

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 2638 OF 2017

Shri. Ramesh Nagnath Kadam	]	Petitioner
Vs.		
The State of Maharashtra & Ors.	]	Respondents

.....
 Mr. Sachin R. Pawar, learned Counsel for the petitioner.
 Mr. Pravin P. Chavan, Special PP, for respondents No.1 and 2.

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CORAM : R.G. KETKAR, J.

DATE : 14th JULY, 2017.

P.C.

Not on board. At the request of Mr. Pawar, taken up in the production board.

2. The petitioner has moved this Court for obtaining urgent relief as per the administrative order passed by the Hon'ble the Chief Justice in view of the liberty granted by the regular Court presided over by Hon'ble Mr. Justice A.K. Menon to the petitioner to move alternate Bench as his Court is assigned with matters of the Special Court on Friday.

3. Heard Mr. Pawar, learned Counsel for the petitioner and Mr. Chavan, learned Special PP for respondents No.1 and 2 at

length. By this Petition under Articles 226 and 227 of the Constitution of India read with Section 482 of Code of Criminal Procedure, 1973, petitioner has challenged the judgment and order dated 3rd July, 2017 passed by the learned Special Judge [under the P. C. Act], Greater Mumbai below Exhibit 272 in Special Case No. 104 of 2015 and Special Case No. 108 of 2015 arising from C.R. No. 336 of 2015. The petitioner has also prayed for direction to the respondents and in particular, 2nd respondent to provide security through marshals along with armed police escort for the transit of the petitioner to the Assembly to cast his ballot in the Presidential Election scheduled on 17th July, 2017.

4. In support of this Petition, Mr. Pawar has relied upon the order dated 3rd July, 2017 passed by the learned Special Judge under the Prevention of Money Laundering Act in Spl. PMLA Case No. 2 of 2016 in the case of **Assistant Director, Directorate of Enforcement Vs. Chhagan Bhujbal & Ors.** By that order, learned Special Judge permitted accused No.1 Chhagan Bhujbal to cast vote for Presidential Election, 2017 by directing Jail Superintendent, Arthur Road Jail and Commissioner of Police, Mumbai to take appropriate steps for producing him at the place of polling with sufficient police escort for the purpose of casting vote for the Presidential Elections 2017. After casting vote, he shall be immediately taken back to Arthur Road Jail. Registrar (Sessions) is directed to communicate this order forthwith to the Election Commission of India as well as Assistant Returning Officer/Principal Secretary, Maharashtra Legislature Secretariat, Vidhan Bhavan, Backbay Reclamation, Mumbai – 400 032.

5. Mr. Pawar also relied upon the decision in the case of **Mohd. Shahabuddin Vs. State of Bihar, (2007) 10 SCC 28**. He submitted that in that case petitioner was undergoing imprisonment in District Jail, Siwan, Bihar. He is a sitting Member of Parliament and decided to cast his vote for election of Vice-President. The Apex Court permitted the petitioner therein to cast his vote subject to imposing conditions. He submitted that the petitioner is under-trial and is not convicted in any case. The petitioner is also not served with any detention order. He, therefore, submitted that subject to imposing conditions, petitioner may also be permitted to cast his vote in the Presidential election, which is scheduled to be held on 17th July, 2017.

6. On the other hand, Mr. Chavan has strenuously opposed the Petition. He relied on following decisions:

[1] Order dated 17th February, 2017 passed by the learned Special Judge under the Prevention of Corruption Act below Exhibit 154 in the case of petitioner herein. That application was filed by the petitioner seeking permission to attend the budget session which was to commence from 6th March, 2017 to 7th April, 2017. The learned Special Judge relying upon decision of Delhi High Court in the case of **Suresh Kalmadi Vs. Union of India and others, L.PA No. 707 of 2011** dismissed the application.

[2] Order dated 27th March, 2017 passed by this Court [Coram: A.S. Gadkari, J.] in Bail Application No. 505 of 2017 filed by the petitioner herein for temporary

bail for a period of one month starting from 6th March, 2017 to 7th April, 2017 to enable him to attend the Budget Session of the Maharashtra Legislative Assembly.

- [3] Decision of Delhi High Court in case of **Surekh Kalmadi Vs. Union of India & Ors, W.P (c) No. 5367 of 2011.**
- [4] Decision of this Court in case of **Tanaji s/o Keshavrao Bhoite Vs. The State of Maharashtra & Ors, Writ Petition No. 7509 of 2011** of this Court [Coram: A.H. Joshi and A.R. Joshi, JJ.] dated 3rd October, 2011.
- [5] **K. Ananda Nambiar and others Vs. Chief Secretary to the Government of Madras, AIR 1966 SC 657.**

7. Relying on the aforementioned decisions, he submitted that decision in case of **K. Ananda Nambiar and others** [supra] was considered by Delhi High Court in the case of **Suresh Kalmadi** [supra]. He also relied upon Section 62 (5) of the Representation of the People Act, 1951 (for short 'R.P. Act') to contend that petitioner is not entitled to vote at any election as he is confined in a prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police. He submitted that petitioner is under trial. He is in lawful custody of the Police and, therefore, he is not entitled to cast vote in the Presidential election. He further submitted that right to cast vote is not a fundamental right and, therefore, no case is made out out for granting any relief to the petitioner.

8. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. It is no doubt true that the petitioner is facing about 10 cases. It is also not in dispute that as on date the petitioner is not convicted of any of the offence / charges levelled against him. Mr. Chavan relied on Section 62(5) of the R.P. Act. Section 62 (5) lays down that no person shall vote at any election if he is confined in a prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police; Provided that nothing this sub-section shall apply to a person subjected to preventive detention under any law for the time being in force; Provided further that by reason of the prohibition to vote under this sub-section, a person whose name has been entered in the electoral roll shall not cease to be an elector.

9. As noted earlier, the Presidential elections are scheduled on 17.07.2017 and the papers are produced before me today in the afternoon session. In view of the limited time at my disposal, I am prima facie of the opinion that Section 62 of the R.P. Act is not applicable to the Presidential Elections. Presidential Election is governed by the Presidential and Vice-Presidential Elections Act, 1952. Mr. Chavan did not point out any provision under the R.P. Act that prohibits the under-trial to cast vote in the Presidential Election.

10. In the case of **Mohd. Shahbuddin** [supra], petitioner had moved the High Court seeking permission to cast vote for election

of Vice-President. As no orders were passed, he moved Apex Court. In paragraph 3, the Apex Court noted that petitioner is undergoing imprisonment in District Jail, Siwan, Bihar. In paragraph 4, the Apex Court issued direction to the Jail Superintendent of the District Jail, Siwan to take the petitioner with sufficient police escort to the Parliament House, Delhi, to cast his vote and the Election Commission may allow him to cast the vote in the premises of the Parliament House for the election of Vice-President. After casting of the vote, the petitioner was to be taken back to the District Jail, Siwan.

11. Mr. Chavan relied on various rulings referred hereinabove. In the case of **K. Ananda Nambiar and others** [supra], petitioner had challenged validity of the detention order dated 29.12.1964 passed under Rule 30(1)(b) and (4) of the Defence of India Rules, 1962. In paragraph 8, the submission advanced on behalf of the petitioner were recorded, viz., that a Member of Parliament like a Member of any of the State Legislatures, has constitutional rights to function as such Member and to participate in the business of the House to which he belongs. He is entitled to attend every Session of the Parliament, to take part in the debate, and to record his vote. So long as a Member of Parliament is qualified to be such Member, no law can validly take away his right to function. The right to participate in the business of the legislative chamber to which he belongs, is a constitutional right. The Constitutional right of a Legislature can be regarded as his fundamental right.

12. In paragraph 17, the Apex Court held that they are not rights,

which can be properly described as constitutional rights of the Members of Parliament at all. The Apex Court referred to Articles 79, 85 and 86 and observed that these Articles cannot be construed to confer any right as such on individual Members or impose any obligation on them. It is not as if a Member of Parliament is bound to attend the Session, or is under an obligation to be present in the House when the President addresses. The context in which these Articles appear shows that the subject matter of these articles is not the individual rights of the Members of Parliament, but they refer to the right of the President to issue a summons for the ensuing Session of Parliament or to address the House or Houses.

13. In paragraph 18, the Apex Court held that on a close examination of the articles relied by the petitioner, the whole basis of his argument breaks down, because the rights which the petitioner calls constitutional rights are rights accruing to the Members of Parliament, after they are elected, but they are not constitutional rights in the strict sense, and quite clearly, they are not fundamental rights at all.

14. In paragraph 19, the Apex Court referred to Section 7(b) of the R.P. Act and held that it is true that the conviction of a person at the end of a trial is different from the detention of a person without a trial, but so far as their impact on the alleged constitutional rights of the Member of Parliament is concerned, there can be no distinction. If a person who is convicted and sentenced, has necessarily to forgo his right of participating in the business of the Legislature to which he belongs, because he is

convicted and sentenced, it would follow that a person who is detained must likewise forgo his right to participate in the business of the Legislature. As noted earlier, in the present case, neither the petitioner is served with a detention order nor he is convicted and sentenced. In view thereof, the said decision is not applicable to the facts of the present case.

15. Mr. Chavan relied upon the decision of the Division Bench of this Court in **Tanaji s/o Keshavrao Bhoite** (*supra*). In that case, petitioner was an elected Director of respondent No.5, The Jalgaon District Central Co-operative Bank Limited. He was served with the detention order passed by the Collector, Jalgaon under the Maharashtra Prevention of Dangerous Activities and Slumlords and Bootleggers Drug Offenders and Dangerous Persons Act, 1981. While under detention, petitioner received agenda of elections for the Chairman and Vice-Chairman of the 5th respondent-Bank, scheduled on 05.10.2011. The petitioner had filed the Petition for issuing mandatory direction to the jail authorities to escort him for attending the meeting on 05.10.2011 and participation, if voting is needed. In paragraph 13, the Division Bench noted that the petitioner had instituted Writ Petition for issue of Habeas Corpus, which was dismissed and the case, at the relevant time, was pending before the Apex Court and no interim relief was granted. In paragraph 15 and 16, the Division Bench noted that the right claimed by the petitioner was emerging from the Maharashtra Co-operative Societies Act, 1960 and the Maharashtra Co-operative Societies Rules, 1961 as also bye-laws of the 5th respondent-society.

The right is thus carved out under the statutory rules. The said right cannot be regarded as a legal right justiciable in Court against “State”, as long as the State has not acted in any manner, which can attract the description “denial of a right by the State”. In paragraph 17, the Division Bench held that right of attendance is not exercisable on the face of preventive detention order of the petitioner. In paragraph 18, the Division Bench, considering the background and the social stigma on account of preventive detention, held that the relief in equity and as a constitutional right, enforceable through Article 226 of the Constitution of India was not available to the petitioner. In my opinion, the said decision is also not applicable to the facts of the present case.

16. Mr. Chavan relied on the decision in the case of **Suresh Kalmadi** [*supra*], and in particular paragraph 17. The Delhi High Court denied permission to the petitioner to attend the Sessions of Parliament and record his vote. In that case, petitioner sought direction against respondents for attending the Parliament commencing from 01.08.2011. Following the decision of **K. Ananada Nambiar** (*supra*), the learned Single Judge rejected the Petition. I have already held that the decision in **K. Ananda Nambiar** (*supra*) is not applicable to the facts of the present case.

17. Mr. Chavan also invited my attention to the order dated 17.02.2017 passed by the learned Special Judge, below exhibit-154, rejecting the petitioner's application seeking permission to attend the Budget Session between 06.03.2017 and 07.04.2017. I

do not find any merit in this submission. Mr. Chavan also relied upon the order dated 27.03.2017 passed by this Court (Coram: A. S. Gadkari, J.) in Bail Application No.505 of 2017. The petitioner had sought temporary bail for a period of one month starting from 06.03.2017 to 07.04.2017 to enable him to attend Budget Session of the Maharashtra Legislative Assembly. For the reasons already recorded, even this decision is not applicable.

18. In my opinion, the learned Sessions Judge should have allowed the application in the light of the decision of the Apex Court in **Mohd. Shahabuddin's case** (*supra*) subject to imposing conditions.

19. In the light of the aforesaid discussion, Petition succeeds. Application at exhibit-272 filed by the petitioner before the learned Special Judge [under the P. C. Act], Greater Mumbai is allowed in the following terms:

: O R D E R :

- [1] Petitioner is permitted to cast vote for Presidential Elections 2017, scheduled on Monday i.e. 17th July, 2017;
- [2] Jail Superintendent, Byculla and Commissioner of Police, Mumbai are directed to take appropriate steps for producing him at the place of polling viz: Central Hall, 4th Floor, Vidhan Bhavan, Backbay Reclamation, Mumbai 400 032 with sufficient police escort for the purpose of casting vote for the Presidential Elections

2017. They shall ensure that petitioner is taken to the Polling Station before 10.00 a.m. positively. After casting vote, he shall be immediately taken back to Byculla Jail;

- [3] Registrar [Judicial] is directed to communicate this order forthwith to the Election Commission of India as also to Dr. A.N. Kalse, Principal Secretary, Maharashtra Legislature Secretariat by e-mail and / or Fax;
- [4] Election Commission of India and / or respondent No.3 will permit the petitioner to cast vote;
- [5] For the time being, petitioner shall deposit Rs. 5,000/- towards escort charges;
- [6] All the parties to act upon authenticated copy of this order;
- [7] Petition is disposed of in the aforesaid terms. Order accordingly.

[R.G. KETKAR, J.]