

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9315 OF 2014

Pratiksha Pravin Raut	..	Petitioner
VS.		
Additional Collector, District Raigad & Ors.	..	Respondents

Mr. C. G. Gavnekar for Petitioner.
Ms Aparna Vhatkar – AGP for Respondent Nos. 1 and 2.
Mr. Pratap Patil for Respondent No. 4.

CORAM : M. S. SONAK, J.
DATE : 03 FEBRUARY, 2015

ORAL JUDGMENT :-

1] Rule was issued in this petition on 26 August 2014 and the same was made returnable in the last week of September 2014. The matter has today come up for final disposal.

2] The challenge in this petition is to the order made by the Additional Commissioner, Konkan Division allowing the appeal instituted by the respondent no. 4, in the matter of her election as a Sarpanch of the Gram Panchayat Chaul, Alibag.

3] The facts in brief, in which the aforesaid challenge arises are as follows :

(A) The elections to the post of of Sarpanch and Up-Sarpanch

were held on 5 March 2014, under the supervision of the respondent no. 3;

(B) At the election, there was demand for conduct of election by ballot. Accordingly, the respondent no. 3, prepared a necessary ballots and the same were furnished to the 17 members of the Panchayat;

(C) From the ballot, it is seen that there was a contest between the petitioner and the respondent no. 4 for the post of Sarpanch;

(D) At the election, eight votes were tendered in favour of the petitioner and the eight votes in favour of the respondent no. 4. One of the votes was declared as invalid. In terms of the Bombay Village Panchayats (Sarpanch and Up-Sarpanch) Election Rules 1964 ("1964 Rules"), in case of equality of valid votes, the result of the election is to be decided by a lot to be drawn by the Presiding Officer in such manner as he may determine;

(E) Accordingly, a lot was drawn and the respondent no. 4 was declared as elected to the post of Sarpanch of the Panchayat.

(F) The petitioner, raised a dispute in terms of Section 33(5) of the Bombay Village Panchayats Act, 1958 ("said Act") before the Collector. The case of the petitioner was that the vote in her favour was incorrectly declared as invalid;

(G) The Collector, by order dated 13 May 2014 upheld the petitioner's contention, declared the election of the respondent no. 4

as invalid and finally issued directions for fresh conduct of elections to the post of Sarpanch;

(H) The respondent no. 4 appealed against the Collector's order dated 13 May 2014 to the Additional Commissioner, who has by the impugned order dated 9 July 2014 allowed the appeal and set aside the Collector's decision dated 13 May 2014;

(I) Hence, the present petition.

4] Mr. Gavnekar, the learned counsel for the petitioner submitted that the 1964 Rules make no provisions concerning a ballot paper and record of vote thereon for the purpose of elections to the post of Sarpanch and Up-Sarpanch. In the minutes maintained by the respondent no. 3, there is a clear overwriting and fabrication so as to indicate that instructions had been issued to the members of the Panchayat that the vote had to be by means of a tick mark in the box /square indicated against the name of the candidate. In the present case, there was a tick mark as against the name of the petitioner, though not in the box in front of the petitioner's name. The perusal of the ballot would make it clear that the intention of the voter was clearly to tender a vote in favour of the petitioner. In the absence of any statutory rules as well as ambiguity, such vote could never have been rejected. The Collector, therefore rightly upheld the petitioner's objections. The Additional Commissioner however,

without any tangible reasons and by ignoring the settled position of law, has reversed the Collector. For all these reasons, Mr. Gavnekar submitted that this Court ought to interfere with the decision of the Additional Commissioner.

5] Mr. Pratap Patil, the learned counsel for the respondent no. 4, at the outset submitted that the Bombay Village Panchayat Election Rules 1959 ("1959 Rules") are not applicable for elections to the post of Sarpanch and Up-Sarpanch, However, if the same are to be applied or the principles laid down therein are to be applied, then particular reference shall have to be made to Rule 33 of the 1959 Rules which provides for the grounds for rejection of ballot papers. One of the grounds for rejection of ballot papers is where it bears any mark or writing by which a voter can be identified. In the present case, the learned counsel pointed out that the voter in question has not only failed to put tick mark in the box opposite the name of the candidate, but further the voter has put a mark 'C' instead of a tick mark. Accordingly, the learned counsel submitted that on basis of such a mark, the voter could be easily identified and this was sufficient reason for rejection of the ballot paper. The learned counsel further pointed out that elections to the post of Sarpanch and Up-Sarpanch were held on the same date and the same time. There was no difference with regard to the voting

pattern for the two posts Sarpanch and Up-Sarpanch. Neither the petitioner nor the candidate who lost the election of Up-Sarpanch have chosen to question the election of Up-Sarpanch. This implies that the petitioner has accepted that a similar vote for the election of Up-Sarpanch was validly rejected. The petitioner, in such circumstances, cannot be permitted to approbate and reprobate. The petitioner was estopped from raising any dispute with regard to her election. For all these reasons, the learned counsel submitted that this Court ought not to interfere with the impugned order in the exercise of its extra ordinary jurisdiction.

6] Ms Aparna Vhatkar, the learned AGP by adverting to the affidavit filed by and on behalf of the respondent nos. 1 and 2 submitted that the Presiding Officer rejected the ballot in question, on the ground that the mark was not in the box prescribed and further the mark was not a tick mark.

7] Rival contentions now fall for my determination.

8] The procedure for election of Sarpanch and Up-Sarpanch is laid down in Section 33 of the said Act and the 1964 Rules. The perusal of the provisions would indicate that normally such election has to be by show of hands. If, however, any member at the

meeting specially convened for such election so desires, the voting shall be by ballot. The candidate who obtains highest number of votes shall be declared to have been duly elected as Sarpanch or Up-Sarpanch as the case may be. When any equality of votes is found to exist between any or two more candidates and the addition of one vote will entitle any of them to be declared as Sarpanch or Up-Sarpanch, the determination of the candidate to whom such additional vote shall be deemed to have been given shall be made by the lot to be drawn by the Presiding Officer in such manner as he shall determine. There are no provisions with regard to the manner in which a ballot paper is to be prepared and for recording of votes thereon. Similarly, there are no provisions as to circumstances, in which the Presiding Officer would be entitled to reject the votes.

9] Apart from the provisions contained in Section 33 of the said Act and the 1964 Rules, there are however the Bombay Village Panchayat Election Rules of 1959. These Rules do not ipso facto apply for elections to the post of Sarpanch or Up-Sarpanch. These Rules basically apply for election of the members to a Panchayat, by which the Panchayat is constituted. The learned counsel for the petitioner however made reference to the 1959 Rules, for the purposes of importing the principles set out therein to the fact situation of the present case.

10] Rule 23 of the 1959 Rules is entitled '*Recording of votes*'. Sub clause (v) thereof provides that a voter shall make a mark on the ballot paper with the instrument supplied for the purpose on or near the symbol of the candidate for whom he intends to vote so however that no part of the mark so made shall appear in the space provided for other candidate. The voter shall thereafter fold the marked ballot paper into the ballot box and without undue delay leaving the polling room. Rule 33 provides for ground for rejection of ballot papers. Sub clause (a) provides that a ballot paper shall be rejected if it bears any mark or writing by which a voter can be identified.

11] In the present case, there is no necessity to go into the controversy as to whether the minutes of the meeting were tampered or were over written by the Presiding Officer, in the matter of determination of the procedure for elections. No doubt, perusal of the minutes does indicate that the portion with regard to putting the tick mark in the box has been inserted between the lines. However, there is no necessity to go into the issue as to whether this constitutes tampering or overwriting. This is because, admittedly there are no statutory rules in the matter of record of votes or grounds for rejection of ballots in so far as the elections to the post

of Sarpanch and Up-Sarpanch are concerned. Besides, even if we proceed on the basis of the minutes as they stand, the same may not make significant difference to the principle involved in the present case, namely, whether there is anything in the ballot paper, which renders the intention of the voter either uncertain or ambiguous.

12] The ballot in question has been exhibited at page 15 to the memo of petition. Perusal of the same indicates that as against the name of the petitioner there is a mark. Such mark is in fact very close to the name of the petitioner, though not in the box in front of the name of the petitioner. The mark can resemble a tick mark, though from some perspective, it may also resemble a mark of 'C'. One thing however is extremely clear i.e. that the voter in question intended to vote for the petitioner. There is neither any uncertainty or ambiguity on this score. So also, based upon the styles adopted by the voters, it cannot be said that the mark in question is not at all a tick mark but rather, the same is a mark resembling 'C'. There is nothing that can be deduced from the ballot paper that the intention behind making such a mark was basically to disclose the identity of the voter. Accordingly, there was no justification for rejecting the ballot paper, particularly since the irregularity thereof, if at all, was not of such nature as would create some sort of uncertainty or

ambiguity in the matter of expression of the voter's intention. The Collector was therefore right in setting aside the election of the respondent no. 4 on the basis that the vote tendered in favour of the petitioner was wrongly rejected.

13] The Division Bench of this Court in the case of *Dajiba Gurunath Gavane vs. Sangappa Sharanappa Patil*¹ in the context of provisions of Bombay Village Panchayats Act, 1958 and the 1959 Rules has held that if the intention of the voter to vote for a particular candidate clearly appears from the way the ballot paper is marked, then such vote should not be rejected on the ground that the mark indicating the vote is indistinct or made more than once. This observation is in the context of Rules 23 and 33 of 1959 Rules. Second proviso to Rule 33(1) in terms, provides that a ballot paper shall not be rejected merely on the ground that the mark indicating the vote is indistinct or made more than once, if the intention that the vote shall be for a particular candidate merely appears from the way the paper is marked. Although, Mr. Pratap Patil, the learned counsel for the respondent no. 4 is right in his submission 1959 Rules do not ipso facto apply to elections for the post of Sarpanch and Up-Sarpanch, nevertheless the principles laid down therein, cannot be foreign to such an election. In any case, even if we have to go by general principles, then in the absence of

1 1966 Mh. L. J. 804

any statutory provisions, it is appropriate to accept the position that where the intention of the voter clearly appears from the way the paper is marked, then such a ballot paper should not be rejected on the ground that the mark indicating the vote is indistinct. This in fact takes care of the submission that the tick mark resembles the letter 'C'.

14] Further, in the facts and circumstances of the present case, there is absolutely no material to infer that the voter by making the indistinct mark, (if at all), which by itself, is not uncertain or ambiguous, intended to disclose his or her identity. The proposition canvassed is based upon surmises and conjectures, which are by no means sufficient to commend acceptance.

15] The perusal of the impugned order would indicate that the Additional Commissioner has not appreciated the entire issue in the proper legal prospective. The Additional Commissioner failed to pose the correct questions to himself and consequently has arrived at conclusion, which is legally untenable. In contrast, the Collector upon, due consideration of the facts and law, had rightly set aside the election of the respondent no. 4 and issued directions to conduct fresh elections.

16] There is no merit in the contention based upon so-called approbation and reprobation. The petitioner, who was a candidate for the post of Sarpanch, was not bound to challenge the result of the elections to the post of Up-Sarpanch. The circumstance that the candidate who lost the elections to the post of Up-Sarpanch, may have not deemed it appropriate to challenge such result, surely cannot operate as some kind of estoppel against the petitioner.

17] In view of the aforesaid position, Rule is made absolute in terms of prayer clause (a) to this petition. Decision of the Collector dated 13 May 2014 shall be complied with by the concerned Authorities.

18] At this stage, the learned counsel for the respondent no. 4 seeks a stay on the implementation of the order dated 13 May 2014 made by the Collector for a period of eight weeks, as the respondent no. 4 seeks to take legal recourse against a judgment and order now pronounced, by approaching the Supreme Court.

19] Taking into consideration, the circumstance that the Additional Commissioner had held in favour of the respondent no. 4, there shall be no fresh elections held in pursuance of the Collector's order dated 13 May 2014, for a period of four weeks from today. If during

this time, the respondent no.4 is unable to obtain any interim orders, the Authorities to proceed with the election process as directed by the Collector's order dated 13 May 2014 and to complete the same within a period of two weeks.

(M. S. SONAK, J.)

Chandka