

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 13829 OF 2017

Sau. Vandana Pradip Patil

...Petitioner

versus

Sau. Suvarna w/o Sanjay Jadhav and others

...Respondents

.....

Mr. Mahesh Deshmukh, advocate for the petitioner.

Mr. P.M. Shah, senior counsel i/b Mr. Y.V. Kakde, advocate for respondent No. 1.

Mr. S. B. Choudhari, advocate for respondent no.4.

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CORAM : V. K. JADHAV, J.
DATED : 1st MARCH, 2018

PER COURT :-

1. By consent of the parties, heard finally at admission stage.
2. By the instant writ petition, the petitioner seeks quashing of the order passed below Exh.44 dated 1.11.2017 in Election Petition No. 4 of 2016 by the learned Adhoc District Judge, Vaijapur, District Aurangabad, thereby rejecting the application filed by the present petitioner under Order VII Rule 11 of Code of Civil Procedure, 1908.
3. Brief facts giving rise to the present writ petition are as follows:-
 - a) The general elections of Municipal Council, Gangapur for a term

of five years i.e. from 2016 to 2021 were held in the month of December, 2016. Total strength of the Municipal Council, Gangapur is 17 elected councilors and one directly elected President as per the provisions of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 (for short hereinafter referred to as "the Act of 1965"). The post of President of Municipal Council, Gangapur was reserved for woman category. The petitioner herein has contested the election for the post of President. Respondent Nos. 1 and 4 herein have also contested the said election. After polling, results were declared, wherein the present petitioner was declared as returned candidate, who has defeated respondent Nos. 1 and 4 herein. The present petitioner got elected by margin of 130 votes as against respondent No.1 herein. Accordingly, the present petitioner assumed the charge for the post of President of the Municipal Council, Gangapur, in accordance with law.

b) On 27.12.2016, respondent No.1 herein has filed election petition No. 4 of 2016 on various grounds. Upon receiving notice, the petitioner has put her appearance in the said election petition. The petitioner has also filed her written statement. Even the respondent Nos. 2 and 3 herein have also filed their common written statement.

c) The petitioner herein filed an application Exh.44 on 11.9.2017 under Order VII Rule 11 of C.P.C. In the said application, the present

petitioner (respondent No.3 in the election petition) prayed for dismissal of the election petition summarily on the ground that there is non-compliance of the mandate as referred in Clauses (a) and (b) of Section 21(2) of the Act of 1965 by not annexing the separate concise statement of material facts and not providing sufficient particulars as well as the grounds on which the election is called in question. It has also been contended in the application Exh.44 that there is no specific plea made in the election petition by respondent No.1 herein as to how the petitioner herein has adopted illegal means and as such 152 votes are not counted as well as the votes from two polling stations are not counted. It has been contended in the application Exh.44 that no sufficient particulars together with the grounds regarding collusion between Returning Officer and the present petitioner are set-forth in the election petition.

d) Respondent No.1 herein (original petitioner in the election petition, filed his say to the said application Exh.44. Upon hearing, by the impugned order dated 1.11.2017 the learned Adhoc District Judge, Vaijapur, rejected the application Exh.44 filed by the present petitioner. Hence, this writ petition.

4. Learned counsel for the petitioner submits that there is no concise statement of material facts in the election petition on which respondent no.1 (election petitioner) relies and as such, non compliance

of the provisions of Section 21(2) (a) of the Act of 1965 is apparent on the face of record. Learned counsel submits that even there are no sufficient particulars setting forth the grounds on which the election or nomination is called in question and as such, there is non compliance of the provisions of Section 21(2) (b) of the Act of 1965. Learned counsel submits that in view of the provisions of section 21(11A) of the Act of 1965, if the validity of any election is called in question only on the ground of an error made by an officer charged with carrying out the provisions of clauses (b) and (c) of sub-section (2) of Section 9 or of the Rules made under Section 17 or of an irregularity or informality not corruptly caused, such election cannot be set aside. Learned counsel submits that by plain reading of the contents of the election petition, it appears that the grounds on which respondent No.1 relies upon relate to an error committed by the Returning Officer and in absence of any sufficient particulars about corrupt practice, election petition itself is not maintainable.

5. Learned counsel for the petitioner, in order to substantiate his contentions, placed reliance on the decisions in the following cases:-

- i) ***Smt. Inderkaur Guruchanransingh Ragi vs. Hanmantrao s/o Sayanna Battin and others***, reported in **1996 BCI 290**,
- ii) ***Anil Vasudev Salgaonkar vs Naresh Kushali Shigaonkar***, reported in **2009 (9) SCC 310** and
- iii) Judgment of this Court dated 23.12.2011 in ***Election Petition Nos.***

4 of 2009 and 10 of 2009 (Tatyasaheb @ Raghunath s/o Omkar Patil vs. The Election Commissioner of India and others)

6. Shri P.M. Shah, learned senior counsel appearing for respondent No.1 submits that as per the record, total number of votes casted on 18.12.2016 were 15867 but while counting the votes on the next date, the authority has only counted 15715 votes and as such there is difference of 152 votes which were not calculated while counting the total number of votes. Respondent No.1 (original petitioner in election petition) came to be defeated by the petitioner herein by 130 votes only. Learned senior counsel submits that there is option of NOTA (none of the above) on the EVM (electronic voting machine). Learned senior counsel submits that respondent No.1 has specifically made allegations in the election petition that the authorities have adopted corrupt practice so as to support the petitioner herein and they have not followed the provisions of Election Rules and by not counting 152 votes exceeded their jurisdiction. After the election, respondent No.1 herein has filed an application for recounting, however, the authorities have turned down the said application. Learned senior counsel submits that respondent No.1 herein has specifically shown the cause of action in para 21 of the election petition, stating therein that there is collusion between respondent Nos. 2 to 4 of the election petition which resulted into declaring respondent No.3 (petitioner herein) as President of the Municipal Council, Gangapur by not following the prescribed Rules of Election. Learned senior counsel submits that the election petition

contains the statement of material facts on which the respondent No.1 herein relies and further there are sufficient particulars set forth as the grounds on which the election of the present petitioner is called in question. Learned senior counsel submits that in terms of Section 21(11A), if an irregularity or informality is not corruptly caused and the same has occurred on account of error committed by the Officer in charge, then the Court cannot set aside the election. However, in the election petition, respondent No.1 herein has made specific allegations about the said irregularity or corrupt practice made by the petitioner in collusion with respondent Nos. 2 and 4 to the election petition. Learned senior counsel submits that it is very serious matter wherein the authorities, in collusion with the petitioner herein, have not counted 152 votes. The same is significant for the reason that the petitioner herein got elected by margin of 130 votes only.

7. Learned senior counsel appearing for respondent No.1 submits that rejection of a plaint is an action drastic in nature and as such condition precedent to exercise the powers. The learned senior counsel submits that plaint can be rejected only if the averments made therein *ex facie* did not disclose the cause of action or reading thereof, the plaint appears to be barred under any law. The stand of the defendant in the written statement or in an application for rejection of plaint is wholly immaterial at that stage.

8. Learned senior counsel, in order to substantiate his submissions, placed reliance on the judgment of Supreme Court in the case of ***P.V. Guru Raj Reddy & Anr vs. P. Neeradha Reddy and others***, reported in **(2015) 8 SCC 331**.

9. I have also heard Mr. S.B. Choudhari, learned counsel for respondent No.4.

10. Learned counsel for the petitioner has vehemently argued that the election petition is liable to be rejected for non-compliance of Clauses (a) and (b) of Section 21(2) of the Act of 1965. Learned counsel for the petitioner has also submitted that in terms of provisions of Section 21 sub-section (11A) such election petition cannot be entertained. Clauses (a) and (b) of Section 21(2) and sub-section (11A) of Section 21, which are relevant for the present discussion, read as under:-

“21(2) Any such petition -

(a) shall contain a concise statement of the material facts on which the petitioner relies;

(b) shall, with sufficient particulars, set forth the ground or grounds on which the election, or nomination is called in question; and

(c)

21(11A) If the validity of any election is called in question only on the ground of an error made by an officer charged with

carrying out the provisions of clauses (b) or (c) of sub-section (2) of section 9 or of the rules made under section 17 or of an irregularity or informality not corruptly caused, the Judge shall not set aside the election.”

11. On careful perusal of the contents of election petition, I find that respondent No.1 herein (original election petitioner) has specifically pleaded about the corrupt practice adopted by the authorities in collusion with the petitioner herein. It has been specifically pleaded in the election petition that 152 votes were not counted in order to help the petitioner herein. It is also a part of record that the petitioner herein got elected by small margin of 130 votes, whereas 152 votes were admittedly not counted by the authorities. Respondent No.1 has given sufficient particulars for setting forth the grounds on which the election of the petitioner herein is called in question. Thus, such election petition requires to be inquired into and disposed of by a Judge. The allegations are serious in nature and those are significant due to the fact that the petitioner got elected by small margin of votes. So far as the provisions of sub-section (11A) of section 21 of the Act of 1965 are concerned, the respondent No.1 has approached the court with a specific pleading about corrupt practice adopted by the authorities in collusion with the petitioner herein in not counting 152 votes. *Prima facie*, it appears that the validity of the election is not called in question only on the ground of error made by an Officer. I do not find any substance in the submissions of the petitioner that in view of the provisions of Section 21(11A) of the

Act of 1965, there is no cause of action in filing the election petition. The Supreme court, in the case of ***P.V. Guru Raj Reddy & Anr vs. P. Neeradha Reddy & Ors*** (supra), relied upon by learned senior counsel for respondent No.1, has reiterated that while exercising the power under Order VII Rule 11 of C.P.C., the condition precedent to exercise the such power are stringent and the order of rejection of plaint is of drastic nature.

12. In the case of ***Smt. Inderkaur Gurucharansingh Ragi vs. Hanmantrao s/o Sayanna Battin and others*** (supra), relied upon by the learned counsel for the petitioner, this court has held that election petition must contain the material facts and must set out full particulars of corrupt practice. This being the mandatory provision, the absence of concise statement of material facts with full material particulars in the election petition would result in dismissal of the election petition itself. This Court, in the above cited case, has considered the election petition after the same is decided by the learned District Judge. Consequently, this court has also observed that respondent No.1 therein has not adduced substantial or positive evidence even to raise the presumption as to the commission of corrupt practice and it is held that the finding recorded by the learned Additional District Judge is not only perverse but suffers from non-application of mind to the evident on record. In the instant case, the trial of the election petition is yet to be commenced and *prima facie* it appears that the election petition contain material facts by

setting out full particulars.

13. In the case of **Anil Vasudev Salgaonkar vs Naresh Kushali Shigaonkar** (supra), the Supreme Court had an occasion to deal with somewhat similar provisions of the Representation of People Act, 1951 in respect of election petition. The Supreme Court, in the facts of the said case, observed that the pleadings of corrupt practice are limited to digging of bore holes only, however, neither any facts are pleaded nor particulars given as to how and in what manner the voters were influenced in favour of the appellant so as to cast votes in his favour. The Supreme Court has observed that there is total absence of material pleadings to prove that due to the alleged corrupt practice, the election has been vitiated in a manner that but for such bore holes not being dug, the appellant would not have been returned as a winning candidate. The Supreme court thus observed that the election petition read as a whole, does not disclose any cause of action and the election petition came to be dismissed by the Supreme Court.

14. In the instant case, there are specific allegations about not counting 152 votes. Admittedly, 152 votes were not counted. It is also significant that the preset writ petitioner won the election by small margin of 130 votes. Thus, not counting of 152 votes certainly affected the election result. There are specific allegations about corrupt practice by the authorities in collusion with the petitioner herein in not counting

those votes while declaring the result.

15. In the case of ***Tatyasaheb @ Raghunath s/o Omkar Patil vs. The Election Commissioner of India and others*** (supra), this court observed that the petitioner did not plead and show affirmatively that result of election has been materially affected.

16. In view of the above discussion, I do not find any substance in this writ petition and the same is liable to be dismissed. The writ petition is accordingly dismissed. In the circumstances, there shall be no order as to costs.

(V. K. JADHAV, J.)

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