
(1997) 09 BOM CK 0027

In the Bombay High Court

Case No : Writ Petition No's. 3459, 3460, 3461, 3462, 3463, 3464, 3465, 3466, 3467, 3468, 3469 and 3472 of 1997

Farook Ali Khan and others

APPELLANT

Vs

Maharashtra State Election Commission and others

RESPONDENT

Date of Decision : 02-09-1997

Acts Referred:

Bombay Provincial Municipal Corporations Act, 1949 — Section 16
Constitution of India, 1950 — Article 226, 227, 243

Citation : (1998) 1 ALLMR 9 : (1998) 2 BomCR 566 : (1998) 2 MhLj 750

Hon'ble Judges : V.R. Datar, J;N.P. Chapalgaonkar, J

Bench : Division Bench

Advocate : R.S. Deshmukh, A.G.P., V.J. Dixit, P.V. Mandlik, D.R. Shelke, S.B. Talekar, A.G. Godhamgaonkar, N.V. Deshpande and K.G. Khader, for the Appellant; S.B. Bhapkar, N.S. Chaudhari, V.B. Ghatge, K.G. Patil, S.K. Kadam, V.K. Sapkal, A.G.Ps. and N.H. Patil, for the Respondent

Judgement

N.P. Chapalgaonkar, J.—These petitions challenge the order passed by the Returning Officer either rejecting the nomination paper of the petitioner or accepting the nomination paper of the respondent in Nanded Waghala Municipal Corporation elections, which are in process. Elections were declared by a Notification dated 18-8-1997. The scrutiny of nominations took place on 28-8-1997. Ten petitions challenge the rejection of the nomination paper of petitioner by the Returning Officer and one petition challenges acceptance of the nomination paper of respondent No. 5 in their petition, who is alleged to be defaulter and, therefore, disqualified. Since all these petitions raise common questions of law and facts, they are being disposed of by this common order.

2. The nomination papers were rejected on either of the following grounds :

(1) The petitioner was not qualified to be chosen being below the prescribed age of 21 years;

(2) The original caste certificate showing the entitlement of the petitioner to

contest the seat reserved for that category was not produced at the time of scrutiny;

(3) Certificate which was produced did not contain the seal of the office of the authority issuing the certificate;

(4) The name in the caste certificate and the name in the nomination form did not tally;

(5) The name as given in the voters' list and as given in the nomination paper, differs;

(6) The petitioner was holding a plumber's licence and, therefore, was disqualified within the meaning of section 10(1)(d).

3. The maintainability of these petitions was objected to by the learned Counsel for the State Election Commission Shri N.H. Patil and the learned A.G.P. Shri V.D. Sapkal. Both of them contended that Article 243ZG(b) creates an absolute bar and prohibits the interference by any Court, including this Court, in the election process, which is already on. The election will have to be challenged only in the manner prescribed by law. The Counsel for the petitioners Shri V.J. Dixit, Shri P.V. Mandlik, Shri D.R. Shelke, Shri S.B. Talekar, Shri A.G. Godhamgaonkar, Shri M.V. Deshpande, and Shri K.C. Khader submitted that these petitions do not pray for stay of the election process but pray for correction, which can be made without disturbing the calendar of events prescribed by the authority and since there is no challenge to the election as such, the challenge to the Returning Officer's order rejecting or accepting a nomination paper is not covered by the prohibition contained in Article 243ZG of the Constitution of India. It was further contended that unlike the Statute governing other local authorities like, Zilla Parishads, Panchayat Samitis, Village Panchayat and the Municipalities in Maharashtra, the Bombay Provincial Municipal Corporations Act, 1949 does not provide for an appeal against the acceptance or rejection of a nomination paper and, therefore, there is no efficacious and alternate remedy available to the petitioners than to approach this Court under Article 226 and 227. It is further submitted that the election rules appended as the Schedule to the Bombay Provincial Municipal Corporation Act do not contain any specific provision for the scrutiny of the nomination paper listing the grounds on which the nomination paper can be rejected and leaves the field for exercise of an unguided and uncontrolled power by the Returning Officer. If such a power is there, it is very much necessary that this Court should exercise the power of review which is inherent to this Court and cannot be taken away by any statutory provision, it being a component of basic structure of the Constitution. It is further contended that any notification or order of the Election Commission or any person authorised by it, can be reviewed by this Court and proper orders annulling or modifying the said order can always be passed despite the provisions contained in Article 243ZG.

4. The first contention raised by the petitioners that the rejection or acceptance of a nomination paper is not the part of the process of election, is devoid of any

merit. Right from the case of N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others, judicial pronouncements have held that the word "election" as appearing in Article 329(b) is used in a wider sense and is not confined to final result thereof. It embarrasses the whole procedure which consists of several stages and many steps whereby an elected member is returned whether or not it be found necessary to take poll. Rejection or acceptance of a nomination paper being one such step, is included in the term "election". The same view was reiterated by the Supreme Court in various judgments. The provisions of Article 243-ZG(b) is in pari-materia to Article 329(b). What is prohibited in Article 329(b) in respect of the elections to the legislature is also prohibited in respect of elections to the Municipalities under Article 243-ZG(b). There is nothing either in the wording of Article 243-ZG or in the context in which it is used to permit this Court to hold that the word "election" occurring in this provision is used in a narrower sense than it signifies when it occurs in Article 329(b).

5. The learned Counsel for petitioners relied on certain observations in the judgment of the Supreme Court in the case of Boddula Krishnaiah and another Vs. State Election Commissioner, A.P. and others, . The portion of the judgment relied on is as under :

"Thus it would be clear that once an election process has been set in motion, though the High Court may entertain or may have already entertained a writ petition, it would not be justified in interfering with the election process giving direction to the election officer to stall the proceedings or to conduct the election process afresh, in particular when election has already been held in which the voters were allegedly prevented to exercise their franchise."

Relying on the words "the High Court may entertain or may have already entertained a writ petition", the Counsel appearing on behalf of the petitioners contended that the Supreme Court has accepted the position that the petitions can be entertained by the High Court despite the fact that the election process is on. In this case, the High Court of Andhra Pradesh had given directions for declaring the result of the election or to conduct fresh poll for 20 persons to exercise their franchise when the poll was already over.

6. The observations made by the Supreme Court in Para 11 (above quoted) will have to be read in context in which they were made. Supreme Court had relied on its earlier judgment in the case of Laxmi Charan Sen v. A.K.M. Hassan Uzzaman, AIR 1985 S.C. 1233 and quoted the following observations :

"The High Court acted within its jurisdiction in entertaining the writ petition and in issuing a Rule Nisi upon it, since the petition questioned the vires of the laws of election. But it was not justified in passing the interim orders dated February 12 and 19, 1982 and in confirming those orders by its judgment dated February 25, 1982..... though the High Court did not lack the jurisdiction to entertain the writ petition and to issue appropriate directions therein, no High Court in the

exercise of its power under Article 226 of the Constitution should pass any orders, interim or otherwise, which has the tendency or effect of postponing an election, which is reasonably imminent and in relation to which its writ jurisdiction is invoked."

In the very judgment relied by the learned Counsel for the petitioners, Supreme Court has also quoted with approval its earlier judgment in the case of *State of Uttar Pradesh v. Pradhan, Sangh Kshetra Samit*, 1995 Supp. (2) S.C.C. 306. The judgment reads :

"What is more objectionable in the approach of the High Court is that although Clause (a) of Article 243(o) of the Constitution enacts a bar on the interference by the courts in electoral matters including the questioning of the validity of any law relating to the delimitation of the constituencies or the allotment of seats to such constituencies made or purported to be made under Article 243K and the election to any panchayat, the High Court has gone into the question of the validity of the delimitation of the constituencies and also the allotment of seats to them."

7. Thus it is clear that though the High Court may entertain a petition when the question of vires of a law relating to election (except the law relating to delimitation) is questioned. But there are two blanket restrictions on the power to be exercised by the High Court. The first is that it cannot entertain a challenge to any law relating to delimitation of the constituencies or the allotment of seats to such constituency and the second is that it cannot entertain the challenge to an election of the Municipality or the Panchayat. The learned Counsel appearing for the petitioners also relied on the judgment of the Andhra Pradesh High Court in the case of *Smt. Sk. Khasim Bee Vs. The State Election Commissioner and others*, . The Division Bench observed :

"Judicial review is the basic structure of the Constitution and the same cannot be abrogated and Article 243(o) does not bar the extraordinary jurisdiction of High Court under Article 226 of the Constitution. It is settled principle that where there is an effective alternative remedy under the statute, the High Court will not exercise its jurisdiction as a self-imposed restriction. In electoral matters, the High Court observes self-imposed limitations and declines to interfere with the election process when once the election notification is issued because they can effectively be agitated before the Election Tribunal. But, where the constitutional validity of an Act or a rule or provision of an Act affecting the election is challenged, or where error in exercising such jurisdiction or mala fide or non-compliance of rules of natural justice established, the High Court has got ample power to render justice by exercising the power of judicial review conferred on it under Article 226 of the Constitution."

8. In this case, election to the office of Sarpanch of Mangalagiripadu Gram Panchayat had held on 27-6-1995. In the counting, petitioner was shown to have received 512 votes as against the respondent No. 4 who got 509 votes. In a

petition before the Election Commission, the State Election Commissioner issued a notification and directed the Election Officer to undertake recounting of votes where margin of votes was less than 10% of the total polled votes and on other grounds mentioned in the notification. The recounting was done and it was found that the petitioner got 510 votes whereas the fourth respondent got 513 votes. In a petition before the High Court to quash the result of the recounting, the High Court allowed the petition quashing the notification No. 531/SEC-B/95-3 dated 26-7-1995 issued by the State Election Commission and restored the result of the counting.

9. We find that the Andhra Pradesh High Court did not go into the validity of the election but it struck down a notification issued by the Election Commission on the ground that it did not have power to issue such a notification. The High Court noticed that Rules 34, 35 and 37 of the relevant rules which empower the Election Officer to order recount and found that. When there is no reference under Rule 37 to the Election Commissioner by the Election Officer, exercise of the powers by the Election Commission amounts to usurping the powers conferred on the Election Officer which would be contrary to the rules and the provisions of the Act. Taking this view, the High Court struck down the notification directing the recounting. This judgment of the Andhra Pradesh High Court is no authority laying down a proposition that the election process can be interfered into by the High Court under Article 226 entertaining a writ petition challenging any stage at the election despite the constitutional bar.

10. The petitioners further relied on the judgment of the Division Bench of ALLAHABAD High Court in the case of Mukesh Ram Chandani and others Vs. State of U.P. and others, . But this judgment was overruled by the Supreme Court in the case of Anugrah Narain Singh and Another Vs. State of U.P. and Others, . Quoting earlier judgment in the case of State of Uttar Pradesh v. Pradhan Sangh Kshetra Samiti (cited supra), Supreme Court held that such a challenge should not have been entertained by the High Court, which is not permissible in view of the bar created by the Constitution. We, therefore, hold that the bar under Article 243-ZG and the similar provision in the Constitution applies to all stages of the election covered by the said provisions. Rejection or acceptance of a nomination paper is also a stage in the election and it cannot be challenged in a petition under Article 226 or 227 of the Constitution before the High Court. The only remedy available is the election petition as is provided by law.

11. The Counsel for the petitioners relied on the judgment of the Supreme Court in the case of G.C. Kanungo and D.C. Routray Vs. State of Orissa, to contend that the power of the judicial review is the basic feature of the Constitution and it cannot be annulled by any Statute. While there can be no dispute about the proposition that the power of judicial review under the Constitution of India entrusted with the High Court, is one of the basic features of the Constitution and it cannot be abrogated by the statutory rules, we see hardly any relevance

of the judgment cited by the learned Counsel. What was being considered by the Supreme Court in that case was whether the Amending Act of 1991 seeking to nullify the awards made by the Special Arbitration Tribunals constituted under the 1984 Amendment Act would be an encroachment upon the judicial power. If some awards have been made in exercise of the judicial powers, subsequent legislation seeking to nullify such awards would be violative of the basic features of the Constitution. In the instant case, we do not see any encroachment on the power of judicial review, which is entrusted with this Court under the Constitution. A remedy has been provided by way of an election petition to challenge the election including acceptance or rejection of a nomination paper. Whatever order is passed in an election petition by the Tribunal constituted under the law, can always be a subject matter of judicial review. But in the presence of an alternate remedy, even the norms of judicial restraint followed by this Court would not permit the review of such orders before the alternate remedy is resorted to. The prohibition under Article 243-ZG is to be read in this context.

12. Further contention was raised that the rules are incomplete and no separate provision has been made for scrutiny. To supplement the provisions contained in the rules, an order titled as "Municipal Corporations Election Rules (Supplemental Provisions) Order, 1994 is issued by the State Election Commission on 22nd November 1994 and this has been made applicable to all elections of Municipal Corporations in the State by further order dated 4th May 1995. Clause (5) of the said Order speaks about the general duties of Returning Officer. It says that it shall be the general duty of the Returning Officer at an election to do all such acts and things as may be necessary for effectually conducting the election in the manner provided by the Acts, Rules and the said Order. Therefore, it would be the duty of the Returning Officer to scrutinise the nomination papers and see that they conform to the requirements of law. Merely because this was not elaborately stated in the Rules, it cannot be said that the Rules are invalid.

13. It was also submitted before us that the order of the Returning Officer rejecting the nomination paper is an administrative order and, therefore, we can judicially review the said order. In the absence of any alternate remedy and the prohibition contained in Article 243-ZG, this submission would have been valid. However, in the present set of rules applicable to the facts of the cases, these petitions cannot be entertained.

14. Writ petitions are summarily rejected.

15. Petitions rejected.