

(2004) 04 GUJ CK 0065

In the Gujarat High Court

Case No : Special Civil Application No. 3765 of 2004

Rajesh Mahendrabhai Joshi

APPELLANT

Vs

Bhavnagar University

RESPONDENT

Date of Decision : 07-04-2004

Acts Referred:

Bhannagar University Act, 1978 — Section 67
Constitution of India, 1950 — Article 226

Citation : (2004) 04 GUJ CK 0065

Hon'ble Judges : J.N. Bhatt, J;D.N. Patel, J

Bench : Division Bench

Advocate : R.J. Oza, for the Appellant; S.N. Shelat, Ld A.G. and Harshadray A. Dave, AGP for Respondent No. 1, R.M. Chhaya, For Respondent No. 2, J.R. Nanavati Sr. Counsel and A.R. Thakkar Advocate, for the Respondent

Judgement

.N. Bhatt, J.—Pursuant to the consensus, rule was issued and service of which is waived by learned Assistant Government Pleader,

Mr.Dave for respondent No. 1, by learned advocate Mr.Chhaya for respondent No. 2, and by learned advocate Mr.Thakkar for respondent No.

3, and in view of the element of urgency involved, consensual request for final hearing is accepted by us and, therefore, we have heard the matter

on merits for final judicial adjudication.

2. A short, but interesting question, at the instance of the petitioner, who is according to him, a duly elected representative of the Bhavnagar

Municipal Corporation to the Court of Bhavnagar University and the action of the respondent-authority, in directing repoll, cancelling the election

process ended with counting and resultsheet, dated 22.3.2004, is raised for reconsideration and adjudication in this writ petition, under Article 226

of the Constitution of India.

3. The claim of the petitioner has been that, pursuant to the election programme, he has been one of the candidates for the election for the

Bhavnagar Municipal Corporation to the Court of Bhavnagar University, as he is eligible to be elected for the post of Member of Bhavnagar

University from the constituency of the Bhavnagar Municipal Corporation, contemplated u/s 15 of Clause II (A) (iv) (b) of the Bhavnagar

University Act, 1978 [for short ""Act""]

4. The respondent no.1, Bhavnagar university, through its Vice Chancellor appointed respondent no.2. as Returning Officer for the said election

process and to conduct the election for the said constituency, specified u/s 15 of Clause II (A) (iv) (b), the respondent no.2 Returning Officer

published, notice dated 09.2.2004 and thereby election programme came to be notified. Bhavnagar Municipal Corporation opted for election to

be conducted by postal ballots and the said exercise of option was also notified. There were two candidates. Respondent no.2, started scrutiny

and counting of votes at at 5 hrs. in the evening on 22.3.2004 in presence of representative nominated by the respondent no.1, Bhavnagar

University as also in presence of representative of both the candidates, who were contested the said election.

5. The respondent no.2, Returning Officer had counted the envelopes. There were 50 voters, out of 51 corporators, and 8 voters were declared

invalid, and out of 42 votes declared valid, the petitioner got 23 votes and respondent no.3, the other candidate got 19 votes. The result-sheet was

signed by the petitioner but was not signed by the respondent no.3. However, the Returning Officer signed it.

6. In the meantime, First Information Report came to be lodged by respondent no.3 to the concerned Police Station for irregularities and illegalities

in the election process. A cognizable offence came to be recorded on this complaint being Cr.No.62 of 2004 before the Bhavnagar Police Station.

The respondent No.2, in order to ensure that free and fair election takes place, sent a communication dated 25.3.2004, whereby the Vice

Chancellor was informed about the factum of criminal complaint. He, therefore, thought it expedient to direct repoll and sought the guidance from

the Vice Chancellor, who in turn, informed him, as an Election Officer that he is

competent to take appropriate decision in accordance with law.

He, therefore, directed fresh election and for that purpose, notice was also came to be issued and ballot papers were also sent to the voters for repolling.

7. It becomes very clear from the affidavit-in-reply that, as an election officer, he noticed serious irregularities as alleged in ballots papers, and

which, in his opinion are eligible to be declared to be invalid. It is in this context, repoll was thought expedient so as to free and fair election takes

place, devoid of any irregularities alleged in the FIR, as well as, application which was filed by respondent no.3

8. During the Course of hearing, we were taken through the relevant material, and provisions of the Act in order to appreciate in a nutshell, a

mechanism and the constitution of the authorities and the profile of provisions of holding of elections of the University. Section 14 prescribed

authorities in which a Class II, ordinarily, membership provisions is made. Section 62 of the Act provides for method as to how election to be held

and by which system. It provides for proportionality representation method and first Statute Part I, Chapter I provides for about establishment of

court. So far as Statute 7-14 are concerned, 1 pertains to the election whereas, other pertains to the manner of election giving option either by post

or by ballots. In the case on hand, option was exercised by the postal ballots.

9. A report was made by the returning officer on 22.3.2004 to the Vice Chancellor is placed on record on page 43. The important provisions

prescribed in the mechanism for resolution of the disputes pertaining to election or appointed or persons entitled to be elected or appointed is

provided for section 67, statute 190 provides for powers of Vice Chancellor. Chapter 27 contains various provisions pertaining to the election to

the authorities, right from statute 188 to 226. In other words, right from holding election till the stage of the declaration of the result, different

Statutes are provided for meeting different contingencies. In this context, we would like to highlight the statutory provisions, contained in statute 190

which read hereunder:-

Statute 190:- Subject to Section 64 of the Act, The Vice Chancellor shall have the power - [a] to fix the date of election [b] to fix the last date of

receiving nominations [c] to decide in cases of doubt the validity or invalidity of a

vote recorded and [d] to declare the result of each election.

10. It could very well be seen that the Vice Chancellor is empowered to fix the date of election, to fix the last date of receiving the nominees and even

to decide in case of doubt, the validity and invalidity of vote recorded and also to declare the result of different election. Statute 190[c] makes it

amply clear that the Vice Chancellor is the authority under the act to decide the validity or invalidity of the vote in case of doubt.

11. A common reliance is placed on provisions of Section 67 of the Act, which provides for the resolution of the dispute of the constituency of the

University authority or body, we are of the opinion that this provision is very material and important which reads as under:

67- Disputes as to constitution of University authority or body where any question arises as to [1] the interpretation of any provisions of this Act,

or any Statute, Ordinance, Regulation or Rule or, [2] Whether a person has been duly elected or appointed as, or is entitled to be or ceases to be

entitled to be a member of any authority or other body of the University [a] it may be referred to the State Government if it relates to a matter

specified in clause [1] and [b] it shall be referred to the State Government if [i] it relates to a matter specified in clause [2] or [ii] It twenty

members of the Court so require, irrespective of whether it relates to matter specified in clause [1] or clause [2], and the State Government shall

after making inquiry as it deems fit [including giving an opportunity of being heard where necessary] decide the question and its decision shall be

final.]

12. In this connection, two decisions are relied on by learned Advocate General, while appearing for the University. A constitutional bench

decision, in Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, and contention is advanced that in

absence of any provisions or statutory alternative provisions, repoll direction or power is inherent and the election repoll can be directed by the

Returning Officer, since he was in-charge of the entire conduct of the election. Our attention is also invited to a decision interpreting the provisions

of Section 58 of Gujarat University Act, which is pari-passu to Section 67 of this Act, rendered in Gujarat University Vs. Shri N.U.Rajguru, AIR

1988, SC 66. Section 58 of the Gujarat University Act pertains to the dispute

arises with regard to the constitution of any of the authorities of the University or body. Similar provision is made in Section 67 of the Act. We have dispassionately examined both the decisions.

13. It has been held in Gujarat University case [supra] if a dispute with regard to the constitution of any of the authorities of the University, it

should be referred to the State Government for determining the same. It firstly provides that where any question arises as to interpretation of any

provision of the Act, or of any Statute, Statutory Ordinance, Regulation or rules, it may be referred the State Government. Again it lays down that

if a question arises, whether a person has been duly elected or appointed as, or is entitled to be or ceases to be entitled to be, a member of any

authority or other body of the university, it shall be referred to the State Government. Section 67 (2) (b) (ii) which is equivalent to Section 58(2)(a)

of the Gujarat University Act, which provides that the dispute relating to the interpretation of any provisions of the Act or Statute, Ordinance,

Regulation, or Rules, may be referred to the Government. While Clause (b) of sub section (2) of Section 58 contains a mandatory provision that if

the dispute relates to the question whether a person has been duly elected or appointed to any authority of the University, such a dispute shall be

referred to the State Government. It becomes very clear therefore, that there is no such option or discretion. If such a dispute arises, it has to be

referred to the State Government for determining and resolving the same. The legislative designed and desideratum is manifestly clear that any

dispute relating to the matters covered by Section 67 of the Bhavnagar University Act, which is equivalent to Section 58 of the Gujarat University

Act, it should be referred to the State Government for its decision and such decision shall be final.

14. It could very well be visualized that the legislature in its wisdom has evolved a separate mechanism for the resolution and determination of the

dispute in respect of the matters specified therein. Since the ""Court"" is authority of the University, as declared by the provisions of Section 14, of

the Bhavnagar University Act, Section 67 provides an effective remedy for challenging the election of a member to the Court of the University. In

the present case, the claim of the petitioner is that he is entitled to be member of Court of the Bhavnagar University, as he has been elected and

secured majority votes. This fact therefore, shall not fall within the ambit of the Provision of Section 67 of the Bhavnagar University Act. Any

person aggrieved by the election of any manner to the Court has right to challenge the same before the State Government by raising a dispute in

accordance with law. Provisions of Section 67 which provides the effective, expeditious remedy.

15. Instead of raising the dispute, by way of reference, before the State Government as contemplated by the provisions of Section 67 of the Act,

the petitioner raised the challenge before this court under Article 226 of the Constitution. In our opinion, the petitioner ought to have raised the

dispute for being resolved before the appropriate forum, which is the State Government, in view of clear provisions of Section 67 of the Bhavnagar

University Act. He has, therefore, to pursue his remedy before the appropriate forum provided by the Statute. While considering an election

dispute, it may be kept in mind that right to vote, contest or dispute relating to election is a statutory right regulated by the statutory provisions and

dispute relating to election is not a fundamental right. Obviously, therefore, Court at loath to permit the party having statutory rights being infringed

and having mechanism in its redressal to invoke extraordinary, plenary equitable, discretionary writ jurisdiction under Article 226 of the

Constitution, bypassing the statutory mechanism, provided for meeting with such situations and contingencies for the effective and speedy

resolution of such dispute of election matters. Therefore, we are of the clear opinion that ordinarily, statutory mechanism provided for evolvment

of statutory rights must be followed before the authority described therein or special forum or mechanism provided for. No argument is advanced

and no material from the record has shown extraordinary, situational relating compelling or warranting circumstances, bypassing the statutory

mechanism and, therefore, such a question would not assume any survival value in so far as the petitioner is concerned. After having heard the

learned advocates appearing for the parties, and considering the factual profile emerging from the record of the present case, the relevant material,

legal settings and the examination of important papers from the record of the Returning Officer, we issue following directions for efficacious and

effective resolution of dispute between the petitioner and the respondent no.3, in respect of impugned election.

[1] Petitioner will make a reference directly to the Government, as provided in Section 67 of the Bhavnagar University Act, 1978, within a week

from today. Copy of such reference or representation shall be sent by the petitioner to all the respondents.

[2] The respondent no.1, Bhavnagar University will also forward the same with necessary relevant material to the Government of Gujarat within a

period of two weeks on receipt of a copy of reference or representation from the petitioner. Upon receipt of such papers, by way of reference

from the petitioner as well as the University respondent no.1, the State of Gujarat, shall after making an inquiry, in accordance with law including

giving an opportunity of hearing, decide the question or dispute and the decision that may be taken, shall be communicated to the petitioner, as well

as to the respondent No. 1.

16. In view of the aforesaid observations and directions, the petition shall stand partly allowed and until the Government takes the final decision as

directed hereinabove, the proposed repoll, directed by the respondent No. 2, by notice dated 26.3.2004 shall stand stayed. Rule made absolute

to the above extent only. Direct service is permitted.