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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION NO.49 OF 2018

Sambhaji Chandrakant Kharade
and ors

... Petitioners

V/s.

The Returning Officer,
Shyamsundar Gajanan
Khataavkar

... Respondents

Mr. Umesh H. Pawar, for the Petitioner.
Mr. Kuldeep U. Nikam, for the Respondent Nos. 3 to 5.
Mr. A.R. Patil, AGP for the State.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 27th MARCH, 2018.

P.C. :

1] Heard learned counsel for the petitioners, learned counsel for the respondent Nos. 3 to 5 and learned AGP for the State.

2] By this Revision Application filed under Section 115 of the Code of Civil Procedure, the petitioners are challenging the order dated 12.1.2018 passed by the Civil Judge Junior Division, Islampur, below the application at Exh.37, in Election Petition No.1 of 2017.

3] The application at Exh.37 was filed by the present petitioners under Section 151 of Code of Civil Procedure, on the ground that the Election Petition does not disclose the cause of action

and whatever the cause of action stated in the Election Petition, is imaginary and illusory and hence in the absence of the cause of action, the Election Petition needs to be dismissed.

4] This application came to be resisted by the learned counsel for respondents and the trial Court has, after considering the submissions advanced by learned counsel for both the parties, rejected the said application.

5] Being aggrieved thereby, the instant Revision is preferred.

6] The submission of learned counsel for the petitioners is that the respondent Nos. 3 to 6 have filed this Election Petition under Section 15 of the Maharashtra Village Panchayat Act, 1959, challenging the results of the election held on 17.10.2017, for the Gram Panchayat Wategaon, Taluka: Walva, on the ground that the number of votes were not calculated properly. However, the Election Petition does not contain the material facts disclosing the cause of action. By placing reliance on Rule 35 of the Maharashtra Village Panchayats Election Rules 1959, it is submitted that the objection to the counting of ballot papers, should have been raised by the respondents before the Returning Officer itself, so that the Returning Officer could have permitted the recounting of the votes. Here in this case, it is urged that no such application was filed before the Returning Officer for recounting of the votes and in such situation,

there cannot be any cause of action for filing of this Election Petition, challenging the election of the petitioners.

7] Learned counsel for the petitioners, has in this respect pointed out to the declaration which was made by the Returning Officer and which is duly signed by the Representative of the respondents. My attention is also drawn to the certificate relating to the chart showing the calculated number of votes and which is also signed by the elected candidate and also the defeated candidates. It is urged that there was no grievance made by the respondents at that time relating to the election of the petitioners, though the grievance should have been raised before the Returning Officer itself, in absence thereof, there cannot be any cause of action for filing of the Election Petition. The cause of action as given in the Election Petition is, thus, merely illusory and imaginary.

8] To substantiate his submission, learned counsel for the petitioners has relied upon the judgment of Rajasthan High Court, in the case of *Supyar Kanwar -vs- Civil Judge (Sr. Dn.), Fatehpur Shekhawati and anr*, [2012 SCC online Raj.1704] wherein, after discussing the number of judgments of Hon'ble Supreme Court and other High Courts, it was held that the Election Petition, sans the material statement of facts cannot be entertained, as only the concise of statement of material facts can give the cause of action for filing

such Election Petition.

9] Learned counsel for the petitioners has then placed reliance on the judgment of this Court, in the case of *Duryodhan Mahadev Kale and ors -vs- Election Returning officer, Gram Panchayat Redni and ors* [2004 (2) Mh. L.J. 861]; wherein rule 34(3) of the Village Panchayat Election Rules, 1959 was discussed and it was held that, “if there is nothing on record to show that the defeated candidate had invoked Rule 35, which provides for recounting of votes after the declaration under Rule 34 of the Rules, then the order of the recount of the votes as passed by the trial Court cannot being against the settled principles of law needs to be set aside”.

10] According to learned counsel for the petitioners, therefore, this is a fit case where in the absence of any averment or the material showing that the defeated candidate viz. the respondent Nos. 3 to 6 have invoked Rule 34 of the Maharashtra Village Panchayat Election Rules, there remains no cause of action at all to file the Election Petition and on this very ground, the Trial Court should have rejected the said Election Petition, under Order VII Rule 11(a) of C.P.C.

11] Per contra, learned counsel for respondents has drawn the attention of this Court, to the averments made in the Election

Petition, coupled with the complaint, which was lodged before the Election Commissioner, on the very day that is on 18.10.2017, relating to the votes being not counted properly

12] It is undisputed that the Election Petition must contain a concise statement of material facts which give rise to the cause of action for filing such Election Petition. In this case, in my considered opinion, both the plain and meaningful, reading of the Election Petition, goes to reveal that in paragraph No.16 of the Election Petition, the respondents have given the cause of action for filing this Election Petition by stating that on the day of election that is on 17.10.2017, when the election result was declared, it was noticed that counting of the votes was not proper, on account of defect in the electronic machine and hence the cause of action arose on that day. This is the clause of formal cause of action pleaded in the petition.

13] The substantive cause of action is stated in paragraph No.10 of the petition. It is stated that, immediately after respondents came to know that the counting of the votes was not proper, on the same day itself, respondent No.1 has given the complaint application to the Returning Officer, requesting him to take necessary action. However, respondent No.1 has neither accepted the said application nor took cognizance of the said complaint. Therefore, respondent No.3 Rahul Chavan has sent the said complaint by email to the Collector,

the Sub Divisional Officer and the Tahasildar. Similarly the said complaint was sent by email to the Election Commissioner and also to the Returning Officer. However, no cognizance of the said complaint was taken by any of the authorities.

14] In support of averments made in the petition, respondents had filed a copy of the complaint which was sent to the Election Commissioner on 18.10.2017 itself; wherein also there are averments that the difference in the counting of votes was noticed at about 10.00p.m., then immediately in the morning, the representative of respondent Nos. 3 to 6, namely Shrikrishna Dattu Nalavade, made phone call to the Returning Officer, who had also accepted the difference of votes.

15] The submission of learned counsel for the petitioners is that this complaint was made at night and not when the counting was in the process or the election result was declared. It is submitted that once the election result is declared, there is no point in contending that the complaint was made subsequently as Rule 34 mandates that such grievance be raised before the Returning Officer itself.

16] In this respect, as pointed out by learned counsel for respondents here in the case the election results were declared on the next day, that is on 18.10.1017, which clearly indicates that the process of counting of votes was in progress throughout the night in

between 17.10.2017 to 18.10.2017.

17] The next contention of learned counsel for the petitioners is that though the complaint is alleged to be sent on 18.10.2017, it bears the acknowledgement of the Tahasil office of having received the same on 23.10.2017 and hence it was not filed on the same night or on the next morning. In my considered view, the question whether the said complaint was sent on the same night or on the next day or on 23.10.2017, is a matter of trial to be decided by the trial Court only after recording of the evidence.

18] For the present, as per pleading in the election petition, the cognizance was not taken of the said complaint. Rule 35 nowhere provides that if the objection is not raised as per Rule 34 immediately, in respect of incorrect counting of votes, there will be no cause of action for challenging the election under Section 15 of the Village Panchayat Act. That is not the pre-condition as such for maintainability of the election petition. Ultimately respondents may not succeed in the Election Petition on their failure to show that they have raised the objection at the time of counting of votes, but that is again a merit of the matter, which cannot be a ground for rejection of the election petition, on the count that there was no cause of action for filing of the said Election Petition. The cause of action being definitely mentioned in the election petition, at this stage, it cannot

be said that the said cause of action is imaginary or illusory. Thus, as the cause of action is disclosed on the basis of facts pleaded and the documents annexed to the election petition, the trial Court, has rightly rejected the application for dismissal of the election petition.

19] Considering the limited scope of revisional jurisdiction of this Court, this Court will not be justified in interfering in the impugned order passed by the trial Court. Hence, the Revision Application stands dismissed.

20] It is, however, clarified that whatever observations are made herein above, are only for the purpose of deciding this Revision Application and the trial Court shall not be influenced or swayed by the same.

21] The trial Court is requested to decide the Election Petition as expeditiously as possible, provided both the parties and their counsel extend their co-operation for expeditious disposal.

[DR.SHALINI PHANSALKAR-JOSHI, J.]