

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

WRIT PETITION NO. 15557 OF 2024

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Farooque Pathan

... Petitioner

V/s.

The District Collector & Ors

... Respondents

Ms. Pooja Phagnekar, for Petitioner.

Mr. B.V. Samant, Addl.G.P., a/w A.K. Naik, AGP for Respondent No.1-
State.

Mr. Akshay Shinde, for Respondent Nos.2 & 3. (Election Commission of
India).

**CORAM : ARIF S. DOCTOR &
SOMASEKHAR SUNDARESAN, JJ.**

**DATE : 5TH NOVEMBER 2024
[VACATION COURT]**

P.C. :

1. This Petition challenges the rejection of nomination filed by the
Petitioner for the forthcoming Maharashtra State Legislative Assembly
election in respect of the Bhiwandi East Constituency.

Factual Background:

2. The Petitioner filed a nomination form along with the supporting
affidavit on October 29, 2024. The documents were examined and a
checklist of deficiencies were provided to the Petitioner. A revised
affidavit was filed by the Petitioner, to deal with the defects pointed out,

prior to 11:00 a.m. on October 30, 2024.

3. We have heard Ms. Pooja Phagnekar, Learned Counsel on behalf of the Petitioner; Mr. Akshay Shinde, Learned Advocate appearing on behalf of the Returning Officer (Respondent No.2) and the State Election Commission (Respondent No.3); as also Mr. B.V. Samant, Addl.G.P. and Mr. A.K. Naik, AGP on behalf of the State (Respondent No.1).

Preliminary Objection:

4. When the matter was called out, Mr. Shinde raised a preliminary objection to submit that no writ petition invoking Article 226 of the Constitution of India can at all be entertained in connection with rejection of a nomination prior to the election. The only recourse for a candidate who is aggrieved by the rejection of a nomination would be to file an Election Petition subsequent to the conduct of the elections. Consequently, according to the Respondents, the Writ Court cannot even get into the facts of the case. In support of the aforesaid contentions, they would submit that the law is clear right from the case of N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency & Ors.¹ (**Ponnuswami**) and thereafter in Mohinder Singh Gill & Anr. Vs. The Chief Election

¹ AIR 1952 SCC 64

Commissioner, New Delhi & Ors.² (**MS Gill**). More importantly (as far as this Bench is concerned) a decision of the Full Bench of this Court in Karmaveer Tulshiram Autade & 4 Ors. Vs. The State Election Commission & 9 Ors.³ (**Full Bench**), which dealt with two writ petitions to reconcile conflicting views of earlier benches of this Court, has dealt with the law on the scope of intervention by writ courts under Article 226 of the Constitution of India, and has held that Article 243-O of the Constitution of India constitutes a bar on entertaining writ petitions under Article 226 of the Constitution challenging the rejection of nomination in an election.

Contentions of Parties:

5. Without prejudice to Mr. Shinde's submissions, Mr. Samant would submit that while the Petitioner rectified the errors pointed out to him upon scrutiny of a nomination, fresh errors were found in the revised affidavit filed by him on October 30, 2024. If by 11:00 am on the stipulated date, an error-free affidavit was not in place, it would be incumbent on the Returning Officer to reject the nomination. According to Mr. Samant, fresh errors could have never been envisaged in the earlier list of rectification and it could never be expected that a candidate could go on making newer errors, and expect time to rectify them, and such an

² (1978) 1 SCC 405

³ Civil Writ Petition (St.) No. 26 of 2021 dated January 13, 2021

approach would lead to the process of conducting elections getting disrupted with no finite time limit being effected.

6. Ms. Phagnekar, Learned Counsel for the Petitioner would submit that since the guidelines of the Election Commission of India requires a list of objections to be given upon scrutiny of the documents, there ought to have been a specific communication of the errors newly found in the revised affidavit. Such a notice would have given the Petitioner an opportunity to rectify the errors newly made. Refusal to do so is a denial of natural justice and a violation of the due process since the Petitioner was not made aware of the new objections that arose.

7. Consequently, the Petitioner's case is that the Returning Officer had arbitrarily rejected the nomination and this Court, in exercise of its jurisdiction under Article 226 ought to interfere and permit the Petitioner's name to be included in the ballot paper since there is significant time before the actual conduct of the election scheduled for November 20, 2024.

Analysis and Findings:

8. We have given our anxious consideration to the submissions made by the Learned Counsel for the parties. Suffice it to say that the **Full**

Bench of this Court has indeed considered the march of the law, indeed in the context of Panchayat elections, to hold that writ courts are barred from entertaining petitions under Article 226 of the Constitution of India, by reason of Article 243-O, which contains a *non-obstante* provision. The **Full Bench** has declared that two decisions of this Court holding to the contrary did not lay down correct law. The elections involved in the matter at hand are elections to the State Legislative Assembly, which is governed to Article 329 of the Constitution, the provisions of which are in *pari materia* and near-identical to the provisions of Article 243-O insofar as they contain a bar on Courts interfering in electoral matters. It has been held that such bar would include the exercise of jurisdiction under Article 226 of the Constitution.

9. It may be noted that the **Full Bench** decision was rendered on January 13, 2021. Thereafter, a three-judge Bench of the Supreme Court, in State of Goa & anr. v. Fouziya Imtiaz Shaikh & anr.⁴ (**Fouziya**), also dealing with Panchayat and Municipal elections, has rendered a detailed judgment on the inter-play between the scope for writ petitions under Article 226 and election petitions, interpreting the same provisions stipulating a bar on interference by courts in electoral matters. The law

⁴ (2021) 8 SCC 401

on the subject has been summarized in ***Fouziya*** in the following terms :

68. A conspectus of the aforesaid judgments in the context of municipal elections would yield the following results:

68.1. Under Article 243-ZG(b), no election to any municipality can be called in question except by an election petition presented to a Tribunal as is provided by or under any law made by the legislature of a State. This would mean that from the date of notification of the election till the date of the declaration of result a judicial hands-off is mandated by the non obstante clause contained in Article 243-ZG debarring the writ court under Articles 226 and 227 from interfering once the election process has begun until it is over. The constitutional bar operates only during this period. It is therefore a matter of discretion exercisable by a writ court as to whether an interference is called for when the electoral process is “imminent” i.e the notification for elections is yet to be announced.

68.2. If, however, the assistance of a writ court is required in sub serving the progress of the election and facilitating its completion, the writ court may issue orders provided that the election process, once begun, cannot be postponed or protracted in any manner.

68.3. The non obstante clause contained in Article 243-ZG does not operate as a bar after the Election Tribunal decides an election dispute before it. Thus, the jurisdiction of the High Courts under Articles 226 and 227 and that of the Supreme Court under Article 136 of the Constitution of India is not affected as the non obstante clause in Article 243-ZG operates only during the process of election.

68.4. Under Article 243-ZA(1), the SEC is in overall charge of the superintendence, direction and control of the preparation of electoral rolls, and the conduct of all municipal elections. If there is a constitutional or statutory infraction by any authority including the State Government either before or during the election process, the SEC by virtue of its power under Article 243-ZA(1) can set right such infraction. For this purpose, it can direct the State Government or other authority to follow the Constitution or legislative enactment or direct such authority to correct an order which infracts the constitutional or statutory mandate. For this purpose, it can also approach a writ court to issue

necessary directions in this behalf. It is entirely up to the SEC to set the election process in motion or, in cases where a constitutional or statutory provision is not followed or infringed, to postpone the election process until such illegal action is remedied. This the SEC will do taking into account the constitutional mandate of holding elections before the term of a municipality or Municipal Council is over. In extraordinary cases, the SEC may conduct elections after such term is over, only for good reason.

68.5. Judicial review of a State Election Commission's order is available on grounds of review of administrative orders. Here again, the writ court must adopt a hands-off policy while the election process is on and interfere either before the process commences or after such process is completed unless interfering with such order sub serves and facilitates the progress of the election.

68.6. Article 243-ZA(2) makes it clear that the law made by the legislature of a State, making provision with respect to matters relating to or in connection with elections to municipalities, is subject to the provisions of the Constitution, and in particular Article 243-T, which deals with reservation of seats.

68.7. The bar contained in Article 243-ZG(a) mandates that there be a judicial hands-off of the writ court or any court in questioning the validity of any law relating to delimitation of constituency or allotment of seats to such constituency made or purporting to be made under Article 243-ZA. This is by virtue of the non obstante clause contained in Article 243-ZG. The statutory provisions dealing with delimitation and allotment of seats cannot therefore be questioned in any court. However, orders made under such statutory provisions can be questioned in courts provided the statute concerned does not give such orders the status of a statutory provision.

68.8. Any challenge to orders relating to delimitation or allotment of seats including preparation of electoral rolls, not being part of the election process as delineated above, can also be challenged in the manner provided by the statutory provisions dealing with delimitation of constituencies and allotment of seats to such constituencies.

68.9. The constitutional bar of Article 243-ZG(a) applies only to courts and not the State Election Commission, which is to supervise, direct and control preparation of electoral rolls and conduct elections to municipalities.

68.10. The result of this position is that it is the duty of the SEC to countermand illegal orders made by any authority including the State Government which delimit constituencies or allot seats to such constituencies, as is provided in Proposition 68.4 above. This may be done by the SEC either before or during the electoral process, bearing in mind its constitutional duty as delineated in the said proposition.

[Emphasis Supplied]

10. In particular, the declaration of the law in Paragraph 68.5 of ***Fouziya*** (extracted above) clearly lays down the principle that writ courts must adopt a hands-off policy when the election process is on, but may interfere either before the process commences or after such process is completed, unless interference sub-serves and facilitates the progress of the election. Therefore, to put in a nutshell, the law as it stands, is that it cannot be stated as an absolute proposition that the writ courts are totally denuded of any jurisdiction whatsoever under Article 226, when there is a challenge made before the electoral process or after completion of the electoral process. Likewise, it must be noticed that an interference is warranted even when an election process is on, provided the interference subserves and facilitates the progress of election, rather than result in vitiating the election. The principle of examining whether the election

process is vitiated was also set out in ***Suleman***. Conversely, ***Fouziya*** would point to the position that a writ court exercising jurisdiction under Article 226 would have a narrow scope of interference even during the electoral process, insofar as it meets the purpose of progressing and facilitate the election.

11. Put differently, if administrative actions of returning officers and the State Election Commission vitiates the progress of the elections, the writ court may indeed consider whether to formulate an appropriate intervention in accordance with these principles. Therefore, the review of facts necessary to arrive at such a view would be necessary since that would entail examination of the existence of a jurisdictional fact.

12. Indeed, the decisions of the ***Full Bench*** as well as the three judge Bench of the Supreme Court in ***Fouziya*** relate to Panchayat elections. However, considering the provisions of Article 329 are near-identical to the provisions of Article 243-O, it would only be appropriate to apply the same principles in connection with the elections to the State Legislative Assembly as well. Consequently, the writ court must be very careful to ensure that outside such narrow scope, no intervention is made that interferes with the progress of the election.

13. In the facts of this case, it is a matter of record that examination of the nomination was conducted when the papers were filed, and scrutiny of the rectified documents was scheduled for 11:00 am. on October 30, 2024, by which time the rectified documents ought to have been ready. At such time, if it is found that newer defects have been introduced, there would be no scope for the Returning Officer to exercise any discretion to go beyond such deadline and enable parties to have the ability to supplement and continue with rectifications beyond such deadline. It is a matter of public record that the time at which the scrutiny would commence was well known in the schedule published by Election Commission. Suppose there were even newer errors introduced in one more round, according to Ms. Phagnekar's submissions, yet another checklist would have to be given. Such an approach would render the timelines meaningless and that would vitiate the smooth progress of the elections. The principles of intervention in exercise of Article 226 as declared in *Fouziya* would therefore be vitiated if any intervention is made by us in the fact pattern at hand. Consequently, in our opinion, this is not a fit case for any consideration of the scope of intervention by us in exercise of powers under Article 226 of the Constitution.

14. Consequently, rule is discharged and the writ petition is disposed of

with no intervention being made.

15. We make it clear that apart from the discussion contained above on whether we ought to consider any intervention, we have not intended to express any opinion on or pronounce upon any issue including any issue of fact. All contentions on merits are expressly kept open and the Petitioner is at liberty to pursue such remedies as he may be advised as being available in law.

16. This order will be digitally signed by the Private Secretary/ Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

[SOMASEKHAR SUNDARESAN, J.]

[ARIF S. DOCTOR, J.]