

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.637 OF 2020**

Prakash Devji More .. Petitioner
Versus
Komal Kamlakar Jamsandekar & Ors. .. Respondents

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Mr.Bharat Joshi with Mr.R. K. Mendadkar for the Petitioner.
Ms.Asha Bhuta with Mr.Aditya Pawar for the Respondent No.1.
Mr.Om Suryavanshi for the MCGM.

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**CORAM: BHARATI DANGRE, J.
DATED : 15th DECEMBER, 2021**

JUDGMENT :-

1. The petitioner, who is elected as a Councillor on 23/02/2017 of the Municipal Corporation of Greater Mumbai (for short, **“the MCGM”**) for a term of five years, is aggrieved by an order passed by the learned Additional Chief Judge of the Small Causes Court at Mumbai on 24/04/2019, thereby rejecting the application filed by him under order VII Rule 11 of the Code of Civil Procedure (for short, **“the CPC”**), by which he sought rejection of the plaint filed by way of an Election Petition, calling in question his election as a Councillor. By the impugned order, the application came to be rejected by

recording that the application has been filed, at a stage when the issues in the Election Petition are already framed and it has been perceived as an attempt to protract the Election Petition. By recording that the application is an outcome of delaying tactics, cost of Rs.5,000/- has been imposed upon the petitioner.

2. The sequence of events would reveal that on the petitioner being elected as a Councillor in the year 2017, the respondent No.1-Smt.Komal Kamalakar Jamsandekar, his rival contender from Ward No.159, filed an Election Petition under Section 33 of the Mumbai Municipal Corporation Act, 1888 (for short, **“the Act”**), calling in question his election as a Councillor. The Election Petition was registered as Election Petition No.13 of 2017. The ground raised in the Election Petition by his rival, is to the effect that he has concealed certain information from the Returning Officer of the Election Commission and furnished false or incorrect information in the affidavit, which was filed alongwith the nomination paper. The Election Petition categorised the conduct of the elected candidate as amounting to corrupt practices within the meaning of Section 28F of the Act. It was also pleaded by the Election Petitioner that the conduct of the elected candidate in

concealing the information or furnishing incorrect or false information alongwith the affidavit, rendered his candidature illegal, as the declaration filed by the candidate violates the provisions of the Municipal Corporation for Greater Mumbai Conduct of Election Rules, 2006 and, therefore, the election is liable to be set aside under Section 33 of the Act.

3. The present petitioner, who was impleaded as respondent in the Election Petition, filed his written statement and denied all the allegations levelled against him. He also denied that any irregularities are involved in his election as Councillor. On 02/02/2018, issues came to be settled in the Petition, to the following effect :-

“1. Does the petitioner proves that the respondent No.1 has suppressed the immovable and movable properties standing in his name and his family members in the nomination paper filed by him and thus, election of the respondent no.1 is materially affected ?

2. Whether the petitioner proves that because of non mentioning of PAN number of the spouse of the respondent no.1 has been materially affected?

3. Does the petitioner proves that the non disclosure of the caste by the respondent no.1 amounts to concealment?

4. Whether the petitioner proves that the respondent No.1 has given false information as to his education qualification thereby incurred disqualification?

5. Whether the petitioner proves that the respondent No.1 has committed the corrupt practice while contesting election from ward No.159 of the respondent no.2 Corporation?”

4. The Election Petition proceeded further and when it was at the stage of evidence, an application came to be filed by the petitioner (respondent No.1 in the Election Petition) by invoking Order VII Rule 11 of the CPC and the ground projected is that the petition did not disclose cause of action and in support of the said submission, the application contain an averment to the effect that the election petitioner had staked a claim that the conduct of the elected candidate amount to corrupt practice within the meaning of Section 28F of the Act, but perusal of Section 28F would clearly reveal that the claim made by the election petitioner is totally incorrect as it do not provide for filing of an affidavit alongwith the nomination paper or provide for a stipulation that such an affidavit furnish certain wrong/false information or conceal some information, would amount to corrupt practice. It was, therefore, pleaded that the allegations in the Election Petition, taken at the face value, in the light of the provision of Section 28F of the Act would not be sufficient to demonstrate that he is guilty of any corrupt practice, as defined in Section 28F. It was also submitted that the phrase ‘any other reason’ even in

Section 33 will have to be read alongwith, what precede the wording and what follows it and the said phrase will take colour from the company in which it find itself. It was also further averred that except pleading that the alleged irregularities committed by the elected candidate have materially affected the result of the election, the election petitioner did not disclose any cause of action for filing of the petition.

5. In support of the aforesaid application, which came to be rejected under the impugned order, I have heard the learned counsel Mr.Bharat Joshi with Advocate R.K.Mendadkar for the petitioner, Ms.Asha Bhuta with Mr.Aditya Pawar for the respondent No.1 and Mr.Om Suryavanshi for the MCGM.

The learned counsel for the petitioner, whose application for rejection of the plaint has been turned down, would submit that the substantive law governing the election in local bodies is governed by Article 243 ZA of the Constitution and the said substantive provision do not contemplate filing of an affidavit, disclosing properties, criminal antecedent, educational qualification and other details with the nomination form for election of the Municipal Corporation. The submission is to the effect that like a provision contained in Section 33-A of the

Representation of People Act or election to seat in Parliament, non-disclosure of the same, would not be construed as materially affecting the result of the election. It is submitted that the Hon'ble Supreme Court in case of *PUCL Vs. Union of India*¹, had directed filing of such affidavit of details by the candidate contesting the seat for Parliament and the State Legislature Elections, till the law is amended. It is submitted that in the year 2002, the Representation of People Act was amended, thereby inserting Section 33-A and 33-B in it, but subsequently Section 33-B was declared as unconstitutional though Section 33-A continued to govern the election to the Parliament. In absence of any such provision in the Act, it is argued by the learned counsel Mr.Joshi that the Election Petition in the instant case is filed on the allegation of non-disclosure of correct information regarding property and educational qualification in the affidavit filed alongwith the nomination form filled on-line. The submission of the learned counsel is, that the Election Petition is premised on an averment that non-disclosure of the aforesaid information is amounting to 'corrupt practice' under Section 28F of the Act and the Election Petition is filed under Section 33 of the Act.

¹ (2003) 4 SCC 399

It is further canvassed by the learned counsel that the State Legislature has formulated the Municipal Corporation Election Conduct Rules in exercise of powers under Section 26 of the Act and in accordance with the said Rules, Form No.2 prescribe the form of nomination, which is required to be filled by the candidate, on-line, but according to him, it do not prescribe any format of affidavit to be filed alongwith it for disclosure of the details, which are complained of while calling the election of the candidate in question. The gist of the submission advanced is, in absence of any statutory provision where filing of such affidavit alongwith nomination can be construed to be mandatory with an effect, that on furnishing incorrect information, the election of a candidate is liable to be set aside. The submission is, that the learned Judge rejected the application, wherein he pleaded that there is no cause of action for petitioner to file the Election Petition perfunctorily, without advertting the provisions of the enactment, which govern the election to the Municipal Corporation and the procedure prescribed therein, particularly when there is no amendment by the State Legislature in the Act, which make it mandatory for the candidate to file an affidavit with the nomination paper prescribed under the Municipal Corporation

Election Conduct Rules. The emphasis of the learned Judge on the wording 'any other cause' contained in Section 33(1) of the Act is an erroneous conclusion and the grounds which are sought to be invoked in the Election Petition against the elected candidate are not available for setting aside his election, is the submission. Learned counsel Mr.Joshi has placed reliance upon a decision of the Hon'ble Supreme Court in case of *Mohamed Arshad Faizulla Vs. Devidas Vithal Salsingikar & Ors.*²

6. Per contra, the learned counsel Ms.Asha Bhuta would submit that the application filed under Order VII Rule 11 of the CPC sought rejection of the petition filed by the defeated candidate on the ground that it do not disclose any cause of action. She submit that the election of a candidate can be called in question only by filing an Election Petition and Section 33 of the Act contain a provision to that effect, which will have to be widely construed by taking into account the intention of the Legislature in providing such a remedy to a defeated candidate, who dispute the qualification of any person declared to be elected or who question the validity of any election, whether by reason of the improper rejection of a

² AIR 1976 Bom 281

nomination form or of the improper reception or refusal of a vote or for any other cause if the validity of the election of a person is questioned on the ground that he has committed a corrupt practice within the meaning of Section 28F of the Act. According to Ms. Bhuta, the provision is wide enough to cover a case which has been pleaded by her client in the Election Petition, since the elected candidate had submitted the incorrect information along with the nomination form and has concealed relevant information about his candidature and, therefore, the petition was filed, bringing the case within the meaning of the words 'for any other cause'.

The learned counsel has placed on record the copy of the nomination form of the candidate in which information has been supplied by him in various columns and this information is incorrect is the basis of the Election Petition. The Election Petition pleads various grounds and by referring to the forms prescribed under the Conduct of Election Forms, 2006 the submission is that the nomination form is to be filled in in the prescribed format as per Form 2 (See Rule 6) and this includes the information about the caste of a candidate and his other details. It is submitted by the learned counsel for the respondent that where the nomination form is defective and

where an incorrect information was supplied, the Election Petition is the only remedy, once a candidate is elected and it cannot be said that the petition lack cause of action.

7. There cannot be any dispute about the legal position that if an Election Petition does not disclose cause of action, it can be dismissed summarily at the threshold of the proceedings by invoking Order VII Rule 11 of the CPC. If an Election Petition can be summarily rejected at the threshold, it can also be rejected at any stage of subsequent proceeding. If after framing of issues, basic defect in the Election Petition persist, it is always open to the contesting respondent to insist that the petition be rejected, under Order 7 Rule 11 of the CPC and the court is empowered to exercise the said power at any stage, since there is no restriction imposed as to the stage at which the power of rejection of plaint can be exercised.

8. In light of the aforesaid position when the Election Petition is perused, the following grounds are sought to be invoked for declaring the election of the elected candidate as illegal;

“(a) The Respondent No.1 though belongs to Boudha by caste and although he contested the election from General Category, he mentioned his caste as General. The non disclosure of his caste in this way amounts to concealment.

(b) The Respondent No.1 while giving details of his immovable properties particularly agricultural land, he has stated that he does not have any agricultural property either in his individual name, joint name. As against this the Respondent No.1 owns agricultural lands at Bhambarde, Tal. Mulshi, District : Pune, bearing Gat Nos.147, 203, 206, 385 in his joint name. Hereto annexed and marked as Exhibit 'D' (Colly) are copies of the 8-A extract issued for the year 2016-2017 by the Talathi on 25.02.2017.

(c) The Respondent No.1 while disclosing the details of his other immovable properties including house standing in his name or in the name of his spouse/other dependents, he did not furnish the details of the properties of his spouse that amounts to concealment of the information.

(d) Even in the said declaration while giving the value he mentions a property at Ghatkopar being Survey No.7/1 admeasuring 2580 (neither sq.feet nor sq.meters). There are no other details given by him. It clearly means that he has only one commercial property at Ghatkopar and there is residential property either in his own name. The column in respect of residential property is concerned he says as Nil but, the said table again mentions that he has one house at Sakinaka bearing Survey No.194 admeasuring 525. This information is contrary to his assets. The nomination form Exhibit C referred to above is compared which discloses a declaration by his own wife that she has a building namely A-2, Shivkrupa Society, Ghatkopar. So also, her spouse (i.e. Respondent No.1) has got house property bearing D-402, Dhanlaxmi C.H.S. Sakinaka. This comparison clearly shows that the Respondent No.1 did not furnish the details of house and commercial properties though they are standing either in

his own name or in the name of his wife either individually and jointly and this non disclosure amount to false declaration.

(e) When he filed a declaration there also he mentioned his educational qualification as, up to 5th standard it is contrary to the School Leaving Certificate of the Respondent No.1 annexed and referred to above.”

9. Based on the aforesaid pleadings, in the Election Petition it is stated that the aforesaid declaration which the candidate has filed is false to his own knowledge and by furnishing the said information, he has cheated the voters and, therefore, it amount to corrupt practice within the meaning of Section 28F of the Act. The prayer in the Election Petition specifically reads as under :-

“(a) It may be declared that the Respondent No.1 having submitted false declaration/affidavit alongwith his nomination and as such incurred disqualification and therefore his election as a Corporator of Mumbai Municipal Corporation of Ward No.159 dated 23.02.2017 be declared as illegal and the same may be quashed and set aside.”

10. In exercise of the powers conferred under the Act, the Municipal Corporation of Greater Mumbai Conduct of Election Rules 2006 are framed. Rule 6 of the aforesaid Rules, prescribe that every nomination paper presented shall be

complete in Form -2, prescribed by the State Election Commission. The rules are accompanied with the said form, which is in the form of a nomination paper to be filled in by the Proposer and the Seconder and the Candidate. There is a specific declaration by the candidate about his age, caste and religion and that he has not incurred any disqualification for being elected as a Councillor. There is also a declaration that he agree to his nomination.

By lapse of time, the State Election Commissioner has modified the format of the nomination and for the current election of 2017, the candidate was expected to submit an affidavit alongwith the nomination paper and this stipulation has been specifically complied with by the petitioner, who has filled in the form, though it is submitted that it was an on-line submission where he submitted the details about his name, caste, educational qualification, details about his criminal antecedents, details about his property. The said form also contain a column of immovable property and its details where the petitioner has marked the columns of agricultural land, non-agricultural land, building (residential) as NIL. In the column of house, he has given the detail of one of his property at Sakinaka vide Survey No.194. The further columns in

respect of agricultural and non-agricultural land has been filled by him as NIL. At the end of the said affidavit, there is a declaration submitted by him that the information supplied in the form is true and correct as per his knowledge and no part of the information supplied is false and he has not concealed any information.

11. The learned counsel for the petitioner do not dispute the submission as regards filling up the said form or its contents. The challenge in the Election Petition is, though he belong to Boudha caste, he has contested the election from general category. I do not think that this would go against the petitioner, since though a candidate belong to a particular reserved category, can always contest from general category and there is no prohibition to that effect. However, what is pleaded as affecting the election, is the description of immovable properties, particularly agricultural land where the candidate has declared that he does not own any agricultural property whereas the details of the agricultural property of the petitioner are given in the Election Petition alongwith the proof enclosed therewith. Further, he has also not furnished the details of property of his spouse, which is also projected as concealment of information. About

disclosure of his other property in form of residential property, there is a concealment as stated in the Election Petition and the submission before the learned Judge determining the Election Petitioner is that the acceptance of the nomination form by the Returning Officer itself is illegal and relying upon the false information, his candidature was accepted and, therefore, the election itself is sought to be declared as illegal and set aside on the said ground.

12. Dealing with the contention of the petitioner that there is no cause of action, since Section 33 do not contemplate the contingency stipulated in the Election Petition, it is necessary to reproduce Section 33(1) of the Act.

“33. Election petitions to be heard and disposed of by Chief Judge of the Small Cause Court.-(1) If the qualification of any person declared to be elected for being a councillor is disputed, or if the validity of any election is questioned, whether by reason of the improper rejection by the State Election Commissioner of a nomination or of the improper reception or refusal of a vote, or for any other cause or if the validity of the election of a person is questioned on the ground that he has committed a corrupt practice within the meaning of section 28F, any person enrolled in the municipal election roll may, at any time, within ten days from the date, on which the list prescribed under clause (k) of section 28 was available for sale or inspection apply to the Chief Judge of the Small Cause Court. If the application is for a declaration that any

particular candidate shall be deemed to have been elected, the applicant shall make parties to his application all candidates who although not declared elected, have, according to the results declared by the State Election Commissioner under section 32, a greater number of votes than the said candidate, and proceed against them in the same manner as against the said candidate.”

What is corrupt practice for the purpose of Section 33 has been defined in Section 28F and the case of the petitioner in concealing information or giving incorrect information may not fall within the purview of Section 28F, i.e corrupt practice. However, when Section 33 is meaningfully read, it is not the only ground for calling in question the election, but the ground on which an election can be called in question are set out as, if the qualification of a person declared to be elected is disputed or if the validity of any election is questioned, whether by reason of the improper rejection of a nomination or of the improper reception or refusal of a vote or ‘for any other cause’. Upon an inquiry conducted by a Chief Judge of the Small Causes Court, if the election is found to be not a valid election, it shall be set aside.

The use of the phrase ‘for any other cause’ would therefore include all other grounds other than the one specified in the said Section, for setting aside an election of an

elected candidate. The rules framed under the statute in the form of Election Rules require a candidate to fill in the nomination paper, which is accompanied by an affidavit and which is in the form of a declaration on oath and when such information is required to be submitted by a candidate, it is expected that the information is true and correct. On oath, the candidate confirm that the information supplied by him is true and correct and not false and that he has not concealed any information. When such an affidavit sworn by a candidate is alleged to be false and if an Election Petition is filed by invoking Section 33 of the Act, in my considered opinion, it clearly fall within the purview of 'for any other cause', which necessarily contemplate grounds other than the one which are set out in Section 33. The submission of the learned counsel that the words are to be read *ejusdem generis* do not come to his assistance, since if a candidate is required to do something by a statute and if he complies with the said direction and in the course of it, supply incorrect information or conceal certain information, though he affirm before the Election Commissioner, that he has not given any false information as per his knowledge and belief, then this is surely akin to the other grounds subject to which an election shall be called in

question; the candidate either being not qualified, nomination paper is improperly rejected or he has committed a corrupt practice. In order to set aside the election on the ground of residuary clause, the Election Commission will consider the events and the decision in the case of **Mohamed Arshad Faizulla** (supra), which had construed residuary clause in Section 33 of the Act, make it sufficiently clear when it has been interpreted in the following words,

“11.The residuary clause admitted of no limitation except that the ‘cause’ should have bearing on the validity of an election. Every ‘cause’ affecting the freedom of election and the purity thereof would be within the sweep of the clause. Every act, whether declared by any law as corrupt or not, affecting the freedom and purity of election would go to vitiate any election and is covered by the residuary clause. But while holding so, the learned Judge set down certain limitations, when a corrupt practice falls under the residuary clause. Those limitations were although a campaign involving appeal on the ground of religion falls under the residuary clause, the proof that there was such an appeal is not in itself sufficient to invalidate the election. It had to be further proved that such an appeal, in fact, had the effect of interfering with the freedom to vote and the purity of election as a whole. It was also necessary to establish what exactly was the extent of the effect of that appeal and that it was such as to invalidate the entire election.

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14. This argument misses the basic point. An appeal to the voters in the name of religion falls under the residuary clause not because it is one of the corrupt practice recognised under some election laws. In relation to those corrupt practices, the observations of the Supreme Court in Banwari Das Vs.Sumer Chand, [1974]3SCR358, relied upon by Mr.Singhvi, will apply. In that case it was pointed out that “an election contest is not an action at law or a suit in equity but a purely statutory proceeding unknown in common law and the Court possesses no common law powers” and further that “although the object of the statute by which the election tribunals were created was to prevent corrupt practices, still the tribunal is a judicial and not an Inquisitorial one; it is a court to hear and determine according to law, and not a commission armed with power to enquire into and suppress corruption”. The Court can not, therefore, in those cases add anything more to the corrupt practices specifically mentioned in the election law. Here the footing is different. As rightly pointed out by the learned Single Judge, the footing is that free election is the essence of the scheme under Section 33. Free election implies right to form opinion as to whom to vote according to the dictates of one’s judgment in disregard of extraneous influence. Every cause affecting the freedom of election and the purity thereof would be within the sweep of the residuary clause. The appeal on the ground of religion is certainly calculated to interfere with free election. Every act, whether declared by any law as corrupt or not, affecting the freedom and purity of elections would thus go to vitiate any election and is, therefore, covered by the residuary clause.”

13. Since the elections contemplated in our country are free elections, a voter voting in favour of a particular candidate is expected and entitled to be aware of his details, in whose favour he is casting his vote and, therefore, when a candidate has concealed the necessary information or has given an incorrect information, it can be said to have materially affected the outcome of the election. The details of the candidate, ultimately assist the voter in voting in his favour or against him. This ultimately will be determined at the end of the trial in an Election Petition and in the wake of the aforesaid, it can not be said that the Election Petition do not contain any cause of action to proceed. I am not convinced to accept the submissions advanced on behalf of the petitioner. At the end of the trial of the Election Petition, the learned Judge will have to arrive at the conclusion whether the grounds relied upon for setting aside the election of the elected candidate are proved and established by leading evidence to that effect and whether it warrant the election to be set aside on the said ground. In any case, this is a matter of trial and the Election Petition do not warrant its rejection at the threshold and the impugned order has rightly refused to do so. The present petition, therefore, do not warrant any

consideration and deserved to be dismissed and is accordingly dismissed.

Needless to state that since there was a stay granted in favour of the petitioner by an order dated 27/01/2020 and it continued till date, the learned Judge of the Small Causes Court is requested to conclude the Election Petition within a period of six months from today.

(SMT. BHARATI DANGRE, J.)