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ELECTION COMMISSION OF INDIA

New Delhi-110001
Dated 29 January,1983

NOTIFICATION

No. 82/MIZ-LA/1/79 - In pursuance of section 106 of the Representation of the People Act 1951, the Election Commision of India hereby publishes the judement dated the 20th November, 1982, of the High Court of Gauhati at Gauhati in Election petition No. 1 of 1979

(HERE PRINT THE JUDGEMENT ATTACHED)

By order,

Sd/-
(C.L. ROSE)
UNDER SECRETARY

IN THE GAUHATI HIGH COURT
(THE HIGH COURT OF ASSAM: NAGALAND: MEGHALAYA: MANIPUR & TRIPURA)

ELECTION PETITION NO. 1 OF 1979

Shri. P.C.Bawitluanga .... Petitioner

VS

Brigadier Thenphunga Sailo & ors ... Respondents

PRESENT

The Hon'ble Mr. Justice B.L. Hansaria

For the petitioner	: Mr. A.M.Mazumder. Advocate General, Assam Mr. R.P. Kakati Mr. S. Latif & Mr. N.Z.Ahmed, Advocates.
For the respondents	: Mr. N.M. Lahiri, Advocate General, Meghalaya Dr. M.K.Sarma Mr. P.C.Kataky Mr. D.K.Bhattacharya & Mr. D.K.Das Advocates.
Dates of hearing	: 14.9.82, 3.11.82, 4.11.82, 8.11.82. to 10.11.82, 12.11.82 16.11.82 to 18.11.82.
Date of judgement	: 20.11.82.

JUDGEMENT

The last General Assembly Elections were held in Mizoram in April, 1979- the date of polling was 27th of that month. The two main cantestants from the Aizawl North (Scheduled Tribe) Constituency were the petitioner and respondent No.1. The electorate preferred the latter who won by a margin of 149-2951 votes as against 2802 secured by the petitioner. The allegation is that respondent No. 1 had won the election by indulging in corrupt pratices. The two main allegations are that dummy ballot papers were issued with the consent of the returned candidate in which the election symbol of the petitioner was wrongly shown which misguided the voters and his partry. Congress (I) was described as a party of non-Mizos. This apart, in a meeting held on 21. 4. 79 at Sihphir, which was addressed by respondent No. 1 himself, the audience was told that the Congress (I) was a non-Mizo Party. The only other allegation is that the returned candidate, who was subsequently selected as the Chief Minister of Mizoram, had taken assistance of the Government machinery so much so that one John V. Hluna, a Lecturer of Government College has canvassed for him by addressing a public meeting on 24. 4. 79 at Durtlang.

2. The aforesaid alleged acts attract the mischief of sub-sections (3), (3A), (4) and (7) of section 123 of the Representation of People Act, 1951 (for short the Act) according to the election petitioner. All the allegations have been denied by respondent No. 1. On the basis of the pleadings as many as II issues were framed in support of which the petitioner examined 6 witnesses and exhibited some documents. The respondent No. 1 produced himself and 8 other persons. An agreement entered into between the Government and North Eastern Hill University (NEHU) was also exhibited by the respondent to show that the College in which Shri. John. V. Hluna is a Lecturer had ceased to be a Government College on and from 19.4. 79 as it had acquired the status of a University College from that day.

3. On the basis of the evidence led by both the parties the allegations which, according to the learned Advocate General, Assam, who is appearing for the petitioner, could be substantiated are :

1) Distribution of dummy ballot papers at (a) Chaltlang and (b) Sihphir : and

2) The objectionable speech of Brig. T. Sailo, respondent No. I at Sihphir.

X The learned counsel, therefore, addressed me on these aspects only. It may be stated that the only material allegations in the election petition were :

1) Distribution of dummy ballot pepers like Exhibit P (5) at Durtlang by Mrs. Sailo; and

2) Addressing of election meeting by John V. Hluna. Though relying on the rubber stamp impression on the election symbol of Brig. T. Sailo in dummy ballot papers, it was urged that assistance of the election Office of the Government was also taken, this aspect was not pressed, and rightly, because a rubber stamp like one whose impression found place on dummy ballot papers could have been made at any place. The distribution of dummy ballot papers at Durtlang was not pressed because of the witnesses examined by the petitioner none had deposed about the same as being true to his knowledge. As against this, Mrs. Sailo came forward to deny the allegation. She was reported by R. Ws 7 & 8. The objection relating to the addressing of meeting by John V. Hluna was given up having found from Exhibit R(1) (the agreement above referred) that Pachhunga Memorial College had ceased to be a Government College on and from 19-4-79 In view of all these there would not have been any legal objection in Shri. Hluna addressing the meeting, though this also has been denied by Shri. Hluna, who appeared as RW- 6.

4. We are thus required to answer if dummy ballot papers like Exhibit P(5) had been distributed at Chaltlang and Sihphir ; and whether at Sihphir Brig T. Sailo had described Congress (I) Party as the party of non-Mizos. The distribution of dummy ballot papers at Chaltlang is said to have taken place on two occasions. First on 21-4-79 when respondent No. 5, Shri. Biakliana a worker of People's Conference Party, the party of respondent No.1 , had handed over document like Exhibit P(5) to none else than petitioner himself. This apart, dummy ballot papers were widely distributed in that village on 23-4-79 among the voters by Lalmuana, Secretary of the People's Conference Party Unit; Lalhma Chhuana, Secretary of the Youth Wing of that Unit and RW- 5, Biakliana. The distribution at Sihphir was on 21-4-79 according to the petitioner in the meeting addressed by Brig. T. Sailo.

5. Before proceeding with the analysis of the evidence it may be seen as to how and when a corrupt practice can be said to be established. It has been held by catena of decisions by the highest court of the land that a charge of corrupt practice is substantially akin to that of a criminal charge because the commission of corrupt practice entails serious panal consequences. It not only vitiates the election of the candidate but also disqualifies him from taking part in elections for a considerably long time. 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, more preponderance of probabilities being not enough, vide N.C. Zeliang, AIR 1981 SC 8; Mohammad Koya, AIR 1979 SC 154; Rajagopala Rao, AIR 1971 SC 267 and Razik Ram vs. J.S. Chouhan, AIR 1975 SC 667. It, however, deserves to be pointed out that though the charge of commission of corrupt practice has to be proved like a criminal charge or quasi-criminal charge, but not exactly in the manner of establishment of guilt in a criminal prosecution giving the liberty to the accused to keep mum, and the charge has to be judged an appraisal of the the evidence adduced by both sides, specially by election petitioner as pointed out in Narayan Rao vr. Venkata Reddi, AIR 1977 SC 208.

6. Another thread around which the election law has been woven is that it is unsafe in an election case to accept oral evidence at face value without looking for assurance from some surer circumstances or in impeachable documents. as held in Lakshmi Raman vs. Chandan Singh, AIR 1977 SC 587 and Amolak Chan Vs, Bhagawandas, AIR 1977 SC 813. This is for the reason, as pointed out in forceful language by Iyer, Jin Rahim Khan vs. Khurshid Ahmed, AIR 1975 SC 290 that;

> " (i) t must be remembered that corrupt practices may perhaps be proved by hiring half a dozen witnesses apparently respectable and disinterested, to speak to short simply episodes such as that", a small village meeting took place where the candidates accused his rival of personal vices. There is no X-Ray whereby the dishonesty of the story can be established and if the Courts were gullible enough to gulp such oral versions and invalidate elections, a new menance to our electoral system would have been invented through the Judicial apparatus. We regard it as extremely unsafe, in the present climate of kilkenny cat election competitions and partisan witnesses wearing robes of veracity, to upturn a hard won electoral victory merely because lip service to a corrupt practice has been rendered by some sanctimonious witnesses".

7. Lastly, an election court has also to bear in mind that hard won elections are not to be likely set aside, of course in a democracy like ours, the purity and sanctity of election, the sacrosanct and sacred nature of the electoral process must also be preserved and maintained. So, a court has to strike a balance in this regard i. e. it has to see that election results are not likely brushed aside and at the same time it must protect the purity and sobriety of the elections as pointed out in Venkata Reddy vs .R. Sultan, AIR 1976 SC 1599.

8. To the facts and evidence now. In so far as the distribution 21st April/79 is concerned, the petitioner himself has deposed about this, which has been sought to be controverted by examining Biakliana. A reference to the evidence of the petitioner shows that he was not specifically cross-examined on his evidence bout handing over a ducument like Exhibit P (5) by Biakliana. Learned Advocate General, Assam, therefore, contends that the evidence of the petitioner himself establishes this fact. This apart, by referring to the evidence of Biakliana it is urged that he may not be believed in what he has deposed. It is first stated that Biakliana is not only a worker of People's Conference Party. He is also a P.W.D. Contractor to whom a big loan had recently been given by the small Industrial Development Corporation whose Chairman is the Chief Secretary. As such it is submitted that Biakliana is under the obligation of the Chief Minister in many ways. His evidence that he had seen document like Exhibit P (5) for the first time in the Court cannot inspire any confidence, contends

the learned Advocate General, Assam, when it is noted that even according to him he had been asked in the later part of July/79 by Brig. T.Sailo whether he had distributed such papers. This clearly shows that a document like Exhibit P (5) had been shown to the witness earlier, may be after Brig. Sailo had received a copy of the election petition along with which a copy of Exhibit P (5) had been enclosed.

9. I have found sufficient force in this submission on behalf of the petitioner. It has been noted by me that all the witnesses for respondent No. 1 had at least one thing to say, and the same was that they had not seen dummy ballot paper like Exhibit P (5) earlier. Of course, Brig. T.Sailo and his wife have deposed that they had seen this after a copy of the election petition was received. I would think that in making a statement of the above type other witnesses of respondent No. 1 had departed from the truth in as much as if they were questioned by the returned candidate or his party about this allegation, or were
could not have been possible without the witnesses being shown the alleged document. Apart from the aforesaid criticisims of Biakliana's evidence, his statement that he had not given a dummy ballot paper to the petitioner on 21-4-79 as it being a Sunday he had gone to his quarry is not correct because 21st April, 1979 was not a Sunday-it was rather a Saturday.

10. Learnd Advocate General, Meghalaya, however, submits that despite the above, it can not be held beyond reasonable
over the dummy ballot paper to the petitioner. He first bring to my notice that no specific issue was struck about distribution of dummy ballot paper at Chaltlang on 21-4-79. As to why an issue on this was not framed is not quite clear as the pleadings do contain neccessary materials for the same. It seems it has missed all as indicated by both the sides. Learned counsel is, however, fair in stating that non-framing of issue would not stand in the way as the parties did go to trial on this point and led evidence in support of their rival cases. Despite reference is made to Narendra vs. Manikrao,, AIR 1977 SC 2171, wherein allowing evidence to be led "on the critical question of corrupt practice" without issue on the question and even in the absence of material facts and/or particulars was not appreciated. In the case at hand material facts do exist in Para 9 of the petitioner. Let it also be put on record that no objection was taken before me when the petitioner deposed about this aspect. It may be stated that the case had been transferred to my file only on 22-9-82, whereas issues had been framed on 29-6-81.

It is next urged that none except PW- 1 has deposed about this aspect of his case, and he being definitely an interested person, the fact of distribution may not be held established on his solitary evidence. It is also contered that it is unbelievable that a prominent party worker would appreach a rival candidate in his efford to persuade him to vote for his adversary. As to Exhibit P (7) dated 23-4-79 which is strongly relied by the learned Advocate General, Assam, in this regard,, the submission is that the document has not specifically referred about any act of Biakliana.. Indeed learned Avocate General. General Meghalaya, contends that this document is a manufactured one and no reliance at all be placed on it.

12. As necessity of receiving assurance from unimpeachable document has been emphasised in the decisions noted above, it has to be seen whether Exhibit P(7) suffers from any infirmity. The first submission made in this regard that the election petition did not contain a copy of this vital document, and in para 10 nothing much was said about its contents. It is then urged that the point raised in Exhibit P (7), namely putting of wrong symbol of Congress (I), is not the ultimate grievance of the petitioner in as much as while deposing about the corrupt practice because of which he was defeated, he has not mentioned about the wrong symbol. As this document came from the custody of the petitioner and/ or his party and has no indication on it that it was over seen by the Returning Officer, it is urgen that a document like Exhibit P (7) could have been prepared by the petitioner any time to suit his convenience. Some grievance is also mede about exhibiting this document in the present case by calling for the records of Election petition No. 2 of 1979 for wihich a prayer was made only on 13-9-82 by stating that some documents filed that case are needed for adjudication of the present matter.

13. I have not been persuaded by these submissions to hold that Exhibit P (7) is a creation of afterthought. Indeed, even such a suggestion was not given to PW-3, the author of the document. The learned Advocate General, Assam is right in stating that if it would have been created afterwards, mention could have been made in it about Mawia's mother's appeal describing Congress as a party of Vais, which it dones not contain. Though it would have been better if a copy of this document were enclosed with the Election petition, the same would not have saved this document from the attack of after-creation in as much as despite the document being annexed with the petition filed on 12-6-79, such attack would have been made. Then, para 10 of the petition does state that a letter was wtitten by PW-3 to the Returning Officer alleging distribution of dummy ballot papers. The sum and substance of Exhibit P (7) is also that the submission that as the petitioner while summarising the corrupt practices allegedly committed by the returned candidate, did not mention about wrong symbol, and no it should be held that he has no grievance on this score, would be an unfair finding because such a grievance looms large in the entire evidence of the petitioner. This document had to come from the custody of the petitioner or his party because it is the evidence of PW-3 that the Returning Officer had returned the same. As the document had not been kept by the officer, no docketing by his office can be expected on it. On the face of the averments finding place in the written statement of the Returning Officer qua this document, which amounts to admission of showing such a letter to him, as is the case of the petitioner, it would be an absolutely unjustified finding to hold that it was created afterwards.

14. I would, therefore, hold that Exhibit P (7) did exist at the relevant time. The submission relating to non-compliance with Order 13 Rule 1 C.P.C. while calling for the records of Election petition No. 2 of 1979 has also not much merit when it is remembered that the document had been filed earlier in that case. The non-mentioning of the name of Biakliana in this document cannot also be overplayed because the Secretary of the party was not so much interested as to who had distributed the dummy ballot papers, but was more concerned with the fact of distribution of these papers containing wrong symbol of the party. The evidence of PW-1 however, clearly shows that he had approached PW-3 after Biakliana had passed on the offensive documents to him.

15. Another contemporaneous document pressed into service by the petitioner is Annexure IV to the petition, which is a copy of letter written by Liankaia, President of Khatla Unit of People's Conference Party on 23. 4. 79 acknowledging distribution of dummy ballot papers and requesting the Assistant Returning Officer to treat it as withdrawn because it was rumoured that his party had printed forged ballot papers as names of all the candidates alongwith their symbols appeared in the document As to this, the first submission of the other side is that this was not duly proved in as much as the petitioner even admitted that the signature of Liankaia as the appearing in the original of this letter which he had seen in the Office of the Assistant Returning Officer was not known to him. But here again receipt of this letter has been admitted in the reply filed by the Returning Officer. Indeed what has been stated in the reply of respondent No. I in para 18 would amount to an admission that such a letter had been written by Liankaia, although this was so done according to the contesting respondent, by Liankaia in his personal capacity. The provisions of the C.P.C. relating to pleading finding place in Order VIII have to be borne in mind in this connection. An evasive denial will not do. The word "alleged" in para 18 while admitting about this letter, cannot be taken to be a specific denial. The original of the letter could not, however, be brought on record by the petitioner because though the Assistant Returning Officer and the Superintendent of Police to whom the matter had been referred for inquiry were summoned to produce the same, they had failed to appear in this case.

16. Another point urged by the learned Advocate General, Meghalaya as to this document is that it not referable to this constituency at all. This submission is founded on what finds place in the Ultimate para of the letter. As already noted, this letter come to be written because a rumour was spread that the party of the writter had printed "forged ballot papers" because the papers circulated by it contained names of all the candidates and their symbol. So far as the names of all and sponsored candidate's symbol is concerned, it has been stated in the early part of the letter that this was done by Shri. Lalsangzuala also. As to the printing of symbols of others, it was stated in the Ultimate para that "if was put X marks against other candidates namely like Pu Sangzuala as reported that would have mean "don't" cast your vote for him "and printing their symbols means" you have free choice " .Relying on the reference to Pu Sangzuala in this para, it is contended that this letter was written for the constituency in which he was a candidate, and as he had contested from Aizawl East, it is submitted that the dummy ballot papers published by Liankaia did not relate to the constituency at hand, which is Aizawl North. But, according to me, no such conclusion follows. A fair reading of the whole letter (ignoring the grammatical lapses at many places) would show that the name of Pu Sangzuala in this para has appeared not to indicate that he was a candidate for the constituency, but that he had reportedly put X marks against
names in his papers. This apart, nothing has been brought on record to show that Liankaia had issued any other dummy ballot papers except like Ext. P (5) which is clearly meant for the constituency at hand. For these reasons I reject the contention of the learned counsel.

17. It is then contended that Khatla was not a part of Aizawl North Constituency, and as such it cannot be accepted that a unit of of that place even of People's Conference Party would have undertaken to publish such dummy ballot papers-

would It is also mentioned in this connection that nobody of the press was examined to find out as to who had really entrusted the job to it. These are undaubtedly submissions of some merit but then Khatla is part of Aizawl West which is adjacent to the Constituency at hand. When importance of Brig. T. Sailo for the party is recognised as would be evident from the statement of Brig. himself he being the founder President of the party and having taken a very leading role in getting the candidates of the party ellected, the effort of the Khatla Unit to campaign for respondent No. I should not surprise anybody. Had its President Liankaia really not undertaken this exervise in the name of his unit, it stands to reason to believe that respondent No. I would have examined him as his witness. It would have been no doubt better if somebody from the press would have been examined by the petitioner, but in view of all that has been stated about, I do not entertain any doubt about the existence of dummy ballot papers like Exhibit P (5). It is also worth nothing that a copy of Annexure IV was endorsed to the Hnamte Press, who has been shown in Exhibit P (5) as its printer. Let it be noted that the lack of evidence showing compliance with section 127A of the Act has not been regarded as sufficient by me to completely undo the weight of the aforesaid contemporaneous document. What has been observed in Amolak Chand (supra) cannot be applied in the case at hand particularly because of the letter of Liankaia

18. In view of all these, I would accept that the petitioner has succeeded in establishing that Biakliana handed over a document like Exhibit P (5) to the former on 21st April, 1979. There is another allegation relating to Village Chaltlang and the same is distribution of dummy ballot papers on 23rd April/79 at about 4-30 p.m. among the voters. The petitioner has produced only PW- 2 Lalmawia in support of this allegation. The learned Advocate General, Meghalaya, has contended that Lalmawia is a got up witnesses in as much as his name did not find place in the election petition or in the list of witnesses submitted by the petitioner. A reference to para 12 of the petition which contains this allegation shows that three persons were specifically named in this connection. They are Ngurbela, Lalrinliana and Chhuana; and these persons were shown as witnesses by the petitioner. Of these three, Ngurbela and Chhuana refused to come forward, according to the petitioner, because they having joined Government service after the filing of the election petition were stated to be not willing to depose againts their Chief Minister. As to Lalrinliana the case of the petitioner is that he had come to this Court on several occasions in connection with the case, but could not be examined for one reason or other and he expressed his unwillingness to come any further. It is for this reason that Lalmawia was allowed by this Court vide order passed on 3-11-82 to be examined as a witness on the allegation in question.

19. But allowing PW. 2 to be examined is one matter, and how much credence should be placed on his evidence is another aspect. His late appearance on the scene is in itself a factor which has to put the Court on special guard. This apart, there is absolutely no supporting document so far as this distribution is concerned. It has to be remembered that Exhibit P (7) had been written after PW. 3 had been approached at about 10.30 a.m. as stated by PW. 1. whereas this exercise was allegedly under taken at about 4.30 p.m. So, on the solitary evidence of a late comer like PW 2, this allegation cannot be accepted to have been proved by the petitioner.

20. This takes us to the crucial meeting held on 21st April/79 at Sihphir. There are two allegations relating to it : (1) distribution of dummy ballot papers of the above type; and (2) criticism by the returned candidate of Congress (I) as a party of non-Mizos. This has been stoutly denied by respondent No. 1. The petitioner has produced PWs. 4 and 5 in support of his case and respondent No. 1 has examined RWs. 2 to 4, apart from denying the same on oath.

21. According to PWs. 4 and 5 the meeting had taken place in the Primary School of the Village and started at about 8 p.m. It was chaired by Shri Rohlira, who was the President of the Sihphir Unit of the party. At first Rohlira addressed the meeting for about half an hours, and thereafter respondent No. I delivered his speech for about two hours. According to them dummy ballot papers were distributed in the meeting. These papers, as per these witnesses, had earlier been stacked on the table by the side of which the President of the meeting and respondent No. 1 had taken their seats. In his speech respondent No.1 talked about developmental programme of the State and he also criticised Congress (I) party by saying that it is a party of "vais" i.e. it is a "vai pawl".

22. The holding of meeting at Sihphir on 21st April/79 at about 8 p.m. in the Primary School is an admitted fact. Respondent No. 1 has also deposed that he had addressed that meeting. That it was presided over by Rohlira who first addressed the audiance is also not disputed. The two points denied relate to distribution of dummy ballot papers and criticisim of Congress (I) party. To believe the RWs, respondent No.1 had not told anything relating to the Congress Party. Further, absolute discipline had been maintained in the meeting as there was no movement at all during about two hours when Brig. Sailo had delivered his speech. According to RW. 1 this had happened because people knew his style of addressing public meeting, wich is to give specific time to start the address, and not to allow making of noise or movement during the address. It is claimed that people have shown respect for this desire and generally silence prevails during his address. This version has received support from PWs. 2 to 4, of whom it seems RW. 4 was examined mainly to satisfy the Court that PW. 5 Rothanga was not present in the meeting.

23. Before other aspects are examined, it may be seen whether from the evidence of RW. 4 it could be held that PW. 5 was not present in the meeting. It is an admitted position that the meeting had been organised inside the school hall and that it was almost packed to the full. About 200 peop'e were accommodated in the small hall which was illuminated with the help of two petromax lights. In such a situation it would not have been possible for RW. 4, who had come along with Brig. Sailo to the meeting from Ramhlun, to have recognised all those who were sitting in the hall when he entered it. Indeed this witness had admitted this position in his cross-examination. The further evidence that he had not particularly searched for his relative PW–5 would show that not much weight can be given to what has been deposed by RW–4 about the absence of PW. 5 from the meeting.

24. Learned Advocate General, Meghalaya, contends that PWs. 4 and 5 being partisan witnesses in as much as they are attached to the Congress (I) party and had worked for that party in the election, too much of credence should not be

placed on their evidence. It is also submitted that their statements that they had seen the alleged dummy ballot papers stacked on the table is an act of embellistment on their part which would make them further unreliable because they must have deposed about the same only to boost up the case of the petitioner that the distribution was with the consent of the returned candidate.

25. There is undoubtedly some force in these submissions. But then it would be difficult to get a really independent person to depose about what had happened in an election meeting held indoors. The veracity of such witnesses has to be judged from inherent infirmities, if any in their evidence or from contradictions between their statements. Further, that version has to be accepted between the two put up by the two sides which is more reasonable and which accords with normal human conduct. To put it differently broad probabilities have also to be borne in mind. Though RWs. 2 and 3 appear to be neutral witnesses, it is stated by learned Advocate General, Assam, that they are indeed not so in as much as RW. 2 got the job of Carpenter in a Government Aided High School in 1980; and RW. 3 being a Hindi Teacher must have been appointed by the Government.

26. Let it be first seen whether distribution of dummy ballot papers had taken place in the aforesaid meeting. Having accepted that documents like Exhibit P (5) had found their circulation, it is reasonable to accept that these must have been made available to the persons who had came to attent the meeting addresssed by the hero of the party and by one in whose name and for whose benefit the dummy ballot papers had been prepared. It is on record that Brig. Sailo had addressed only a few meetings in his own constituency and that too had been done when he was acquainted with the grievance of the people of his constituency about the nonvisit of their candidate. Enthusiastic workers could not have missed the opportunity of apprising the voters what had Shri. Sailo to say through document like Exhibit P (5) when he himself was present in the meetting. The normal human conduct, the aforesaid circumstances and the broad probabilities would therefore support the case of the petitioner about the distribution of the dummy ballot papers in the aforesaid meeting. It may, however, be that the same were not distributed when Shri. Sailo was addressing the meeting, but when the Chairman of the meeting was on his legs. Indeed PW. 5 had said so. As such the distribution might have taken place even while respecting the desire of respondent No 1 that there should be no movement or noise when he was sharing his thoughts with the people.

27. As to the evidence of PWs. 4 and5, it is further submitted by the learned Advocate General, Meghalaya that they (father and son) are not believable in as much though in their presence an objectionable act was committed, the matter was not discussed with the party officials at all which will show that nothing of the kind had happened. Fault is found with PW. 4 for not having contacted any office bearer of Chaltlang on 22nd or 23rd April. not having found the petitioner at his house on those two dates. These are not so weighty criticims as to regard PWs. 4 and 5 as cooked up witneses. Had no effort been made even to inform the petitioner in time about what had taken place in the meeting, delay or want of contact with proper person could have been urged as valid ground to discard their testimony. But when the person most vitally concerned was sought to be apprised without delay, lack of discussion with other less concerned cannot cause dent to their evidence.

28. So far as RWs. 2 to 4 are concerned, I cannot pin full faith in what has been stated by these witnesses mainly because of two reasons 1/4 (1) They were evidently not telling full truth (as would appear from what is being said later) when they deponed about non-mentioning of the Congress (I) party at all by Shri Sailo in his speech. (2) The parrot like contention of RWs. 2 to 4 that they had seen document like Exhibit P (5) for the first time in Court is hard to swallow when witness like RW. 3 knew that this case was inter alia about the distribution of dummy ballot papers. The evidence of RW. 4 that nobody had told him that the election petition was bout distribution of dummy ballot papers connot be accepted when he had been told about the case. RW. 2 also did not give good account of hihmself by stating that he had no idea as to what was this case about. These witnesses must have known that they had been summoned on behalf of the respondent No. 1 to counter the allegations relating to what had happened at Sihphir meetting. The distribution of dummy ballot papers is one of the two allegations qua that meeting. As such the witnesses Court in frankly stating this fact. They, however, chose to remain as far away as possible from document like Exhibit P (5). This have done at the cost of making their evidence unnatural.

29. As to the evidence of respondent No. 1 himself I have to say this: His claim that there was no movement or noise during his address may sound rather curious being almost a part of military disipline, as stated by the learned Advocate General, Assam, but people may undergo the same for a dear leader of theirs. The discipline of a meeting depends on the person addressing it, people. who are addressed and the place and occassion of the meeting. The fact that Poeple's Conference Party had won 23 seats out of 30 in the General Election of 1978 which was the first to be contested by it, and had captured 19 seats in 1979 would show the popularity of this party with the people. To hear the founder of such a party, the people, and in partcular, the followers of the party, may undergo some amount of right discipline in deference to the wishes of their leader. But then the evidence of Shri Sailo is also not free from infirmity. His statement that he is not in a position to tell in what way the Congress symbol is shown in the election materials issued by the Congress (I) party and that he did not know if Congress (I) symbol is raised hand facing palm, are difficult to accept. After the Congress (I) party has established itself for long in power at the Centre and a large number of States, any man having to do with grass root politics in today India would definitely know the symbol of that party. To hear from the Chief Minister of a State that he does not know what the Congress (I) symbol really is, except that it is "Hand" is indeed surprising. Similarly to hear from Brig.Sailo that he had not mentioned even once about Congress (I) in his entire speech raining over about two hours is another part of his long evidence which is hard to concede, as Congress (I) Party was the real challenger and respondent No. 1 having gone to address an election meeting, it would be quite reasonable to hold, as contended by the learned Advocate General, Assam, that RW. 1 must have told to his audience something as to why they should vote for his Party and not for the opposite party. This conclusion almost seems irresistible when it is borne in mind that the Peolpe's Conference Party was born according to its father, because other political parties, including Congress (I) had failed to make any headway in the

matter of planned development as well as insurgency problem. An election is an excercise of selecting one who is best among the contestants. To decide this, qualities of one who seeks vote is no doubt important. But it is no less important as to who are the other candidates or to which party they belong. Elections are thus fought and won not only on positive votes, but also on negative votes as they are called. Recent Indian experience will bear this. There being no yardstick of judging who is absoeutety good, it is the comparative merit which matters in all walks of life. Nobody is perfect, or can be perfect. It is the comparative perfection which weighs the scale ultimately. Addressing an election meeting without mentioning even once about the rival party is something which cannot be accepted. This is not really "unproductive work" as stated by Shri Sailo. Of course, to win voters on this count criticism has to be sound and meaningful.

30. In view of all the above, I hold that in the meeting of Sihphir, dummy ballot papers like Exhibit P (5) were distributed. But in so far as describing of the Congress (I) as a party of non-Mizos by respondent No. 1 is concerned, though I am of the firm view that the returned candidate must have said something about that party. I have no clinching materials before me to hold that he must have characterised it as a non Mizo party. At best it could be said that he might have done so because it is too common a thing in Mizoram to say so as deposed by PW. 3, which statement has been relied on by the respondent himself for some other purpose. But. as already noted, such a matter cannot be held established by preponderance of probabilties. So, I reject this part of the allegation.

30A. It has now to be seen whether on the basis of facts found to have been established by the petitioner respondent No. 1 can be said to have committed corrupt practices mentioned in sub-sections (3), (3A) and (4) of the Act. According to the learned Advocate-General, Assam, description of Congress (1) as non-Mizo party (vai-pawl) in Ext- P (5) would amount to corrupt practice within the meaning of sub-sections (3) and (3A). The counter submission is that this would not be so even on the facts alleged. As per the learned Advocate General, Meghalaya sub-section (3) interdicts appeal on the ground of religion, race etc. of the person concerned. It is nobody's case that Ext. P (5) had asked the people to refrain from voting for the election petitioner on the ground of his religion, race etc. Indeed, the petitioner is as much Mizo as is respondent No. 1. Further, in so far as Mawi's mother's appeal is concerned, the thrust of the same against the Congress (1) party is not because of it being "vai pawl ". This would be apparent from what has been stated in the appeal as regards Congress. The English translation of the relevant portion would reap as below :

> "Congress party is the first "vai" to have made a name with perpetual party squabbles. The people have rejected their 5 years Government and they were badly defeated. Some of them have even joined Janata, Cow Congress, Bird Congress and now Hand Congress, I do not hold any regard for them. Moreover, it is the hiding place of veteran Mizo Union (leaders)."

This would clearly show that though the appeal started by describing the Congress as "vai-pawl", it ended by even stating that it is a party of veteran Mi-

zo Union leaders, who are definitely Mizos. So, the appeal not to vote for Congress (I) cannot be really said to be on the ground that it is non-Mizo party. It is rather aimed against defection and party squabbles.

31. Finally, it is urged by learned Advocate General, Meghalaya, that description of Congress (I) party as non-Mizo party is not taken seriously by the people of the area in question. This is sought to be brought home by first referring to Exhibit P (7) in which no grievance at all was made on this score by P.W. 3 Lalsangzuala. When asked about this the witness stated :—

> "In the complaint I had not mentioned about Mawai's mother's appeal on the reverse side because such things have been too common in Mizoram. This was known to me before I had lodged the complaint to the Returning Officer. Such appeals were even made by Congress (I) also".

32. On the basis of all the above, it is contended and rightly, by the learned Advocate General, Meghalaya, that describing Congress (I) as a non-Mizo party would not attract the operation of sub-section (3). As to sub-section (3A), it is urged that there is not even a whisper about any attempt on the part of the returned candidate to promote or attempt to promote feeling of enmity or hatred between different
Party. Though it may be, as stated in Ebrahim Sulaiman v. M. C. Mohammed AIR 1980 SC 354 that speech against a political party comes within the ambit of sub-section (3A) but as such things have been too common in Mizoram as stated by PW 3, and as the appeal has not been regarded by me to be directed on the non-Mizo component of Congress (I), the question of promoting or attempting to promote hatred between Mizos and non-Mizos does not arise.

33. It remains to be seen whether the distribution of the dummy ballot papers attracted the mischief of section 123 (4) of the Act. To constitute corrupt practice under sub-section (4), following five conditions are required to fulfilled :-

(1) there would be publication of statement of facts relating to the personal character or conduct of any candidate or in relation to his candidatures ;

(2) the statement must be false.

(3) the person making it should either believe it to be false or should not believe it to be true;

(4) the statement should be one which is reasonably calculated to prejudice the prospects of that candidate's election, and.

(5) the publication must have been by the candidate or his agent or by any other person with the consent of the candidate or his election agent.

34. The submission for respondent No. 1 is that none of the aforesaid ingredients is really satisfied in the present case. As to the first condition, it is stated that the publication can have a nexus only with the candidature

of the petitioner, but this too is doubtful. The learned Advocate General, Assam, refers to Elvin Sangma, AIR 1975 SC 425 to dispel this doubt. In that case the symbol of the election petitioner was shown in the dummy ballot papers as "Boat" instead of "Two leaves" which had been alloted to him. A point was urged before this Court that this wrong showing would not be relatable to the candidature of the election petition. It may be stated that in the dummy ballot papers the name of the election petitioner had also been wrongly spelled. This Gourt held that the statements as appearing in the dummy ballot papers did show that the petitioner was nowhere and the petitioner had ceased to subsist; and so these related to his candidature. On appeal being preferred by the returned candidate, this decision was affirmed. No submission had been advanced before the Supreme Court that the aforesaid statements would not be in relation to candidature. In coming to this conclusion, the wrong spelling was not given any importance because the electorate had consisted of 80% of illiterate persons.

35. Learned Advocate General, Meghalaya, urges that what has been held in Elvin Sangma has to be confined to the facts of that case in as much as an absolutely wrong symbol was shown in the dummy ballot papers which would have definitely confused the illiterate voters. In the present case, the majority of the electors (about 60% are literate and the symbol shown in the dummy ballot papers cannot be said to be of such a kind as to cause confusion in their mind, submits the learned Counsel. Whether the statements prejudiced the prospect of the candidate is a matter which shall be seen seperately, but on the ratio of Elvin Sangma it has to be held that showing of wrong symbol would have a nexus with the candidature of a person.

36. As to the second of the above five conditions, the contention is that the way Congress (1) symbol as shown in Exhibit P (5) cannot be regarded to be a false statement. It is urged that tbe symbol allotted to this party was a "HAND" and what finds place in Exhibit P (5) is also a hand. The fact that it has been horizontally placed instead of showing it vertically (in a raised position) would not alter the fact that the symbol shown in Exhibit P (5) is that of a hand. According to the learned counsel it would be wrong to say, as is the case of the petitioner, that the symbol in Exhibit P (5) is of a left hand glove as that is belied by the fact of trident mark in the symbol, because a glove does not have such a mark.

36. As in the present case, the replica of the symbols supplied by the concerned Election Officer to the parties is not on record, it cannot be held that what has appeared in Exhibit P (5) is not the symbol at a hand. The decision of this Court in Election Petition 2/79, which is relied on by the learned Advocate General, Assam, cannot assist him, as in that case there were some more materials before the Court to come to its finding in this regard. So far as the third condition is concerned, as the person who had published the dummy ballot papers (Liankaia) is not before the Court, it cannot be said that he had shown the symbol as finds place in Exhibit P (5) believing it to be false, or not believing it to be true. It is worth pointing out that it is not material for this purpose whether respondent. No. 1 believed the statement to be false or not true because admittdely he is not the person who had published the document. As to the fourth condition, there is nothing before this Court to hold that the symbol as

printed in the offensive papers prejudiced the prospect of the petitioner's election or was culculated to do so. Apart from the general statement made by the petitioner that the symbol had confused or misguided the voters, there is absolutely nothing to satisfy this Court about this aspect. Facts of Elvin Sangma's case are entirely different in this regard.

38. The last condition of this sub-section raises a question of some importance. The point is whether consent of the candidate or his election agent would be necessary even if the Publication be by an agent of the candidate. To answer this, we may have a glimse at the history of this sub-section. When the Act found place in the statute book, this provision was covered by sub-section (5) and it had then stated that the publication has to be "by a candidate or his agent, or by any other person with the connivance of the candidate or his agent." In 1956 the Act underwent a great many amendments, and twice. The second amendment of that year being by Act No. XXVII of 1956 substituted entirely a new Chapter in Part-VII of the Act. In the recast section 123, sub-section (4) dealt with this corrupt practice and it stated that the publication has to be "by a candidate or his agent or by any other person". An Explanation was, however, inserted stating that the expression 'agent' in the section included an election agent, a polling agent and any person "who is held to have acted as an agent in connection with the election with the consent of the candidate" The only other amendment material for our purpose is that of 1958 by Act 58 of that year which inserted the words "with the consent of a candidate or his election agent" after the words "any other person".

39. The question which has to be decided in the ligth of the above history is whether consent of the candidate or his election agent, is necessary if the publication be by an agent. I am of the view that this is not required. Of course, any and everybody would not be an agent even within the expended meaning given in the Explanation (I). A reference to that Explanation would show that apart from an election agent or a polling agent, a person can be treated and held to be an agent only if he had so acted with the consent of the candidate. Thus consent of the candidate would have to be ascertained, but only to find out whether a person, other than the election agent or polling agent, would come within the ambit of the expression 'agent'. Once, however, a person is so held, further consent of the candidate or his election agent for the publication would not be necessary. The material change which has been brought about in this provision as it has found place when the Act was first enacted, is that in the case of publication by any other person mere connivance of the candidate would not do, it has to be with his consent.

40. To examine whether the last condition of section 123 (4) was satisfied or not, it has to be first seen whether Biakliana could be put in the category as an agent. I am speaking of Biakliana alone, as the names of the persons who had distributed the dummy ballot papers in the Sihphir meeting are not known. It may also be mentioned that the word "Publication" in the sub-section really means "distribution" as stated in Prabhu Naryan, AIR 1975 SC 968. As Biakliana was admittedly not the election agent, or a polling agent, he can be regarded as an agent only if the last requirement of Explanation (1) is satisfied. In this connection, reference has been made to Nani Gopal Swami V. Abdul Hamid, 19 ELR 175, by the learned Counsel for the petitioner. Though the ratio of that decision does not hold the field

in so far as what has been stated there-in about the consent of a candidate in the activities undertaken by an agent in view of subsequent pronouncements of the Supreme Court, more particularly Balokrishna v. Fernandes, AIR 1968 SC 1201. What was observed by Sarjoo Prasad, C.J. as to when a person can be regarded to be an agent, has not been disturbed or differed. As pointed out by the learned Chief Justice, an 'agent' within the meaning of section 123 would include a person who in fact does work for a candidate and whose services have been accepted by the candidate. So also, an association of persons or a society or a political party and its prominent members who set up the candidate, sponsor his cause and work to promote his election, may be aptly called 'agent' of the candidate for election purpose.

41. Thus, Biakliana could be regarded as an agent of respondent No. 1 as admittedly he is a prominent worker of returned candidate's party and had worked for the party's nominee. He is also in visiting terms with respondent No. 1 who had solicited much information from Biakliana about the allegations made in this case. But as some of the other conditions of section 123 (4) are not satisfied, it cannot be held that any corrupt practice within its meaning was committed by the people's nominee.

42. In view of the finding regarding non-fulfilment of necessary conditions of sub-sections (3), (3A) and (4) of sections 123, it is strictly speaking not necessary to examine whether respondent No. 1 had consented to the issue of this offending No. 1 had consented to the issue of this offending document, but as I am addressed at length on this aspect, it would be only proper to record my view about the name. It may be stated that question of consent is being examined, apparently it is not a case attracting clause (d) (ii) of section 100 (1) of the Act.

43. As to when consent can be inferred has been a subject matter of a number of decisions. It is necessary, indeed not possible, to refer to all those judgements. It would be enough if some representative opinions are alluded to. Rajagopala Rao v. N.O. Ranga, AIR 1971 SC 267 may be first referred. This aspect bas been dealt in para 16 where it is stated :-

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

In the aforesaid case the consent of the candidate was not read from the mere fact that the publication was by a Swahantra party worker and the candidate had been set up by that party even though the distributor was an important member of the party. Relying on this it is submitted by the learned Advocate General, Meghalaya, that although Biakliana is a prominent party worker consent of the candidate cannot be read in what was done by him merely because of party affiliation.

44. Mention has to be made on this aspect of S.N. Balakrishna V. Fernandez, AIR 1969 SC 1210, as it is an important decision in this point. It has been accepted in Para 45 of this judgement that consent need not be directly proved and the consistent course of conduct may raise a presumption of consent. For such a inference to be raised there must, however, be some reasonable evidence from which an inerence can be made of the meeting of the minds or at least a tacit approval of the general conduct of the agent. It has also been stated in para 50 that in view of the substitution of the word 'consent' for "knowledge and connivance", the law requires some concrete proof, direct or circumstantial, of consent and not merely of knowledge and connivance.

Lastly, reference may be made to Mohammad Koya vs, Muthu Koya, AIR 1979 SC 154. In that case the election of Mohammad Koya was set aside by the Kerala High Court but on appeal that judgement was set aside by the Supreme Court. The gravemen of the allegation in that case was that Shri Koya had committed corrupt practice falling within sub-section (3A) of section 123 which was because of writings of several articles, extract of speeches and cartoons in a daily paper called Chandrika of which Shree Koya was the Chief Editor. As liability was sought to be fastened on Shri Koya by alleging that he must be deemed to have given his consent to what was appearing in Chandrika, the Supreme Court examined as to when consent could be in such a case. In this connection reference was made to Harasingh, AIR 1974 SC 47 where it had been stated that consent or agency cannot be inferred from remote causes or from mere close friendship or other relationship of political affiliation. As it was found that Shri Koya was not the Editor but Chief Editor and was really a name lender and the post which he held was purely ornamental, consent of the returned candidate was not read in the articles, cartoons etc. The learned Advocate General, Meghalaya, has placed reliance on this decision to show that even where a person had financial interest in the newspaper which was published by a party sponsoring the candidate, consent had not been read in all that it appeared in the newspaper. So consent of a candidate in the case at hand cannot be inferred, submits the learned Counsel, from the mere fact that some important party-men had done something to advance the cause of the candidate.

46. On this aspect no more citation is felt necessary. I would only refer to the conclusions, I had arrived in Election Petition No. 2/80 (Bakin Pertin v. Soseng Tayeng) as I think that those hold the field even now. This is what was stated in para 25 of the judgement on the question of consent :—

(1) It cannot be equated with knowledge;

(2) it is different from connivance;

(3) it need not be express and can be inferred from facts and circumstances of a case;

(4) the fact that an action has been taken by an AGENT as understood in the Election law is not enough to imply consent of the candidate;

(5) this cannot also be inferred from mere close relationship or other relationship or political affiliation;

(6) if the agent be a regular worker in whose hands election campaign has been left, or if he be the sole agent, implied consent of the candidate may be read;

(7) if something be done in the presence of a candidate, or is said to his hearing, implied consent may be taken to this, I shall now add that the candidate must have knowledge as well of the thing done.

(8). if numerous acts of one nature are done to the knowledge of the candidate, it may be accepted that the same was done with his consent.

47. The learned Advocate General, Assam has relied on the following circumstances to show the consent of the returned candidate to the distribution of the damaging document. : (1) Publication by a party man and the distribution by a prominent party worker like Biakliana; (2) distribution at Sihphir in presence of Brig. T. Sailo; (3) the "dubious nature of written statement"; (4) non-examination of Liankaia and (5) failure to produce other documents said to have been distributed by workers of the People's Conference Party.

48. The first circumstances could at best make the publisher and the distributor, an agent of the returned candidate, and nothing more. The case of Fernandez would amply bear this conclusion. In that case the consent of Shri Fernandez was not read despite these factors: (1) benefit reaped by Fernandez from the writings of Shri Atre; (2) sharing of a common planform by Shri. Fernandez with Shri. Atre; (3) social contacts between the two; and (4) the cause of Shri. Fernandez being supported by Sampurna Maharastra Samity, whose Chairman Shri. Atre was. Learned Advocate General, Assam, presses into service Ram Kishan v, Jai Singh, 37 ELR 217. That case however was much different on facts as the person who had distributed the offending posters was made all in all of the election campaign the candidate had himself seen the posters, and what is more had shown the expenses incurred in printing the same in his return of election expenses.

49. So far as the second circumstance is concerned, the fact of distribution in presence of the candidate cannot be held to be sufficient in this regard. Learned counsel. however, relies on the case of Janak Sinha v. Mahant Ram, AIR 1972 SC 359. A reference to paragraph 41 of that judgement shows that consent was read not only from the fact of distribution of the pamphlets in presence of the candidate but also because on oral appeal was made by the candidate himself on the basis of caste. It is because of this that the distribution of the pamphlets containing an appeal in the name of caste, was accepted to have been with the consent of the candidate. It would be opposite to remind ourselves as to what was stated in Rajagopal Rao (supra) in this connection. According to that decision prior knowledge of the contents couples with keeping quiet at the time of distribution may amount to consent. The present case has nothing to show that Shri T. Sailo had

any prior knowledge of the contents of the offensive document. The fact of standing of the documents is mentioned by the learned Advocate General, Assam in this context. I would first regard this part of PWs 4 and 5's evidence as embellishment. Secondly, even if this was so, it would not show prior knowledge of the contents on the part of Shri Sailo, really, it would to some extent negative prior knowledge, as a speaker going to meeting cannot know what is written in the documents stacked before him. If it were that the pamphlets were brought by Shri Sailo along with him, it could have been argued that he must have known as to what was contained therein.

50. The charge of " dubiousness " of the written statement, has no merit. This was, however, levelled because in the written statement it was stated inter alia by the contesting respondent that even if there was any distribution of dummy ballot papers, the same was made without the knowledge consent or connivance of the answering respondent. It was further stated that at any rate such distribution did not cause any prejudice to the election petitioner. These statements having made after the clear averment that there had been no distribution of dummy ballot papers, cannot be characterised as dubious. What was held in this regard in Vimala Devi v. K.M. Reddy, AIR 1975 SC 1135, has no application. The observation regarding dubiosness was made therein because what was stated could enable putting forward of two alternative pleas (i) preparation of the documents before the election and (ii) of their prepared after the election but before filling of the election petition It was therefore stated that the pleading cannot be drafted in such a way as to shape the evidence or arguments to suit either theory. But what has been averred in the present written statement is far from dubiousness. The stand taken therein is one which had to be taken, as mere distribution without consent and prejudice to the prospects cannot satisfy the requirements of section 123 (4).

51. The contention relating to non-examination of Liankaia has, however, some merit but much cannot be made out of it because even from his letter which is at Annexure-IV of the petition, it cannot be even distantly inferred that the affending statements made in the dummy ballot papers were with the consent of the candidate. This apart, if something positive in this regard was sought to be taken out from Liankaia, the petitioner could have as well produced him, it has to be remembered that the burden of proving a corrupt practice after all lies on the election petitioner, though a returned candidate cannot also keep mum.

52. Failure to produce before the Court the documents which party workers of respondent No. I had distributed has nothing to do with the consent relating to distribution of dummy ballot papers like Ext. P (5). That is more relevant about the existence and publication of this document. As I have accepted publication of dummy ballot papers, the non-production of the election manifesto or other appeals issued by the People's Conference Party cannot be regarded as a circumstance to show the consent of the respondent No. 1 to what has gone in Ext. P (5).

53. This being the position, it cannot be held that the returned candidate had given his consent to the distribution of dummy ballot papers like Ext. P(5), which in any case, do not satisfy all the requirements of Section 123(4). As I have held that the election petitioner has failed to prove beyond reasonable doubt if respondent No. 1 had characterised Congress (I) as a non-Mizo Party, which in any view of the matter would not attract the mischief of sub-section (3) and (3A) of section 123, for reasons given earlier no case for setting aside the election has been made out.

54. The result is that the petition stands dismissed with costs which I assess at Rs. 1000/-

Sd/- B.L. Hansaria
Judge.

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