

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.10168 OF 2013

Sachin Arun Thakur and others ... Petitioners
Vs.
Pramod Eknath Kadu and others ... Respondents

WITH
WRIT PETITION (ST.) NO.27306 OF 2013

Ramnath Manilal Thakur and others ... Petitioners
Vs.
Dhanaji Mahadev Thakur and others ... Respondents

WITH
WRIT PETITION (ST.) NO.27310 OF 2013

Premnath Anant Thakur and others ... Petitioners
Vs.
Dashrath Mohan Thakur and others ... Respondents

Mr. Shreekant V. Gavand for Petitioners in all the Petitions.
Mr. Priyal G. Sarda for Respondent No.1 in all the Petitions.
Mr. S. D. Rayrikar, AGP for Respondent No.6-State in WP No.10168 of 2013.
Mr. A. R. Metkari, AGP for Respondent No.7-State in WP (St.) No.27306 and 27310 of 2013.

CORAM : R. G. KETKAR, J.
DATE : APRIL 1, 2016

P.C. :

Heard Mr. Gavand, learned Counsel for petitioners, Mr. Sarda, learned Counsel for respondent No.1 in all the Petitions, Mr. Rayrikar, learned AGP for respondent No.6-State in Writ Petition No.10168 of 2013 and Mr. Metkari, learned AGP for respondent No.7-State in Writ Petition (St.) No.27306 and 27310 of 2013 at length. Mr. Gavand orally applies for deleting respondents No.2 to 5 in Writ Petition No.10168 of 2013, respondents No.2 to 6 in Writ Petition (St.) No.27306 of 2013 and respondents No.2 to 6 in Writ Petition (St.) No.27310 of 2013 as they are not the contesting respondents. Leave as prayed for is granted. Amendment shall be carried out forthwith. Rule. Learned Counsel for

respective respondents waive service. At the request and by consent of the parties, Rule is made returnable forthwith and the Petitions are taken up for final hearing.

2. By these Petitions under Article 227 of the Constitution of India, petitioners have challenged the judgments and orders dated 10.06.2013 passed by the learned Civil Judge, Junior Division, Uran. By these orders, the learned trial Judge rejected the application made by the petitioners under Section 15 of the Maharashtra Village Panchayats Act (for short 'Act') read with Order VII, Rule 11 and Section 151 of the Code of Civil Procedure, 1908 (for short 'C.P.C.').

3. Writ Petition No.10168 of 2013 challenges the order dated 10.06.2013 passed by the learned trial Judge below exhibit-26 in Election Petition No.9 of 2012. Writ Petition (St.) No.27306 of 2013 challenges the order dated 10.06.2013 passed by the learned trial Judge below exhibit-27 in Election Petition No.7 of 2012. Writ Petition (St.) No.27310 of 2013 challenges the order dated 10.06.2013 passed by the learned trial Judge below exhibit-29 in Election Petition No.5 of 2012. As the common questions of law and facts are raised in these Petitions, the same can conveniently be disposed of by this common order. For appreciating the controversy raised between the parties, facts in Writ Petition No.10168 of 2013 are considered.

4. Respondent No.1, hereinafter referred to as 'election petitioner', has instituted Election Petition under Section 15 of the Act calling in question election of petitioners, who are returned candidates from Ward No.2 of Grampanchayat Dhutum, Taluka Uran, District Raigad. In paragraph 5 of the Petition, the election petitioner asserted that on 21.10.2012, General Elections of Grampanchayat Dhutum were held.

There are in all three Wards in the said Grampanchayat. From each Ward, three candidates are to be elected. Thus, in all, nine candidates are required to be elected. In so far as controversy in this Petition is concerned, it relates to election of Ward No.2.

5. In paragraph 6, election petitioner asserted that there are, in all, 451 voters in Ward No.2. Out of 451 voters, 411 voters exercised their franchise. election petitioner secured 181 votes and petitioner No.1 Sachin Arun Thakur secured 230 votes. Two seats were reserved for ladies (general) and on these two seats so reserved, petitioner No.2 – Nutan Samadhan Thakur secured 231 votes and petitioner No.3 – Vaishali Bhanudas Patil secured 233 votes and thus, they were declared as returned candidates.

6. In paragraph 8, election petitioner asserted that as per Rule 29 of Casting of Votes By Electronic Voting Machine in Grampanchayat Election Order, 2007, detachable memory is to be sealed. After confirming the votes polled by each candidate in the Control Unit of the voting machine and after recording the same in the prescribed form VM-4, Returning Officer has to remove the detachable memory from the Control Unit of the voting machine. He has to sign it and affix his stamp. Likewise, candidates who are present or their election agents, who are desirous of signing or affixing thumb impression on it, are permitted to either sign or affix their thumb impression. However, the Returning Officer will ensure that the votes recorded in the memory are not deleted.

7. election petitioner alleged that he requested the Returning Officer to seal memory card and obtain his signature whereupon the Returning Officer informed him that the election petitioner is not concerned with

the memory card. In fact Rule 29 requires the Returning Officer to obtain signatures of candidates, who are present or their election agents. However, the Returning Officer failed to discharge his duty. It is, therefore, necessary to enquire from the Returning Officer as to why he did not obtain signatures on the memory card. This clearly shows that the Returning Officer has corruptly caused irregularity and informality.

8. In paragraph 9, it is asserted that before commencement of voting, the Returning Officer gave information in respect of electronic voting machines to all the candidates and their agents. Only the information regarding number of votes secured by each candidate was furnished. No other information as to when the voting will commence and will end, was furnished. The election petitioner also brought to the notice of the Returning Officer that seal from one side of the electronic voting machine is removed. However, the Returning Officer did not take this aspect seriously. The election petitioner has, therefore, called in question elections of the petitioners.

9. The returned candidates filed application under Section 15 of the Act read with Order VII, Rule 11 and Section 151 of C.P.C. for dismissing the Election Petition on the ground that it does not disclose cause of action. By the impugned order, the learned trial Judge rejected the application.

10. Mr. Gavand submitted that in paragraph 4 of the impugned order, though it is observed that no cause of action is pleaded, the election petitioner has asserted that he has made application before the Returning Officer for recounting of votes. However, the said request was not acceded to. Whether the Returning Officer has discharged his duties properly or not can be decided only after recording the evidence. This

discloses cause of action for filing the Election Petition.

11. Mr. Gavand submitted that the Election Petition does not disclose cause of action and as such, is liable to be set aside. The Election Petition must disclose material facts. All basic and primary facts must be proved at the trial by a party to establish the existence or a cause of action or defence. Bare allegations cannot be treated as material facts. He submitted that the averments set out in paragraphs 8 and 9 do not set out all material facts and do not constitute cause of action for declaring election of the returned candidates to be void.

12. On the other hand, Mr. Sarda supported the impugned order. He submitted that the material facts have been pleaded in the Election Petition. Whether the Returning Officer has discharged his duties properly or not is a matter of evidence. The learned trial Judge, therefore, rightly rejected the applications.

13. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the election petitioner has called in question election of the returned candidates solely on the ground under Section 15(7) of the Act. Section 15(7) of the Act reads thus,

“(7) If the validity of any election is brought in question only on the ground of an error made by the officer charged with carrying out the rules made in this behalf under Section 176 read with sub-section (2) of Section 10 and Section 11, or of an irregularity or informality not corruptly caused, the Judge shall not set aside the election.”

14. A close analysis of paragraph 8 of the Petition shows that the election petitioner has merely alleged that Returning Officer has corruptly caused irregularity and informality. In paragraph 9, it is

alleged that the Returning Officer did not take the information furnished by the election petitioner seriously as regards removal of seal from one side of electronic voting machine. A close analysis of assertions made in paragraphs 8 and 9 of the Petition shows that the election petitioner has barely alleged that the Returning Officer did not discharge his duties properly. In the case of ***Jitu Patnaik Vs. Sanatan Mohakud*, (2012) 4 SCC 194**, the Apex Court has held in paragraph 24 that in long line of cases beginning from 1952, the Apex Court has stated time and again that right to contest the election or to question the election by means of the election petitioner is neither common law nor fundamental right. Instead, it is a statutory right regulated by the statutory provisions. In the said judgment, the Apex Court also dealt with the distinction between material facts and material particulars.

15. The Apex Court has held 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 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. The material facts are primary or basic facts which must be pleaded by the petitioner 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 Petition.

16. It is also material to note that as per Rule 35 of the Bombay Village Panchayat's Election Rules, 1959, after declaration of result is

made, a candidate or in his absence his election agent has to apply in writing to the Election Officer for a recount of all or any of the ballot papers already counted stating the grounds on which he demands such recount. Mr. Gavand submitted that no such application was made by the election petitioner. Mr. Sarda was not in a position to point out that in fact the election petitioner or his election agent has made any application in writing. In view thereof, the observations made in paragraph 4 by the learned trial Judge that the election petitioner demanded recount of the votes and that the Returning Officer did not accede to this request is not borne out from the record. Hence, the impugned orders cannot be sustained and are liable to be set aside and the applications made by the returning candidates at exhibit-26 in Election Petition No.9 of 2012, exhibit-27 in Election Petition No.7 of 2012 and exhibit-29 in Election Petition No.5 of 2012 deserve to be allowed and the Election Petitions instituted by the election petitioner deserve to be dismissed for want of cause of action. Hence, the following order:

- a. the impugned orders dated 10.06.2013 are quashed and set aside;
- b. the applications made by the returning candidates at exhibit-26 in Election Petition No.9 of 2012, exhibit-27 in Election Petition No.7 of 2012 and exhibit-29 in Election Petition No.5 of 2012 are allowed;
- c. the Election Petitions instituted by the election petitioners are dismissed for want of cause of action;
- d. Rule is made absolute in the aforesaid terms with no order as to cost.

(R. G. KETKAR, J.)