* Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5310 OF 2005

Joseph M. Puthussery ... Appellant

Versus

T.S. John & Ors. ... Respondents

JUDGMENT

J.M. Panchal, J.

This appeal, filed under Section 116A of the Representation of People Act, 1951 ('the Act' for short), is directed against judgment dated August 8, 2005, rendered by the learned Single Judge of the High Court of Kerala at Ernakulam in Election Petition No. 6 of 2001 by which the election of the appellant as Member of Kerala Legislative Assembly from No. 106, Kallooppara Constituency is declared void on the ground that he was guilty of the corrupt practice within the meaning of Section 123(4) of the Act as he extensively distributed directly and through UDF workers, who did so with his consent, the copies of Ext. X4, which contained statements of fact, which were false and which he believed to be false or did not believe to be true in relation to the personal character and conduct of the respondent No. 1.

2.The facts, emerging from the record of the case, are as under:

The election to the Kerala Legislative Assembly was held on May 10, 2001. From the Constituency, i.e., No. 106 Kallooppara Constituency, the appellant, i.e., Joseph M. Puthussery, the respondent No. 1, i.e., Advocate T.S.

John, Prof. P.K. Rajasekharan Nair, i.e., the respondent No. 2 and Mathew Pinakkulath Padinjaremannil, i.e., the respondent No.3, contested the election. The result of[3] the election was declared on May 13, 2001 and the appellant was declared elected with 42,238 votes cast in his favour. As far as the respondent No. 1 is concerned, he was able to poll 31,013 votes. Thus, the appellant defeated the respondent No. 1 by a margin of 11,225 votes. The respondent Nos. 2 and 3 received 4,432 and 361 votes respectively.

On June 27, 2001, the respondent No. 1 filed Election Petition No. 6 of 2001 in the High Court of Kerala at Ernakulam, under Section 100(1)(b) of the Act assailing the election of the appellant. According to the respondent No. 1, the election of the appellant was vitiated by corrupt practice defined under Section 123(4) of the Act for the reason that copies of Ext. X4, which allegedly contained false statements of fact in relation to the personal character and conduct of the respondent No. 1 having tendency to prejudice the prospects of the election of the respondent No. 1, were distributed by the appellant, his election agent and workers of the United Democratic Front, i.e., the party to which the appellant[4] owe allegiance, with his consent as well as with the consent of his election agent on May 8, 2001 and May 9, 2001 ignoring the stipulation that electoral campaign must come to an end. The precise statements in Ext. X4, which, according to the respondent No. 1, allegedly amounted to the corrupt practice within the meaning of Section 123(4) of the Act, are extracted below: -

> "Adv. T.S. John Is He A Servant of the People
> or Hero of Corruption?
>
> When tens of thousands of Homeless wander
> on streets, this MLA, the people’s servant
> acquires mansion after in his name.

Let us start journey from Anathapuri to take an account of the number of flats owned by this esteemed personality. Even in the District of Trivandrum a flat was allotted during 1980, when Gopi was the Chairman of the Housing Board while he was MLA.

During 1984, when P.J. Joseph of flats near the Chairman's Quarters were acquired by this MLA in the name of daughter of his elder brother. At that time, the Chairman of the Housing Board was Oommen Mathew. By leasing out all the acquired flats on rent, he was fetching, Rs.1000 to 2000 per month. Nearly Rs.30,000/- was being received as profit from this alone.

T.S. John, who was allotted a plot earlier, got the flat in exchange by paying the price in monthly installments. This flat cost Rs.12 lakhs. Even the third flat of the Housing Board came of T.S. John.

In order to hoodwink the people of Kallooppara, he still continues to live in a small house. His car shed is even better. It would have been nice for T.S. John to live in the car shed with concrete roof.

Thengana Kadanthod Thankchan, who is running "Mariya Store" on the Changanacherry-Karukachal road near the Thengana Waiting Shed, had prized the lottery ticket. Now the only question that arises, is how much profit Thankchan got in this transaction. Though a lot of such incidents had happened in the State, in the history of Kerala this is the first time that an MLA had indulged in this type of deceit.

Poor Simpleton of a Little Hut Or Many..... Many..... Corruption Stories. These repulsive stories of corruption are a disgrace to the country. It should not be forgotten that by this ridiculed are the people of this place.

Corruption Hero T.S. John M.L.A.

T.S. John M.L.A. the people's representative who lives in his small house as a puritan poor folk, has built up flats and properties under benami worth crores of rupees through out the Kerala State.

Even the Ambassador Car No. KL 3/E7 this M.L.A. owns is, it is the name of Manjeri Bhaskaran Nair.

Role of P.J. Joseph, Minister and T.S. John M.L.A.

Embezzlement of crores of rupees behind Palemaad Vivekanada School

There is a school in the name of Palemaad Vivekanada village near Manjeri in Malappuram District, which is populous with settlors, but is an undeveloped area under the shield of this school, which started functioning

during 1963, a family is leading princely life at
the expense of the Government, embezzling
crores of rupees. Those who liaise for them
and receive lakhs of rupees as their share are
two important persons. Education Minister
P.J. Joseph and the formal Minister and the
Assembly Speaker T.S. John.

It is now years since P.J. Joseph and T.S. John
begun this business in the education with
Bhaskara Pillai.

Bhaskara Pillai, who was removed from N.S.S.
for indulge in financial irregularities, has seen
the green pasture in his life through the
education business with P.J. Joseph - T.S.
John."

The appellant filed written statement resisting the election petition. In the written statement, distribution of Ext. X4 in the Constituency on May 8, 2001 and May 9, 2001 was not specifically denied meaning thereby ignorance was pleaded so far as distribution of the

pamphlets was concerned. However, the appellant took a specific stand that neither he nor his election agent or any one with his and/or their consent had distributed Ext. X4. What was stated by the appellant in the written statement was that the distribution was done by the Youth Wing of the party to which the respondent No. 1 belongs and that the distribution of Ext. X4 does not amount to any publication. It was also averred that, at any rate, the statement was not calculated to prejudice the prospects of the respondent No. 1 in the election held on May 10, 2001 and, therefore, the Election Petition was liable to be dismissed.

3. Having regard to the pleadings of the parties, the learned Single Judge framed as many as eight issues for determination. On behalf of the respondent No. 1, who was the original petitioner, as many as 90 witnesses were examined and documents Ext. P-1 to P-22 were produced in support of his case that the election of the appellant

was liable to be voided. So far as the appellant is

concerned, he had examined 53 witnesses and produced documents at Ext. R-1 to R-20 in support of his case that his election was not liable to be set aside on the ground of alleged corrupt practice. Further, Ext. C-1 to C-3(b) were marked as Court Exhibits whereas X-1 to X-24 documents were marked as proved by witnesses and Ext. N-1(a) and N-1(b) were marked by the persons to whom the court had issued notice under Section 99 of the Act.

4. After considering the evidence adduced and hearing the learned counsel for the parties, the court proceeded to consider the question as to which standard of proof is required to be applied while resolving election disputes raised in the Election Petition and held that the standard of proof which is higher than one made applicable to decide civil cases but which is lesser than the one applied in criminal cases should be adopted. The High Court

has further held that relevant contemporaneous newspaper publications like Ext. P-5 and P-6 and entries in official documents like Ext. X5 and X6 corroborate the ocular version tendered by the witnesses examined by the respondent No. 1 about the distribution of Ext. X4 pamphlet in the constituency on May 8 and May 9, 2001 by UDF workers. The learned Single Judge further observed that the act of the appellant in not stopping his workers from continuing with distribution of objectionable pamphlet Ext. X4 is sufficient to assume consent on his part. The learned Judge held that it was not established by the respondent No. 1 that DW-52 Jaya Varma, who was election agent of the appellant, had himself distributed the pamphlets in question nor it was established that

UDF workers had distributed the pamphlets with consent of Jaya Varma. The learned Judge further held that the evidence tendered about the

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involvement of DW-52 Jaya Varma in actual distribution did not inspire confidence of the court.

5. The learned Judge further held that in releasing Ext. X4 for consumption of the electorate by extensive distribution in the Constituency, there was publication as contemplated by Section 123(4) of the Act. The learned Judge found that Ext. X4 was not merely republication of the relevant portions of Exts. R-6, R-7 and R-8, but in addition to what was available in Exts. R6, R-7 and R-8, defamatory imputations by way of title, observations/comments in the sub-title, etc., were available in Ext. X4. The learned Judge held that out of the three allegations made in objectionable pamphlet Ext. X4, the third allegation, which relates to misappropriation and fraud to the tune of crores, falls under category of objectionable statement of fact under Section 123(4) of the Act and evidence of PW-6 shows that the statement was false. The

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Court noted that publication of Ext. X4 on the eve of election was calculated to prejudice the prospects of the respondent No. 1 of winning the election. The Court concluded that the appellant was guilty of corrupt practices under Section 123(4) of the Act. However, the Court did not name any of the 77 workers of UDF under Section 99 of the Act and held that there was no specific evidence against any of them.

6. In view of the above mentioned conclusions, learned Single Judge has allowed the Election Petition filed

by the respondent No. 1 and set aside the election of the appellant, giving rise to the instant appeal.

7. This Court has heard the learned counsel for the parties at length and in great detail. This Court has also considered the voluminous oral as well as documentary evidence produced by the parties and read out before the Court.

8. So far as standard of proof is concerned, there is no manner of doubt that the High Court misdirected itself on the point of standard of proof required under Section 123 of the Representation of People Act, 1951. The learned Judge without explaining invented a new standard of proof to be made applicable to election disputes and has held that standard of proof higher than the one applicable to the civil cases but certainly lesser than one applicable to the criminal cases, should be adopted while determining the question whether an elected candidate is guilty of corrupt practice/s within the meaning of the Act. Normally, standard of proof made applicable to civil cases is preponderance of probabilities and the one made applicable to criminal cases is proof beyond reasonable doubt. Even with the ablest assistance of the learned counsel for the parties, this Court could not comprehend as to which is that standard of proof which is higher than the one applicable to civil

cases and lesser than the one applicable to criminal cases. The standard of proof, spoken of by the learned Judge, neither gets recognition/stamp of authority either from the provisions of the Indian Evidence Act or from any other statute or from judicial precedents. There is no manner of doubt that the standard of proof, which should be adopted

according to the High Court while determining an election dispute, is contrary to settled principles of law. The settled law is that an election trial where corrupt practice is alleged is to be conducted as a criminal trial. Unfortunately, the High Court has not referred to any decision of this Court on the point though the learned counsel for the appellant claimed that several decisions were cited by the learned counsel for the parties to guide the High Court as to which standard of proof should be adopted while deciding an election dispute. In Jagdev Singh Sidhanti vs. Pratap Singh Daulta (1964) 6 SCR 750, the Five Judge Constitution

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Bench of this Court has laid down, in paragraph 11 of the reported decision as under: -

> "11.It may be remembered that in the trial of an election petition, the burden of proving that the election of a successful candidate is liable to be set aside on the plea that he was responsible directly or through his agents for corrupt practices at the election, lies heavily upon the applicant to establish his case, and unless it is established in both its branches i.e. the commission of acts which the law regards as corrupt, and the responsibility of the successful candidate directly or through his agents or with his consent for its practice not by mere preponderance of probability, but by cogent and reliable evidence beyond any reasonable doubt, the petition must fail."

It may be observed that the principle that in an election petition based on corrupt practice the Court has to adopt standard of proof beyond reasonable doubt, is enunciated in at least not less than six other reported decisions of this Court. However, this Court does not wish to burden the judgment unnecessarily by referring to those reported decisions in detail because the learned counsel for the respondent has fairly conceded before this Court that a wrong standard of proof was adopted by the High Court

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while trying the election petition filed by the respondent No. 1 challenging the election of the appellant.

9. The consequence of the conclusion, that the learned single Judge adopted a wrong standard of proof while determining the election dispute raised by the respondent No. 1, would be that the other findings recorded by the learned Judge will have to be viewed in the light of this fundamental error committed by him.

10. It may be mentioned that the impugned judgment roughly runs into 87 pages. However, this Court finds that no evidence of any witness is discussed in detail at all. The conclusion of the High Court that distribution of Ext. X4 in the Constituency concerned on 8th and 9th May, 2001 was by the appellant and by UDF workers with the consent of the appellant is to be found on pages 28 to 33 of the impugned judgment. It is relevant to notice that the appellant had stated in his written statement that

he was not aware of any such distribution and in the alternative it was mentioned that even if the distribution had taken place, neither he nor his agent nor any of the workers of UDF was/were involved in the distribution of the Pamphlet Ext. X4. The learned Judge has observed that the appellant has not expressly denied distribution of Ext. X4 on the above said dates in his written statement. However, this Court finds that in an election trial it is not permissible to the High Court to discard substantive oral evidence on account of defect in the pleadings. This is so in view of the decision of this Court in Dr. Jagjit Singh vs. Giani Kartar Singh and others AIR 1966 SC 773.

11. What is important to notice is that the testimony of the appellant that printing and distribution had

taken place in March, 2001 and not in May, 2001, as alleged by the respondent No. 1, was discarded by the learned Judge only because it was not so
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stated in his written statement. At this stage it would be advantageous to refer to the testimony of PW-88. PW-88 is the owner of the press. He had deposed before the Court on February 13, 2002 that Shaji P. Jacob, i.e., DW-10, had entrusted him the printing of Ext. X4 Pamphlet on March 8, 2001. The said witness had produced Ext. X17 Bill Book maintained by him in the ordinary course of business to substantiate that Mr. Jacob, i.e., DW-10, had entrusted him the printing of Ext. X4. Again, DW-10 had also deposed before the Court on March 6, 2002 that he had got printed Ext. X4 from the press of PW-88 and that he himself had distributed the same in the month of March, 2001. It may be stated that PW-88 was one of the witnesses produced by the respondent No. 1 himself in support of his case that the election of the appellant was liable to be set aside and the respondent No. 1 wanted the Court to rely upon the testimony of PW-88. As observed earlier, PW-88
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had in categorical terms stated before the Court that Mr. Jacob, i.e., DW-10, had entrusted him the printing of Ext. X4 Pamphlet on March 8, 2001. The testimony of PW-88 was never challenged by the respondent No. 1 in the sense that PW-88 was never declared hostile to the respondent No. 1 nor the respondent No. 1 had sought permission of the Court to cross-examine PW-88. Thus, evidence tendered by PW-88 was accepted to be true by the respondent No. 1. The testimony of DW-10, whose credibility could not be impeached during his

lengthy cross-examination by the learned counsel for the respondent No. 1, had asserted that he had got printed Ext. X4 from the press of PW-88 and that he had distributed the same in March, 2001. From the impugned judgment it becomes evident that without assigning cogent and convincing reasons the learned Judge had chosen to disbelieve the evidence of PW-88 and that of DW-10. No convincing reason recorded by the learned Judge as

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to why the testimony of PW-88 or for that matter the testimony of DW-10 should be disregarded. The only and feeble reason, which has no legs to stand, given by the learned Judge to disbelieve the testimony of PW-88 and DW-10, is that those who distributed the pamphlets must have got the same printed in the press of PW-88. Thus, this Court finds that the conclusion drawn by the learned Judge, that the evidence of PW-88 and DW-10 was unreliable, will have to be regarded as perverse. The finding recorded by the learned Judge that no adverse inference can be drawn against the respondent No. 1 on the score that he had neither asserted nor controverted that Ext. X4 was got printed by DW-10 in the press of PW-88, has no factual basis and this Court, having regard to the facts of the case, is inclined to draw an adverse inference against the respondent NO. 1 on the score that he had neither asserted nor controverted the fact that Ext. X4 was got printed by DW-10 at the

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press of PW-88. Viewed in the light of what is held above, the assertion made by the appellant, who had examined himself as DW-53 that he had come to know about the distribution of Ext. X4 in the month of March from DW-10 later on, deserves to be accepted and cannot be brushed aside as

improvement in the version as is done by the learned Judge.

12. The finding that there is overwhelming and satisfactory oral evidence on the point that the distribution had taken place on May 8, 2001 and May 9, 2001, to say the least is contrary to the evidence on record. What is the value of oral evidence while deciding issue of corrupt practice within the meaning of Section 123(4) of the Act will have to be considered? So far as election law is concerned by now it is well settled that it would be unsafe to accept the oral evidence on its face value without seeking for assurance from other

circumstances or unimpeachable document. It is very difficult to prove a charge of corrupt practice merely on the basis of oral evidence because in election cases, it is very easy to get the help of interested witnesses. In Abdul Hussain Mir vs. Shamsul Huda and another (1975) 4 SCC 533, the Three Judge Bench of this Court held that oral evidence, ordinarily is inadequate especially if it is of indifferent quality or easily procurable. According to this Court, the oral evidence has to be analyzed by applying common sense test. It must be remembered that in assessing the evidence, which is blissfully vague in regard to the particulars in support of averments of undue influence, cannot be acted upon because the court is dealing with a quasi-criminal charge with serious consequences and, therefore, reliable, cogent and trustworthy evidence has to be led with particulars. If this is absent and the entire case is resting on shaky ipse dixits, the version tendered by witnesses examined

by election petitioner cannot be accepted. Before

recording the above finding, the learned Judge has not adverted to the evidence of any witness nor taken into consideration the positive evidence of DW-10 that he himself had distributed Ext. X4 in the month of March, 2001. This Court does not find from the impugned judgment as to why the High Court was inclined to prefer testimony of a particular witness as against the reliable evidence tendered by the appellant himself and the evidence tendered by DW-10. The finding that contemporaneous newspaper publications produced at Exts. P-5 and P-6 corroborate the testimony of the respondent No. 1, is also not supported by the evidence on record. If one examines newspaper publications produced at Exts. P-5 and P-6, it becomes at once clear that the reports were entirely hearsay. The reporters of Exts. P-5 and P-6 were examined in this case. They have categorically, and in no uncertain terms, stated that they had no

personal knowledge of the events published in Exts. P-5 and P-6. Therefore, what was reported in the newspapers could not have been regarded anything except hearsay. There is no manner of doubt that the High Court has misdirected itself in placing reliance on the hearsay evidence, which was produced before the Court in the form of Exts. P-5 and P-6. In view of clear proposition of law laid down by this Court in Quamarul Ismam vs. S.K. Kanta and others 1994 Supp. (3) SCC 5 and Laxmi Raj Shetty and another vs. State of Tamil Nadu (1988) 3 SCC 319, the hearsay evidence could not have been used by the learned Judge for coming to the conclusion that contemporaneous newspapers publications Exts. P-5 and P-6

corroborate the testimony of the respondent No. 1.

13. The first question, which deserves to be addressed by this Court, is whether it is satisfactorily established that the appellant himself had

distributed the pamphlets in question on May 8 and May 9, 2001.

14. As noticed earlier, the High Court has recorded a finding that Ext. X4 pamphlets were distributed on May 8, 2001 and May 9, 2001 by the appellant and also by UDF workers with his consent and for this purpose the High Court has relied on the testimony of PW-12 to PW21. The learned counsel for the respondent No. 1 would contend that the fact that the appellant had distributed the pamphlets in question stands satisfactorily proved by the evidence of PW-12 to PW-21, out of whom PW-16, PW-18, PW-19 and PW-20 are independent witnesses and, therefore, the finding recorded by the High Court that the appellant had distributed pamphlets on May 8. 2001 and May 9, 2001 based on appreciation of evidence, should be upheld by this Court. The above mentioned submission makes it abundantly clear that PW-12, PW-13, PW-

14, PW-15, PW-17 and PW-21 were not independent witnesses and had affiliation with the party to which the respondent No. 1 belongs. What is important to note is that once the testimony of PW-88 read with that of DW-10 is believed that pamphlets Ext. X4 were printed in the press of PW-88 at the instance of DW-10 and that DW-10 had distributed the same in the month of March, 2001, the assertion made by witnesses examined as PW-12 to PW-21 that the pamphlets were distributed by the appellant and also by UDF workers with the consent of the

appellant on May 8, 2001 and May 9, 2001 becomes highly doubtful and their say cannot be accepted. It is relevant to notice that G. Govindan Nampoothiri, who is examined as PW-88, is witness for the respondent No. 1. The respondent No. 1 desires this Court to act upon the testimony of the said witness, who is examined by him. The respondent No. 1 has not disowned the testimony of PW-88 in the sense that the said witness was not declared

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hostile nor cross-examined on behalf of the respondent No. 1. Once the testimony of PW-88 read with that of DW-10 is acted upon, it becomes evident that the respondent No. 1 had led two sets of evidence each contradicting the other regarding distribution of pamphlets and obviously in such circumstances the reasonable benefit of doubt would go to the elected candidate, namely, to the appellant. Further, the claim made by the learned counsel for the respondent No. 1 that PW-16, PW-18, PW-19 and PW-20 were independent witnesses, who had deposed before the Court that the appellant had distributed Ext. X4 pamphlets on May 8, 2001 and May 9, 2001, on scrutiny, is found to be hollow. The scrutiny of evidence of PW-16 Kuttappai K.K. indicates that in cross-examination it was put to him that Ext. X4 was brought out by the President of Youth Front (J) against another member of the same party and in answer to the said question he replied that he was not knowing that it

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was brought out by the President of Youth Front (J), but admitted that it was so written/mentioned in Ext. X4 itself. Though he admitted that he had not bothered to peruse the full text of Ext. X4, he had audacity to state before the Court that Ext. X4

contained defamatory matter and that allegation of corrupt practice at the personal level were made against the respondent No. 1. When it was put to him that Ext. X4 did not contain any reference about the personal conduct of the respondent No. 1 other than as a servant of the people, the claim of this witness was that he had not read the full text. A witness, who claims before the Court on oath that Ext. X4 pamphlets contained defamatory matter without reading the contents of the same, would hardly inspire confidence of the Court. A perusal of testimony of PW-18 K. Anil Kumar would indicate that in an answer to the question i.e. whether there was anything in Ext. X4 causing defamation of the candidate as such or about election, the witness

replied that those words were not used in Ext. X4 and he agreed that Ext. X4 did not contain the words 'election' or 'candidate'. Initially, this witness maintained that he was an independent witness and had nothing to do with Marxist Party to which the respondent No. 1 belongs, but in cross-examination he admitted that he had worked in the SFI, which was the Student Front of the Marxist Party, in the year 1984-85. He further admitted that at the time when he had worked in the SFI, which was the Student Front of the Marxist Party, he was in the college and had occasion to mingle with the party leaders. In the opinion of this Court the admission made by the witness makes it more than clear that he was not an independent witness as claimed by the learned counsel for the respondent No. 1 and had come to the Court to oblige the respondent No. 1. Again, a critical scrutiny of evidence of PW-19 M.M. Simon would indicate that he had informed one Mr. Pradeep, who was an LDF worker, about

the distribution of the pamphlets by the appellant. This witness also admitted that he had not read the contents of Ext. X4 and had only read the headlines. This witness admitted in the cross-examination that he had deposed before the Court on the basis of information that he had got from others during the election propaganda. This statement made by the witness makes it doubtful whether in fact this witness had seen the appellant distributing the offending pamphlets. Thus on the re-appreciation of evidence of this witness this Court does not find it prudent to place implicit faith on the testimony of this witness. The evidence of PW-20 Verghese Mathew shows that his vegetable shop and the LDF Committee Office are situated in one and the same building and both are separated by a wall. A question was put to witness that whether both sides had raised allegations of corruption against each other. In answer to the said question the witness stated that according to

his knowledge such allegations were raised only by the UDF and not by the LDF. Earlier this witness on his own had mentioned that the respondent No. 1 had issued notices soliciting votes and had not published any pamphlet of the nature of Ext. X4 raising allegations against the UDF. It is important to note that it was nobody's case and certainly it was not the case of the appellant that the respondent No. 1 had published any pamphlet of the nature of Ext. X4 raising allegations against the UDF. Therefore, making of such a statement shows to what extent this so called independent witness was interested in the respondent No. 1. His claim that his wife told him that the copy of Ext. X4 was

distributed along with the identity slip by the UDF party workers can hardly be believed. Such an evidence would never be made available and/or left by the distributors of the pamphlet concerned. Though this witness denied that he was member of the party to which the respondent No. 1 belonged,

after reading his testimony a general impression is created that he was in active politics and had supported an independent candidate, who was contesting Panchayat Elections. His evidence further shows that in connection with the disputes relating to the said election a criminal case was registered against him and he was prosecuted. Therefore, his attempt to project himself as a totally independent witness does not inspire confidence of this Court at all, more particularly, when on presumption the witness had audacity to claim on oath that since the respondent No. 1, who belongs to LDF, was maligned. He had presumed that the publication was brought out by UDF and after seeing bottom portion of Ext. X4 he had to admit that it was brought out in the name of Shaji P. Jacob Kallunkal, who was a former member of the Youth Ftont of Joseph Group of Thiruvalla Constituency. Thus the so called independent witnesses examined by the respondent No. 1 to

establish that the appellant had distributed the offending pamphlets on May 8, 2001 and May 9, 2001 are in fact not independent witnesses and are not reliable at all. The finding recorded by the learned Judge of the High Court that there is overwhelming and satisfactory oral evidence on the point that distribution of pamphlet Ext. X4 on May 8, 2001 and May 9, 2001 was made by the appellant, is not borne out from the record of the

case. In fact there is no discussion as to which witness has testified to this fact and why the High Court has preferred that testimony as against the evidence tendered by the appellant.

15. This Court further finds that the High Court has recorded a finding that the pamphlets were distributed by the appellant by observing that "the allegation in para 13.1(iii) is also to be found to be established satisfactorily by the evidence tendered". This Court notices that before recording above

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mentioned finding, the High Court has not taken trouble of referring to any evidence on the record. The High Court while recording the said finding should have referred to the evidence which had tendency to establish the said fact. Thus, most of the findings recorded by the High Court are based on surmises and inferences and have no factual basis at all. While discussing whether the distribution of the pamphlets was with the consent of the appellant, the High Court mentions the testimony of PW-12 to PW-21. All these witnesses were produced by the respondent No. 1 during the course of the election trial. Many of them admitted that they were affiliated to the respondent No. 1 and/or his party, whereas rest of them have been found to be interested witnesses. There is absolutely nothing on the record to show that the appellant had indulged in the act of distribution of pamphlets and thus committed a corrupt practice. The case of the respondent No. 1 in the election

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petition was that on May 8, 2001 seven UDF workers were arrested by the police in connection with the distribution of pamphlets and the appellant had personally got them released from the Police

Station and after coming out from the police station, the appellant himself had distributed the pamphlets and directed others to distribute the same. As noticed earlier, the respondent No. 1 had examined PW-7, Additional S.I., and produced Ext. X5, which is GD entry to substantiate this case. Apart from the evidence of PW-12 to PW-21, who are his own party workers and/or interested witnesses, the official evidence has completely disproved the case of the respondent No. 1, because PW-7 specifically stated that the seven UDF workers were not arrested and so the appellant had no occasion to get them released. The GD entry also states that the ASI had gone to the spot and removed the UDF workers from the scene to avoid breach of law and order and later on they were let off on the advice of

the superior officers. Once it is held that the respondent No. 1 has failed to prove that seven UDF workers, who were distributing the pamphlets, were arrested and lodged in the police station and that the appellant had gone to the police station and got the seven workers released from the police station, the further case of the respondent No. 1, that after coming out of the police station, the appellant himself had distributed the offending pamphlets and directed others to distribute the pamphlets, becomes highly doubtful and improbable. This Court finds that the High Court has placed reliance on unreliable and scanty evidence to find the appellant guilty of corrupt practice and, therefore, the finding that the appellant is disqualified under Section 99 of the Act is completely unsustainable.

16. The second question, which needs to be considered, is whether it is satisfactorily proved by the

respondent No. 1 that whether the pamphlets in question were distributed by the workers of UDF.

17. This Court further finds that the High Court has recorded a finding in paragraph 39 of the impugned judgment that the official documents, which have come from proper custody, corroborate the ocular version of the witnesses about distribution of Ext. X4 on May 8, 2001 and May 9, 2001. On scrutiny of the whole evidence on record this Court finds that the High Court has not pointed out as to which were the official documents referred to in paragraph 39 of the impugned judgment. The learned counsel for the respondent No. 1 also could not point out to this Court any document which can be termed as official document, which, in turn, corroborated the ocular version of the witnesses regarding distribution of Ext. X4 on May 8, 2001 and May 9, 2001. This Court finds that the learned Judge has referred to Ext. X5, which is General Diary

maintained in the Police Station read with the testimony of Additional S.I. of Police at Thiruvalla, Mr. V.R. Rajendran Nair to conclude that official document corroborated the version of the witnesses that distribution of pamphlets, copy of which was produced as Ext. X4, had taken place on May 8 and May 9, 2001. Ext. X5, which is referred to by the learned Judge, is to be found on page 130 of Volume V of the appeal. It is General Diary entry of the Police Station. The Additional S.I. PW-7, who made the GD entry, has in terms disproved the arrest of seven UDF workers, who were allegedly distributing the pamphlets, and the involvement of the appellant in getting them released from the Police Station as alleged by the respondent No. 1.

Therefore, this Court fails to understand as to how General Diary entry of the Police Station and the testimony of Additional S.I. PW-7 proved that seven UDF workers were distributing the offending

pamphlets and that the appellant was involved in getting them released from the Police Station.

18. Further, while concluding that the pamphlets were distributed by the UDF workers on May 8, 2001 and May 9, 2001, what is observed by the learned Judge is that the benefit of the distribution would have enured to none other than the appellant and, therefore, inference can be drawn that UDF workers had distributed the pamphlets with the consent of the appellant. This Court finds that such a conclusion, based on unwarranted inferences and surmises, is recorded only because High Court had misdirected itself on the question of standard of proof required to be adopted to resolve a dispute raised under Section 123 of the Act. The theory that the benefit of distribution could have enured only to the appellant is misplaced in the light of principles laid down in D. Venkata Reddy vs. R. Sultan and others (1976) 2 SCC 455. It is

relevant to notice that in his written statement the appellant had denied that 77 persons named in the election petition, who had allegedly distributed the pamphlets, were UDF workers. However, the High Court found that the appellant had in his testimony admitted that some of them were in fact UDF workers. Therefore, the High Court proceeded further to record a finding that "this must go a long way when the court considers the question as to who had distributed copies of Ext. X4". Although from the record it is evident that out of 77 persons

named in the election petition, the appellant had admitted that a few were UDF workers but from this it would be unwise to jump on to the conclusion and that too on inferences that the UDF workers had distributed the pamphlets. The High Court in the impugned judgment could not even identify a single UDF worker, who, according to it, had distributed the pamphlets and has simply held that there is evidence to show that UDF workers had

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distributed the pamphlets. The testimonies of 77 persons named in the election petition could not have been accepted because their testimonies are self-serving and interested one. The finding that DW-14 Mustafa Kutty admitted during his cross-examination that UDF workers had distributed the pamphlets is nothing else but the result of complete misreading of the testimony of the said witness. The said witness does not make any such admission as is referred to by the High Court in the impugned judgment. On the contrary the said witness had stated that he had distributed only the pamphlets issued from the Election Committee Office and nowhere had he stated that the Election Committee Office of the appellant had issued the pamphlet's, copy of which was produced at Ext. X4, and that he had distributed those pamphlets.

19. The discussion made above makes it evident that the respondent No. 1 has failed to prove that UDF

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workers had distributed the offending pamphlets on May 8 and May 9, 2001. The finding of the High Court on this score being against the weight of evidence is hereby set aside.

20. In the alternative, it was argued on behalf of the

appellant that even if the distribution of pamphlets by UDF workers was held to be proved, no satisfactory evidence was adduced by the respondent No. 1 to establish that distribution of the pamphlets by the UDF workers was with the consent of the appellant and, therefore, the judgment impugned is liable to be set aside.

21. It is well-settled that to prove that the corrupt practice of a third person is attributable to a candidate under Section 123 of the Act, it must be shown that the candidate consented to the commission of such act. The finding that the appellant knew about such distribution because benefit of such distribution could only enure to him,

but he kept silent despite knowledge of such distribution, is nothing else but an unwarranted inference and surmise on the part of the court. Similarly, the finding that seven UDF workers, who were allegedly arrested on May 8, 2001 by the police for distribution of the pamphlets, were released at the behest of the appellant who went to the Police Station and, therefore, there was consent of the appellant is quite contrary to the testimonies of the witnesses. It may be mentioned that this finding is arrived at on the basis of (i) the averments in the election petition which have no basis to justify the finding, (ii) the testimonies of PW-12 to PW-21, but scrutiny of their evidence reveals that none of the said witnesses had witnessed the appellant going to the police station and securing release of the seven workers and (iii) entries in the General Diary Ext. X5 which contains no details and only records what the Sub-Inspector heard from other people over the telephone about distribution of some printed

notices. Nothing is mentioned in the said entry about involvement of any of UDF workers or the appellant and, therefore, the finding that UDF workers had distributed the pamphlets with the consent of the appellant being against evidence on record is liable to be set aside and is hereby set aside.

22. The High Court's understanding of law that the appellant would be liable for penalty under Section 99 of the Act for the acts of his agents without the conviction of such agents is completely erroneous in law. It is relevant to notice that Mr. Jaya Varma was validly appointed as election agent of the appellant. The High Court, on appreciation of the evidence adduced, has recorded a clear finding that no reliable evidence was led by the respondent No. 1 to establish that Mr. Jaya Varma himself had distributed the offending pamphlets or that UDF workers had distributed the pamphlets with the

consent of Mr. Jaya Varma. The conclusion of the High Court that distributer of objectionable pamphlets Ext. X4 need not be named nor a finding with name of the distribution be recorded under Section 99(1)(a)(ii) of the Act, to say the least, is contrary to the ratio laid down by this Court in Chandrakanta Goyal vs. Sohan Singh Jodh Singh Kohli (1996) 1 SCC 378, wherein the principle is laid down that when a candidate is held to be guilty of corrupt practice vicariously, for an act done by any person other than his agent with his consent, then the ultimate finding to this effect has to be recorded and that too only after notice under Section 99 to that other person and an inquiry must be held as contemplated therein naming the other

person simultaneously for commission of such corrupt practice. There is no manner of doubt that making of an order under Section 98 against the appellant, who is returned candidate, without complying with the requirements of Section 99

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when the corrupt practice against the appellant is held to be proved vicariously for the act of another person, by itself vitiates the impugned judgment. Further, in view of the principles laid down in the above mentioned reported decision, it is also clear that the court has no option in this matter and it is incumbent to name such a person in the final verdict given in the election petition under Section 98 of the Act after making due compliance of Section 99 of the Act. The High Court has not only acted contrary to law and ignored the mandate of Section 99 of the Act but taken the view that there was an option available to the Court to ignore the requirement of Section 99 to give notice to the distributors of the pamphlets and to name them as persons guilty of the corrupt practice even though the distribution of pamphlets by the UDF workers is made the foundation of the corrupt practice, allegedly committed by the appellant. The judgment is obviously vitiated since no concluded finding on

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this question is recorded against the UDF workers, who had allegedly distributed Ext. X4, choosing to ignore the requirement of Section 99 of the Act. The approach of the learned Judge of the High Court in finding the appellant guilty for distribution of pamphlets vicariously in the sense that UDF workers had distributed the pamphlets with the consent of the appellant, after holding that there is no sufficient data to conclude that those UDF workers who had distributed Ext. X4 pamphlets had

the requisite contumacious mind, is contrary to law and difficult to uphold. If the workers had no contumacious mind, the appellant hardly could have been fastened with any vicarious liability for the so called alleged corrupt practice.

23. The net result of the above discussion is that the finding, recorded by the High Court that the pamphlets were distributed on May 8 and May 9, 2001, is not only perverse but contrary to the facts proved and, therefore, the same is liable to be set aside.

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24. Another alternative plea, which was raised on behalf of the appellant, was that even if the court were to hold that it was proved by the respondent No. 1 that the appellant and/or the UDF workers with the consent of the appellant had distributed the pamphlets in question, there was no publication of the same within the meaning of Section 123(4) of the Act as the contents of Ext. X4 were already previously published in "Crime" Magazine having circulation in the constituency concerned.

25. The High Court further committed error in holding that the distribution of the pamphlets amounted to publication for the purposes of Section 123 of the Act. Section 123(4) of the Act provides as follows: -

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

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(4) The publication by a candidate or his agent or by any other person with the consent of a candidate or his election agent, of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, or in relation to the candidature, or withdrawal, of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate's

> election."

It is an admitted fact that the objectionable pamphlets contained statements, which were previously published in the three editions of the "Crime" magazine which has circulation in the Constituency concerned. Though the High Court holds that the pamphlet additionally contains a heading and a caption, ultimately, the appellant is found guilty for republishing material from Crime magazine relating to misappropriation of the funds from one Vivekananda College. The question is whether republishing material from the "Crime" Magazine, which was already distributed earlier, can be regarded as an act of publication of statements of fact relating to the personal character and/or conduct of the respondent No.

1, within the meaning of Section 123(4) of the Act. The word "publication" occurring in Section 123(4) of the Act, has not been defined under the Act. Therefore, it would be relevant to refer to the meaning of the word "publication" as given in standard dictionary. The word "publication" has been defined in Black's Dictionary of Law (6th Edition) as follows: -

> "to make public; to make known to people in general; to bring before public; to exhibit; display, disclose or reveal.........the act of publishing anything; offering it to public notice, or rendering it accessible to public scrutiny. An advising of the public; a making known of something to them for a purpose. It implies the means of conveying knowledge or notice."

A similar meaning has been ascribed to the word "publication" in State of M.P. and another etc. etc. vs. Ram Raghubir Prasad Agarwal and others (1979) 4 SCC 686. The first and foremost ingredient of publishing is making information known to the public in general. Publication is an act by which some information is exhibited, displayed, disclosed or revealed before the

public. By publication, the necessary information is made accessible for public scrutiny. It is an act of making known of something to the public in general for a purpose. In the present case, this Court finds that the information as contained in the pamphlet about the respondent No. 1 having misappropriated the funds of the school was already exhibited, displayed, disclosed, made known, revealed and brought to the notice of general public residing within the constituency when "Crime" magazine was previously published and circulated in the constituency. The reproduction and distribution of the same information within the space of a few months cannot amount to publication for the purposes of Section 123 of the Act. It must be remembered that a trial under Section 123 of the Act is a criminal trial. Conviction under the provisions of Section 123, may lead to disqualification of the candidate concerned for a period of six years under Section 99 of the Act, which is a serious matter. Therefore, the provisions will have to be construed strictly. So

construed, there is no manner of doubt that reproduction and distribution of the reproduced information within the space of few months cannot be regarded as publication of the statements of fact relating to the personal character and/or conduct of the respondent No. 1 within the meaning of Section 123 of the Act. Instead, the impugned judgment holds that as in law of defamation, the republication of statements of fact also amounts to publication for the purpose of Section 123(4) of the Act. This Court is of the firm opinion that there is no warrant for such a conclusion and it is wrong to say that republication as in defamation law amounts to publication so far as Section 123(4) of the Act is concerned.

26. Another alternative plea raised on behalf of the appellant for consideration of this Court was even if it was assumed that the respondent No. 1 had proved that the appellant and/or UDF workers with the consent of the appellant had distributed the pamphlets and
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distribution of the pamphlets amounted to publication notwithstanding the fact that the contents of the pamphlets were previously published in "Crime" Magazine, it was contended that evidence adduced establishes that the appellant had believed the imputations made against the respondent No. 1 in Ext. X4 to be true, whereas it was not established by the respondent No. 1 that the imputations made in Ext. X4 were believed to be untrue by the appellant and, therefore, no corrupt practice as alleged was committed by the appellant.

27. The High Court has further erred in holding that the appellant believed the published material to be false at the time of its distribution. One of the important ingredients in proving the offence of corrupt practice under Section 123(4) of the Act is that it has to be established that the returned candidate believed the statement that was published, to be an untrue statement. It is significant that unlike the law of
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defamation, where truth is a defence, Section 123(4) of the Act not only recognizes truth as a defence by using the words "publication of any statement of fact ..... which is false....." but additionally protects the maker of the statement by stipulating that the maker must believe the statement to be false. This Court has held that the onus of proving that the maker believed the statement to be false rests with the election petitioner (see Dr. Jagjit Singh vs. Giani Kartar Singh and others AIR 1966 SC 773 - paragraph 21). The High Court does not explain

how and by way of what evidence led by the respondent No. 1 it stands proved that the appellant believed that the contents of the pamphlets were false. On the contrary, the defence of the appellant that he believed the statements made in Ext. X4 to be true because of their prior publication in "Crime" magazine and failure of the respondent No. 1 to initiate any legal action against the Crime magazine, if tested on preponderance of probability stands proved. However, this defence of the

appellant is discarded by the High Court by making the following observations: -

> "71.There are many in this country who may believe that the printed word is truth. But that certainly is not the yardstick or touch stone on which the contumacious state of mind of the maker of a statement of fact will be assessed. Merely because the Crime Magazine is one having circulation, popularity and notoriety, D.W. 53 (the appellant) cannot assert that he believed the printed words in Exts. R6, R7 and R8 to be the gospel truth. If such an approach were permitted, section 123(4) of the Act can be violated with impunity if some yellow journalist publishes unfounded allegations and the offender-facing proceedings for defamation or for corrupt practice under Section 123(4) of the Act, repeats the allegation with impunity and claims immunity from consequences of his conduct. That cannot certainly be the law. That cannot be approach that this court will adopt. The 1st respondent who has had a fairly long political career cannot contend that he simply swallowed the publications made earlier in Exts. R6, R7 and R8 and hence did not believe the statement of facts made in Ext. X4 to be false or he did not believe them to be not true."

> "78......the publication of the same statement of fact earlier in the Crime Magazine cannot justify the 1st respondent. Even the fact that some other gullible members of the public who read the relevant Crime Magazines and came to know of these allegations believed or did not doubt the truth of such statement of fact

> cannot help the 1st respondent at all. At worst, that can only prove the pregnant possibilities of such false assertion of fact. Except the earlier publication of the same statement of fact in the Crime Magazine i.e. Exts. R6, R7 and R8, there is not a semblance of scintilla or data which can persuade this Court to assume that the maker of the said objectionable statement or any other had reasons to believe the said statement of fact to be true or did not

> believe it to be false."

It is not clear from the extracts quoted above as to how the High Court has concluded that the appellant could not have relied upon the publications of the offending information in "Crime" magazine. The reference to "Crime" magazine as a yellow journal is also not proper. The term "yellow journal" has its origins in American slang. It was initially used by some people to describe a newspaper called the "New York World" in the early 1900s because the paper used to print sensational stories and had a cartoon strip called the "yellow kid" which was printed with yellow ink. Black's Law Dictionary (6th Edition) defines "yellow journalism" as follows: -

> "type of journalism which distorts and exploits the news by sensationalism in order to sell copies of the newspapers or magazines."

The High Court has summarily described "Crime" Magazine to be a yellow journal. Whether "Crime" magazine is a yellow journal is a matter of opinion and not of fact. It is impossible to conclude that an opinion of this sort is a judicially noticeable fact for the purposes of Section 56 or Section 57 of the Evidence Act, 1872. There is nothing in the impugned judgment which indicates that any evidence was led, much less considered as to whether "Crime" magazine is a yellow journal and hence magazine could not have been relied upon by the appellant in forming a belief that the contents of the magazine were not untrue. Further, between the time of publication of offending material in Crime magazine and the alleged distribution of the pamphlet, the respondent No. 1 did not pursue any action in law by way of criminal complaint or suit against the publishers of the Crime Magazine for defamation. It

is only after the institution of the election petition that such a complaint was filed, presumably as an after thought. Even in the said complaint for defamation, filed by respondent No. 1 against the printer and publisher of crime, the third imputation which is found as offending by the High Court was not included. This would show that the respondent No. 1 himself considered the said imputation as not defamatory or at least not capable of being proved to be false. The appellant, in these circumstances, not only had an explanation but a satisfactory explanation as to why he believed the objectionable statements in the pamphlet Ext. X4 to be true. There is no manner of doubt that the High Court, therefore, erred in holding otherwise, despite the fact that the respondent No. 1 had not discharged initial onus resting on him. In view of the fundamental mistake committed by the High Court in the matter of standard of proof while resolving dispute of corrupt practice and faulty appreciation of evidence by applying wrong standard of proof as also the fact that the election of the

appellant is set aside on the basis of broad probabilities and presumptions, without even referring to any of the evidence adduced by the parties, the impugned judgment is liable to be set aside.

28. For the foregoing reasons the appeal succeeds. The judgment dated August 8, 2005, rendered by the learned single Judge of the High Court of Kerala at Ernakulam in Election Petition No. 6 of 2001 by which the election of the appellant as a member of Kerala Legislative Assembly No. 106 Kallooppara Constituency is declared to be void on the ground that he is guilty of corrupt practice under Section 123(4) of the Representation of People Act, 1951, is hereby set aside. There shall be no order as to costs.

....

.......J.
[J.M. Panchal]

.....................................J.
[Gyan Sudha Misra]

New Delhi;
December 01, 2010.

ITEM NO.1A COURT NO.12 SECTION XVII
(FOR JUDGMENT)

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

CIVIL APPEAL NO(s). 5310 OF 2005

JOSEPH M. PUTHUSSERY Appellant (s)

VERSUS

T.S.JOHN AND ORS. Respondent(s)

Date: 01/12/2010 This Appeal was called on for judgment today.

For Appellant(s) Mr. Himinder Lal,Adv.

For Respondent(s) Mr. Romy Chacko,Adv.

Hon'ble Mr. Justice J. M. Panchal pronounced reportable judgment of the Bench comprising of His Lordship and Hon'ble Mrs. Justice Gyan Sudha Misra.

In terms of the signed reportable judgment, the appeal succeeds. The judgment dated August 8, 2005, rendered by the learned single Judge of the High Court of Kerala at Ernakulam in Election Petition No. 6 of 2001 by which the election of the appellant as a member of Kerala Legislative Assembly No. 106 Kallooppara Constituency is declared to be void on the ground that he is guilty of corrupt practice under Section 123(4) of the Representation of People Act, 1951, is hereby set aside. There shall be no order as to costs.

(Neetu Sachdeva) (Sneh Bala Mehra)
Sr. P. A. Court Master

(signed reportable judgment is placed on the file)