

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 6677 OF 2021

Babu Shafazali Khan

...Petitioner

vs.

Rajendra Narayan Suryawanshi & Ors.

...Respondents

Mr.Pramod N. Patil with Sachin Thorat, Ajit Hon and Komal Mistri for
Petitioner.

Ms.Rita Desai with Panthi Desai i/b. M.P. Vashi & Associates for
Respondents.

CORAM : BHARATI DANGRE, J.

DATED : 13 OCTOBER 2021

ORAL JUDGMENT :

. Rule. Rule made returnable forthwith. Called out for hearing
with consent of parties.

2. By the present writ petition, the Petitioner raise a challenge to
the order passed by the Additional Chief Judge of the Small Causes Court
at Mumbai, who is trying Election Petition No.56/2017.

The brief facts leading to the passing of the said order can be
discerned on perusal of the writ petition.

The Petitioner is an elected candidate pursuant to an election being
conducted for Ward No.184 of Municipal Corporation of Greater Mumbai.
His opponent, being Respondent No.1, on his defeat in the said election,
instituted Election Petition, which was numbered as Election Petition
No.56/2017 in the Small Causes Court at Mumbai, wherein the election of
the present Petitioner as a Municipal Corporator from Mumbai Ward

No.184 declared on 23 February 2017 is called in question and it is prayed to be set aside and ancillary relief is sought to the effect that since the Petitioner had secured second highest number of votes, he shall be declared as Municipal Corporator from the said ward.

3. The prayer in the Petition is set out in the backdrop of facts that he has constructed certain structures in his name and in the name of his wife and brother or other family members but the said structures do not find mention in the affidavit filed by him at the time of filling up of the nomination form. The details of the structures as well as the electric bills in respect of such properties are set out in para 9, which include a list of 11 such structures. Apart from this, in para 14 of the petition, there is a reference to Gat Nos.117 and 118 situated at Hawker Plaza, Dadar and Room No.48 situated at Dharavi. The pleading is to the effect that though the electric bills in respect of the said galas contain the name of the present Petitioner, he has not disclosed the particulars of the said two galas in the affidavit filed by him along with the nomination form.

4. The pleadings in the election petition are traversed by the Petitioner (Respondent No.1 therein), on several grounds and as far as the pleadings in para 9 are concerned, a specific pleading is made to the following effect:

“Respondent submits that this Respondent has nothing to do with the persons mentioned at Sr.Nos.2, 3, 6, 7, 10 and 11 mentioned in the table in paragraph No.9. These are not the persons who are dependent of this Respondent and therefore this Respondent was not bound under any law to disclose any properties belonging to the said persons mentioned at Sr.Nos.2, 3, 6, 7, 10 and 11 in the said table

in Paragraph No.9. As far as properties which commensurate to consumer account numbers at Sr. No.1 and 8 are concerned, the same do not belong to this Respondent and the same have been disposed of by this Respondent long back to one Niyaz Ahmed Shaikh in the year 2015. This Respondent states that the MCGM has issued approval for transfer of the said properties in the name of said Niyaz Ahmed Shaikh on 09.11.2015. In any event it may be submitted that the said two properties were stalls in the hawkers plaza market of the MCGM with license from MCGM to conduct business of garments/clothes. Both said stalls have been transferred in the name of said Niyaz Ahmed Shaikh and the same is approved by MCGM.”

As far as the allegation in para 14 is concerned, it is responded in the written statement in the following words :

“The Petitioner does not disclose under which statutory requirement the candidate is required to disclose properties owned by him and what are the consequences of non-disclosure. In any event, neither this Respondent nor his wife own Gala No.117 and 118 situate at Hawker Plaza, Dadar or Room No.48 at Dharavi. The allegations in this regard are speculative and in the nature of seeking roving and fishing inquiry without giving material facts and material particulars. In any event since neither this Respondent nor his wife owned the properties mentioned in the said paragraph at the time of submitting nomination form of this Respondent, the question of disclosing the said properties did not arise.”

5. In the backdrop of the said pleadings, the issues were framed and the trial commenced when the affidavit in lieu of examination came to be filed. The Petitioner entered the witness box and was cross-examined by the elected candidate. Thereafter, the Respondent, the elected candidate, filed the affidavit of evidence and was also cross-examined. On the

happenings of subsequent events resulted into passing of the impugned order and this can be reflected in the order-sheet dated 8th September 2021. On the said date, the learned chief Judge record as under :

“08-09-2021 Resumed

Petitioner and advocate present. Respondent no.1 and his advocate present. Advocate Pramod Patil council for respondent no.1 present.

Advocate for respondent BMC present.

Further cross of R.W.1 taken by advocate for petitioner is completed.

Cross of R.W.1 by respondent no.2 and 3 BMC decline.

Exh-78/D Application filed by advocate for respondent no.1 for permission to examine further 2 witness. O - Other side to say.

Exh-79/C Closing evidence pursis filed by advocate for respondent no.2 and 3.

Adj for further witness of respondent no.1.”

6. This order-sheet will have to be read along with the pursis filed by the Respondent which read thus :

“That the Respondent No.1 in his affidavit has specifically stated that Property shop No.117 and 118 situated at Hawker Plaza, Senapati Bapat Marg, Dadar has been transferred in the name of Niyaz Ahmed Shaikh residing at R.H.1 M-14, Section 7, Vashi, Navi Mumbai 400 703 and Room/Shop No.95/245 Social Nagar, Dharavi has been transferred to Gouhar Maism Khan having address of 95/245, Social Nagar, Dharavi.

The Respondent No.1 has also annexed the copy and transfer letters issued by the B.M.C. along with his affidavit. Respondent states and submits that the Respondent No.1 wants to examine said two witnesses

namely Niyaz Ahmedn Shaikh and Gouhar Maism Khan,

Respondent states that he will file his affidavit of evidence on next date in the interest of justice, the Respondent No.1 be permitted to examine the aforesaid witness.”

7. The objection was raised to the said pursis and the parties were heard by the Additional Chief Judge and upon consideration of the rival contentions, the order came to be passed on 18 September 2021 under which the application, which was in the form of pursis filed by the present Petitioner, was rejected and his evidence is declared to be closed. Learned Additional Chief Judge has also stayed the proceedings for a period of three weeks so as to enable him to assail the said order before the competent Court.

8. Perusal of the impugned order dated 18th September 2021. It categorically reveal that the learned Judge has formed an opinion that the application filed by Respondent No.1, to the petition reflect about the transfer of licence in the name of the witnesses, who had attended the court and also submitted their affidavit, but the fact remains that witnesses are going to be examined on the ground that the photocopies of transfer letters for licence of the shop to the witnesses are not exhibited by the court. It was opposed by the Petitioner on the ground that Order 16 Rule 1 specifically contain a stipulation that the list of witnesses must be submitted within 15 days from the date of settlement of issues and if it is not so submitted, that the respondent shall set out sufficient reasons and the purpose, that he intend to examine the witnesses.

Recording that, in the present case, there is a lack of reasoning in the application and the reason why the witnesses are sought to be

examined is not stated, evidence cannot be permitted to be lead through these two witnesses in support of the Respondent to the petition.

9. The impugned order lay its emphasis on Sub-Rule (1), of Order 16, which adumbrates the provision of list of witnesses and summons being issued to the witnesses.

Sub-Rule (1) of Order 16 reads thus :

“1. List of witnesses and summons to witnesses— (1) On or before such date as the Court may appoint, and not later than fifteen days after the date on which the issues are settled, the parties shall present in Court a list of witnesses whom they propose to call either to give evidence or to produce documents and obtain summonses to such person for their attendance in Court.

(2) A party desirous of obtaining any summons for the attendance of any person shall file in Court an application stating therein the purpose for which the witness is proposed to be summoned.

(3) The Court may, for reasons to be recorded, permit a party to call, whether by summoning through Court or otherwise, any witness, other than those whose names appear in the list referred to in sub-rule (1), if such part shows sufficient cause for the omission to mention the name of such witness in the said list.

(4) Subject to the provisions of sub-rule (2), summonses referred to in this rule may be obtained by the parties on an application to the Court or to such officer as may be appointed by the Court in this behalf within five days of presenting the list of witnesses under sub-rule (1).”

Sub-Rule (3) of the said Order 16 act as a relaxation to Sub-Rule (1) and confer a discretion in the court which would permit a party to call any witness, whether by summoning through court or otherwise, even though the name of the witness do not appear in the list referred to in Sub-Rule (1), provided, if such party shows sufficient cause for the omission to

mention the the name of such witness in the said list.

Sub-Rule (3), therefore, operate as a proviso to Sub-Rule (1) subject to the stipulation that the conditions set out in Sub-Rule (3) are made out which would confer the power upon the court to record the evidence of the witness whose name is not included in the list furnished for issuance of summons under Sub-Rule (1). Order 16 Sub-Rule (1-A), which is brought into effect from 1 February 1977, reads thus:

”A-1. Production of witnesses without summons— Subject to the provisions of sub-rule (3) of rule 1, and party to the suit may, without applying for summons under rule 1, bring any witness to give evidence or to produce documents.”

Sub-Rule (1) and Sub-Rule (1-A) of Order 16 operate in two distinct fields, the former being invoked when the parties are intending to call for witnesses or produce documents and for the said purpose, they are desirous of obtaining summons for securing the attendance of such witnesses in the court, whereas in the latter case, any party to the suit without applying for summons is permitted to bring any witness to give evidence or to produce documents. Needless to state that Sub-Rule (1-A) is made subject to the provisions of Sub-Rule (3) of Rule 1.

The conjoint reading of Rule 1 and Sub-Rule (1-A) would, therefore, lead to a conclusion to the effect that the parties can call a witness to give evidence or to produce documents without issuing summons and upon such an application, the witness can be examined or the documents can be obtained on record. The interplay between the two sub-rules has been succinctly set out by the Hon’ble Apex Court as early as in 1983, in the celebrated decision in the case of **Mange Ram vs. Brij Mohan**¹ where the position of law has been elucidated in paras 7 and 8 to the following effect :

1 (1983) 4 SCC 36

“7. The neat question of law is: where a party to a proceeding does not wish to have the assistance of the court for the purpose of procuring the attendance of a witness or witnesses, could he be denied the privilege of examining witnesses kept present by him on the date fixed for recording his evidence, on the sole ground that the names of the witnesses and the gist of evidence have not been set out in the list which may or ought to have been filed in compliance with order XVI Rule 1 of the Code of Civil Procedure ?

“8. Sub-rule (1) of Rule 1 of order XVI casts an obligation on every party to a proceeding to present a list of witnesses whom it proposes to call either to give evidence or to produce documents and obtain summonses to such persons for their attendance in court. Sub-rule (2) requires that the parties seeking the assistance of the Court for procuring the attendance of a witness must make an application stating therein the purpose for which the witness is proposed to be summoned. Sub-rule (3) confers a discretion on the court to permit a party to summon through court or otherwise any witness other than those whose names appear in the list submitted in sub-rule (1), if such party shows sufficient cause for the omission to mention the name of such witness in the said list. Rule 1-A in its amended form in force since 1977 enables a party to bring any witness to give evidence or to produce documents but this enabling provision is subject to the provision contained in sub-rule (3) of Rule 1 of order XVI. If a reference to Rule 22 of the High Court Rules is recalled at this stage, it merely reenacts sub-rule (1) and sub-rule (2) of Rule 1 of order XVI.”

In para 9 of the said decision, the Apex Court has culled out the legal consequences where the witness summoned either to give evidence or to produce documents fail to attend or to produce the documents in compliance with such summons, then the court may issue a proclamation requiring him to attend to give evidence or to produce documents. Even

the court in its discretion may issue a warrant for arrest of such person. Referring to the provision, it has been held that in view of the legal consequence ensuing from the issuance of a summons by the court and failure to comply with the same, the scheme of Rules 1, 1-A of Order XVI and Rule 22 framed by the High Court clearly envisaged filing of a list only in respect of witnesses whom the parties desire to examine and procure presence with the assistance of the court. There, however, remains an area where if the party to the proceeding does not desire the assistance of the court for procuring the presence of a witness, obviously the party can produce such witness on the date of hearing and the court cannot decline to examine the witness unless the court proposes to act under the proviso to sub-section (1) of Section 87 of the '1951 Act' which enables the court for reasons to be recorded in writing, to refuse to examine any witness or witnesses if the court is of the opinion that the evidence of such witness or witnesses is not material for the decision of the petition or that the party tendering such witness or witnesses is doing so on frivolous grounds or with a ground to delay the proceedings.

10. In the light of the aforesaid authoritative verdict, when the parameters of Rule 1 and Sub-Rule (1-A) are succinctly set out as above, the impugned order passed on 18 September 2001 merely on a technicality, that no reasons are cited before any such evidence is sought to be adduced, cannot be sustained. Pertinent to note that on 8 September 2021 in the roznama of the proceedings, the court has recorded that "adjourned for further witness of Respondent no.1". Written statement of the defendant would justify examination of the said witness when he was answering the pleading to the effect that the properties mentioned in paras 9 and 14 of the election petition are belonging to the candidate who has concealed the

said information while filling up the nomination form. A specific defence has been set up by the present Petitioner in the form of written statement to the effect that the properties mentioned in paras 9 and 14 are already transferred in the names of some other person and it is these persons who he is claiming to examine.

In any case, the Respondent had not closed his evidence and he had opportunity to bring the witness which would support his case as juxtaposed against the pleadings in the plaint which claim a relief of defeating him a councilor. The election petition necessarily will have to be governed by the provisions of Code of Civil Procedure and contemplate opportunity to contest the Petition, and in any case, no prejudice would be caused to the Petitioner since on the witness being examined, he will naturally be entitled to cross-examine the said witness.

In the wake of the aforesaid, impugned order, in my opinion, cannot be sustained and is liable to be quashed and set aside. Consequently, the application filed by the petitioner/respondent for permitting him to adduce evidence of two witnesses, is allowed.

11. The writ petition is made absolute in terms of prayer clauses (a) and (b).

(SMT. BHARATI DANGRE, J.)