

(2008) 01 GUJ CK 0047

In the Gujarat High Court

Case No : Special Civil Application No. 354 of 2008

Baria Ambaben Vikrambhai

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 17-01-2008

Acts Referred:

Constitution of India, 1950 — Article 243O

Gujarat Panchayat Election Rules, 1994 — Rule 12, 12(3), 15, 15(2), 15(5)

Gujarat Panchayats (Amendment) Act, 1993 — Section 274, 31(1), 31(4)

Citation : AIR 2008 Guj 73 : (2008) 1 GLH 247

Hon'ble Judges : Z.K. Saiyed, J;D.A. Mehta, J

Bench : Division Bench

**Advocate : M.P. Shah and Kruti M. Shah, for Petition 1, for the Appellant;
Maithili Mehta, AGP for Respondents 1 and 2, for the Respondent**

Final Decision : Allowed

Judgement

D.A. Mehta, J.—Rule. Considering the urgency and the subject matter of the petition, with consent of the parties, the petition is taken up for final hearing and disposal today. The learned AGP appearing on behalf of the respondents authorities is directed to waive service.

2. The brief facts necessary for the present are that the petitioner filled up nomination form for the post of Sarpanch of the Gram Panchayat of village Bamroli, Taluka: Jetpur-Pavi, District Vadodara pursuant to notification dated 31.12.2007 relating to election of members and sarpanch of the aforesaid gram panchayat. It is an admitted position that the post in question, namely of the sarpanch, relates to Socially and Educationally Backward Class (woman), while the ward in question was Anusuchit AdiJati (woman). The election schedule provided for scrutiny of nomination forms to be undertaken on 7.1.2008 from 11.00am onwards till the point of time the scrutiny was complete. The nomination form of the petitioner came to be rejected vide communication/order dated 7.1.2008 (Annexure-C), whereunder, the reason assigned for rejection is

stated to be that the petitioner is shown to have surname "Rathva" in the voters list while the certificate produced showing the caste of the petitioner is having surname "Bariya".

3. The learned advocate for the petitioner has challenged the aforesaid order of rejection of the nomination form on the ground that the nomination has been rejected due to malafide and arbitrariness on behalf of the respondent No. 2. That even if the objection which has been taken up by the Returning Officer is a valid objection, the said objection can at best be termed to be a technical objection which is rectifiable under Rule 12(3) and the Proviso thereunder of the Gujarat Panchayats Elections Rules, 1994 (the Elections Rules). According to the petitioner, there are other such instances denoting difference in the name as mentioned in caste certificate and the names as recorded in voters list, but only the petitioner has been singled out while permitting other candidates, who are similarly situated, to contest the election without rejecting their nomination on the same ground. The names of two such candidates have been mentioned in paragraph No. 3(B) of the petition. The allegation regarding malafide is based on the capacity of Returning Officer, by virtue of being Mamlatdar (Civil Supplies Department) and the husband and another person, of the two candidates, being closely known to the Returning Officer as the said gentleman runs a fair price shop in the village.

4. Upon notice having been issued the Returning Officer has tendered affidavit-in-reply wherein same ground regarding discrepancy in the name as recorded in the voters list and the surname as appearing in the caste certificate, has been reiterated. It is further stated that once the notification issued on 31.12.2007 under Rule 9(2) of the Elections Rules specifies that the post of sarpanch is to be filled up by a Baxipanch candidate the petitioner is not entitled to contest the election because the surname "Rathva" denotes a scheduled tribe which cannot be considered as equivalent to Other Backward Class (O.B.C.) as specified. Further reason which has been advanced in the affidavit-in-reply, but does not find mention in the impugned order, is that the petitioner has contested as a Scheduled Tribe candidate on the basis of her surname "Rathva" in 2003 and cannot now be permitted to rely upon the benefit of "Bariya" surname for contesting the seat reserved for OBC candidates. The Court need not consider the aforesaid reason which has appeared for the first time in the affidavit-in-reply and is not forming the basis of the impugned order.

5. Learned AGP appearing on behalf of the respondents authorities has placed reliance on the rojkam stated to have been drawn up on 7.1.2008 by the Returning Officer to show compliance with the requirements of the Elections Rules. However, on plain reading of the said rojkam it becomes apparent that though in general, at first blush it appears that there is compliance with the statutory requirements of the Election Rules, when one reads provisions of Rule 15(5) and the Proviso thereunder it becomes clear that there is lack of compliance with the said provision and the procedure adopted by the Returning

Officer is not only faulty but is in gross violation of the Statutory Rules.

6. In exercise of powers under 274 of the Gujarat Panchayats Act, 1993 (for short "the Act") the Elections Rules have been framed. Rule 12 of the Elections Rules provides for presentation of nomination papers and requirement for valid nomination. Under Sub-rule (3) of Rule 12 of the Elections Rules the Returning Officer is required to satisfy himself that the names and numbers in the list of voters of the candidate, his proposer and seconders as entered in the nomination paper are the same as those entered in the list of voters, and if not, invite the attention of the candidate etc. to this effect and also permit any clerical or technical error to be corrected in order to bring the details in the nomination form in conformity with the corresponding entries in the list of voters. Though the learned advocate for the petitioner has placed reliance on the aforesaid provision in support of the case pleaded it is apparent that the said rule and Sub-rule, namely Rule 12(3) of the Elections Rules, cannot in strict sense apply to the present case.

7. In fact, it is Rule 15 of the Elections Rules which empowers the Returning Officer to accept or reject a nomination paper on scrutiny of the same as provided in the said rule. The present exercise is directly attributable to the provisions of Rule 15(2)(a) of the Elections Rules which permits the Returning Officer to reject a nomination paper on the date fixed for scrutiny of nomination form if the candidate is either not qualified or disqualified for being chosen to fill the seat under the Act or under any other law time being in force. Therefore, a candidate is required to ensure that the nomination is in accordance with the seat for which the nomination paper has been filled up and presented, which in the present case, relates to the post of Sarpanch reserved for a person who is falling within the defined category, i.e. Socially and Educationally Backward class and is also a woman.

8. However, before any such rejection can be ordered by the Returning Officer compliance with Sub-rule 5 of Rule 15 of the Elections Rules is a pre-requisite condition. The said provision as is relevant for the present, reads as under:

(5) The returning officer shall hold the scrutiny on the appointed date in this behalf under rule 9 and shall not allow any adjournment of the proceedings except when such proceedings are interrupted or obstructed by riot or violence or by causes beyond his control;

Provided that in case an objection is raised by the returning officer or is made by any other person the candidate concerned may be allowed time to rebut it not later than the next day immediately following the date fixed for scrutiny and the returning officer shall record his decision on the date to which the proceedings have been adjourned.

9. On a plain reading, it is apparent that while conducting the scrutiny of the nomination papers where returning officer raises an objection to the nomination paper of a candidate, the candidate concerned is to be granted time to rebut the

objection not later than the next day immediately following the date fixed for scrutiny and the returning officer is bound to record his decision on the date to which the proceedings have been adjourned. In the present case, admittedly, the returning officer raised objection on his own motion and rejected the nomination without granting the petitioner candidate any opportunity/time to rebut the objection. The provision requires that the returning officer specifically points out the objection, before rejecting the nomination, and calls upon the candidate concerned to rebut the objection. In a given case the entire exercise may be completed even on the same day because the rule uses the words 'Not later than the next day immediately following?'. In other words, either on the same day i.e. the day fixed for scrutiny, or on the immediately next day the returning officer may make an order after permitting the candidate concerned to deal with the objections raised by the returning officer.

10. The record in the present case reveals that the returning officer on his own motion came to the conclusion that the petitioner candidate was not qualified to fill up the post of sarpanch for the reasons stated in the impugned order but the said objection, namely the factum of the petitioner not being qualified, on the basis of the discrepancy in the surname as appearing in the list of voters and in the caste certificate presented by the petitioner, was never brought to the notice of the petitioner to enable the petitioner to rebut the objection as required by the Proviso under sub-rule 5 of Rule-15 of the Elections Rules. Once this is the position it is apparent that the impugned order suffers from vice of non-compliance with the statutory requirement provided in the Elections Rules and it is not possible to uphold the impugned order merely by referring to rojkam. At the cost of repetition, it is required to be noted that the rojkam does not record that the candidate concerned, that is the petitioner, was informed about the objections so as to grant an opportunity of rebutting the objection. The rojkam in question is recording in general terms, the procedure adopted by the returning officer for scrutiny of the nomination forms. Therefore, the impugned order dated 7.1.2008 made by the returning officer is required to be quashed and set aside.

11. The question that would thereafter survive is as to what should be the ultimate relief and what direction should be made to ensure that the election process which has been notified under the notification dated 31.12.2007 (Annexure-A) is neither stalled nor postponed nor is required to be re-scheduled. The notification stipulates that, if necessary, voting is to take place on 20.1.2008. In the circumstances, it would be fair and just and in the interest of all concerned if the petitioner is directed to treat the impugned order as notice under the Proviso to Sub-rule 5 of Rule 15 of the Elections Rules and tender rebuttal/explanation along with any evidence in support thereof before 6.00pm today i.e. 17.1.2008. The returning officer shall thereupon consider the objections and pass an appropriate order in accordance with law latest by 4.00pm on 18.1.2008 and communicate the same in writing to the petitioner. The rest of the schedule of election as per notification dated 31.12.2007 shall be followed.

12. Before parting, it is necessary to record that one Jujara Nasrinbanu Imranbhai has filed three Civil Applications being Civil Applications Nos. 442/2008, 444/2008 and 445/2008 seeking to be impleaded as a necessary and proper party in the present petition and two other petitions. Mr. Champaneri learned advocate appearing on behalf of said applicant was permitted to intervene and address the court as according to the learned advocate interest of the applicant was directly involved in relation to the outcome of this and other two petitions.

13. Learned advocate appearing for the intervenor submitted that this Court has no jurisdiction to entertain the petition in light of provisions of Article 243O of the Constitution of India which provides for bar to interference by courts in electoral matters. It was further submitted that in light of provisions of Section 31(1) of the Act also it was always open for the petitioner to challenge the validity of the election within 15 days after the date of declaration of the result of the election on any ground and hence at this stage the election process cannot be disturbed by intervention of the court. In support of the submissions reliance was placed on Full Bench decision of this Court in the case of Jabir Hussain Nasir Ahmed Bogaand Another Vs. State of Gujarat and Others, and the decision in the case of Thakore Shanabhai Gedalbhai v. State Election Commission and Ors. reported in 2005 (3) GLH . 686.

14. In abstract there can be no dispute to the proposition canvassed by the learned advocate for the intervenor. However, the statutory bar and/or prohibition from intervening in an election process can operate only when "the resolution of any dispute pertaining to an election which has the effect of interrupting, obstructing or protracting the election shall be post-poned until after the completion of the election", as laid down by the Full Bench of this High Court. But, as already directed hereinbefore, the Court while deciding the present petition has neither adopted an approach which has an effect of interrupting, obstructing or protracting the election process nor issued any direction which would result in either stalling or postponing the election or re-scheduling the election and therefore, the bar or the prohibition shall not operate in the present factual matrix. To the contrary, the directions issued hereinbefore go to show that the Court has consciously proceeded to decide the matter so as to ensure that the election schedule is not disturbed and proceeds within the same time frame as notified by notification dated 31.12.2007.

15. It is also necessary to take note of the fact that the learned advocate for the intervenor was not in a position to point out any decision which directly deals with Sub-section (4) of Section 31 of the Act. The said provision specifically stipulates 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 u/s 274 or of an irregularity or informality not corruptly caused, the Judge shall not set aside the election". Thus, considering the stage at which the petition has been brought before the Court, it is apparent that if the Court is in a position

to ensure compliance with statutory requirements and direct such compliance without disturbing the election schedule there should be no difficulty in making an order which requires all the parties involved in the election process, namely the candidates and the returning officer, to comply with the statutory requirements. There can be no impediment and that is the only order that the Court has made in the present case.

16. The learned AGP is hereby directed to ensure that the returning officer is informed about the judgment so as to enable the parties to act in consonance with the directions issued hereinbefore, within the frame laid down in the judgment.

17. In the aforesaid facts and circumstances of the case, the impugned order dated 7.1.2008 "Annexure-C" made by the returning officer is quashed and set aside and the parties are directed to abide by the directions made in paragraph No. 11 hereinbefore to ensure that the election schedule as notified remains uninterrupted.

18. The petition is allowed accordingly in the aforesaid terms. Rule made absolute to the aforesaid extent. There shall be no order as to costs.