

(1966) 08 BOM CK 0018

In the Bombay High Court

Case No : Special Civil Application No. 578 of 1966

Jagannath Pundlik and Others

APPELLANT

Vs

Sukhdeo Onkar Wankhede and Others

RESPONDENT

Date of Decision : 10-08-1966

Acts Referred:

Bombay Village Panchayats Act, 1959 — Section 13(3), 15, 16, 28, 44(2)
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 2
Constitution of India, 1950 — Article 226, 227

Citation : AIR 1967 Bom 317 : (1967) 69 BOMLR 300 : (1967) MhLj 126

Hon'ble Judges : Patel, J;Deshmukh, J

Bench : Division Bench

Advocate : V.R. Manohar, for the Appellant; V.M. Kulkarni and C.G. Madkholkar, for the Respondent

Judgement

Patel, J.

(1) This petition demonstrates the manner in which some of the Panchayats are working under the Panchayats Act.

(2) The dispute between the parties arises out of an election to the village Panchayat of wadshingi, taluq Jalgaon, which took place on May 25, 1966. The result of the election were declared on the next day. At this election petitioners 1 to 4 and respondents 1 to 5 were elected. The meeting for the election to the Sarpanch of this Panchayat was fixed originally for July 5, 1966, and then adjourned to July 18, 1966. In the meantime, respondents 6 and 7 filed two election petitions against petitioners 1 and 2 on June 10, 1966. Respondent No. 1 was the Sarpanch elected to the prior Panchayat. He then made an application u/s 16 of the Bombay Village Panchayats Act 1958, to the Collector for disqualifying the petitioners 1 and 2 on the ground that they were disqualified for being elected as members of the Panchayat because petitioner no. 1 was below the age of 25 and petitioner no. 2 was below the age of 21 years. The Collector rejected this application on July 8, 1966. Prior to this, before the first date for

election of the Sarpanch, respondent no 1 had made an application to the Collector for postponing the election on the ground that an election petition was pending. The Collector rejected this application. Thereafter, respondents 6 and 7 presented an application for an in term injunction to the Civil Judge before whom the election petition was pending, praying that petitioners 1 and 2 be restrained by an injunction from voting at the ensuing meeting for election of the Sarpanch, adjourned to July 18, 1966. The application was made on July 14, 1966 and the interim injunction was granted by the learned Judge on July 15, 1966. Surprisingly enough, this injunction was not served right until one hour before the meeting and the petitioners were effectively prevented from voting at the election. The petitioners seek to challenge the order of the learned Civil Judge & further consequential order to quash the election of respondent No, 1 as Sarpanch and of respondent no. 3 as Upasarpanch of the Village Panchayat . It appears that the meeting which was scheduled to take place on July 18, 1966, had to be adjourned to July 19, 1966. Though the injunction related to the meeting of July 18, petitioners 1 and 2 were not allowed to vote at the meeting which actually took place on July 19, 1966, by the presiding officer.

(3) Mr. Manohar contends that the Civil Judge acting under the provisions of S. 15 of the said Act acts as a persona designata and therefore he has no power to issue an in term injunction restraining any of the elected members from voting at the election of the Sarpanch. It has been held that the Civil Judge acting u/s 15 is not a Court but merely a persona designata. It is not necessary, however, to decide whether or not he has got all the powers of a Civil Court while holding an enquiry and whether the powers of granting interim injunction are powers which are exercisable during the enquiry by him. For the purposes of this matter we will assume that the Civil Judge has by reason of section 15 (2) all the powers of a Civil Court.

(4) A Civil Court can grant injunction only under Order 39, Rules 1 and 2. Evidently rule 1 has no application. Rule 2 applies only if conditions thereof are satisfied.

The rule 2 so far as relevant reads;

"In any suit (1) for restraining the defendant from committing a breach of contract or (2) other injury of any kind apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of."

We may assume that though election petition is not a suit, it may even be treated as suit. The first party cannot apply for there is no question of a contract. In order to bring the case within the second part the applicant must show some legal injury of some kind.

(5) In order to prove legal injury the applicant must establish that he has a legal right to do something and the opponent prevents him from the exercise of such right. Unless a right is alleged and/or shown to exist prima facie, there can be no

question of any breach of that right. The question then is whether the applicant has a right to do that what he wants to prevent the defendant from doing.

(6) Respondent no. 6 applied u/s 15 of the Act to have the election of the petitioners set aside from ward 3 from where petitioners 2 and 3 were returned, and respondent 7 applied to set aside the election of petitioner 1 and respondent no 5 from ward 4. Respondent No. 6 was a voter while respondent no. 7 was a candidate at the election. Under the Act what is the right that each of them possesses? Neither one nor the other is entitled to act as member of the Panchayat or vote at its meeting. In fact, until election of petitioners 1 and 5 is set aside, and he is declared elected he would have no right in respect of which injury is threatened to him. If he has no right there can be no injury to him at all. There is no explanation as how the legitimate exercise of his right by petitioners and respondent no. 5 would cause the applicants any injury.

(7) Apart from this, it is impossible under the provisions of the above Act to countenance the above contention that elected representatives of the people can be prevented. from exercising their right of the voting at a meeting of the Panchayat during the pendency of an election petition u/s 15 of the Act. In this connection we must refer to section 15 (5) (a), Section 28 and Section 44 (2), S. 15 (5) (a) requires the Court to set aside the election of a candidate if he has committed corrupt practice after the enquiry. When there is any other dispute, the judge has to make scrutiny of the votes and then declare the candidate with the largest vote duly elected. Section 28 prescribes the terms of the office of the members elected to the Panchayat. It provides that the term shall be deemed to commence on the date of the first meeting of the Panchayat which shall be held on a day to be fixed by the Collector within four weeks of the date on which names of elected members are published under S. 10. Section 44 (2) provides that proceeding of the Panchayat shall be valid notwithstanding it is discovered subsequently that some person who was not entitled to do so, sat or voted or otherwise took part in the proceedings.

(8) The scheme of the Panchayats Act as of such similar Acts is that the person who is elected to the office continues to act in the office until his election is set aside by a tribunal entitled to do so. Section 16 supports the above conclusion. It provides for cases where a person who is elected but who was disqualified or who incurs disqualification u/s 14. Section 16 (2) provides that an elected member shall not be disqualified from voting unless the Collector decides the dispute. Under the Act a person who is declared elected has statutory rights to attend the meetings of the Panchayat and vote at its meetings. The Court cannot in any manner touch his statutory rights until his election is set aside or some one else is declared elected in his place. The reason for this is obvious. When an elected member exercises his right of voting he does not exercise it for himself, but as representative of the voters. Legitimate exercise of his right as a member by him cannot be regarded as any matter affecting respondent no. 7. In England it seems no injunction so far has ever been granted preventing an elected

member from exercising his rights during the pendency of an election petition against him.

(9) Mr. Manohar is right when he contends that the ground that the petitioners 1 and 2 had not completed 21 years of age and therefore were not qualified either to vote or to be elected as members cannot be taken in an election petition under S. 15, inasmuch as the entry in the list of voters is made conclusive by section 13 sub-section (3) of the Act. In this contention he is supported by the decision of a Bench of this Court in Civil Revn. Appln. No. 25 of 1961. D/-30-9-1964 (Bom) in a case which arose under the C. P. and Berar Municipalities Act, sections 20 A, 12 (3) and 15 of which are similarly worded as the sections in the present case. To the same effect is the judgment by us in Dhondba Adku and Another Vs. Civil Judge, Junior Division, Hinganghat and Others, . It is clear, therefore that the allegation that the two petitioners were disqualified because of their age was not open to be made for setting aside the election of the petitioners 1 and 2 u/s 15. Thus on merits also the respondent Nos. 6 and 7 had no case.

(10) Mr. Kulkarni very strongly relied upon Bhimanna Balappa v. Ramchandra gopal Spl. Civil Appln. No. 126 of 1965, D/-15-2-1965, reported in 1965 MLJ 79, where a Bench of this Court observed that interim injunction ought not to be issued unless a prima facie case is found. Mr. Kulkarni wants us to import into this decision a further decision that the Court rules that under the Act injunction can be granted preventing a person from voting at the election of the office-bearers merely because his election is challenged if a prima facie case was made out. No such point was noted before the Court and none was decided. It may be that the Court in that case did not think it necessary to decide this aspect of the matter as the case may have appeared to be a very clear one. It is well recognised that the case is merely an authority for what it decides and not for what it has not decided.

(11) An argument of desperation was made by Mr. Kulkarni that as under the Act there is an alternative remedy to the petitioners, this Court ought not to interfere. It must be noticed that respondent No. 1 was only wanting to continue in office as long as he could and realising that his party may not be in a majority, made his best attempts to prevent the two petitioners from voting at the election of the office-bearers. He failed before the Collector on the ground of disqualification; he failed before the Collector in obtaining injunction against election to the office of Sarapanch, and ultimately therefore, through 6 and 7 he obtained the injunction. On the other hand, the harm caused to the petitioners and to the voters who elected them is immense, because they were not allowed to vote and respondent No. 1 has been able to continue in the saddle by election in a truncated body. The remedy that is provided is far too long and until the result of that proceeding is known respondent No. 1 would be enabled to continue in office where he has no right to be. We cannot therefore on the facts of this case hold that the remedy which is available to the petitioners as an

alternative remedy is adequate. This contention also must fail.

(12) In the result, we set aside the order of injunction made by the learned Judge and quash the election of respondents 1 and 3 i.e. we grant prayers (a), (b), (c) and (d) made in the petition. The petition is allowed. The petitioners will get their costs from respondents 1, 3, 6 and 7.

(13) Petition allowed.