

(1962) 06 BOM CK 0013

In the Bombay High Court

Case No : Special Civil Application No. 1459 of 1961

Ajgaralli Yusufalli

APPELLANT

Vs

Kacharulal Maneklal

RESPONDENT

Date of Decision : 13-06-1962

Acts Referred:

Bombay District Municipal Act, 1901 — Section 22(3)

Citation : (1962) 64 BOMLR 583

Hon'ble Judges : H.K. Chainani, C.J;K.K. Desai, J

Bench : Division Bench

Judgement

H.K. Chainani, C.J.—The dispute in this application relates to the election held in ward No. 2 of Dondaicha Varvade Municipality on September 25, 1960. Three councillors were to be elected from this ward and one of the three seats was reserved for women. There were eight candidates and they received votes as follows:-

1. Ajgaralli Yusufalli 325 2. Sushilabai Tukaram Jadhav 270 3. Kacharulal Maneklal 325 4. Suratsinh Padamsinh 131 5. Khatun Bhikan Pinjari 52 6. Bhika Supadu Bhavsar 298 7. Gitabai Gangadhar Lingayat 273 8. Shaikh Kasam Piran 376

2. Of the two women candidates, serial No. 7 Gitabai, who is opponent No. 2 in the present special civil application, was declared to be elected, as she had received three votes more than the other woman candidate Tehshilabai. Amongst the .male candidates, Shaikh Kasam Piran was declared elected, as he had received the highest number of votes. For the third seat there was a tie between Ajgaralli and Kacharulal, as they had secured equal number of votes. The Returning Officer, therefore, drew lots as provided in the Bombay District Municipal Election Rules and Ajgaralli was declared duly elected to the third seat. Sushilabai, who is petitioner No. 2 in the present application, then filed an election petition No. 2 of 1960 before the District Judge, West Khandesh. All the three elected candidates, Gitabai, Shaikh Kasam Piran and Ajgaralli were made

parties to this petition. In her petition Sushilabai stated that she did not claim any relief against opponents Nos. 2 and 3, that is, Shaikh Kasam Pirail and Ajgaralli. Her allegation was that many valid votes east in her favour had not been counted and some invalid votes cast in favour of Gitabai had been treated as valid. She, therefore, prayed for a fresh scrutiny and computation of votes, for the "election of Gitabai being set aside and for her being declared to have been elected in place of Gitabai. Kacharulal, who had received the same number of votes as Ajgaralli, filed another petition, election petition No. 3 of 1960, against Ajgaralli. In his petition he alleged that Ajgaralli was not qualified to stand for election, as he was a partner of a shop, which used to sell goods to the municipality, and that, consequently, he was disqualified from being a councillor under Clause (1) in Sub-section (1) of Section 15 of the, Bombay District Municipal Act, which applies to Dondaicha Municipality., Both these petitions were consolidated and heard together. The petitions were heard by the Assistant Judge. He came to the conclusion that Ajgaralli was disqualified from standing for election as a councillor. He also found that Gitabai had been properly declared to have been elected as a councillor. He, therefore, dismissed the election petition filed by Sushilabai. He, however, allowed the. election petition filed by Kacharulal and set aside the election of Ajgaralli. Although Kacharulal had not made a prayer to that effect, the learned Assistant Judge declared Kacharulal to be a duly elected member of the Municipality. Against the order passed by the learned Judge, Ajgaralli and Sushilabai have filed the present special civil application.

3. Mr. Kane, who appears on behalf of the two petitioners, has first urged that the learned Judge should have set aside the entire election, when he came to the conclusion that Ajgaralli was disqualified from standing for flection. No such prayer was, however, made either in the election petition filed by petitioner No. 2 Sushilabai or petitioner No. 1 Ajgaralli. In, the petition filed by petitioner No. 2 Sushilabai, she specifically stated that she did not claim any relief against Ajgaralli and other elected candidate. Shaikh Kasam Piran. In the other election, petition filed by Kacharulal, Gitabai and Shaikh Kasam Piran were not made parties. Consequently, in neither of these two petitions was any prayer made for the election of at least Shaikh Kasam Piran being set aside. As, therefore, no prayer had been made for the entire election being set aside in either of the" two petitions, it is not possible to accept Mr. Kane's contention that the election of all the three candidates, who were declared to have been elected, should be set aside.

4. The next question, which Mr. Rane has raised, is that the learned Assistant Judge was not right in declaring Kacharulal to be elected. In order to consider this question, it is first necessary to refer to the relevant provisions of the Bombay District Municipal Act, which empower the District Judges to hear election petitions. Sub-section (1) of Section 22 of the Act states that if the validity of any election of a councillor is brought, in question by any person qualified either to be elected or to vote at the election, such person may, at any time within ten days after the date of the declaration of the result of the election,

apply to the District Judge of the district within which the election has been held. Sub-section (2) provides that an inquiry shall thereupon be held by a Judge not below the grade of an Assistant Judge, and that such Judge may, after such inquiry as he deems necessary, and subject to the provisions of sub"s. (3), pass an order confirming or amending the declared result of the election, or setting the election aside. This sub-section empowers the Judge to either confirm the declared result of the election or to amend the declared result of the election or to set the election aside. Sub-section (5) is as follows:

(a) The Judge, if satisfied that a candidate has, within the meaning of Sub-section (4), committed any corrupt practice for the purpose of the election, shall declare the candidate disqualified both for the purpose of that election, and of such fresh election as may be held under Sub-section (2), and shall set aside the election of such candidate if he has been elected.

(b) If in any case to which clause (a) does not apply, the validity of an election is in dispute between two or more candidates, the Judge shall, after a scrutiny and computation of the votes recorded in favour of each such candidate, declare the candidate who is found to have the greatest number of valid votes in his favour, to have been duly elected:

There are two provisos to this sub-section, to which it is not necessary to refer for the purposes of this petition. Sub-section (5) states that if the validity of the election is brought in question only on the ground of any error by the officer or officers charged with carrying out the rules made under the Act or of an irregularity or informality, not corruptly caused, the Judge, shall not set aside the election.

5. It will be seen that the powers, which, the Judge can exercise under Sub-section (2) are subject to the provisions of Sub-section (3). Under Clause (a) in Sub-section (5), the Judge must set aside the election of the candidate, who has committed any corrupt practice. Under Clause (6) the Judge has to declare a candidate, who is found to have received, the largest number of valid votes, to have been duly elected. The question, which now arises for consideration, is whether Clauses (a) and (b) are exhaustive and whether a Judge can exercise powers apart from those, which are specified in these clauses. In *Jtifzurrahman Ansarsaheb v. Hasansaheb Abansaheb* (1943) 46 Bom. L.R. 371 Mr. Justice Macklin, had to consider the scheme of Section 15 of the Bombay Municipal Boroughs Act, which is almost in, the same terms as Section 22 of the Bombay District Municipal Act. At pages 373-374 he observed:

The scheme of Section 15 is this. By Sub-section (1) any one qualified to vote can question the validity of an election by going before the District Judge within ten days and asking that validity of the election shall be decided. Thereupon the Judge holds an enquiry and "subject to the provisions of Sub-section (3)" passes an order confirming or amending the declared result of the election or setting the election aside. The words "subject to the provisions of Sub-section (3)" are

important. Though the exact meaning of the words "subject to" is not perhaps obvious, it is clear that in passing orders confirming or amending the result or setting the election aside the Judge must not lose sight of the provisions of Sub-section (3). Sub-section (3) is in two parts; it provides that a candidate guilty of corrupt practices as defined later on shall be unseated, and that in every other case where the validity of an election is in dispute between two or more candidates, the Judge shall scrutinise and count the votes and declare elected that candidate who has the greatest number of valid votes. No other specific power is given in terms to the Judge making an order u/s 15. There is, however, a provision in Sub-section (5) that a Judge shall not set aside an election of which the validity is questioned only on the ground of an error in carrying out the election rules or any irregularity or informality not corruptly caused;... It is true that the beginning of the section is in general terms and does not restrict the power of a voter to question an election on any grounds, but I am not prepared to hold that this implies that the enquiring authority has a right to pass orders except in accordance with the express terms of Sub-section (3)...

I think, therefore, that on the wording of the section itself a Judge ought not to be deemed to have powers other than those expressly specified in the section; and the section has gone out of its way in Sub-section (3) to specify what his powers are, and prima facie the powers so specified are exhaustive.

Mr. Justice Macklin was, therefore., of the view that the only powers, which a Judge hearing an election petition can exercise, are those specified in Sub-section (5). A contrary view has, however, been, taken by a Division Bench of this Court in *Narayan Maruti v. District Judge, Kolaha* (1952) 53 Bom. L.R. 314 and *Samsherkhan Mohamadkhan Vs. Jafarali Ahmedalli Saiyad and Others*, . In the first case at page 318 it was observed:

...Mr. Gokhale on behalf of the Municipality, on the other hand, contends that the jurisdiction of the District Judge is much wider than deciding cases specified in Sub-sections (3)(a) and (3)(b) of Section 22. In our opinion, Mr. Gokhale seems to be right because the powers of the Judge are really set out in Sub-section (2) of Section 22 and not in Sub-sections (3)(a) and (3)(b) of Section 22, and when Sub-section (2) limits his powers by providing that his powers are subject to the provisions of Sub-section (3), all that it means is that in the two cases referred to in Sub-sections (3)(a) and (3)(b) it is obligatory upon him to set aside the election in one case and to declare a particular candidate elected in the other." In the second case at page 856 it was observed:

...It may also be pointed out that u/s 22(2) wide powers are given to the District Judge in an election petition. As we have pointed out in a recent case, the power and jurisdiction of the District Judge is not confined either to cases falling under Sub-section (3)(a) or (3)(b) of Section 22. Those two sub-sections deal with the specific cases which fall under them, but the power and jurisdiction of the District Judge is dealt with in Section 22(2) which power and jurisdiction consists in the District Judge having the power to pass an order confirming or amending the

declared result of the election or setting the election aside.

6. u/s 22(1) the validity of an election of a councillor may be questioned not only by the other candidates, who had stood for election, but by any person qualified to vote at the election. If a candidate is elected unopposed, his election may be challenged by any voter. In such a case the validity of the election would be in dispute between the elected councillor and the voter, and Clause (b) would not apply, for it refers to cases, in which the validity of an election is in dispute between two or more candidates. Clauses (a) and (b), therefore, do not appear to be exhaustive of the cases, in which the validity of an. election may be brought in question. With respect, therefore, we agree with the view taken in *Narayan Maruti v. District Judge, Koldba*, and *Samsheerjian Mohamadkhan v. Jafarali*, that Clauses (a) and (b) deal with the specific, cases, which fall, under them, but that the powers, which the Judge hearing an election petition can exercise, are those specified in Sub-section (2) of Section 22.

7. The next question to be considered is whether Clause (b) in Sub-section (3) of .s. 22 will apply, when the candidate declared to have been elected is found to have been disqualified from standing for election. The words "after a scrutiny and computation of the votes recorded in favour of each such candidate" in this clause suggest that this clause applies to cases in which it is necessary to scrutinise and compute the votes received by each of the candidates, between whom there is an election dispute. If a candidate, who was subject to a disqualification, is elected, his election must necessarily be set aside and no question of scrutiny and computation of votes recorded in his favour can arise. Clause (ft) in Sub-section (3) will not, therefore, apply in such cases.

8. The next question to be considered is what further order a Judge should make, when he sets aside the election of an elected candidate on the ground that he - was not eligible to stand for election. The law in England has been stated as follows in para. 556 in Halsbury's Laws of England, Vol. XII, 2nd edition, p. 285:

If a candidate, who does not withdraw, is for any reason disqualified to be a candidate, and the other candidate desires that all votes given for the candidate so disqualified should be treated as having been thrown away- i.e. treated as null and void as though they had never been given a notice of the disqualification must be published to the electors.

In the absence of such a notice, a new election ought to be had unless either (3) the persons whose votes it is sought to treat as having been thrown away can be shown in fact to have been aware of the disqualification, or (2) the disqualification is of a sort whereof notice is to be presumed.

Even when a candidate's nomination is wrongly accepted, the election is held on the basis that he is qualified to stand for election and that his nomination is void. As observed by Lord Watson in *Pritchard v. Mayor & c., of Bangor* (1888) 13 App. Cas. 241.

...If no objection is made, or if objections are stated and repelled by the mayor, then the nomination becomes a valid nomination. I do not mean to suggest that it is final and conclusive upon questions of disqualification or other similar objections which may be taken to it, but I think it was intended to be conclusive to this effect, that the nomination paper so sustained as valid should form the basis of the election and that the nominee in that paper should be treated as a person for whom votes could be given before the returning officer.

If, therefore, the nomination paper of a disqualified candidate is accepted, the votes given to him cannot be deemed to have been thrown away or regarded as invalid, for the voters cast their votes on the assumption, which they were entitled to make, that as he was included in the list of candidates whose nomination papers had been accepted, he was qualified to stand for election. As therefore, the voters are misled by the acceptance of the nomination paper of a disqualified candidate, and as it is not possible to speculate which other candidate or candidates would have received the votes recorded in his favour, the proper course in such a case is to set aside the election of the disqualified candidate and to give the electorate a chance to elect a person who enjoys its confidence.

9. In our opinion, therefore, the learned Judge was wrong in declaring Kacharulal, opponent No. 1, to be duly elected. We set aside the order made by the learned Judge declaring Kacharulal, opponent No. 1, to be duly elected and direct that a fresh election should be held to elect another person in place of petitioner No. 1 Ajgaralli, whose election has been set aside on the ground that he was not eligible to stand for election. The rest of the order passed by the Assistant Judge is confirmed.

10. No order as to costs.