

(2014) 06 GUJ CK 0031

In the Gujarat High Court

Case No : Special Civil Application No. 606 of 2012

Amratbhai D. Raval

APPELLANT

Vs

State Election Commission

RESPONDENT

Date of Decision : 24-06-2014

Acts Referred:

Citation : (2014) 3 GLR 2437

Hon'ble Judges : Z.K. Saiyed, J; Jayant M. Patel, J

Bench : Division Bench

Advocate : Dhaval M. Barot, Advocate for the Appellant; Amit J. Shah, Advocate for the Respondent

Judgement

Jayant M. Patel, J.—The petitioner, by this petition, is seeking appropriate writ for setting aside of the election held on 29-12-2011 of the Ward Nos. 2 to 14 and 18 of Rajpur Gram Panchayat and it is prayed by the petitioner to direct the election authority to hold fresh election. The short facts of the appear to be that the petitioners, who are 23 in numbers, are the residents of Village Rajpura, Taluka Kadi, District Mehsana and they are voters in different Wards on Rajpur Gram Panchayat and they also contested the election by filing their nomination forms, which was scheduled to be held on 29-12-2011. As per the petitioners, on 29-11-2011, Notification was published under Rule 9 read with Sec. 15 of the Act for declaring the elections of Gram Panchayat. As the election was to be held as per the petitioners, on 9-12-2011, they submitted application for getting voters" list and they were supplied all the voters" list on the same day by the respondent No. 5. On 10-12-2011, the nomination forms were submitted by some of the petitioners for contesting the election, but in the said nomination forms, details were given of the respective candidate as per the serial number given, in the voters" list, which was supplied to the petitioners. The scrutiny of the nomination forms had taken place and their nomination forms were accepted. The case of the petitioners is that they bona fide believed the very voters" list to operate for the purpose of election. However, on the date of election on 29-12-2011 it came

to the notice of the petitioners that there were large number of changes in the voters" list inasmuch as the voters in a particular ward were transferred to various other wards and as a result thereof, the whole election as per the petitioners was vitiated. In any case, the voting as per the so-called revised voters" list had taken place and respondent Nos. 6 to 19 came to be elected. Under these circumstances, the petitioners have approached this Court by the present petition.

2. We have heard Mr. Barot, learned Counsel appearing for the petitioners, Mr. Amit Shah, learned Counsel for respondent No. 1, State Election Commission, Mr. Jayswal, learned A.G.P. for respondent Nos. 2 to 5 and Mr. Vaishnav, learned Counsel for respondent Nos. 6 to 19. We have also considered the original file of respondent No. 1, which has been made available by the learned Counsel, Mr. Shah appearing for respondent No. 1.

3. Mr. Barot, learned Counsel appearing for the petitioner raised the grievance that the voters" list could not have been altered by the election authority after the nomination forms were filed. He submitted that on account of the so-called change in the voters" list, everything is vitiated, inasmuch as the petitioners had filed the nomination forms but the voters" list was changed and there was reformation of the voters by change of ward. It resulted into a situation that number of voters in a particular ward, upon which the petitioners and their candidates, were aspirant to get votes were shifted to the other ward for which the candidature was of a different person. He submitted that, therefore, when all the voters of all wards were changed arbitrarily by the election authority, the action could be said to be illegal and without there being any authority under the law, and therefore, the whole election be set aside.

4. Whereas, Mr. Vaishnav, learned Counsel appearing for the respondent Nos. 6 to 19 submitted that at the time when the nomination forms were filed and the scrutiny had taken place, revised voters" list was brought to the notice of all the candidates, and therefore, now the petitioners cannot be heard to say that they were not aware about revised voters" list and as a result thereof they have suffered. Mr. Vaishnav submitted that the petitioners and their group have not succeeded at the election, and therefore, with a view to frustrate the election, the present petition has been filed.

5. Whereas, Mr. Shah, learned Counsel appearing for the Election Commission submitted that the voters" list was already revised on the date of nomination form. However, he candidly admitted that when the scrutiny had taken place, respective serial number in the old voters" list, though was mentioned in the nomination form, has not been considered, nor any reasons are mentioned by the authority, who had accepted the nomination form and it is stated as "nomination forms are accepted". He submitted that as per the record of the Election Commission, the preliminary voters" list was published on 25-7-2011 and after the preliminary voters" list based on oral representation made by the respective voters, the voters" list is revised and on 23-8-2011 the final

publication of the voters" list was made. He admitted that in the final publication, large number of voters who were earlier in the other ward are placed in a different ward, though ultimately, the total number of voters for the whole of the village has remained the same.

6. Mr. Shah, learned Counsel, during of the hearing, upon direction of the Court, has submitted the statement of the details of preliminary publication, number of voters included in the respective ward and the number of voters, who were deleted from their respective wards and the number of voters, who were included in the respective ward and the number of voters in the final publication. However, he maintained that the preliminary publication was made on 25-7-2011 and the final publication was made on 23-8-2011, but he is unable to explain the circumstances as to why when the petitioners applied for a copy of the voters" list on 9-12-2011, the old voters" list or rather preliminary publication of the voters" list was supplied and not revised voters" list, which was finally published on 23-8-2011. He fairly submitted that the Election Commission has to place all correct facts before the Court and the Court may examine in accordance with law.

7. Mr. Shah also submitted that after the preliminary publication, no written applications were made by any of the voters for alteration of their names from one ward to another, but only oral requests were made to the Election Officer and based on the same, there was change of wards of the voters and final voters" list was published.

8. We may first consider the factual aspect as emerging from the record and the material coming out from the record of the said Election Commission. The preliminary publication of the voters" list is stated to be on 25-7-2011, which include 3,475 male voters in total 19 wards and 3,396 female voters in the said 19 wards and the total number of voters is 6,871. After the preliminary publication, 2,310 male voters are added in the aforesaid respective 19 wards and 2,305 male voters are excluded from the aforesaid respective 19 wards. The statement further shows that 2,312 female voters are added in the aforesaid respective 19 wards and 2,311 female members are excluded from the aforesaid respective 19 wards. Resultantly, out of the total 6,871 voters, 4,616 voters were excluded from their original wards and 4,622 voters were added in the other respective ward. The aforesaid total figure of the voters for the purpose of exclusion and inclusion is for both male and female voters. It can broadly be said that there is change of the position of the voters to the extent of about 67 to 68% out of which, total number of 6,871 voters. If the figures are taken as it is coupled with the internal changes of the voters in the respective ward, it can be said that there is substantial material change of the voters of the respective 19 wards, except for Ward No. 1, where the change is "0" for all the categories of voters. Therefore, the aforesaid record shows that if the voters" lists for Ward Nos. 2 to 19 are revised in a manner affecting about 67% of the voters, it can be said to be substantial change, which would materially affect the result of the election of Ward Nos. 2 to 19 and the reason being that the voters, who were

earlier in the voters" list are precluded from casting the votes in the respective original ward and the other voters, who were earlier not in the respective ward are permitted to cast the votes in the wards, for which there was no notice to them.

9. The aforesaid would lead us to examine the mandatory procedure to be followed for the purpose of preparation of voters" list. The election was of a Gram Panchayat, and therefore, was governed by the provisions of Gujarat Panchayats Election Rules, 1994 (hereinafter referred to as "the Rules"). Rules 3, 3(A), 3(B) and 3(C), which are relevant for the purpose of present petition, read as under:

"3. Manner of publication of list of voters:- (1) The list of voters referred to in sub-sec. (2) of Sec. 20 along with a notice in Form 1 and the list of voters referred to in sub-sec. (7) of the said Sec. 20 shall be published--

(a) in respect of elections to a Village Panchayat or election of a Sarpanch of a Village Panchayat, by affixing the list of voters at the office of the concerned Village Panchayat or the concerned village Chavdi or at other conspicuous place, if any;

(b) in respect of elections to a Taluka Panchayat by affixing the list of voters at the office of the Taluka Panchayat and by affixing the extract of the first at the office of the Village Panchayat so far as it relates to the voters, residing within the limits of the village;

(c) in respect of elections to a District Panchayat by affixing the list of voters at the office of the District Panchayat and by affixing the extract of the list at the office of the Taluka Panchayat and Village Panchayat insofar as the extract relates to the voter residing within the limits of the taluka or, as the case may be village;

3(A). Application for amendment, deletion or addition of an entry in list of voters. An application under sub-sec. (3) of Sec. 20 to the Specified Officer for amendment, deletion or addition of an entry in the list of voters shall be made in Form 1A.

3(B). Application for inclusion of an entry in the list of voters:- An application under sub-sec. (4) of Sec. 20 of the Specified Officer for inclusion of an entry in the list of voters shall be made in Form 1B.

3(C)(1) The Specified Officer shall, after making such inquiry as he deems fit (including giving an opportunity of being heard where necessary) decide the claim made by an application under Rules 3(A) and 3(B) and where the specified officer rejects claim, he shall inform the applicant accordingly.

(2) The Specified Officer shall endeavour to decide the claim within seven days from the date of receipt of an application under Rule 3(A) or 3(B)."

10. The aforesaid Rules can be considered with the provisions of Statute. Sections 17 to 20 of the Gujarat Panchayats Act (hereafter referred to as "the Act") reads

as under:

"17. List of Voters for every electoral division:- For every electoral division, there shall be a list of voters which shall be prepared and maintained in accordance with the provisions of Secs. 18 to 22 under the superintendence, direction and control of the State Election Commission.

18. Preparation of list of Voters:- At any time not later than two months before the expiry of the duration of a Panchayat under Sec. 13, and in the case of a Panchayat which is to be constituted or reconstituted under the provisions of this Act otherwise than on the expiry of its duration under Sec. 13 at any such time as the State Election Commission may after consulting the State Government determine, there shall be prepared for the purpose of the general election of members for constituting, or as the case may be, reconstituting such Panchayat, a list of voters for every electoral division in respect of such Panchayat as determined under Sec. 16 and in force at the time when such list is prepared.

19. Persons qualified to be registered as voters:- Every person who is entitled to be registered in the relevant part of the electoral roll of the Gujarat Legislative Assembly under the Central Act shall be entitled to be registered as a voter in the list of voters for the electoral division, to be prepared under Sec. 18.

20. List of voters:- (1) The electoral roll of the Gujarat Legislative Assembly prepared under the provisions of the Central Act, for the time being in force for such part of the constituency of the Assembly as is included in the relevant electoral division, shall, subject to any amendment, deletion or addition made under sub-sec. (3) or any inclusion of any name under sub-sec. (5), be the list of voters for that electoral division.

(2) Such officer of the State Government as the State Election Commission may specify in this behalf (hereinafter referred to as "the specified officer") shall, subject to superintendence, direction and control of the Commission, maintain a list of voters for each electoral division the list shall be published in the prescribed manner.

(3) If on an application made to him in this behalf or on his own motion, the specified officer is satisfied that the list of voters is at variance with the relevant part of the electoral roll of the Gujarat Legislative Assembly on account of any mistake in the list, he shall amend the list so as to bring it in conformity with the said electoral roll and for that purpose may amend, delete or add any entry in that list.

(4) Any person who has become entitled to be registered in the relevant part of the electoral roll of the Gujarat Legislative Assembly under the Central Act, after the qualifying date may apply to the Specified Officer for inclusion of his name in the list.

(5) Where the Specified Officer after making such inquiry as he may consider necessary, is satisfied that the applicant is entitled to be registered in the

relevant part of the electoral roll of the Gujarat Legislative Assembly under the Central Act, he shall direct the name of the applicant to be included in the list of voter:

Provided that no such direction shall be given if the applicant is disqualified to vote under this Act or any other law for the time being in force.

(6) No amendment, deletion or addition of any entry in the list of voters for an electoral division shall be made under sub-sec. (3) and no direction for inclusion of a name in that list shall be given under sub-sec. (5) during the period between such date as the State Election Commission may, by general or special order, notify in this behalf and the date of the completion of any concerned election in the electoral division.

Explanation:- In this Section the expression "qualifying date" has the same meaning as in clause (b) of Sec. 14 of the Central Act.

(7) The list of voters shall after it is finally prepared under this Section be published in the prescribed manner and shall come into operation immediately upon its final publication."

The conjoined reading of the aforesaid statutory provisions shows that the list of voters for every electorate division is to be prepared and maintained in accordance with the provisions of Secs. 18 to 22 under the supervision and direction of the State Election Commission. Section 18 of the Act provides the preparation of the voters" list prior to two months before the expiry of the duration of the Panchayat whose election is to take place. The electoral division shall be as finalised by the State Election Commission as per Sec. 16 of the Act. Section 19 of the Act provides that all those persons who were on the electoral roll at the election of Legislative Assembly shall be entitled to be registered as voters in the list of voters for the electoral division to be prepared under Sec. 18. Sections 20(1) to 20(2) provides for preparation of the voters" list of the respective electoral division as may be directed by the State Election Commission and such list shall be published in the prescribed manner. The publication of the voters" list in a prescribed manner would call for application of the aforesaid Rules providing for the list of voters under Part 2. Sub-section (3) of Sec. 20 provides that if any application is made or the officer at his own motion is satisfied that the list of voters is at variance on account of any mistake in the list, he shall amend the list so as to bring in conformity with the electoral roll. Sub-section (4) of Sec. 20 provides that if any person has become entitled to be registered in the electoral roll, he may apply to the Specified Officer for inclusion of his name in the list. Sub-section (5) of the Act provides that the Specified Officer after making such inquiry as he may consider necessary, is satisfied that the applicant is entitled to be registered in the electoral roll, he will direct the name of such applicant to be included in the list of voters. If the aforesaid Secs. 20(1) to (5) are considered with Rule 3 to Rule 3(C) it would mean that before preliminary publication of the list of voters under Rule 3, the exercise is required

to be undertaken by the election authority to make the voters' list of Legislative Assembly for that particular village in conformity with the electoral division as specified and notified by the State Election Commission. After such exercise is undertaken, the list is required to be published in the manner as provided under Rule 3 of the Rules. Rule 3 of the Rules provides that the list of the voters so prepared under Sec. 20(2) as well as the list of voters so finalised under Sec. 20(7) shall be required to be published in the office of the concerned Village Panchayat or concerned Village Chavdi or at the other conspicuous place, if any. To say in other words the list prepared under Sec. 20(2) which can be termed as preliminary voters' list, but after incorporation of the directives of the Election Commission for various electoral division is to be published as preliminary voters' list whereas after preliminary publication the list so finalised is also to be published in the same manner. Further as per sub-sec. (3) of Sec. 20 read with Rule 3(A), the application under sub-sec. (3) is to be made to the Specified Officer for deletion or addition in the entry in the list of voters in Form No. 1A. In the same manner, if any person is desirous to get his name included in the voters' list after qualifying but before final publication, he has to apply under Sec. 20(4) read with sub-rule 3(D) in Form No. 1B. After forms are received by the Specified Officer may be in the Form No. 1A or may be in the Form No. 1B, the Specified Officer has to finalise the aspect of inclusion and/or exclusion in the voters' list as per Rule 3(C) of the Rules. It is thereafter the voters' list can be finalised and the publication is to be made.

11. The aforesaid scheme of Sec. 20 read with the aforesaid Rules 3 to 3(C) can be summarised as under:

(i) The Specified Officer will receive the list of voters of the Legislative Assembly of particular village or Panchayat whose election is to be held.

(ii) After receipt of the said voters' list of the Legislative Assembly for that particular village, he will prepare the voters' list as per the electoral division so notified by the State Election Commission as per Sec. 16 of the Act. After such voters' list is prepared, the same shall be published as per Rule 3(1)(a) by way of preliminary publication.

(iii) After preliminary publication is made, any person can apply for inclusion and/or for amendment and/or for deletion of his or any other name from the voters' list as by making application under Form No. 1A or Form No. 1B as the case may be.

(iv) Thereafter the Specified Officer has to hold inquiry as he deems fit for the purpose of inclusion and/or exclusion and/or deletion of any name in the voters' list and thereafter has to finalise the voters' list.

(v) Such voters' list so finalised is again to be published in the manner as provided under Rule 3(1)(a) of the Rules.

(vi) Once the list is finalised and so published, no change or amendment is to be

made during the period of the dates so notified by the State Election Commission.

12. Considering the case further, two aspects are worth to be recorded; one is that after preliminary publication the change, if any, is to be made at the instance of any voter, the prescribed application may be in Form No. 1A or Form No. 1B is required or in any case there is a requirement for making of any application by the person whose name is wrongly included or wrongly not included or may be by any voter but the requirement of making application is a must and the reason being that the power under sub-secs. (3) to (5) of Sec. 20 are so expressly prescribed for the procedure by Rules 3(A) to 3(C). Therefore, in absence of any application by the voter concerned or by the person concerned or addition and/or deletion of any name in the preliminary voters' list, the amendment in the list cannot be made. Further, even if the officer concerned wants to exercise his suo motu power under sub-sec. (3) of Sec. 20, he has to record reasons for exercise of the power and normally such powers are available only for correcting the mistakes and not for considering the case independently of any voters particularly but it could be for the general electoral division.

13. The facts of the present case shows that it is an admitted position that not a single application is made by any of the voters or any person in writing for inclusion or exclusion in the voters' list for the respective Ward. The learned Counsel for the State Election Commission is also not in a position to show any material in writing submitted by any of the voters or any person concerned to the Specified Officer for the change to be effected in the voters' list by inclusion or deletion or addition in the voters' list of the respective Ward. Therefore, as such, it can be said that in absence of any application made the exercise of power for inclusion and/or for addition and/or for deletion of any name in the voters' list of that particular ward was without there being any foundation or it can also be said to be without following the mandatory procedure of Rules 3(A) and 3(B) of the Rules.

14. On the exercise of suo motu power under sub-sec. (3) and/or sub-sec. (4), the learned Counsel for the State Election Commission is not in a position to show as to whether any suo motu powers were exercised or not and if yes, the reason behind it. It is hardly required to be stated that if any person is included as the voter in the particular ward and he wants his name to be included in the another award, either there should be the application by the person concerned and if the Specified Officer is to exercise the power of his own, then also there should be material by way of the address proof or otherwise for taking out the name of that voter from the voters' list of particular ward and/or to include his name in the list of voters of another Ward. There is no material whatsoever available in the file shown by the learned Counsel for the State Election Commission. Only a tabular statement is stated to have been prepared by the Specified Officer for inclusion and/or for exclusion or for altering the voters' list by referring to that upon the oral request without there being any material for verification and/or the name of the person who represented for change in the

voters" list. It can rather be said that the power so exercised for inclusion and/or for addition and/or for alteration is ultra vires to the Act read with Rules, since neither there is any application made by the person concerned nor any reason recorded or material produced for exercise of suo motu power. Under these circumstances, when the action for preparation of the final voters" list by making amendment in the preliminary voters" list is ultra vires to the statutory power, the election so held based on the final voters" list can be said as wholly vitiated for Ward Nos. 2 to 16.

15. It is true that in a given case if the mandatory procedure not followed or is not materially to affect the result of the election, Court may not set aside the election. But as observed earlier the change in the voters of Ward Nos. 2 to 16 is to the extent of 60 to 67%. If the total figure of the voters are considered, large number of persons who were earlier entitled to cast the vote in one ward or another have been placed in the different ward. Such would also materially affect the right to cast the vote by particular representative for a particular ward. Once there is deprivation of voting right of the electoral to the extent of 67%, it can be said that the result of the election is bound to be materially affected on account of the action of the Specified Authority which is ultra vires.

16. In view of the aforesaid observation and discussion, we find that the election held of Ward Nos. 2 to 14 and 18 deserve to be quashed and set aside. Hence order accordingly. As the petitioner has not made prayer for setting aside the election for the Ward Nos. 16, 17 and 19 and as the persons so elected are not joined as the party, we find that it may not be possible for this Court to set aside the election of Ward Nos. 15, 16 and 19. However, considering the facts and circumstances of the case, we find it proper to observe that the State Election Commission-respondent No. 1 shall examine the matter in respect of election of Ward Nos. 15 to 17 and 19 in light of the observations made by this Court in the present judgment and may decide as to whether to continue with the said election already held for the Ward Nos. 15 to 17 and 19 or to cancel the election and to hold fresh election for Ward Nos. 15 to 17 and 19.

17. It is further observed and directed that Election Commission shall undertake the action for holding the fresh election for the aforesaid respective wards of Rajpur Gram Panchayat by undertaking the process in accordance with law and the attempt shall be made to complete the process of election preferably within a period of three months from the receipt of the order of this Court. The petition is allowed to the aforesaid extent. Considering the facts and circumstances no order as to costs. Direct service is permitted.