
(1986) 11 BOM CK 0026

In the Bombay High Court

Case No : Election Petition No. 1 of 1986

Jagannath Ramchandra Nunekar

APPELLANT

Vs

Genu Govind Kadam and others

RESPONDENT

Date of Decision : 28-11-1986

Acts Referred:

Evidence Act, 1872 — Section 79

Representation of the People Act, 1951 — Section 103, 10A, 2(e), 33(4), 33(5)

Citation : (1987) MhLj 260

Hon'ble Judges : S.N. Khatri, J

Bench : Single Bench

Advocate : Avinash Shivade with S.P. Thorat, for the Appellant; C.J. Sawant for respondent No. 1, V.C. Kotwal with B.R. Gavai for respondent No. 3, R.J. Mane for respondent No. 4, Liladhar Vyas, for the Respondent

Final Decision : Dismissed

Judgement

S.N. Khatri, J.—This election petition challenges the by election of the first Respondent to the Maharashtra Legislative Assembly from Jaoli Constituency in Satara District, on the ground that the petitioner's nomination was improperly rejected by the Returning Officer the 5th Respondent before me.

2. Almost none of the material facts are in dispute. Because of the demise of the sitting member Shri D. B. Kadam, the by election in question was held on 2-2-1986. The last date for making nominations was 10th January 1986. Scrutiny of nomination papers was fixed for 11-1-1986. The petitioner and Respondents Nos. 1 to 4 were candidates among others. The petitioner filed his nomination on 9-1-1986. He is not registered as an elector in the Jaoli Constituency. His claim is that he was so registered in Shivaji Nagar Assembly Constituency, Pune District. Section 33(5) of the Representation of the People Act, 1951 (hereafter generally referred to as "the 1951 Act") requires that where the candidate is an elector of a different constituency, a copy of the electoral roll of that constituency or of the relevant part thereof or a certified copy of the

relevant entries in such roll shall be filed by him either along with the nomination paper or produced before the Returning Officer at the time of scrutiny. In purported compliance of this provision the petitioner filed a certified copy of entries from the Shivaji Nagar Constituency vide Exh. B-1. I will have occasion later to refer to it in more detail. Suffice it to say at the moment that the date of final publication of the rolls as mentioned at the bottom of this certified copy Exh. B-1 is 31-1-1984. At the time of receiving the nomination paper of the petitioner, the 5th Respondent brought to his notice that the extract Exh. B-1 was not from the roll last published, that is in January 1985. The petitioner was admittedly directed to produce the correct extract at the time of scrutiny..

3. It is again not in dispute that on 11th January 1986, the 5th Respondent started scrutiny of nomination papers at 11 a.m. When the petitioner's turn came, he was not present. It appears that after waiting for him for some time, the 5th Respondent rejected his nomination paper around noon on the ground that he had not complied with the provisions of Section 33(5) of the 1951 Act. The nominations of Respondents Nos. 1 to 4 were found in order and accepted. The petitioner reached the office sometime about 1 p.m. and produced a fresh certified copy of the relevant entry in the electoral roll: Vide Exh. D. It shows the date of final publication of the electoral rolls as 29-1-1985. The petitioner lodged an application with the 5th Respondent (Exh.E), requesting him to place on record the fact that he had produced a fresh certified copy, albeit after the 5th Respondent had already rejected his nomination paper.

4. The petitioner's challenge to the 1st Respondent's election is based on the sole ground that the rejection of his nomination was improper. The 2nd and 4th Respondents have not put in their written statements. The 3rd Respondent supports the petitioner's claim. The 1st and the 5th Respondents support the latter's order, rejecting the petitioner's nomination.

5. This petition is transferred to me by My Lord the Chief Justice in the middle of November 1986. The only issue that arises and is framed by me is whether the petitioner's nomination was wrongly rejected by the 5th Respondent. For the reasons that follow, I hold that the rejection was proper and as such the petition will have to be dismissed.

6. Besides himself, the petitioner has examined Kulkarni P.W. 2, Tahsildar of Haveli Taluka, Pune District, who had issued the two certified copies Exh. B-1 and Exh.D in his favour. Mansing Mardekar P.W. 3 who was also a candidate for the bye-election, is also examined to prove the undisputed fact that the objection to the petitioner's candidature was raised suo motu by the 5th Respondent himself and not by any candidate as such. The 1st Respondent has not led any evidence as he does not challenge any facts. At the request of the petitioner, the 5th Respondent has entered the witness box in order to tender himself for cross-examination. As nothing worth turns on oral evidence, I straightway go to the legal aspects.

7. Shri Shivade for the petitioner makes three main submissions. First on a true construction of the relevant provisions of the 1951 Act, the petitioner must be held to have complied with the requirements of Section 33(5) at the threshold on 9-1-1986 itself, that is at the time of presentation of his nomination paper to the 5th Respondent. The defect or deficiency in the first certified copy (Exh. B-1), if any, should have been ignored by Respondent No. 5 u/s 36(4) as being unsubstantial. The second submission of Shri Shivade is that at any rate on 11-1-1986 once the petitioner had produced the correct certified copy (Exh. D), the 5th Respondent should have revoked his earlier order and accepted his nomination paper. The learned Counsel in this connection points out that even as admitted by the 5th Respondent, the list of validly nominated candidates was published on the Notice Board only after the petitioner had reached the office with the fresh certified copy. It is urged that under the law, the 5th Respondent had adequate power to alter his earlier decision any time before the list was so published on the Notice Board u/s 36(8) of the 1951 Act. The third and the last branch of Shri Shivade's submissions is that on 11-1-1986 the 5th Respondent should have himself held a formal inquiry as contemplated by Section 36(2) of the 1951 Act, even if the petitioner was absent, and granted adjournment for a couple of days to enable the petitioner to rebut the objection.

8. Shri Kotwal for the 3rd Respondent relies on the admission of Kulkarni P.W.2 in his cross-examination that after 31-1-1984, there had been no amendment whatever in the basic roll of electors, so far as the present petitioner is concerned. In the circumstances, the learned Counsel stresses, the petitioner was not obliged u/s 33(5) to do anything beyond producing certified copy of the relevant entry in the basic electoral roll.

9. As against this, S/Shri Sawant and Vyas for the 1st and 5th Respondents, contend that after 31-1-1984, the electoral rolls for the Shivaji Nagar Constituency had been admittedly revised twice more in November 1984 and January 1985, on the eve of the general elections to the House of People and the Maharashtra Legislative Assembly respectively. The date of final publication of the electoral rolls as mentioned on the first certified copy Ex. B-1 was 31-1-1984. In absence of any other materials on record, the learned Counsel urge, the 5th Respondent was bound under law to refuse to treat Ex. B-1 as an extract from the electoral rolls as in force in January 1986. He was thus entirely justified in rejecting the petitioner's nomination paper.

10. Before adverting to the decisions of the Supreme Court and High Courts, I shall recapitulate the relevant provisions of the two Acts (Representation of the People Act of 1951 and 1950). The qualifications for membership of a State Legislature are prescribed in Section 5 of the 1951 Act. Sub-clause (c) of the section requires that a candidate must be an elector from any Assembly constituency in the State concerned. The expression "elector" is defined in Section 2(e) of the 1951 Act as a person whose name is entered in the electoral roll of the constituency concerned/or the time being in force and who is not

subject to any of the disqualifications mentioned in Section 16 of the 1950 Act. Where a candidate is an elector in the very constituency from which he seeks to contest the election, Section 33(4) of the 1951 Act requires that the Returning Officer shall at the time of presentation of the nomination paper, satisfy himself that the candidate's name and electoral roll number are the same as those entered in the electoral rolls. Obviously, because the electoral rolls of the Constituency for which the election is to be held, are readily available with the Returning Officer, the law does not cast any responsibility on the candidate to produce evidence that he is registered as an elector: However, where a candidate is an elector of a different constituency, section 33(5) of the 1951 Act obliges him to produce such evidence either with the nomination paper or at the time of scrutiny. Section 33(5) ordains : -

"Where the candidate is an elector of a different constituency, a copy of the electoral roll of that constituency or of the relevant part thereof or a certified copy of the relevant entries in such roll shall, unless it has been filed along with the nomination paper, be produced before the returning officer at the time of scrutiny."

Here it may be noted that this provision does not expressly refer to the electoral roll as one "for the time being in force". However, as the following discussion will show, the electoral roll has necessarily to be the one that is "for the time being in force" (that is as on the date of scrutiny, here 11-1-1986).

11. The obvious object of requiring a candidate to file the electoral roll or a copy of the relevant part thereof or a certified copy of the relevant entries in such roll u/s 33(5) *ibid* is to enable the Returning Officer to satisfy himself that the candidate is in fact an elector of some constituency in the State. Section 2(e) of the 1951 Act defines "elector" in relation to a constituency as a person whose name is entered in the electoral roll of that constituency "for the time being in force" and who is not subject to any of the disqualifications mentioned in Section 16 of the 1950 Act. When Section 33(5) is read in conjunction with Sections 5 and 2(e) of the 1951 Act, the inescapable conclusion would be that the electoral roll referred to in Section 33(5) is the electoral roll that is effectively in force on the date of scrutiny. If this plain interpretation is not accepted, absurd results will follow. For example, a candidate might opt for an electoral roll, which has ceased to be in force, say for 2 or 3 decades. Such an absurd position, I am sure, the law cannot countenance for a moment.

12. The next question now is whether the production of the first certified copy (Exh. B-1) by the petitioner on 9-1-1986 was sufficient compliance of Section 33(5). My answer is a No. The reasons are plain. Section 21 of the 1950 Act deals with preparation and revision of electoral rolls. Sub-section (1) of this section *inter alia* provides that the electoral roll for each constituency shall be prepared in the prescribed manner. Rules called as "Registration of Electors Rules, 1960" have been framed in this regard. Section 21(2) of the 1950 Act says that unless otherwise directed by the Election Commission for reasons to be

recorded in writing, the electoral rolls shall be revised on the eve of every general election to the House of the People and the Legislative Assembly and also before each by election to fill a casual vacancy in a seat allotted to that constituency. It is not in dispute that revision of the electoral rolls of the petitioner's Shivaji Nagar Constituency had taken place in November 1984 and again in January, 1985 on the eve of the general elections to the House of People and the Maharashtra Legislative Assembly. The process of preparation of electoral rolls and their revision is contained in Rules 5 to 27 of the aforesaid Rules. The main stages of this process are :

"(i) Collection of information in respect of voters (Rules 8 and 9);

(ii) Publication of draft rolls (Rules 10 and 11);

(iii) Inviting claims and objections and taking decisions thereon either without enquiry or after enquiry (Rules 18 and 20); (iv). Preparation of a list of amendments to the basic roll (as referred to in Rule 22(3) infra) by incorporating in the list, decisions made under Rules 18, 20, 21 and 21A; and (v) the final, publication of the rolls together with the list of amendments as contemplated by Rule 22."

13. Rule 22 may now be reproduced in its entirety :

"22(1) The registration officer shall

(a) prepare a list of amendments to carry out his decisions under rules 18, 20, 21 and 21A and to correct any clerical or printing errors or other inaccuracies subsequently discovered in the roll;

(b) publish the roll, together with the list of amendments, by making a complete copy thereof available for inspection and displaying a notice in Form 16 at his office; and

(c) subject to such general or special directions as may be given by the Election Commission supply, free of cost, two copies of the roll as finally published, with the list of amendments, if any, to every political party for which a symbol has been exclusively reserved by the Election Commission.

(2) On such publication, the roll together with the list of amendments shall be the electoral roll of the constituency.

(3) Where the roll (hereafter in this sub-rule referred to as the basic roll), together with the list of amendments becomes the electoral roll for a constituency under sub-rule (2); the registration officer may, for the convenience of all concerned, integrate, subject to any general or special directions issued by the Election Commission in this behalf, the list into the basic roll by including the names of electors in the list together with all particulars relating to such electors in the relevant parts of the basic roll itself, so however that no change shall be made in the process of such integration in the name of any elector or in any particulars relating to any elector as given in the list of amendments."

It is thus obvious that it is the basic roll together with the list of amendments, as duly published under Rule 22, that becomes the electoral roll of the constituency. Now where an extract from a particular roll (Ex. B-1) expressly mentions that the date of publication was 31-1-1984 and admittedly two revisions had taken place after that date - first in November 1984 (on the eve of the general Parliamentary elections) and the second in January 1985 (on the eve of the general Maharashtra Legislative Assembly election), the 5th Respondent had no option but to hold that Exh. B-1 was not a copy of the roll as in force on 9-1-1986 or 11-1-1986.

14. Shri Shivade was at pains to point out that there had been in fact no amendments whatever after January 1984 to the basic electoral roll so far as the entry of the petitioner was concerned. For this, he relied on the evidence of Tahsildar Kulkarni P.W. 2 as well as the endorsement made to this effect in the two applications made by the petitioner to the Tahsildar on 6-1-1986 and 10-1-1986 for getting certified copies (Exh. "A" and "O"). As it transpires today, this factual position adverted to by the learned Counsel may be true. However, it is not the petitioner's case that he had apprised the 5th Respondent of this factual position on or before the date of scrutiny. The applications Ex. A and C were also not before him. The 5th Respondent was in the circumstances not reasonably expected to know as to whether there had or had not been made any amendments to the petitioner's entry during the two subsequent revisions. The belated revelation of the correct factual position, cannot enure to the benefit of the petitioner. The crucial question is whether the 5th Respondent was right in rejecting the petitioner's nomination paper on the date of the scrutiny. Obviously he was right.

15. S/Shri Shivade and Kotwal heavily rely on Section 36(4) of the 1951 Act, which enjoins upon the Returning Officer not to reject any nomination paper on the ground of any defect which is not of a substantial character. They contend that the defect in the first certified copy Exh. B-1, if any, was not of a substantial character. I do not agree. Shri Shivade banks on N.T. Velusami Thevar Vs. S. Raja Nainar and Others, , Madan Lal Vs. Hira Singh Pal, and Ram Awadesh Singh Vs. Smt. Sumitra Devi and Others, .

16. All the three cases are clearly distinguishable on facts. Indeed, in none of them did arise the central question, namely whether the mention of a wrong or redundant date of final publication of electoral roll in a certified copy is or is not a defect of a substantial character. In the Madras case, there was no dispute at all before the Returning Officer about the fact that the candidate concerned was actually an elector in a different constituency. A certified copy of the relevant electoral roll was duly filed. However, that copy contained interpolation of some words. In the circumstances, the Court held that where the fact is reasonably clear that the candidate in question is an elector of a different constituency and what purported to be a certified copy of the relevant entry in electoral roll relating to him has been filed, any defect in the copy would not amount to a

defect of a substantial character. One cannot have any quarrel with the correctness of the decision. But it does not ease the problem of the petitioner before me.

17. The Delhi case lays down that the question whether the defect is of a substantial character or not does not depend on the presence or absence of the candidate concerned at the time of scrutiny and that the question has to be determined with reference to the character of the defect itself. If that question can be effectively decided by the Returning Officer even in the absence of the candidate concerned or without any assistance from his side, the Returning Officer will be wrong in treating the defect to be of a substantial character, merely because the candidate concerned is absent. There can be no dispute about the correctness of this proposition. However, where a Returning Officer is not able to decide on the character of the defect without the candidate's assistance, this proposition will not simply apply.

18. I would like to mention just one decision of the Supreme Court in this regard: Lila Krishan Vs. Mani Ram Godara and Others, . The Supreme Court has in this case held that even where a defect is curable u/s 36(4) of the 1951 Act, if it is not possible for the Returning Officer to do so without the assistance of the candidate concerned, and if that candidate does not care to remain present at the time of the scrutiny and assist the Returning Officer in that regard, the law does not cast any obligation on the Returning Officer to unearth the true factual position by himself. I must repeat that in the present case the 5th Respondent could not have figured out that there was no amendment whatever with regard to the entry of the petitioner in the electoral roll the in two revisions after January 1984. It was the bounden duty of the petitioner to bring this position to the notice of the Returning Officer. Obviously nothing was done by him on this crucial aspect. In absence of any light, the 5th Respondent was under no legal obligation to treat the defect as trivial and ignore it. There is no merit whatever in the contention of Shri Shivade that the Respondent No. 5 by himself should have conducted the inquiry as contemplated by Section 36(2) of the 1951 Act.

19. There is also no force in Shri Shivade's contention that the 5th Respondent ought to have adjourned the matter on 11-1-1986 for a day or two, even in the absence of the petitioner. No doubt power does vest in a Returning Officer under the proviso to Section 36(5) of the 1951 Act to grant adjournment for a couple of days, in order to enable a candidate to rebut an objection. But such an adjournment has normally to be sought on behalf of the petitioner. It is not incumbent on a Returning Officer to oblige a calcitrant candidate who in spite of prior appraisalment of the defect concerned by the Returning Officer chooses to remain absent on the date of scrutiny.

20. It was next contended by Shri Shivade for the petitioner that the 5th Respondent should have at any rate recalled his earlier order of rejecting the nomination paper, when the second certified copy of the electoral roll (Ex. D) was produced before him by the petitioner on 11-1-1986 before the list of the validly

nominated candidates was published on the Notice Board. The learned Counsel banks on a decision of the Rajasthan High Court reported in *Tejaram Gahlot Vs. Pukhraj Kalani and Others*, . The ratio of that ruling will be found in paragraph 13 of the judgment. The learned Single Judge observes:

"There is no reason to deny a Returning Officer the power to correct accidental errors or slips or mistakes, before he finally publishes his list u/s 36(8) of the Representation of the People Act. To deny such inherent power to a Returning Officer may result in such a waste of time, energy and money for the participants in an election and may in some cases where no election petition challenges the election, even work out to be denial of a reliable representative and impair the working of democracy itself. Technicalities must be trimmed to proper limits."

21. This decision does not lay down any proposition that the Returning Officer has a general power of review of his orders. The particular decision was given on the peculiar and extraordinary facts of that case. There the candidate concerned was disqualified by an order of the Deputy Chief Election Commissioner for 3 years u/s 10A of the 1951 Act. This period of 3 years actually expired on 14th January 1971, that is more than a year before 9th February 1972 - the date of scrutiny. The candidate was absent when his turn for scrutiny came. Relying on a letter of the Deputy Chief Election Commissioner, the Returning Officer held that the disqualification was in force, and as such rejected the nomination paper. Here it may be noted that attached to the letter was a list giving particulars of the disqualifications of various persons. Item 14 related to the petitioner. Column 6 thereof expressly mentioned that the disqualification caused had already ceased on 14-1-1971. The Returning Officer inadvertently overlooked these material remarks in column No. 6 and made the wrong order of rejection of the nomination paper. When the candidate later turned up before him, the scrutiny of papers of others was still in progress. He brought the aforesaid remarks in Column No. 6 to the notice of the Returning Officer. On these premises, the Returning Officer felt that it was necessary in the interests of justice to correct the accidental slip on his part. Accordingly he recalled his earlier order and held that the candidate's nomination in order.

22. Are these facts not qualitatively different from those in the present case? In our case there is no accidental slip or anything resembling that on the part of the 5th Respondent. On the materials available, namely Exh. B-1, any prudent man would have come to the same conclusion as he did. Again here the 5th Respondent did not choose to recall his earlier order as was done by the Returning Officer in the aforesaid case. In the circumstances, he was not obliged to revise his earlier order. In my view, the Rajasthan case does not go so far as laying down that the Returning Officer is under legal obligation to entertain a demand of review his order in every case, if it is made before the list is finally published u/s 36(8) of the 1951 Act. Indeed in our case the petitioner did not even make a formal request for review. But even if such request had been made, I do not think the 5th Respondent was bound to entertain it. I may in passing

just mention V. E. L. R. 408 Natwar Lal vs. Bhartendra Singh relied upon by the 1st and 5th Respondents to buttress their submission that a Returning Officer has no power to review his own order rejecting a nomination paper.

23. Shri Kotwal relies on Section 79 of the Indian Evidence Act for his submission that the first certified copy Exh. B-1 issued by the Tahsildar Kulkarni P. W.2 should have been treated as genuine by the 5th Respondent. It is argued that the Tahsildar was also working as Electoral Officer and the 5th Respondent should have appreciated that the Tahsildar would not issue a certified copy from a redundant electoral roll. The submission is not valid. Section 79 *ibid* would only enable the 5th Respondent to presume that (a) the contents of Exh. B-1 were correct, namely that the petitioner was registered as an elector in the rolls as published in January 1984 and (b) Kulkarni was in fact holding the post of Electoral Officer. The operation of Section 79 could not further be stretched to prove that the petitioner continued to be an elector in January 1986 also. It was faintly suggested that the Electoral Officer had no power whatever in law to issue a certified copy of an electoral roll which was not in force at the time the copy was applied for by the petitioner. According to Shri Kotwal, the petitioner could not be penalised for the fault of Kulkarni P.W.2. There is nothing in law which prohibits the authority concerned to issue certified copies of extracts from electoral rolls which have ceased to be in force. Even if Kulkarni P. W.2 may be faulted for a moment, that would not justify Respondent No. 5's accepting the petitioner's nomination, if it was illegal to do so. No further discussion is necessary on this aspect.

24. After giving my anxious consideration to all the submissions raised by the learned Counsel of the petitioner and 3rd Respondent, I am satisfied that the defect in the first certified copy Exh. B-1 was of a very substantial nature so far as the principal question was concerned, that is to say, whether the petitioner was an elector of the Shivaji Nagar Constituency on the date of scrutiny, namely, 11-1-1986. When the date of publication of the electoral rolls was prominently figuring in the certified copy Exh. B-1 as 31-1-1984, the 5th Respondent would have failed in his duty, if he had ignored this date and proceeded to hold that the petitioner continued to be an elector in the Shivaji Nagar Constituency in January 1986 also. This would be particularly so, when admittedly two revisions of the rolls had already previously taken place in November 1984 and January 1985. The rejection of the petitioner's nomination paper by the 5th Respondent was in perfect order. I return a finding to this effect on the only issue that arises in the present petition.

25. So far as the question of costs is concerned, the 1st and the 5th Respondents will be entitled to get the same from the petitioner. The 2nd, 3rd and 4th Respondents will bear their own as incurred. The proceedings show that there were five effective dates of hearing before Justice Pratap and four more before me. The 1st and 5th Respondents are represented in different sets by one Advocate each. I quantify the over all costs for the 1st and 5th Respondents at

Rs. 2250/- each.

26. In the result, the petition is dismissed. The petitioner shall pay Rs. 2250/- each by way of costs to the 1st and 5th Respondent. The petitioner and Respondents Nos. 2 to 4 shall bear their own costs as incurred. Substance of the judgment will be forthwith communicated to the Election Commission and the Speaker of Maharashtra Legislative Assembly. Copies of the judgment may also be despatched to them soon after it is ready. This be done in compliance of Section 103 of the 1951 Act. The petitioner has already deposited Rs. 2000/- towards costs at the time of presenting the petition. The 1st Respondent will be at liberty to withdraw the whole amount and appropriate the same towards his claim for costs. The petitioner has not yet furnished English translations of the documents exhibited at his instance. This be done within a week.