

(2018) 04 BOM CK 0011
In the Bombay High Court
Case No : WRIT PETITION NO.2925 OF 2018

GANESH PRAKASH WANKAR

APPELLANT

Vs

THE DIVISIONAL COMMISSIONER, PUNE DIV. AND ORS.

RESPONDENT

Date of Decision : 10-04-2018

Acts Referred:

Constitution of India, — Article 226, 243-ZA, 243-ZA(1)
Maharashtra Municipal Corporations Act, 1949 — Section 21, 456A, 456A(41)
Bombay Provincial Municipal Corporations (Conduct of Elections to the post of
Chairman of the Standing Committee, Transport Committee, Wards Committees and
other Committees), Rules 2007 — Rule 2, 2(2), 3(1), 4, 6

Citation : (2018) 04 BOM CK 0011

Hon'ble Judges : A.S.OKA, J, RIYAZ.I.CHAGLA, J

Bench : Division Bench

Advocate : G.S.Godbole, Sumit S. Kothari, Ketki Gadkari, Tushar Sonawane,
Priyal G. Sarada, .Deendayal G. Dhanure, R.S.Apte, A.Y.Sakhare, M.M.Pabale

Final Decision : Allowed

Judgement

A.S.OKA,J

1 In Writ Petition No.2925 of 2018, on the earlier date the parties were put to notice that the petition will be heard finally at the admission stage.

2 The controversy which arise for consideration in Writ Petition No.2925 of 2018 is very narrow. The controversy concerns the election of the

Chairman of the Standing Committee of the fourth respondent Municipal Corporation which is a Corporation constituted under the Maharashtra

Municipal Corporations Act, 1949 (for short the said Act of 1949). It appears that the election of the Chairman of the Standing Committee was

scheduled to be held on 3rd March 2018 at 10.30 a.m. in the Municipal Hall.

3 As per Rule 4 of the Bombay Provincial Municipal Corporations (Conduct of

Elections to the post of Chairman of the Standing Committee, Transport Committee, Wards Committees and other Committees), Rules 2007 (for short 'the Election Rules'), the Divisional Commissioner (first respondent) nominated the second respondent (the Chief Executive Officer of Zilla Parishad, Solapur) to preside over the meeting fixed on 3rd March 2018 to elect the Chairman of the Standing Committee. The Municipal Secretary of the fourth respondent's Municipal Corporation who is the sixth respondent published a notice directing that his office will accept the nomination papers between 11.00 a.m. to 2.00 p.m. on 1st March 2018. The occasion for filing the present petition is the impugned order made on 3rd March 2018 by the first respondent's Divisional Commissioner. Before the said order was made by the first respondent's Divisional Commissioner, on 2nd March 2018, a communication was issued by the first respondent to the Municipal Secretary informing him that he had nominated the second respondent to preside over the meeting scheduled to be held on 3rd March 2018 for electing the Chairman. In the said communication, he recorded that the nomination papers have been received by the Municipal Secretary on 1st March 2018 between 11.00 a.m. to 2.00 p.m. In the further part of the communication, he stated that the Municipal Secretary shall hand over the nomination papers to the Presiding Officer immediately after the commencement of the meeting to be held on dated 3rd March 2018.

4 By the impugned order, the first respondent purported to cancel the process of the election for the post of Chairman of the Standing Committee which was to be conducted on 3rd March 2018 and he directed that a fresh process shall be conducted from the stage of filing of nomination papers.

5 Thereafter, on the basis of the said order, the Municipal Secretary directed that fresh nomination papers shall be received by him between 11.00 a.m. to 2.00 p.m. on 6th March 2018 in his office.

6 The submission of the learned counsel for the petitioner is that the first respondent had no power to cancel the election process in as much as neither under the provisions of the said Act of 1949 nor under the provisions of the Election Rules, any power has been conferred on the first respondent to cancel the entire process of election and to direct a fresh election process to be conducted. He pointed out that the letter dated 2nd March 2018 addressed by the first respondent to the Municipal Secretary was addressed

after the nomination papers were received by the Municipal Secretary on 1st March 2018.Â His submission is that the impugned order dated 3rd March 2018 is nullity which interferes with the democratic process of election. He pointed out that the first respondent has relied upon the report submitted by the second respondent who was to preside over the meeting scheduled to be held on 3rd March 2018 and the letter dated 1st March 2018 as well as video clip.Â He submitted that only on the basis of the said report and the video clip, he has come to the conclusion that there was a serious issue of law and order during the period when the nomination forms were accepted on 1st March 2018 and therefore, the process of accepting nomination papers is not conducted in free and fair manner.Â He argued that the Divisional Commissioner has not conducted any inquiry about the alleged incident and has simply relied upon the report and the complaints made by the two elected councilors to the second respondent.Â He would urge that the as the order is null and void, the said order as well as all steps taken on the basis of the said order must be quashed and set aside.Â He pointed out that one of the grievances made by the seventh respondentÂ (the petitioner in Writ Petition No.3346 of 2018) was that he was prevented from filing the nomination papers as the nomination paper was snatched from him by the mob. He submitted that on 6th March 2018, the seventh respondent did not file his nomination paper on 1st March 2018 and it is not his case that on 6th March 2018 he was prevented from filing the nomination paper. He would, therefore, submit that interference is called for by the writ Court.

7 The learned senior counsel representing the first respondent as well as third respondentÂState urged that a power was vesting in the first respondent to preside over the meeting and after he was satisfied about the events of 1st March 2018 on the basis of the report submitted by the second respondent as well as by the Municipal Secretary and the video clip, he passed the impugned order. The first respondent was satisfied that the process of acceptance of nomination papers was not conducted in a free and fair manner. He pointed out thatÂ a First Information Report was registered at the instance of the seventh respondent.Â He submitted that the second respondent was his delegate and after finding that the entire election process stands vitiated as a result of the incident of 1st March 2018, he

has re-scheduled the election process. He submitted that the entire exercise has been done by the first respondent only to ensure that the election takes place in a free, fair and transparent environment. He submitted that the first respondent Divisional Commissioner had power to preside over the meeting but he had delegated the same to the second respondent. He urged that when the first respondent is empowered to preside over the meeting for holding election, the power to reschedule the election is implicit which he has exercised on valid grounds. He relied upon the following five decisions of the Apex Court:

- (1) Secretary, Jaipur Development Authority, Jaipur vs. Daulat Mal Jain & Ors. (1997) 1 SCC 35
- (2) Ekta Shakti Foundation Vs. Govt. of NCT of Delhi (2006) 10 SCC 337
- (3) State of Kerala & Ors. vs. K. Prasad & Anr. (2007) 7 SCC 140
- (4) Raj Kumar Soni & Anr. Vs. State of U.P. & Anr. (2007) 10 SCC 635
- (5) Maharaja Chhintamani Saran Nath sagardei vs. State of Bihar & Ors. (1998) 8 SCC 16.

8 He relied upon the said decisions in support of the proposition that even assuming that there may not be any statutory power vesting in the first respondent to re-schedule the election, there is a material on record to show that the process of acceptance of nomination papers was not conducted in free and fair manner and therefore, a writ Court by exercising the discretionary and equitable jurisdiction should not interfere with the impugned order. His submission is that considering the extraordinary situation, the first respondent exercised the power only to ensure free and fair election and therefore, by setting aside the impugned order, this Court cannot restore the election process which is far from being fair and transparent. He submitted that this Court cannot restore the election process which stands vitiated. He relied upon another decision of the Apex Court in the case of Mohinder Singh Gill and another vs. Chief Election Commissioner, New Delhi and others which deals with the powers of the Election Commissioner of India. As the first respondent was entrusted with the power to preside over the meeting to conduct elections, he has exercised the power with which no interference is called for.

9 The learned senior counsel for the fifth respondent relied upon the provisions of Article 243ZA and proviso to sub-section 1 of section 456A of the

said Act of 1949.Â He also relied upon the decision of the Apex Court in the case of Kishansing Tomar vs. Municipal Corporation of City of

Ahmedabad and others . He relied upon the paragraphs 24 and 25 of the said decision which hold that the State Election Commission has a power of

superintendence direction and control over the elections, and the said power is no less than the power of the Election Commission of India. He urged

that thereÂ is every justification for the power exercised by the first respondent.

10 The learned counsel for the Municipal Corporation and the Municipal Secretary submitted that there is sufficient material on record to come to the

conclusion that there was an unruly mob which was present on 1st March 2018 in the office of the Municipal Secretary which prevented one of the

prospective candidates (the seventh respondent) from filing his nomination paper.Â There is a video clip and photographs of the said incident which

the Municipal Secretary had placed before the Presiding Officer.

11 The learned counsel for the seventh respondent stated that he is not supporting the order impugned in Writ Petition No. 2925/2018.Â He states

that in fact he has filed a separate writ petition (Writ Petition No.3346 of 2018) in which his prayer is that as he was prevented from filing the

nomination paper on 1st March 2018, his nomination paper should be accepted and the same election process be continued. On a query made by the

Court, he accepted that if the first respondent had not intervened, there were remedies available to the seventh respondent for challenging what

happened on 1st March 2018.Â He urged that in fact that is the reason why he has filed a petition seeking a writ of mandamus for praying that the

nomination paper filed by him on 1st March 2018 should be accepted. He also relied upon the decision of the Apex Court dated 9th April 2018 in Writ

Petition (Civil) No.302 of 2018 in the case of BJP vs. State of West Bengal and others.Â He submitted that in view of the principles laid down in the

said decision, it was necessary for the Authorities to consider the grievances of the seventh respondent.

12 We have given careful consideration to the submissions.Â Section 21 of the said Act of 1949 provides for appointment of the Chairman of the

Standing Committee.Â The power is vesting in the Standing Committee to elect one of its members to be the Chairman.

13 The election Rules have been framed by the State Government in exercise of

power under subsection 1 of section 456A of the said Act of 1949.

Rules 2 to 4 as well as 6 are relevant for our purpose which read thus:

â??2 Special meeting for election of Chairman of the Standing Committee

(1) For the purpose of holding elections to the post of Chairman of the Standing Committee, after general elections of the Corporation and whenever

the post of Chairman becomes vacant for whatsoever reasons, to fill the vacancy therein, a special meeting shall be held by the Corporation

(2) The Municipal Secretary shall, in consultation with the Divisional Commissioner of the concerned Revenue Division in which Corporation is

situated, fix a date for holding the special meeting under sub-â??rule

(1):

Provided that, the notice of such meeting shall be given to all the members of the Standing Committee, at least three clear days prior to the date of

meeting;

(3) The special meeting so called, shall not be cancelled or adjourned.

3. Submission of nomination paper

(1) Any member of the Standing Committee who intends to contest the election to the post of Chairman shall submit his nomination in the Form-â??I

appended to these rules on the day fixed for nomination to the Municipal Secretary in person.

(2) Each nomination paper shall state the name of the candidate in full and be subscribed by one Councillor as proposer and another as seconder.

(3) No Councillor shall propose or second the nomination of more than one candidate : Provided that, the Councillor who acts as proposer or seconder

shall not be eligible to contest for the post of Chairman of that Committee.

(4) Nothing in this rule shall prevent any candidate from submitting more than one nominating paper:

Provided that, not more than four nomination papers shall be presented by or on behalf of any candidate.

4 Presiding Authority

(1) The special meeting shall be presided over by the concerned Divisional Commissioner-â?? or his representative not below the rank of Additional

Divisional Commissioner.â??

5.

6 Election procedure and the declaration of election result

(1) If there is only one valid nomination, the presiding authority shall declare such candidate as duly elected.

(2) If the number of validly nominated candidates is more than one, the presiding authority shall arrange the names of contesting candidates in alphabetical order.

(3) The presiding authority shall announce the name of each contesting candidate in the alphabetical order and shall take voting by show of hands.

The names of the councilors i.e Members of the Standing Committees who have voted in favour of such candidate shall be recorded in the minutes.

(4) The presiding authority shall ensure that

(i) every member who desires to cast his vote is given fair and reasonable opportunity of casting his vote and the vote so cast is recorded properly

against the name of the candidate in whose favour the vote is cast;

(ii) the Councilor whose vote is recorded once shall not be allowed to recast or change his vote.

(5) The presiding authority shall also record the names of those councilors who abstain from voting.

(6) The presiding authority after recording the names of the councilors who have voted or abstained from voting, shall announce the number of votes

secured by each contesting candidate.

(7) The presiding authority after declaring the number of votes polled by each contesting candidate shall proceed to declare the result.

The list of the candidates shall then be prepared in accordance with the ascending order in which the candidates have secured votes.

The candidate who poll highest number of votes, in accordance with such ascending order, shall be declared as duly elected.

(8) In case of equality of votes, the presiding authority shall declare that the result of the election shall be decided by drawing lots.

The lots will be drawn by such person as may be decided by the majority of the Councilors present and entitled to vote. (9) The candidate on whom the lot falls shall

be declared to be validly elected to the said post.

(10) The presiding authority besides recording the proceedings in writing shall

also cause the proceedings to be recorded by way of videography, to ensure free and fair elections.

(11) The Municipal Secretary shall assist the presiding authority in conducting the election process and recording the proceedings of the meeting.â??

14 Sub Rule 2 of Rule 2 provides thatÂ Municipal Secretary shall fix the date for holding a special meeting for electing the Chairman in consultation

with the Divisional Commissioner. SubÂRule 1 of Rule 3 provides that the date for filing nomination papers is to be fixed by the Municipal Secretary.

The function of the Divisional Commissioner in the process of the election of the Chairman is firstly under SubÂRule 2 of Rule 2 which provides that

the Municipal Secretary shall fix a date for holding a special meeting after consulting him.Â The second and the only other role played by the

Divisional Commissioner is confined to presiding over a special meeting. He is empowered to nominate his representative to preside over the special

meeting. Rule 6 provides the actual procedure of election to be followed in the special meeting.Â SubÂRule 10 of Rule 6 which provides that the

Presiding Officer shall also causeÂ the proceedings to be recorded by way of videography.

15 Neither the provisions of the said Act nor the provisions of election Rules confer any power on the first respondent or his nominee either to cancel

the process of election or reschedule theÂ election. The date for convening the special meeting is to be fixed by the Municipal Secretary after

consulting the Divisional Commissioner.Â Thereafter, the Rules provide for no role to be played by the Divisional Commissioner except presiding over

the special meeting and to declare the result of the election.

16 Now, coming back to the impugned order, it specifically records that the first respondent has purported to cancel the entire process of election

including the process of filing of nomination papers. It was sought to be urged that he has not cancelled the election process butÂ he has rescheduled

the election.Â This argument is completely devoid of any substance as in the impugned order, the first respondent has specifically recorded that he

has cancelled the process of election from the stage of filing of nomination papers.Â In fact, there is a specific stand taken by the first respondent in

his affidavit that â??I had only cancelled the election process and rescheduled itâ?. In fact in the impugned order he has mentioned that he has

cancelled the nomination papers.

17 Thus, the first respondent has exercised a non-existing power. While doing so, he has interfered with the process of election of the post of Chairman of the Standing Committee which he was not empowered to do so. He had a limited role of firstly to be consulted by the Secretary at the time of fixing date of the special meeting and secondly, either to personally preside over the said meeting or appoint his nominee. Even the perusal of Rule 6 of the Election Rules shows that there is no power vesting in the first respondent to cancel and reschedule or postpone the process of election. Thus, there is absolutely no difficulty in holding that the order passed by the Divisional Commissioner is without jurisdiction.

18 An argument sought to be made on the basis of the Article 243ZA of the Constitution of India which applies only to the election of the Municipalities. Therefore, the said argument has no bearing.

19 The question is whether we should interfere under Article 226 of the Constitution of India. Five decisions have been relied upon by the learned counsel for the State for contending that the writ jurisdiction is discretionary and by exercising the said jurisdiction, a writ Court cannot restore an action which is blatantly and patently illegal.

20 Firstly, we may note that a communication dated 2nd March 2018 was issued by the first respondent to the Municipal Secretary after process of accepting nomination papers on 1st March 2018 was over in which he had issued directions about the manner in which the election will be conducted on the next day.

21 Now, we refer to the impugned order. The impugned order refers to and relies upon following documents/material; (1) The letter dated 1st March 2018 forwarded by the Municipal Secretary, (2) the letter dated 2nd March 2018 of the second respondent and (3) video clip. In further part of the order, there is a reference to the application made by the seventh respondent and one Rajashri Aambadas Kanake, another elected councilor.

22 As far as the second respondent is concerned, obviously, he had no personal knowledge of what transpired on 1st March 2018 as he was to preside over the meeting scheduled to be held on 3rd March 2018. Thus, in effect, the first respondent relied upon the complaints of the seventh respondent and other elected councilors made to the Municipal Secretary, the

report of the Municipal Secretary and a video clip. It is an admitted position that the first respondent conducted no inquiry himself. He did not call the seventh respondent for inquiry who had made a very serious allegation regarding snatching of his nomination paper. With a view to ascertain truthfulness of his allegations, it was necessary for the first respondent to hold an inquiry. There was no attempt made by him to verify the authenticity and genuineness of the video clip. There is no attempt made to ascertain whether the video recording is of 1st March 2018 and whether the video recording really shows what transpired in the office of the Municipal Secretary on that day. He ought to have verified the authenticity and genuineness of the contents of the video clip. Thus, the first respondent accepted what the Municipal Secretary stated in his report as a gospel truth. He proceeded on assumption that the video clip is a genuine video clip and that it depicts what transpired between 11.00 a.m. to 2.00 p.m. in the office of the Municipal Secretary on 1st March 2018. His finding that there was a chaotic situation on 1st March 2018 in the office of the Municipal Secretary is not based on any independent inquiry made by him but only on the basis of the report of the Municipal Secretary and the video clip. Without making any independent inquiry, the first respondent has come to a very serious conclusion that the process of acceptance of nomination forms is vitiated as a result of chaotic situation and law and order situation allegedly created in the office of the Municipal Secretary. He did not call the Municipal Secretary for inquiry. It is significant to note that though the seventh respondent alleges that on 1st March 2018, he was prevented from filing nomination, on 6th March 2018, admittedly he did not file his nomination. In fact, on 1st March 2018 and on 6th March 2018 only the fifth respondent and petitioner filed nomination papers. The seventh respondent did not file nomination paper on 6th March 2018.

23 Even the arguments made across the bar of the learned senior counsel for the State Government, the learned counsel for the Municipal Corporation and the Municipal Secretary and the learned counsel for the contesting respondents proceed on the footing that what is stated by the Municipal Secretary in his report is a gospel truth and that the video clip is genuine. Assuming that the first respondent has a statutory power, he was dealing with a serious issue of conduct of the election for the post of Chairperson of the

Standing committee in a special meeting.Â Without holding any independent inquiry and without calling the seventh respondent for an inquiry who had made a very serious allegation and without verifying the correctness of his allegations, the first respondent in a very casual manner accepted the allegations made in the report of the Municipal Secretary and has relied upon the video clip without even making an attempt to verify the genuineness and authenticity of the video clip. Without holding any independent inquiry, the first respondent has interfered with the democratic process of election. Not only that he has interfered with the process, but he has purported to cancel the election process from the stage of acceptance of nomination papers.

24 If according to the case of the seventh respondent, he was prevented from filing the nomination paper or that his nomination paper was not accepted for any reason, his remedy was to adopt appropriate remedy which is available in law for challenging the result of the election.Â In fact, this position is conceded by the learned counsel for the seventh respondent.

25 If this Court confirms the impugned order which is per se without jurisdiction, the sanctity of the democratic process of election will be lost.Â As stated earlier, this is not a case whereÂ after making due inquiry, any finding of fact was recorded by the first respondent Divisional Commissioner.

26 Even assuming that there was some illegality which took place on 1st March 2018 at the time of acceptance of nomination papers, the same was a ground for challenging the result of election in accordance with law.

27 Therefore, we do not agree with the submissions canvassed by the learned senior counsel for the State Government and the Municipal Corporation that by setting aside the impugned order, this Court will restore something which is illegal.

28 We may also note here that we have already quoted Rule 2 of Election Rules and in particular subÂRule 3 which mandates that aÂ special meeting called after fixing of the date in terms of subÂRule 2 shall not be cancelled or adjourned.Â In the present case, the first respondent has set at nought the said mandatory provision and has set aside the entire election process right from the stage of filing the nomination papers.

29 Now coming to the decision in the case of Mohinder Singh Gill and another (supra), the Apex Court has discussed the powers of the Election

Commission of India while dealing with a situation where before the declaration of the final result, the ballot papers and ballot boxes were destroyed in

mob violence.Â In the present case, we are dealing with the order passed by the first respondent who plays no role at all except as a Presiding

Officer and to give consultation to the Municipal Secretary for fixing the date of meeting.Â The Apex Court was dealing with the powers of the

Election Commission of India. In this case,Â the first respondent has passed an order which is null and void.Â If we allow such illegal order to stand,

it will completely defeat the democratic nature of the election process for the post of the Chairman of the Standing Committee.Â Even in the case of

Kishansing Tomar (supra), the issue was of the power of the State Election Commission where it was held that the power of the State Election

Commission to conduct election is not less than that of the Election Commission of India.

30 Now, coming to the separate petition filed by the seventh respondent the only substantive prayer made therein is to allow him to file nomination

form in the process of election which was set aside by the first respondent. Even according to the case of the petitioner, he has a remedy available to

challengeÂ what allegedly transpired on 1st March 2018 while challenging the result of the election.

31 Hence, we pass the following order:

(I) The impugned order dated 3rd March 2018 and all further steps taken on the basis of the said order and all consequential actions taken on the basis

of the said order are hereby quashed and set aside and now the election which was scheduled to be held on 3rd March 2018 will proceed further.Â

The Municipal Secretary shall fix the date for holding special meeting in consultation with the Divisional Commissioner;

(II) Writ Petition No.2925 of 2018 is allowed on above terms and Writ Petition No.3346 of 2018 is rejected;

(III) We make it clear that we have made no adjudication on the factual controversy in connection with the alleged incident of 1st March 2018;

(IV) All concerned to act upon an authenticated copy of this order;

(V) At this stage, the learned counsel for the fifth respondent prays for stay of execution of this order;

(VI) We direct that this Judgment and Order shall not operate till the expiry of

the period of one month from the date on which this Judgment and order is uploaded;

(VII) We, however, clarify that in the meanwhile nothing further shall be done on the basis of the impugned order.