

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO. 4031/2021

Salma Bi W/o Syed Noor Attar,
Aged 54 years, Occu: Household,
R/o Dongaon, Tah. Mehkar, Distt. Buldana.

PETITIONER

.....VERSUS.....

1. The Collector, Buldana.
2. The Returning Officer for the Elections of Grampanchayat, Dongaon and Naib Tahsildar, Mehkar, Tah. Mehkar, Distt. Buldana.
3. The State Election Commission (Maharashtra), Through its Commissioner, Mumbai.
4. Gazala Bi Saddam Shah,
Aged about 27 years, Occu: Housewife,
R/o At Post Dongaon, Tah. Mehkar, Distt. Buldana.
5. In-Charge Officer (Gram Panchayat) and District Deputy Election Officer, Buldana.
6. Gauri Sawant,
In-Charge Officer (Gram Panchayat) and District Deputy Election Officer, Buldana.
7. Avinash Sanas,
Deputy Commissioner, State Election Commission, Maharashtra, First Floor, New Administrative Building, Hutatma Rajguru Chowk, Madam Cama Road, Mumbai-400 032.

RESPONDENTS

Shri R.L. Khapre, Senior Advocate with Shri D.R. Khapre, counsel for the petitioner.

Mrs. K.R. Deshpande, Assistant Government Pleader for the respondent nos.1 and 2.

Shri J.B. Kasat, counsel for the respondent no.3.

Shri A.M. Ghare, counsel for the respondent no.4.

CORAM : A. S. CHANDURKAR AND SMT.PUSHPA V. GANEDIWALA, JJ.
DATE : 08TH FEBRUARY, 2022.

ORAL JUDGMENT (PER : A.S. CHANDURKAR, J.)

An interesting question as regards the effect of contesting elections pursuant to an interim order passed in a writ petition which is subsequently dismissed as not maintainable by vacating the interim order and directing the consequences of the same to follow arises for consideration in this writ petition. The sole candidate left in the fray consequent upon dismissal of the writ petition seeks relief of declaration of being elected on the principle of restitution while the candidate who contested the elections on the strength of the interim order and was declared elected contends that she could be unseated only by instituting statutory proceedings in the form of an election petition.

2. With a view to answer the aforesaid question the learned counsel for the parties have been heard at length by issuing **RULE** and making the same returnable forthwith.

The facts giving rise to the aforesaid question are that elections to elect members of Gram Panchayat Dongaon, Taluka Mehkar, District Buldana were held in December-2020 – January-2021. The nomination forms were to be filled by 30.12.2020 and the scrutiny of the same was to take place on 31.12.2020. The final list of candidates was to be published on 04.01.2021 and the polling was scheduled on 15.01.2021. The votes were to be counted and the results were to be declared on 18.01.2021.

3. The ward in question is Ward No.1 which was divided into three segments. Seat A was reserved for candidates from the Scheduled Castes category. Seat B was reserved for the candidates from the Backward Class Category while Seat C was reserved for Backward Class Category (Women). It is the case of the fourth respondent that she had filed a nomination form for contesting elections on Seat C which was reserved for Backward Class Category (Women). The Returning Officer however accepted her nomination form for Seat B which was reserved for Backward Class Category candidates. Being aggrieved by this decision the fourth respondent filed Writ Petition No.85 of 2021 challenging that decision of the Returning Officer. On 04.01.2021, the learned Judge while issuing notice to the respondents passed an order which reads thus:

“Considering the extreme urgency projected on behalf of the petitioner, the petition was taken up for consideration.

(2) Heard learned counsel for the petitioner.

(3) The petitioner has challenged the order dated 31.12.2020 passed by the respondent No.2 – Returning Officer whereby her nomination form for election to Ward No.1 in Gram Panchayat, Dongaon, Taluka Mehkar, District Buldana, has been accepted for the Backward Class Citizen Category, instead of Backward Class Citizen Women Category.

(4) It is the case of the petitioner she had filled the nomination form for the election wherein she had specifically stated that she was contesting for Backward Class Citizen Women Category and she has answered in the affirmative on the specific question in the nomination

for to the effect as to whether the candidate was contesting for a seat reserved for woman. Attention of this Court was also invited to documents filed along with nomination form wherein it was repeatedly stated that she was filing nomination form for election in BCC Women category. It is submitted that despite such explicit statements made on behalf of the petitioner in the nomination form and the supporting documents as per the existing format, the respondent no.2 – returning Officer wrongly accepted her nomination paper for Backward Class Citizen Category only and not for the Backward Class Citizen Women Category.

(5) Having perused the writ petition and the documents filed therewith, the Court is of the opinion that a prima facie case is made out on behalf of the petitioner.

(6) Hence, issue notice to the respondents, returnable in four weeks.

(7) Shri Chutke, learned A.G.P. waives notice on behalf of both the respondents.

(8) In the meanwhile, there shall be ad interim relief in terms of prayer clause (d), subject to result of the writ petition.

(9) Considering the urgency in the matter the learned A.G.P. is requested to communicate this order to the respondent No.2 – Returning Officer immediately.”

Prayer Clause (d) in that writ petition reads as under:

“(d) during pendency of instant petition, by way of interim order, be pleased to direct the respondent No.2 i.e. the Returning Officer for the Elections of Grampanchayat Dongaon and Naib-Tahsildar, Mehkar to provisionally accept the nomination paper of petitioner submitted for a seat reserved for Backward Citizen Category/OBC-Women Category (BCC-W) in the election for Ward No.1 of Village Dongaon, Tah. Mehkar, Dist. Buldana;”

4. Pursuant to the aforesaid interim order the fourth respondent contested elections from Seat C that was reserved for Backward Class Category (Women). The petitioner and the fourth respondent were the only candidates seeking election from Seat C. The fourth respondent was then declared elected. The petitioner thereafter got herself impleaded in the said writ petition as the respondent no.4 therein. She also moved C.A.W. No.237 of 2021 for vacating the interim order dated 04.01.2021. On 08.07.2021 the learned Single Judge on hearing the learned counsel for the parties held that in view of the judgment of the Full Bench in *Karmaveer Tulshiram Autade & Others Versus State Election Commissioner, Mumbai* [2021(2) Mh.L.J. 349] the writ petition challenging an order rejecting the nomination paper was not maintainable in view of the bar contemplated under Article 243-O(b) of the Constitution of India. Resultantly while dismissing the writ petition as not maintainable it was observed as under:

“28. This Court is of the opinion that considering the settled position of law laid down by the Hon’ble Supreme Court and reiterated in the aforesaid recent Full Bench Judgment of this Court, the present writ petition challenging the impugned order dated 31/12/2020, passed by the respondent No.2 – Returning Officer, is not maintainable in view of the specific bar under Article 243-O(b) of the Constitution of India and Section 15A of the Act of 1959. Consequently the present writ petition is held to be not maintainable.

29. Accordingly, the Writ Petition is dismissed. The interim order dated 04/01/2021, passed by this Court

stands vacated and its consequences shall follow. No order as to costs.”

Thus the interim order dated 04.01.2021 was vacated and the consequences thereof were directed to follow.

5. Pursuant to the aforesaid adjudication, the Collector on 16.07.2021 sought the opinion of the State Election Commission as regards the course to be followed in the matter. On 07.09.2021 the State Election Commission informed the Collector that since the fourth respondent had contested the elections and had won the same, her election was required to be challenged under Section 15 of the Maharashtra Village Panchayats Act, 1958 (for short, ‘the Act of 1958’). This aspect was then communicated to the petitioner on 08.09.2021 by the Deputy District Election Officer. The petitioner then moved C.A.W. No.1311 of 2021 praying that she be declared elected as a consequence of vacation of the interim order dated 04.01.2021. On 05.10.2021 however the petitioner withdrew C.A.W. No.1311 of 2021 with liberty to file appropriate proceedings. It is in the aforesaid backdrop that this writ petition has been filed.

6. Shri R.L. Khapre, learned Senior Advocate for the petitioner submits that the fourth respondent had contested elections for Seat C only

on account of the interim order dated 04.01.2021 passed in Writ Petition No.85 of 2021. While passing that ad-interim order it was directed that the same would be subject to the result of the writ petition. Further when the writ petition was dismissed as not maintainable on 08.07.2021, the interim order dated 04.01.2021 was expressly vacated and it was also directed that the consequences of vacating the interim order would follow. The order passed in Writ Petition No.85 of 2021 was challenged before the Hon'ble Supreme Court and the Special Leave Petition was dismissed on 23.07.2021. The order passed by this Court thus having attained finality the only course open was to declare the petitioner who was the sole candidate for Seat C elected. The State Election Commission that was approached by the Collector for guidance in the matter pursuant to the applications made by the petitioner had wrongly opined that its hands were tied as there were no specific directions issued by the High Court as to the course to be followed while dismissing the writ petition. There was no justification in directing the petitioner to avail the remedy of filing an election petition under Section 15 of the Act of 1958. Inviting attention to the provisions of Section 144 of the Code of Civil Procedure, 1908 (for short, 'the Code') it was urged that on analogous principles, this Court ought to implement its own order by declaring the petitioner to be duly elected. Placing reliance on the decisions in *Kavita Trehan (Mrs) & Another Versus Balsara Hygiene Products Ltd.* [(1994) 5 SCC 380],

Kalabharati Advertising Versus Hemant Vimalnath Narichania & Others [(2010) 9 SCC 437] and *State of Gujarat & Others Versus Essar Oil Limited & Another* [(2012) 3 SCC 522] it was submitted that there was no reason whatsoever to deny relief to the petitioner on the principle of restitution. But for the interim order passed in Writ Petition No.85 of 2021 the petitioner would have been declared elected unopposed under Rule 15(2) of the Maharashtra Village Panchayats Election Rules 1959 (for short, 'the said Rules') and that position therefore ought to be restored.

The learned Senior Advocate further highlighted the effect of dismissal of a writ petition on an interim order passed therein. He submitted that on dismissal of the writ petition and vacating the interim order passed earlier, the *status quo* ante ought to be restored. There was hardly any justification in directing the petitioner to file an election petition for challenging the election of the fourth respondent. The petitioner was not seeking adjudication of any statutory right under election law but was merely seeking to be placed back in the same position that was obtaining prior to 04.01.2021 when the ad-interim order was passed. In that regard the learned Senior Advocate referred to the decisions in *Baby Samuel Versus Tukaram Laxman Sable & Others* [1996(1) Mh.L.J. (SC) 9], *State of Karnataka Versus Vishwabharathi House Building Coop. Society & Others* [(2003) 2 SCC 412] and *State of*

West Bengal & Others Versus Banibrata Ghosh & Others [(2009) 3 SCC 250]. It was thus submitted that the petitioner was entitled for the reliefs prayed for in the writ petition.

7. Shri J.B. Kasat, learned counsel for the State Election Commission submitted that though it was true that the fourth respondent had contested elections on the strength of the ad-interim order dated 04.01.2021 in Writ Petition No.85 of 2021, on the results being declared the State Election Commission had no authority or jurisdiction to change or modify such results. There was no power conferred on the State Election Commission to do so and hence it was legally justified in directing the petitioner to avail the statutory remedy under Section 15 of the said Act. In that regard the learned counsel invited attention to the decision in *Sarla w/o Sopan Bopale Versus State of Maharashtra & Others* [2001(1) Mh.L.J. 453] and submitted that the writ petition was not liable to be entertained.

8. Shri A.M. Ghare, learned counsel for the fourth respondent also opposed the prayers made in the writ petition. At the outset he submitted that in view of the provisions of Article 243-O of the Constitution of India it was not permissible to call in question the election of the fourth respondent except by availing the statutory remedy as

prescribed. Since the petitioner was calling in question the election of the fourth respondent such relief could be sought only in an election petition. Another objection raised was that a similar prayer as made herein having been made by the petitioner by filing C.A.W. No.237 of 2021 in Writ Petition No.85 of 2021 and the same not having been granted, it was not permissible for the petitioner to re-agitate that prayer in this writ petition. On principles of *res-judicata* such course was barred. Reference was made to the decision in *Anil s/o Jagannath Rana & Others Versus Rajendra s/o Radhakishan Rana & Others* [(2015) 2 SCC 583] in that regard. Yet another objection raised was that the petitioner ought to avail the remedy of execution of the order dated 08.07.2021 in Writ Petition No.85 of 2021 as provided by Chapter XVII Rule 23 of the Bombay High Court Appellate Side Rules, 1960. He relied on the decision in *Madhavrao s/o Krishnarao Zade Versus State of Maharashtra & Others* [2012(1) Mh.L.J. 792] in that regard.

It was further submitted that the petitioner having contested the elections for Seat C alongwith the fourth respondent and having lost the same it was not permissible for the petitioner to now turn around and seek the relief of declaration. It was not permissible for the petitioner to bypass the statutory remedy that was provided and seek a declaration that she stood elected from Seat C. It was thus submitted that the writ petition was liable to be dismissed.

9. Shri R.L. Khapre, learned Senior Advocate for the petitioner in reply to the aforesaid submitted by inviting attention to the prayers made in Writ Petition No.85 of 2021 that the fourth respondent herself had prayed that her nomination form as filled be accepted for Seat C that was reserved for Backward Class Category (Women). It therefore could not be said that the fourth respondent lost an opportunity to contest the elections for Seat B that was reserved for Backward Class Category candidates. He also invited attention to the observations in paragraph 24 of the order passed in Writ Petition No.85 of 2021 that the petitioner was the lone candidate for Seat C and was to stand elected unopposed therefrom. In view of the provisions of Rule 15(2) of the said Rules there was no reason to deny the relief to the petitioner.

10. We have heard the learned counsel for the parties at length and with their assistance we have perused the material placed on record. The relevant factual aspects are not in dispute. The nomination form of the petitioner was accepted as valid for Seat C that was reserved for Backward Class Category – Women while the nomination form of the fourth respondent was accepted from Seat B that was reserved for Backward Class Category candidates. Since the fourth respondent intended to contest elections for Seat C she challenged the acceptance of her nomination form from Seat B and filed Writ Petition No.85 of 2021.

While granting ad-interim relief to the fourth respondent on 04.01.2021 of accepting her nomination form for Seat C, it was made clear that the ad-interim order was subject to the result of the writ petition. In the elections that were held for Seat C, the petitioner and the fourth respondent were the only candidates and the fourth respondent was declared elected having secured higher votes than the petitioner. It is also a fact that Writ Petition No.85 of 2021 was dismissed as not maintainable on 08.07.2021 which is much after declaration of results. This Court while dismissing the said writ petition vacated the interim order dated 04.01.2021 and also directed that the consequences of the same would follow. This order has thereafter attained finality with the dismissal of the Special Leave Petition on 23.07.2021. It is on this undisputed factual platform that the petitioner has sought a direction to be issued to the Collector, Buldana as well as the Returning Officer, the State Election Commission and the District Deputy Election Officer to declare her elected as Member of the Gram Panchayat from Seat C since she was the only candidate for the said Seat. In effect, the petitioner seeks to be placed in the position that was obtaining on 04.01.2021 prior to passing of the ad-interim order.

11. Since the fourth respondent has raised an objection to the maintainability of the writ petition on various counts it would be

necessary to first consider the same. The bar under Article 243-O of the Constitution of India is the sheet anchor of these objections. As per Article 243-O(b) of the Constitution of India no election of any panchayat can be called in question except by an election petition presented to such authority and in such manner as prescribed. To consider whether the bar under Article 243-O(b) of the Constitution of India is attracted it would be necessary to consider the premise on which the petitioner seeks relief and whether the election of the fourth respondent is infact being called in question in this writ petition. The case of the petitioner is that initially she was the lone candidate who was validly nominated to contest elections for Seat C. Ordinarily, she ought to have been declared elected unopposed. By virtue of an ad-interim order dated 04.01.2021 passed in Writ Petition No.85 of 2021 the fourth respondent was permitted to contest elections for Seat C but this interim direction was subject to the outcome of the writ petition. With the dismissal of the said writ petition as not maintainable and the specific order vacating the interim relief and directing the consequences to follow, it was clear that the position as prevailing prior to passing of the ad-interim order would stand restored. Thus in effect the petitioner being the lone candidate for Seat C was entitled to be declared elected unopposed as per Rule 15(2) of the said Rules. Under Rule 15(2) of the said Rules, the Returning Officer has to declare a candidate to be elected if there is no contested election. This

stage of declaring a candidate elected unopposed under Rule 15(2) of the said Rules is prior to the stage of allotment of symbols and actual polling. Seeking restoration of *status quo* ante in these facts would thus not amount to calling the election of the fourth respondent in question for attracting the bar prescribed by Article 243-O(b) of the Constitution of India. For, if *status quo* ante is restored there would have been no election held since the petitioner was the sole validly nominated candidate for Seat C and was entitled to be declared elected unopposed.

12. It is thus clear that the petitioner in this writ petition has not called in question the election of the fourth respondent. No adjudication of the correctness of the election of the fourth respondent is being sought. The petitioner contends that as a consequence of vacation of the interim order dated 04.01.2021 the fact that the fourth respondent contested the election for Seat C and won has no legal existence. This contention is well founded. We are satisfied that in the light of the order dismissing Writ Petition No.85 of 2021 on 08.07.2021 with a direction that consequences would follow, the fourth respondent cannot contend that she has been validly elected on Seat C and that her election would have to be first set aside under Section 15 of the Act of 1958. For these reasons the provisions of Article 243-O of the Constitution of India cannot

be resorted to by the fourth respondent to prevent the present adjudication.

13. Even while considering the provisions of Article 243-O(b) of the Constitution of India, we may in the passing note that the Hon'ble Supreme Court in *Harnek Singh Versus Charanjit Singh & Others* [(2005) 8 SCC 383] in paragraph 16 thereof has observed as under:

“16. Article 243-O of the Constitution mandates that all election disputes must be determined only by way of an election petition. This by itself may not per se bar judicial review which is the basic structure of the Constitution, but ordinarily such jurisdiction would not be exercised. There may be some cases where a writ petition would be entertained but in this case we are not concerned with the said question.”

The aforesaid observations have thereafter been quoted in paragraph 53 of the decision in *State of Goa & Another Versus Fouziya Imtiaz Shaikh & Another* [(2021) 8 SCC 401] while referring to the decision in *Laxmibai Versus Collector* [(2020) 12 SCC 186]. Similarly, *Bharati Reddy Versus State of Karnataka & Others* [(2018) 12 SCC 61] while considering a somewhat identical contention as regards bar in view of Article 243-O(b) of the Constitution of India it was held that it was left to the discretion of the Court exercising power under Articles 226/227 of the Constitution of India to entertain a writ petition. Since we have held that in this writ petition the petitioner has not called in question the

election of the fourth respondent but is merely seeking restoration of *status quo ante*, the remedy under Section 15 of the Act of 1958 is not available to the petitioner. The only remedy available is by way of the present writ petition under Articles 226 and 227 of the Constitution of India.

Yet another aspect that cannot be ignored is that the effect of vacation of the ad-interim order dated 04.01.2021 and the consequences that were intended to follow are now required to be considered by this Court as is clear from the incorrect approach of the State Election Commission as it has in its order dated 07.09.2021 opined that the High Court had not issued any directions while deciding Writ Petition No.85 of 2021. The said writ petition having been entertained by this Court, the ad-interim order dated 04.01.2021 being passed subject to the outcome of the writ petition and the writ petition then having been dismissed on 08.07.2021 by specifically vacating the ad-interim order, it is within the jurisdiction of this Court to consider whether its orders are correctly understood and taken to the logical end. The reliance placed on the decision in *Sarla Sopan Bopale* (supra) is misplaced in these facts. The writ petition is thus liable to be entertained on merits.

14. It was also contended on behalf of the fourth respondent that as the petitioner had moved C.A.W. No.237 of 2021 in Writ Petition

No.85 of 2021 seeking similar reliefs as sought in the present writ petition, such prayers do not deserve to be granted on principles of *res judicata*. This contention cannot be accepted. In C.A.W. No.237 of 2021 the petitioner had prayed for vacating the interim order dated 04.01.2021 and to thereafter declare the present petitioner elected by issuing necessary declaration. It is seen that while deciding Writ Petition No.85 of 2021 the Court specifically vacated the ad-interim order dated 04.01.2021 and further directed that its consequences shall follow. Despite the specific direction requiring the consequences to follow, the respondent nos.1 to 3 have failed to take necessary steps to implement that direction. The petitioner thus seeks implementation of that direction and not reconsideration or re-determination of the prayers made in C.A.W. No.237 of 2021. As noted above, the election of the fourth respondent is not in question in this writ petition and the petitioner merely seeks the relief of restitution based on the final adjudication of Writ Petition No.85 of 2021.

For these reasons, the further submission that the order passed in Writ Petition No.85 of 2021 should be got executed by taking recourse the provisions of Chapter XVII Rule 23 of the Bombay High Court Appellate Side Rules, 1960 also does not deserve acceptance. Infact, the fourth respondent having lost the right to continue as Member of Gram Panchayat, Dongaon in view of vacation of the ad-interim order

dated 04.01.2021, the petitioner cannot be directed to seek execution of the order passed in Writ Petition No.85 of 2021 in the manner proposed by the fourth respondent. The present writ petition having been found maintainable, the reliefs prayed for by the petitioner can be considered in these proceedings. For this reason, the ratio of the decision in *Madhavrao Krishnarao Zade* (supra) cannot be made applicable to the case in hand.

15. The preliminary objections having been considered and the writ petition being maintainable, it would be necessary to consider the matter on merits. As stated above, the petitioner is not seeking any substantive relief by calling in question the election of the fourth respondent from Seat C. The petitioner merely contends that with the dismissal of Writ Petition No.85 of 2021 resulting in vacation of the ad-interim order and a direction that consequences would follow, the same can lead to only one conclusion that the petitioner on 04.01.2021, which was the date on which the final list of candidates was published was entitled to be declared elected unopposed under Rule 15(2) of the said Rules. The petitioner seeks restoration of *status quo* ante as on 04.01.2021 which is purely the consequence of the order dated 08.07.2021 in Writ Petition No.85 of 2021.

16. The effect of vacation of an interim order consequent upon dismissal of the writ petition and the applicability of the principle of restitution in that context would have to be considered. It is well settled that on the adjudication of a substantive proceeding, any interlocutory order passed would merge into the final order. Such interim order cannot form the basis of conferring any right in favour of a party in whose favour such interlocutory orders were initially passed especially when such proceedings are dismissed. Reference can be usefully made to the following decisions:-

(a) *Ouseph Mathai & Others Versus M.Abdul Khadir* [(2002) 1 SCC 319]

“13. It is settled position of law that stay granted by the court does not confer a right upon a party and it is granted always subject to the final result of the matter in the court and at the risks and costs of the party obtaining the stay. After the dismissal, of the lis, the party concerned is relegated to the position which existed prior to the filing of the petition in the court which had granted the stay.”

(b) *Kalabharati Advertising* (supra)

“15. No litigant can derive any benefit from the mere pendency of a case in a court of law, as the interim order always merges into the final order to be passed in the case and if the case is ultimately dismissed, the interim order stands nullified automatically.....

The maxim actus curiae neminem gravabit, which means that the act of the court shall prejudice no

one, becomes applicable in such a case. In such a situation the court is under an obligation to undo the wrong done to a party by the act of the court. Thus, any undeserved or unfair advantage gained by a party invoking the jurisdiction of the court must be neutralised, as the institution of litigation cannot be permitted to confer any advantage on a party by the delayed action of the court.

17. In *South Eastern Coalfields Ltd. v. State of M.P.* this Court examined this issue in detail and held that no one shall suffer by an act of the court. The factor attracting the applicability of restitution is not the act of the court being wrongful or a mistake or error committed by the court; the test is whether an act of the party persuading the court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage it would not have otherwise earned, or the other party suffering an impoverishment which it would not have suffered but for the order of the court and the act of such party. There is nothing wrong in the parties demanding to be placed in the same position in which they would have been had the court not intervened by its interim order, when at the end of the proceedings, the court pronounces its judicial verdict which does not match with and countenance its own interim verdict. The injury, if any, caused by the act of the court shall be undone and the gain which the party would have earned unless it was interdicted by the order of the court would be restored to or conferred on the party by suitably commanding the party liable to do so. Any opinion to the contrary would lead to unjust if not disastrous consequences.

The aforesaid thus clearly indicates that a party in whose favour an interim order is passed cannot be permitted to continue to retain the benefit thereof consequent upon dismissal of the substantive proceedings. In effect the petitioner by relying upon aforesaid legal principle seeks the relief of declaration of being elected unopposed for Seat C. In the aforesaid factual backdrop and the legal position obtaining it

cannot be said that the petitioner was infact “calling in question the election” of the fourth respondent in these proceedings so as to attract the bar under Article 243-O(b) of the Constitution of India.”

(c) *Abhimanyoo Ram Versus State of Uttar Pradesh & Another*
[(2008) 17 SCC 71]

“5. The assumption of the appellant that the High Court has made any unwanted or unwarranted observation or issued any direction which is uncalled for, while dismissing his petition as not pressed, is not correct. The High Court has merely spelt out expressly, the consequences of the dismissal of the writ petition. Such explicit directions have become necessary to check a raising trend among the litigants to secure the relief as an interim measure, and then avoid adjudication on merits, particularly in matters relating to examinations and recruitment. The modus operandi adopted in such matters is as follows: The litigant approaches the court in the last minute for relief with an interim prayer. He persuades the court to grant the interim relief by highlighting the urgency, irreparable loss and balance of convenience. He obtains interim relief and secures the desired benefit with the help of such interim order. Once the purpose of securing the interim order is achieved (particularly where the interim order granted is the same as the final relief prayed), he makes an innocuous submission to the court that he does not want to press the petition and gets the matter disposed of, thereby achieving the goal of securing relief without adjudication. He takes advantage of the fact that invariably courts do not spell out the consequences, when dismissing the petitions as not pressed. The result is that in many cases, a litigant who would not get the relief on detailed scrutiny of his claim during a contested final hearing, gets away with undeserved relief secured by way of an interim order.”

(d) *Kanoria Chemicals and Industries Ltd. & Others Versus U.P. State Electricity Board & Others [(1997) 5 SCC 772]*

“11. It is equally well settled that an order of stay granted pending disposal of a writ petition/suit or other proceeding, comes to an end with the dismissal of the substantive proceeding and that it is the duty of the court in such a case to put the parties in the same position they would have been but for the interim orders of the court. Any other view would result in the act or order of the court prejudicing a party (Board in this case) for no fault of its and would also mean rewarding a writ petitioner in spite of his failure. We do not think that any such unjust consequence can be countenanced by the courts.”

It is thus clear that the fourth respondent after 08.07.2021 on dismissal of her writ petition cannot rely upon the ad-interim order dated 04.01.2021 to contend that she is now a validly elected member of the Gram Panchayat from Seat C. The advantage gained by her will have to be neutralised.

17. The petitioner also seeks to rely upon the principle of restitution. Restitution is based on first principles of restoring a thing back to its original state or restoring to a party the benefit which the other party has received under a decree subsequently held to be wrong. The power of restitution has been recognised as an inherent power of the Court. In *Mahijibhai Mohanbhai Barot Versus Patel Manibhai* [**AIR 1965 SC 1477**] the Constitution Bench of the Hon’ble Supreme Court

considered the question as to whether an application under Section 144 of the Code was an application in execution. Reference was made to a writ of restitution as issued under English law. In paragraph 21 it was observed as under:

“21. In Halsbury’s Laws of England, 2nd Edn., Vol. 14, p. 28, para 69, the English law on the subject is stated thus:

“Where a wrongful or irregular execution has been set aside, or where a judgment or order has been reversed after execution thereon has taken place, restitution will be made to the successful party. The order setting aside the execution or reversing the judgment or order should provide for this; and if it does, execution may issue upon it in the ordinary course. If the order does not so provide, another order may be made, or a writ called a writ of restitution be issued, commanding the judgment creditor to restore the property or pay over the proceeds of sale.”

The said passage indicates that under the English law the appellate order reversing the original one may itself contain a direction for restitution or a Court may issue a separate order or a writ of restitution.”

In the context of Section 144 of the Code, it was held that an application for restitution was infact an application for execution. Reference was also made to the decision of the Privy Council in *Jai Berham & Others Versus Kedar Nath Marwari & Others* [AIR 1922 Privy Council 269]

“It is the duty of the Court under Section 144 of the Civil Procedure Code to “place the parties in the position which they would have occupied, but for such

decree or such part thereof as has been varied or reversed.”

Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved. As was said by Cairns, L.C. in Rodger v. The Comptoir d’Escompte de Paris (1871) 3 PC 465.

“One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors and when the expression ‘the act of the Court,’ is used, it does not mean merely the act of the primary Court, or of any intermediate Court of Appeal, but the act of the Court as a whole from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case.”

18. We may also refer to the decision in *Dr.Raghubir Saran vs. State of Bihar and another* [**AIR 1964 SC 1**]. In paragraph 27 it was held as under:-

“27. When we speak of the inherent powers of the High Court of a State we mean the powers which must, by reason of its being the highest Court in the State having general jurisdiction over civil and criminal Courts in the State, inhere in that Court. The powers in a sense are an inalienable attribute of the position it holds with respect to the Courts subordinate to it. These powers are partly administrative and partly judicial. They are necessarily judicial when they are exercisable with respect to a judicial order and for securing the ends of justice. When we speak of ends of justice we do not use the expression to comprise within it any vague or nebulous concept of justice, nor even justice in the philosophical sense but

justice according to law, the statute law and the common law. Again, this power is not exercisable every time the High Court finds that there has been a miscarriage of justice. For the procedural laws of the State provide for correction of most of the errors of subordinate Courts which may have resulted in miscarriage of justice. These errors can be corrected only by resorting to the procedure prescribed by law and not otherwise. Inherent powers are in the nature of extraordinary powers available only where no express power is available to the High Court to do a particular thing and where its express powers do not negative the existence of such inherent power.”

Yet again in *Kavita Trehan (Mrs) & Another* (supra) it was observed as under:-

“22. The jurisdiction to make restitution is inherent in every court and will be exercised whenever the justice of the case demands. It will be exercised under inherent powers where the case did not strictly fall within the ambit of Section 144. Section 144 opens with the words : “Where and insofar as the decree or an order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose,” The instant case may not strictly fall within the terms of Section 144; but the aggrieved party in such a case can appeal to the larger and general powers of restitution inherent in every court.”

19. The power of restitution having been recognized as an inherent power of the Court, it is with that position in mind that the learned Single Judge directed “consequences to follow”. Once that intention was clearly expressed, the manner of execution of that direction

and the resultant consequences cannot be placed on a higher pedestal than what the justice of the case demands. The adjudication of Writ Petition No.85 of 2021 having attained finality, the petitioner cannot be denied her prayer of being placed in the position that she was prior to passing of the ad-interim order dated 04.01.2021. We may in this regard refer to what has been observed in *State of Gujarat & Others Versus Essar Oil Limited & Another* [(2012) 3 SCC 522] in paragraphs 71 and 72:

“71. The second principle that an act of court cannot prejudice anyone, based on the Latin maxim *actus curiae neminem gravabit* is also encompassed partly within the doctrine of restitution. This *actus curiae* principle is founded upon justice and good sense and is a guide for the administration of law.

72. The aforesaid principle of “*actus curiae*” was applied in *A.R. Antulay V. R.S. Nayak* wherein *Sabyasachi Mukharji, J.* (as His Lordship then was) giving the majority judgment for the Constitution Bench of this Court, explained its concept and application in p. 672, para 83 of the Report. His Lordship quoted the observation of Lord Cairns in *Rodger v. Comptoir D’Escompte de Paris*, LR at p. 475 which is set out below:

“Now, Their Lordships are of opinion, that one of the first and highest duties of all courts is to take care that the act of the court does no injury to any of the suitors, and when the expression ‘the act of the court’ is used, it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as a whole, from the lowest court which entertains jurisdiction over the matter up to the highest

court which finally disposes of the case. It is the duty of the aggregate of those tribunals, if I may use the expression, to take care that no act of the court in the course of the whole of the proceedings does an injury to the suitors in the court.”

In *Ram Krishna Verma & Others Versus State of UP & Others* [(1992) 2 SCC 620] after referring to the earlier decision in *Grindlays Bank Ltd. Versus ITO* [(1980) 2 SCC 191] the Hon’ble Supreme Court has observed that the High Court while exercising its power under Article 226 of the Constitution of India can consider if the interest of justice requires any undeserved or unfair advantage gained by a party invoking the jurisdiction of the Court must be neutralised.

20. In a recent decision, the Constitution Bench in *Indore Development Authority Versus Manoharlal & Others* [(2020) 8 SCC 129] in paragraph 335 has observed as under:-

“335. The principle of restitution is founded on the ideal of doing complete justice at the end of litigation, and parties have to be placed in the same position but for the litigation and interim order, if any, passed in the matter. In South Eastern Coalfields Ltd. v. State of M. P., it was held that no party could take advantage of litigation. It has to disgorge the advantage gained due to delay in case lis is lost. The interim order passed by the court merges into a final decision. The validity of an interim order, passed in favour of a party, stands reversed in the event of a final order going against the party successful at the interim stage. Section 144 of the Code of Civil Procedure is not the fountain source of restitution. It is rather a statutory recognition of the rule of justice, equity and fair

play. The court has inherent jurisdiction to order restitution so as to do complete justice. This is also on the principle that a wrong order should not be perpetuated by keeping it alive and respecting it. In exercise of such power, the courts have applied the principle of restitution to myriad situations not falling within the terms of Section 144 CPC. What attracts applicability of restitution is not the act of the court being wrongful or mistake or an error committed by the court; the test is whether, on account of an act of the party persuading the court to pass an order held at the end as not sustainable, resulting in one party gaining an advantage which it would not have otherwise earned, or the other party having suffered an impoverishment, restitution has to be made. Litigation cannot be permitted to be a productive industry. Litigation cannot be reduced to gaming where there is an element of chance in every case. If the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order. This Court observed in South Eastern Coal Field thus:

“26. In our opinion, the principle of restitution takes care of this submission. The word “restitution” in its etymological sense means restoring to a party on the modification, variation or reversal of a decree or order, what has been lost to him in execution of decree or order of the court or in direct consequence of a decree or order (see Zafar Khan v. Board of Revenue, U.P.) In law, the term “restitution” is used in three senses: (i) return or restoration of some specific thing to its rightful owner or status; (ii) compensation for benefits derived from a wrong done to another; and (iii) compensation or reparation for the loss caused to another. (See Black’s Law Dictionary, 7th Edn., p. 1315). The Law of Contracts by John D. Calamari & Joseph M. Perillo has been quoted by Black to say that “restitution” is an ambiguous term, sometimes referring to the disgorging of something which has been taken and at times referring to compensation for the injury done:

"Often, the result under either meaning of the term would be the same. ... Unjust impoverishment, as well as unjust enrichment, is a ground for restitution. If the defendant is guilty of a non-tortious misrepresentation, the measure of recovery is not rigid but, as in other cases of restitution, such factors as relative fault, the agreed-upon risks, and the fairness of alternative risk allocations not agreed upon and not attributable to the fault of either party need to be weighed."

The principle of restitution has been statutorily recognized in Section 144 of the Code of Civil Procedure, 1908. Section 144 CPC speaks not only of a decree being varied, reversed, set aside or modified but also includes an order on a par with a decree. The scope of the provision is wide enough so as to include therein almost all the kinds of variation, reversal, setting aside or modification of a decree or order. The interim order passed by the court merges into a final decision. The validity of an interim order, passed in favor of a party, stands reversed in the event of a final decision going against the party successful at the interim stage. ...

27. This is also on the principle that a wrong order should not be perpetuated by keeping it alive and respecting it (A.Arunagiri Nadar vs. S.P. Rathinasami). In the exercise of such inherent power, the courts have applied the principles of restitution to myriad situations not strictly falling within the terms of [Section 144](#).

28. That no one shall suffer by an act of the court is not a rule confined to an erroneous act of the court; the "act of the court" embraces within its sweep all such acts as to which the court may form an opinion in any legal proceedings that the court would not have so acted had it been correctly apprised of the facts and the law. the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the

opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the court withholding the release of money had remained in operation.”

21. Before concluding this aspect it is necessary to refer to the following observations in paragraph 28 of the decision in *South Eastern Coalfields Ltd. Versus State of M.P.* [(2003) 8 SCC 648] which entitle the petitioner to relief:-

“28. That no one shall suffer by an act of the court is not a rule confined to an erroneous act of the court; the “act of the court” embraces within its sweep all such acts as to which the court may form an opinion in any legal proceedings that the court would not have so acted had it been correctly apprised of the facts and the law. The factor attracting applicability of restitution is not the act of the court being wrongful or a mistake or error committed by the court; the test is whether on account of an act of the party persuading the court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the court and the act of such party. The quantum of restitution, depending on the facts and circumstances of a given case, may take into consideration not only what the party excluded would have made but also what the party under obligation has or might reasonably have made. There is nothing wrong in the parties demanding being placed in the same position in which they would have been had the court

not intervened by its interim order when at the end of the proceedings the court pronounces its judicial verdict which does not match with and countenance its own interim verdict. Whenever called upon to adjudicate, the court would act in conjunction with what is real and substantial justice. The injury, if any, caused by the act of the court shall be undone and the gain which the party would have earned unless it was interdicted by the order of the court would be restored to or conferred on the party by suitably commanding the party liable to do so. Any opinion to the contrary would lead to unjust if not disastrous consequences.”

22. For aforesaid reasons, we find that the petitioner is entitled for the reliefs sought in the writ petition. The fourth respondent having contested the elections from Seat C in view of the ad-interim order dated 04.01.2021 has no right to continue on the post as Member of Gram Panchayat, Dongaon in view of dismissal of Writ Petition No.85 of 2021 after vacating the interim order and directing the consequences to follow. The respondent nos.1 to 3 erred in not gathering the true import of the consequences of dismissal of Writ Petition No.85 of 2021 despite the clear order passed on 08.07.2021 that the interim order stood vacated and the consequences ought to follow. In addition, the said ad-interim order dated 04.01.2021 was made subject to the outcome of the writ petition.

23. In view of aforesaid the following order is passed:

- (I) The communication dated 07.09.2021 issued by the Deputy Commissioner, State Election Commission to the Collector as well as the subsequent communication dated 08.09.2021 issued by the Deputy District Election Officer, Buldana to the petitioner is set aside.
- (II) It is declared that as a consequence of dismissal of Writ Petition No.85 of 2021 by vacating the ad-interim order dated 04.01.2021 and directing the consequences to follow, the petitioner is entitled to a declaration that she stands elected as Member of Gram Panchayat Dongaon, Taluka Mehkar, District Buldana from Seat C. The fourth respondent shall yield that seat to the petitioner. The respondent nos.1 to 3 shall do the needful accordingly.

24. Rule is made absolute in aforesaid terms with no order as to costs. In the facts of the case this judgment shall operate after a period of four weeks. The elections for electing the Sarpanch and Upa-Sarpanch if not held till today shall be so held on expiry of the period of four weeks from today.

(SMT.PUSHPA V. GANEDIWALA, J.) (A.S. CHANDURKAR, J.)

APTE

Signed By: Digitally signed
by ROHIT DATTATRAYA
APTE
Signing Date: 08.02.2022 15:50