

(Reportable)

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

WRIT PETITION NO. 7853 OF 2017

HAMEED PEER MOHAMMAD PATHAN AND ANOTHER
VERSUS
THE ELECTION RETURNING OFFICER BEED AND OTHERS

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Advocate for the Petitioners : Shri Salunke Sudarshan J.
Advocate for Respondent 1 : Shri S.T.Shelke.
AGP for Respondent 2 : Shri B.A.Shinde.
Advocate for Respondents 8 and 9 : Shri Solanke Vinayak H..

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CORAM: RAVINDRA V. GHUGE, J.

DATE :- 07th August, 2018

Oral Order :

1 The Petitioners have challenged the judgment and order dated 01.06.2017 delivered by the learned Civil Judge, Senior Division, Majalgaon in Election Petition No.1/2015 thereby, setting aside the elections of the Petitioners and directing a fresh election to be held.

2 This Court has passed an order on 19.06.2017 staying clause-2 of the operative part of the order dated 01.06.2017 by which, the Trial Court has set aside the elections of these Petitioners and directed to conduct the elections once again for the said two positions.

3 The operative part of the impugned order reads as under :-

"१) मौजे गंगामसला ता. माजलगाव जि. बीड येथील ग्रामपंचायत

प्रभाग क्र ४ मध्ये सर्वसाधारण एक आणि अनुसूचित जाती स्त्री प्रवर्ग क्र. १ चे सदस्यासाठी झालेले सन २०१५ मधील निवडणुक व त्यातील मतदान आणि निवडणूक प्रक्रिया आणि त्यात सामनेवाला क्र. ६ व ८ यांचे विजयाची केलेली घोषणा याद्वारे रद्दबातल ठरविणेत येत आहे.

- २) गैरअर्जदार क्र. १ ते ३ यांनी ग्रामपंचायत गंगामसालाचे प्रभाग क्र. ४ मध्ये सन २०१५ मधील पंचवार्षिक निवडणुकीत पडले आरक्षणा प्रमाणेच निवडून घ्यावयाचे दोन सदस्यासाठी आदेश तारखेपासून दोन महिन्याचे आत फेर निवडणुकीचा कार्यक्रम लावून त्याप्रमाणे फेर निवडणूक घेऊन तेथून सर्वाधिक मते मिळवणाऱ्या उमेदवारांना विजयी घोषित करण्याची प्रक्रिया अवलंबावी.
- ३) या आदेशाची एक सत्यप्रत तातडीने सामनेवाला क्र. १ ते ३ यांना पाठविणेत यावी.
- ४) प्राप्त परिस्थितीत खर्चाबाबत आदेश नाही."

4 I have considered the submissions of the learned Advocates for the respective sides. There is no dispute that the elections were held to the Ward No.4 of Gram Panchayat, Gangamasala, Taluka Majalgaon, District Beed, wherein, one seat was meant for "General" category and one seat was reserved for the "Scheduled Caste Female" category. Both these Petitioners secured 149 and 159 votes, respectively and were declared as returned candidates from the respective categories.

5 Respondent Nos.8 and 9 herein preferred the Election Petition No.1/2015 before the Trial Court. The only issue that was raised before the Trial Court was as to what would be the vote count after recounting of the votes. It is admitted that the Electronic Voting Machine (EVM) was placed before the Trial Court under the supervision of the Election Officer and the recounting of votes was carried out. After the recounting, the tally of the votes was identical to the result declared when the elections were held. Both these Petitioners secured 149 and 159 votes in their respective categories and Respondent Nos.8 and 9 (Election Petitioners) secured 131 and 150 votes.

6 Actual votes tally of the Ward No.4 is as under :-

(I) General Category

- a) Four candidates contested.
- b) 384 voters cast their votes.
- c) 367 votes were counted.
- d) 17 votes were unaccounted.

The votes secured by candidates :-

Petitioner No.1 (Hameed Pathan) :- 149 votes.

Respondent No.8 (Ganesh Solanke) :- 131 votes.

Respondent No.4 (Khalil Shaikh) :- 25 votes.

Respondent No.5 (Nivrutti Solanke) :- 52 votes.

NOTA :- 10 votes.

(II) Scheduled Caste (Female) Category :-

- (a) Four candidates contested.
- (b) 384 voters cast their votes.
- (c) 365 votes were counted.
- (d) 19 votes were unaccounted.

The votes secured by candidates:-

Petitioner No.2 (Daivashala Gawali) :- 159 votes.

Respondent No.9 (Ashamati Pandit) :- 150 votes.

Respondent No.7 (Dropati Pandit) :- 19 votes.

Respondent No.6 (Gayabai Salve) :- 30 votes.

NOTA :- 7 votes.

7 It became obvious before the Trial Court, keeping in view the affidavit filed by the Election Officer, that some of the voters may have, out of ignorance or lack of proper understanding, pressed the end button on the EVM and as such, though the register indicates that they have voted, their votes were not recorded in favour of any of the contesting candidates. However, the Trial Court has concluded that if these uncounted/ invalid votes could have been cast in favour of Respondent Nos.8 and 9/Election Petitioners, they would have been returned as elected candidates.

8 Though the learned Advocate for Respondent Nos.8 and 9/ Election Petitioners has strenuously supported the impugned judgment, he is unable to explain as to what is the basis for the Trial Court to presume that all these invalid/unaccounted votes would have been cast only in favour of Respondent Nos.8 and 9/ Election Petitioners.

9 The learned Advocate for the Returning Officer, in my view, rightly submits that there was no difficulty or fault noticed in the EVM and it was nobody's case that the EVM be subjected to an inspection for being declared as a defective/ malfunctioning EVM. He submits that the possibility of ignorant voters having pressed the end button, cannot be ruled out because if the end button is pressed at the time of a vote being cast, the said vote is not recorded in the EVM, though the electoral register would indicate that the voter has voted.

10 The law is settled that unless it is conclusively established, for strong and convincing reasons, that the election of a returned candidate has to be set aside, a democratically elected candidate cannot be unseated on assumptions and presumptions.

11 The learned Division Bench of this Court in the matter of *Sau.Dropadabai Murlidhar Thete and another vs. State of Maharashtra and others, 2007 (4) ALL MR 2*, has dealt with a similar issue of the voter having made an error while operating the EVM. This Court has ruled that for such an act of an ignorant voter, neither can the

Election Officer be held responsible, nor can the returned candidate be unseated. Such votes are to be considered as invalidated votes just as is so done in the conventional system involving ballot papers. The observations of the learned Division Bench of this Court recorded in paragraphs 6 to 11 read as under :-

- "6. *The petitioners' grievance is that as per the chart prepared by the Returning Officer in respect of the Zilla Parishad constituency an aggregate 11443 votes were cast and in respect of the Panchayat Samiti elections an aggregate of 5791 votes were cast. However on counting it was found that the total votes were 11327 for the Zilla Parishad and only 5713 in respect of the Panchayat Samiti elections. There is therefore undoubtedly a discrepancy between the number of persons who cast their votes and the number of votes actually counted. In view of the aforesaid circumstances it is submitted that the entire electoral process is vitiated and ought to be set aside and fresh elections should be ordered.*
7. *The difficulty has arisen in view of the electronic voting machine not having been operated properly by some of the voters. There is nothing on record to even remotely suggest any tampering or mala fides against any of the electoral officers.*
8. *The explanation furnished by the Returning Officer appears to be correct and in any event plausible. The affidavit sets out in detail the manner in which the electronic voting machines are to be operated and the probable reason for the discrepancy in the total number of votes actually registered. It will be convenient to set out paragraph 2 of the affidavit filed by respondent No. 4, the Returning Officer which speaks for itself and reads as under:*
 2. *There are two Units of electronic voting machine used in the election. One is called Control*

Unit and the second is called Ballot Unit. The Control Unit is with the Polling Officer. In the Ballot Unit, the ballot is inserted and thereafter the Unit is sealed in the presence of the candidate or his election agent. The Control Unit is also sealed. In the presence of the polling agents of the candidates it is ensured that the machine displays zero. After identification of voter by the polling agents of the candidates, indelible ink is applied on the forefinger and signature or thumb impression in the register of voters is obtained, the voter is therefore allowed to record his vote with the help of Ballot Unit. For that purpose, the Polling Officer presses the 'Ballot' button on ballot section of the Control Unit which makes the Ballot Unit ready for recording of vote by that voter. Thereafter the voter goes in that compartment for voting purpose. Since the Zilla Parishad elections and Panchayat Samiti elections were taken together, the voter was required to cast his/her vote for both. However, if voter only casts his/her vote only for Zilla Parishad or only for Panchayat Samiti, then the 'End' button is required to be pressed, otherwise the vote is not registered/recorded in the machine. If a voter does not wish to cast any vote but only presses the 'End' button, the vote is not recorded in voting machine. The identification of voter, application of ink and obtaining signature/thumb impression in the register of voters are done manually. The difference in the number of total voters and the total votes cast is due to the fact that the said voters did not cast their votes but only pressed the 'End' button. After the polling is over, all agents and representatives of the contesting candidates are shown the total number of votes cast on the electronic voting machine. The memory chip is also preserved. I, therefore, say that the difference has, therefore, arisen.

9. The explanation furnished by respondent No. 4 appears correct. The electoral officers can hardly be faulted for the discrepancy. It is pertinent to mention that the electronic voting machines have been used in the entire State and the difficulty has arisen only in

two constituencies. It is also pertinent to note that the details of the electronic voting machine and the manner in which they are to be operated have been set out in large public announcements in the constituencies as well as in the polling booths.

10. *Assuming that a voter made an error in operating the electronic voting machine the electoral officers cannot be held responsible for the same. Nor would there be any justification in setting aside the entire election for that reason. This would result in and be similar to a vote being invalidated just as in the conventional system involving ballot papers.*
11. *The reliance upon the letter dated 2.3.2007 addressed by the Secretary, State Election Commission to the Collectors does not carry the matter further. The letter sets out the difficulties in accepting certain suggestions regarding the operation of the electronic voting machine and in particular the "ENTER" button. For instance it was justifiably not considered advisable to permit any officers to be present while the voter was casting his vote as that would negate the concept of a secret ballot. Further the letter indicates that even if the "ENTER" button was covered by a black plastic cap an error in registering the vote could still arise if the same was pressed with some force."*

12 Considering the above, I find that the Trial Court has grossly erred in concluding that all invalidated votes, if counted in favour of Respondent Nos.8 and 9/ Election Petitioners, would have rendered them elected and hence, the reelection needs to be conducted. The impugned judgment is a classic example of non application of mind and a casual attitude, completely ignoring fundamentals of democracy in this country.

13 This Writ Petition is, therefore, allowed. The impugned judgment and order dated 01.06.2017 is quashed and set aside and Election Petition No.1/2015 stands dismissed.

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(RAVINDRA V. GHUGE, J.)