
(1997) 09 BOM CK 0031

In the Bombay High Court

Case No : Writ Petition No. 3110 of 1997

Momin Abdul Rashid

APPELLANT

Vs

Patil Vilas Raghunath and others

RESPONDENT

Date of Decision : 23-09-1997

Acts Referred:

Constitution of India, 1950 — Article 226, 243
Maharashtra Municipal Councils Nagar Panchayats and Industrial Township Act, 1965
— Section 10(5), 21(10), 51(5)

Citation : (1998) 2 BomCR 618

Hon'ble Judges : J.A. Patil, J;Ashok Agarwal, J

Bench : Division Bench

Advocate : M.M. Vashi, for the Appellant; Nitin V. Pradhan, S.D. Khot, R.M. Agarwal and N.M. Zambre, A.G.P., for the Respondent

Judgement

Ashok Agarwal, J.—The present petition pertains to a dispute in respect of the election of respondent No. 1 to the post of President of Bhiwandi-Nizampur Municipal Council. Petitioner and respondent No. 1 were the only contesting candidates for the election to the post of President held on 9th May, 1997. The post of President for the present term is earmarked for open category candidates, As far as petitioner is concerned, he belongs to the open category and has been elected from a ward earmarked for open category candidates. As far as respondent No. 1 is concerned he belongs to the backward class citizens and has been elected from a ward reserved for backward class citizens. Apart from the petitioner and respondent No. 1, one Shri Dalavi Javed Gulam Mohamad had also filed his nomination for the post of President. He, however, withdrew his nomination. After respondent No. 1 filed his nomination petitioner had raised an objection to his nomination on the ground that the post of President had been earmarked for open category candidates and hence respondent No. 1 who had been elected from a ward earmarked for backward class citizen was not eligible to contest. The said objection did not find favour with the Sub-Divisional Officer, who, by an order passed on 9th May, 1997 overruled the objection. Petitioner

and respondent No. 1 were the only candidates in the fray. Elections were accordingly held and respondent No. 1 was declared elected.

2. The petitioner, being aggrieved by the order, overruling his objection to the nomination of respondent No. 1, carried the matter in appeal to the Commissioner/ Regional Director of Municipal Administration who, by an order passed on 12th June, 1997, confirmed the order passed by the Sub-Divisional Officer and dismissed the appeal. Taking exception to the aforesaid orders passed by the Sub-Divisional Officer and Commissioner/Regional Director of Municipal Administration, the petitioner has preferred the present petition.

3. The short question which has been raised in the present petition is in regard to the eligibility of respondent No. 1 to contest for the post of President. The post of President, as already indicated, has been earmarked for the open category candidate. As far as petitioner is concerned, he belongs to the open category and has been elected from a ward earmarked for open category candidates. Respondent No. 1 on the other hand belongs to the backward class citizens and has been elected from a ward reserved for backward class citizens.

4. Shri Vashi, who appears on behalf of the petitioner, has contended that the post of President is reserved for a candidate belonging to the open category. Hence, in order to be eligible for contesting for the post, a candidate must necessarily, not only belong to the open category but should also have been elected from a ward earmarked for open category candidates.

5. In support of the contention reliance is placed on a decision of the Supreme Court in the case of *Saraswati Devi Vs. Smt. Shanti Devi and Others*, . The Supreme Court in the aforesaid case has inter alia observed as under :--

"On a combined reading of Article 243-T of the Constitution of India sections 10(5) and 18 of the Act and sub-rule (4) of Rule 70 of Election Rules, it becomes clear that the Parliament as well as the Legislature have enacted these provisions in order to provide for reservation of office of the President for members of Scheduled Castes, Scheduled Tribes, backward classes and women in rotation. A bare reading of section 10(5) and Rule 70(4) shows that the offices of the Presidents are to be filled from among members belonging to different categories by rotation and by lots. It is not disputed that the post of President of Loharu Municipal Committee at the relevant time was reserved for Scheduled Castes Women. So far as the appellant is concerned, she has been elected from Ward No. 5 on a seat reserved for Scheduled Caste women. Therefore, in that category she is the sole candidate. So far as respondent No. 1 is concerned even though by coincidence she also belongs to Scheduled Caste but she was not elected on a seat reserved for Scheduled Caste women, but on a seat reserved for General category women from ward No. 11. It is not in dispute that in that ward there were other contesting women, not belonging to Scheduled Castes category, but also belonging to General category. Therefore, respondent No. 1 is a member who is elected on the seat earmarked for General category women, she cannot

be said to be a member elected on a seat reserved for Scheduled Caste women. In Ward No. 5 from where the appellant contested General category women could not have contested, and only Schedule Castes women could have contested and in that contest appellant emerged successful. Therefore, she must be held to be belonging to category of Scheduled Castes and not belonging to category of women to which respondent No. 1 belongs. Consequently, both of them cannot be treated to form a part and parcel of the same category of seats on which they have got elected. It is true as contended by learned Counsel for respondent No. 1 and which contention as appealed to the High Court that Rule 70(4) mandates that the offices of President of the Municipalities shall be filled up from amongst the members belonging to the concerned categories mentioned in the Rule. But the said phraseology does not imply that the members must belong to a particular caste like Scheduled Castes, Backward Classes etc. because the general words "members belonging to" are followed by different types of classes like General category, category of Scheduled Castes, category of Backward Classes and category of women as mentioned in the said Rule. It is obvious that general category has nothing to do with castes. Similarly Backward Classes have nothing to do with castes and the category of women is also separately indicated. That is also not having any nexus with the castes. When the thrust of the rule is that offices of the Presidents in Municipalities must go by rotation to members belonging to the specified categories, it would necessarily mean in the context of parent Article 243-T of the Constitution of India and section 10(5) of the Act that the concerned elected members of the Municipal Committee must have got elected on the seats available to General category candidates or Scheduled Castes category candidates or Backward Classes category candidate or General women category candidates by rotation. The very concept of rotation presupposes that for the contest of Presidentship once by rotation a reservation is made for members elected from a particular category only those members can contest for Presidentship. As admittedly the post of President, Loharu Municipality is subjected to double reservation of being available only to an elected member who is a Scheduled Caste woman she must have been elected on the Scheduled Castes seat from the ward reserved for such Scheduled Castes candidates. As admittedly only three wards, namely, 1, 4 and 5 are reserved for members belonging to Scheduled Castes and even out of three wards only ward No. 5 from which the appellant was elected was reserved for Scheduled Castes women and as President's post is reserved for being filled up by a member belonging to the category of Scheduled Castes women who has been elected on such a seat, the respondent No. 1 who is elected as a member not on any seat reserved for Scheduled Castes women but on a seat reserved for General category of women from ward No. 11 is obviously out of the arena of contest for the post of Presidentship of Loharu Municipality. Appellant is the sole candidate elected on the seat reserved for Scheduled Castes women. With respect, it is not possible to agree with the reasoning of the High Court that the words "members belonging to" as employed in Rule 70(4) of the Election Rules would bring in all the elected members belonging to Scheduled Castes into one

category to enable them to contest for the post of President. Such reasoning would cut across the very scheme of reservation as envisaged by Article 243-T of the Constitution of India and section 10(5) Read with Rule 70(4) of the Election rules.....

It must, therefore, be held that as respondent No. 1 and the appellant did not belong to the same category of candidates elected on the seats reserved for Scheduled Castes women even though both were women and belonged to Scheduled Castes; they represented separate electoral wards indicating non-competing groups or categories of membership and as both of them were not at par they could not contest on an equal footing for the post of President. As admittedly appellant was the sole returned candidate from the ward reserved for Scheduled Castes women and as the post of President was also by rotation reserved only for a member belonging to Scheduled Castes women category, she was the sole contestant for the said post and was rightly held to be entitled to be the President of Loharu Municipality."

(Emphasis provided)

6. The above decision, in our view, lays down that where the post is reserved or earmarked for a particular category of candidates, it is only the candidates who not only belong to the said category but who have also been elected from wards earmarked or reserved for that category are eligible to contest for the said post. The Appellate Authority in the impugned order, however, has observed as follows:---

"I have gone through the arguments put forth by both the sides and have perused the judgments of the Supreme Court in the case of *Saraswati Devi v. Shanti Devi* and others. The issue in this appeal is unambiguous i.e. whether a person who has been elected from a Ward which is reserved for Scheduled Caste or Scheduled Tribe or Backward Class of citizen or a woman belonging to any of the earlier classes or the general category is entitled to contest the election of President during the year when by rotation, the post of President is not reserved for any specific category but is meant for the general category. Obviously the facts in the case of *Saraswati Devi v. Shanti Devi* and others are different than the present case because in the former, the post of the President was reserved for a specific category viz. Scheduled Caste women category. The question before me is whether the ratio of the Supreme Court's judgment can be applied to the present appeal where the post of President is made for the general category. A constructive reading of the relevant articles of the Constitution, the sections of the Municipalities Act and the Rules indicates that the scheme of reservation at each level is made for ensuring certain minimum rights and privileges to the under privileged classes and in almost all schemes of reservation, the so called open seats are always filled up based on merits. The arguments of double privilege or getting advantage of both the tracks is a feeble one because the open track is in any case open to all members of the universal set. The reserved track is meant for the sub-set, of a specific category. While

the ratio of the Supreme Court case is unambiguous and not directly applicable to the present case, the issues covered by the Supreme Court case regarding clear differences between caste and the category do not imply that when the post of President is not reserved for any category by rotation, it cannot go to a person who has been elected on a reserved seat."

7. The appellate authority by the impugned order has treated the present post which is earmarked for the general category as not having been reserved for any category. Hence, according to him, respondent No. 1 even though he belongs to the backward class category and has been elected from a ward reserved for backward class category candidates is also eligible to contest. In our view, the aforesaid view, does not take into account the following observations which are found in the decision of *Saraswati Devi* (supra) namely "When the thrust of the rule is that offices of the Presidents in Municipalities must go by rotation to members belonging to the specified categories, it would necessarily mean in the context of parent Article 243-T of the Constitution of India and section 10(5) of the Act that the concerned elected members of the Municipal Committee must have got elected on the seats available to General category candidates or Scheduled Castes category candidates or Backward Class category candidates or General women category candidates by rotation. The very concept of rotation presupposes that for the contest of Presidentship once by rotation a reservation is made for members elected from a particular category only those members can contest for Presidentship."

8. The appellate authority in support of its conclusion has placed reliance on a Government Order No. MMC 1197/156/PK-17/97/UD-32 dated 23rd May, 1997 wherein the Government has placed reliance on the decision of the Supreme Court in the aforesaid case of "*Saraswati Devi v. Smt. Shanti Devi and others*" and has intimated the concerned authorities that the decision of the Supreme Court in the above mentioned case is applicable only to the post which are to be reserved and that it is not applicable to the unreserved posts. It is further stated in the said order that whenever the post of President/Mayor is earmarked for an unreserved category then any person elected from any Ward will be entitled to contest the election. In our judgment, the interpretation placed by the Government on the aforesaid decision is not justified in view of our observations contained in the preceding paragraphs.

9. It would, therefore, follow that even the general category is a category in itself as is the case of other categories such as Scheduled Castes, Backward Class etc. Hence the post of President which by rotation is earmarked for the general category candidates the same will be deemed to have been reserved for candidates belonging to that category only. The post will, therefore, be held as reserved for general category candidates. Hence only such candidates who belong to the general category and have been elected from wards which are earmarked or reserved for the general category candidates will alone be entitled to be eligible to contest. Since respondent No. 1 does not belong to the general

category candidates and since he has not been elected from a ward earmarked or reserved for general category candidates, he, we are constrained to hold, will not be eligible to contest for the post. In the circumstances, we find that the nomination of respondent No. 1 for election to the post of President should not have been accepted and the contrary decisions of the Sub Divisional Officers and Commissioner/Regional Director of Municipal Administration are liable to be quashed.

10. The next question, which arises for our consideration is, whether the petitioner who would be the sole candidate in the fray is entitled to be declared elected or whether a fresh poll is required to be directed. Whereas it is contended by Shri Vashi on behalf of the petitioner that since his client is the only surviving eligible candidate in the fray, he is entitled to be declared elected. On the other hand, it is contended by S/Shri Nitin Pradhan and R.M. Agrawal, who appear for respondent No. 1 and respondent No. 3, respectively, that the petitioner cannot be declared elected as a consequence of the nomination of respondent No. 1 being invalidated. Respondent No. 1 had been sponsored by a majority of councillors. Apart from the petitioner and respondent No. 1 one other candidate Shri Dalavi Javed Gulam Mohamed had also filed his nomination. He withdrew his nomination in favour of respondent No. 1. If the nomination of respondent No. 1 is invalidated there will be other candidates who would be inclined to file their nominations and contest for the post. In the circumstances, it is submitted that this is a fit case where a repoll should be ordered.

11. Shri Vashi has placed reliance on the decision of the Supreme Court in the case of Vishwanatha Reddy Vs. Konappa Rudrappa Nadgouda and Another wherein the Supreme Court has observed thus:

"When there are only two contesting candidates, and one of them is under statutory disqualification; votes cast in favour of the disqualified candidate may be regarded as thrown away, irrespective of whether the voters who voted for him were aware of the disqualification and no fresh poll is necessary. This is not to say that where there are more than two candidates in the field for a single seat, and one alone is disqualified, on proof of disqualification all the votes cast in his favour will be discarded and the candidate securing the next highest number of votes will be declared elected. In such a case, question of notice to the voters may assume significance, for the voters may not, if aware of the disqualification have voted for the disqualified candidate.... If the number of candidates validly nominated is equal to the number of seats to be filled, no poll is necessary. Where by an erroneous order of the Returning Officer poll is held which but for that order, was not necessary, the Court would be justified in declaring those contesting candidates elected, who, but for the order, would have been declared elected."

12. Shri Vashi has next placed reliance on a decision of the Supreme Court in the case of Madhukar G.E. Pankakar Vs. Jaswant Chobbildas Rajani and Others, wherein the Supreme Court has observed thus:

"The third plea, not aimed at salvaging the poll success of the appellant but in unseating the respondent who has been declared elected by the Tribunal also has no merit from a legal angle although it is unfortunate that in a situation where there are only two candidates and the election of one is set aside by the tribunal, the other automatically gets returned, without resorts to polls. Anyway, in the present case, if the appellant's election were invalid, there is only a single survivor left in the field, i.e. the first respondent. Naturally, in any constituency where there is only one valid nomination, that nominee gets elected for want of contest."

13. If regard is had to the aforesaid decisions of the Supreme Court it would follow that the petitioner is entitled to be declared elected and no repoll is required to be ordered. Shri Agrawal, the learned Counsel appearing for respondent No. 3 and intervenors has sought to distinguish the aforesaid decisions by placing reliance on section 21(10) and section 51(5) and (8) of the Maharashtra Municipalities Act, 1965. Section 21 inter alia deals with dispute in respect of election of Councillors. Sub section (10) of section 21 provides as under :---

"If the petitioner has, in addition to calling in question the election of the returned candidate, claimed declaration that he himself or any other candidate has been duly elected and the Judge is satisfied that---

(a) the petitioner or such other candidate received sufficient number of valid votes to have been elected; or

(b) but for the votes obtained by the returned candidate by corrupt practices the petitioner or such other candidate would have obtained a sufficient number of valid votes to have been elected,

the Judge, may, after declaring the election of the returned candidate void, declare the petitioner or such other candidate to have been duly elected:

14. The aforesaid provision, points out Shri Agrawal, only deals with elections of Councillors and is not relevant for the election for the post of President. As far as the election of the post of President is concerned the same is governed by the provisions of section 51. Sub section (5) of section 51 provides that any dispute regarding the election of the President shall be referred to the State Government whose decision in that behalf shall be final. In view of the aforesaid provision, Shri Agrawal contended that the present dispute which the petitioner is raising relates to the election of respondent No. 1 as President and his only remedy is by way of a reference to the State Government. Sub section (8) of section 51 provides that if, during the term of Council, there is a vacancy in the office of the President due to any reasons what-so-ever, the same procedure as laid down in sub-sections (2) to (5) shall apply.

15. In the instant case, Shri Agrawal points out, respondent No. 1 has been elected as President. If the said post becomes vacant on account of his

nomination being invalidated, re-election in terms of sub-section (2) to (5) of section 11 of the Act would be required to be held. This is especially so as the aforesaid sub section provides "if there is vacancy in the office of the President due to any reason whatsoever". In our view, provisions of sub section (8) of section 51 can come into play only after respondent No. 1 can be said to have been validly elected as President. If the nomination of respondent No. 1 is held invalid, what follows is that the petitioner will be the only sole contesting candidate for the post and hence he will be entitled to be declared elected as President. That a third candidate had withdrawn his nomination in favour of respondent No. 1 or that other candidates would be interested in filing their nominations, is neither here nor there. The fact is that the third candidate who had filed his nomination had withdrawn his nomination. The petitioner and respondent No. 1 were the only surviving contestants in the fray. Respondent No. 1, in view of the aforesaid decisions, of the Supreme Court is not eligible to contest for the post. His nomination, in the circumstances, is liable to be held to be invalid. As a consequence, the petitioner is the sole contesting candidate for the post and hence he is declared elected to the said post.

16. Rule in the circumstances is made absolute in terms of prayer Clauses (a) and (c). No order as to costs.

On a prayer being made on behalf of respondent No. 1, which prayer is naturally opposed on behalf of the petitioner, our order is stayed for a period of two weeks on a condition that respondent No. 1, during the aforesaid period of two weeks, will only be entitled to attend and participate in the meeting of the Municipal Council but will not be entitled to vote and draw remuneration as President.

Prayer Clauses (a) and (c) :

(a) That a writ of certiorari, a writ of mandamus or any other appropriate writ, order or direction be issued calling for the records and proceedings pertaining to the order dated 12-6-1997 passed by the Commissioner, Konkan Division, Mumbai, in Municipal Appeal No. 3 of 1997 and the order dated 9-5-1997 passed by the 2nd respondent which is at Exhibit "C" and after going into legalities and validity of the same to quash and set aside them.

(c) That the respondent Nos. 2 and 3, their officers, servants, agents and employees be ordered and directed to declare that the petitioner is elected unopposed as the President of Bhiwandi-Nizampur Municipal Council; Bhiwandi (District Thane) for the period 9-5-97 to 9-5-98.

17. Petition allowed.