

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 930 OF 2019

DIONISIO FRANCISCO TRINIDADE ... Petitioner

Versus

NANESHWAR GOPAL FADTE AND 3 ORS ... Respondents

WITH

WRIT PETITION NO. 931 OF 2019

PETER MARTIN., ... Petitioner

Versus

ASHLEY LOBO AND 3 ORS., ... Respondents

WITH

WRIT PETITION NO. 932 OF 2019

PURXOTOMA V. X. SHIRODKAR., ... Petitioner

Versus

AGNELO D'SOUZA DE ROSARIO AND 3
ORS., ... Respondents

WITH

WRIT PETITION NO. 933 OF 2019

GOVINDRAJ VITHOBA SHET TANAVADE., ... Petitioner

Versus

PAULO D'SOUZA AND 3 ORS., ... Respondents

Adv. Mr. Shivan Desai with Adv. Jatin Ramaiya for the Petitioners in all the petitions.

Adv. Y. V. Nadkarni with Adv. Ms. Divya Raviraj Shirgam for Respondent no.1 in all the petitions.

Mr. D. Pangam, Advocate General with Ms. Priyanka Kamat, Additional Government Advocate for Respondent nos.2 and 4 in all the petitions.

Mr. Deepak Gaonkar, Advocate for the Respondent no.3 in all the petitions.

Coram:- DAMA SESHADRI NAIDU, J.

Date:- 14th February 2020.

Oral Order:

Communitade of Serula was ripe for elections for its Managing Committee, but that ripeness has yielded only the fruit of litigation. Elections not held on time, a prospective contestant filed WP No.1178/2018 complaining about the delay. Pending that writ petition, on 27.1.2019, elections were held for the post of President and Substitute President.

2. Once the result for the post of President was declared, the trend of election emerged. So one faction indulged in vandalism, and that prevented the declaration of the result concerning the substitute President. It was despite the completed counting.

3. In that context, one of the petitioners before this Court in this batch of writ petitions has filed WP No.165/2019. He questioned the delay in the process. Eventually, this Court through its common judgment, dated 6/2/2019, disposed of both the writ petitions: WP No.1178/2018 and WP No.165/2019. It has allowed the authorities to declare the result for the post

of Substitute President, besides directing the authorities to hold elections for the remaining office bearers.

4. Accordingly, on 3.3.2019, the authorities declared the result for the post of Substitute President and held the elections for the posts of Attorney, Substitute Attorney, Treasurer, and Substitute Treasurer. Once the results were declared, the first respondent in this batch of writ petitions has filed a statutory appeal before the Administrative Tribunal by invoking Article 49 of the Code of Comunidade. In that appeal, the first respondent contented that the final voting tally would reveal that more number of votes were polled than the total number of voters present. On the other hand, the petitioners, as the respondents in the appeal, contented that even if the excess votes were deducted from the successful candidates' tally, the result would remain unaltered.

5. Nevertheless, the Tribunal accepted the first respondent's plea and directed re-election, through its order dated 30.9.2019. Aggrieved, the petitioners have filed these writ petitions.

Submissions:

Petitioners:

6. Shri S. Desai, the learned counsel for the petitioners, has raised four issues. According to him, the first respondent ought to have, as a precondition, protested under Article 48 before the Mamlatdar soon after the elections. Without that protest, no appeal should be maintained under Article 49. It is because both the Articles read together, the legislative

mandate emerges that absent protest, it is deemed that there was no objection or the objection, at least, stood waived.

7. The second contention is that the margin is huge. According to Shri Desai, even if we subtract the excess votes from the petitioners' tally, the result remains unaltered, as there is still a clear margin of victory.

8. As the foundation for his third contention, Shri Desai informs the Court that the petitioners wanted the Tribunal to inquire into the irregularities committed by the Mamlatdar, the Election Officer. After accepting that it has the jurisdiction to inquire into things, the Tribunal, Shri Desai stresses, has refused to order any inquiry.

9. In fact, when the Tribunal refused to inquire into the petitioners' allegations, they filed W.P. Nos.665/2019, 672/2019, 673/2019, 674/2019, and 675/2019. Then, this Court through its common judgment, dated 31/7/2019, preserved their right to raise that objection in these writ petitions. In this context, Shri Desai elaborates and contends that had the Tribunal ordered an inquiry, that would have obviated the entire litigation. At least now, this Court may, implores Shri Desai, remand the matter to the Tribunal, requiring it to conduct an inquiry, especially, in the light of the material the petitioners placed before this Court in these writ petitions.

Respondents:

10. On the other hand, Shri Y. V. Nadkarni, the learned counsel for the first respondent, has submitted that the method adopted by the Mamlatdar—raising of hands instead of ballot—has led to confusion.

Though the entire election process was video recorded, the voting pattern cannot be ascertained conclusively. Thus, he has stressed that the Tribunal's order requires no re-considerations.

11. On the part of the State, the learned Advocate General has insisted that fresh elections should be held with no more delay.

12. Heard Shri S. Desai, the learned counsel for the petitioners; Shri Y. V. Nadkarni, the learned counsel for the first respondent; the learned Advocate General and Ms. Kamat, the learned Additional Government Advocate for respondent nos.2 and 4; and Mr. Gaonkar, the learned advocate for respondent no.3.

Discussion:

13. Indeed, it is sad that for a small Comunidade elections could not be held properly. Though the total strength of the Comunidade is 2500, the voters present on the material date was only 375. Yet for this failed election, the reasons are many. On 27.1.2019, once the result for the post of President was declared, one of the two factions read the writing on the wall and disturbed the further process, That is why despite the authorities' completing the vote counting for the post of Substitute President, they could not declare the result. There was vandalism and violence. Then, after directions from this Court in two writ petitions, the authorities held elections 3.3.2019; on the same day, they declared the result for the Substitute President.

14. This time, the authorities video graphed the election. But it hardly helped the situation, as we shall see soon. For the reasons not readily discernable, the Mamlatdar, as the Election Officer, required the 375 voters present to cast their vote by raise of hands, instead of ballot. In fact, the first respondent's counsel informs me that so far as this Comunidade is concerned, all along only show of hands has been the practice; the statute is said to be silent on this aspect. To my mind, the safe practice ought to have been ballot system for it leaves traces for verification in the event of any dispute, as is the case here. In fact, Article 48 of the Code does prescribe "an open ballot system."

15. True, all the petitioners were declared elected; yet the voter tally would show that there were more hands raised than the members actually present. And the tally reads thus:

Sr. No	Petition no.	Petitioner	Respondent no.1	Post	Election	Total Voters	Petitioner's Voters	Respondent No.1 Votes	Other Votes	(H) + (I) + (J) + (K)
(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)	(I)	(J)	
1	930/19	Dionisio F. Trinidad	Nandeshwar G. Fadte	Treasurer (Substi)	3/3/19	375	195	183	---	378
2	931/19	Peter Martin	Ashley Lobo	Attorney	3/3/19	375	198	181	06 (Ajit Fotto)	385
3	932/19	Purxotoma V. Shirodkar	Agnelo D. Rosario	Treasurer	3/3/19	375	196	182	---	378
4	933/19	Govindraj V. Tanavade	Paulo D'Souza	Attorney (Substi)	3/3/19	375	196	183	-----	379

16. Perhaps the above arithmetic incongruity has prompted the Administrative Tribunal to set aside the elections.

The Court's Endeavour:

17. When the matter was taken up, I felt it undesirable for the Court to direct the Comunidade to go for one more round of elections. To resolve the issue, I asked the learned counsel on either side whether our watching the recording of the election process would help determine who secured more number of votes. To their credit, they have agreed. So the Registry has made the arrangements for us to watch the compact discs (CDs) available on the record. We, including the Mamlatdar, watched the video footage—on more than one occasion.

18. As rightly pointed out by the learned Assistant Government Advocate, the hall in which the election was held appeared cramped and crammed with people, too. It is relatively a small hall to accommodate 375 people, the officials, and perhaps a few onlookers. True, the Mamlatdar required the voters owing allegiance to the rival factions to sit in two separate columns, with internal rows. But a few more people, presumably voters, were seen standing at the end, not strictly confining themselves to either column.

19. The voters seated in two columns, the Mamlatdar and a couple more officials sat on the dais and asked each column to raise its hands in support of either panel. The voters raised hands. Then, the other officials standing in the aisle counted the raised votes first from one column and then from the other. I reckon as more than one officer counted the raised hands,

there was overlapping. So that resulted in more raised hands than the voters actually present.

20. In this context, Shri Desai, the learned counsel for the petitioners, then impressed upon me that now technology is available to count votes accurately from the video footage. According to him, the experts can take hard copies of the frozen frames of raised hands row by row and count them.

21. I felt if the technology could assist the parties, of course to the satisfaction of the Court, to resolve the dispute, it is always welcome. The learned counsel for the first respondent, too, has agreed. Then, the petitioner's counsel has taken a couple of adjournments to present before the Court the voter tally with the help of the technology. Eventually, Shri Desai has informed us the CDs contain the recording from the original source; so its resolution is low. When the frames were frozen and enlarged, they lost their coherence and got diffused. Thus, Shri Desai has agreed that his attempt with the experts' help, though, could bear no fruit.

22. Despite the petitioners' failed attempt to count the votes with the help of the technology, they insisted that they should have a judgment on the merits.

23. Now I will address the objections raised by Shri Desai. First, we will deal with the protest or the lack of it under Article 48. I may note that the provision only makes it optional for any party to protest. The provision reads:

Art. 48 – The election committee for the attorney and his substitute and of the treasurer and his substitute, shall be composed of the president of the committee, the attorney and the clerk and the former shall be the president of the said committee.

§ 1. *All the elections shall be held by open ballot* and each list should have one name for the effective member and another one for his substitute. The voting shall be conducted by the listing of the electors present personally or by proxy and of the absent electors by declaration of vote.

§ 2. The minutes of the elections shall be recorded by the clerk in the minutes book of the *comunidades, mentioning therein all facts occurred including any protests and declaring at the end, the names of the members elected.* This shall be announced by the president in the light of the votes counted by the said committee.

(italics supplied)

24. As it could be seen from Clause (2) of Article 48, the clerk of the Comunidade must record in the minutes book “all facts occurred including any protests.”

25. Now let us examine Article 49. It reads:

Art. 49 – In the case of any irregularity in the election, any member of the comunidade, with voting right, may appeal to the Administrative Tribunal, within five days and the proceedings of the appeal shall be drawn up on plain paper.

Sole § The Administrative Tribunal shall decide the appeal, within eight days and, if the election is annulled, the comunidade or the twenty major shareholders members, shall be convened again, following the formalities prescribed in the article 47, in order to hold a fresh election in accordance with the decision of the Tribunal.

26. Indeed, Article 49 mandates that if there is any irregularity in the election, any member of the comunidade with a voting right may appeal to the Administrative Tribunal. It must be within five days. That apart, Article 49 does not impose on the aggrieved member any other limitation than that his or her appeal must be filed in five days. It has conspicuously not made the protest contemplated under Article 48 a precondition for a member to appeal under Article 49.

27. After all, we cannot read limitations or disabilities into an enabling provision; nor can we imply restrictions. They must be present—clearly and evidently. Thus, to my mind, even the combined reading of Articles 48 and 49, as Shri Desai has urged, does not suggest that an appeal must be preceded by a registered protest.

28. The second contention concerns the victory margins. The crucial aspect is that though there are 375 voters, the votes polled—in fact, by show of hands—come to more than 375. To be illustrative, for the Substitute Treasurer, 378 votes were polled (3 excess); for the Attorney, 385 votes (10 excess); for the Substitute Attorney, 379 votes (4 excess).

29. In this context, Shri Desai argues that even if the excess votes are taken away from the tally of the successful candidates, still they are left with a clear margin. To support his contention, he has relied on this Court's judgment in *Manik Lal Madana Lal Lahoti v. Tukaram Ganpat Tehore*¹. That decision postulates that once the alleged irregularity does not materially affect the election outcome, the election should not be set aside for mere asking.

30. Here, had it been a case of ballot system and the votes had been preserved, the whole dispute could have been a matter of arithmetic. Then, the Court could have ignored the excess votes by deducting them from the successful candidates' tally or ordered recounting. But here it is a case of show of hands. Once 375 hands were raised supporting either candidate or more, it was a jumble of raised hands—one too many—as we have seen from the video footage. It is not the question of margins; rather, the voting must be beyond reproof, and the outcome certain. We cannot rule out, say, somebody raising both hands or the same hand getting counted again and again. And this may have benefited or affected either panel. I am afraid it is

difficult to adopt a method of addition and subtraction. Rather it is unsafe.

31. Now we may turn our attention to the final objection: the Tribunal's refusal to order an inquiry into the manner the election had been held. I am afraid if at all the Tribunal has the power, that power is discretionary. And it has refused to exercise that discretion. Having the power is one thing and deciding to exercise it is another. The presence of power does not always result in its use. There ought to be circumstances to use that power. The Tribunal's refusal to use the power cannot be said to be capricious or injudicious. It has felt that such course of action will amount to a roving inquiry, leading to nothing. Let us assume that there was an inquiry and that showed that the Mamlatdar had bungled the process of election, still that would not have obviated a fresh election. So I decline to interfere with the Tribunal's discretion not to order an inquiry.

32. True, Shri Desai has contended that now this Court may remand the matter to the Tribunal so it could order an inquiry based on the material the petitioners have now placed before this Court in these writ petitions. I am afraid I cannot re-assess or re-appreciate the Tribunal's discretion *post factum* in the face of the evidence the petitioners have placed before me now, rather than before the Tribunal, then.

33. As contended by the learned Advocate General, the election must be held without any further delay. So shall it be. But it must be after giving the time margins for the notice and other formalities in terms of the statutory provisions.

34. I, therefore, dispose of these writ petitions holding that the re-election is the only way out to resolve the imbroglio. The authorities will take expeditious steps in accordance with law to hold the elections for the post of Attorney, Substitute Attorney, Treasurer and Substitute Treasurer . And the election must be through open ballot as mandated under Article 48 of the Code of Comunidade. I clarify “open ballot” stands in contradistinction with “secret ballot;” it need not be by show of hands of alone. The authorities will adopt a method that leaves verifiable material should there be any controversy about the voting, as it happened this time.

35. At this juncture, the petitioner's counsel wants the judgment stayed for two weeks. In response, the first respondent's counsel states that there cannot be any blanket stay. The statute provides for notice period of 31 days. That is, the authorities could conduct elections only after one month. In the meanwhile, the petitioners may exhaust their remedial options against this judgment. It needs no stay.

No order on costs.

DAMA SESHADRI NAIDU, J.

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