
(2000) 12 BOM CK 0006
In the Bombay High Court
Case No : W. P. No. 3818 of 2000

Meena Shriram Thakre

APPELLANT

Vs

Election Officer and others

RESPONDENT

Date of Decision : 02-12-2000

Acts Referred:

Constitution of India, 1950 — Article 226, 227, 243O(b), 243ZG, 329(b)

Citation : (2000) 12 BOM CK 0006

Hon'ble Judges : R. K. Batta, J;P. S. Brahme, J

Bench : Division Bench

Advocate : Nitin Sambre, for the Appellant; Bhushan Gavai, Government Pleader, For respondents Nos. 1, 8, 9 and 10, P.G. Kheole, For respondent No. 7, Respondents 2 to 6 deleted, for the Respondent

Final Decision : Allowed

Judgement

R. K. Batta, J.—Rule. Learned Advocate for the petitioner seeks to delete respondents Nos. 2 to 6. Leave granted. With the consent of learned Advocates appearing on behalf of the parties, rule was made returnable forthwith. Heard learned Advocates for the parties.

2. Election to Gram Panchayat (respondent No. 8) was held on 31-8-2000. The Gram Panchayat consists of seven members including petitioner, respondent No. 7 as also the deleted respondents Nos. 2 to 6. Petitioner and respondent No. 7 were the only candidates for the post of Sarpanch for which election was held. Polling by secret ballot was resorted to in which petitioner polled three valid votes and respondent No. 7 polled two valid votes. One vote is stated to be clearly invalid since the voter had written her name in the ballot paper. According to respondent No. 1, he could not decide about the validity of the seventh vote in which the voter had made a tick mark above and below the line which was drawn to indicate space between the two contestants. According to the Election Officer (respondent No. 1), since the petitioner had not polled 2/3rd of the votes, he ordered fresh voting and in this fresh voting, respondent No. 7 polled four votes

and the petitioner polled three votes. Respondent No. 1, Election Officer, therefore, declared that respondent No. 7 was elected to the post of Sarpanch. Aggrieved by this decision, the petitioner sought reference u/s 33(5) of the Bombay Village Panchayats Act, 1958 (hereinafter called, the "said Act") to the Collector. The Additional Collector vide order dated 4th October 2000 found that in the first round of voting, the petitioner had polled three valid votes whereas respondent No. 7 had polled only two valid votes and the other two votes were invalid. However, it was urged by the Election Officer before the Additional Collector that since the petitioner and respondent No. 7 had polled equal votes and draw of lots was demanded, he got confused on account of dispute regarding the invalid vote and he ordered re-election. The Additional Collector found that the minutes of the said meeting disclosed that the Election Officer had ordered repoll on the ground that no candidate got 2/3rd votes which was not the requirement of law and as such, the Election Officer had miserably failed in the discharge of his duties for ordering revoting which is not provided in law. The Additional Collector, therefore, quashed second round of voting being contrary to the Act and the Rules and declared petitioner as elected to the post of Sarpanch. This order of the Additional Collector was challenged before the Commissioner, Nagpur Division, Nagpur. The Additional Commissioner vide order dated 24th October 2000 held that the Election Officer had put up completely new story before the Additional Collector that there were equal votes and draw of lot was demanded, but he got confused and as all the members requested re-voting, he ordered re-voting. The Additional Commissioner has held that the process of election once started, cannot be re-started as per the Rules; the proceedings do not mention how many votes were in favour of petitioner and how many in favour of the respondent No. 7 in the first round of voting; the theory of Election Officer and Gram Sevak that there was equality of votes and, therefore there was request for drawing lots, cannot be believed as the proceedings as recorded on page 3 of Register do not make mention of such request and in view of the same, the entire election process was vitiated. He, therefore, directed Additional Collector to hold fresh election to the post of Sarpanch of the Gram Panchayat.

3. The petition was filed on 7-11-2000 and it came up for hearing on 14-11-2000 when it was adjourned on the request of learned Advocate for petitioner, to 16-11-2000. On that day, learned Advocate for respondent No. 7 stated that the election process had started in terms of the order dated 24-10-2000 of the Additional Commissioner. The matter was heard on merits on 18-11-2000 and was fixed for judgment on 21-11-2000. On 21-11-2000, learned Advocate for respondent No. 7 filed pursis stating that in the fresh election held pursuant to order dated 24-10-2000 of the Additional Commissioner, respondent No. 7 had been declared to be elected as Sarpanch of the Gram Panchayat as a result of which petition has become infructuous. After hearing learned Advocates for the parties, it was ordered that the said result of election shall be subject to the judgment passed in the writ petition. The pursis that the petition had become infructuous, was dismissed.

4. Learned Advocate for the petitioner urged before us that the petitioner had polled three valid votes whereas respondent No. 7 had polled only two valid votes and the other two votes being invalid, the petitioner should have been declared elected as Sarpanch, but the Election Officer on the premise that no one had obtained 2/3rd majority, which does not have support of any provision in law, ordered re-voting which is not contemplated in the Act and the Rules. In the circumstances, it was urged that the Additional Collector had rightly declared the petitioner elected to the post of Sarpanch whereas the Additional Commissioner though disbelieved the theory of Election Officer and Gram Sevak about equality of votes and request for drawing of lots, yet ordered that the entire election process is vitiated, resulting in order of fresh election. It was pointed out that the petitioner took over as Sarpanch and continues to be Sarpanch.

5. Learned Government Pleader candidly submitted before us that what has been done by Election Officer, respondent No. 1 cannot be supported in law, but there was no mala fides on his part and it is only on account of inexperience and confusion on the part of Election Officer that the correct procedure was not followed by him by ordering re-voting which is not contemplated under the Act and the Rules. The Election Officer was directed to produce all records before us. On specific query being made, learned Government Pleader stated before us that the hand-writing in Marathi on the two envelopes, one stating "Valid Votes 5" and the other stating, "Invalid Votes 2" is that of the Election Officer.

6. Learned Advocate for respondent No. 7 urged before us that the Additional Collector had exceeded in his jurisdiction to declare the petitioner as Sarpanch since the Additional Collector had no power to do so in view of section 33(5) of the said Act. The Additional Collector could have at the most ordered that the election of the respondent No. 7 was invalid, but he had no jurisdiction to declare the petitioner as elected on the post of Sarpanch. In support of this submission, learned Advocate for respondent No. 7 has relied upon State of Kerala vs. M. P. Shanti Verma Jain, AIR 1998 SCW 2098. The second contention advanced by learned Advocate for respondent No. 7 is that the election process is already on and this Court should not interfere in the election process at this stage. In this connection, our attention was drawn to Articles 243-O(b), 243-ZG and 329(b) of the Constitution of India as also the judgment of the Apex Court in Anugrah Narain Singh and another vs. State of UP and ors., 1997(1) Mh.L.J. 132, as also the judgment of the learned Single Judge of this Court in the case of Vijaykumar Maniklal Bang vs. State of Maharashtra and ors., 1997(1) Mh.L.J. 637; judgment of the Division Bench of this Court in the case of Kalpana Ananda Sutar and others Vs. The State of Maharashtra and others, , and the judgment of the Apex Court in M. Venkatachalam vs. A Swamickan and another, AIR 1999 SCW 1353. He also urged that re-election did not prejudice anybody. Third contention raised by learned Advocate for respondent No. 7 is that the petitioner has not come to the Court with clean hands as a result of which petitioner is not entitled to any relief in the petition. He urged before us that the petitioner did not raise any objection to re-voting and it is only after the result of re-voting was declared that

the petitioner filed Annexures C, E, G and I later on before the Tahsildar, but in the petition, it is claimed that all these documents were filed before the Election Officer. On the basis of above submissions, learned Advocate for respondent No. 7 urged that the petition be rejected.

7. In reply, learned Advocate relied upon Election Commission of India Through Secretary Vs. Ashok Kumar and Others, .

8. In the light of rival contentions, we have examined the record including seven ballot papers. We have already pointed out that on the two envelopes containing votes, there are in the hand-writing of the Election Officer (respondent No. 1) notings to the effect "Valid Votes 5" on one envelope and "Invalid Votes 2" on the other envelope. The minutes of the meeting recorded by the Election Officer (respondent No. 1) does not surprisingly indicate as to how many Valid votes were polled by each of the candidates, but it only speaks of two invalid votes - on one, the voter had written her own name and this vote obviously was invalid. On the other ballot paper, tick mark had been recorded by the voter on the line dividing the two names of the contestants. In respect of this vote, the Election Officer in the minutes has written that it could not be made out from the vote of one voter clearly as to in whose favour the voter had given the vote which means that the Election Officer had treated both the votes as invalid. However, without support from any provision of law, the Election Officer declared re-voting on the ground that no candidate had obtained 2/3rd votes. There is no requirement of law that the candidate should get 2/3rd votes for the purpose of being declared as Sarpanch. The result is that the petitioner had polled three valid votes and respondent No. 7 had polled two valid votes whereas two votes were invalid.

9. Rule 10 (2) of the Bombay Village Panchayats (Sarpanch and Up-Sarpanch) Election Rules, 1964 which deals with the procedure for election, lays down that the candidate who obtains the highest number of votes, shall be declared to have been duly elected as Sarpanch and when a equality of valid votes is found to exist, the Presiding Officer shall resort to draw of lots. The theory of equality of votes does not at all figure in the minutes of the election written by the Election Officer and this theory was propounded for the first time before the Additional Collector. The Additional Collector as well as Additional Commissioner have both rejected this theory. In such circumstances, there was absolutely no reason for any confusion in the mind of respondent No. 1, Election Officer and it appears that the Election officer has taken shelter under the plea of confusion in order to defeat the claim of the petitioner. The respondent No. 1 had not recorded the minutes of the meeting correctly indicating valid votes polled by each candidate which was required to be recorded in the minutes. He put up the theory of equality of votes as a matter of deliberate after-thought before the Additional Collector and the manner in which he acted, shows total incompetency. The Additional Collector had, therefore, considered the entire matter in correct perspective and held that since the petitioner had polled three valid votes as against two valid votes polled by respondent No. 7, the two votes being invalid,

re-voting ordered by Election Officer (respondent No. 1), in the circumstances, was contrary to law and as such, declared the petitioner elected to the Office of Sarpanch. The Additional Commissioner without sufficient and proper justification interfered with the order of the Additional Collector even after discarding the theory of equality of votes put up by the Election Officer before the Additional Collector. The non-mention of the valid votes polled by the petitioner and the respondent No. 7 in the minutes by respondent, obviously could not be the reason to declare the entire election process as vitiated. The record speaks for itself that the petitioner had polled three valid votes and respondent No. 7 had polled only two valid votes and the Election Officer had ordered re-polling on the ground that no one had got 2/3rd of the votes which has no support of law. The two envelopes containing the votes on which there are notes in the hand-writing of Election Officer clearly show that there were five valid votes and two invalid votes. Out of five valid votes, petitioner had polled three valid votes and respondent No. 7 had polled two valid votes. The question of drawing lots, confusion resulting in the mind of the Election Officer and ordering re-voting, is totally without any justification whatsoever. Accordingly, the order of the Additional Commissioner declaring the entire election process as vitiated and ordering fresh election of Sarpanch, cannot be sustained and has to be set aside.

10. The fresh election held in pursuance of the said order of the Additional Commissioner is obviously subject to final outcome of this writ petition.

11. In this set of facts, the rulings upon which reliance has been placed by learned Advocates for parties, strictly speaking, do not have any bearing on the matter in issue.

12. Article 243-O(b) of the Constitution of India lays down that notwithstanding anything in this Constitution, no election to any Panchayat shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State. Section 33(5) of the said Act lays down that in the event of a dispute arising as to the validity of the election of a Sarpanch or Upa-Sarpanch under sub-section (1), the Officer presiding over such meeting or any member other than an associate member may, within fifteen days from the date of the election, refer the dispute to the Collector for decision. In this case, the matter was before the Collector in terms of section 33(5) of the said Act. From the decision of the Collector, an appeal lies before the Commissioner whose decision is final. The order of the Additional Commissioner was challenged in this petition under Articles 226 and 227 of the Constitution of India. The power of judicial review is now well recognised. Judicial review is a basic structure of the Constitution. The Apex Court in *K. Venkatachalam vs. A Swamickan and another*, AIR 1999 SCW 1353, has laid down that Article 226 of the Constitution is couched in widest possible term and unless there is clear bar to the jurisdiction of the High Court, its powers under Article 226 of the Constitution can be exercised when there is any act which is against any provision of law or violative of constitutional

provisions and when recourse cannot be had to the provisions of the Act for the appropriate relief. In the facts and circumstances of this case, we consider it necessary to exercise the writ jurisdiction.

13. The Additional Collector, in the exercise of jurisdiction u/s 33(5), was well within his jurisdiction in passing the order dated 4-10-2000. We, therefore, do not find any merit in the first and second contentions raised by learned Advocate for respondent No. 7.

14. Coming to the last contention of learned Advocate for respondent No. 7, it is to be seen that in the petition, the petitioner has clearly averred that Annexure C was filed by her after voting to respondent No. 1 and respondent No. 1 had immediately informed her the result of election vide Annexure D and the petitioner had immediately requested respondent No. 1 to declare her as elected to the post of Sarpanch. These averments are found in para 5 of the writ petition. In para 6 it is urged by petitioner that she was informed by Annexure F that revoting was ordered because nobody had got 2/3rd votes. In para 7 it is urged by petitioner that she resisted the above action of respondent No. 2 and by giving a representation immediately on the spot which is Annexure G. It is further stated that when these affidavits were brought to the notice of respondent No. 8, he expressed that the petitioner shall be declared as elected and copy of communication is at Annexure H. In para 8, it is further stated that respondent No. 1 conducted election in spite of protest raised by petitioner. A reading of paragraphs 5 to 8, therefore, clearly shows that the case of the petitioner is that all that is stated in the said paragraphs took place at the special meeting which, prima facie, does not appear to be correct since the original of the said Annexure C shows that the same was received at 7.40 p.m. original of Annexure D was received at 7.30 p.m. original of Annexures E and G were received at 8.10 p.m. and original of Annexure H at 8.00 p.m. The election started at 2.00 p.m. and was over at 4.30 p.m. Prima facie, therefore, the case of the petitioner that all this had transpired at the special meeting does not appear to be correct and the facts contained in paragraphs 5 to 8 have been verified by the petitioner as true to her personal knowledge and belief. Verification of paragraphs 5 to 8 is prima facie false verification. In this state of facts, we direct the Additional Registrar to file appropriate criminal proceedings against the petitioner for placing incorrect facts before this Court by duly verifying the same as true to her personal knowledge and belief. This, however, would not be sufficient to disentitle the petitioner from the relief which she is entitled in law irrespective of having placed incorrect facts before this Court. This issue was also dealt with by the Additional Collector and he had rightly observed that the whole issue of when the documents were produced and if they were produced in the evening, is relevant to decide whether the election meeting was conducted, according to due procedure.

15. For the aforesaid reasons, order dated 24th October 2000 passed by the Additional Commissioner (respondent No. 10) is quashed and set aside and the

order passed by the Additional Collector (respondent No. 9) on 4-10-2000 quashing the second round of voting and declaring the petitioner elected to the post of Sarpanch, is sustained. Writ petition is allowed in the aforesaid terms. We direct the Additional Registrar of this Court to take necessary action against the petitioner in terms of observations made in paragraph 14 above. No costs.