

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 4769 OF 2017

Shashikala Khiramnath Kale

..PETITIONER

VERSUS

**The State Election Commission
Through its Commissioner and Others**

..RESPONDENTS

....

Mr. V.D. Salunke, Advocate for petitioner.

Mr. S.T. Shelke, Advocate for Respondent Nos. 1 and 2.

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**CORAM : M.S. SANKLECHA, J.
DATED : 12th APRIL, 2017**

ORDER :

1. This petition under Articles 226 and 227 of the Constitution of India challenges the order dated 05th April, 2017 passed by the Returning Officer, Parbhani Municipal Corporation, Parbhani. The impugned order rejected the petitioner's request to change her constituency for election to the Parbhani Municipal Corporation from Ward No. 13-D as shown in nomination form to Ward No. 13-B. The Ward No. 13-D was reserved for women (open to all women) and Ward No. 13-B was reserved for women belonging to Backward Class of Citizens.

2. The petitioner's grievance is that the nomination form as filed by her by mistake indicated her constituency as Ward No. 13-D instead of Ward No.13-B. This mistake according to the petitioner is self evident and obvious from the various other details mentioned in the nomination form including her caste certificate and affidavit indicating her caste as backward caste furnished/filed alongwith her nomination form. This mistake was brought to the notice of the election officer by her on the date of the scrutiny. However, the application was rejected on the ground that the nomination form indicates her constituency as Ward No.13-D which is a constituency reserved only for woman irrespective of caste. The petitioner states that in terms of Schedule D of the Maharashtra Municipal Corporation Act, Election Rule in particular Election Rule 9(9) thereof provides that on the date of the scrutiny, the Returning Officer on examination of the nomination papers can reject the nomination paper on the ground specified therein. Rule 9(10) of the Rules of Schedule D specifically provides that the Returning Officer shall not reject nomination paper on the ground of any defect which is not of substantial nature. According to the petitioner in the context of the surrounding circumstances the mistake in not reflecting the correct constituency is not a defect of a substantial nature. Therefore the corrections should have been allowed and the petitioner permitted to contest from Ward No. 13-B instead of Ward No. 13-D.

3. In the above view, it is submitted that this Court should entertain this petition and as an interim measure, the petitioner may be allowed to contest the election subject to the final result of this petition.

4. As against the above, Mr. Shelke, learned Counsel for Respondent Nos. 1 and 2 points that the selection of Ward No. 13-D in the nomination form is not a mistake but is a chosen constituency when the nomination was filed as it is so mentioned at three places in the nomination form. Besides he raises an objection with regard to this Court exercising its extraordinary writ jurisdiction under Articles 226 and 227 of the Constitution of India in electoral matters. Specific attention is invited to Article 243ZG (b) of the Constitution of India. For the sake of convenience, reproduce Article 243ZG (b) of the Constitution of India which reads as under:-

“243ZG. Notwithstanding anything in this Constitution,—

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under article 243ZA shall not be called in question in any court;

(b) no election to any Municipality shall be called in question except by an election petition presented to such

authority and in such manner as is provided for by or under any law made by the Legislature of a State.]”

3. Mr. Shelke, learned Counsel in support of his submission invites attention to the decision of the Division Bench of this Court in ***Farook Ali Khan and Others Vs. Maharashtra State Election Commission*** reported as ***1998(2) Mh.L.J. 750*** wherein this Court refused to exercise its jurisdiction under Articles 226 and 227 of the Constitution of India in respect of rejection of nomination form.

4. Mr. Salunke, learned Counsel for petitioner in response submits that this Court had occasion to deal with a similar issue in ***Poonam Rajesh Pawar Vs. The Returning Officer, Zilla Parishad, Naigaon, District Nanded and Others (Writ Petition No. 1974 of 2017)*** decided on 10th February, 2017 where the challenge in respect of the election to Zilla Parishad under Articles 226 and 227 of the Constitution of India was entertained. This is after having considered various decisions of the Apex Court beginning from ***N.P. Ponnuswami Vs. The Returning Officer, Namakkal Constituency, Namakkal, Salem Dist. and Others*** reported as ***AIR 1052 SC 64*** exercised jurisdiction under Articles 226 and 227 of the Constitution of India in electoral matters.

5. However, in view of the objections raised by Mr. Shelke, learned Counsel for Respondent Nos. 1 and 2 and in particular in view of Article 243ZG(b) of the Constitution of India, as reproduced hereinabove the remedy available to the petitioner is by way of an election petition and not by virtue of filing of writ petition before this Court under Articles 226 and 227 of the Constitution of India. The decision in Poonam Pawar (supra) relied upon by Mr. Salunke in support of his submission that this Court should entertain the present petition would not advance the case of petitioner for the reasons that the Court's attention was not drawn to 243 O (dealing with election to Panchayat) similar to Article 243ZG(b) of the Constitution of India dealing with election to corporation nor the decision of the Division Bench of this Court in Farook Ali Khan (supra). Consequently the decision of the learned Single Judge of this Court which would otherwise be binding upon me, is not so, as it has been rendered per incuriam as the above constitutional provision and the decision of the Division Bench in Farook Ali Khan (supra) were not brought to the notice of the single Judge. The Supreme Court in ***A.R. Antulay Vs. R.S. Nayak 1988 (2) SCC 602*** has observed "42..... *"per incuriam" are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the Court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on*

that account to be demonstrably wrong.” Further the Court observed in para 42 thereof that *“It is a settled rule that if a decision has been given per incuriam, the Court can ignore it.”* In the present facts, neither constitutional provision nor the binding decision of the Division Bench of this Court in Farook Ali Khan (supra) brought to the notice of the Court passing the order in Poonam Pawar (supra) Therefore, it is not binding. Therefore, the remedy, if any, available to the petitioner is by way of an election petition under Section 16 of the Maharashtra Municipal Corporation Act, 1949.

6. In the above view, the petition is dismissed. No order as to costs.

(M.S. SANKLECHA, J.)

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