

(1968) 07 BOM CK 0008

In the Bombay High Court

Case No : Spl. Civil Application No. 339 of 1968

Kisan Januji

APPELLANT

Vs

Anilkumar Manilal and another

RESPONDENT

Date of Decision : 03-07-1968

Acts Referred:

Bombay Village Panchayats Act, 1958 — Section 12, 13, 15
Maharashtra Municipalities Act, 1965 — Section 11, 21

Citation : (1968) MhLj 858

Hon'ble Judges : N.L. Abhyankar, J;D.B. Padhye, J

Bench : Division Bench

Advocate : P.G. Palshikar and V.G. Palshikar, for the Appellant; V.R. Manohar and S.N. Kherdekar for Respondents No 1 and Respondent No. 2 was not represented, for the Respondent

Final Decision : Allowed

Judgement

N.L. Abhyankar, J.—The petitioner by this petition under Article 227 of the Constitution challenges the order of the Extra-Assistant Judge, Akola, as an Election Tribunal, setting aside the election of the petitioner as a member to the Municipal Council, Akot, from Ward No. 15 held recently.

2. An election programme for electing members from different wards to the Municipal Council at Akot under the provisions of the Maharashtra Municipalities Act, 1965, was fixed by the authorities in 1967. The date for acceptance of nomination paper was 10th May 1967, scrutiny was on 13th May 1967, date for withdrawal was 20th May 1967, poll was taken on 4th June 1967 and the votes were counted and the results declared on 5th June 1967. The petitioner and the first respondent were the only contesting candidates from Ward No. 15. On a scrutiny and counting of ballot papers, it was found that each of them, that is, the petitioner and the first respondent, had secured 320 valid votes. Under rule 58 of the Maharashtra Municipalities Election Rules, 1966 if after the counting of the votes is completed an equality of votes is found to exist between any

candidates and the addition of one vote will entitle any one of the candidates to be declared elected, the Returning Officer is required forth, with to decide between these candidates by lot. Accordingly such lot was drawn and the verdict was in favour of the petitioner and the petitioner was, therefore, declared elected.

3. The election of the petitioner in these circumstances was challenged by the first respondent on several grounds before the Extra-Assistant Judge, who is empowered to decide disputes relating to elections u/s 21 of the Maharashtra Municipalities Act. Among other issues arising out of the pleadings of the parties was issue No. 9. The contention of the first respondent giving rise to this issue appeared to be that two citizens viz., Shri Shantaram Yadaorao Deshpande and Smt. Sulabha Shantaram Deshpande were entitled to vote at this election and that their names were included in the electoral roll of Maharashtra Legislative Assembly, but their names were not incorporated in the list of voters prepared by the Chief Officer for the Municipal elections and they were not allowed to vote at the election and therefore, the result of the election was materially effected. It will be seen that each of the contesting candidates has polled equal votes and if it could be established that the two citizens had a right of franchise to cast their votes at this election from this ward and were illegally prevented from voting, then the result of the election could be said to be affected by such improper refusal of the franchise.

4. It seems at the instance of the respondent No. 1 a copy of the electoral-roll for the Maharashtra Legislative Assembly was filed and it is marked as Exhibit-55. The electoral-roll comprised of a printed list and two appendages. The printed list includes names of 768 persons and thereafter the names of Shri Shantaram Deshpande and Smt. Salabha Deshpande were mentioned at serial Nos. 769 and 770, on the first appendage, and thereafter on the second appendage names of seven other voters bearing serial Nos. 771 to 777 appear to be printed. It is an admitted position, however, that the names of the two Deshpandes do not appear in the voters' list maintained and authenticated by the Chief Officer and it was also filed as Exhibit-43. That was the copy of the voters' list pertaining to Ward No. 15.

5. In this list though the names at serial Nos. 769 and 770 from the electoral-roll of the Legislative Assembly are omitted, it appears that the list of persons at serial Nos. 771 to 777 appearing in the electoral-roll for the Legislative Assembly was included in Exhibit-43 at serial Nos. 769 to 770. In other words, except for the omission to include the names of Shri Shantaram Deshpande and Smt. Sulabha Deshpande which appeared in the appendage or part of the electoral roll for the Legislative Assembly for this ward, all other names apparently were included in Exhibit-43,

6. It seems to have been contended before the learned Assistant Judge that the Chief Officer who was required to do his job of preparing and maintaining a list of voters u/s 11 of the Maharashtra Municipalities Act, 1965, did not do it diligently and carefully and this resulted in the omission of the names of the two voters

from the list maintained by him. It was incumbent, the argument was, on the Chief Officer to copy down the voters' list accurately from the electoral-roll of the Legislative Assembly for the ward and if he failed to comply with this provision under the Act, such failure to comply with a mandatory provision vitiated the further action. It was, in effect, therefore, contended that the failure to comply with the mandatory provisions deprived the list of its status as an authentic list and the authenticity and finality attached to it was, therefore, taken away. As there was no authenticity or finality to the list prepared by the Chief Officer, it was not binding in the sense that exclusion from that list in respect of any citizen would not disentitle him to exercise his right of franchise and if that be the result of the failure of the Chief Officer to carry out his duty, the election in the instant case, which resulted in equality of votes should be held to be vitiated on account of such failure. This contention found favour with the learned Extra-Assistant Judge and on this sole ground the petition was allowed and the election has been set aside.

7. In support of this petition challenging the landing on this issue, the Learned Counsel for the petitioner has invited our attention to the scheme of preparation of list of voters and conferment of the right to vote given by the Legislature in sections 11 and 12 of the Maharashtra Municipalities Act. As the principal argument is based on either side on proper construction to be put on these two provisions of the Act, it is necessary to reproduce these provisions which are as follows:

11. (I) The electoral roll of the Maharashtra Legislative Assembly prepared under the provisions of the Representation of the People Act, 1950, and for the time being in force on such date as the Director may by general or special order notify in this behalf (being a date not earlier than one month from such notification) for such constituency of the Assembly or any part thereof as is included in the municipal area, shall be divided by the Chief Officer {or such other officer of the Council or Government as may be designated by the Director in this behalf) into different sections corresponding to the different wards in the municipal area; and a printed copy of each section of the roll so divided and authenticated by such officer shall be the list of voters for each ward. The ward lists shall collectively be deemed to be the municipal voters' list.

(2) The Chief Officer shall maintain the lists of voters prepared under sub-section (K) and the lists so maintained, shall be deemed to be the authentic lists for all elections under this Act.

(3) At least fifteen days before the last date fixed for nomination of candidates for every general election, the Chief Officer shall keep open for public inspection at the municipal office and at such other places in the municipal areas, as the Council may fix, copies of the lists of voters of each ward maintained under sub-section (2).

12. (1) Every person whose name is in the list of voters maintained under the

land preceding section shall be qualified to vote, and every person whose name is not in such list shall not be qualified to vote, at the election of a Councilor for the ward to which such list pertains.

(2) The list of voters maintained under the last preceding section shall be conclusive evidence for the purpose of determining under this section whether a person is qualified or is not qualified to vote, as the case may be, at any election.

8. According to the Learned Counsel for the petitioner, an Election Tribunal adjudicating the validity of an election u/s 21 of the Maharashtra Municipalities Act acts without jurisdiction if it does not give effect to the legislative mandate unequivocally expressed in section 12 of the Maharashtra Municipalities Act. According to the petitioner, the right to vote at a municipal election is given by the Statute, namely, the Maharashtra Municipalities Act and it must be found within the framework of the Statute and nowhere else. Section 12 of the Act, in terms, restricts that right to vote only to those whose names are in the list of voters and denies to everyone else whose name is not in the list of voters. If for any reason, a person's name is not included in the list of voters, then such a person has been denied the right of franchise to vote at a municipal election. There is no getting out of this position so long as and as long as the person's name cannot be found in the voters' list. In our opinion, this contention is well founded and must be accepted.

9. It was urged on behalf of the contesting respondent that the voters' list that is really made the basis of franchise is the electoral roll of the Maharashtra Legislative Assembly prepared under the provisions of the Representation of the People Act, 1950 and for the time being in force on such date as the Director may notify. If a person's name is found included in such electoral roll, then the Chief Officer in copying out the names from that roll in exercise of his power to prepare the list of voters for the municipal election has no right to exclude any name or omit any name from the electoral roll. If such Chief Officer omits inadvertently may be, the name of [any one who is included in the electoral roll of the Maharashtra Legislative Assembly, such an omission should not deprive that person of his right to vote at the municipal election. In other words, the argument suggests that the function entrusted to the Chief Officer is merely administrative or mechanical function of copying out the list of names of persons included in the electoral roll of the Maharashtra Legislative Assembly and a mere omission to include some of the names which are albeit in the electoral roll should not have the effect of depriving such omitted persons of their right to vote.

10. In our opinion, it is not possible* to construe the provisions of section 11 of the Maharashtra Municipalities Act in this manner. A close scrutiny of sub-section (1) of section 11 will show that the duty cast on the Chief Officer is to prepare his own list of voters who will be entitled to vote at the ensuing municipal election and the basis for inclusion in such list is the electoral roll of the Maharashtra Legislative Assembly for that particular area or ward. He is required

not only to divide the electoral roll into appropriate wards which will become-the ward roll, but is further required to authenticate such list for each ward. The right to authenticate also imposes a duty and it is only the authentication which, in our opinion, invests the list of voters prepared by the Chief Officer with the status of an authentic list of voters for the municipal election in that ward. The Chief Officer is required to maintain the list of voters prepared under sub-section (1) and sub-section (2) itself expressly says that the lists so maintained shall be deemed to be the authentic lists for all elections under this Act. If it was the intention of the Legislature to make the electoral roll of the Maharashtra Legislative Assembly prepared for that area or the ward as the authentic list, nothing was easier than to say so which has been done in some other statutes. For instance, under the Bombay Village Panchayats Act section 12 provides that the electoral roll of the Maharashtra Legislative Assembly prepared under the provisions of the Representation of the People Act, 1950, and in force on such day as the State Government may by general or special order notify in this behalf for such part of the constituency of the Assembly as is included in a ward or a village shall be the list of voters for such ward or village. We have to contrast this provision from the provision made in section 11 of the Maharashtra Municipalities Act enjoining on the Chief Officer to prepare a separate and independent list of voters although the basis of such preparation is the electoral roll of the Maharashtra Legislative Assembly for that area. We are, therefore, unable to accede to the contention of the contesting respondent that merely because the names of some persons may be found in the electoral roll of the Maharashtra Legislative Assembly that by itself is enough to enfranchise them to entitle them to vote at the municipal election. That franchise is earned when their names are repeated in an authentic list of voters required to be prepared by the Chief Officer. The wording of section 12 in both its sub-sections also makes it clear that it is only such list of voters maintained u/s 11, that is, the list of voters prepared and authenticated by the Chief Officer, which alone has to be seen to find out whether a person is qualified to vote and every person whose name is not in such list is not qualified to vote. The Legislature has expressed its intention to restrict the right to vote only to those citizens whose names are found in the list of voters maintained by the Chief Officer and expressly denies it to others whose names, whatever may be the reasons, are not to be found in the list of voters maintained and authenticated by the Chief Officer. If that be the nature of the grant and its limitation, we fail to see what scope there is, for contending that merely because a citizen's name appears in the electoral roll of the Legislative Assembly, he should be held entitled to vote at the municipal election. Though it is true that the electoral rolls prepared for the Assembly elections are treated as the basis from which lists of voters are prepared for municipal elections, so far as the municipal elections are concerned, the right to franchise seems to be necessarily restricted only to those persons whose names are in the list of voters and is specifically denied to those whose names are not in the list.

11. A somewhat similar question arose before this Court in *Dhandba v. Civil Judge*" Junior Division, Hinganghat (1). There, the question was interpretation of sections 15, 12 and 13 of the Bombay Village Panchayats Act, but the issue raised was identical. As in this case, a contention seems to have been raised that the names of the persons in that case were included in the electoral-roll of the Legislative Assembly for a particular ward though they were not residents of that ward and the names of persons who were residents of a particular ward were excluded from the Assembly electoral-roll. As in this case, it seems to have been complained that there is no specific provision either in the Bombay Village Panchayats Act or the rules made thereunder empowering the (sic) to correct the voters list to be maintained and authenticated by him. It was, therefore, contended that if any citizen's name is wrongly omitted from such list, that should be a sufficient ground for contesting the election because the electoral-roll was not properly maintained. Repelling this contention, the Division Bench has observed as follows:-

The Panchayats Act has conferred power on the designated officer to prepare and maintain the voters' list as required, and in our view it must necessarily include the power to make necessary corrections which are within the scope of his authority. This is borne out from the fact that sub-rule (4) requires copies of list of voters to be kept open for inspection at the Village Panchayat. Office and the Ghavdi. Everyone is free to go to the village Chavdi and to the Panchayat Office and inspect the copies of the voters' list. There is no limit of period prescribed for which the lists are to be kept open. Since the lists must be kept open, it must suggest, therefore, that there would be ample opportunity to any person to point out mistakes and get them overruled before the date of nominations.

Even sub-rule (5) gives a sufficiently long notice prior to the nomination, specified the places where copies of relevant lists of voters are kept open for public inspection. One of the essential purposes of keeping open these copies for public inspection must be, to have such mistakes corrected so far as are possible to be corrected within the framework of the Act. Though, therefore, there is no specific provision made by the State Government by the rules for getting mistakes in the voters' lists rectified, still in our view it would be open to the petitioners to have the list corrected. If no steps are taken to have the same corrected, then for the purposes of election, under sub-section (3) of section 13 the list is conclusive evidence and cannot be challenged.

12. In our opinion, this principle applies with equal force to the provisions of the Maharashtra Municipalities Act, 1965. u/s 12 (2) of this Act, the voters' list prepared, maintained and authenticated by the Chief Officer is conclusive evidence for the purpose of determining whether a person is qualified or not qualified to vote. Similarly, under sub-section (3) of section 11 of the Act, for at least a fortnight before the date fixed for nomination of candidates for every general election, the Chief Officer has to keep open for public inspection at the municipal office and at such other places in the municipal area as the Council

may fix, copies of the lists of voters of each ward maintained under sub-section (2). This requirement is necessarily for the benefit of those whose names may have been omitted, though liable to be included, from the authentic list. It is not the case of the first respondent that the two citizens who complained of being deprived of their right of franchise went to the Chief Officer with a request to have their names included in the voters' list prepared by him. If such a request was made and denied, it would be another matter. We have also no doubt that the Chief Officer is bound to include the names of those who are eligible, that is, the names of those whose names are to be found in the electoral-roll of the Legislative Assembly for the appropriate area. If there is refusal to include these names, a right can be exercised or enforced by asking for a mandate from the Court, but in absence of any such steps being taken to make the voters' list complete, we are unable to hold that merely because a person's name is in the electoral roll of the Assembly, that by itself would entitle him to claim franchise under the Municipal Act which is restricted to only those whose names are in the list of voters prepared by the Chief Officer,

13. Differing from the Tribunal, therefore, we have come to the conclusion that there was no jurisdiction in the Tribunal to adjudicate on the issue raised in the form before it. The voters' list prepared by the Chief Officer is made conclusive evidence as to the rights of persons who are entitled to vote and it is not permissible to travel beyond that list. As the names of the two Deshpandes were not in the voters' list, admittedly they had no right to exercise any franchise at this election and that fact, therefore, could not affect the election in the manner in which it was contended by the first respondent. This finding is enough to set aside the order of the learned Extra-Assistant Judge.

14. It is also urged in his own petition filed by the first respondent, and which was at his request placed for admission for today, that the first respondent had secured or valid votes in addition to the votes declared to be secured by him and thus the first respondent had secured a majority of two valid votes. No such contention was raised in the original petition filed before the Extra-Assistant Judge. The first respondent seems to have been allowed to amend his election petition after scrutiny of ballot papers, that is, long after the period of limitation fixed for filing such an election petition. We are not sure whether any such contention could have been allowed to be raised by the learned Assistant Judge after the limitation for filing the election petition was long passed. The two ballot papers were rejected by the Returning Officer because it was found that on each of them mark was made on the reverse of the ballot paper, over that part where the symbol of standing lion could be seen against light. The contention of the first respondent was that a mark so made even though on the reverse of the ballot paper, should be held as a proper mark on the ballot paper because it is on the symbol of the candidate for whom the voter intended to vote and this intention can be gathered from fact that trade mark, though on the reverse, is on the obverse of this symbol.

15. In support of this contention our attention was invited to two decisions. One of them is the one reported in *Swarup Singh v. Election Tribunal* AIR 1960 All. 06. In that case, the symbol was clearly visible on the back of the ballot paper, but the name of the candidate was not. The mark was made by the voter not on the face of the ballot paper, but on the reverse. The judgment in paragraph 7 observes that the voters who voted on these ballot papers made the marks on the back of the ballot papers and not on the front and were probably led to do so because the symbols which were more prominent than the written (sic) appeared clearly on the back of the ballot papers as well. The Returning Officer rejected these ballot papers because the voters marked on the back side of the ballot papers, while the Election Tribunal did not consider it to be a good reason to reject the ballot paper. When the matter came up to the High Court, the learned Judge has observed:

I do not consider such marking in this particular use, to be marking against this provision of paragraph 48.

If we have to deduce from this observation that the High Court seems to accept the principle, contended for here, that even if the voter makes a mark on the reverse side of a ballot paper, that is, not on the face but on the back side, such mark should be held to be a valid compliance with rule 37 which prescribes the voting procedure in this case we are unable to agree. In rule 37, the voter on receiving the ballot paper has forthwith to proceed to one of the polling compartments and there make a mark on the ballot paper with the instrument supplied for the purpose on or near the symbol of the candidate for whom he intends to vote. We are not in a position to construe this requirement of the procedure to have been complied with by a voter, who makes mark with the instrument supplied to him not on or near the symbol of the candidate, which is necessarily on the face of the ballot paper, but on the reverse, merely because the symbol is visible either because the ballot paper is translucent or because there is so much ink used or appearing in the symbol that it seeps through the paper and is visible on the back side. The intention of the rule is very clear in our opinion, and does not permit any infraction in its observance. The ballot paper is intended to be used as such by making a mark with the instrument supplied on the face of the ballot paper and not on the reverse. The two ballot papers in the instant case were the only ballot papers on which such marks are found to have been made by two voters. It is not as if a majority of voters were misled into thinking by reason of the appearance of the symbol on the reverse side that marks were to be made on the reverse of the ballot paper. We are unable to accede to the proposition that merely because a symbol may be visible on a ballot paper on its reverse side, it is permissible for a voter to make a mark with the instrument supplied to him on the obverse side of the ballot paper. However an illiterate person may be, he is not ignorant now-a-days of the procedure which is explained with pains not only by the candidate but also by the officers. Therefore, if in a given case the ballot paper is found to have marking on the reverse side, it must be wholly due to the negligence of the voter and not

because of exercise of a choice to mark either on front side or on back side, as no such choice is given to the voter. On plain reading of the rule, we are unable to accept that exercise of franchise in this fashion in violation of the instructions and the procedure prescribed by the rules would amount to exercise of a proper making or recording of one's vote. So to allow, would lead to several difficulties and there is no limit where one would be able to restrict the scope of such infractions. We are, therefore, unable to hold that the learned Extra Assistant Judge was in error in rejecting this contention of the first respondent and holding that the two ballot papers were rightly rejected. We have dismissed the petition filed by the first respondent and we have given reasons for the same in this petition as both the petitions came to be heard together.

16. The result is Special Civil Application No. 339 of 1968 is allowed. The order of the Extra-Assistant Judge is set aside and the result declared by the Returning Officer is held to be properly declared. The petitioner will be entitled to his costs from the first respondent.