
(2019) 02 BOM CK 0029
In the Bombay High Court
Case No : Writ Petition No. 153 Of 2019

Damodar R. Naik

APPELLANT

Vs

State Of Goa

RESPONDENT

Date of Decision : 11-02-2019

Acts Referred:

Code Of Comunidades, 1904 — Article 47, 49

Citation : (2019) 2 BCR 781

Hon'ble Judges : M.S. Sonak, Prithviraj K. Chavan, J

Bench : Division Bench

Advocate : Abhijit Gosavi, Deep Shirodkar, H.D. Naik

Judgement

M.S. Sonak, J

1. Heard Mr. Abhijeet Gosavi for the Petitioner, Mr. Deep Shirodkar, Additional Govt. Advocate for Respondents No. 1 to 4 and 6 and Mr. H.D. Naik for the Respondent No.5.

2. Rule. Rule is made returnable forthwith with the consent and with the request of the learned Counsel for parties.

3. This Petition depicts a very disturbing state of affairs in so far as the elections to the Managing Committee of the Comunidade of Sancoale are concerned. The elections were duly notified and were scheduled to be held on 2 December 2018 at the meeting hall at Sancoale Comunidade. There are minutes of what transpired on

2 December 2018 at the election hall, placed on record from pages 18 to 29 of the paper book. The minutes, amongst others, are signed by Shri Ravishekhar Nipanikar, Joint Mamlatdar II, Mormugao. The minutes are also signed by Shri Dattaraj K. Gauns Dessai, Mamlatdar of Qupem, who was the Presiding Officer for the elections scheduled on 2 December 2018.

4. The minutes note that on 2 December 2018, at 10.15 a.m. in the meeting hall

of Sancoale Comunidade Shri Ramakant Borkar President of the Managing Committee, Attorney Shri Satish Narvekar, Treasurer Shri Shivdas Borkar, Shri Dattaraj K. Gauns Dessai, Joint Mamlatdar, Canacona appointed by the Collector to preside over the election process, were present. There is reference to publication of notices for the election process, inter alia, in the Gazette and two newspapers. There is mention regards complying with other formalities prescribed under the Code of Comunidades for conduct of the election process.

5. The minutes then proceed to state that at the marked time, "following shareholders were present to form the quorum:- ..."

This is followed by the names and signatures of 174 shareholders. The minutes then stated that after finalization of the list of voters, they were informed that they can file their nominations and accordingly nominations for the posts were received as under :

"For the post of President :- Mr. Damodar R. Naik, but no other person filed any other nomination for the post of President.

For the post of attorney, Mr. Satish Narvekar and Jayesh Fadte filed nomination. For the post of treasurer, Mrs. Nilima Naik and Srinivas Naik filed nomination. Further for the post of Substitute President nomination was filed by Mr. Pratap Mardolkar and Mr. Vishal Naik, for the post of Substitute Attorney, Mr. Vinod V. Naik and Mr. Suraj Gopal Fadte filed the nomination for the post of Substitute Treasurer, Gaurish D. Naik and Nilesh G. Fadte filed nomination. As there were contesting candidate for the post of attorney, Treasurer, Substitute President, Substitute Attorney and Substitute Treasurer, the election was necessary. Hence options were given to decide the candidates by raising of fingers and by open ballot wherein some of the candidates and components objected for raising fingers as the secrecy of the vote will not be maintained. Hence they opted for open ballot."

6. The Minutes then proceeded to state that after finalising the candidates and the process of withdrawal, ballots were distributed to the Components for voting. During the process, 41 ballots were issued to the Components and this was objected by Jayesh Gopal Fadte, candidate for the post of Attorney by stating that the contesting candidates are filling the issued ballots, due to which there will be no clarity and authenticity in the election process and the persons elected there at. The minutes then recorded that "on the personal verification it is seen that mob of shareholders gathered outside the Comunidade building and they started alleging that the ballots were taken out by the Components and the same were taken in possession by the contesting candidates which led to law and order situation hampering the election process."

7. The minutes then proceeded to state "Considering the the probable law and order situation and consequences thereby all the contesting candidates were called for a discussion and it was requested to call back the issued ballots, but some of the ballots were missing which were issued to the Components". The

minutes then add that after the discussion with the candidates, it was learnt that the people were not in a situation to conduct the procedure by issuing fresh ballots, as time limit did not permit the same and continuation of process "might have led to law and order situation".

The minutes then add "During the entire procedure the agitation of the Components was going on. Considering the law and order situation and to conduct the election in transparent way, it was amicably decided by all contesting candidates, President, Officials of the Comunidade and the staff deployed by the Collectorate of South to postpone the election and conduct the same in free and fair manner. To conduct the election, the area available of office cannot accommodate all the Components."

8. The minutes finally recorded that "As decided by the President, Attorney, Escrivao, Presiding Officer, contesting candidates that due to the allegation regarding filling of ballot papers by candidate, thereby leading to law and order situation which may adversely affect a peace and tranquility of the present process of election is postponed till further order to conduct the election in free and fair manner.". The minutes in the concluding paragraph state that the present process of election is postponed considering law and order situation during the process. The minutes also add that the law and order situation was handled by the Executive Magistrate and Joint Mamlatdar II, Mormugao whose signature has also been obtained on the minutes.

9. Mr. Deep Shirodkar, learned Additional Govt. Advocate refers to Article 49 and proviso added thereto and submits that the action of postponement can be justified under the proviso.

10. Article 49 of the Code of Comunidades, as it presently stands, reads as follows:

"49. In the case of any irregularity in the election, any member of the comunidade, with voting right, may appeal to the Administrative Tribunal, within five days and the proceedings of the appeal shall be drawn up on plain paper.

Sole § The Administrative Tribunal shall decide the appeal, within eight days and, if the election is annulled, the comunidade or the twenty major shareholders members, shall be convened again, following the formalities prescribed in the article 47, in order to hold a fresh election in accordance with the decision of the Tribunal.

Provided that in case of allegations of irregularities concerning the voters' list or any matters relating to the elections, the Government or the Collector or any officer authorised by the Government, in this behalf shall have powers to postpone the elections or appoint temporary managing committee or direct the Administrator to prepare a fresh voters' list or direct the Administrator or such other officer as may be specified by the Government to conduct the elections:

Provided further that any action by the Government or the Collector or any

officer authorised by the Government, taken on or after 30-11-2000 shall be deemed to have been taken in accordance with the above proviso."

11. Now, in the facts of the present case, we are not at all satisfied that the aforesaid proviso was attracted and on the basis of the same, any decision could have been taken to postpone the duly notified elections. In the first place, there is no allegation of irregularities concerning the voters' list. Secondly, the expression

"any matters relating to the elections" is required to be construed rather strictly and not very liberally. There is no indication in the Code as to what this phrase means. Based upon any wide or liberal interpretation of such phrase, the Authorities who are enjoined to hold elections to the Managing Committees of the Comunidades, cannot, postpone the duly notified elections. Thirdly, this is not a case where the elections were postponed by the Government or the Collector. There is no material produced on record to indicate that the Mamlatdar was authorised by the Government to exercise the powers under the proviso to Article 49 of the Code of Comunidades.

12. Accordingly, it is quite clear that the Mamlatdar had no power or authority to order postponement of the elections, on his own. The Joint Mamlatdar & Executive Magistrate, who was present at the election hall, in order to ensure that law and order is maintained, also had no power or authority to order postponement of the elections. The minutes indicate that the decision to postpone the elections was taken by the President, Attorney, Escrivao, along with the Presiding Officer and the contesting candidates. None of these persons were empowered, or could be said to have been empowered to exercise the power under the proviso to Article 49 of the Code of Comunidades. Thus, in the facts and circumstances of the present case, neither were there any circumstances justifying the postponement of the elections, nor can it be said that the decision to postpone the elections was taken by any person or authorities who had power to take such a decision.

13. The constitutional validity of the proviso to Article 49 of the Code of Comunidades, is not in issue in the present case and, therefore, we make no observations in that regard. However, we are of the opinion that in the facts and circumstances of the present case, there was no justification for exercise of the power under the proviso to Article 49 of the Code of Comunidades. In any case, none of the persons or the authorities who have purported to exercise such power were, in fact, vested with such power to order postponement of the duly notified elections.

14. In this case, we are surprised as to why the Mamlatdar who was to preside over the election process, proceeded to or permitted distribution of 41 ballot papers to the voters/shareholders of the Comunidade in the election hall. Normally, the names of the voters have to be called out serially or as and when they come forward to vote, and after verifying their identity they have to be

issued the ballot papers, so that they are in a position to cast their votes in a disciplined and orderly manner. If the Code of Comunidades permits holding of elections in some other manner, then, the Mamlatdar, who was enjoined with the duty to preside over the election process, could have held the elections in the manner as prescribed. However, it was not the case of any of the parties before us that the procedure prescribed permits distribution of 41 ballot papers on the first instance, as was done in the present case.

15. Further, the record indicates that there was no actual law and order situation, but the law and order situation was only apprehended by those present. There is record to indicate that there was a Police force, immediately outside the election hall. There is no explanation as to why the Police force did not act, so that the apprehensions of law and order situations were set to rest. The Authorities which are enjoined to hold elections to the Managing Committees of the Comunidades, cannot, themselves contribute to the creation of law and order situations, or to a situation in which the law and order issue is apprehended and, on such basis, postpone the elections. The postponement of an election is extremely serious matter and from the minutes placed on record, it is apparent that none of the Authorities have treated this issue of postponement of elections with the seriousness which it deserves.

16. The minutes state that "The law and order situation was handled by Executive Magistrate and Joint Mamlatdar II of Mormugao whose signature has been obtained.". In the facts and circumstances of the present case, it would have been appropriate if the minutes were to record that so called law and order situation was, in fact, mishandled by the said Mamlatdar and Joint Mamlatdar/ Executive Magistrate. The two Officers ought to have discharged the duties assigned to them in a proper manner and thereby ensured that the election process is held in a free, fair and transparent manner. Instead, the two officers virtually abdicated their powers possibly to the judgment to the existing Managing Committee or, in any case, to the voters who took the ballot papers out side the election hall and some of the voters who even ran away with the ballot papers.

17. We note all this because this year itself there have been six instances where the elections to the Managing Committees of the Comunidades were disrupted by extra legal means and adoption of modus operandi very similar to the one adopted in the present case.

The elections to the Managing Committees of at least six Comunidades, in the State of Goa, had to be postponed on account of law and order situations or apprehended law and order situations.

According to us, such instances have to be dealt with with a firm hand and the authorities must not permit the elections to be disrupted or postponed on account of such extra legal acts.

18. In *Mohinder Singh Gill vs. Chief Election Commissioner* (1978) 1 SCC 405,

the Hon'ble Apex Court, through Krishna Ayer, J., made significant observations which are at paragraph 16, in the context of free and fair elections and the repercussions, if instances of threat to peaceful polls are not dealt with a firm hand. The observations read as follows :

" 16. Secondly, the pregnant problem of power and its responsible exercise is one of the perennial riddles of many a modern constitutional order. Similarly, the periodical process of free and fair elections, uninfluenced by the caprice, cowardice or partisanship of hierarchical authority holding it and unintimidated by the trust, tantrum or vandalism of strongarm tactics, exacts the embarrassing price of vigilant monitoring. Democracy digs its grave where passions, tensions and violence, on an overpowering spree, upset results of peaceful polls, and the law of elections is guilty of sharp practice if it hastens to legitimate the fruits of lawlessness. The judicial branch has a sensitive responsibility here to call to order lawless behaviour. Forensic non-action may boomerang, for the court and the law are functionally the bodyguards of the people against bumptious power, official or other."

19. In the case of elections to the Managing Committee of Comunidade of Serula, we have made a detailed order dated 6 February 2019 in Writ Petition No.1178/2018. This order is relied upon by Mr. Gosavi, learned Counsel for the Petitioner in the present case, as well.

20. Mr. Gosavi, relying upon the aforesaid order dated 6 February 2019 and even otherwise contends that there was no ground for postponement of the elections. He submits that in any case, the Petitioner was the only candidate who had filed his nomination for the post of President and, therefore, the Petitioner was required to be declared as the President. He further submits that the process of filing nominations was complete and assuming that there was some law and order situation which was apprehended after this process was complete, only the actual voting could have been postponed. He submits that the Notification dated 22 January 2019, which has been issued by the Respondents, suggests that fresh elections are scheduled to be held on 17 February 2019 and that this is not a case of conduct of elections from the stage at which the elections came to be interrupted on 2 December 2018. Mr. Gosavi submits that if this is permitted, then, it would amount to granting the miscreants, who succeed in postponing the elections, a premium for their unlawful activities. Mr. Gosavi, therefore, submits that the reliefs prayed for in the present Petition may be made absolute.

21. Mr. Deep Shirodkar, learned Additional Govt. Advocate, in deference to the observations made by us in the order dated 6 February 2019, including in particular paragraph 11 of our order dated 6 February 2019, in Writ Petition No.1178/2018, submits that directions may be issued to declare results of the elections to the post of President, since, in the present case, the record indicates that the Petitioner's nomination was the sole nomination which was received on 2 December 2018. He states that the elections can be directed to be held for the posts of President Substitute, Attorney/Attorney Substitute and Treasurer/

Treasurer Substitute on the basis of the nominations accepted on 2 December 2018 wherein only the 174 voters/shareholder who were present on 2 December 2018, can be permitted to vote.

22. Taking into consideration our observations in paragraph 11 of our order dated 6 February 2019, in Writ Petition No.1178/2018, which are quoted here after, we are of the opinion that the stance taken by Mr. Shirodkar, learned Additional Govt. Advocate is quite fair and reasonable.

23. In paragraph 11 of our order dated 6 February 2019, in Writ Petition No.1178/2018, this is what we had observed :

"11. In so far as Comunidade of Serula is concerned, the Affidavit states that the result of the elections to the post of President is already declared. Counting of votes for the post of President Substitute is completed and only what remains is declaration of result to the post of President Substitute. We are informed that such declaration will be made on 3 March 2019, which is the postponed date. We direct that such declaration be made on the basis of the counting which has already taken place on 27 January 2019, on 3 March 2019. The learned Advocate General has made a statement that the elections to the remaining posts of Attorney/Attorney Substitute, Treasurer/Treasurer Substitute will be positively held on 3 March 2019 on the basis of the same voters' list which was in operation on 27 January 2019. This is only appropriate as, otherwise, it is possible that the disruptors may secure some undue and undeserving advantage in the matter."

24. Mr. H.D. Naik, learned Counsel for Respondent No.5, however, submits that on 2 December 2018, several voters could either not remain present, or were present, but their presence was not marked. He, therefore, submits that it would not be fair to either deprive such voters their right to vote or hold the elections on the basis of the nominations received on 2 December 2018. He, therefore, submits that it is only appropriate that fresh elections are held on 17 February 2019.

25. Upon due consideration of the contentions raised by Mr. H.D. Naik, we are afraid we are unable to accept the same. According to us, there is no material on record to indicate that several voters/shareholders were actually present and their presence was not marked. The minutes placed on record are quite exhaustive. The minutes have been signed not only by the authorities, but also by all the 174 voters/shareholders, who were present on 2 December 2018. Accordingly, there is no material on record to accept that some voters/shareholders were indeed present, but their presence was not marked. There was no contemporaneous record or complaints produced by such alleged voters/shareholders stating that they were in fact present on that day, but their presence was not marked.

26. Therefore, according to us, the notification/notice dated 22 January 2019, to the extent the same relates to the elections to the post of President of the Managing Committee of the Comunidade of Sancoale, warrants interference. As

in the case of elections to the Managing Committee of the Comunidade of Serula, it is only appropriate that the Respondents, on 17 February 2019, merely declare the result in so far as the post of President of the Managing Committee of the Comunidade of Sancoale is concerned.

27. If, on 17 February 2019, the elections are permitted to be held to all the posts and that too on the basis of fresh nominations and increased list of voters, then, in all probabilities the miscreants who created apprehensions of the law and order, will succeed in disrupting the entire election, which was duly notified for 2 December 2018. In such a situation, such miscreants will, undoubtedly, secure undue and undeserving advantage on the basis of their own illegal and unlawful acts. This will, then, amount to granting a premium to such miscreants which, obviously, cannot be permitted.

28. Since the State and the other Authorities, who are enjoined to hold the election process have, at least in case of the elections to the Managing Committee of the Comunidade of Serula, accepted the position that on the postponed date the election process will continue at the stage at which it was disrupted, or stalled, there is obviously no reason for the very same State and its Authorities to adopt any different stance when it comes to the elections to the Managing Committee of Comunidade of Sancoale. Accordingly, the Notification dated 22 January 2019, to the extent the same is not consistent with this stance of the State Government, warrants interference.

29. Accordingly, on the postponed date i.e. 17 February 2019, the concerned Respondents are directed to continue the election process commenced on 2 December 2018, from the stage at which it was disrupted/postponed. In order that there is no ambiguity in complying with this direction, we clarify, this means the following :

(i) Since the record indicates that the Petitioner's nomination was only one received for the post of President, the result in the form of appropriate declaration to be made on 17 February 2019, without inviting any fresh nominations or holding any fresh elections to the post of President;

(ii) Similarly, on 17 February 2019, the elections to the post of President Substitute, Attorney/Attorney Substitute, Treasurer/Treasurer Substitute to be held on the basis of the nominations received on 2 December 2018 as reflected in the Minutes of the Proceedings dated 2 December 2018 (at pages 25-26 of the paper book). Accordingly, no fresh nominations shall be accepted and the elections to be held on the basis of the nominations already received and accepted on 2 December 2018;

(iii) Only 174 voters/shareholders, whose names are clearly reflected in the Minutes of the Proceedings dated 2 December 2018, will be permitted to take part at the elections now scheduled on 17 February 2019. The election process to be held on 17 February 2019 shall, therefore, in effect be in continuation of the election process which commenced on 2 December 2018 and from the stage at

which it was stalled/postponed.

30. In addition to the aforesaid, we take note of the statements made by the learned Advocate General in Writ Petition No.1178/2018, including the statements recorded by us in paragraphs 13, 14 and 15 of our order dated 6 February 2019 and direct that the measures stated therein are to be taken even for the postponed elections now scheduled for 17 February 2019.

31. Paragraphs 13, 14 and 15 of the order dated 6 February 2019, made in Writ Petition No. 1178/2018, read as under :

"13. The learned Advocate General states that the elections to the Five Comunidades in North Zone, which were similarly postponed, will also be held on 3 March 2019. The learned Advocate General points out that the elections to the Sancoale Comunidade is now scheduled on 17 February 2019 and will be held on the said date. All these statements are again accepted as statements made to this Court.

14. The learned Advocate General has pointed out that even the State has taken a serious note of such incidents and in future State will take all efforts to ensure that such elections are not disrupted. He points out to paragraph 10 of the affidavit filed by Mr. Vikas S.N. Gaunekar, and submits that various measures set out in this paragraph will be taken by the State machinery to ensure that such incidents do not repeat or if they arise, will be dealt with, with firm hand. The measures proposed, read as follows :

"(a) Although generally police staff is not deployed inside the polling booths, as an exceptional case sufficient number of Police personnel, in uniform, will be deployed inside the polling hall on stage to control mob.

(b) Video recording/filming of the entire process will be done.

(c) An endeavour will be made to ensure that no mobile phones will be permitted to be taken inside the polling station. Advance Notice intimating such situation will be issued in that regard.

(d) Only the members/voters will be permitted to enter the gate/compound wall of the premises. Non-members/ bystanders etc. will not be permitted to enter inside the gate.

(e) All necessary measures will be taken to deal with any emergency situation."

15. The learned Advocate General has stated that the aforesaid measures will not be restricted only for the elections to the Comunidade of Serula, but will apply also to all the elections now scheduled on 17 February 2019 (at Sancoale) and the elections to five other Comunidades in the North Zone. We appreciate this stance on behalf of the State administration. We direct that such measures be taken so that such incidents do not repeat or, in any case, if such incidents take place, they are dealt with with firm hand."

32. We, however, make it clear that once the results of the elections are declared on 17 February 2019, any member of the Comunidade, consistent with the provisions of Article 49 of the Code of Comunidades, may, if aggrieved, appeal to the Administrative Tribunal and the Tribunal to then decide such appeal, in accordance with law and on its own merits. Nothing in this Judgment and Order is intended to restrict the exercise of such right.

33. Accordingly, we dispose of the present petition by making the following Order :

(A) On 17 February 2019, only the results for the elections to the post of President of the Managing Committee of the Comunidade of Sancoale are to be declared. Since, the record indicates that the Petitioner's nomination was the only nomination received, appropriate declaration to be made on 17 February 2019, without inviting any fresh nominations, or holding any fresh elections to the said post.

(B) Similarly, on 17 February 2019, the elections to the post of President Substitute, Attorney/Attorney Substitute, Treasurer/ Treasurer Substitute to be held on the basis of the nominations received on 2 December 2018 as reflected in the Minutes of the Proceedings dated 2 December 2018 (at pages 25-26 of the paper book). Accordingly, no fresh nominations shall be accepted and the elections to be held on the basis of the nominations already received and accepted on 2 December 2018;

(C) Only 174 voters/shareholders, whose names are clearly reflected in the Minutes of the Proceedings dated 2 December 2018 will be permitted to take part at the elections now scheduled on 17 February 2019. The election process to be held on 17 February 2019 shall, therefore, in effect be in continuation of the election process which commenced on 2 December 2018 and from the stage at which it was stalled/postponed.

(D) The Notification dated 22 January 2019 (Annexure A at page 15 of the paper book) is modified to the aforesaid extent and, therefore, must be construed and implemented in the aforesaid manner.

(E) Rule is made absolute in the aforesaid terms. There shall be no order as to costs.

(F) All concerned to act on the basis of an authenticated copy of this order.