

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 1976 OF 2014

Shaikh Khalil Ahmed Naikwadi,
Age: 58 years, Occu: Business,
R/o Jummapeth, Basmathnagar,
District Hingoli

...Petitioner

versus

1. Syed Irfan Karim S/o Syed Karim,
Age: 28 years, Occu: Agri.,
R/o Basmathnagar, Tal. Basmat,
District Hingoli
2. The Returning Officer,
Municipal Council Election of
2011, Basmatnagar,
District Hingoli of Basmatnagar
Municipal Council, Basmatnagar
3. Ali Majhar Ibrahim,
Age: 35 years, Occu: Business,
R/o Jummapeth, Basmatnagar,
District Hingoli
4. Deepak S/o Gopal Kosalge,
Age: 35 years, Occu: Business,
R/o As above
5. Balijur Raheman Khan Pathan,
Age: 55 years, Occu: Business,
R/o Pathan Mohalla, Basmatnagar,
District Hingoli
6. Mohd. Aref Yasin,
Age: 60 years, Occu: Business,
R/o Parbhani Road, Basmatnagar
District Hingoli
7. Shaikh Mohsin S/o Shaikh Karimoddin,
Age: 30 years, Occu: Legal Practitioner,
R/o Kajipura, Station Road,
Basmatnagar, Dist. Hingoli

...Respondents

.....
Mr. P. R. Katneshwarkar, Advocate for petitioner
Mr. S. K. Chavan, Advocate for respondent No. 1
Mr. S. T. Shelke, Advocate for respondent No. 2
.....

CORAM : N.W. SAMBRE, J.

DATE : 21st NOVEMBER, 2015

ORAL ORDER :

Heard.

2. In Election Petition No. 04 of 2011, which is based on issue of tendered votes, an application Exhibit-76 was filed by the petitioner to the said Election Petition to issue witness summons to Mr. K.P. Chandrashekar, Senior Manager, Electronic Corporation of India seeking his attendance with copy of E.V. Machine details and software device to D-codify electronic chip, which was used in the election, result of which is under question. The said application came to be allowed by Election Tribunal-Additional Sessions Judge, Basmath by an order dated 14/02/2014, as such, present writ petition.

3. Mr. Katneshwarkar, learned Counsel for the petitioner would urge that the order impugned summoning the witness for the purpose is against the jurisprudence of election law, as according to him, same violates the secrecy that is required to be followed in the

election, which is conducted in a democratic set up. In addition to above, he would then urge that once chip is opened, voters whose votes were under challenge will be opened and known to the candidates and other public. He would then urge that such type of roving of inquiry in the matter of election petition, wherein the issue of tendered votes is raised is not permissible and has sought to place reliance upon the judgment of Apex Court in the matter of ***Dr. Wilfred D'Souza vs. Francis Menino Jesus Ferrao*** reported in ***(1977) 1 SCC 396***. According to him, since the petitioner has not proved his case, summoning of witness with chip was uncalled for and as such, sought to set aside of the order impugned.

4. The claim was opposed by learned Counsel for the respondent No.1. Learned Counsel for respondent No. 1 has invited my attention to the order passed on earlier occasion by Election Tribunal below Exhibit-19 - an application filed by respondent No.1-petitioner to the Election Petition for issuing directions to respondent No.1 to the Election Petition, to produce all election papers and proceedings and electronic voting machine. He would then urge that once by an order dated 06/01/2013 below Exhibit-19, respondent No.1 was directed to produce electronic voting machine and memory chip, the order passed below Exhibit-76 is consequential order. According to him, the law as regards secrecy of voting and such

privilege to be claimed by elected candidate is already settled in the judgment of Apex Court in the matter of **A. Neelalohithadasan Nadar vs. George Mascrene** reported in **1994 (Supp.2) SCC 619**. According to him, said order passed below Exhibit-19 summoning the electronic voting machine and memory chip has attained finality and not questioned in any proceedings and as such, present petition is not tenable.

5. Having bestowed my anxious thoughts to the issue that was urged, it is required to be noted that the issue of tendered votes is discussed by the Apex Court in the matter of **Dr. Wilfred D'Souza** (supra). It is true that tender votes are excluded at the time of counting of votes before declaring result of returned candidate, however, tendered votes can be proved by the petitioner, who has brought such issue before the tribunal by specifically alleging that tendered votes were submitted and true voters after challenging the votes tendered has carried out their voting, which ballots were not counted. It is further required to be noted that breach of secrecy issue as is rightly pointed out by learned Counsel for respondent No.1 was settled in the matter of **A. Neelalohithadasan Nadar** (supra), wherein the Apex Court has observed that breach of secrecy of voting is permissible to subserve the larger public interest i.e. purity of election process. The principle of secrecy of ballot cannot

stand aloof or in isolation and in confrontation to the foundation of free and fair election i.e. purity of election. In view of above judgment, the submission of the learned Counsel for the petitioner that breach of secrecy of voting is not permissible is liable to be rejected.

6. As stated herein above, in the present case, the petitioner has come out with specific case of four tendered votes and has named such voters. The case of the election petitioner is not based on roving enquiry, whereas upon perusal of the pleadings, it is clear that he has already pleaded material fact and has also adduced the evidence to substantiate the same. The tribunal, having noted the above referred primary elements which are placed before it, has proceeded to grant application Exhibit-76 ordering issuing of witness summons to Mr. K.P. Chandrashekhar, Civil Manager Electronic Corporation of India, with direction that he shall attend the Court with copy of EVM details alongwith software device to D-codify electronic chip. The tribunal also considered the names of four tendered voters and examination of Mr. K.P. Chandrashekhar at Exhibit-59. It is also required to be noted that there is difference of only four votes in between the candidate who has returned and election petitioner, as election petitioner has secured 1434 votes, whereas, respondent has secured 1438 votes.

7. As the petitioner, in specific terms, has pleaded the material fact about tender votes and has also adduced the evidence to substantiate the same, in my opinion, in the background of order below Exhibit-76 discussed above, no interference is called for.

8. The writ petition fails, stands dismissed.

[N.W. SAMBRE, J.]