

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

911 WRIT PETITION NO. 13823 OF 2017

VAISHALI NITIN KAMBALE
VERSUS
THE STATE OF MAHARASHTRA AND OTHERS

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Advocate for Petitioner : Mr. S.G. Jadhavar
AGP for Respondent No.2 and 5: Mr. S.N. Moramaplle
Advocate for Respondents 3 and 4: Mr. S. T.Shelke
Advocate for Respondent No.6 : Mr. B.B. Dahiphale

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CORAM : V. K. JADHAV, J.
DATED : 3rd MAY, 2018

PER COURT:-

1. With consent of the parties, heard finally at admission stage.
2. The petitioner has contested the elections for the post of Sarpanch of the village Anjandoha, Tq. Dharur, District Beed and the respondent No.6 herein has also contested the elections of the Sarpanch of the said village. After counting of votes, respondent No.4 Returning Officer has declared the petitioner as elected for the post of Sarpanch as the petitioner has secured 725 votes. None of the candidate has raised any dispute about declaration of result of the petitioner. After three days of declaration of result, respondent No.4 Returning Officer had filed an application in the office of the Collector contending therein that the mistake has been committed in counting of votes and inadvertently the petitioner has been declared

as elected. In consequence of the same, respondent No.3 has directed recounting of the votes and on 18.10.2017 recounting has taken place. After the said recounting, respondent No.6 was declared elected for the post of Sarpanch. Hence, this writ petition.

3. Learned counsel for the petitioner submits that under the provisions of Maharashtra Village Panchayat Act, 1958 and the Maharashtra Village Panchayat Election Rules 1959, once the Returning Officer declares the results of the elections under Rule 34 of the Rules of 1959, next step can be that the candidate, or, in his absence, his election agent may apply in writing to the Returning Officer for a recount of all or any of the ballot papers already counted stating the grounds taken and as contemplated under Rule 35 of the Rules of 1959 and if the Returning Officer decides to allow such an application, then he shall count the ballot papers again in accordance with his decision and amend the statement showing the number of votes recorded, referred to in sub-rule (4) of Rule 32 to the extent necessary after such recount and announce the amendments so made by him and the result of the election. Learned counsel submits that therefore, in whole process, commencing from declaration of results of the elections to its publication, the Rules do not permit or vest with the Returning Officer or the Collector, any power to add, amend, vary or rescind the declaration of results of elections and

therefore, to borrow such powers from Section 21 of the Bombay General Clauses Act, 1904. Learned counsel submits that the impugned action on the part of respondent Returning Officer in issuing the corrigendum and in staying the result of the election earlier declared on the basis of the instructions-guidelines was without jurisdiction and liable to be quashed and set aside.

4. Learned counsel for the petitioner, in order to substantiate his contentions, placed reliance on the judgment of this court in the case of ***Smt. Sarla vs. State of Maharashtra and others, reported in AIR 2001 Bombay 159.***

5. Learned counsel for the respondent Returning Officer submits that in terms of provisions of Rule 34 of the Maharashtra Village Panchayat Elections Rules 1959, on completion of statement showing the numbers of votes recoded, the Returning Officer shall from amongst the candidates qualified to be chosen to fill reserved a seat, if any, declare subject to the provisions of Rule 5 the candidate who has secured the large number of votes to be elected to fill such reserved seat. Learned counsel submits that the mistake has been occurred in counting the votes and in fact respondent No.6 has secured more votes than the petitioner and accordingly the respondent Returning Officer has corrected the said mistake.

Learned counsel thus submits that there is no substance in the writ petition and accordingly the Collector, has also rejected the dispute raised by the present petitioner.

6. Learned counsel for respondent No.6 submits that respondent Returning Officer had counted the votes and prepared a counting sheet without declaring the result and therefore, it was within his powers to correct the mistake if occurred in counting the votes. Learned counsel submits that it is a part of record that respondent No.6 herein had secured more votes than the petitioner and as such respondent No.6 was rightly declared as elected.

Learned counsel for respondent No.6, in order to substantiate his contentions, has placed reliance on the judgment of Supreme Court in the case of ***Sohan Lal vs. Babu Gandhi reported in 2003 AIR (SC) 320.***

7. On careful perusal of the submissions made in the petition, the documents annexed with it and the affidavit in reply filed on behalf of respondent No.5, it appears that in terms of provisions of Rule 34 of the Election Rules 1959, the Returning Officer had prepared a statement showing the number of votes recorded and made declaration as to who has secured the more number of votes to be

elected to fill the seat of Sarpanch. It is also a part of record that in terms of provisions of Section 36 of the Election Rules 1959, the Returning Officer has complied with the provisions of declaration of the result. In para 4 of the affidavit in reply filed by respondent No.5, it has been specifically admitted that the Returning Officer has declared the present petitioner as elected for the post of Sarpanch of village Anjandoha.

8. Thus, the question arises whether after declaration of result of the petitioner as elected, respondent can unsettle the result of the election earlier declared. In terms of Rule 35 of the Election Rules 1959, after such declaration has been made, a candidate or in his absence election agent may apply in writing to the Returning Officer for a recount of all or any of the ballot papers already counted stating the grounds on which he demands such recount. On such an application being made, the Returning Officer shall decide the matter and may allow the application in whole or in part, or may reject it in toto if it appears to him to be frivolous or unreasonable. In the instant case, none of the candidate has taken recourse to the provisions of Rule 35 of Rule 1959.

9. In case ***Smt. Sarla vs. State of Maharashtra (supra)*** relied upon by the learned counsel for the petitioner, the Division Bench of

this court, in identical facts, in para 8 of the judgment, has made the following observations:

“8. We do not propose to examine as to whether guidelines/Instructions issued by the Election Commission as regards the interpretation of Sub-rule (2) of Rule 34 of the Rules of 1959, are correct or not, for the simple reason that the main challenge before us is in respect of the jurisdiction or the power vested in the Returning Officer to add to, amend, vary or rescind the results of election once they are declared by him and, therefore, we leave this question open. Let us take up the issue as to whether this Court can interfere in election matters under its extra-ordinary jurisdiction under Articles 226 and 227 of the Constitution of India, by entertaining the petition. In a recent decision rendered by the Apex Court in the case of Election Commission of India through Secretary v. Ashok Kumar, the Apex Court, after considering the catena of decisions on the point, held as under.

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 herein above :--

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 completing of proceedings in elections.

2) Any decision sought and rendered will not amount to "calling in question an election" if it subserves 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 decision 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 court's indulgence by filing a petition outwardly innocuous but essentially a subterfuge or pretext for achieving an interior 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.

The underlying principle which has persuaded the Court to exercise its extra ordinary jurisdiction under Articles 226 and 227 of the Constitution of India is that "Purity of election process has to be preserved" and, therefore, if in a given situation, the very nature of things such as in the matters at hand, what we find is a strong case

which calls for intervention. The main emphasis on the part of the respondents in justifying the authority of the Returning Officer to modify the results of the elected candidates is by placing reliance on Section 21 of the Bombay General Clauses Act 1904, which has been so referred to in the impugned notifications. In an identical situation, this Court had an occasion to examine the issue while dealing with the general elections held on 9-6-2000 to Vangani Gram Panchayat in an unreported decision in the case of Anil Sudam Patil v. Returning Officer, v. Angani GP (Writ Petition No. 4516 of 2000) decided on 7-9-2000, wherein the Bombay Bench of this Court held as under :

"3. After hearing the learned counsel for the parties, we are of the opinion that the impugned order passed by the 1st respondent cannot be sustained in law. It is an admitted position that the result was declared on 10-6-2000 whereby the respondent No. 1 declared Ghanshyam Dangre as elected in seat reserved for OBC and as far as the present petitioner is concerned he was declared elected as against open category. Once the results are declared respondent No. 1 had no power to modify or alter the result of the election. It is well settled that the returning officer becomes functus officio after the results are declared and thereafter he cannot alter or modify the results of election. Section 15-A of the Village Panchayat Act provides in clear terms that election of any panchayat cannot be called in question except in accordance with the provisions of Section 15 of the Act i.e. by way of filing of election petition. Thus the impugned order passed by the respondent No. 1 is wholly illegal and without jurisdiction. The impugned order is therefore quashed and set aside. Rule is made absolute in terms of prayer Clause (a) (1)."

We concur with the view taken by the Division Bench of this Court as cited above and would like to add that under the scheme of the Bombay Village Panchayat Act. 1958 and that of the Bombay Village Panchayat Election Rules, 1959, once Returning Officer declares the results of elections under Rule 34 of the Rules of 1959, next step can

be that the candidate, or, in his absence, his election agent may apply in writing to the Returning Officer for a recount of all or any of the ballot papers already counted stating the grounds taken and as contemplated under Rule 35 of the Rules of 1959, and if the Returning Officer decides to allow such an application, then he shall count the ballot papers again in accordance with his decision and amend the statement showing the number of votes recorded, referred to in Sub-rule (4) of Rule 32 to the extent necessary after such recount and announce the amendments so made by him and the result of the election. It is only in this contingency that the Returning Officer is vested with powers to amend the results of the elections and under Rule 36, he shall cause the names of elected candidates to be posted at Village Chavdi or at the village panchayat office or at such other public place, if any, appointed in that behalf by him and shall report such names immediately to the Collector. It is thereafter that the Collector would cause publication of results of elections under Rule 37 of the Rules of 1959. The Collector also is vested with a limited jurisdiction before the publication of the names of the elected and appointed members i.e. to the extent of correcting any mistake in the names of the elected and appointed members. Therefore, in the whole process, commencing from declaration of results of the elections to its publication, the Rules do not permit or vest with the Returning Officer or the Collector, any power to add to, amend, vary or rescind the declaration of results of elections, and, therefore, to borrow such powers from Section 21 of the Bombay General Clauses Act 1904, would be nothing but acting beyond the jurisdiction vested by the Act and Rules. Therefore, the Returning Officer having once exercised his power of declaring the results of elections, cannot exercise it again unless statute provides for or vests with him the right to do so. Section 21 of the Bombay General Clauses Act, 1904 cannot be used by the Returning Officer to put a person who has been declared by him as elected (rightly or wrongly), to change the result of the election and place the person in an

advantageous position over the other side and drive the other side to seek redress by taking recourse to election petition. It is rightly contended by the learned counsel appearing for the respondents that the remedy available to a person aggrieved by the declaration of the result of election is only through filing an election petition as contemplated under Section 15 of the Bombay Village Panchayat Act. The Karnataka High Court, while dealing with a similar situation in the case of *The Tahsildar and Returning Officer, Agricultural Produce Market Committee, Bhalki v. Shivaji Rao*, AIR 1976 Karnataka 233, observed in para 4 of the judgment as under

"4. The general principle of law is that once the process of election is started, the same cannot be interrupted except by an order of Court. The result of the action of the appellant-Tahsildar is to interrupt the process of election after the nominations had been filed and accepted. If the principle of Section 21 of the General Clauses Act can be availed of by Returning Officers, then it is likely to be seriously abused whenever the persons in authority find that their candidates are not likely to win or their nominations are not valid. As at present advised we are of the opinion that unless there is an express power conferred by the Statute, the Tahsildar has no power to cancel the notification once he has issued a calendar of events and pursuant to the same, nominations have been filed and accepted."

In another case, Patna High Court, while dealing with Section 21 of the General Clauses Act (1897), in the case of *Bakshi S.B.P. Sinha v. The Bihar State Bar Council*, held as under :

"The Bihar State Bar Council has no power to cancel its entire election and to give direction to the Returning Officer to hold fresh election. Thus where some obstructions and disturbances took place, at certain polling booths and polling had also stopped for some time but ultimately the poll had been completed, and the counting and recounting of votes also took place, the State Bar Council could not at such stage pass a resolution cancelling the entire election and

directing fresh election. The resolution of the State Bar Council could not be saved under implied powers under Section 21 of the General Clauses Act, because the resolution did not amount to postponement or alteration of the election programme but amounted to cancellation of election already held. If at all any irregularities were committed at the election, the proper remedy was to file election petition before the Election Tribunal constituted under Rule 47 of the State Bar Council Rules. Till the result of the election was declared, it could not be challenged by filing election petition and therefore the Bar Council was directed to declare the result."

Therefore, we have no hesitation to hold that the impugned action on the part of the respondent-Returning Officer in issuing the corrigendum and unsettling the results of the election earlier declared, on the basis of the instructions/guidelines, was without jurisdiction and deserves to be quashed and set aside."

10. In case of ***Sohan Lal vs. Babu Gandhi (supra)***, relied upon by learned counsel for respondent No.6, even the Supreme Court has also observed that in such contingency the only remedy would be to file election petition under Section 122 of the Act of 1958 and the Court or Tribunal is bound to consider the plea and where case is made out, it may direct recount depending upon the evidence led by the parties. In the facts of the said case, on 20.1.2000 the election for the post of Sarpanch of Gram Panchayat, Ringnodiya, Indore was held. After counting of votes, the appellant was orally informed that he had won the elections. However, when the result was officially declared, respondent No.1 was shown to have won. The Returning Officer then issued a certificate showing that respondent No.1 won

the election. The appellant therefore, filed an election petition before the Sub-Divisional Officer. By an ex-parte order, the Sub-Divisional Officer directed recounting of the ballot papers. Against the said ex-parte order the writ petition came to be filed wherein the High Court of Madhya Pradesh has directed the Sub-Divisional Officer to consider the issue again by giving opportunity to both sides. Thereafter, the Sub-Divisional Officer heard all the parties and again passed an order of recounting. On second recount, it was found that the votes polled in favour of the appellant had been erroneously shown as having been polled in favour of respondent No.4. Thus, the Sub Divisional Officer again corrected the results. The Madhya Pradesh High Court, based upon the ratio laid down in case of Smt. ***Ram Rati Vs. Saroj Devi*** set aside the order of the Sub Divisional Officer solely on the ground that the appellant had not applied to the Returning Officer for recounting. The Supreme Court thus, observed that in view of Section 122 and the Rules of the said State, the ratio laid down in the case of Ram Rati (supra) is not correct to hold that in an election petition, after declaration of the result, the Court or the Tribunal cannot direct recounting of votes unless the party has applied in writing for recounting of votes. It thus, appears that the aforesaid ratio laid down by the Supreme Court may help respondent No.6 if she is permitted to file an election petition and even identical issue is raised that none of the candidate or his authorized agent has

filed any application for recounting of votes before the Returning Officer.

11. In view of above discussion, this writ petition deserves to be partly allowed granting liberty in favour of respondent No.6 herein to prefer an election petition under Section 15 of the Act, 1958. Hence, the following order.

O R D E R

- I) Writ petition is hereby partly allowed. No costs.
- II) The impugned order dated 17.10.2017 issued by the Maharashtra State Election Commission and order dated 17.10.2017 communicated by the Collector, Beed to the Tahsildar, Dharur, District Beed are hereby quashed and set aside.
- III) Respondent No.6 is at liberty to file election petition as provided under Section 15 of Maharashtra Village Panchayat Act, 1958 and the cause of action for filing election petition under the said section would arise from today. The period of limitation prescribed under the said provision is to be construed accordingly.

IV) In case, such election petition is preferred, the learned Civil Judge, Junior Division, before whom the election petition challenging the validity of the election is filed, will decide the same without being influenced by any of the observations made by this court and the same shall be decided on its own merits, in accordance with law.

V) Writ petition is disposed of accordingly.

12. At this stage, learned counsel for respondent No.6 requests to stay the effect of this order for a period of six weeks so as to enable respondent No.6 to approach the Supreme Court. However, considering the facts and circumstances of this case, request stands refused.

(V. K. JADHAV, J.)

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