

(2007) 07 BOM CK 0010
In the Bombay High Court
Case No : Writ Petition No. 3046 of 2007

Madhuri Dhurve

APPELLANT

Vs

State Election Commissioner and Others

RESPONDENT

Date of Decision : 13-07-2007

Acts Referred:

City of Nagpur Corporation Act, 1948 — Section 428, 428(2), 9AA
Constitution of India, 1950 — Article 226, 227, 243ZG
Mumbai Municipal Corporation Act, 1888 — Section 33(2)

Citation : (2007) 5 MhLj 716

Hon'ble Judges : R.C. Chavan, J; A.H. Joshi, J

Bench : Division Bench

Advocate : F.T. Mirza, for the Appellant; P.C. Marpakwar and C.S. Kaptan, for the Respondent

Final Decision : Dismissed

Judgement

A.H. Joshi, J.—Rule. Rule is made returnable forthwith as respondents are represented. Service to respondent No. 3 is not necessary since she is a proforma respondent and no relief is claimed against her.

2. Petitioner-herein who was one amongst the two candidates contesting from Ward No. 36 where respondent No. 3 was elected as Corporator, has filed this petition.

3. The caste claim of respondent No. 3 has been held invalid and by virtue of effect of Section 10(4) of the Maharashtra Scheduled Caste, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Other Backward Classes and Special Backward Category (Regulation of Issuance and Verification of) Caste Certificate Act, 2000, and Section 9AA of the City of Nagpur Corporation Act, 1948, respondent No. 3 stands unseated and disqualified retrospectively.

4. According to petitioner:

(a) since the disqualification operates retrospectively, the candidature of

respondent No. 3 itself is to be void;

(b) the Returning Officer is under an obligation to declare the petitioner elected as a Corporator, being only candidate whose nomination was valid in Ward No. 36.

5. In support of submission, learned Advocate Mr. Mirza placed reliance on different judgments. The first group of judgment is:

(1) Sujit Vasant Patil Vs. State of Maharashtra and Others, (2) The Management of National Projects Construction Corporation Ltd. Vs. Their Workmen and Others, ; (3) Rupadhar Pujari Vs. Gangadhar Bhatra, . (4) Sagiruddin v. State of Maharashtra 2007 (2) M.L.J. 55.

The judgment i.e. (1) Sujit Vasant v. State of Maharashtra (supra), is relied upon to urge that since the Election Tribunal does not have jurisdiction to consider the question of validity of caste, and the judgment of the Committee is to bind the Election Tribunal, it would not be necessary to challenge the legality of election by filing Election Petition and the candidate would automatically lose the status by virtue of invalidation of his certificate and the office shall fall vacant.

The other judgments, namely: Madhukar v. Jaswant (supra); Rupadhar Pujari v. Gangadhar (supra) are relied upon to urge the proposition that it is competent for the Election Tribunal to grant declaration in favour of a candidate is elected when the nomination of returned candidate was liable to be rejected as the votes secured by him were liable to be wasted.

In Madhukar v. Jaswant (supra) the matter had gone to the Apex Court through the channel of Election petition, as is apparent from para No. 45, apart from other discussion.

6. Insofar as Sagiruddin v. State of Maharashtra is concerned, the declaration has been granted by the Division Bench of this Court in favour of respondent No. 5 in the petition who had not filed any election petition, though election petition which was filed by petitioner No. 2 was pending before the Court of Small Causes, and the petitioner No. 2 had suffered invalidation of caste claim, and on that ground, though the election petition was pending, this Court granted the declaration.

7. Learned Advocate Mr. Kaptan and Mr. Marpakwar for respective respondents, while opposing the petition, submitted that the scheme of Section 428 of the City of Nagpur Corporation Act, 1948 and the general principles of election law do not provide for challenge to the election and consequent relief by way of declaration in favour of claim to be made in absence of election petition. Mr. Kaptan, argued that necessary corollary of Article 243-ZG Sub-clause (b) is that no election can be challenged otherwise than as prescribed in the law. According to Mr. Kaptan, by its necessary corollary the relief that, in place of the returned candidate a person who challenges election should be declared elected or any ancillary relief would be permissible only in election petition since the jurisdiction to grant such a relief primarily vests in the Election Tribunal constituted under the Act the

relief, would not be granted by the High Court exercising jurisdiction under Articles 226 and 227 of the Constitution would not be the Court or Tribunal vested with these powers. According to Mr. Kaptan, the Division Bench judgment of this Court in the case of Sagiruddin v. State, would not serve the cause of petitioner as it does not lay down law to that effect.

In support, learned Advocate Mr. Kaptan pointed out that in the body of judgment in case of Sagiruddin (supra) what has been noted in para No. 28 is only recording of submissions Mr. Kaptan, then, pointed out that the submissions, which have been recorded in para No. 28, have not been analysed and ruled upon, and all that this Court has done, is to order the declaration as returned candidate in favour of respondent No. 5 and, therefore, this judgment does not serve as the precedent on this point.

8. 4 We have perused the judgment in the light of submissions. The concluding portion of the judgment is contained in para Nos. 28 and 29 which we quote below for convenience and ready reference.

28. Counsel for the respondent No. 5 contended that if the petition is to be dismissed, then u/s 33(2) of the Mumbai Municipal Corporation Act, 1888, the respondent No. 5 will have to be declared as elected. The petitioner No. 2 has contested elections from Ward No. 106 from the category of OBC Ladies, came to be declared elected in place of Geeta Gore under the same provisions of the Mumbai Municipal Corporation Act, as has been reiterated by the petitioner in paragraph 6 of the petition and therefore consequence must follow. Section 33(2) of the Mumbai Municipal Corporation is as under:

If the said Chief Judge, after making such inquiry as he deems necessary, finds that the election was valid election and that the person whose election is objected to is not disqualified he shall confirm the declared result of the election, (if he finds that the person whose election is objected to is disqualified for being a councillor he shall declare such person's election null and void. If he finds that the election is not a valid election he shall set it aside. In either case he shall direct that the candidate, if any, in whose favour the next highest number of valid votes is recorded after the said person..., and against whose election no cause of objection is found, shall be deemed to have been elected).

It will be clear that if the Court finds that the petitioner No. 2 was disqualified, the said election has to be declared null and void. If the Court finds that the election is not a valid election he shall set it side. 29. Considering therefore all the circumstances and submissions, we have no hesitation to hold that the claim of the petitioners that they belong to Lohar caste is false and bogus and it is based on manipulation of Government record obviously done at the instance of the petitioners. Therefore, order:

ORDER

Petition is dismissed with costs of Rs. 5000/-.

Petitioner No. 2 is disqualified for being elected as a Corporator, and therefore, her election is null and void. Respondent No. 5 has contested election from the said Ward No. 108 from the category of OBC ladies and as has secured next highest number of valid votes, therefore, respondent No. 5 is declared elected as Corporator from the said Ward No. 108.

9. From above quotation, it is apparent that paragraph 28 of judgment in case of Sujit Vasant (supra) contains the quotation of submissions, whereas Paragraph 29 contains the finding as to the caste claim being false and bogus and later part is an operative order. We are unable to extract any observation consisting discussion and judicial dictum from this judgment.

10. Mr. Kaptan, learned Advocate then placed reliance on the reported judgment in the case of Shri Banwari Dass Vs. Shri Sumer Chand and Others, . He placed reliance on the observations and findings contained in para No. 20 to urge that the provision relating to election law need to be strictly construed. Based on this judgment, learned Advocate Mr. Kaptan submitted that in absence of a challenge to the election and a prayer for relief that the declaration be made in favour of the petitioner by filing a petition u/s 428 of the City of Nagpur Corporation Act, 1948, any declaration will be impermissible since it would amount to this Court assuming the jurisdiction of the Tribunal. Moreover, the election petition if at all to be filed ought to have been filed within prescribed period of limitation of ten days, which has not been filed. According to Mr. Kaptan, had the election petition been filed and it was to be based on invalidation or challenge to the caste validity, the declaration made by the Scrutiny Committee would have been binding on the Election Tribunal, as found by this Court in Sujit Vasant's case, and the Election Tribunal could have had at once granted the declaration had it been sought. According to him, the situation, namely, the fiction for setting aside the election would automatically operate as the only candidate who had otherwise remained in the fray to be declared elected would not be available as legal right. In absence of any such legal right, according to him, there is no foundation for issuing writ of mandamus and the declaratory relief sought in the petition. Moreover, writ would not be issued when alternate remedy was available and has not been resorted to.

11. We find that the Election Law has all throughout been recognized as a law of hyper technicalities. Representatives of the people are expected to be extremely diligent in the matter of challenge to the election. This is rather the only reason why the limitation prescribed for challenging the declaration of returned candidate is kept of such a narrow span of time i.e. of ten days.

12. The powers of Election Tribunal are abundantly and apparently clear as eloquent from Sub-section (2) of Section 428 and as interpreted and on the lines on which the guidance can be sought from the precedents under the Representation of the People Act. In this situation, had the relief which ought to have been prayed for sought, would have automatically followed, but cannot be construed to automatically follow now in absence of challenge by a petition

before appropriate forum in appropriate manner.

13. Granting of such a relief in the present petition would mean dispensation of alternate and efficacious remedy and thereby licensing the candidate not to have recourse to statutory remedy and to speculatively challenge as and when the invalidation arose as a fortuitous gain.

14. In this background, we hold that in the absence of challenge by petitioner, a candidate cannot by way of a fortuitous gain or in a wagering manner pray for the relief which the candidate did not resort to knowing fully well that a statutory remedy was available. In this background, we hold that the petitioner has failed to make out a case for any relief.

15. Rule is discharged. Writ petition is dismissed. Parties shall bear their own costs.