

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 818 OF 2014

Mr. Hanif Yusuf Kazi	...Petitioner
<i>Versus</i>	
Mr. Sanjay Manohar Pawar	
And Ors.	...Respondents

WITH
Writ Petition NO. 822 OF 2014

Mr. Hanif Musa Kazi	...Petitioner
<i>Versus</i>	
Shri. Ashok Pandurang Gurav	
And Ors.	...Respondents

WITH
Writ Petition NO. 823 OF 2014

Mrs. Sneha Sanjay Kuveskar	...Petitioner
<i>Versus</i>	
Mrs. Kalyani Kalyan Rahate	
And Ors.	...Respondents

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Mr. Uday P. Warunjikar, Advocate for the Petitioners.
Mr. Sanjiv A. Sawant, Advocate for Respondent No.1
Mr. Sachindra B. Shetye, Advocate for Respondent No.2.

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CORAM : R. G. KETKAR, J.

DATE : 27th APRIL, 2016

P.C.

1. Heard Mr. Uday Warunjikar, learned Counsel for the petitioners, Mr. Sanjiv A. Sawant, learned Counsel for Respondent No.1 and Mr. Sachindra Shetye, learned Counsel for respondent No.2, at length.

2. By these petitions under Article 227 of the Constitution of India, the petitioner in each of the petition has challenged the judgment and order dated 29.11.2013 passed by learned Principal District Judge, Ratnagiri in Election Petitions instituted under Section 21 of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 (for short, 'Act') thereby setting aside the elections of the petitioners as Municipal Councilor of Rajapur Municipal Council (for short, 'Council') and directing holding of the fresh elections.

3. The petitions were admitted on 29.4.2014 by issuing Rule. Rule was made returnable after six months. In the light of the decision of the Apex Court in **Indira Nehru Gandhi vs. Raj Narain, 1975 DGLS (Soft.) 206**, following interim order was ordered to be remained 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 decision, the petitioners approached the Apex Court. By order dated 16.12.2015, the appeals preferred by the petitioners were allowed and the petitioners are permitted to participate in the meetings of Rajapur Municipal Council and to vote therein. The petitioner is also entitled to draw his remuneration. Apex Court directed this Court to dispose of the election petition at the earliest possible. In view thereof the petitions are taken up for final hearing. As common question of law and facts arise in these petitions, the same can conveniently be disposed of by this common order. For appreciating the controversy between the parties, the facts from Writ Petition No.822/2014 are taken into consideration.

5. Respondent No.1, hereinafter referred to as 'election petitioner' had instituted Election Petition No.1/2011 in District Court, Ratnagiri under Section 21 of the Act *inter alia* challenging the election of the petitioner, hereinafter referred to

as the 'returned candidate'. The election petitioner has instituted the petition against respondent No.2, Returning Officer, returned candidate and one Mr.Vivek Sitaram Gurav. The election petitioner contended that Ward No.3 was divided in four constituencies and one candidate each was to be elected from these four constituencies. Election petitioner contested the election from Ward No.3D. The voting took place on 11.12.2011. As the election petitioner secured highest number of votes, he was declared elected. In the election petition, it was contended that the Returning Officer has committed various irregularities during the election process. Amongst others, it was contended that the requisite information as also training how to operate the Electronic Voting Machine [for short, 'EVM'] was not given to the voters coming from rural area. In Ward No.3D there were four polling centres, namely, 1/4 to 4/4. In Ward No.3, 1375 voters had cast votes. In polling centre No.4/4, one voter did not cast the vote by filling in requisite application and declined to cast vote i.e. None Of The Above [NOTA]. Thus, in all 1374 voters had cast their votes through EVM. The counting took place on 12.12.2011 at Rajapur. The Returning Officer declared that 1344 votes are valid. Out of these 1344 valid votes, the election

petitioner, returned candidate and Mr.Vivek Sitaram Gurav [respondent No.3 in Election Petition], secured votes as under :

Sr. No.	Name	Votes secured
1.	Election Petitioner	435
2.	Returned Candidate	656
3.	Mr.Vivek Sitaram Gurav	253
	Total	1344

6. As the returned candidate secured highest number of votes, he was declared elected.

7. In paragraph-8 of the election petition, it was asserted that 1374 voters had cast their votes through EVM. In other words, 30 votes were declared as invalid. The Returning Officer declared the result of election without verifying and considering 30 invalid votes. Election Petitioner obtained information and found that in three polling centres, 1374 voters had cast votes as 1344, 1349, 1361 respectively. Thus in Ward No.3, 98 votes were not registered [^A(1374-1344=30), ^B(1374-1349=25), ^C(1374-1361=13) = 68 (i.e. total of A+B+C=30+25+13=68) + 30 votes which were declared invalid = 98]. Thus, the Returning Officer has adopted defective procedure while recording the votes

through EVM. Election petitioner made reference to Ward No.4/A where similar irregularities were committed. Election petitioner also made reference to the demonstration conducted while election of Ardhapur Nagar Parishad in Nanded District to contend that even if any button is pushed, the vote was given to a particular party. To that effect, complaint was lodged with Election Commission by Shiv Sena. However, no explanation is given by the Government. Election petitioner therefore asserted that the votes recorded by EVM were invalid and not reliable.

8. Election petitioner further contended that on 4.12.2011 candidates were called for giving information about EVM. However, at that time nobody was aware as to whether any data was properly fed in EVM or not. At that time, the trained person was not present for explaining the technicalities as also for removal of doubts. Election petitioner, therefore, entertained bonafide doubt that the data was not properly fed in EVM. Election petitioner further contended that for the first time, the use of EVM was made in the election where one voter can cast votes to the candidates from four constituencies. However, the voters and particularly votes from rural area were not given

necessary instructions. Thus even though the voter desired to cast vote in favour of the election petitioner, they may have cast their votes in favour of other candidate and accordingly complaints were made by the voters to the Election Commission. After the counting was over, it transpired that the complaint so made had substance. Election petitioner, therefore, contended that election may be set aside and the election petitioner may be declared to have been elected.

9. Returning Officer filed written statement on 12.4.2012 at Exhibit-18 resisting the election petition. By filing purshis at Exhibit-19, the returned candidate adopted written statement of the Returning Officer. Election petitioner filed affidavit of evidence in lieu of examination in chief at Exhibit-22 on 9.7.2012. He was cross-examined by returned candidate and also by Mr.Vivek Gurav. Returning Officer also filed affidavit in lieu of examination-in-chief at Exhibit-47 on 24.6.2013. He was cross-examined. After considering the evidence on record, by the impugned order, learned District Judge partly allowed the election petition and set aside the election of returned candidate and ordered fresh election. It is against this order, returned

candidate has instituted this Petition.

10. As noted earlier, on 29.4.2015, Rule was issued by this Court, returnable after six months. In the meantime, interim order, extracted hereinabove, was granted. Aggrieved by that order, returned candidate approached the Apex Court. Apex Court passed the following order :

“ Leave granted.

Learned counsel for the appellant states, that even if the votes which are subject matter of discrepancy are added to the votes caste in favour of respondent No.1, the appellant would still be the elected candidate. Learned counsel for respondent No.2 confirms the instant position.

In view of the above, we consider it just and appropriate set aside the impugned order, and allow the appellant to participate in the meetings of the Municipal Council, and to vote therein. He shall also be entitled to draw his remuneration.

The High Court is requested to dispose of the Election Petition at the earliest possible.

The appeals are allowed in the above terms.

As a sequel to the above, all pending interlocutory applications also stand disposed of.”

11. Mr. Warunjikar submitted that election petitioner has

alleged that the election petitioner came with the case that in all 1374 voters had cast their votes. Out of these 1374 votes, 1344 votes were held to be valid and remaining 30 votes were declared as invalid. Returned candidate had secured 656 votes. As against this election petitioner secured 435 votes and Mr.Vivek Gurav secured 253 votes. Even if all 30 votes declared invalid are held to be valid and are added to the votes secured by election petitioner, still he will secure 465 votes (435+30). In other words, as election petitioner has not secured the highest number of votes, he cannot be declared elected.

12. Mr. Warunjikar relied upon Section 21(11A) of the Act and submitted that 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. He submitted that in the present case, no allegations are made falling in section 9(2)(b) or (c) or pertaining to Rules made under Section 17 of the Act. In other words, the case made out by the petitioner falls only in the

residuary category, namely, “an irregularity or informality not corruptly caused”. He therefore submitted that in view of Section 21(11A) of the Act, election cannot be set aside only on this ground. For all these reasons, he submitted that the petitions deserve to be allowed.

13. On the other hand Mr.Sawant supported the impugned order. He submitted that even if 30 votes are added, votes secured by the election petitioner and election petitioner has not secured highest number of votes, for maintaining the purity in the election process, no interference with the impugned order is called for. He relied upon the orders dated 6.1.2007 and 5.12.2011 issued by the State Election Commission.

14. I have considered rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, in the present case returned candidate secured 656 votes, election petitioner secured 435 votes and Mr.Vivek Gurav secured 253 votes. Even accepting the allegations made by the election petitioner in the election petition to be true and correct, 30 votes were declared invalid are treated valid and are added to the votes secured by election

petitioner, still he can not be declared as elected as still he does not secure highest number of votes.

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

“21. Disputes in respect of election nomination of Councillors :

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(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 subsection (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.”

16. It is common ground between the parties that the case made out by election petitioner does not fall either in [1] an error made by Returning Officer charged with carrying out the provisions of section 9(2)(b) or (c); or [2] of the Rules made under Section 17 of the Act. The case made out in the election petitions falls in the category of an irregularity or informality not corruptly caused. Perusal of the allegations made in the petition

does not remotely suggest that election petitioner has alleged that irregularity or informality is corruptly caused by Returning Officer.

17. As far as Writ Petition No.818/2014 is concerned, in that case the returned candidate secured 514 votes and the election petitioner secured 472 votes. The grievance of the election petitioner was that without considering 13 votes, Returning Officer declared the returned candidate as elected. Even if 13 votes are added to the votes of election petitioner, namely, $472+13=485$, still the election petitioner cannot be declared as elected candidate. Even in that event, returned candidate has to be declared as elected.

18. Insofar as Writ Petition No.823/2014 is concerned, in that case the returned candidate secured 580 votes and the election petitioner secured 467 votes. The grievance of the election petitioner was that without considering 30 votes, Returning Officer declared the returned candidate as elected. Even if 30 votes are added to the votes of election petitioner, namely, $467+30=497$, still the election petitioner cannot be declared as elected candidate. Even in that event, returned

candidate has to be declared as elected.

19. In view thereof, I find that learned District Judge committed serious error in setting aside the election of the returned candidates and ordering fresh election. Hence, the impugned order deserves to be set aside thereby dismissing the election petition instituted by the election petitioner. Hence, the following order :

- [i] Impugned order dated 29.11.2013 in Election Petitions No.1/2011, 2/2011 and 3/2011 are quashed and set aside;
- [ii] Election Petitions No.1/2011, 2/2011 and 3/2011 filed by the election petitioners are dismissed.
- [iii] Rule is made absolute in above terms with no order as to costs. Petitions are disposed of. Order accordingly.

(R. G. KETKAR, J.)