

(1961) 08 GUJ CK 0006
In the Gujarat High Court

Lavjibhai Naranbhai

APPELLANT

Vs

Ramjibhai Hetabhai and Another

RESPONDENT

Date of Decision : 02-08-1961

Acts Referred:

Bombay General Clauses Act, 1904 — Section 14
Bombay Village Panchayats Act, 1958 — Section 10, 11
Constitution of India, 1950 — Article 15, 15, 226, 227

Citation : (1962) 3 GLR 56

Hon'ble Judges : V.B. Raju, J;A.R. Bakshi, J

Bench : Division Bench

Judgement

V.B. Raju, J.—This Special Civil Application relates to Village Panchayats Elections. The main contention in the application is that the Collector of Mehsana having formed the wards in the village Tavadiya u/s 10 of the Bombay Village Panchayats Act 1958 (which for convenience will hereinafter be referred to as the Act) had no authority to reform the wards for the purposes of the same election. It is contended in the petition that the reformation for the purposes of the election of the wards by the Collector who had previously formed the wards in a different manner is illegal and void. It is also contended that this formation is contrary to Article 15 of the Constitution as the reformation is based on communal considerations.

Most of the facts are admitted and are as follows:

2. The Government issued a Notification declaring Tavadiya as a village u/s 4 of the Act. The Government also issued a Notification ordering that election to the Village Panchayat of Tavadiya should be held. In August 1960 the Collector issued an order forming three wards for Tavadiya village with 2 2 and 3 members respectively the first ward consisting of houses Nos. 1 to 48 the second of houses Nos. 49 to 96 and the third of houses Nos. 97 to 166. This Notification is at page 386 to 396 of the Gujarat Government Gazette dated September 29 1960 Part I-A Supplement (Baroda Division). Then certain representations were made to the

Collector by the villagers complaining that the fixation of wards had not been duly published at the village that the Voters List was not separately prepared for each ward but only one list had been published and that the wards were not formed on the basis of population but on the basis of the number of houses. In his order the Collector held that the wards had been published in the Gazette and therefore rejected the first objection. He upheld the second objection relating to the separate preparation of the Voters List for each ward and he directed the Mamlatdar to publish separate lists of Voters for each of the three wards. This order of the Collector is referred to by him in his subsequent order dated 29-3-1961. It appears that further representations were made to the Collector. The Collector himself went to the village. Then he passed an order on 29-3-1961 holding that the distribution of wards and seats will cause disturbance in the village and predominance of one party over the other. He therefore decided that the wards and the number of seats allotted to the wards should be changed and that there should be 3 seats in the first ward 2 seats in Ward No. 2 and 2 seats in Ward No. 3. He therefore ordered that wards should be reformed again after adjusting the population. In pursuance of this order a Notification was published by the Collector in the Gujarat Government Gazette Part I-A dated June 15 1961 at page 330 in which it was notified that there should be three wards in Tavadiya village with 3 2 and 2 members respectively and it was also notified that Ward No. 1 should consist of houses Nos. 1 to 68 Ward No. 2 of houses Nos. 69 to 122 and Ward No. 3 of houses Nos. 123 to 166. It is this Notification that is challenged by this petition. The contention is that the Collector having formed the wards and having published the Notification forming the wards in the Gazette of September 1960 the second order and the second Notification dated 15-6-1961 reforming the wards in a different manner and allotting different number of seats to each ward although keeping the total number of wards the same and keeping the total number of seats the same is illegal and void and contrary to Article 15 of the Constitution of India.

3. The petitioner impleaded two respondents the Collector being respondent No. 2. The Collector appeared by a counsel who stated that the Collector was not interested in the proceedings and would abide by whatever order was passed in the matter. Respondent No. 1 however strongly opposes the petition and it is contended for him that the Collector was justified in re-forming the wards that the Collector had authority to form and re-form the wards that the point that the Collector had no authority to re-form the wards was not taken up by the petitioner when he appeared before the Collector and that therefore this point cannot be taken up before the High Court in the Writ Petition. It is also contended that no prejudice had been caused to the petitioners by the re-arrangement or re-formation of the wards and that there is no averment in the petition that any prejudice had been caused to the petitioner. It is also contended that the order dated 29-3-1961 is an administrative order and therefore no writ in the nature of Certiorari can be issued in respect of such an order. It is also contended that in fact there has been no re-distribution of wards because the

formation of wards was not completed by publishing the Voters Lists in due manner. It is lastly contended that the validity of the election does not depend on the formation or non-formation of the wards and that therefore the petition should be dismissed.

The contention that the notification dated 5-6-1961 offends Article 15 of the Constitution has no merit. There is nothing in that notification which smacks or smells of discrimination. In his order dated 29-3-1961 the Collector observed that it was desirable to re-form the wards to prevent domination by one section over another but his intention was not to discriminate in favour of one caste or against another. It is conceded that people of various castes live in each of the three wards. This contention is therefore rejected.

In order to decide this petition it is necessary to have regard to the statutory provisions contained in the Act and in the Rules made under Act. Section 4 of the Act enables the State Government by notification in the Official Gazette to declare a village for purposes of the Act. Section 5 provides that in every village there shall be a Panchayat. Section 10(1) provides that:

Subject to any general or special order which the State Government may make in this behalf-

(a) a panchayat shall consist of such number of members not being less than 7 and more than 15 as the Collector may determine;

(b) each village shall be divided into such number of wards and the number of members of a panchayat to be elected from each ward shall be such as may be determined by the Collector..

Sub-sections 2, 3 and 4 of Section 10 are not material for the purpose of this petition. Section 11 of the Act reads as follows:

(1) The election of members to a panchayat shall be held on such date as the Collector may appoint in this behalf. (2) Such elections shall be conducted in the prescribed manner. Section 12 of the Act provides as follows: (1) The electoral roll of the Bombay 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.

(2) An Officer designated by the Collector in this behalf shall maintain a list of voters for each such ward or village.

Section 13 deals with the qualification of a person to vote and to be elected. Rule 3 of the Village Panchayat Election Rules has also been referred to but this rule refers to the lists of voters and it is not necessary to consider this rule at the present stage. It is clear from Section 11 of the Act that the election to the village Panchayat shall be conducted in the prescribed manner. The manner in

which the election is to be conducted is prescribed in sections 10, 11, 12 and in the Rules framed under the Act. Section 10 provides for the fixation of the number of members of a Panchayat and the number of members to be elected from each ward. The Collector is to determine the number of members of the Panchayat which should not be less than 7 and more than 15. He is to determine the number of wards into which each village shall be divided and also the number of members of a Panchayat to be elected from each ward. Section 12 provides for the lists of voters for each ward. The qualification to vote and to be elected depends on whether the name of the person is included in the voters' list of the ward or of the village as the case may be. This is provided in Section 13. Rule 3 of the Village Panchayats Election Rules provides for the maintenance and custody of the list of voters. It should be kept open for inspection at the Village Chavdi and at the village panchayat office and a public notice is to be given Sub-Rule 4 and sub-rule 5 of Rule 3 are important and they are:

(4) Copies of lists of voters maintained under this rule shall be kept open for public inspection at the village Chavdi and at the village panchayat office.

(5) The Mamlatdar shall at least one month before the date fixed for the nomination of candidates for every general election of the village panchayat give a public notice of the places where copies of the relevant lists of voters are kept open for public inspection. Such notice shall be affixed at the village Chavdi and at the village panchayat office.

The Mamlatdar has the power to appoint dates etc. for various stages of election by notification in the village viz. the dates the hours and place or places for the following stages of an election viz. (i) the nomination of candidates (ii) the scrutiny of nominations (iii) the recording of votes and (iv) the counting of votes (Vide Rule 7). Sub-rule (3) of Rule 7 provides that these dates hours and places shall not be changed except with the sanction of the Collector. Rule (8) deals with nomination of candidates. Rules 9, 10 and 11 deal with the other steps regarding nominations scrutiny of nominations rejection of nominations etc. The other rules relate to the subsequent stages of the election. It is therefore clear from Section 11 that the election of members to a Panchayat should be held in the manner prescribed in the Act and in the Rules.

4. As observed by Their Lordships of the Supreme Court in *Jagan Nath Vs. Jaswant Singh and Others*, *Jagan Nath v. Jaswant Singh*:

The general rule is well settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and that the Court possesses no common law power. It is also well settled that it is a sound principle of natural justice that the success of a candidate who has won at an election should not be lightly interfered with and any petition seeking such interference must strictly conform to the requirements of the law.

5. See also AIR 1954 SC 411 Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others, Hah Vishnu Kamath v. Ahmad Ishaque Their Lordships of the Supreme Court have observed:

Article 226 confers on High Courts power to issue appropriate writs to any person an authority within their territorial jurisdiction in terms absolute and unqualified. Election Tribunals functioning with the territorial jurisdiction of the High Courts fall within the sweep of that power. If the High Courts are to recognise or admit any limitation on this power that must be founded on some provision in the Constitution itself.

The Election Tribunals are subject to the superintendence of the High Courts under Article 227 of the Constitution. That superintendence is both judicial and administrative.

While in a certiorari under Article 226 the High Court can only annul the decision of the Tribunal it can under Article 227 do that and also issue further directions in the matter.

It is clear from the provisions in the Act and the Rules that the formation of wards by the Collector and the fixing of number of seats for each ward is one of the important steps in the process of election of members to the Panchayat. The voters list is to be prepared for each ward separately. That depends on the number of wards and their geographical distribution in the village. The Collector having determined the formation of the wards u/s 10 (1)(b) that step in the process of election cannot be varied again in the course of the same election. Once that step has been taken by the Collector the election procedure will have to run through the subsequent stages according to the programme laid down in the Act and the Rules. The programme fixed by the Act and the procedure laid down in the Act for the conduct of election cannot be varied and cannot be retraced by the Collector or by any authority. The Collector formed the wards as provided in Section 10 (1)(b) of the Act in August 1960 and a notification was published in the Government Gazette accordingly. This having been done the same step in the election procedure cannot be taken again nor can the step once taken be varied in a different manner for the same election. It is therefore clear that the act on the part of the Collector in re-forming the wards in June 1961 is not authorised or permitted by the Act and is contrary to the provisions of the Act.

It is however contended by the learned Counsel for the respondent No. 1 that the plea that the Collector had no authority to re-form the wards was never taken before the Collector and that therefore this new plea cannot be taken in the proceedings before the High Court in a writ petition. The learned Counsel for the respondent relied on the following cases:

In Gandhinagar Motor Transport Society Vs. State of Bombay, (Gandhinagar Motor Transport Society v. State of Bombay) Their Lordships observed:

Before a question of jurisdiction of a tribunal is raised on a petition under Articles 226 and 227 objection to jurisdiction must be taken before the tribunal whose order is being challenged.

But this was a case where the order of a Tribunal was challenged before the High Court. The next case relied on by the learned Counsel of the respondent is Bhikaji Narain Dhakras and Others Vs. The State of Madhya Pradesh and Another, Bhikaji Narain v. State of Madhya Pradesh where a point not taken or even hinted at in the petition was not permitted to be raised at the stage of arguments. Their Lordships were dealing with a point which was not even to be found in the writ petition. In The Tropical Insurance Co. Ltd. and Others Vs. The Union of India (UOI) and Another, The Tropical Insurance Co. v. Union of India also a similar point was decided and it was held that the petitioner should not be allowed to urge a ground which he had not taken in the petition. The learned Counsel for respondent No. 1 also relied on Rai Bahadur Kanwar Raj Nath and Others Vs. Pramod C. Bhatt, Custodian of Evacuee Property, Management of Rajendra Mills Ltd. and Management of Jawahar Mills Ltd. Vs. Their Workmen and Others, Newspapers Ltd., Allahabad Vs. U.P. State Industrial Tribunal and Others, Newspapers Ltd. Allahabad v. U.P. State Industrial Tribunal and Ors. The first case dealt with the Supreme Court Rules under Order 19, rule 4 and is, therefore, not applicable to the facts of the present petition. The second and third decisions related to questions of fact which were not allowed to be raised before Their Lordships of the Supreme Court The next case relied on by the learned Counsel for respondent No. 1 is Pannalal Binjraj Vs. Union of India (UOI), Messrs. Pannalal Binjraj and Ors. v. Union of India where Their Lordships observed as follows:

There is moreover another feature which is common to both these groups and it is that none of the petitioners raised any objection to their cases being transferred in the manner stated above and in fact submitted to the jurisdiction of the Income Tax Officers to whom their cases had been transferred. It was only after our decision in Bidi Supply Co. v. The Union of India (B)(Supra) was pronounced on 20th March 1950 that these petitioners woke up and asserted their alleged rights the Amritsar group on 20th April 1956 and the Raichur group on 5th November 1956. If they acquiesced in the jurisdiction of the Income Tax Officers to whom their cases were transferred they were certainly not entitled to invoke the jurisdiction of this Court under Article 32. It is well settled that such conduct of the petitioners would disentitle them to any relief at the hands of this Court.

6. But this case has no application to the facts of the instant case where there is no question of submitting to the jurisdiction of a Tribunal. The learned Counsel for respondent No. 1 also relied on The Burmah-shell Refineries Limited Vs. Their Workmen, Burmah-Shell Refineries Ltd. v. Their Workmen which is not applicable to the facts of the instant case as there Their Lordships were dealing with an application by special leave to appeal which is regulated by special

considerations. The learned Counsel for the respondent No. 1 also relied on Raj Pat Singh Vs. Dy. Superintendent of Police, Basti and Others, Raj Pat Singh v. Dy. Superintendent of Police Basti where it was held:

While exercising jurisdiction under Article 226 High Court does not and cannot usurp the functions of a Court of Appeal and for that reason cannot permit the party to raise a fresh point for the first time before it. Even otherwise the High Court can presume that a point not raised before the subordinate authorities has been given up as being without any substance.

7. The learned Counsel also relied on Kumaran Vs. Ist Addl. Income Tax Officer, Kozhikode, Kumaran v. 1st Addl. Income Tax Officer Kozhikode where the following observations were made:

A petitioner cannot succeed on the ground against the jurisdiction of an authority whose order he is challenging unless he has taken the ground before the authority making the order. A General objection to the jurisdiction taken by him before the authority is not sufficient for the purpose. The reason for the rule is that the authority making the order must have the opportunity of adjudication on the objection and where the ground be vaguely put the authority does not have a fair opportunity of doing so. Nor can a party be treated as diligent when though armed with a legal objection which is known to be strong he intentionally refrains from urging or passing the ground in that form.

Another case relied on is Jasoda Jiban Saha (P.) Ltd. Vs. S.K. Chatterjee and Another, Jasoda Jiban Saha Ltd. v. S.K. Chatterjee and Anr where it was observed:

Generally speaking an application to the High Court for a high prerogative writ of certiorari cannot be allowed on ground which were not taken in the Courts below and which are being taken in the High Court for the first time. Even when it relates to the question of jurisdiction the objection as to jurisdiction ought to have been taken in the Court of the first instance.

But these three cases have no application to the facts of the present case because when forming of wards the Collector does not function as a Court. It is clear from the order of the Collector dated 29-3-61 that he himself visited the village where certain representations were made to him. His order dated 29-3-1961 does not show what were the points urged before him although it shows that the present petitioner was before him. In the order the Collector observed that he went to the village and heard both the parties, ft therefore appears that he had heard the parties at the village and when he passed the order on 29-3-1961 he was not acting as a Tribunal or as a Court. In fact he had not determined the wards by his order dated 29-3-1961. The order re-forming the wards is to be found in the notification of June 1961. The notification of June 1961 reforming the wards in a different geographical manner and allotting seats to each ward in a different manner from that decided by the Collector in his notification of September 1960 is contrary to the Act. It is therefore illegal and

void, it is therefore immaterial whether the Collector had heard the parties or even, the petitioner when he decided on 29-3-1961 to reform the wards.

8. In S.C. Prashar and Another Vs. Vasantsen Dwarkadas and Others, S.C. Prashar and Anr. v. Vasantsen Dwarkadas and Ors. Their Lordships observed:

A patent want of jurisdiction entitles the petitioner to obtain immediate relief from the High Court even though he could raise the plea of want of jurisdiction in a higher tribunal and even though he may have acquiesced in the want of jurisdiction. But the want of jurisdiction must be a patent one. Where even on a cursory perusal of Section 34 and its provisos it is clear that the Income Tax Officer has exceeded his competence and authority the want of jurisdiction is undoubtedly a patent one.

In A.S.T. Arunachalam Pillai Vs. Southern Roadways (Private) Ltd., St. Arunachalam Pillai v. Southern Roadways Ltd. Their Lordships of the Supreme Court held that the High Court in a writ petition rightly allowed the petitioner to urge a plea which went to the root of the matter and involved the question whether the Regional Transport Officer had jurisdiction to vary the conditions of a permit.

In our view, the contention of the learned Counsel for respondent No. 1 cannot be accepted because the notification of June 1961. was not passed by the Collector as a tribunal or as a Court. What is really challenged is this notification dated 5th June 1961 and not the order of the Collector dated 29-3-1961.

9. It is next contended that the original formation of wards notified in the Gujarat Government Gazette on 29th September 1960 at pages 386 to 396 showing the formation of wards for Tavadiya village and other villages and showing the number of members to be elected for each of the three wards was not a complete formation of wards. It is contended that the formation of wards should be completed only when a voters list prepared ward-wise is duly published as provided in Sub-rules 4 and 5 of rule 3. It is contended that as the voters list according to the first formation of wards was not duly published the first formation of wards does not become complete and could therefore be altered. We cannot accept this contention because the formation of wards and determining the number of seats allowed 10 a ward etc. are steps preceding and independent of the preparation of the voters list. The preparation of the voters list according to wards can only follow the notification or the order of the Collector determining the formation of wards It is immaterial for this purpose that the villagers did not know that the wards had been formed by the Collector and notified by him in the Gazette of September 1960.

It is next contended that the Collector has power to form and reform the wards and emphasis is laid on the wordings of Section 10(1) of the Act which reads as follows:

Subject 10 any general or special order which the State Government may make

in this behalf-

(a) a panchayat shall consist of such number of members not being less than 7 and more than 15 as the Collector may determine;

(b) each village shall be divided into such number of wards and the number of members of a panchayat to be elected from each ward shall be such as may be determined by the Collector.

10. It is contended that the ward used is "may and not" shall and that the use of the word "may gives an unlimited discretion to the Collector to determine the wards the number of wards and the allotment of seats to each ward in any manner he liked and any number of times. Reliance is placed on 59 Bom.L.R. 158 Kurban Hussien Sajauddin v. Ratikant Nilkant where the distinction between "may and "must has been pointed and where it is explained when the word "may can in some cases be read as "must. But for the purpose of this petition it is unnecessary to consider this distinction. Section 10(1) clearly gives the Collector power to form the wards and to divide the village into number of wards and allot the number of seats of the Panchayat to be elected from each ward. The first part of this Clause (b) clearly provides that each village shall be divided into such number of wards as may be determined by the Collector. The Collector is therefore under an obligation to divide the village and it is left to his discretion whether to divide the village into one or two or more wards. That is why the word may is used.

11. Section 14 of the Bombay General Clauses Act of 1904 provides that where by any Bombay Act made after the commencement of the General Clauses Act of 1904 any power is conferred on any Government then that power may be exercised from time to time as occasion requires. This section does not help the Collector as the power to form wards is not conferred on Government. Of course the Collector can exercise the power to form wards from time to time as occasion requires but this power is subject to the rule that the election to the Village Panchayat must be conducted in the manner prescribed. Two of the integral steps in the conduct of the election in the prescribed manner are the formation of the wards and preparation of voters lists according to such wards. These two steps cannot be altered in the course of the same election.

12. It is also contended that the Collector has power to re-form the wards any number of times provided no prejudice is caused to anyone. It is contended that no prejudice is caused because the villagers have only the right to vote and to get elected and these are unaffected by any change in the wards. This contention cannot be accepted because the villagers and the residents of each ward are interested-in the number of members to be elected in each-ward. If the number of members to be elected from each ward is changed certain people are adversely affected and certain people are favourably affected. But on this point the question of prejudice is immaterial. If the Collector has done something which he has no authority to do his order is illegal and unjustified and must be

set aside. He must follow the election rules and conduct the election in the manner prescribed. He cannot vary the procedure of the election even if no prejudice is caused. But in fact his notification re-forming the wards causes prejudice to many persons in the village.

13. It is next contended that in the electoral-roll the petitioner remains as a voter in the same ward viz. ward No. 3 notwithstanding the reformation of the wards. It is therefore contended that the writ petition should be dismissed. In addition to the petitioner the whole village is interested in the proper conduct of the election. Even if the petitioner remains a voter in the same ward viz. ward No. 3 in which three members were to be elected as a result of the notifications only two members would be elected from ward No. 3 instead of three as originally notified. The petitioner is therefore himself directly affected by the reformation of the wards. Even if the petitioner is not directly affected this is a matter in which the whole village is interested and anyone who files a writ petition would be entitled to succeed whether he is in the same position as the petitioner or not.

14. It is also contended that the voters list of the village remains the same and the validity of the election does not depend on any change in the voters list. This contention cannot be accepted because according to rules for the conduct of an election it is the voters list for each ward that plays an important part in the conduct of an election. If elections are conducted in a manner which is contrary to law a writ must issue. In this particular case the petitioner is a resident of the village and is very well interested in the proper conduct of the election to the panchayat in his village.

15. It is lastly contended that a writ of certiorari does not lie against an administrative order and reliance is placed on the judgment of the Supreme Court in 53 BomLR 1 Province of Bombay v. Khushaldas S. Advani. That case was a petition for a writ of certiorari and for an order u/s 45 of the Specific Relief Act filed in 1948. Their Lordships of the Supreme Court explained the distinction between an administrative order and a quasi-judicial order.

16. In State of Bombay Vs. K.P. Krishnan and Others, State of Bombay v. K.P. Krishnan Their Lordships of the Supreme Court held that even in the case of an administrative order writ of mandamus can be issued if there are good grounds for the same. It is true that the notification issued by the Collector in June 1461 is not a judicial or a quasi-judicial notification. But Article 226 of the Constitution clearly provides that writs including writs in the nature of mandamus prohibition quo-warranto and certiorari can be issued. There is no limitation to the nature of a writ which can be issued by a High Court under Article 226 of the Constitution. In this case we are clearly of the opinion that the Collector had no authority to vary the procedure for the conduct of the election of the panchayat prescribed by the Act and the Rules and that having issued the notification in August 1960 forming the words he had no authority to reform the words and to change their formation and geographical distribution and the number of seats allotted to each

ward But he did so by his notification of June 1961.

17. We therefore hold that the notification of 5th June 1961 is an illegal Notification and we hereby issue a writ to the Collector prohibiting him from enforcing that notification or acting under that notification or conducting the election in pursuance of that notification. No order as to costs.