

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.2778 OF 2021

Narayan Kalba Gaikwad

... Petitioner.

Versus

The State of Maharashtra
and others

... Respondents.

....

Mr. Sachin S. Deshmukh, Advocate for the Petitioner.

Mr. A.R. Kale, A.G.P. for Respondent Nos. 1 and 2.

Mr. A.B. Kadethankar, Advocate for respondent No.3.

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**CORAM : S.V. GANGAPURWALA AND
SHRIKANT D. KULKARNI, JJ.**

DATE : 10th FEBRUARY, 2021

PER COURT:-

1. The petitioner is elected as a Member of the Grampanchayat Pethwadaj from the S.C. category. The post of Sarpanch of the said Grampanchayat is reserved for S.C. (women) category. Earlier, when the draws were made on 08.10.2020, the post of Sarpanch of the said Grampanchayat was reserved for S.C. The petitioner assails the change of the reservation for the post of the Sarpanch.

2. Mr. Deshmukh, learned counsel for the petitioner strenuously contends that the respondents lack authority to change the reservation once the draws were made. The communication dated 16.12.2020, pursuant to which the draws were cancelled is issued by

the Desk Officer in the name of Hon'ble Governor. All the proceedings of the State are required to be at the instance and in the name of the Hon'ble Governor. The learned counsel for the petitioner placed reliance on the judgment of the Apex Court in case of ***Nareshbhai Bhagubhai and others Vs. Union of India and others*** reported in ***(2019) 15 SCC 1***. The learned counsel further contends that if the statute provides for the act to be done by the authority in a particular manner, then the authority only has a power to perform the act. Once the draws were made, the Tahsildar lacks the authority to change the reservations made pursuant to the said draw. The learned counsel placed reliance on the judgment of the Division Bench of this Court in case of ***Kishori Shivram Parab and another Vs. Tehsildar Vengurla and others*** reported in ***2006 (4) Mh.L.J. 539***.

3. Mr. Deshmukh, learned counsel for the petitioner further submits that the action of the respondents lack *bonafide* and is arbitrary and the said action cannot be sustained. The hasty action suffers from arbitrariness. In the present case, the act of the respondents in changing the reservations smacks of arbitrariness. The learned counsel to substantiate his contention placed reliance on the judgment of the Apex Court in case of ***Zenit Private Limited Vs. State of Maharashtra*** reported in ***(2009) 10 SCC 388***.

4. Relying upon the judgment of the Apex Court in case of ***Uddar Gagan Properties Limited Vs. Sant Singh and others*** reported in ***(2016) 11 SC 378***, it is submitted that fraud on power voids the action of the authority. The *mala fides* can be inferred from undisputed facts and the use of power for the purpose is colourable exercise of power. According to the learned counsel, it was an error on the part of the respondents in changing the reservation. The State has no authority of committing flip flop in the reservation and the illegality committed on 16.12.2020 and thereafter by issuing different communications culminated in drawing a fresh draws for the post of Sarpanch on 19.11.2020 and 05.02.2021.

5. The learned A.G.P. submits that the change of the draws were initiated. The Rules of the Bombay Village Panchayat (Sarpanch and Up-Sarpanch Election) Rules 1964 have been adhered to while drawing the draws by the authorities and no illegality has been committed by them.

6. There cannot be any dispute with the proposition that an arbitrary action cannot be sustained. Arbitrariness does not have place in a society governed by the rule of law. Arbitrariness is antithesis to the rule of law, justice, equity, fair play and good conscience. An act arbitrary in nature cannot be sustained even for a moment.

7. In the present case, the draws for the post of Sarpanch were drawn initially on 08.11.2020 that too not for all the Grampanchayats in the State, but for the limited Grampanchayats. The draws for almost 60% of the Grampanchayats were not drawn prior to the election of the members of the Grampanchayat. It appears that the decision cancelling all the draws made prior to the elections of the members of Grampanchayat and to make the draws subsequent to the elections of the members of the Grampanchayats was taken on 16.12.2020. If the petitioner was really aggrieved by the same, the petitioner ought to have assailed the action of the respondents of cancelling the draws at the relevant point of time. The petitioner did not assail the same at the appropriate time. It is only after the fresh draws are made and finding that the seat is not available, the petitioner approached this Court by assailing the cancellation of draws made on 16.12.2020.

8. The draws have not been changed by the Tahsildar or the Collector at their end. It appears that the State has taken decision to cancel the draws already made in respect of some of the village Panchayats. However, subsequently the draws were made in respect of some of the Grampanchayats after the elections of the members were held. Once the State took the decision to cancel the draws, it

cannot be said that the authorities such as Tahsildar or the Collector have powers to change the draws. The judgment relied upon by the petitioner in case of *Kishori Shivram Parab* (supra) would not apply.

9. The petitioner could not place on record the relevant statistic / data of the reservation for the post of Sarpanch of Grampanchayat Pethwadaj for S.C. (women) is in any way not in consonance with the Rules of 1964. We do not have data before us to show the reservations made for the post of the Sarpanch of other Grampanchayats and whether descending order of S.C. category is adhered to. In absence of the data of the reservation made in the previous years, it would not be possible to arrive at a definite conclusion that the reservation made for S.C. (women) is *per se* erroneous.

10. Moreover, it does not appear that the petitioner has assailed the communication dated 16.12.2020 directing the cancellation of the draws made earlier.

11. In view of the aforesaid, the writ petition stands disposed of. No costs.

(SHRIKANT D. KULKARNI)
JUDGE

S.P. Rane

(S.V. GANGAPURWALA)
JUDGE