

(1996) 03 BOM CK 0016

In the Bombay High Court

Case No : Election Petition No. 1 of 1994

Ganeshrao Raut

APPELLANT

Vs

The Returning Officer, Parbhani Local Authorities Constituency,
Parbhani, District Parbhani and Others

RESPONDENT

Date of Decision : 12-03-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 13 Rule 1, Order 6 Rule 11, Order 6 Rule 15, Order 6 Rule 16
Conduct of Elections Rules, 1961 — Rule 71(1), 74, 75, 82
Representation of the People Act, 1951 — Section 117, 81, 82, 83, 86

Citation : AIR 1996 Bom 416 : (1996) 98 BOMLR 55

Hon'ble Judges : N.P. Chapalgaonker, J

Bench : Single Bench

Advocate : C.G. Madkholkar and D.D. Pokharkar, for the Appellant; V.R. Manohar and S.C. Dharmadhikari and S.V. Chillarge, P.V. Mandlik and S.G. Deshmukh, for the Respondent

Judgement

1. This is an Election Petition under Section 81 of the Representation of the People Act, 1951 challenging election to Maharashtra Legislative Council from 14 --Parbhani Local Authority Constituency which took place on 15th June, 1994 and the result of which was declared on 17th. Petitioner is a defeated candidate at the said election and the Respondent No. 3 is the returned candidate. Respondents Nos. 4 to 9 are other contestants who lost the election and Respondents Nos. 1 and 2 were the Returning Officer and the Collector, Parbhani who were directed to be deleted as per order of this Court dated 14-3-1995. A SLP challenging that order was filed before the Supreme Court and the Supreme Court was pleased to dismiss it with an observation that the said dismissal not to be construed to mean that the Returning Officer and the Collector cannot be summoned if the High Court is satisfied that they are required to be examined in the interest of the case.

2. Only dispute raised before this Court relates to the manner in which counting

was made. On 12th January, 1996, purshis was passed by the petitioner that if the contesting Respondent No. 3 does not oppose production of certain affidavits filed in support of the pleadings, there is no necessity to record any further evidence. On this purshis, the contesting Respondent No. 3 submitted her say that the Respondent No. 3 does not oppose production of the affidavits filed in support of the petitioner and does not want to lead any evidence. This way, both the parties agreed that no evidence is necessary in this case.

3. Material contentions raised by the petitioner in his election petition are as follows --

(A) Total number of votes in this Constituency are 424. All the voters have cast their votes. They were all accepted as valid votes, while the votes that were actually counted were only 353 which is evident from the result sheet. Therefore, as many as 71 votes were not counted preference wise and other preferences in these ballot papers were not transferred. This has materially affected the election result.

(B) The counting agent of the petitioner has examined these 71 votes/ballot papers and 3rd, 4th and 5th preferences in these 71 ballot papers were in favour of the petitioner and not in favour of Respondent No. 3. Because of the progressive exclusion of the contesting candidates, 3rd preference onwards will be valid as 1st preference and ought to have been transferred in favour of petitioner. If it would have been done, it would not have been possible for the Returning Officer to declare Respondent No. 3 elected without completing counting of all preferences until anyone of the contesting candidate completes the quota.

(C) The petitioner himself and through his agent examined the ballot papers and according to the information received from the agent who examined these 71 ballot papers, 3rd, 4th, 5th, 6th and also 7th preference votes were given to the petitioner while the Respondent No. 3 has hardly polled any votes amongst these 71 votes. Result sheet shows that non-transferable votes are 81. These 81 ballot papers are such in which preferences at 6th and 7th round were not counted. As a matter of fact, the result sheet itself is full of mistakes because figure ought to have been 71 instead of 81.

(D) In paragraph Nos. 14 and 15, some voters arc mentioned and it is alleged that they have cast 3rd, 4th, 5th and 6th preference in favour of the petitioner. Names of the voters and the preference which is alleged to have cast in favour of the petitioner are as under:

and it is alleged that these preferences were not counted.

On these pleadings, the petitioner has claimed re-count in paragraph 13 of his petition. He also prayed that election of Respondent No. 3 be set aside and re-counting be ordered of these 71 ballot papers, particularly 3rd, 4th and 5th preferences and after its re-count whosoever has secured more votes he

declared elected.

4. Respondent No. 3 -- returned candidate has filed her written statement at Exhibit 14 and denied material contentions raised in the above mentioned paragraphs. She has contended that there is no breach or violation of the rules. It was denied that because of non-transfer of 71 votes, election result was materially affected. It was denied that 3rd, 4th and 5th preferences of 71 votes were cast in favour of the petitioner and it was examined by the counting agent of the petitioner. It was further denied that merely because there were 7 candidates, their preferences onwards will be valid as first and ought to have been transferred in favour of the petitioner. It was also denied that if these preferences would have been counted, it would have not been possible to declare Respondent No. 3 elected. Returned candidate contends that she was present throughout at the time of counting and neither the petitioner nor his agent were present. It is also contended that the petitioner had at no stage of counting requested for a recount then and there by furnishing all particulars. No details have been mentioned in the petition about the contentions raised except mentioning names of few voters in paragraphs 14 and 15. It is also contended that the petition is not verified in accordance with law i.e. according to provisions of Order 6, Rule 15 of the Code of Civil Procedure, 1908 which has been expressly made applicable to the election petition by virtue of Section 83(1)(c) of the Representation of the People Act, 1961.

5. It is necessary to mention 3 applications filed by the parties. First one is Exh. 13 presented by the petitioner seeking production of certain affidavits annexed to that application. This application purporting to be under Order 13, Rule 1 was presented on 25-10-1994 and it was accompanied by 7 affidavits sworn in the Court of Civil Judge, S. D., Hingoli. These affidavits are of -- Girish Balajirao Jadhav, Shambhusingh Vijaysing Gahilot, Ashok Kaluram Wadhe, Gajanan Vithalrao Ghuge, Pathan Anwar Khan Habib Khan, Shekar Basatwar and Humayun Rashid Mohd., Omar Naik. These affidavits state that the deponents had cast preference in favour of the election petitioner as indicated in the foregoing paragraphs. All these affidavits are identical and copy of each other except the difference in the name of deponent and the preference which he is alleged to have been given in favour of the petitioner. These affidavits are identically verified and the verification clause reads as under --

"Verified that the contents of paras 1 to 3 above are true to my personal knowledge and belief. Hence, signed at Hingoli on this 27th day of September, 1994."

Since production of these affidavits is not opposed by the Respondents, I do not wish to go into propriety of production of these affidavits but its evidentiary value will have to be taken into account. Application (Exh. 17) was submitted by the returned candidate -- Respondent No. 3 on 16-11-1994 for a direction that paragraphs Nos. 11 to 18 of the election petition be struck off and the petition be dismissed. It was contended that the petition is lacking in material particulars.

On 7th December, 1994, an application (Exh. 21) was moved by the petitioner praying that the written statement filed by the returned candidate -- Respondent No. 3 be not accepted as it has been filed in breach of provisions of the Representation of the People Act and Order 6 of the Code of Civil Procedure, 1908.

6. A dispute has been raised about the verification of the petition that it is not in accordance with the requirement of law. Section 83 of the Representation of the People Act, 1951 provides for the manner in which pleadings in election petition are to be verified. Sub-section (1)(c) of Section 83 lays down that it shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908. Order 6, Rule 15 of the Code of Civil Procedure, 1908 lays down that the person verifying shall specify by reference to the numbered paragraphs of the pleading what he verifies of his own knowledge and what he verified upon information received and believed to be true. The verification of election petition is made by the petitioner in the following manner --

"I, Ganeshrao S/o. Nagorao Raut, age major, Occupation agricultural, residing at Laxmi Nagar, Parbhani, today at Aurangabad, do hereby state on solemn affirmation that the contents of facts in the aforementioned election petition are true and correct to my personal knowledge and that the contentions raised in paragraphs which include legal submissions, are believed to be true and correct. Hence this affidavit verified on this 1st day of August, 1994 at Aurangabad."

The objection to this verification appears to be that the petitioner has not verified by reference to the numbered paragraphs of the pleadings what he verifies of his own knowledge and what he verifies upon information received and believed to be true.

7. It is true that the rules are made for compliance and as observed by the Supreme Court "verification of the pleadings is also important to test genuineness and authenticity of allegations and also to make the deponent responsible for allegations." (Read A.K.K. Nambiar Vs. Union of India (UOI) and Another,), But the defect in the verification by itself will not be sufficient to dismiss the petition. Section 86 of the Representation of the People Act lays down that High Court shall dismiss an election petition which does not comply with the provisions of Section 81, 82 or Section 117. Therefore, any defect in the "verification will not attract the dismissal of the petition compulsorily by the High Court on that ground alone as held by Supreme Court in the case of Murarka Radhey Shyam Ram Kumar Vs. Roop Singh Rathore and Others, . In that case, Supreme Court referring to Section 90, as it then was in the statute book, found that the legislative mandate to dismiss election petition for noncompliance of Sections 81, 82 and 117 only.

8. Obviously, verification is improper. Some material information which is sought to be pressed in service for contending that the counting was not proper in paragraphs 14 and 15 of the petition. Paragraph 16 of the petition says that this

information was supplied to him by voters mentioned in paragraphs Hand 15, which petitioner believes to be true but the same has not been stated in the verification clause. Secondly, there is no reference to the numbered paragraphs to state as to which facts are believed to be true by the petitioner on the information supplied by somebody else and as to facts stated in which paragraphs are correct as per his own personal knowledge. The verification has been made in most casual manner and without looking to the rules set therefor. Same is the case about the verification of the affidavit filed along with the Application (Exh. 13). The voter stating that he has cast a particular preference in favour of a particular candidate is something important which may, in a given case, material evidence in favour of either of the party. Verification of these affidavits is also improper. However, for this reason alone I am not discarding them. Even in the verification of the written statement, there is no reference to the numbered paragraphs. However, deponent verifies that whatever stated in the foregoing paragraphs of the written statement is true and correct to the best of her knowledge. It is true that the Respondent No. 3's pleading is also not in accordance with Order 6, Rule 15 but it will not be proper to struck off written statement merely on the ground that numbered paragraphs have not been referred to in the verification. Verification is solely on the basis of the knowledge of respondent and her belief has not been brought into play.

9. Instead of considering the striking of some paragraphs of the petition above for not giving material particulars or rejecting the petition for non-disclosure of the cause of action at the preliminary stage and since no evidence was required to be recorded, I have incorporated these contentions in the issues framed. Counsel were heard on the question of framing of the issues and considering draft issues submitted by him, following issues were framed about which no dispute is raised by the parties.

ISSUES:

1. Whether the petition is liable to be dismissed in limine under Order VII, Rule 11 read with Order VI, Rule 16 of the CPC with Section 86 of the Representation of the People Act, 1951 for failure to disclose any cause of action ?

2. Whether the petitioner proves that the Returning Officer was in error in declaring 71 ballot papers, referred to in Para 12 of the petition as exhausted and he should have taken, in consideration the 3rd, 4th, 5th and 6th preferences indicated in those ballot papers, allegedly casted in favour of the petitioner?

3. If so, whether the petitioner makes out a case for re-count of the votes ?

4. What order?

10. Part VII of the Conduct of Elections Rules, 1961 lays down rules regarding counting of votes in which single transferable vote system is employed. Rule 74 directs that the ballot papers should be arranged in parcels according to the first preference recorded for each candidate and crediting value of the papers in his

parcel. Rule 75(1) lays down the method by which the quota is to be arrived at. Sub-rule (3) lays down the procedure when at the end of the count, no candidate can be declared elected having completed the quota. This sub-rule (3) reads as under --

(3) If, at the end of any count, no candidate can be declared elected, the returning officer shall --

(a) exclude from the poll the candidate who up to that stage has been credited with the lower value;

(b) examine all the ballot papers in his parcels and sub-parcels, arrange the unexhausted papers in sub-parcels according to the next available preferences recorded thereon for the continuing candidates, count the number of papers in each such sub-paragraph and credit it to the candidate for whom such preference is recorded, transfer the sub-paragraph to that candidate, and make a separate sub-paragraph of all the exhausted papers; and

(c) see whether any of the continuing candidates has, after such transfer and credit, secured the quota.

In the election, no candidate had secured more votes than the quota in first preference. Therefore, sub-rule (3) comes into operation. Respondents Nos. 5 and 6 did not poll even a single first preference vote. Therefore, they were excluded from the consideration. Next turn was that of the Respondent No. 7 who secured one first preference vote. When he was excluded, the vote came to be transferred in favour of the Respondent No. 4 since second preference was cast in his favour and at the end of that count, total votes received by Respondent No. 4 became 101 + 1 i.e. 102. In the third count, Respondent No. 8 -- Liyakatalikhan was excluded who has polled only 4 first preference votes. All these 4 votes were exhausted after the exclusion of this respondent, meaning thereby, that there was no second preference cast in these ballot papers in favour of the continuing candidate. Needless to clarify that at the time of exclusion of Pathan Liyakatalikhan, Respondents Nos. 5, 6 and 7 were already out of the contest and only petitioner, respondents Nos. 3 and 9 were in the field. In the fourth count, Respondent No. 9, who had secured 5 first preference votes, was excluded and 5 votes were considered but they were marked as exhausted. It means that there was no second preference cast in these ballot papers in favour of any of the continuing candidates who were only petitioner and the respondents Nos. 3 and 4. It is not the case of the petitioner that any of these exhausted votes should have been counted in favour of the petitioner. At the 4th round of counting, the respondent No. 4 being lowest polled continuing candidate was excluded and his votes were scrutinized to find out to whom they should be transferred, it appears that out of these ballot papers, 21 votes were transferred to election petitioner making his total 166 and 9 votes came to be transferred in favour of the Respondent Nos. 3 and 71 votes became exhausted votes being not transferable (by typographical error, the election result shows number of these

votes to be 81 but it should be read 71).

11. Shri Madkholkar, learned Counsel appearing on behalf of the petitioner, contended that these 71 votes should have been transferred in favour of the petitioner. According to him, counting mere second preference is not contemplated by the rules but 3rd, 4th, 5th and 6th preference listed in these ballot papers should have been counted. This is perhaps the only contention raised before me which is required to be considered. Rules 75(3)(b) requires that at the time of the exclusion of the candidate, unexhausted ballot papers will have to be arranged in sub-parcel according to the next available preference recorded thereon for the continuing candidate, count the number of papers in each such sub-parcel and credit it to the candidate to whom such preference is recorded, transfer the sub-parcel to that candidate, and make a separate sub-parcel of all the exhausted papers.

12. We find that the Returning Officer has transferred 30 votes to the petitioner and respondent No. 3 and rest of the ballot papers were found exhausted, meaning thereby that there was no preference cast in favour of any continuing candidate. These voters either must have not cast the second preference at all or must have cast second preference in favour of a person who is already excluded. "Continuing candidate" as defined under Rule 71(1), is a candidate not elected and not excluded from the poll at any given time, and the "exhausted ballot paper" has been defined to be--

(3) "Exhausted ballot paper" means a ballot paper on which no further preference is recorded for a continuing candidate, provided that a paper shall also be deemed to have become exhausted whenever--

(a) the names of two or more candidates, whether continuing or not, are marked with the same figure and are next in order of preference; or

(b) the name of the candidate next in order of preference, whether continuing or not, is marked by a figure not following consecutively after some other figure on the ballot paper or by two or more figures,"

Thus, it is clear that except 30 votes transferred to the petitioner and Respondent No. 3, rest of the ballot papers become exhausted ballot papers since the next preference which was considered was not in favour of any continuing candidate. When Respondent No. 4 -- Khurana was excluded, petitioner and Respondent No. 3 were only continuing candidates and next preference in favour of any other candidate would render ballot papers exhausted one.

13. Rule 71(8) defined "unexhausted paper" to mean, a ballot paper on which a further preference is recorded for a continuing candidate. The meaning of the further preference or next preference is second preference in respect of 101 votes cast in favour of respondent No. 4 -- Khurana since in these ballot papers, Khurana was given first preference. Shri Madkholkar wants to contend that

whatever may be second preference in these ballot papers, the further preference should have been counted since principle of this election system is that no vote shall go waste. Petitioner was confident that further preference in these papers were in favour of him. Firstly, whenever a second preference was given in favour of the petitioner, those votes (21 in Nos.) have already been transferred to the petitioner. 9 votes were transferred to the Respondent No. 3. Other ballot papers become exhausted ballot papers since further preference was not in favour of any continuing candidate or there was no further preference cast at all. It is not the case of petitioner that second and further preference in these ballot papers was given to any continuing candidate, while obviously can not be since at that time only election petitioner and returned candidate were continuing candidates.

14. Paragraphs Nos. 9 and 10 of the election petition makes grievance that 3rd, 4th and 5th preferences in 71 ballot papers were in favour of the petitioner and not in favour of Respondent No. 3. Even assuming this to be true, if the second preference in these ballot papers was cast in favour of candidate who was already eliminated or second preference was not cast at all and when marked second preference, 3rd, 4th or 5th preference was cast in favour of the petitioner, these ballot papers are of no use to petitioner because these papers will be exhausted ballot papers cast since second preference was not cast in favour of continuing candidate.

15. When second preference in these ballot papers was taken into consideration, following possibilities could have been there.

(A) There was no second preference at all.

(B) Second preference was in favour of the petitioner (these votes have already been transferred to him).

(C) Second preference was in favour of the Respondent No. 3 (these have already been transferred to her).

(D) Second preference was in favour of any other candidate since such candidate was not a continuing candidate, ballot paper becomes an exhausted ballot paper and when second preference is cast in favour of a candidate who is not a continuing candidate, further preferences become useless since ballot paper is an exhausted ballot paper within the meaning of the rules.

Thus, allegation made by the petitioner, is totally baseless and the facts alleged are impossible to exist. 7 deponents who have filed the affidavits and whose names have been mentioned in their affidavits as to in whose favour they have cast their first preference or second preference vote. But since the dispute is raised in respect of 71 ballot papers in which first preference was cast in favour of Respondent No. 4 --Khurana, it can be presumed that the deponents might have not cast their second preference vote in favour of Respondent No. 4 -- Khurana. It is also clear that they have not cast their second preference vote in

favour of the petitioner or the Respondent No. 3 -- returned candidate. Therefore the only possibility remains is that they must have cast their second preference vote in favour of Namdeo Ghughe, Balkrishna Chandak or Sharad Devalgaonkar, Liyakatalikhan Pathan or Shakuntalal Ramprasad Sharma. If they have cast their second preference vote in favour of any of these candidates then ballot paper becomes exhausted ballot paper since these candidates were not continuing. When Brijlal Khurana was excluded, if voters have not cast their second preference vote at all and have given 3rd, 4th 5th and 6th preference as the case may be in favour of the petitioner, even then the ballot paper is an exhausted ballot paper since name of the candidate in order of preference, whether continuing or not, is marked by a figure not following consecutively after some other figure on the ballot paper or by two or more figures, as is laid down in sub-rule 3(b) of Rule 71 of the Conduct of Election Rules, 1961.

16. Shri Madkholkar relied on Rule 71(7) defining "transferred vote" and contended that plural were preferences as used in this rule. Reference to the preferences given in the same ballot paper and not to the plurality of the ballot papers. He also submitted that the definition has not been properly interpreted in the case of Dattatraya Eknath Lanke Vs. Returning Officer, Amravati and Others, . I do not think that any other meaning can be attached other than what is held to be the correct meaning of the rule by Mohta, J. in this case. Definition of the "transferred vote" will have to be read in the light of the judgment of this Court in Lanke's case. This Court in Lanke's case cited supra rightly emphasized on the fact that reference to the preference is singular in this definition. The scheme of the Rules in Chapter VII of the Conduct of Election Rules, 1961 is that a vote can be transferred if it is not regarded a ballot paper which is not (sic) exhausted one and if the ballot paper becomes exhausted, then any preference when recorded, such ballot paper cannot be transferred and the vote can never be a transferred vote. Therefore, I am in respectful agreement with the view expressed by Mohta, J. in the case cited supra.

17. Shri Madkholkar further contended that if these 71 votes are counted, this will not violate secrecy of the ballot. He relied on a judgment of Punjab and Haryana High Court in the case of Shri Mahender Singh Vs. Shri Hukam Singh and others, . When it is to be decided when the recounting is to be ordered or not, maintenance of the secrecy of the vote is not the only consideration. A recount in an election cannot be ordered merely for asking. Unless a proper foundation is led in the pleadings how the reasons which rendered the counting already held doubtful, the order of recount is totally unwarranted. Unless the pleadings disclose and the evidence supports material irregularity which might have affected the result, no recount should be directed. As was observed by Mathew, J. speaking for Supreme Court in Smt. Sumitra Devi Vs. Shri Sheo Shanker Prasad Yadav and Others, :

"A recount will not be granted as a matter of right but only on the basis of evidence of good grounds for believing that there has been a mistake in the

counting. It has to be decided in each case whether a prima facie ground has been made out for ordering an inspection."

Rule 82 of the Conduct of Election Rules, 1961 permits any candidate or in his absence, his election agent or counting agent that he may, at any time during the counting of the votes either before the commencement or after the completion of any transfer of votes requests the returning officer to re-examine and recount the papers of all or any candidates (not being papers set aside at any previous transfer as finally dealt with), and the returning officer shall forthwith reexamine and re-count the same accordingly. This provision could have been taken help of by the petitioner and he could have demanded the re-count. But this was not done by being present on the occasion. Secondly, whatever was stated in the election petition does not appear to be true on scrutiny. Therefore, no ground is made out for re-count and the prayer in this respect will have to be rejected.

18. Since I have discussed the evidence and found that the contentions raised by the petitioner are totally untrue and he has failed to prove them, I answer Issue Nos. 2 and 3 in negative. Since I am dismissing the petition after considering all the contentions raised, I do not wish to answer the Issue No. 1 whether the petition is liable to be dismissed in limine for failure to disclose any cause of action. I, therefore, dismiss the election petition filed by the petitioner and uphold the election of the Respondent No. 3 in 14-Parbhani Local Authority Constituency to the Maharashtra Legislative Council. Costs of this election petition are quantified to Rs. 1,500/- and I direct that Respondent No. 3 be paid this cost from the cost deposited in this Court. The balance of the cost be refunded to the petitioner.

19. The Registrar of this Court shall intimate the substance of the decision to the Election Commission at New Delhi, to the Chairman of the Maharashtra Legislative Council at Bombay and soon thereafter send authenticated copies of the decision to both these authorities. Petition disposed.

Petition dismissed.