

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR

THURSDAY, THE 11TH DAY OF APRIL 2024 / 22ND CHAITHRA, 1946

ELECTION PETITION NO. 8 OF 2021

PETITIONER:

ADV.M.SWARAJ
AGED 41 YEARS
S/O. MURALEEDHARAN NAIR, SUMA NIVAS, BHOODAN
COLONY P. O., MALAPPURAM DISTRICT, PIN -
679334.
BY ADVS.
P.K.VARGHESE
K.S.ARUN KUMAR
N.K.SHYJU
P.P.BIJU
P.S.ANISHAD
K.R.ARUN KRISHNAN
SANJANA RACHEL JOSE
BIJU KUMAR
REGHU SREEDHARAN

RESPONDENTS:

- 1 K.BABU
AGED 70 YEARS
S/O. KUMARAN, KUNNUPARAMBATH HOUSE, SANSKRIT
COLLEGE ROAD, TRIPUNITHARA, ERNAKULAM DISTRICT,
PIN - 682301.
- 2 DR. K. S. RADHAKRISHNAN
S/O. K. A. SUKUMARAN, AGED 66 YEARS,
KALLUMADATHIL, HMC ROAD, SOUTH CHITTOOR P. O.,
ERNAKULAM DISTRICT, PIN - 682027.
- 3 K. P. AYAPPEN
S/O. K. M. PONNAN, AGED 46 YEARS, KAPPILY
HOUSE, EDAKKUNNU, PADUVAPURAM P. O., PIN -
683576.
- 4 ARUN BABU P. C.
S/O. CHANDRASEKHARAN, AGED 35 YEARS, NIKARTHIL,
KUMBALAM P. O., KUMBALAM, ERNAKULAM DISTRICT,
PIN - 682506.

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- 5 RAJESH PAIROAD
S/O.K. K. RAMESH, AGED 44 YEARS, KALAPPURACKAL,
EDAKOCHI, ERNAKULAM DISTRICT, PIN - 682010.
- 6 C. B. ASHOKAN
S/O. BHASKARAN T. K., AGED 57 YEARS,
CHERAPURATHU VEEDU, IRUMBANAM P. O.,
TRIPUNITHARA, ERNAKULAM DISTRICT, PIN - 682309.
- 7 ELECTION COMMISSION OF INDIA
NOT A PARTY
R1 BY ADVS.
S.SREEKUMAR (SR.)
T.KRISHNANUNNI (SR.)
K.ANAND (SR.)
C.S.AJITH PRAKASH
K.P.ARUN
LATHA ANAND
M.N.RADHAKRISHNA MENON
K.R.PRAMOTH KUMAR
SAJIKUMAR.K.K.
N.SREEJITH (MAKALIYAM)
S.VISHNU (ARIKKATTIL)
ROHITH MOHAN
RADHAKRISHNA PILLAI B
SIDHARTH P.S.
ARJUN VARMA
PAUL C THOMAS
FRANKLIN ARACKAL
BABU M.
NIDHIN RAJ VETTIKKADAN
HAARIS MOOSA
ADESH JOSHI
- OTHERS SHRI.DEEPULAL MOHAN, SC, ELECTION COMMISSION
PRESENT OF INDIA

THIS ELECTION PETITION HAVING COME UP FOR FINAL
HEARING ON 22.02.2024, THE COURT ON 11.04.2024 DELIVERED
THE FOLLOWING:

P.G. AJITHKUMAR, J.

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Dated this the 11th day of April, 2024

ORDER

The petitioner and the 1st respondent, besides five others, contested the election held on 06.04.2021 to elect the member from 081-Thrippunithura Constituency to the Kerala Legislative Assembly. The result was declared on 02.05.2021. The 1st respondent, who was a candidate of the Indian National Congress, a constituent of the United Democratic Front(UDF), returned. The petitioner, who was a candidate of the Communist Party of India (Marxist), a constituent of Left Democratic Front (LDF), calls into question the election of the 1st respondent on the ground of corrupt practices.

2. The 1st respondent raised preliminary objections pointing out material defects in the election petition, want of cause of action to constitute corrupt practices and non-compliance of the provisions of Section 81 of the R.P.Act and Rule 212 of the Rules of the High Court of Kerala, 1973.

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Preliminary objections were considered by this Court as per order dated 29.03.2023 and sustained a part of the objection.

The operative part of the said order reads,-

- “1) the election petition on the basis of the allegations contained in paragraphs No.10 to 14 and 20 to 28 of the Election Petition that-
- i) the 1st respondent committed corrupt practice since he, his election agent and other persons with his consent or his election agent induced the electors to vote for him and not to vote for the petitioner by publicising the messages that unless they do so, they will be rendered objects of divine displeasure coming within the meaning of Section 123(2)(a)(ii) of the R.P.Act, or
 - ii) appealed to the electors to vote for him and refrain from voting to the petitioner on the ground of religion coming within the purview of Section 123(3) of the R.P.Act,
- do not make out a cause of action. Therefore, the Election Petition as regards the said allegations is rejected under the provisions of Order VII, Rule 11 of the Code, and
- 2) The averments in paragraphs No.16 to 21 of the Election Petition that the 1st respondent, his election agent and other persons with the consent of the 1st respondent and his election agent, used Hindu religious

symbol by distribution of Annexures I to III and similar slips to electors, for the furtherance of the prospects of election of the 1st respondent and for prejudicially affecting the election of the petitioner, made out sufficient cause of action for a trial on the Election Petition in order to decide whether the election of the 1st respondent as a member of the Legislative Assembly from Thrippunithura Legislative Assembly constituency in the election held on 06.04.2021 is null and void. The Election Petition will be proceeded with in respect of the said aspect alone.”

3. The 1st respondent challenged the said order before the Apex Court by filing Civil Appeal No.5975 of 2023. The Apex Court dismissed that appeal as per the order dated 12.02.2024. What remains for consideration is the allegations concerning corrupt practice by the use of religious symbol alone. The averments regarding the same are contained in paragraphs No.16 to 21 in the election petition. Reference to the said allegations and the contentions of the 1st respondent in that regard alone require mention. The other respondents did not contest the petition.

4. The petitioner alleges as follows:

Sri.R.Venugopal was the election agent of the 1st respondent.

He along with Sri.Anand Udayan and Sri.Naveender reached the houses of Sri.Sajil Raj, Sri.Shan, Sri.Sekharan, Sri.Rajesh, S/o Appu, Sri.Ranjith and Sri.Rajesh, S/o Mani and other residents of Thekkumbhagam, Thrippunithura on 04.04.2021 at about 7.00 a.m. and distributed election slips with wording "Ningalude vote Ayyappanu" and the picture of Lord Sabarimala Ayyappa, below which printed the election symbol of the 1st respondent with a request to vote for the 1st respondent. The slips contained particulars of the voter concerned, such as booth number, serial number, house number, name, age and house name, and polling station. Annexure I is the slip so given to Sri.Sajil Raj. While giving the slip, Sri.R.Venugopal and others fervently appealed to cast vote for the 1st respondent and the voters were told if not, there would be divine displeasure or spiritual censure. Similarly, at about 7.30 a.m. on 04.04.2021, Sri. P.K. Devarajan along with Sri.Saratchandran, who was the campaigner for the 1st respondent, went to the houses of Sri.Pradeepkumar, Sri.M.S.Saju, Sri.Vinu Sasi and others

residing near GLPS, Mangayil and delivered similar slips and made similar appeals. Annexure II is the slip given to Sri.Pradeepkumar. At about 7.30 a.m. on 04.04.2021, Sri. Vinod C., who was the Block President of the Indian National Congress along with Sri.Ravi Varma went to the houses of Sri.Reghu U.Menon, Sri.Nandakumar Varma, Sri.Hari Varma, Sri.Harisankar Raja and several others residing near Thrippunithura Poornathrayeesa Temple and distributed similar slips and made similar appeals. Annexure III is the slip issued to Sri.Harisankar Raja.

5. Those slips did not contain details as to the printer and publisher as mandated under Section 127-A of the R.P.Act. However, those slips were printed and published by the 1st respondent together with his election agent. The majority of voters in the Thrippunithura Assembly Constituency are believers of Lord Sabarimala Ayyappa. By distributing such slips, the 1st respondent, his election agent and others with their consent used the religious symbol, i.e., the name and picture of Lord Sabarimala Ayyappa for the

furtherance of the election prospects of the 1st respondent. Immediately on knowing the distribution of such slips, Sri.P.Vasudevan, who was the Secretary of the Area Committee of the Communist Party of India (Marxist) submitted Annexure IV complaint to the Circle Inspector of Police, Hill Palace Police Station. A receipt in that regard was issued to Sri.P.Vasudevan, which is Annexure-V. By distributing such slips and making use of the same to win the election, the 1st respondent and his election agent had committed corrupt practice as defined in Section 123(3) of the R.P.Act. Therefore, the election of the 1st respondent is liable to be set aside. Seeking such a declaration, the election petition has been filed.

6. The 1st respondent contends as follows:

Sri.R.Venugopal was his election agent. Neither the 1st petitioner, his election agent nor any person with their consent printed or distributed Annexures I to III or similar slips to the voters in the Thrippunithura Constituency. It is also incorrect that while distributing such slips Sri. R. Venugopal and others

made requests to vote for the 1st respondent and told them that lest, there will be divine displeasure. Election petition was filed without any basis and the grounds urged therein are untenable. It was filed without any cause of action. The 1st respondent did not commit any corrupt practice as defined in the RP Act. It is incorrect that the majority of voters in Thrippunithura Assembly Constituency are believers of Lord Sabarimala Ayyappa; most of them are devotees of Lord Poornathrayeesa. Similarly, the allegations as to the distribution of Annexures I to III and similar slips to the persons named in the petition and others as also making appeals to vote for the 1st respondent by the persons distributed the slips are totally false. The allegation that the persons, who distributed Annexures I to III and similar slips made appeal to the voters to cast vote for the 1st respondent since he was the only person who stood with the believers of Lord Ayyappa is also incorrect. The persons named in the petition or anyone on behalf of the 1st respondent did not distribute slips containing any religious symbol. The 1st

respondent, his election agent or anyone with their consent did not print or publish Annexures I to III or similar slips. Those are creations of the petitioner himself for the purpose of the election petition. The petitioner with the help and assistance of others created Annexures I to III slips for the purpose of this election petition. During the last phase of the election, there was a strong opinion that the 1st respondent would win with a thumping majority. The petitioner anticipating defeat in the election had submitted a complaint to the Circle Inspector of Police, Thrrippunithura Police Station to create false evidence to support the prospective election petition. The slip referred to in that complaint does not relate to Annexures I to III. Annexures I to III and similar slips were not distributed as alleged and it is incorrect that the distribution of those slips materially affected the result of the election. Accordingly, the 1st respondent seeks to dismiss the election petition.

7. On the said pleadings the following issues were raised:

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- 1) Were Annexures I to III slips and/or similar slips distributed to the electors for the election held on 06.04.2021 to elect the Member from Thrippunithura Constituency to the Kerala Legislative Assembly as alleged in the Election Petition?
- 2) Was Mr.R.Venugopal, the Election Agent of the 1st respondent in the election held on 06.04.2021?
- 3) Did the Election Agent of the 1st respondent or any other person with the consent of the 1st respondent or his election agent distribute Annexures I to III slips and/or similar slips to the electors in the Thrippunithura Constituency in connection with the election held on 06.04.2021 as alleged in the Election Petition?
- 4) Do Annexures I to III slips and/or similar slips said to have been distributed to the voters in the Thrippunithura Constituency in connection with the election held on 06.04.2021 contain a religious symbol?
- 5) Whether distribution of Annexures I to III slips and/or similar slips to the electors in the voters list for electing a Member from the Thrippunithura Assembly Constituency to the Kerala Legislative Assembly as alleged in the Election Petition, amounting to a corrupt practice as defined in Section 123(3) of the Representation of People Act, 1951?
- 6) Is the election of the 1st respondent as a Member of the Kerala Legislative Assembly from Thrippunithura Constituency in the election held on 06.04.2021 liable to be declared null and void?
- 7) What shall be the order as to costs?

8. At the trial, PWs.1 to 6 were examined and Exts.P1, P1(a), P2, P2(a), P3, P3(a), P4, P4(a), P5, P5(a) and X1 were marked on the side of the petitioner. Rws.1 to 4 were examined and Exts.R1 to R5 were marked on the side of the 1st respondent.

9. Heard the learned counsel for the petitioner and the learned Senior counsel, appeared on instructions, for the 1st respondent.

ISSUE No.4.

Do Annexure I to III slips and/or similar slips said to have been distributed to the voters in the Thripunithura Constituency in connection with the election held on 06.04.2021 contain a religious symbol ?

10. Annexures I to III are respectively Exts.P1 to P3. Exts.P1(a), P2(a) and P3(a) are respective English translations. The case of the petitioner is that Ext.P1 was given to PW2, Ext.P2 was given to PW4 and Ext.P3 was given to PW5. Exts.P1 to P3 are slips(handbills) given to electors helping them to vote by identifying their booths and voter details. It contains a picture of Lord Sabarimala Ayyappa and appeals that "your vote for Ayyappa (നീങ്ങളുടെ വോട്ട് അയ്യപ്പന)" and "let K.Babu win (കെ.ബാബുവിനെ വിജയിപ്പിക്കുക)". The slips also contain the

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election symbol of Sri.K.Babu, 'hand'. For easy understanding, Ext.P1 slip and its English version are copied below.

നിങ്ങളുടെ വോട്ട് അയ്യപ്പൻ



കെ.ബാബുവിനെ വിജയിപ്പിക്കുക

നമ്മുടെ ചിഹ്നം
കൈപ്പത്തി

ബുക്ക് നമ്പർ... 69 ക്രമനമ്പർ... 843

വീട്ട് നമ്പർ

പേര് ... സജിൻ രാജ് ... വയസ്സ് 34

വീട്ടുപേര്... ഉതലിത്താഴത്ത്

പോളിങ്ങ് സ്റ്റേഷൻ... ഗവ. UPS, ചൂരക്കാട്

VERIFICATION

I, Adv.M.Swaraj, S/o Muraleedharan Nair, aged 41 years, Suma Nivas, Bhoodan Colony (PO), Malappuram District, Pin – 679334, the petitioner in the above election petition do hereby declare and verify that the above is the original of Annexure- I in the election petition and it is true and correct to the best of my knowledge, information and belief and is signed and verified by me at Ernakulam on this the 15th day of June 2021


Advocate


Adv.M.Swaraj
Petitioner

True and correct English translation of Annexure-I

YOUR VOTE FOR AYYAPPAN | Booth Number.....69.....Serial Number.....843.....

| House Number.....

| Name.....Sajilraj.....Age.....34.....

| House Name.....Uthalithazath.....

Make victory of K.Babu | Polling Station. Govt. UPS, Choorakkadu

OUR SYMBOL
HAND

VERIFICATION

I, Adv.M.Swaraj, S/o Muraleedharan Nair, aged 41 years, Suma Nivas, Bhoodan Colony (PO), Malappuram District, Pin – 679334, the petitioner in the above election petition do hereby declare and verify that the above is the true and correct English translation of Annexure- I and marked as Annexure- I(a) in the election petition and it is true and correct to the best of my knowledge, information and belief and is signed and verified by me at Ernakulam on this the 15th day of June 2021


Advocate


Adv.M.Swaraj
Petitioner

11. The case of the petitioner is that distribution of Exts.P1 to P3 and similar slips to the voters in the constituency with a picture of Lord Sabarimala Ayyappa along with an appeal to vote in favor of the 1st respondent amounted to the use of a religious symbol for the furtherance of the prospects of the election of the 1st respondent coming within the mischief of Section 123(3) of the R.P. Act.

12. In **Kantaru Rajeevaru v. Indian Young Lawyers Association through its General Secretary and others [(2020) 2 SCC 1]**, the Apex Court after referring to the principle laid down in the **Commissioner, Hindu Religious Endowments, Madras v. Shri.Lakshmindra Thritha Swaminar of Sri Shirur Mutt [1954] SCR 1005]** and **S.P.Mittal v. Union of India [(1983) 1 SCC 51]** held that devotees of Lord Ayyappa do not constitute a separate religious denomination, but Hindus in common. Viewed so, the deity of Lord Sabarimala Ayyappa is a Hindu Religious symbol.

13. In **Shubnath Deogam v. Ram Narain Prasad [AIR 1960 SC 148]** the question considered by the Apex

Court was whether the leaflet distributed to the voters, which contain a picture of a 'cock' with an appeal to vote amounted to the use of a religious symbol for the furtherance of prospects in the election. The symbol 'cock' was assigned to the returned candidate as election symbol. The contention was that since the cock was religiously important for a religious sect in the constituency, the use of the figure 'cock' along with a request to vote in the name of religion indirectly would amount to an appeal to vote on the ground of religion. It was a religious belief among a religious sect in the constituency that the sacrifice of cock after giving food to it before the Deity brings happiness and gets rid of miseries. It was held that when the cock was printed in the leaflet with a request to give it *chara* (which means food) in the shape of votes, that, in substance, would amount to the use of Deity for soliciting votes. The view taken was that not the use of a religious object, but the use of an object of religious importance with an appeal to vote, that amounts to an appeal in the name of a religious symbol.

14. In **Ramanbhai Ashabhai Patel v. Dubhi Ajitkumar Fulsinji [AIR 1965 SC 669]** the Apex Court took the view that the use of a symbol even when it is associated with a Deity cannot without something more be the use of religious symbol coming within the purview of Section 123(3) of the R.P.Act. There the returned candidate distributed leaflets with 'star' as the election symbol prefixed by 'Druva' with a view to give religious impetus to the election symbol and to appeal to vote. 'Druva star' was considered to be a mythological figure, having significance in the religious belief of the Hindus. The Apex Court held that Hindu religion cannot be said to be associated with a particular symbol. Even when a symbol associated with some deity is used, it cannot be regarded as a corrupt practice within the meaning sub-section (3) of Section 123 of the R.P.Act unless the symbol is used along with something more. If a vote is solicited using the name of God or in the name of a Deity, that would amount to an appeal to vote in the name of a religious symbol, and is a corrupt practice.

15. In **Mullapudi Venkata Krishna Rao v. Vedula Suryanarayana [AIR 1994 SC 1627]** the allegation was that Sri.N.T.Ramarao in the attire of Lord Krishna blowing a Sanku was depicted in the election posters together with words from Bhagavat Geetha, which Lord Krishna addressing Arjuna. There was an appeal to vote also in the posters. The Apex Court held that the use of such a poster by the candidate in the election amounted to the use of religious symbol. It was explained that depiction of Lord Krishna along with a quote from Bhagavad Geetha, in which Lord Krishna addressed Arjuna that his incarnation was to restore Dharma, was a religious symbol.

16. The principle laid down by the Apex Court consistently in the aforesaid decisions is that the use of the figure of God, a Deity or a religious symbol; be it of any religion, in furtherance of the election prospects of a candidate is the use of religious symbol, which is prohibited under sub-section (3) of Section 123 of the R.P.Act.

17. A similar question, whether the use of pictures of Deities in the election leaflets is the use of religious symbols arose in **Rustom Satin v. Sampooranand [1959 (20) ILR 221]** before the Allahabad High Court. In that case, Annexure B2 was a leaflet containing a picture of the symbol of Bhagwan Viswanath Ji with a priest sitting by the side. Annexures B3 and B4 contained coloured pictures of the symbol of Bhagwan Viswanath Ji with two priests sitting beside. The court took the view that the use of the picture of Deity in Annexures B2, B3 and B4 leaflets, which were distributed by the 1st respondent therein with an appeal to vote amounted to the use of religious symbol, which is prohibited under sub-section (3) of Section 123 of the R.P.Act.

18. In **S. R. Bommai v. Union of India, [(1994) 3 SCC 1]** after referring elaborately to several provisions of the Constitution of India including Articles 25, 26, 29, 30, 44 and 51A declared that these provisions prohibit the State from identifying with any particular religion, sect or denomination. Drawing support from the philosophy of secularism ingrained

in the Constitution of India, the Court explained the legal position thus:

"148. One thing which prominently emerges from the above discussion on secularism in our Constitution is that whatever the attitude of the State towards the religions, religious sects and denominations, religion cannot be mixed with any secular activity of the State. In fact, the encroachment of religion into secular activities is strictly prohibited. This is evident from the provisions of the Constitution to which we have made reference above. The State's tolerance of religion or religions does not make it either a religious or a theocratic State. When the State allows citizens to practise and profess their religions, it does not either explicitly or implicitly allow them to introduce religion into non-religious and secular activities of the State. The freedom and tolerance of religion is only to the extent of permitting pursuit of spiritual life which is different from the secular life. The latter falls in the exclusive domain of the affairs of the State. This is also clear from Sub-section (3) of Section 123 of the R.P Act which prohibits an appeal by a candidate or his agent or by any other person with the consent of the candidate or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or the use of or appeal to religious symbols".

19. In **Abhiram Singh v. C. D. Commachen (Dead) by LRs. and others [(2017) 2 SCC 629]** a seven Judge Bench of the Apex Court opined about the Constitutional ethos that excludes religion from the arena of electoral processes in the following words:

“86. There is thus ample authority for the proposition that while interpreting a legislative provision, the Courts must remain alive to the constitutional provisions and ethos and that interpretations that are in tune with such provisions and ethos ought to be preferred over others. Applying that principle to the case at hand, an interpretation that will have the effect of removing the religion or religious considerations from the secular character of the State or state activity ought to be preferred over an interpretation which may allow such considerations to enter, effect or influence such activities. Electoral processes are doubtless secular activities of the State. Religion can have no place in such activities for religion is a matter personal to the individual with which neither the State nor any other individual has anything to do. The relationship between man and God and the means which humans adopt to connect with the almighty are matters of individual preferences and choices. The State is under an obligation to allow complete freedom for practicing,

professing and propagating religious faith to which a citizen belongs in terms of Article 25 of the Constitution of India but the freedom so guaranteed has nothing to do with secular activities which the State undertakes. The State can and indeed has in terms of Section 123(3) forbidden interference of religions and religious beliefs with secular activity of elections to legislative bodies."

20. Thus the Constitution of India in unmistakable terms prohibits the State from identifying with any particular religion, sect or denomination. The encroachment of religion into secular activities is strictly prohibited. Of course, the State tolerates religions, but that does not mean that it is either religious or theocratic. The freedom and tolerance of religion is only to the extent of permitting the pursuit of spiritual life which is totally different from secular life. Sub-section (3) of Section 123 of the R.P.Act inheres to that principle and prohibits appeal to vote or refrain from voting on the ground of religion, or the use of or appeal to religious symbols. In terms of Sub-section (3) of Section 123 interference of religions and religious beliefs with the secular activity of the election process is wholly forbidden.

21. Deity is a supernatural being that people worship because they believe it has power over the world. A pictorial representation of a Deity, or God of any religion is a religious symbol. As stated, Exts.P1, P2 and P3 slips contain the picture of Lord Ayyappa, deity of Sabarimala Temple. The 1st respondent has no contention that the picture in Exts.P1 to P3 is not that of Lord Sabarimala Ayyappa. The slips also contain requests, "your vote for Ayyappan" and "let Babu win the election". The election symbol of the 1st respondent, 'hand' also is printed. Depiction of the picture of Lord Sabarimala Ayyappa along with the election symbol and request for vote in Exts.P1 to P3 undoubtedly is the use of religious symbol for the furtherance of election prospects coming within the prohibition of sub-section (3) of Section 123 of the R.P.Act. The issue is answered in favour of the petitioner.

ISSUE NO.2

Was Mr.R.Venugopal, the Election Agent of the 1st respondent in the election held on 06.04.2021?

22. The case of the petitioner is that Sri.R.Venugopal, who was examined as RW2, was the election agent of the 1st

respondent. This fact is admitted by the 1st respondent in his written statement. While examined as RW1 also the 1st respondent admitted that fact. Therefore, the issue is answered by holding that Sri. R.Venugopal was the election agent of the 1st respondent in the election held on 06.04.2021.

ISSUE NOs.1, 3 and 5

Were Annexure I to III slips and/or similar slips distributed to the electors for the election held on 06.04.2021 to elect the Member from Thripunithura Constituency to the Kerala Legislative Assembly as alleged in the Election Petition?

Did the Election Agent of the 1st respondent or any other person with the consent of the 1st respondent or his election agent distribute Annexure I to III slips and/or similar slips to the electors in the Thripunithura Constituency in connection with the election held on 06.04.2021 as alleged in the Election Petition?

Whether Annexure I to III slips and/or similar slips to the electors in the voters list for electing a Member from the Thripunithura Assembly Constituency to the Kerala Legislative Assembly as alleged in the Election Petition, amounts to a corrupt practice as defined in Section 123(3) of the Representation of People Act, 1951?

23. These questions and also the evidence to be considered to answer these issues are intertwined. The

petitioner has to prove that Exts.P1, P2, P3, and similar slips were distributed to the electors in the constituency by the 1st respondent or his agent or by any person with the consent of the 1st respondent or his election agent to establish the charge of corrupt practice. The plea is that they thereby appealed to vote using religious symbol for the furtherance of the prospects of the 1st respondent in the election. Contentions of the petitioner in that regard are that at about 7.00 a.m. on 04.04.2021 RW2, the election agent of the 1st respondent, along with Sri.Anand Udayan and Sri.Naveender reached the house of PW2, Sri.Sajil Raj and gave Ext.P1 slip. The further allegation is that they went to the houses of PW3, Sri.Rajesh and his neighbours, and gave slips similar to Ext.P1. In paragraph 19 of the election petition, it is alleged that RW3 Sri.T.K.Devarajan along with Sri.Saratchandran reached the house of PW4, Sri.Pradeepkumar and gave Ext.P2 slip. RW3 and Sri.Saratchandran allegedly went also to the houses of Sri.M.S.Saju and Sri.Vinu Sasi in the locality and gave slips similar to Ext.P2. What is averred in paragraph No.21 of the

election petition is that at about 7.30 p.m. on 04.04.2021, RW4 Sri.Vinod C. along with Sri.Ravi Varma reached the house of PW5 Sri.Harisankar Raja and gave Ext.P3 slip. It is also averred that RW4 and Sri.Ravi Varma went to the houses in the neighbourhood of Sri.Raghu U.Menon, Sri.Nandakumar Varma, Sri.Hari Varma and others and gave similar slips, besides appealing them to vote for the 1st respondent.

24. The petitioner is PW1. It is his version that he knew about distribution of such slips to the voters in the entire area of Thrippunithura Constituency. He got that information and also obtained a slip from PW2 on the evening of 04.04.2021. He soon instructed PW6, who was the Area Committee Secretary of CPI(M), Thrippunithura to complain to the Hill Palace Police Station regarding the distribution of the slips to the voters. Accordingly, a complaint was submitted to the Circle Inspector of Police, Hill Palace Police Station on the morning of 05.04.2021. Ext.X1 is the said complaint, which was produced in court by the Station House Officer of that police station. Ext.P4 is a copy of Ext.X1. Ext.P5 is the receipt

issued by the Circle Inspector of Police, Hill Palace Police Station for receiving Ext.X1 complaint.

25. The petitioner attempted to prove distribution of slips to the electors in the constituency, through the oral evidence tendered by PWs.2 to 6 and Ext. X1. The learned counsel for the petitioner would submit that Ext.X1 complaint was lodged by PW6 in the Hill Place Police Station on 05.04.2021 itself, and that renders sufficient support to the oral evidence tendered by PWs.2 to 5 regarding distribution of slips. It is further submitted by the learned counsel that the assertion of PW1 as also that of PWs.2 to 5 regarding distribution of slips to others in the constituency, besides them was not challenged by the 1st respondent. Similarly, the facts that PW6 had submitted Ext.X1 complaint in the police station and also that it was submitted on the instruction of the petitioner were not traversed by the 1st respondent by either pleading in the written statement or challenging their evidence in court. It is accordingly contended that the petitioner's case in that regard stands proved.

26. PWs.2, 3, 4 and 5, deposed about giving to them slips by the respective persons and appealed to vote for the 1st respondent. Their further version is that similar slips were distributed in the neighbouring houses also. Regarding that the version of PWs.2 to 5 is identical and it is that they were told by their neighbours that they also received voter's slips having a picture of Lord Ayyappa with request to vote for the 1st respondent. The learned counsel for the petitioner would submit that assertions of PWs.2 to 5 regarding distribution of slips in such neighbours were also not challenged by the 1st respondent during their cross-examination. Therefore, that unchallenged evidence proves distribution of slips similar to Exts.P1 to P3 to the voters in the Thrippunithura constituency.

27. In order to buttress his above submission the learned counsel for the petitioner places reliance on **State of U.P. v. Nahar Singh (Dead) and others [(1998) 3 SCC 561]** and **Gujua Manjhi and others v. State of Jharkhand [2015 KHC 3929]**. The Apex Court in **Nahar Singh** (supra)

held that in the absence of cross-examination, the evidence of a witness remained unchallenged and that evidence had to be believed by the court. It was observed,-

“Section 138 of the Evidence Act confers a valuable right of cross-examining the witness tendered in evidence by the opposite party. The scope of that provisions is enlarged by Section 146 of the Evidence Act by a allowing a witness to be questioned:

- (1) to test his veracity.
- (2) to discover who he is and what is his position in life,
or
- (3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.”

28. In **Gujua Manjhi** (supra), the Jharkhand High Court held that a witness should be cross-examined on each and every point and failure to cross-examine him/her on a particular point would entail a presumption that the party, not cross-examining the witness, had accepted the evidence. Thus, if a witness is not cross-examined concerning a particular fact, the same can be taken as proved.

29. As against the aforesaid submissions, the learned Senior Counsel appearing for the 1st respondent would submit, when RW1 deposed that he or his election agent or any one with their consent did not print or distribute Exts.P1 to P3 or similar slips to voters and there is enough pleadings in that terms in the written statement, there cannot be a contention that the plea of the petitioner regarding distribution of slips was not refuted. The 1st respondent does not dispute that Ext.X1 complaint was lodged by PW6 on 05.04.2021. The submission of the learned Senior Counsel in that regard is that Ext.X1 does not relate to Exts.P1 to P3 or similar slips. When the recitals in Ext.X1 do not indicate that Exts.P1 to P3 or similar slips are the ones referred to therein, lodging of such a complaint does not help the petitioner to prove distribution of such slips.

30. The learned Senior Counsel further would submit that the 1st respondent denied printing or distribution of slips in question on his behalf and RWs.2 to 4 denied such distribution by them or at their instance, and therefore the

petitioner cannot be heard to contend that the plea in the petition and also the evidence thereof as to the distribution of slips are not denied. It is also submitted that when PWs.2 to 5 are ardent workers of CPI(M) or its foster organisations, and their interested oral testimonies are unsupported by any independent evidence, the evidence is insufficient to prove distribution of the slips. The further case of the 1st respondent is that Exts.P1 to P3 were created by the petitioner for the purpose of instituting this election petition. Thus the 1st respondent maintained that the corrupt practice alleged in the petition is not proved.

31. Section 127-A of the R.P.Act insists that any pamphlet, poster, etc. printed and published in connection with an election by a candidate, shall bear on its face the name and address of the printer and publisher thereof. Exts.P1 to P3, however, do not contain the name and address of the printer or publisher. The learned counsel for the petitioner would submit that, apparently, it was printed and published at the instance of the 1st respondent, but in the

absence of authorship printed on it, the petitioner was handicapped in getting in evidence the details as to the printing of the said document. Had the details of the printer or publisher been available in Exts.P1 to P3, the petitioner could have brought in the statement of accounts and the declaration submitted by the 1st respondent before the election Commission and prove that fact. It is further submitted that the details of the printer and publisher were omitted with the oblique motive of distributing the slips incognito to avoid evidence to relate the slips to the 1st respondent.

32. The submission of the learned Senior Counsel for the 1st respondent in that regard is that without bringing on record the accounts furnished by the 1st respondent, no such contention can be raised by the petitioner. If the 1st respondent or on his behalf such slips were printed or published, the same would have reflected in the statement of accounts, which is a mandatory requirement under Section 127-A of the R.P.Act. The insistence of Section 127-A of the R.P.Act is that every pamphlet, poster, etc. printed and

published by a candidate in connection with an election should bear on its face the name and address of the printer and the publisher. The copy of such a document together with a declaration as to the identity of the publisher shall be submitted to the Chief Electoral Officer also. When Exts.P1 to P3 do not bear the name or other details of the printer or the publisher, details as to its expenses cannot be expected in the accounts of the 1st respondent. But when it is the definite case of the petitioner that those slips were printed and distributed by or on the behest of the 1st respondent, the petitioner ought to have brought in evidence the statement of accounts which, indisputably, was submitted by the 1st respondent. The failure thereof, however, would not altogether fail the case of the petitioner. The other evidence has to be appreciated to answer the issues.

33. In **Prabhu Narayan v. A.K.Srivastava [(1975) 3 SCC 788]** the Apex Court considered the question as to the sufficiency of the evidence to prove distribution of pamphlets, which is violative of the provisions of sub-section (4) of

Section 123 of the R.P.Act. In that case the charge made in the petition was that objectionable pamphlets were published. No charge concerning its printing was set forth. The allegation as to the printing was added in the petition only to corroborate the evidence regarding the distribution of pamphlets. It was held that when sub-section (4) of Section 123 speaks about publication, which means distribution alone, the failure to give particulars of printing would not yield to the dismissal of the petition. Here also, the corrupt practice alleged is distribution of slips amounting to use of religious symbols. The precise act allegedly done is distribution of voter slips containing religious symbols with a view to further the election prospects of the 1st respondent. Therefore the acts constituting the corrupt practice is distribution of slips containing religious symbols and the appeal to vote based on that. So the principle laid down by the Apex Court in **Prabhu Narayan** (supra) although it was concerning sub-section (4) of Section 123 of the R.P.Act, is equally applicable to this case as well. Therefore, lack of evidence regarding printing of the

slips does not adversely affect the case of the petitioner. Only that, the evidence regarding printing of the slips by the 1st respondent or on his behalf, which might have helped the petitioner to support the oral evidence he brought on record regarding the distribution of slips, is lacking.

34. As stated, the petitioner contends that there was a total lack of pleading to refute the assertions in the election petition that the slips were distributed to persons other than those named in the election petition. The 1st respondent, on the other hand, maintained that the election petition does not contain sufficient pleadings regarding the particulars required to constitute a corrupt practice as insisted by Section 87 of the R.P.Act. It is submitted by the learned Senior Counsel that pleadings are lacking concerning the instructions given to PW6 by the petitioner to lodge Ext.X1 complaint also. Both sides placed reliance in the above regard on a slew of decisions.

35. In **Kalyan Singh Chouhan v. C.P.Joshi [(2011) 11 SCC 786]**, the Apex Court held that during the trial of an election petition it is not permissible for a court to permit a

party to seek a roving inquiry. The party must plead the material facts and adduce evidence to substantiate the same, so that the court may proceed to adjudicate upon the issue. After referring to the various decisions rendered by the Apex Court on the point, it was held that a party to the election petition must plead the material facts and substantiate its averments by adducing sufficient evidence. Also, it was held that no party should be permitted to travel beyond the pleadings and that all necessary materials should be pleaded by the party in support of the case set up by him.

36. A three-judge bench of the Apex Court in **Arikala Narasa Reddy v. Venkata Ram Reddy Reddygari [(2014) 5 SCC 312]** reiterated the aforesaid principle. It was further held that the statutory requirements relating to election law has to be strictly adhered to for the reason that an election dispute is a statutory proceedings unknown to the common law and thus, the doctrine of equity, etc. does not apply in such disputes. All the technicalities prescribed/ mandated in election law have been provided to safeguard the

purity of the election process and courts must enforce the same with all rigour and not to minimize their operation.

37. The lack of pleading in the petition that is pointed out is concerning Ext.X1 complaint. The claim of PW1 and PW6 that Ext.X1 was lodged as instructed by PW1 is unsupported by pleadings. True, it is pleaded that PW6 had complained. Pleadings in that regard in paragraph Nos.22 is the following:-

“On noticing the distribution of Annexure I, Annexure II, Annexure III and other similar slips in and around different areas of Thrippunithura Assembly Constituency, Mr.P.Vasudevan, the secretary, Area Committee of Communist Party of India (Marxist) lodged a complaint to the Circle Inspector of Police, Hill Palace Police Station, Thrippunithura on 05.04.2021.”

38. The learned Senior Counsel for the 1st respondent would submit connecting that when Ext.X1 complaint was not accompanied by a copy of the slip allegedly distributed and did not contain a recital about the picture of Lord Ayyappa, lack of pleading to support the evidence that as PW1 telephonically instructed PW6 complained can only be

eschewed. That aspect becomes more crucial since the wordings in Ext.X1 do not enable a finding that Exts.P1 to P3 are the slips referred to in it. On that premises, it is contended that the evidence concerning telephonic instruction to lodge a complaint is an afterthought to fill in the gap and that lacuna occurred since a false case was created. Another inconsistency pointed out in the above regard is that going by the versions of PW.1 he saw only Ext.P1 on 04.04.2021. PW4 gave Ext.P2 to PW1 only on 09.04.2021 and PW5 gave Ext.P3 to PW1 on 17.04.2021. If so, the assertion in paragraph No.22 that on noticing distribution of Exts.P1 to P3 the complaint, Ext.X1 was filed is an incorrect statement. The learned counsel for the petitioner in this respect contends that the assertion of PW1 that he instructed PW6 to complain regarding a slip containing picture of Lord Ayyappa was not challenged in cross-examination and therefore no challenge to Ext.X1 as now raised is possible.

39. The petitioner relies on the oral testimonies of PWs.2 to 6 and Ext.X1 to substantiate that Exts.P1 to P3 and

similar slips were distributed to the electors on 04.04.2021. PW1, the petitioner, stated in his proof affidavit quite in terms of the allegations in the election petition. It is his version that he knew about distribution of such slips first as told by PW2 in the evening of 04.04.2021. PW2 had handed over the slip to the petitioner on that day, which he produced as Ext.P1. PW2 testified confirming those facts. He stated that Ext.P1 slip, which RW2 along with Sri.Anand Udayan and Sri.Naveender gave to him by reaching his house at 7.00 a.m. on 04.04.2021, was handed over to the petitioner in the evening the same day.

40. PW3 is a resident of Pavamkulangara within the Thrippunithura constituency. He deposed that on the morning of 04.04.2021, Sri.Venugopal(RW2) and others reached his home and gave an election slip having the picture of Lord Sabarimala Ayyappa. It is his version that his neighbours told him about the receipt of similar slips. PW4 is the person who claimed to have received Ext.P2 slip. His version is that at about 7.30 a.m. on 04.04.2021 Sri.Sarat and Sri.Devarajan

(RW3), who were Congress workers, reached his home and gave Ext.P2 slip. He also deposed that he had handed over that slip to the petitioner. PW5 stated that at 7.30 a.m. on 04.04.2021, Sri.Vinod (RW4) together with Sri.Ravi Varma reached his house and gave Ext.P3 slip. Similar slips were given to his mother and wife also. It is his further version that on 17.04.2021, he had handed over Ext.P3 slip to the petitioner, following a conversation in that regard between them when they met at the Oottupura near the Poornathrayeesa Temple where both of them reached to view a Kathakali programme.

41. PW6 is the person who lodged Ext.X1 complaint at the Hill Palace Police Station, Thrippunithura. It is his version that he lodged the said complaint at 7.00 a.m. on 05.04.2021 following the instruction by the petitioner in that regard. He explained that although he was asked on 04.04.2021 to complain, he could not do so immediately since he could reach back his office only late at night on 4.4.2021. He had to go to various places in the constituency and meet the

Secretaries of the Local Committees of his party and that was the cause for the delay. He proved Ext.P5 as the receipt issued by the Circle Inspector of Police, Hill Palace Police Station for receiving Ext.X1 complaint.

42. RW1, the 1st respondent, deposed before the court denying printing of Exts.P1 to P3 or similar slips and distribution to the voters at his instance or on his behalf. RWs.2 to 4 denied the allegation that they along with other party workers distributed Exts.P1, P2 and P3 slips respectively. Their version is that such a slip was not issued in connection with the election of the 1st respondent. It is their common version that on 04.04.2021 they were involved in the final election campaign at Thrippunithura and they did not go for any house-to-house campaign or distribution of slips as alleged. RW2, who was the election agent, further stated that he submitted a representation to the District Collector on 27.03.2021 to ensure distribution of official voter slips through booth-level officers and therefore there was no need for distribution of voter slips by the party workers. Ext.R1 is a

copy of the request so submitted. To prove the submission of such a request, Exts.R2 to R5 were produced. Ext.R5 is a copy of the instruction issued on 28.03.2021 to Election Registration Officer (ERO) in pursuance of Ext.R1. Those documents would prove that RW2 submitted to the District Collector Ext. R1 request.

43. Indisputably, PW1 does not have any direct knowledge regarding the distribution of such slips. As told by PWs.2, 4 and 5 only he came to know about distribution of such slips. Exts.P1 to P3 were the slips handed over to PW1 by those witnesses. Therefore, evidence of PW1 does not help to prove distribution of such slips. Of course, his claim that he received the slip on the evening of 04.04.2021 is direct evidence.

44. PWs.2 to 5 stated almost in similar terms that they as well as their neighbours were given the slips. The source of their information as to the distribution of slips to their neighbours is the information such neighbours passed on to them. None among PWs.2 to 5 deposed that they saw giving

slips to such neighbours or their family members. Therefore, their testimonies that slips similar to Exts.P1 to P3 were distributed to their neighbours are based on hearsay information, and inadmissible in evidence. It is with respect to such inadmissible evidence it is urged that there was no challenge during cross-examination. True, PWs.2 to 5 were not cross-examined concerning their assertion in the above regard. Since that evidence itself is inadmissible being hearsay information, failure to challenge the same in the cross-examination would not make it admissible and reliable evidence. Therefore, the evidence tendered by PWs.2 to 5 that can be considered is as to handing over the slips to them and members of their families alone.

45. How to evaluate oral evidence tendered concerning electoral charges, including corrupt practice, was considered by the Apex Court in **Rahim Khan v. Khurshid Ahmed and others [(1974) 6 SCC 660]**. In that case, publication of a pamphlet was in question. A large volume of oral evidence was let in. Exts.P18 and P19 were the petitions submitted to

the Deputy Commissioner of the District and the Chief Electoral Officer about the publication of the pamphlet. Both those petitions were accompanied by copies of the pamphlets (handbills). The election was held on 11.03.1972. One of the questions was whether such petitions were received before 12.03.1972 so as to make the oral testimony regarding the publication of the pamphlet before the election credible. The view taken was that since the fact that several handbills had come to the possession of the 1st respondent on 10.03.1972 was substantiated since he forwarded them to two officials along with Exts.P18 and P19 petitions, that circumstances bespeak prior circulation of the handbills. The court thus took assurance, before believing the oral testimonies of the witnesses, from the submission of Exts.P18 and P19 petitions together with the objectionable leaflets prior to the election itself. The Apex Court observed that even where good evidence, not parrot-like repetition is forthcoming, it may not be incorrect if such evidence is discarded on the question of fact. But when there is documentary evidence by way of

petitions submitted to the officials along with the leaflets before the date of election itself that would affirm the oral evidence in that regard. What emerges from the above is that when there is oath against oath, the court has to look for some independent materials or circumstances before placing reliance on the oral evidence on a particular fact.

46. A similar question was considered in **Jagir Singh and another v. Jasdev Singh and others [(1975) 4 SCC 380]**. Apart from the oral evidence regarding the publication of the objectionable pamphlet, the fact that the same was forwarded to the Sub Divisional Magistrate as required under Section 127A of the R.P.Act before the date of election, also came on record. The Apex Court, after analysing the oral evidence, held that when the endorsement of the Sub Divisional Magistrate would go to show that the pamphlet was received in his office prior to the date of the election, that emboldened the oral evidence. Therefore a finding as to the publication of the pamphlet could be entered into. The Apex Court took the view that besides oral evidence some

independent circumstance should be looked upon before reaching a positive finding that the pamphlet was published.

47. What shall be the standard of proof in an election petition has often been a point for debate. The Apex Court in **Ch.Razik Ram v. Ch.Jaswant Singh Chouhan and others [(1975) 4 SCC 769]** held that before considering whether the charges of corrupt practice were established, it is important to remember the standard of proof required in such cases. It is well settled that a charge of corrupt practice is substantially akin to a criminal charge. The commission of a corrupt practice entails serious penal consequences. It not only vitiates the election of the candidate concerned but also disqualifies him from taking part in elections for a considerably long time. Thus the trial of an election petition being in the nature of an accusation, bearing the indelible stamp of quasi-criminal action, the standard of proof is the same as in a criminal trial. Just as in a criminal case, so in an election petition, the respondent against whom the charge of corrupt practice is leveled, is presumed to be innocent unless

proved guilty. A grave and heavy onus therefore, rests on the accuser to establish each and every ingredient of the charge by clear, unequivocal and unimpeachable evidence beyond reasonable doubt.

48. In **Ram Sharan Yadav v. Thakur Muneshwar Nath Singh and others [(1984) 4 SCC 649]** the Apex Court held that,-

“8. We would, however, like to add a word of caution regarding the nature of approach to be made in cases where allegations of fraud or undue influence are made. While insisting on standard of strict proof, the Court should not extend or stretch this doctrine to such an extreme extent as to make it well-nigh impossible to prove an allegation on corrupt practice. Such an approach would defeat and frustrate the very laudable and sacrosanct object of the Act in maintaining purity of the electoral process.”

49. The Apex Court in **S.Harcharan Singh v. S. Sajjan Singh and others [(1985) 1 SCC 370]** reiterated the above principle and explained various tests to determine the standard of proof required to establish a corrupt practice. It was also cautioned against resorting to an impracticable approach.

50. In **P.C.Thomas v. P.M.Ismail and others [(2009) 10 SCC 239]**, also the Apex Court considered that question. It was held that a charge of corrupt practice envisaged by the R.P.Act is to be equated with a criminal charge and the standard of proof thereof would not be preponderance of probabilities as in a civil action but proof beyond reasonable doubt as in a criminal trial. If this test is not applied, a very serious prejudice is likely to be caused to the successful candidate whose election would not only be set aside, he may also incur disqualification to contest an election for a certain period entailing even extinction of his political career. Undoubtedly, the onus lies heavily on the election petitioner to make out a strong case for setting aside an election.

51. In **R.Puthunainar Alhithan v. P.H.Pandian and others [(1996) 3 SCC 624]** the Apex Court held that the charge of corrupt practice under Section 123 is treated akin to a charge in a criminal trial. The trial of an election petition is like a trial in the criminal case and the burden to prove

corrupt practice is on the election petitioner. The doctrine of preponderance of probabilities in a civil action is not extended for proof of corrupt practice. It is not, like a criminal trial, that the accused can always keep mum. In a criminal trial, the accused need not lead any defence evidence. It is an optional one. The burden of proof of charge in a criminal case is always on the prosecution. The guilt of the accused beyond reasonable doubt should be established by the prosecution. But in an election petition when the election petitioner had adduced evidence to prove that the returned candidate had committed corrupt practice, the burden shifts on the returned candidate to rebut the evidence. After its consideration, it is for the Court to consider whether the election petitioner had proved the corrupt practices as alleged against the returned candidate.

52. The Apex Court in **Pratap Singh v. Rajinder Singh and another [(1975) 1 SCC 535]** held that our law of evidence does not require that a witness must be proved to be a perjurer before his evidence is discarded. It may be

enough if his evidence appears to be quite improbable or to spring from such tainted or biased or dubious a source as to be unsafe to be acted upon without corroboration from evidence other than that of the witness himself. The evidence of every witness in an election case cannot be dubbed as intrinsically suspect or defective. It cannot be equated with that of an accomplice in a criminal case whose testimony has, according to a rule of practice, though not of law, to be corroborated in material particulars before it is relied upon.

53. In the light of the law laid down in the aforesaid decisions as to the nature and standard of proof required in a charge of corrupt practice in an election petition, evidence tendered by the parties has to be considered. The voter slips were said to have been distributed on 04.04.2021. The election was on 06.04.2021. Ext.X1 complaint was submitted by PW6 on 05.04.2021. The reason for the delay explained by PW6 can certainly be accepted, especially when he personally went to the Hill Palace Police Station to submit the complaint.

54. The allegation in Ext.X1 complaint was that voter slips containing a request “one vote for Ayyappan (അയ്യപ്പന് ഒര വോട്ട്)” were distributed. The caption in Exts.P1 to P3 is “your vote for Ayyappan (നിങ്ങളുടെ വോട്ട് അയ്യപ്പന്)”. Even if that is taken as an inadvertent mistake occurred while drafting the complaint, non-mentioning in Ext.X1 about the printing of a picture of Lord Sabarimala Ayyappa in the slips assumes much importance. The core of the allegation of corrupt practice is the depiction of the picture of Lord Sabarimala Ayyappa in the slips. Ayyappan is a common name. Hence, appealing that “One vote for Ayyappan” without the picture of Lord Ayyappa would not amount to an appeal using a religious symbol or in the name of God. When it is not stated in Ext.X1 that the slips contained the picture of Lord Sabarimala Ayyappa, it becomes all the more difficult to say that the said complaint was related to Exts.P1 to P3 slips.

55. Both PW1 and PW6 explained as to why Ext.X1 contains a different terminology and also does not mention about the picture of Lord Ayyappa figured in the slips. It is

the version of PW1 that he telephonically instructed PW6 to lodge a complaint. PW6 also stated that as instructed by PW1 he reached the Hill Palace Police Station and lodged Ext.X1 complaint. He also explained that he did not see the slip before lodging the complaint. This evidence, as stated above, is not supported by any pleading. True, the version of PWs.1 and 6 that PW1 instructed PW6 to complain about the slip having picture of Lord Ayyappa was not pointedly cross-examined. But regarding that also there is no pleading. Further, if such was the instruction, non-mentioning about the picture of Lord Ayyappa in Ext.X1 further defies a possibility to connect it with the slips in question.

56. The pleading is to the effect that on noticing the distribution of Exts.P1, P2, P3 and similar slips in and around different areas of Thrippunithura Constituency PW6 complained. Admittedly, PW1 obtained Ext.P1 on 04.04.2021 itself. The specific assertion in the election petition is that such voter slips were distributed in the entire area of the

constituency. The version of PW6 is that he was at Amachadi, a distant place, when he was instructed over phone by the petitioner to lodge a complaint. It was at about 6.00 p.m. on 04.04.2021. He went thereafter to Poothotta and various other places in the constituency to meet local committee secretaries of his party. It was after such travel and meeting several persons in the constituency only, he could go to the police station to lodge the complaint. It is difficult, in the above circumstances, to believe that PW6 was not able to see or get a copy of the slip and attach it with the complaint, if such slips were really distributed in various parts of the constituency. In the circumstances, non-submission of a slip along with the complaint creates doubt about the allegation of corrupt practice.

57. Another instance that glares at is the non-submission of a complaint in regard to the distribution of slips to cVIGIL, a portal of the Election Commission for complaining against election malpractices. PW1 stated that several complaints were submitted on his behalf in cVIGIL

and necessary actions were taken on the complaints by the Election Commission. Three complaints so submitted were produced along with election petition which are Annexures VIII, IX and X. Those complaints were seen attached with objectionable wall writing and messages. If so, why no complaint in regard to the slips in question, attaching therewith one such slip, was submitted to cVIGIL is a pertinent question. Reply of PW1 to a specific query in that regard was that immediate action could be availed only from police and therefore, no complaint was given in cVIGIL. That is not a satisfactory answer since action was admittedly taken in other complaints given by the petitioner in cVIGIL. That frowns further upon the case of the petitioner concerning distribution of the slips.

58. As already stated, PW1 is not competent to depose about the distribution of slips for, he did not see such distribution. PWs.2 and 3 testified that RW2 along with Anand Udayan and Naveender came to their houses and gave the slips. PW4 stated that RW3 along with one Sarat reached his

house and gave him, his wife and father in law the slips. Similarly, PW5 stated that RW4 together with one Ravi Varma reached his house and gave the slips to him and other members of his family. PWs.2 to 5 added that they being devotees of Lord Sree Ayyappa, they were persuaded by giving such slips to cast vote in favour of the 1st respondent.

59. RWs.2, 3 and 4 deposed before the Court denying categorically that they along with other named persons reached the houses of PWs.2 to 5 to give the slips as alleged. In the light of the evidence of RWs.2 to 4 totally denying their giving the slips, a strict scrutiny of the evidence of PWs.2 to 5 is necessary. Of course, the assertions of RWs.2 to 4 that they did not go for the house-to-house campaign or distribution of slips on 04.04.2021 since they had to attend the concluding campaign on that day at Thrippunithura and that the day being 'Easter' a Christian auspicious day, they decided not to have a house-to-house campaign are not supported by pleading. So the evidence in that regard is assailed by the learned Counsel for the petitioner on the ground of lack of pleading.

60. The specific contention in the written statement is that such slips were not distributed at all and RWs.2 to 4 did not go to the respective houses on 04.04.2021 to distribute slips. The reasons that on account of the concluding campaign and the day being Easter, RWs.2 to 4 did not go for house to house campaign are not stated in the written statement. That being facts explained by the witnesses of the 1st respondent, the question is more of their reliability than lack of pleadings. It cannot be said that for reason the evidence tendered by the petitioner is credible. The burden of proving the charge of corrupt practice is always on the petitioner. He has to prove it beyond reasonable doubt with the aid of reliable evidence. It is only thereafter the onus shifts to the 1st respondent. Therefore, lack of pleadings in respect of such additional facts stated by the witnesses of the 1st respondent cannot be a reason to discard altogether their evidence or to find the evidence tendered by the petitioner fully reliable.

61. Another contention of the petitioner also needs mention in this connection. The 1st respondent pleaded that

Exts.P1 to P3 were falsely created by the petitioner to file this petition. The learned counsel for the petitioner would submit in this regard that the relevant pleading by the 1st respondent is inconsistent. Therefore, the evidence tendered by the 1st respondent in that regard does not worth consideration. In paragraph No.10 of the written statement, it is averred that the petitioner in connivance with PW2, Sri.Sajil Raj, created the slips to file a false election petition. In paragraph No.15 of the petition, it is averred that the petitioner in connivance with PW5, Sri.Harisankar Raja, created the slips. To that extent there is inconsistency in the pleadings of the 1st respondent. But, there is no such inconsistency in the evidence. During cross-examination of PW1, it was suggested that it was he who created the slips and it was suggested to PW2 that he in association of PW1 had created the slips. When the defence case is that the slips were falsely created for the purpose of filing the election petition, it cannot be a case where the 1st respondent having personal knowledge to plead with meticulous facts as to who created, rather than

that it is a false creation. Hence, the conflict between the written statement and evidence regarding that fact also cannot be a reason to find that the petitioner's case is proved to be true.

62. The Apex Court observed in **Baburao Bagaji Karemore and others v. Govind and others [(1974) 3 SCC 719]** and **D.Venkata Reddy v. R.Sultan and others [(1976) 2 SCC 455]** about the easy possibility of creation of leaflets and use of it to sanctify an election petition. The caution required in the matter is alerted. Also, it was laid down that onus on the petitioner who challenges the election on such a ground is more heavy.

63. In **Baburao Bagaji Karemore** (supra) it was held that it is not unknown that attempts are made to manufacture or bring into being after the declaration of the election result, documents or other material, which could be used for unseating a successful candidate. At any rate when any impugned document is hotly contested on that ground and it is the case of the respondent that it was brought into

existence subsequently, the onus on the petitioner who challenges the election on that ground is all the more heavy.

64. In **D.Venkata Reddy** (supra), the Apex Court held that an allegation of publishing an objectionable pamphlet is indeed very easy to make but very difficult to rebut. At the same time, it puts the Court under the strictest possible scrutiny because objectionable pamphlet can be printed by anybody in any press with utmost secrecy and if a corrupt practice can be sought to be proved merely by the publication of a pamphlet then it will amount to giving a free licence to any defeated candidate to get an objectionable pamphlet published and circulated to his supporters and to make them say that such pamphlet was printed or published or circulated by the successful candidate. The court, therefore, emphasised to have a cautious approach while dealing such a case.

65. As rightly submitted by the learned counsel for the petitioner the law is jealously qualitative, and not clumsily quantitative while deciding a lis predominantly

based on oral evidence. In **Rahim Khan v. Khurshid Ahmed and others [(1974) 2 SCC 660]** the Apex Court considered an election petition where the dispute was regarding the distribution of libellous handbills and making of slanderous speeches by the candidate and his companions which constituted corrupt practice. The Court held that evidence of a single witness is enough to prove a fact provided that the evidence is trustworthy. The quantum of the evidence is not important, but the quality of the evidence is relevant. Bearing that also in mind I shall proceed to decide the sufficiency of evidence to prove the corrupt practice.

66. The essential reason put forward by the 1st respondent to disbelieve PWs.2 to 5 is that they are ardent workers of CPI(M) or its foster organisations. These witnesses categorically deposed during cross-examination that they did not have any such affinity or association with the party. PWs.2 and 5 were confronted with Facebook pages where their photos, purportedly, appeared associated with activities of

CPI(M) or its organs. A Facebook posting that allegedly showed PW2 to be an office bearer of CPI(M) unit was confronted to him. PW5 was confronted with a Facebook posting purported to be of him, which shows that he was an office bearer of DYFI unit, which indisputably is a wing of CPI(M). Both of them denied the photographs to be of theirs, although they admitted that the names and photographs have similarities to them. Although they denied their authorship to those Facebook accounts, the 1st respondent did not venture to adduce positive evidence to prove that fact. Likewise, no tangible evidence to show that PWs.2 to 5 are active workers of CPI(M), CITU or DYFI as the 1st respondent alleged is also brought on record.

67. But, the categoric version of RWs.1 to 4 is that PWs.2 to 5 are ardent workers of CPI(M) or its organs. That version is challenged during their cross-examination. However, on a close analysis of their evidence, particularly the way in which PWs.2 to 5 gave evidence, that in relation to many facts their answers are vague, while in regard to giving

of the slips their versions are parrot-like. PW2 stated that his house where he has been residing for the last four years has no Municipal assessment and no tax payment. Obviously, that assertion is to suit the non-mentioning of his house number in Ext.P1 slip. He could not state satisfactorily about even important aspects of his life. PW3 claimed that he was a devotee of Sabarimala Ayyappa. But, he was not able to say whether any Ayyappa Temple exists in the Thrippunithura Constituency. PW4 stated meticulous details about the distribution of the slip in question, but his answers to the queries regarding elections to the local Municipality are quite vague. He feigned ignorance when such details were asked. Similar vague statements are contained in the evidence of PW5 as well. In such circumstances, I am of the view that the evidence tendered by PWs.2 to 5 regarding the distribution of slips to them by Rws.2 to 4 is not free from doubt.

68. Viewed in the light of the propositions of law laid down by the Apex Court in the decisions mentioned in

paragraphs No.45 to 52, I am of the view that without other evidence or circumstances to corroborate, oral testimonies of PWs.2 to 5 alone are insufficient to prove beyond doubt that Exts.P1 to P3 and similar slips were distributed on behalf of the 1st respondent to the electors in the Thrippunithura constituency. I have pointed out above that Ext.X1 complaint is not available to lend any corroboration to the evidence of PWs.2 to 5 regarding distribution of Exts.P1 to P3 or similar slips to the voters. No other corroborative evidence is adduced. Hence, I answer these issues by holding that the petitioner failed to prove beyond doubt that the 1st respondent committed corrupt practice as alleged.

ISSUE NOS.6 and 7

Is the election of the 1st respondent as a Member of the Kerala Legislative Assembly from Thrippunithura Constituency in the election held on 06.04.2021 liable to be declared null and void?

What shall be the order as to costs ?

69. In view of the findings on Issue Nos.1, 3 and 5, the petitioner is not entitled to get the relief of declaration that the election of the 1st respondent is null and void.

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Accordingly, this petition is dismissed. No order as to costs.

Registry shall intimate the substance of this order to the Election Commission and the Speaker of the Kerala Legislative Assembly in terms of Section 103 of the RP Act. Also, send an authenticated copy of this order to the Election Commission.

Sd/-

P.G. AJITHKUMAR, JUDGE

dkr

APPENDIX OF EL.PET. 8/2021

PETITIONER ANNEXURES

- ANNEXURE I ORIGINAL SLIP WITH THE PHOTOGRAPH OF LORD SABARIMALA AYYAPPA ALONG WITH THE APPEAL TO ELECT THE 1ST RESPONDENT / RETURNED CANDIDATE ALONG WITH HIS SYMBOL TOGETHER WITH THE PARTICULARS OF RESPECTIVE VOTER DISTRIBUTED BY THE ELECTION SQUAD HEADED BY R. VENUGOPAL (ELECTION AGENT OF 1ST RESPONDENT) TO MR. SAJILRAJ, AGED 34 YEARS, S/O. SUBRAMANIAN, OODALITHAZHATH, THEKKUMBHAGAM, THRIIPPUNITHURA DURING THE COURSE OF ELECTION CAMPAIGN OF 1ST RESPONDENT / RETURNED CANDIDATE.
- ANNEXURE I (A) TRUE AND CORRECT ENGLISH TRANSLATION OF ANNEXURE I
- ANNEXURE II ORIGINAL SLIP WITH THE PHOTOGRAPH OF LORD SABARIMALA AYYAPPA ALONG WITH THE APPEAL TO ELECT THE 1ST RESPONDENT / RETURNED CANDIDATE, WITH HIS SYMBOL TOGETHER WITH THE PARTICULARS OF RESPECTIVE VOTER DISTRIBUTED BY THE ELECTION SQUAD HEADED BY MR. T. K. DEVARAJAN TO MR. PRADEEPKUMAR T. T., AGED 48 YEARS, S/O. THANKAPPAN, CHIRETHARA HOUSE, NEAR GLPS MANKAYIL, MARADU P. O. DURING THE COURSE OF ELECTION CAMPAIGN OF 1ST RESPONDENT / RETURNED CANDIDATE.
- ANNEXURE II (A) TRUE AND CORRECT ENGLISH TRANSLATION OF ANNEXURE II
- ANNEXURE III ORIGINAL SLIP WITH THE PHOTOGRAPH OF LORD SABARIMALA AYYAPPA ALONG WITH THE APPEAL TO ELECT THE 1ST RESPONDENT / RETURNED CANDIDATE, WITH HIS SYMBOL TOGETHER WITH THE PARTICULARS OF RESPECTIVE VOTER DISTRIBUTED BY MR. VINOD AND MR. RAVI VARMA TO MR. HARISANKAR RAJA, AGED 32 YEARS, S/O. ASOKAN, KAMALALAYAM PALACE,

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- THRIPPUNITHURA DURING THE COURSE OF ELECTION CAMPAIGN OF 1ST RESPONDENT / RETURNED CANDIDATE.
- ANNEXURE III (A) TRUE AND CORRECT ENGLISH TRANSLATION OF ANNEXURE II
- ANNEXURE IV A TRUE COPY OF COMPLAINT DATED 05.04.2021 SUBMITTED BY MR. P. VASUDEVAN, THE SECRETARY, AREA COMMITTEE OF COMMUNIST PARTY OF INDIA (MARXIST) TO THE CIRCLE INSPECTOR OF POLICE, HILL PALACE POLICE STATION.
- ANNEXURE IV (A) TRUE AND CORRECT TRANSLATION OF ANNEXURE IV.
- ANNEXURE V RECEIPT NO.257/21 ISSUED BY THE SUB INSPECTOR OF POLICE, DATED 05.04.2021 TO MR. P. VASUDEVAN, SECRETARY, CPIM, THRIPPUNITHURA.
- ANNEXURE V (A) TRUE AND CORRECT TRANSLATION OF ANNEXURE V
- ANNEXURE VI A TRUE COPY OF COMPLAINT DATED 01.04.2021 SUBMITTED BY MR. P. VASUDEVAN, THE SECRETARY, AREA COMMITTEE OF COMMUNIST PARTY OF INDIA (MARXIST) TO THE CIRCLE INSPECTOR OF POLICE, HILL PALACE POLICE STATION.
- ANNEXURE VI (A) TRUE AND CORRECT TRANSLATION OF ANNEXURE VI.
- ANNEXURE VII RECEIPT NO.254/21 DATED 01.04.2021 ISSUED BY THE SUB INSPECTOR OF POLICE, HILL PALACE POLICE STATION, THRIPPUNITHURA.
- ANNEXURE VII (A) TRUE AND CORRECT TRANSLATION OF ANNEXURE VII.
- ANNEXURE VIII TRUE COPY OF SCREEN SHOT OF THE COMPLAINT DATED 19.03.2021 MADE THROUGH THE APPLICATION OF ELECTION COMMISSION OF INDIA C VIGIL WITH C VIGIL ID : 487815.
- ANNEXURE VIII (A) TRUE AND CORRECT ENGLISH TRANSLATION OF ANNEXURE VIII.
- ANNEXURE IX A TRUE COPY OF SCREEN SHOT OF THE COMPLAINT DATED 20.03.2021 MADE

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THROUGH THE APPLICATION OF ELECTION COMMISSION OF INDIA C VIGIL WITH C VIGIL ID : 490102.

ANNEXURE IX (A) TRUE AND CORRECT ENGLISH TRANSLATION OF ANNEXURE IX.

ANNEXURE X A TRUE COPY OF SCREEN SHOT OF THE COMPLAINT DATED 21.03.2021 MADE THROUGH THE APPLICATION OF ELECTION COMMISSION OF INDIA C VIGIL WITH C VIGIL ID : 499848.

ANNEXURE X (A) TRUE AND CORRECT ENGLISH TRANSLATION OF ANNEXURE X.

ANNEXURE XI CHELAN RECEIPT DATED 14.06.2021 EVIDENCING THE DEPOSIT OF RS. 2000/- (RUPEES TWO THOUSAND) AS SECURITY BEFORE THIS HONOURABLE COURT.

RESPONDENT ANNEXURES

LIST OF WITNESSES LIST OF WITNESSES SUBMITTED BY THE 1ST RESPONDENT/ RETURNED CANDIDATE IN THE ABOVE ELECTION PETITION

EXHIBIT R1 TRUE COPY OF THE REPRESENTATION DATED 27-03-2021 SUBMITTED BY ME.

EXHIBIT R2 A TRUE COPY OF THE REPRESENTATION DATED 02-10-2023 TO THE DISTRICT COLLECTOR ERNAKULAM UNDER THE RIGHT TO INFORMATION ACT

EXHIBIT R3 ORIGINAL COPY OF RECEIPT DATED 03-10-2023 FOR THE RECEIPT OF THE EXHIBIT R2.

EXHIBIT R4 THE ORIGINAL COPY OF THE REPLY DATED 30-10-2023

EXHIBIT R5 A TRUE COPY OF THE INSTRUCTIONS GIVEN TO ERO ON 28-03-2021 PURSUANT TO EXHIBIT R1

