

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

WRIT PETITION NO. 4927 OF 2018

Ganesh Laxmanrao Waghmare
and another .. Petitioners

Versus

The State of Maharashtra and others .. Respondents

Shri N. V. Gaware, Advocate h/f Shri Suresh P. Salgar, Advocate
for Petitioners.

Shri A. B. Girase, Govt. Pleader for Respondent Nos. 1 and 4.

Smt. Minakshi Arora, Senior Advocate i/by Shri Alok Sharma,
Advocate for Respondent Nos. 2 and 3.

Ms. P. S. Talekar, Advocate i/by Talekar and Associates Advocate
for Respondent Nos. 5, 7 to 9, 11 to 14.

Shri S. V. Kanitkar, Advocate h/f Shri T. Y. Sayyed, Advocate for
the Respondent No. 6.

Shri V. D. Sapkal, Advocate h/f Shri T. Y. Sayyed, Advocate for
Respondent No. 10.

WITH

WRIT PETITION NO. 5072 OF 2018

Amar Marutirao Naikwade .. Petitioner
Versus

Election Commission of India
and others .. Respondents

Ms. P. S. Talekar, Advocate i/by Talekar and Associates Advocate
for the Petitioner.

Smt. Minakshi Arora, Senior Advocate i/by Shri Alok Sharma,

Advocate for Respondent Nos. 1 to 3.

WITH
WRIT PETITION NO. 5377 OF 2018

Ashok Haridas Jagdale
Versus

.. Petitioner

Election Commission of India through Chief

Election Commissioner and others

.. Respondents

Ms. P. S. Talekar, Advocate/Shri S. B. Talekar, Advocate i/by
Talekar and Associates Advocate for the Petitioner.

Smt. Minakshi Arora, Senior Advocate i/by Shri Alok Sharma,
Advocate for Respondent Nos. 1 to 3.

CORAM : S. V. GANGAPURWALA AND
SUNIL K. KOTWAL, JJ.

DATE : 11TH JUNE, 2018.

FINAL ORDER (Per S. V. Gangapurwala, J.) :-

. The Writ Petition No. 4927 of 2018 is filed challenging the communication dated 19th May, 2018 issued by the Election Commission of India thereby declining to delete the names of respondent Nos. 5 to 14 from the electoral roll prepared for the biennial election to the 26 Osmanabad-Latur-Beed Local Authorities Constituency for Maharashtra State Legislative Council.

02. Mr. Gaware, the learned advocate for petitioners during the course of his arguments strenuously contended that, respondent Nos. 5 to 14 were elected as councilors of Beed Municipal Council. Their names were included in the electoral roll for biennial election to the 26 Osmanabad-Latur-Beed Local Authorities constituency for Maharashtra Legislative Council. The respondent Nos. 5 to 14 were disqualified as councilors of Beed Municipal Council by the Hon'ble Minister under order dated 18.05.2018 U/Sec. 55(A & B) and Sec. 42 of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965. The polling was scheduled to be held on 21st May, 2018. As these respondent Nos. 5 to 14 were disqualified, they were not eligible to vote on 21.05.2018.

03. The communication dated 19.05.2018 of the respondent No. 2 stating that though respondent Nos. 5 to 14 are disqualified as councilors of Municipal Council, Beed, still their names cannot be removed from the electoral roll is illegal and against the provisions of the statute. The learned counsel to substantiate his contention relies on Sec. 16, 22 and 27 of the Representation of the Peoples Act, 1950 (for short "Act of 1950"). According to the learned counsel a person who is disqualified, is not entitled to vote. It is submitted that, as per Sec. 22 of the Act of 1950 the correction can be made of the entries in the electoral roll. Reliance on Sub Sec. 3 of Sec. 23 of the Act of 1950

by the Election Commission is misplaced. Sec. 27(2)(d) of the Act of 1950 mandates the Chief Executive Officer of every local authority to immediately inform the electoral registration officer every change in the membership of that local authority and the electoral officer shall on receipt of the information, struck off from the electoral roll the names of the persons who have ceased to be members of that authority. The said provision has not been considered by the respondents. The learned counsel submitted that, on the date of poll, respondent Nos. 5 to 14 were not members of the Beed Municipal Council. It is the members of these local authorities who would elect the representative to the Maharashtra Legislative Council from the Local Authorities Constituency. Having declared disqualified, these respondents ceased to be the members, *inter alia* could not vote to elect the representatives of the local authorities. The learned counsel relies on the judgment of the Division Bench of this Court in a case of **Yeshwantrao Kankrao Gadakh Vs. The State of Maharashtra and others** reported in ***1998 (3) Bom. C. R. 139***.

04. Mr. Gaware, the learned counsel further submits that, interim order was passed by this Court directing the respondent authorities that, if the difference of votes between candidate who secures highest number of votes and the candidate securing second highest number of votes is more than the number of votes to be cast by respondent Nos. 5 to 14, then

the Returning Officer may declare the result and if the difference of votes is less than the number of votes cast by respondent Nos. 5 to 14, then result shall not be declared until further orders of this Court. However, on 23rd May, 2018 the Election Commission erroneously issued a communication that the counting is to be stayed. The said communication is not in consonance with the interim order of this Court. The Election Commission could not have flouted the order of this Court and stalled the election process itself. Though the superintendence, direction and control of elections vest in Election Commission, still the same is within the purview of judicial review of this Court. To substantiate his contention the learned counsel relies on the judgment of the Apex Court in a case of **Digvijay Mote Vs. Union of India** reported in ***(1993) 4 SCC 175***.

05. The learned counsel further submits that, the ground put forth by respondents of maintaining the secrecy is also improper. Rule 39-AA of the Conduct of Election Rules 1961 provides that, when an elector being a member of political party records his vote on a ballot paper and before such elector inserts that ballot paper into the ballot box, the Presiding Officer is required to allow the authorized agent of that political party to verify as to whom such elector has cast his vote. In view of that, it is erroneous on the part of the Election Commission to suggest that, if the votes of these respondent Nos. 5 to 14 were kept

separate that would impeach the secrecy of the votes.

06. The learned counsel further submits that, the purity of election is of paramount importance. This Court would invoke its jurisdiction under Article 226 to maintain the purity of the election and to facilitate the election in a proper manner. The learned counsel relies on the judgment of the Apex Court in a case of **Election Commission of India Vs. Ashok Kumar** reported in **(2000) 8 SCC 216**. The learned counsel also relies on the judgment of **Mohinder Sing Gill Vs. Chief Election Commissioner, New Delhi** reported in **(1978) 1 SCC 405**. According to the learned counsel the bar under Article 329-B of the Constitution of India is not absolute and this Court would exercise its extraordinary jurisdiction to prevent the election being contaminated. The learned counsel further submits that, the impugned communication issued by the respondent No. 2 is without assigning any reasons and on that count also same is illegal.

07. Smt. Meenakshi Arora, the learned senior advocate for the Election Commission submits that, this Court would not invoke its writ jurisdiction under Article 226 of the Constitution of India in view of the bar under Article 329-B of the Constitution of India. The interference of the Court at this stage would amount to stalling the election and would not

facilitate the election. In such a case this Court would not entertain the writ petition. The learned senior counsel relies on the judgment of the Apex Court in a case of **N. P. Ponnuswami Vs. The Returning Officer, Namakhal** reported in *AIR 1952 SC 64*, so also another judgment in a case of **Election Commission of India Vs. Ashok Kumar** (supra) and also another judgment in a case of **Mohinder Sing Gill Vs. Chief Election Commissioner, New Delhi** (supra). The learned senior advocate further contends that, in view of Sub Sec. 3 of Sec. 23 of the Act of 1950, no amendment, transposition or deletion of any entry shall be made U/Sec. 22 of the Act of 1950 after the last date for making nomination for an election in that constituency. In view of the said provision, the names of respondent Nos. 5 to 14, which were legitimately entered in the electoral roll could not have been deleted after 03rd May, 2018 i. e. the last date of making nomination. The learned senior counsel relies on the following judgments of the Apex Court.

- i) **Narendra Madivalapa Kheni Vs. Manikrao Patil and others** reported in (1977) 4 SCC 16.
- ii) **Shyamdeo PD Singh Vs. Nawal Kishore Yadav** reported in (2000) 8 SCC 46.
- iii) **Baidyanath Panjira Vs. Sita Ram Mahto and others** reported in *AIR 1970 SC 314*.
- iv) **Lal Babu Hussein and others Vs. Electoral Registration**

Officer and others reported in *(1995) 3 SCC 100*.

- v) **Indrajit Barua and others Vs. Election Commission of India and others** reported in *(1985) 4 SCC 722*.

07. The learned senior advocate further submits that, the impugned communication dated 23.05.2018 stalling the election was to avoid secrecy of votes.

09. Mr. Kanitkar, the learned counsel for the respondent No. 4 adopts the arguments of the learned senior counsel for the Election Commission and further submits that, the petitioners have an alternate remedy to challenge any entry in the electoral roll U/Sec. 24 of the Act of 1950. The petitioners have not availed the said remedy and seeks dismissal of the writ petition.

10. Mr. Sapkal, the learned counsel for some of the respondents submits that, Sec. 2(e) of the Representation of Peoples Act, 1951 (for the sake of brevity hereinafter referred as to the “Act of 1951”) defines an elector. The petitioners are neither electors, nor candidates. Sec. 80 of the Act of 1951 provides that no election shall be called in question except by an election petition presented in accordance with provisions of the Act of 1950 and Sec. 81 of the Act of 1951 permits a candidate or any elector to file an election petition. The petitioners are

neither candidates, nor electors, as such are not entitled to maintain the present petition and stall the election process.

11. Miss Talekar, the learned advocate for petitioners in Writ Petition No. 5072 of 2018 and Writ Petition No. 5377 of 2018 submits that, the communication dated 23.05.2018 stalling the counting process is *per-se* illegal. So also the impugned order could not have been passed as per Sec. 94 and 128 of the Act of 1951. The secrecy of voting cannot impeach. The Election Commission did not have jurisdiction to stall the counting. The learned counsel in addition to the arguments canvassed by the learned counsel for other respondents in Writ Petition No. 4927 of 2018 submits that, the petitioners in Writ Petition No. 4927 of 2018 do not have the *locus standi* to maintain the present petition. They cannot be said to be aggrieved persons. The learned counsel relies on the judgment of the Apex Court in a case of **Ravi Yashwant Bhoir Vs. District Collector Raigad and others** reported in (2012) 4 SCC 407 and another judgment in a case of **Anand Sharadchandra Oka Vs. University of Mumbai and others** reported in (2008) 5 SCC 217.

12. Ms. Talekar, the learned advocate further submits that, the show cause notice issued to respondent Nos. 5 to 14 seeking their disqualification was assailed before this Court by filing Writ Petition bearing Writ Petition No. 3596 of 2018. On

13.04.2018 *ad-interim* order was passed in favour of the petitioners therein restraining the Hon'ble Minister from passing final order on the disqualification application. *Ad-interim* order was continued from time to time. On 03.05.2018 the Court was not available, the incharge Court could not take the matter and on 18.05.2018 the order was passed by the Hon'ble Minister disqualifying respondent Nos. 5 to 14. In fact, interim order was passed till next date of hearing and hearing had never taken place and stay was in continuation, inspite of the said fact, the Hon'ble Minister passed order of disqualification of these respondents. The said order disqualifying respondent Nos. 5 to 14 is stayed by this Court under order dated 23.05.2018.

13. The learned Government Pleader submits that on the day when the Hon'ble Minister decided the matter and disqualified respondent Nos. 5 to 14 on 18.05.2018 there were no prohibitory orders in operation and the order was rightly passed by the Hon'ble Minister.

14. We have considered the submissions canvassed by the learned counsel for respective parties.

15. The petitioners of Writ Petition No. 4927 of 2018 are neither candidates, nor electors. The petitioners do not have a

right to vote, nor contest the election of a Local Authority Constituency. Writ Petition No. 4927 of 2018 is not filed as a public interest litigation.

16. The Apex Court in a case of **Digvijay Mote Vs. Union of India** (supra) has observed that, it cannot be said that exercise of power under Article 324 of the Constitution of India is not altogether un-reviewable. The review will depend upon the facts and circumstances of each case.

17. It is a matter of record that, respondent Nos. 5 to 14 are elected councilors of Beed Municipal Council and on the date the electoral roll were prepared, were members of the Municipal Council. The election programme published by the Election Commission is thus.

Event		Days and Dates
1	Issue of Notifications	: 26 th April, 2018 (Thursday)
2	Last date of making nominations	: 3 rd May, 2018 (Thursday)
3	Scrutiny of nominations	: 4 th May, 2018 (Friday))
4	Last date for withdrawal of candidature	: 7 th May, 2018 (Monday)
5	Date of poll	: 21 st May, 2018 (Monday)
6	Hours of poll	: 8.00 A.M. To 4.00 P.M.
7	Counting of Votes	: 24 th May, 2018 (Thursday)

8	Date before which election : 29 th May, 2018 (Tuesday) shall be completed
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18. The last date of making nominations was 03rd May, 2018 and the date of poll was 21st May, 2018. It is not a matter of debate that, on 03rd May, 2018, respondent Nos. 5 to 14 were qualified councilors of Beed Municipal Council and their names were validly entered in the electoral roll. Sec. 22 of the Act of 1950 empowers the electoral registration officer for a constituency to correct entries in the electoral rolls. Sub Sec. 3 of Sec. 23 of the Act of 1950 puts an embargo on the powers of the electoral registration officer to amend, transpose or delete any entry in the electoral roll after the last date for making nomination for an election in that constituency. Sec. 27(2)(e) of the Act of 1950, which applies for preparation of electoral rolls for Council constituencies states that, the provisions of Sec. 15, 16, 18, 22 and 23 shall apply in relation to local authorities constituencies, as they apply in relation to Assembly constituencies. The bar engrafted under Sub Sec. 3 of Sec. 23 of the Act of 1950 would also apply to electoral rolls for council constituencies.

19. Sec. 16 (1) of the Act of 1950 prescribes that a person shall be disqualified for registration in an electoral roll, if he :

- (a) is not a citizen of India; or

- (b) is of unsound mind and stands so declared by a competent Court; or
- (c) is for the time being disqualified from voting under the provisions of any law relating to corrupt practices and other offences in connection with elections.

20. Sub Section 2 of Sec. 16 provides that, the name of the person who becomes so disqualified after registration shall forthwith be struck off the electoral roll in which it is included. The disqualification as required under Sec. 16 (1)(c) of the Act of 1950 is the disqualification from voting under the provisions of law relating to corrupt practice and other offences in connection with election. The respondent Nos 5 to 14 under order dated 18.05.2018 passed by the Hon'ble Minister were disqualified on account of misconduct and not with regard to corrupt practice and other offences in connection with election. Be that as it may, it is a matter of record that, show cause notices were issued by the Hon'ble Minister to respondent Nos. 5 to 14 with regard to the disqualification on the complaint of petitioners. The show cause notices were assailed by respondent Nos. 5 to 14 before this Court by filing Writ Petition No. 3596 of 2016. This Court passed *ad-interim* order on 13.04.2018 restraining the Hon'ble Minister from taking final decision on the basis of the impugned show cause notice till the next date. The next date was on 20th April,

2018. On 20th April, 2018 the matter was adjourned to 26th April, 2018 and the *ad-interim* relief granted earlier was continued till the next date of hearing. On 26th April, 2018 the matter was adjourned to 03rd May, 2018 and the *ad-interim* relief granted earlier was continued till next date.

21. On 03rd May, 2018, the Court was not available and the matter could not be taken up by other Court due to administrative reasons. The Hon'ble Minister on 18.05.2018 passed an order disqualifying respondent Nos. 5 to 14 as councilors of Beed Municipal Council. These respondents thereafter filed Civil Application Stamp No. 14749 of 2018 and this Court on 23rd May 2018 stayed the order dated 18.05.2018 passed by the Hon'ble Minister disqualifying the respondent Nos. 5 to 14 till 06.06.2018 and it is submitted that, the said order is continued. Whether *ad-interim* order in Writ Petition No. 3596 of 2018 was deemed to be continued after 03rd May, 2018 or not is not a subject matter of consideration before us. Suffice is to observe that, upto 03rd May, 2018 the Court had specifically continued the *ad-interim* order restraining the Hon'ble Minister from passing final order and on 03rd May, 2018 due to non availability of Court, no further orders could be passed, however, subsequently on 23rd May, 2018 the order disqualifying these respondents is stayed by this Court.

22. As observed supra, the restrictions imposed by Sec. 23(3) of the Act of 1950 also applied to the corrections to be carried out in the electoral roll for council constituencies in view of Sec. 27(2)(e) of the Act of 1950.

23. The scope of Sec. 23(3) of the Act of 1950 has been discussed elaborately by the Apex Court in the judgments referred to supra by the learned senior advocate for the Election Commission, wherein it is held by the Apex Court that, changes in the electoral roll cannot be made after the last date of nomination in view of Sec. 23(3) of the Act of 1950. The case also does not come within the ambit of Sec. 16 of the Act of 1950, as the disqualification referred to in Sec. 16(1)(c) of the Act of 1950 is with regard to disqualification on account of corrupt practice or other offences in connection with the election.

24. It also further needs to be considered that, the notification for biennial election to the Maharashtra Legislative Council from Local Authorities Constituency was published. The election process had proceeded further. The date of poll was 21st May, 2018. The petitioners have filed present writ petition on 20th May, 2018 challenging the communication dated 19.05.2018 issued by the respondent No. 2 thereby declining to delete the name of respondent Nos. 5 to 14 from the electoral roll, for which the polling was to be held on 21st May, 2018 and the counting was scheduled on 24th May, 2018.

25. The *prima dona* question would be the extent of interference by this Court in the election process and entertaining the writ petition at the behest of the petitioners, who are neither the candidates, nor the electors.

26. The Apex Court in a case of **Election Commission of India Vs. Ashok Kumar** (supra) has observed thus :

“(32) FOR convenience sake we would now generally sum up our conclusions by partly restating what the two Constitution Benches have already said and then adding by clarifying what follows therefrom in view of the analysis made by us hereinabove : 1) If an election, (the term election being widely interpreted so as to include all steps and entire proceedings commencing from the date of notification of election till the date of declaration of result) is to be called in question and which questioning may have the effect of interrupting, obstructing or protracting the election proceedings in any manner, the invoking of judicial remedy has to be postponed till after the completion of proceedings in elections. 2) Any decision sought and rendered will not amount to “calling in question an election” if it sub serves the progress of the election and facilitates the completion of the election. Anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the election. 3) Subject to the above; the action taken or orders issued by Election Commission are open to judicial review on the well settled parameters which enable judicial review of decisions of statutory bodies such as on a case of mala fide or arbitrary exercise of power being made out or the statutory body being shown to have acted in breach of law. 4) Without interrupting, obstructing or delaying the progress of the election proceedings, judicial intervention is available if assistance of the Court has been sought for merely to correct or smoothen the progress of the election proceedings, to remove the obstacles therein, or to preserve a vital piece of evidence if the same would be lost or destroyed or rendered irretrievable by the time the results are declared and stage is set for invoking the jurisdiction of the Court. 5) The Court must be very circumspect and act with

caution while entertaining any election dispute though not hit by the bar of Article 329(b) but brought to it during the pendency of election proceedings. The Court must guard against any attempt at retarding, interrupting, protracting or stalling of the election proceedings. Care has to be taken to see that there is no attempt to utilize the Courts indulgence by filing a petition outwardly innocuous but essentially a subterfuge or pretext for achieving an ulterior or hidden end. Needless to say that in the very nature of the things the Court would act with reluctance and shall not act except on a clear and strong case for its intervention having been made out by raising the pleas with particulars and precision and supporting the same by necessary material.”

27. The Apex Court in a case of **Election Commission of India Vs. Shivaji and others** reported in (1988) 1 SCC 277 has observed that, even if there was any ground relating to non compliance to the provisions of the Act and the Constitution of which the validity of any election process could be questioned, the person interested in questioning the elections has to wait till the election is over and institute a petition in accordance with Sec. 81 of the Act of 1951.

28. The Apex Court in a case of **Shyamdeo Pd. Singh Vs. Nawal Kishore Yadav** (supra) has observed thus :

20. During the course of its judgment the Constitution Bench has observed that election laws abhor a vacuum; the electoral rolls may contain errors and they may remain to be corrected or the appeals in respect thereof may be pending, the electoral roll effective for the ensuing election may achieve a finality at a given point of time (such as the last date prescribed for filling the nominations). It has to be remembered that right to contest an election, a right to vote and a right to object to an ineligible person exercising right to vote are all rights and obligations created by Statute. They are

not the rights in common law. Bringing into existence Houses or Institutions responsible for functioning of a democracy have a vital constitutional objective to achieve as they are so essential for the functioning of a democracy. A breach of any statutory right or obligation should not come in the way of the process directed towards fulfilling the high objective of bringing into existence of a House or Institution contemplated by Constitution as enabling democratic functioning of the country.

29. Considering the law laid down by the Apex Court as discussed supra, this Court would be circumspect to invoke its extraordinary jurisdiction under Article 226 of the Constitution in stalling the election process and any order passed in the writ petition would tantamount to stalling the election process, rather than facilitating the election process. In view of that, this Court would not invoke its writ jurisdiction.

30. The matter has another facet. As observed above, the petitioners are neither the candidates, nor the electors. They did not have right to vote for the election in question. The petitioners cannot be said to be the aggrieved parties. The petitioners cannot be said to have been deprived of or denied of legal right nor can be said to have sustained injury to any legally protected interest. The Apex Court in a case of **Ravi Yashwant Bhoir Vs. District Collector Raigad and others** has observed that, in case the petitioner has no legal peg for a justifiable claim to hang on, he cannot be heard as a party in a lis. A fanciful or sentimental grievance may not be sufficient to confer a *locus standi* to sue

upon the individual. There must be injury or a legal grievance. The petitioners may claim right of being heard in a matter where the disqualification of respondent Nos. 5 to 14 is questioned. The biennial election to the Maharashtra Legislative Council from the Local Authorities Constituency is on larger horizon. The correction/non correction of electoral roll cannot be said to impeach upon any right of the petitioners, who are neither the candidates, nor the electors for the said election. They cannot be allowed to interfere with the election process. Their rights are not violated or threatened. Legal right do not exist in the petitioners to question the election. In absence of any legal right being transgressed and injury been caused, the petitioners cannot maintain the writ petition and invoke extraordinary jurisdiction of this Court. On this ground also the petition need not be entertained.

31. The Writ Petition No. 4927 of 2018, as such is dismissed, however, no order as to costs.

32. The Writ Petition No. 5707 of 2018 and 5377 of 2018 assail the communication dated 23.05.2018 passed by the respondent No. 1 thereby staying the counting.

33. The learned senior counsel for the Election Commission has argued that, the interim relief granted by this

Court needs to be vacated and the Writ Petition No. 4927 of 2018 deserves to be dismissed so that they can proceed with the election process. As the Writ Petition No. 4927 of 2018 is dismissed the respondents shall forthwith commence counting and further process of election. The communication dated 23.05.2018 as such now would not survive. The Writ Petition No. 5707 of 2018 and 5377 of 2018 as such stand disposed of with aforesaid observations. No costs.

34. Parties to act on authenticate copy.

[SUNIL K. KOTWAL, J.]

[S. V. GANGAPURWALA, J.]

bsb/June 18