaded. What can be said about the identity of the candidate is equally applicable to the statement made about him. In this case the innuendo alleged, "Everybody knows the hands behind the murder, Marxist leader arrested is also known." This innuendo was based upon the fact that firstly, the respondent was a Marxist leader, and secondly, he was arrested for harbouring the murderers. However, in the petition no averment to this effect was made. The case failed due to lack of pleading and proof required in such cases.

In *Manmohan Kalia v. Shri Yash*,⁵⁸ the Supreme Court held that it is well settled that where the doctrine of innuendo is applied, it must be clearly proved that the defamatory allegation was made in respect of a person though not named yet so fully described that the allegation would refer to that person and that person alone. Innuendo cannot be proved merely by inferential evidence which may be capable of two possibilities.

In *M. C. Jacob v. A. Narayanan & Ors.*⁵⁹, the allegations in the pamphlet published on behalf of the appellant - Shri M. J. Jacob, were against Scaria, a member of the personal staff of T. M. Jacob, the rival candidate that (i) he attempted to murder three persons and (ii) he continued to be an absconder. Allowing the appeal, setting aside the impugned judgement of the Kerala High Court and dismissing the Election petition, the Supreme Court held that neither of these allegations were made against the candidate T M Jacob. Nor did it contain any allegation that Shri T.M. Jacob was in any way involved either in Scaria's alleged attempt to murder the said three persons or that he helped Scaria to remain an absconder by harbouring him or otherwise. It is not therefore possible to read into the statement, an implied false statement that Shri TM Jacob harboured a member of his personal staff who was a murder accused and absconder. Rejecting the

⁵⁷ (1990) 3 SCC 396.

⁵⁸ AIR 1984 SC 1161.

⁵⁹ Civil Appeal No. 3611 of 2008 decided on March 6, 2009.

contention of the respondent that the conclusion that T.M. Jacob harboured the accused can be drawn by innuendo, the Court held that this statement is totally different from alleging that the statement that Scaria is an absconder is an innuendo. there is no mention anywhere in the pamphlet that T.M. Jacob is harbouring Scaria and the mention is only that Scaria who was in the personal staff of Shri T.M. Jacob is absconding. Hence, there should have been a clear pleading in the Election Petition that the said statement is an innuendo, and that it really means that T.M.Jacob harboured Scaria, but there is no such pleading. Innuendo is to be clearly pleaded but that has not been done in the Election Petition.

The doctrine of innuendo is rarely applied in election cases.

False Dummy Papers

Publication of false dummy papers is a corrupt practice under section 123(4). Where it is alleged and proved that the dummy ballot papers with wrong symbols were distributed, it is not necessary to show the exact number of votes which the unsuccessful candidate lost or the successful candidate gained because of such distribution. The corrupt practice is itself enough to invalidate the election. In *Elwin Sangma v. Projengton*,⁶⁰ the election petitioner's election symbol was 'two leaves', in the dummy ballot papers, his symbol was shown to be a 'boot'. The election was set-aside. However, the Supreme Court rejected the further contention that spelling name of the candidate wrongly in dummy ballot paper is also a corrupt practice. Wrong spelling can hardly have any difference. However, the false statement showing wrong symbol affects the prospects of the candidate. Thus, issuing dummy ballot papers with incorrect symbols may constitute a corrupt practice under Section 123(4) for being false statement about the candidature of a candidate.⁶¹

III.IV. Statement to be Calculated to Prejudice the Electoral Prospects of the Candidate

To fall within the mischief of Section 123 (4), a statement made by an election candidate has to satisfy another test, i.e., it shall be a statement reasonably calculated to prejudice the prospects of the election of the candidate against whom it is made.

⁶⁰ (1975) 3 SCC 798.

⁶¹ See also *H.V. Kamath v. Nitraj Singh*, AIR 1970 SC 211; *M.P. Singh v. R.K. Rai*, 46 ELR 115.

In *Dattatraya Narayan Patil v. Dattatraya Krishnaji Khanwilkar*,⁶² a Division Bench of the Maharashtra High Court, explaining the meaning of the expression, “being a statement reasonably calculated to prejudice the prospects of that candidate’s election”, observed:

In our opinion.... the Legislature having in its wisdom used the expression “calculated” and not “designed” or “intended”, it would be reasonable to hold that what is provided in sub-section (4) is that the publication of false statement of fact relating to the personal character and conduct must be such as would in the estimation of the court, having regard to the nature of the publication, evidence tendered in court and the surrounding circumstances have its natural and probable consequence of prejudicing the prospects of the candidate relating to whose personal character or conduct the publication has been made.⁶³

Thus, the High Court made it clear that in defining corrupt practice, the emphasis is not so much on the intention of publisher of a false statement of fact relating to the personal character or conduct of a candidate, but the emphasis is on the *natural and probable consequence* of prejudicing the prospects of the candidate by such a publication. Whatever be the intention of a publisher if the natural and probable consequences of the publication of a false statement relating to the personal character or conduct be of prejudicing the minds of the voters, the election cannot be said to be a free one.

The High Court also held that in order to determine the impact of the publication left on the mind of the voters the testing time would be the time of casting their votes. The Court also specified the relevant circumstances which would have a bearing on the determination of the impact of publication. The Court would, in the first instance, ask the question what is the reaction on the candidate himself of the publication? Does he think that it is likely to prejudice his prospects or does he not think so? Has he published any contradiction? What is the reaction of his election agent and the supporters of the candidate? What have they done in this matter? What is the proximity of the date of the publication to the date of election? What is the nature of the allegations

⁶² 25 ELR 143; AIR 1964 Bom 244. See also *Sheopal Singh v. Ram Pratap*, AIR 1965 SC 677; *Inder Lal v. Lal Singh*, *supra* note 32; *Om Prakash v. Lalchand*, AIR 1970 SC 1889; *N.C. Ray v. N.C. Das*, 45 ELR 318; *Guruji Shrihari Baliram Jivatode v. Vithalrao*, *Supra* note 7.

⁶³ *Id.* at 152.

contained in the publication? The Court would, however, not blindly accept the candidate's or his election agent's evidence that it affected or prejudiced his prospects, or blindly accept the statement of the publisher that it did not prejudice the prospects of the candidate relating to whom the publication has been made. According to the Court, they would, in the circumstance, be admissions in their own favour. But the admission or the statement of the candidate relating to whom the publication has been made or his election agent which would go to show that he or his election agent did not consider the statement to be such as was likely to relevant factors, it being an admission against his interest or conduct which would be relevant because it is an admission made against his own interest. All these circumstances will be material and relevant considerations in deciding the issue as to whether a particular publication would reasonably be calculated to prejudice the prospects of that candidate.⁶⁴

In *Shanti Swaroop v. Abdul Rehman*,⁶⁵ a statement that the candidate had colluded with the mine owners and thereby sacrificed the interest of the labourers for his selfish ends and that he had opened at several places gambling and drinking dens and encouraged goondaism and that he had collected by unfair means property worth Rs. 40,000/- was held by the M. P. High Court to be a statement reasonably calculated to prejudice the prospects of that candidate's election. However, in *Khilumal Topandas v. Arjundas Tulsidas*,⁶⁶ a statement imputing rough nature and abusive language to a candidate, even though it was a statement relating to the personal character of the candidate was held by the Rajasthan High Court to be not violative of Section 123(4) as it was not a statement affecting the prospects of such candidate in the election. "Rough nature in a certain candidate may be taken by the voters as an asset to him in his political life and when it is said about a candidate that he is well known for using abusive language it cannot be said that the chances of such a candidate for election are in a way prejudiced."⁶⁷

In *Sheopat Singh v. Ram Pratap*,⁶⁸ the Supreme Court examined the term 'calculated' and observed that the word calculated means designed, it denotes more than mere likelihood and imports a design to affect the voters. It connotes a subjective element, through the actual effect of the statement on the electoral mind. The emphasis is on the calculated effect, not on actual result, though the latter proves

⁶⁴ *Id.* at 155.

⁶⁵ AIR 1965 MP 55.

⁶⁶ 22 ELR 404.

⁶⁷ *Id.* at 424-425.

⁶⁸ *Supra* note 4.

the former. But what is important to notice is that it is not necessary to establish by positive evidence that the voters with the knowledge of the contents of the statements, were deflected from voting for the candidate against whom the statement was made.⁶⁹

In *Babu Lal v. Sajjan Singh*,⁷⁰ on the day of election, a rumor was spread by a candidate that his rival has killed a worker, which was false. The Supreme Court held that the evidence was sufficient to prove that the returned candidate originated the rumor to the detriment of his opponent in the election.

IV. Conclusion

It is clear that the difficult job before the Courts has been to distinguish between personal character and public conduct. It is difficult to draw a dividing line between personal character and public conduct owing to the reason that the public conduct may be the reflection of the personal character of an individual. The Courts have laid down a test that if a statement of fact affects the man beneath the politician it touches private character and if it affects the politician, it does not touch his private character. It is only when any false allegation of fact pierces the politician and touches the person of the candidate that Section 123 (4) will be contravened. However, the Courts have referred to borderline cases where the false statement may affect both the politician and the man beneath the politician and the difficulty to determine in such cases whether the impugned false statement amounts to a corrupt practice or not. The Courts have not attached much relevance to the intention of a publisher of a false statement of fact relating to the personal character or conduct of a candidate but have stressed upon the natural and probable consequence of prejudicing the electoral prospects of the candidate by such publication.

⁶⁹ *Id.* at 679.

⁷⁰ (1970) 3 SCC 303.