

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 1038 OF 2017**

Mr. Inacio Mariano Fernandes, Aged 57 years, son of late Pedro Joao Fernandes, resident of H. No. 2, Nagvaddo, Betalbatim, Salcete, Goa.

.... Petitioner

Versus

1. Mr. Minu Antonio Fernandes, aged 61 years, son of Joaquim Manuel Fernandes, resident of 27, Pock vaddo, Betalbatim, Salcete, Goa.
2. Mr. Costancio Miranda, aged 60 years, son of Bernand Miranda, resident of H. No. 230, Pockvaddo, Betalbatim, Salcete, Goa.
3. Mr. Pedro Mariano Fernandes, of major age, married, resident of Ranvaddo, Betalbatim, Salcete, Goa.
4. Mr. Vishal C. Kundaikar, of major age, Returning Officer for General Election to Village Panchayat Betalbatim, 2017, Mamlatdar of Salcete, Mathany Saldanha Administrative Complex, Margao.
5. Mr. Domnic Rodrigues, of major age, Counting Supervisor for General Election to Village Panchayat Betalbatim, 2017, Draftsman, office of EE Div-II (S&W) Elect. Department, Aquem, Margao, Goa.
6. Mr. Valeriano Rodrigues, of major age, Counting Supervisor for General Election to Village Panchayat Betalbatim, 2017, UDC, office of Joint Director of Accounts, Margao, Mathany Saldanha Administrative Complex, Margao.
7. Mr. Yatin Sawardekar, of major age, Counting Supervisor for General Election to Village Panchayat Betalbatim, 2017, LDC, office of

Mamlatdar of Salcete, Mathany Saldanha Administrative Complex, Margao.

8. Mr. Rajan Naik, of major age, Counting Supervisor for General Election to Village Panchayat Betalbatim, 2017, office of E.E. W.D. XXV, PWD, Fatorda, Salcete, Goa.
9. Mr. Jeetendra Kamat, of major age, Incharge of distribution of ballot boxes for General Election to Village Panchayat Betalbatim, 2017, Talathi (Distribution), office of Mamlatdar of Salcete, Salcete, Margao, Goa.
10. Goa State Election Commission, through its Commissioner, having office at Panaji-Goa.

.... Respondents

Mr. S.G. Desai, Senior Advocate with Mr. Pavithran A.V. and Ms. S. Shelke, Advocates for the Petitioner.

Mr. Devidas J. Pangam with Mr. S.P. Munj, Advocates for the Respondent Nos. 4 to 10.

CORAM : C.V. BHADANG, J.

Reserved on : 4th April, 2019

Pronounced on : 5th April, 2019

JUDGMENT:

By this petition, the petitioner is challenging the order dated 13.10.2017, passed by the Administrative Tribunal in Panchayat Election Petition No. 28/2017. By the impugned order, the Tribunal has directed deletion of respondent nos. 4 to 10 from the record.

2. The brief facts necessary for the disposal of the petition may be stated thus:

That the petitioner was contesting election from ward no. 1 of Village Panchayat, Betalbatim, which was held on 11.06.2017. The petitioner and the respondent no. 1 were the only contesting candidates from the said ward. The election symbol of the petitioner was 'Aeroplane', while that of the respondent no. 1 was a 'Cupboard'. The petitioner lost the said election by a margin of four votes and the respondent no. 1 was declared elected.

3. The respondent nos. 2 and 3 were contesting election from ward no. 2 of the said Village Panchayat. The election symbol of the respondent no. 2 was an 'Aeroplane', while that of the respondent no. 3 was a 'Cupboard'. In the said election, the respondent no. 2 was declared elected, while the respondent no. 3 lost.

4. The respondent no. 4 is the Returning Officer, the respondent nos. 5 to 8 are the Counting Supervisors, while respondent no. 9 was the Incharge for distribution of ballot boxes. Respondent no. 10 is the Goa State Election Commission.

5. The ground on which the petitioner has filed the election petition, is that there was only one ballot box kept for casting votes from ward nos. 1 and 2. At the time of counting of votes, the ballots were segregated i.e. those pertaining to the ward no. 1 and ward no. 2 and kept in separate trays. The material allegation is that the respondent no. 9, who was only supposed to distribute the ballot boxes and who was neither a Counting Supervisor nor a Counting Assistant, came to the counter where the votes of ward no. 1 were being counted and stated that some votes of ward no. 2 have been mistakenly included in ward no. 1. The respondent no. 9, opened one of the bundles from ward no. 1 (from where the petitioner was contesting the election) and took away about twenty ballots and put them in the tray in which, ballots of ward no. 2 were counted. He then brought twenty ballots from ward no. 2 and put them in ward no. 1. In short, the allegation is that twenty ballots of the two wards were exchanged. The petitioner is alleging a connivance between the respondent no. 1 and respondent nos. 4 to 9, in order to assist the respondent no. 1 in getting elected by exchange of the ballot papers.

6. The petitioner has filed Panchayat Election Petition No. 28/2017, challenging the election of respondent no. 1.

7. The respondent nos. 4 to 10 filed an application before the Tribunal, for their deletion, on the ground that in terms of Section 16(2) of the Goa Panchayat Raj Act, 1994 (Act, for short), in an election petition, only those persons as mentioned in the said Section, can be joined as parties. It was contended that the Returning Officer/Counting Supervisor/Incharge of ballot box and the State Election Commission cannot be joined as party-respondents in the election petition.

8. In reply, the petitioner contended that the respondent nos. 4 to 10 are necessary and proper parties, in as much as these respondents have committed gross illegality in the matter of counting of votes by exchanging the votes from ward no. 1 and ward no. 2.

9. The Tribunal after noticing Section 16 of the Act and placing reliance on the decision of the Supreme Court in the case of **Jyoti Basu & Others Vs. Debi Ghosal & Others AIR 1982 SC 983** and in the case of **Michael B. Fernandes Vs. C.K. Jaffer Sharief & Others (2002) 3 SCC 521** has held that the respondent nos. 4 to 10 cannot be joined as parties and has therefore, directed their deletion. While doing so, the

Tribunal has observed that as per explanation to Section 18 of the Act, the petitioner can examine the respondent nos. 4 to 9, if their evidence is material for deciding the petition. Feeling aggrieved, the present petition is filed.

10. I have heard Mr. Desai, the learned Senior Counsel for the petitioner and Mr. Pangam, the learned Counsel for the respondent nos. 4 to 10. None appears for the respondent nos. 1, 2 and 3. Perused record.

11. Mr. Desai, the learned Senior Counsel for the petitioner has placed reliance on Section 16(2) of the Act and the proviso to Section 19 of the Act, in order to submit that there is no prohibition in arraying the respondent nos. 4 to 10 as party respondents to the election petition. It is submitted that having regard to the nature of the case made out by the petitioner, about illegal exchange of about twenty ballots between ward nos. 1 and 2, the respondent nos. 4 to 10 are necessary and proper parties. It is submitted that Section 16(2) of the Act only provides for a person, who needs to be mandatorily joined as a respondent in the petition. It is submitted that Section 16(2) of the Act in terms, does not prohibit the joining of some other parties, if they are found to

be necessary or proper parties. It is submitted that sub-section (2) of Section 19 of the Act would make it explicit that no finding as to any corrupt practice, can be recorded, unless an opportunity of hearing is granted to the concerned party. It is submitted that the respondent nos. 4 to 9, against whom the allegations are made are both, necessary and proper parties.

The learned Senior Counsel has placed reliance on the decision of the Supreme Court in the case of **Murarka Radhey Shyam Ram Kumar Vs. Roop Singh Rathore & Others AIR 1964 SC 1545**, **B.S. Yadiyurappa Vs. Mahalingappa & Others (2002) 1 SCC 301** and the decision of the Kerala High Court in the case of **Chintha Dharmarajan Vs. Mary Anto 2002 (1) KLJ 654**, in order to submit that there is no prohibition for arraying such persons, other than those, who are mandatorily required to be joined as respondents, in the election petition.

12. Mr. Pangam, the learned Counsel for the respondent nos. 4 to 10 has supported the impugned order. It is submitted that Section 16 of the Act provides for the persons, who can be arrayed as respondents. It is submitted that although, the provisions of Civil Procedure Code apply to the trial of the petition, as held by the Supreme Court in the case of **Michael**

B. Fernandes (supra), the provisions of Order I, Rule 10 of CPC cannot be called into aid. It is submitted that the concept of necessary and proper party cannot be imported, except as otherwise provided in the Act itself. It is submitted that the decision in the case of **Murarka Radhey Shyam Ram Kumar** (supra) and **B.S. Yadiyurappa** (supra) as well as **Chintha Dharmarajan** (supra) turned on their own facts, in which, unlike in the present case, the election petition was dismissed, on account of addition of certain parties, other than those who are required to be joined as respondents.

13. In rejoinder, Mr. Desai, the learned Senior Counsel for the petitioner, submitted that the decision in the case of **Michael B. Fernandes** (supra) turned on its own facts and is not applicable. It is submitted that the question has to be examined in the light of the specific case made out by the petitioner. It is pointed out that the Tribunal was in error in deleting respondent nos. 4 to 10, when in fact, the petitioner had made certain allegations against the very same respondents.

14. I have carefully considered the rival circumstances and the submissions made and I do not find that any case for

interference is made out.

15. It was not disputed during the course of the arguments at Bar that the Returning Officer is not a necessary party to the election petition. Although, it was contended that the petition is based on an allegation of corrupt practice, the case made out and the allegations made do not fall within the four corners of Section 23 of the Act, which defines corrupt practice.

16. Presently, we are only concerned as to whether, the Tribunal was justified in directing deletion of the respondent nos. 4 to 10. In order to appreciate the rival submissions made, it is necessary to reproduce Section 16 and Section 19 of the Act as under:

“16. Election Petition— (1) No election to fill a seat or seats in a Panchayat shall be called in question except by an election petition prescribed on one or more of the grounds specified in sub-section (1) of section 20 and section 21 to such authority as may be prescribed, by any candidate at such election or by any voter qualified to vote at such election together with a deposit of five hundred rupees as security for costs, within thirty days from, but not earlier than, the date of declaration of the result of the election of the

returned candidate at the election, and if the dates of declaration of the results of their election are different, the last of these dates.

(2) A petitioner shall join as respondents to his petition,-

(a) where the petitioner, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates; and

(b) any other candidates against whom allegations of any corrupt practice are made in the petition.

(3) Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition."

"19. Decision of the prescribed authority.— (1) *At the conclusion of the trial of an election petition, the prescribed authority shall make an order,—*

(a) dismissing the election petition; or

(b) declaring the election of all or any of the returned candidates to be void; or

(c) declaring the election of all or any of the returned candidates to be void and the petitioner or any other candidates to have been duly elected.

(2) At the time of making an order under subsection (1), the prescribed authority shall also make an order,—

(a) where any charge is made in the petition of any corrupt practice having been committed at the election, recording,—

(i) a finding whether any corrupt practice has or has not been proved to have been committed at the election and the nature of that corrupt practice; and

(ii) the names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt practice and the nature of that practice; and

(b) fixing the total amount of costs payable and specifying the persons by and to whom costs shall be paid:

Provided that a person who is not a party to the petition shall not be named in the order under sub-clause (ii) of clause (a) unless—

(i) he has been given notice to appear before the prescribed authority and to show cause why he should not be so named; and

(ii) if he appears in pursuance of the notice he has been given an opportunity of cross examining any

witness who has already been examined by the prescribed authority and has given evidence against him, of calling evidence in his defence and of being heard.”

It can thus be seen that under sub-section (2) of Section 16 of the Act, where the petitioner, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates and any other candidate against whom allegations of any corrupt practice are made in the petition are required to be joined as respondents. The respondent nos. 4 to 10 obviously do not fall under any of the categories as set out in sub-section (2) of Section 16 of the Act.

17. Let us now consider the case in context of Section 19 of the Act. A bare perusal of Section 19 of the Act shows that it comes into operation at the conclusion of the trial of the petition and not prior thereto. Sub-section (2) of Section 19 of the Act refers to a finding being recorded by the prescribed authority as to corrupt practice. I have already noted that

prima facie, it cannot be accepted that the allegations fall within the definition of a corrupt practice within the meaning of Section 23 of the Act. Thus, the reliance placed on sub-section (2) of Section 19 of the Act, to my mind is misplaced.

18. At this stage, it would be necessary to make a reference to the decision of the Supreme Court in the case of **Michael B. Fernandes** (supra), in which, it was held that the Returning Officer and the Chief Electoral Officer need not be added as party respondents, even if, they have been alleged in the petition to have not complied with the provisions of Conduct of Elections Rules and the guidelines issued by the Election Commission of India. It can thus be seen that even, in the case of **Michael B. Fernandes** (supra), there were allegations made against the Returning Officer and the Chief Electoral Officer for having not complied with the provisions of Conduct of Elections Rules and the guidelines issued by the Election Commission of India. The Hon'ble Supreme Court held that their plea of impleadment as proper parties, if not necessary parties, cannot be accepted as the concept of proper parties under the Civil Procedure Code is alien to Section 82 of the Representation of the People Act, 1951. It may be mentioned that Section 82 of Representation of the People Act, is *pari materia* with Section

16(2) of the Act. It cannot be accepted that the decision in the case of **Michael B. Fernandes** (supra) is distinguishable on facts. The Supreme Court in the said decision has referred to its earlier decision in the the case of **Jyoti Basu** (supra) and **B. Sundara Rami Reddy Vs. Election Commission of India 1991 Supp. (2) SCC 624** and noted that, however desirable and expedient it may appear to be, none other than those, who are mentioned in Section 82 of the Representation of the People Act, shall be joined as respondents in an election petition. It appears that a specific contention was raised before the Supreme Court that the law enunciated in the two decisions and the observations made therein are too wide and while Section 82 of the Representation of the People Act casts an obligation on an election petitioner to join those mentioned in clauses (a) and (b) as party respondent, it does not put an embargo for addition of any other person in an appropriate case, depending upon the nature of allegation made. The Supreme Court in the case of **Michael B. Fernandes** (supra) has specifically repelled the said contention.

19. A brief reference may be made to the decisions cited on behalf of the petitioner, at this stage.

A perusal of the decision in the case of **Chintha**

Dharmarajan (supra) would show that the question was whether, an election petition can be dismissed on the ground that the parties, other than those who are necessary parties, under Section 90 of the Kerala Panchayat Raj Act, have been made parties to the election petition, which was answered in the negative. While doing so, the Kerala High Court has held that while the petition cannot be dismissed for such addition, the parties who have been so added (other than those as required by Section 90 of the Kerala Panchayat Raj Act) can be struck off. Incidentally, that is exactly what is done by the learned Tribunal in the present case.

20. The Constitution Bench in the case of **Murarka Radhey Shyam Ram Kumar** (supra) has held that the joinder of the parties, other than those required under Section 82 of the Representation of the People Act does not result into non-compliance with the provisions of Section 82 of the Representation of the People Act and the petition cannot be dismissed on any such grounds. That is also held by the Supreme Court in the case of **B.S. Yadiyurappa** (supra), placing reliance on the decision in the case of **Murarka Radhey Shyam Ram Kumar** (supra).

21. The dispute in the present case, essentially involves a question as to whether, certain ballot papers from the two wards have been illegally exchanged and if yes, whether, such exchange has a material bearing on the result of the election. Such a factual finding, in my considered view, does not require the presence of respondent nos. 4 to 10. In that view of the matter, respondent nos. 4 to 10 cannot be said to be necessary parties. The Supreme Court in the case of **Michael B. Fernandes** (supra) has held that the concept of proper party cannot be called into aid in an election petition. Thus, looked from any angle, no exception can be taken to the impugned order passed by the Tribunal in directing deletion of respondent nos. 4 to 10. The observation of the Tribunal that the petitioner can examine the respondent nos. 4 to 9, however, cannot be accepted, particularly looking to the nature of the allegations made by the petitioner against these respondents. However, such an observation, although, found to be incorrect, has no bearing on the ultimate order passed. The petition is without any merit and is accordingly dismissed, with no order as to costs.

C. V. BHADANG, J.