

Meena

IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO. 1166 OF 2018

ANTONIO MAXIMIANO PEREIRA.,
S/o. Valentim Pereira,
major of age, Indian national,
R/o. House No.113, Mangor,
Vasco-da-Gama, Goa.

... Petitioner

Versus

1. THE STATE OF GOA,
Through its Chief Secretary,
having office at Secretariat,
Assembly Complex, Porvorim, Goa.
2. The Administrator of Comunidades,
South Zone, Margao, Salcete, Goa.
3. The Collector,
South Goa,
Having office at Mathany Saldana,
Administrative Complex, Margao, Goa.
4. The Comunidade of Mormugao,
Through its Attorney,
Having office at Vasco-da-Gama,
Mormugao, Goa.
5. Mr. Menino Henriques,
major of age,
R/o. Opposite Mangor Sports Club,
Mangor Hill, Vasco-da-Gama,
Marmugao, Goa.
6. Presiding Officer,
Circle Inspector, Mormugao Taluka ... Respondents

Mr. Kantak, Senior Advocate with Mr. Abhijeet Kamat, Advocate for the petitioner.

Mr. Dattaprasad Lawande, Advocate General with Mr. P. Dangui, Government Advocate for respondents No.1,2,3 and 6.

Mr. C.A. Ferreira, Advocate for respondent No.5.

Mr. J.P. Mulgaonkar, Advocate for respondent No.4.

**Coram:- M. S. SONAK &
NUTAN D. SARDESSAI, JJ.**

Date:- 7th March 2019

ORAL JUDGMENT (per M.S.Sonak,J.)

1. Heard Mr. Kantak, learned Senior Counsel for the petitioner, Shri Dattaprasad Lawande, learned Advocate General appearing for respondents No.1,2,3 and 6, Mr. C.A. Ferreira, learned Counsel for respondent No.5 and Mr. J. P. Mulgaonkar, learned Counsel for respondent No.4.

2. Rule. With the consent and request of the learned Counsels for the parties Rule is returnable forthwith.

3. The challenge in this petition is to the declaration of the respondent No.5 as elected to the post of Attorney in the Managing Committee of the Comunidade of Mormugao. It is the case of the petitioner that the petitioner was declared as elected to the post of Attorney. However, after the conclusion of the election process, the Presiding Officer and the Managing Committee members entertained oral plea made by respondent No.5 for recounting of votes and on the basis of such recounting,

which was behind the back of the petitioner, declared the respondent No.5 as elected to the post of Attorney, in place of the petitioner.

4. The election of the Managing Committee of the Comunidade of Mormugao was held on 02/12/2018 at 10.30am at the meeting of the Comunidade of Mormugao. The first portion of the minutes of the proceedings indicates that the elections concluded and it is the petitioner who was declared as elected to the post of attorney. The minutes, however, thereafter proceeded to state as follows:

" About fifteen minutes post the conclusion of the meeting, the losing candidate for the post of attorney Mr. Menino Henrique approached the election committee for a recount of the votes polled for the post of the Attorney.

Present at that time were Mr. Leslie Pereira- President Comunidade of Mormugao, Mr. Federick Henrique- Attorney, Mr. Terence Carvalho- Treasurer, Mrs. Theresa Fernandes Escrivao, Mr. Rohidas Kudnekar- Officer Appointed by the Government for said elections and Mr. Shailesh Henriques- The President Elect. All other members having left the premises.

The process for recounting of votes for the post of attorney began with Mr. Terence Carvalho and Mr. Shailesh Henriques assisting Theresa Fernandes and

Mr. Rohidas Kudnekar for the said process.

On recounting it was observed that Mr. Menino Henriques had polled 70 votes while Mr. Antonio Maximiano Pereira had polled 68 votes. Total votes polled amounted to 138 as against the original count where the votes for the said posts amounted to 135. The results were then modified with Mr. Menino Henriques being declared as the winner of the post of Attorney."

5. Mr. Kantak, learned Senior Counsel for the petitioner states that in the first place, once the petitioner was declared as elected to the post of Attorney, the Presiding Officer was rendered as *functus officio* and had no jurisdiction or authority to entertain any plea for recounting and on such basis declare respondent No.5 as elected to the post of Attorney. Secondly, he points out that the so called recounting was in the absence of the petitioner and, therefore, constitutes the violation of principles of natural justice. Mr. Kantak, learned Senior Counsel submits that in case respondent No.5 was aggrieved by the petitioner being declared as elected as the Attorney, it was for the respondent No.5 to institute Election Petition before the Administrative Tribunal in terms of Article 49 of the Code of Comunidade.

6. Shri C.A. Ferreira, learned Counsel for the respondent No.5

points out that there are serious errors in the record of minutes. He points out that the minutes as recorded do not reflect what actually transpired in the election held on 02/12/2018. He points out that upon the correct counting of votes respondent No.5 was declared elected to the post of Attorney. He submits that there was obvious error in the counting of votes and the petitioner cannot be permitted to take advantage of such obvious errors.

7. Mr. Dattaprasad Lawande, learned Advocate General, has placed on record the affidavit-in-reply on behalf of the respondent No.6, the Presiding Officer of the said election. In the affidavit, the Presiding Officer has stated that what is reflected in the minutes is correct, though, the minutes were prepared and signed later.

8. In the matter of this nature, it is really not possible for us to adjudicate into disputed questions of fact. However, the minutes which are placed on record, will, have to be at least prima facie regarded as correct for the purposes of the present petition. The Minutes indicate that the elections to various posts of the Managing Committee of Comunidade of Mormugao were in fact concluded. Insofar as elections to all the posts to the Managing Committee, except the post of Attorney, there is no dispute raised at least before us. The minutes reflect that about 15 minutes

post the conclusion of the meeting, the respondent No.5 approached the Election Committee with a oral plea for recounting of votes to the post of Attorney.

9. The minutes also indicate that the Election Committee which includes the Presiding Officer accepted this oral plea made by respondent No.5, recounted the votes, and on such basis declared respondent No.5 as elected to the post of Attorney in place of the earlier declaration of the petitioner as elected to the post of Attorney.

10. According to us, at least prima facie, it was not open to the Election Committee or the Presiding Officer to entertain oral plea on behalf of the respondent No.5 for recounting of votes and on the basis of any alleged recounting to declare the respondent No. 5 as elected to the post of Attorney. If the respondent No.5 had any grievance in relation to the election of the petitioner to the post of Attorney, including, any grievance in relation to the counting of votes, the respondent No.5 was required to take out appropriate proceedings before the Administrative Tribunal in terms of Article 49 of the Code of Comunidade. The respondent No.5 was not entitled to return after the conclusion of the election proceedings and make a oral plea for recount of votes. In any

case, the Election Committee or the Presiding Officer were not entitled to entertain such a plea and on a said basis virtually set aside the election of the petitioner which had already taken place and to declare the respondent No.5, as elected to the post of Attorney, in his place.

11. On the aforesaid short ground, this petition will have to be allowed and so called election of the respondent No.5 to the post of Attorney will have to be set aside. As a consequence, it is the petitioner who will have to be declared as elected to the post of Attorney, Comunidade of Mormugao. Such a declaration is therefore now issued.

12. Notwithstanding the aforesaid, it is made absolutely clear that the findings, if any, in relation to the minutes of what transpired at the election meeting held on 2nd December, 2018, are entirely prima facie. So also, we make no observations with regard to the rival contentions, including the contention that the minutes were not properly recorded or that the minutes do not reflect what actually transpired at the meeting or that there is no power to recount or that there were serious errors in counting of the votes as well as host of other contentions and issues as might arise in the matter of this nature. The reason for this is because

we do not wish to, in any manner, prejudice or affect the right of respondent No.5 to take out appropriate proceedings before the Administrative Tribunal in terms of Article 49 of the Code of Communitade in order to question the declaration of the petitioner as elected to the post of Attorney. Accordingly, we make it clear that all such contentious issues, including the issue as to whether the minutes reflects the correct position or not are kept open for determination by the Administrative Tribunal, should, the respondent No.5 institute an appeal against the election of the petitioner as Attorney to the Communitade of Marmugao.

13. Though, the Presiding Officer – respondent No.6 filed an affidavit, upon which we have placed reliance on a prima facie basis, this may not be taken as we having accepted the statements made in the said affidavit as true and correct on some final basis. We once again clarify that all these are matters which will have to be gone into by the Administrative Tribunal, should, the respondent No.5 or for that matter any other person entitled to vote institutes proceedings under Article 49 of the Code of Communitade. Once again, we make it clear that all issues are kept open and nothing in this order must be construed as restricting any challenge or defences.

14. The only reason which prompted us to interfere in this matter was because the minutes at least prima facie reflect that the election process had concluded with the petitioner being declared as elected to the post of Attorney. Thereafter, the respondent No.5, approached the Presiding Officer and the Election Committee with a plea for recount. This plea was accepted, without any apparent notice to the petitioner. It is in these circumstances that we felt that the process, which, at least prima facie, took place in the presence of all the voters and which culminated into the declaration as the petitioner has elected for the post of Attorney must prevail.

15. If at all there is any irregularity in the process upto the said stage, the respondent No.5, undoubtedly, had the right to seek remedy under Article 49 of the Code of Comunidade. Therefore, after restoration of the petitioner to the post of Attorney, we have taken pains to clarify the right of the respondent No.5 to question such election is expressly reserved and nothing in this judgment and order should come in the way of the respondent No.5 in questioning the election of the petitioner nor should anything in this judgment and order restrict any defense that may be available to the petitioner in respect of his election as Attorney to the Comunidade of Mormugao.

16. Accordingly, we set aside the so called election of the respondent No.5 to the post of Attorney and declare that the petitioner who was elected to the post of Attorney, Comunidade of Mormugao. This declaration to take effect from the date this order is uploaded on the website of this Court and therefore, the period of limitation to commence from the date this order is uploaded on the website of this Court. Mr. Kantak, learned Senior Advocate for the petitioner also agreed that the limitation would commence from the date, next to the date of declaration of the petitioner as elected to the post of Attorney.

17. Therefore, if the respondent No.5 or any other person entitled to vote at the election to the Managing Committee of the Comunidade of Mormugao institutes an appeal within 5 days from the date the copy of this judgment and order is uploaded on the website of this Court, the Administrative Tribunal to entertain such appeal and dispose of the same on its own merits and in accordance of law without being influenced by the prima facie findings recorded in this judgment and order.

18. Further, the Administrative Tribunal to entertain these appeals on the basis of the minutes appended to this petition, which, are to be read alongwith the directions in the present

judgment and order. Therefore, the Administrative Tribunal, should not insist upon the appellants / respondent No.5 filing any revised copies of minutes or other documents in support of the declaration of the petitioner as elected to the post of Attorney, Comunidade of Mormugao. Again, we clarify that we have not accepted for any final purpose the record of minutes by the Presiding Officer or the Escrevao of the Comunidade and the issue of authenticity or validity of the said minutes are expressly kept open.

19. We accordingly make Rule absolute in the aforesaid terms. There shall be no order as to costs.

20. All concerned to act on the authenticated copy of this order.

Nutan D. Sardessai,J.

M.S. Sonak,J.