

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.817 OF 2014

Mr. Rupesh Ravindra Sakharkar ..Petitioner

Vs

Mr. Narendra madhukar
Kambekar and Anr. .. Respondents

Mr.Uday P Warunjikar, Advocate for Petitioner.

Mr. Sanjeev A Sawant a/w Mr Ketan Joshi, Advocate for
Respondent no.1.

Mr D.S.Mondkar a/w S.B.Shetye, Advocate for Respondent no.2.

CORAM : R.G.KETKAR,J.
RESERVED ON : 29.4.2016
DELIVERED ON: 06/05/2016

PC:

1. Heard Mr. Uday Warunjikar, learned counsel for the petitioner, Mr. Sanjeev Sawant, learned counsel for respondent no.1 and Mr. D.S.Mondkar, learned counsel for the respondent no.2 at length.

2. By this petition under Article 227 of the Constitution of India, the petitioner has challenged the Judgment and order dated 29.11.2013 passed by the learned Principal District Judge, Ratnagiri in Election petition No.4 of 2011. By that order, the learned District Judge partly allowed the Election Petition instituted by respondent no.1, hereinafter referred to as 'election petitioner', and set aside the election of the petitioner, hereinafter referred to as 'returned candidate' and directed to

conduct fresh election. Aggrieved by this decision, the returned candidate has instituted this petition.

3. By order dated 29.4.2014, this Court admitted the petition by issuing Rule. Rule was made returnable after six months. In the light of the decision of the Apex Court in the case of Indira Nehru Gandhi Vs Raj Narain, 1975 (2) SCC 159, following interim order was ordered to remain in force.

- i) The petitioners shall be entitled to attend the Municipal Council meetings and sign the register.
- ii) However, the petitioners shall not take part in the proceedings of the said meetings or vote or draw any remuneration.

4. Aggrieved by this interim order, the returned candidate carried the matter to Apex Court. By order dated 16/12/2015, the Apex Court disposed of the S.L.P and requested this Court to dispose of this petition at the earliest. In view thereof, Petition is taken up for final hearing. The relevant and material facts giving rise to filing of the present petition, briefly stated, are as follows.

5. The controversy in this petition is in respect of general elections and more particularly Ward No.4 of Rajapur Municipal Council (for short, 'Council'). Ward No.4 was divided into five constituencies, viz. A, B, C, D, E and from each constituency, one candidate was to be elected. The election petitioner filled his nomination from Ward no.4A. The returned candidate and two

other candidates (S/Shri Prakash Govind Arekar and Dashrath Tukaram Dudwadkar) also filled their nominations. After scrutiny, they were declared as validly nominated candidates. The polling was held on 11.12.2011 through Electronic Voting Machines (EVM). On 4.12.2011, the returning officer had fed data. In that data, details of the candidates and their symbols were also included. Each voter was entitled to cast vote for one candidate in each constituency. Accordingly, each voter in Ward No.4 was entitled to cast one vote each, namely, in all five votes. For the first time, the system of casting vote by a voter in favour of five candidates was introduced by the Election Commissioner. However, the requisite information and training was not given to the voters and more particularly voters from rural area.

6. In Constituency 4A, there were 4 polling centers, namely 1/4, 2/4, 3/4, and 4/4. In all 1555 votes were recorded in the EVM in Ward No.4. The counting took place on 12.12.2011 at Rajapur. After counting, 1542 votes were declared valid. Out of votes so declared, election petitioner secured 602 votes. The returned candidate secured 603 votes, Mr. Prakash Govind Arekar secured 225 votes and Mr. Dashrath Tukaram Dudwadkar secured 112 votes. As the returned candidate secured only one more vote than the election petitioner, he was declared elected.

7. In paragraph 7, the election petitioner contended that after

collecting further information, it transpired that 1555 voters were registered in Ward No.4. However, the Returned Officer considered only 1542 votes and declared the result. The voting and counting of votes through EVM was not properly conducted. While registering the votes in favour of the election petitioner, some votes were recorded against other candidates. The Election Petition was, therefore, instituted under section 21 of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 (for short, 'Act').

8. In paragraph 8, the election petitioner set out the grounds for setting aside the election of the returned candidate which is as under.

A) In Ward No. 4, 1555 voters were registered through EVM. Not a single vote was declared invalid. Thus, there should have been 1555 valid votes. However, only 1542 votes were recorded. This clearly shows that the Returning Officer without taking into account 13 valid votes, declared the result of the election which is illegal. This is especially when the returned candidate secured one more vote than the election petitioner. Only on this count, the election is liable to be set aside as it is evident that the Returning Officer wrongly declared the returned candidate as elected.

B) After obtaining information by the election petitioner in

respect of Ward No.4, the votes recorded in four polling centres, were 1531, 1533, 1532, 1542 which shows that 95 votes were not recorded (24, 22, 23, 13 and 13). This clearly shows that the procedure followed by the Returning Officer while registering votes through EVM was faulty.

C) During demonstration of Ardhapur Nagar Panchayat Election in Nanded District, it transpired that even if any button was pushed, the said vote was recorded in favour of a particular party. In that connection, complaint was lodged to Election Commission by Shiv Sena. The Government has, however, not given any clarification. This shows that EVM is faulty and not reliable.

D) On 4.12.2011, candidates were invited at the time of data feeding in EVM. At that time, nobody was aware as to whether data was properly fed or not. For explaining technicalities and removal of doubts, no trained person was present. Election petitioner bonafide entertained doubt that the requisite information about the election petitioner may not have been fed.

E) For the first time, the system of casting vote by a voter in favour of five candidates were introduced by the Election Commission. However, voters in particularly voters from rural area, were not given proper instructions. Thus, at the time of actual voting even though voter desired to cast vote in favour of

the election petitioner, he may have cast vote in favour of other candidate and to that effect, voters have made complaint to him. After counting was over, it transpired that there was substance in the complaint.

9. The returned candidate filed Written Statement dated 12.4.2012 at Exhibit-19 resisting the petition. The election petitioner filed affidavit of evidence in lieu of examination in chief on 2.4.2013 reiterating the contentions raised in the Election Petition. He was cross examined. Returning Officer filed affidavit of evidence in lieu of examination-in-chief dated 24.6.2013 at Exh.34 and he was cross examined. On the basis of evidence on record, the learned District Judge allowed the Election Petition. It is against this order, the returned candidate has instituted the petition.

10. In support of this petition, Mr. Warunjikar submitted that the learned District Judge committed serious error in allowing the Election Petition. He submitted that the Election petition is liable to be dismissed on the ground that all material facts and material particulars are not set out therein. He submitted that the election petitioner has to plead all material facts in support of the case put up by him. Since the object and purpose is to enable the opposite party to know the case he has to meet with, in the absence of pleading, a party cannot be allowed to lead evidence.

Failure to state even a single material fact will entail dismissal of the petition. He submitted that though the election petitioner has contended that in all 1555 voters were registered in Ward No.4, there is no pleading that all these voters who came to vote in Ward No.4, had in fact voted. In support of this submission, he relied upon the decision of Jitu Patnaik Vs. Sanatan Mohakud, (2012) 4 SCC 194.

11. Mr. Warunjikar also relied upon Section 21 (11A) of the Act. He submitted that the election is called in question only on the ground of irregularity allegedly committed by Returning Officer. There is no allegation that irregularity or informality has corruptly caused by the Returning officer. He further submitted that there is no allegation about error committed by the Returning Officer charged with carrying out the provisions of Section 9(2)(b) or (c) or of the Rules made under Section 17. In view of Section 21(11A), the learned District Judge was not justified in setting aside the election.

12. On the other hand, Mr. Sanjeev Sawant supported the impugned order. He submitted that the Returning Officer is entrusted with a duty to ensure that there is purity in the election process. He submitted that the Returning Officer has committed several errors vitiating the entire election process. He relied upon the decision of this Court in the case of Bhaskar s/o

Laxmanrao Kadam Vs, The Additional Collector, 2013(6) Mh.L.J. 613. He submitted that the basic postulate is free and fair election.

13. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. I have already dealt with grounds set out by the election petitioner in paragraph 8 of the petition. A close analysis of the grounds set out therein shows that there is no pleading that 1555 voters who were registered in respect of Ward No.4 and who came to vote, in fact, voted. In the case of Jitu Patnaik (supra), the Apex Court has referred to various decisions. In paragraph 45, it is observed that it is imperative for an election petition to contain a concise statement of the material facts on which the election petitioner relies. All basic and primary facts which must be proved at the trial by a party to establish the existence of a cause of action or defence are material facts. The bare allegations are never treated as material facts. The material facts are such facts which afford a basis for the allegations made in the election petition. In paragraph 46, it was observed thus:

46. In Virender Nath Gautam, 2007 (3) SCC 617, this Court referred to the leading case of Philipps v. Philipps and Ors. (1878) 4 Q.B.D. 127 (CA) and the subsequent decision in Bruce v. Odhams Press Limited (1936) 1 K.B. 697 that referred to Philipps (1878) 4 Q.B.D. 127 and observed in

paragraphs 34 and 35 (Pg. 629) of the Report as follows:

“34. A distinction between "material facts" and "particulars", however, must not be overlooked. "Material facts" are primary or basic facts which must be pleaded by the Plaintiff or by the Defendant in support of the case set up by him either to prove his cause of action or defense. "Particulars", on the other hand, are details in support of material facts pleaded by the party. They amplify, refine and embellish material facts by giving distinctive touch to the basic contours of a picture already drawn so as to make it full, more clear and more informative. "Particulars" thus ensure conduct of fair trial and would not take the opposite party by surprise.

35. All "material facts" must be pleaded by the party in support of the case set up by him. Since the object and purpose is to enable the opposite party to know the case he has to meet with, in the absence of pleading, a party cannot be allowed to lead evidence. Failure to state even a single material fact, hence, will entail dismissal of the suit or petition. Particulars, on the other hand, are the details of the case which is in the nature of evidence a party would be leading at the time of trial.”

14. As noted earlier, there is no pleading that all 1555 voters registered in Ward No.4 who came to vote in fact voted. As observed by the Apex Court in paragraph 50 in Jitu Patnaik case (supra), such fanciful imagination of proof at the trial cannot be a substitute of the pleading of material facts about the total number of voters who came to vote and in fact voted. In my opinion, the pleading of material facts with regard to this aspect is also incomplete. In paragraph 54, the Apex Court referred to decision in Samant N Balkrishna V George Fernandez, (1969) 3 SCC 238 which dealt with the requirement in an election petition

as to the statement of material facts and consequences of lack of such disclosure. That omission of even a single material fact leads to an incomplete cause of action and statement of claim becomes bad. Applying the tests laid down by the Apex Court, it has to be held that the election petition has omitted to plead material facts and as such is liable to be dismissed.

15. Apart from the above, Section 21 (11A) of the Act reads thus:

21. Disputes in respect of election nomination of Councillors:

(11A) If the validity of any election is called in question only on the ground of an error made by an officer charged with carrying out the provisions of clauses (b) or (c) of sub-section (2) of section 9 or of the rules made under section 17 or of an irregularity or informality not corruptly caused, the Judge shall not set aside the election.

It is common ground between the parties that validity of the returned candidate is not called in question on the ground of an error made by a Returning officer charged with carrying out the provisions of section 9(2)(b) or (c) or that of the rules made under section 17. The election is called in question only on the ground of irregularity or informality committed by the Returning Officer. As the only ground on which the validity of election is called in question, the learned District Judge was not justified in setting aside the election as there are no allegations that the said

irregularity or informality was corruptly caused by the Returning officer.

16. For all these reasons, impugned order cannot be sustained is liable to be set aside. Hence, Petition succeeds. Rule is made absolute in terms of prayer clause (A) with no order as to costs. Election Petition No. 4 of 2011 stands dismissed.

17. At this stage, Mr. Joshi orally applies for continuation of the interim order dated 29.04.2014. On 29.04.2014, this Court passed the following interim order:

- “i) The petitioners shall be entitled to attend the Municipal Council meetings and sign the register.
- ii) However, the petitioners shall not take part in the proceedings of the said meetings or vote or draw any remuneration.”

Mr. Joshi assures that petitioner will not apply for further extension of the interim order.

Mr. Pilankar opposes the oral application on the ground that interim order was passed in favour of the petitioner pending the Petition. As the Petition is finally allowed and the Election Petition is dismissed, the interim order should not be continued.

18. Having regard to the fact that the interim order is operating since 29.04.2014 as also S.L.P. preferred by the petitioner against this order was dismissed and having due regard to the fact that respondent No.1 intends to

challenge this order in the higher Court, I find that the request made by Mr. Joshi is reasonable. Hence, for the period of 8 weeks from today, the interim order dated 29.04.2014 shall remain in force, with clear understanding that no application for further extension of interim order shall be entertained.

(R.G.KETKAR, J.)