

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.893 OF 2019**

Inacio Mariano Fernandes

... Petitioner

Versus

Minu Antonio Fernandes & Ors.

... Respondents

Shri S.G. Desai, Senior Advocate with Shri V. Parsekar, Advocate for the Petitioner.

Shri Byron Rodrigues, Advocate for the Respondents.

Coram: DAMA SESHADRI NAIDU, J.**Date: 13th January 2020****ORAL ORDER :**

The petitioner contested the Grampanchayat elections as a ward number. His rival contender was the first respondent. The petitioner lost. So, he has gone before the Election Tribunal, complaining of various things. Among other things, he has alleged that the ballot papers of his ward got mixed with those of the neighbouring ward.

In that election petition, the first respondent applied under Order VII Rule 11 of CPC, to have the petitioner's petition rejected. He maintained that the election petition lacked "cause of action". The Tribunal concurred with the first respondent and dismissed the election petition. So the petitioner has filed this Writ Petition.

2. To set out the facts a little more elaborately, I may note that on 15.05.2017, the State of Goa issued an election notification, fixing the

schedule for its holding the election for Grampanchayats in the State. Accordingly, it held the elections on 11.06.2017. Village Betalbatim has two wards: Ward 1 and Ward 2. In the first ward, the petitioner and the first respondent contested; for the second ward, the third and the fourth respondent contested. In both cases one candidate was given airplane as the election symbol and the other candidate a cupboard (almirah).

3. The petitioner lost the election by four votes; that is, the airplane lost. In the second ward, the candidate with the symbol airplane won. Thin as the margin was, the petitioner contended that the election officers have been biased. They have, he alleged, illegally transferred twenty votes from his lot to the candidate having the same symbol in the second ward. So he lost the election. Complaining thus, the petitioner filed an election petition before the Administrative Tribunal.

4. In that election petition, besides the successful candidate from the first ward, that is his rival; he has arrayed both the successful and unsuccessful candidates of the second ward, too. That apart, he has arrayed the election officers as respondents 4 to 10.

5. In the course of time, the respondents 4 to 10 applied to the Tribunal for deletion of their names on the premise that Section 16 does not permit any other person than the contesting candidate to the election as a party to the election petition. The Tribunal accepted their plea and deleted them from the array of parties. Aggrieved, the petitioner, it seems, filed a Writ Petition before this Court but could not succeed. That

judgment has become final. Thus, the election petition has only three respondents: the rival candidate from the first ward and both contestants from the second ward. No other person.

6. Later, as we have already noted, the first respondent applied under Order VII Rule 11 of CPC and wanted the Tribunal to non-suit the petitioner on the ground that the election petition, among other things, lacked the cause of action. On contest, the tribunal accepted his plea and dismissed the petitioner's election petition.

Submissions:

Petitioner:

7. Shri S.G. Desai, the learned Senior Counsel, instructed by Shri V. Parsekar, the learned counsel for the petitioner, has submitted that Section 17 of the Goa Grampanchayat Raj Act provides for the way an election petition should be pleaded and presented. If there is any deficiency on that count, the Tribunal, under Section 18, can reject the election petition. According to him, once the Tribunal has accepted the election petition, numbered it and notified the respondents, it ought to proceed with the trial. And it should eventually result in an adjudication on the merits. In other words, Shri Desai stresses that having taken the election petition on file and having not found the petition deficient under Section 17, the Tribunal has no jurisdiction to reject the election petition on any other ground, including those provided under Order VII Rule 11 of CPC. Novel

is the argument.

8. The learned Senior Counsel, in the alternative, has also submitted that the Tribunal's impugned order, though elaborate, contains no reasons whatsoever. According to Shri Desai, it has only catalogued a catena of cases, extracted their ratio, but failed to explain how those precedents applied to the facts of the case. Shri Desai has, first, asserted that the Tribunal ought to have gone by the pleadings in the election petition alone and nothing else. He has, second, contended that the Tribunal ought to have examined the petitioner's pleadings as set out in the election petition.

9. Shri Desai maintains that the Tribunal has not ruled in the statutory backdrop of Order VII Rule 11 CPC; instead, it has vaguely held that the election petition has suffered from statutory lapses. Such vague adjudication, according to Shri Desai, cannot be sustained. To support his contentions, he has relied on *V. S. Achuthanandan v. P. J. Francis*¹, *Madiraju Venkata Ramana Raju v. Peddireddigari Ramachandra Reddy*², and *Virender Nath Gautam v. Satpal Singh*³.

10. The learned Senior Counsel has also taken pains to explain to me how the deleted respondents 4 to 10 ought to have been kept on record. He asserts that they are necessary parties, at least proper parties for the Court to rule comprehensively on the dispute. In this context, the

¹ AIR 1999 SC 2044

² AIR 2018 SC 3012

³ AIR 2007 SC 581

learned senior counsel has drawn my attention to the statutory position as encapsulated under Section 16(2) and Section 19(3) of the Panchayat Raj Act. To support his contentions, Shri Desai has relied on *Murarka Radhey Shyam Ram Kumar v. Roop Singh Rathore*⁴.

Respondents:

11. On the other hand, Shri B. Rodrigues, the learned counsel for the first respondent, has submitted that the election petition has no cause of action. In this context, he has drawn my attention to Rules 54, 55, and 57 of the Goa Panchayat and Zilla Panchayat (Election Procedure) Rules 1996 (“the Rules”). Shri Rodrigues has set out the background of the case, to hammer home his point that the petitioner has taken recourse to abuse of process.

12. To elaborate, Shri Rodrigues has submitted that after his losing the election by a margin of four votes, first, the petitioner has requested the election officers to recount the ballot papers. For this purpose, he has submitted a one-line representation. According to Shri Rodrigues, the petitioner has made no allegations of *mala fides* or any lapses on the election officers’ part. He has simply pleaded the authorities that as the margin was narrow, there should be recounting. Shri Rodrigues maintains that, on a humanitarian consideration, the authorities recounted the votes—not one time but three times. They found the counting to be in order.

13. Second, Shri Rodrigues stresses that in terms of Rules 54 to 57,

4 AIR 1964 SC 1545

an election petition could be maintained only on the grounds set out in the initial objection. But here, the petitioner has never had any objection, much less any allegation about any malpractice or manipulation. Later, only as an afterthought, the petitioner has come up with the allegation that election officers shifted a bundle of votes from his tally to that of the candidate in the second ward having the same election symbol.

14. Shri Rodrigues has read out the petitioner's pleadings before the election tribunal and pointed out that nowhere has he asserted that there was any ground for recounting the votes. He has also submitted that the issue whether the election officer should be party to the election dispute already stands concluded by this Court's judgment. With no further appeal or revision against it, this Court, through coequal bench, cannot revisit that issue.

15. To support his contentions that the Tribunal's impugned order is eminently sustainable, Shri Rodrigues has relied on *Dr. Rameshkumar Bapuraoji Gajbe v. The Election Commission of India*⁵. The judgment lays down that even in an election dispute under Representation of People's Act will attract the provisions of CPC. Shri Rodrigues has also pointed out that the first respondent's winning margin is five votes; that is, four regular votes and one postal ballot.

16. After hearing both the learned counsel, I began my dictation. After narrating the facts and rival submission, when I was about to dictate

⁵ CDJ 2019 BHC 1747

the “discussion” part of the judgment, then, Shri Rodrigues, on instructions from his client present in the Court, has told me that they are willing to have one more recounting even in the presence of a different election officer. But he stresses that under the guise of recounting, the petitioner should not drag the proceedings. As I have felt that the first respondent's readiness on recounting will obviate any further adjudication, I have put the proposal to the petitioner's counsel. After having the matter passed over for a short while, the petitioner's counsel came back and informed me that the petitioner, too, is agreeable for this proposal. He has nevertheless stressed that at the time of recounting, the authorities must verify each ballot to ascertain whether it belongs to ward 1 or ward 2. He also wants the authorities to properly segregate the votes and declare the result. I appreciate the first respondent's willingness to accede to the petitioner's unending persistence.

17. In the light of the consensus arrived at between the parties, I dispose of the Writ Petition as follows:

(i) The Commissioner, Goa State Election Commission, will nominate appropriate number of officials, other than those who had conducted the earlier election, to recount the votes of Ward 1.

(ii) The officers thus appointed by the Commissioner will first segregate the votes ward-wise, for the ballot papers of each ward has the ward number mentioned on the reverse. To be explicit, the officials will first identify the ballot papers of each ward based on the number

mentioned on them and then count the votes of Ward I.

(iii) The parties will carry out this exercise after putting the respondents on notice—and, if possible, in the presence of the petitioner and the first respondent. Whether the contestants from Ward II witness the recounting or not, this recounting should not affect Ward II.

(iv) As the first respondent apprehends that the petitioner may drag the proceedings, the learned Commissioner will ensure that the entire process described above will be concluded in one month from the date this judgment is uploaded.

(v) As the petitioner insists on video recording, the learned Commissioner may direct the officials concerned to video record the proceedings. Both the petitioner and the first respondent have agreed to bear the expenditure together.

(vi) Since the Commissioner of Goa State Election Commission is not a party to this Writ Petition, he will act on the authenticated copy of this order.

DAMA SESHADRI NAIDU, J.

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