

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.11149 OF 2014

LATA AJINATH KHAKNE

PETITIONER

VERSUS

THE ADDITIONAL DISTRICT COLLECTOR,
AHMEDNAGAR AND OTHERS

RESPONDENTS

Mr.V.V.Tarde, Advocate for the petitioner.

Mr.P.K.Jadhavar, Advocate for respondent Nos. 4 to 9.

Mr.D.R.Korde, A.G.P. for respondent Nos. 1 and 2.

(CORAM : RAVINDRA V. GHUGE, J.)

DATE : 21/01/2015

PER COURT :

1. This matter was heard on 12/12/2014 and this Court, while issuing notice to the respondents, has observed in paragraph Nos. 1 to 5 as follows :-

“1. By this petition, the petitioner seeks to challenge the judgment and order dated 28.11.2014 passed by the Additional Collector, Ahmednagar in Gram Panchayat Dispute Application No.40 of 2014.

2. The petitioner is a Sarpanch of village Prabhu Wadgaon, Tq. Shevgaon, District Ahmednagar. A requisition was moved on 9.9.2014 for taking up a motion of no confidence against the petitioner. Having served the same on the Tashildar, a notice dated 9.9.2014 was issued for convening a special meeting on

15.9.2014. The said motion was passed by 6:2 vote count and as such, the motion was supported by 3/4th majority of the voters as is mandated under Section 35 of the Maharashtra Village Panchayat Act ("the said Act") with regard to a lady Sarpanch.

3. The petitioner raised a dispute before the Collector. One of the grounds for appeal was that one ballot paper did not contain a tick mark in favour of the motion at the appropriate place. The tick mark was at the upper right corner of the ballot paper and there are zig zag lines on the ballot paper in the form of a sketch. The inks used for the tick mark as well as zig zag sketch are different. It is, therefore, stated that if that one vote is held to be invalid, the motion of no confidence cannot be said to have been passed by 3/4th majority.

4. The dispute raised by the petitioner has been dismissed by the impugned order. Contention of the petitioner is that the concerned authority has wrongly placed reliance upon the judgment of this Court in the case of Dr. Dattatray Balkrishna Vs. Shaktiprasad [(1960) BLR Vol.LXIL 710]. The petitioner, therefore contends that the impugned order deserves to be quashed and set aside.

5. The petitioner has prayed for ex-parte ad interim relief in terms of prayer clause (C). However, in the light of the judgment of this Court in the case of Dr. Dattatray (supra), where an almost identical issue has been dealt with and the Division

Bench of this Court, has come to a conclusion that an inadvertent mark or dotted lines or some other marks on the ballot paper would not be fatal so as to discard the said vote, as long as the indication of the voter is indicated either by tick mark or cross-sign. I am, therefore, of the opinion that the R & P will have to be called for in order to scrutinise the said ballot paper which the petitioner has been referring to”

2. The record and proceedings from the office of the Tahsildar, Shevgaon, Dist. Ahmednagar in Gram Panchayat Dispute Application No.40/2014 in one file bearing O/W.No.KAVI/GRAP/29/2015 dated 13/01/2015 has been received. The said R & P was opened with the assistance of the learned AGP. There are 2 files in the said envelope. One file bears 99 pages and other file bears 49 pages. The ballot papers in a sealed envelope have been placed before this Court.

3. The said sealed envelope was opened by the learned AGP and the ballot papers contained therein were shown to the learned Advocate for the petitioner as well as the learned Advocate for respondent Nos. 4 to 9. After scrutinizing the ballot papers in favour of “No Confidence Motion”, learned Advocate for the petitioner has pointed out the last ballot paper which contains some scribbling in

the same ink, in which a tick mark to indicate that the vote was cast in favour of the Motion, has been pointed out.

4. Contention of the petitioner is that the said vote creates suspension since there is a zigzag line mark alongwith a tick mark (✓). Submission therefore is that the said ballot needs to be invalidated and ought not to be considered either in favour or against the petitioner. It is, therefore, concluded that if the said ballot is discarded, the votes in favour of the Motion would be reduced to 5 and the vote count, by which the resolution was passed, would stand altered as 5:2 and not 6:2.

5. It is, therefore, submitted that the "No Confidence Motion" will then stand defeated since the petitioner is a lady Sarpanch and Section 35 of The Maharashtra Village Panchayats Act requires 3/4th majority of the total members of the Gram Panchayat for passing a "No Confidence Motion" as against a lady Sarpanch.

6. Learned AGP appearing on behalf of the State submits that the scribbling on the said ballot paper appears to be a zigzag line. However, it surely does not indicate a cross sign to signify that the ballot has been cast against the Motion. He submits that the tick

mark (√) sign clearly appears in the box, in which the voter was supposed to signify his inclination in favour of the Motion or against the Motion. As such, the tick mark (√) clearly indicates that the concerned voter desired to vote in favour of the Motion. There is no semblance of overwriting, which could indicate that a cross sign is later on altered to appear as a tick mark (√) sign. Had it been that there was a cross sign and which was altered to appear as a (√) sign, some doubt would have been created.

7. Mr.Jadhavar, learned Advocate appearing on behalf of respondent Nos. 4 to 9 supports the contentions of the learned A.G.P.

8. The learned Division Bench of this Court in the case of Dattatraya Balkrishna Kulkarni Vs. Sakataprasad Mahanand Upadhyaya, BLR Vol.LXIL, 710, has considered a similar challenge in the matter of the Bombay Municipal Corporation's Elections. It would be apposite to reproduce paragraph Nos. 2, 8 and 9 of the said judgment hereinbelow :-

"2. The petitioner and nine others were candidates at the municipal election in ward No. 26, Naigaum, Greater Bombay, held on May 9, 1957, for five elective seats. The petitioner belonged to one party and respondents Nos. 1 and 2 belonged to

a rival party. The result of the election was declared on May 11, 1957, and the result so far as it affected the petitioner and respondents Nos. 1 and 2 was that respondents Nos. 1 and 2 defeated the petitioner by a margin of respectively 97 and 57 votes. Respondent No. 1 had polled 10414 valid votes, respondent No. 2 had polled 10375 valid votes and the petitioner had polled 10317 valid votes. The petitioner filed an election petition, which was heard before the learned Chief Judge of the Court of Small Causes at Bombay under Section 33 of the Bombay Municipal Corporation Act. In that petition, he challenged the validity of the election of respondents Nos. 1 and 2 on various grounds. He alleged various corrupt practices. He also alleged various procedural irregularities committed by the Polling Officers and their staff in counting, checking and scrutiny of valid and invalid votes and prayed for a declaration that the petitioner was and the respondents were not duly elected candidates at that election. A mass of evidence was led and after a protracted hearing, the learned Judge decided on all points against the petitioner. For the purposes of the present petition, it is unnecessary to give a resume of all those allegations nor is it necessary to summarise the defences raised by the two contesting candidates or the Municipal Commissioner for Greater Bombay, who is respondent No. 3 to this petition. It will suffice to refer only to those contentions which have been pressed before us by Mr. Bhasme, learned Counsel for the petitioner.

8. The crucial question, therefore, is whether this enabling

*requirement of Rule 27 relating to recording of a vote or votes by putting cross or crosses is imperative and absolute. Is it such that the Court must exact rigorous observance of it and visit any departure from it with the consequence of invalidity and nullity? Now, if there is one rule of interpretation clearer than any other, it is this, that "an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially". There is no general rule as to when an enabling enactment is to be regarded as absolute and when directory. There is no general rule that any enactment expressed in negative and prohibitory language must be considered as being absolute. Nor on the other hand is there any general rule that an enactment expressed in an affirmative language must not be considered as absolute. Authorities abound on the subject and one guiding principle of the matter is what was stated by Lord Campbell in *Liverpool Borough Bank v. Turner* : ...No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of Courts of justice to try to get at the real intention of the legislature, by carefully attending to the whole scope of the statute to be construed.*

*In another leading case on the subject *Howard v. Bodington* . Lord Penzance cited this dictum of Lord Campbell and added (p. 211) : I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has*

been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the enactment is what is called imperative or only directory... I have been very carefully through [all the principal] cases, but upon reading them all the conclusion at which I am constrained to arrive is, that you cannot glean a great deal that is very decisive from a perusal of these cases. They are on all sorts of subjects. It is very difficult to group them together, and the tendency of my mind, after reading them, is to come to the conclusion which was expressed by Lord Campbell in the case of Liverpool Borough Bank v. Turner.

During the hearing of this petition, we had time to look into the statement of the law on the subject of elections in Corpus Juris Secundum, Vol. 29. It is not necessary to burden this judgment with any extensive quotations from the law as there summarised. It appears that there are a number of statutes in the United States specifying the nature of the mark to be used by a voter in indicating his choice on the ballot. It also appears that under most of those statutes the mark required to be used for the purpose of recording a vote is a cross. Some of those statutory provisions have been considered by the Courts as mandatory; whereas other similar provisions have been considered as directory. One general rule stated in Corpus Juris, Vol. 29 at pp. 254-255 is: While statutory provisions governing the manner of indicating the voter's choice on the ballot must be complied with, the voter may not be disfranchised where he

made an honest, although partly unsuccessful, effort at compliance, and, in general, his intent will be given prime consideration. Ballots will not be treated as void merely because of technical errors or because of irregular or unauthorised markings which appear to have been innocently made as the result of accident, awkwardness, nervousness, inattention, mistake, ignorance, or physical infirmity, if the lawful intent of the voter can be ascertained.

9. Still, it is not always easy to determine whether any particular provision specifying the nature of the mark to be used by a voter is imperative or directory. One broad principle which emerges from decided cases is that a provision relating to the essence of the thing to be performed or to a matter of substance is imperative; and that which does not relate to the essence of the thing or the substance of it and compliance of which is rather a matter of convenience than of substance is directory. In a case falling under the latter category non-compliance of the requirement is not fatal; its substantial compliance must suffice. There is no infallible way, however, of determining whether there is substantial compliance with an election rule relating to the use of the specified mark on a ballot paper. That, obviously, must be resolved like any other question of fact. The prime consideration is to ascertain the intent of the voter. That intent must, of course, be gathered from the voting paper itself examined in the light of all relevant surrounding circumstances."

9. The Division Bench has therefore concluded that every ballot paper needs to be scrutinized in order to find out whether it deserves to be included in the vote count or should be discarded as being an invalid vote. The Division Bench was considering such ballot papers which did not bear cross sign and had other marks on them. It was therefore concluded that there must be a sufficient compliance of the rules to deduce that a particular ballot paper signified the intention of the voter to sign in favour of the Motion or against the Motion. Any unauthorized markings or irregular markings, appearing to have been made innocently as a result of accident or awkwardness or nervousness or inattention or mistake or ignorance or any physical infirmity, but the lawful intent of the voter is visible, then the said ballot paper signifies the desire of the voter.

10. In my view, it has to be concluded upon inspection of the concerned ballot paper as to whether the intention or desire of the voter is visible. I have given a look to the concerned ballot paper. A zigzag line appeared in the box and does not signify anything. It could have appeared on account of inadvertence. The learned Advocate for the petitioner, upon viewing the ballot paper, has not contended that the zig-zag line was a cross line and was later on altered to indicate a right sign. In my view, a clear right sign (tick

mark √) appears on the said ballot paper which indicates that the concerned voter desired to vote in favour of the Motion.

11. The view therefore expressed by the Division Bench in the Dattatraya Balkrishna Kulkarni's case (supra) and the view expressed by Lord Campbell in Liverpool Borough Bank Vs. Turner (1861) 30 L.J.Ch. 379 applies to this case. I am therefore of the view that the concerned ballot paper clearly indicates that the voter desired to vote in favour of the Motion by assigning a right sign mark (√) on the concerned ballot paper.

12. In the light of the above, the vote count in favour of the "No Confidence Motion", as recorded by the concerned authority, is sustainable. The motion can therefore be held to have been passed by 6:2 vote count.

13. In the light of the above, I do not find that the impugned resolution dtd. 15/09/2014 or the impugned order dtd.28/11/2014 could be termed as being unsustainable.

14. As such, this petition is devoid of merit and is therefore dismissed.

15. The original ballot papers, (8) in number, are handed over to the Registry alongwith the entire R & P, which shall be returned to the concerned Tahsildar in a sealed envelope forthwith.

(RAVINDRA V. GHUGE, J.)