

(1968) 11 BOM CK 0018

In the Bombay High Court

Case No : Spl. Civil Application No. 1617 of 1968

Rangrao Bhausahab Nalawade and Another

APPELLANT

Vs

Bhimrao Babu Dhole and Others

RESPONDENT

Date of Decision : 08-11-1968

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Maharashtra Zilla Parishad and Panchayat Samitis Act, 1961 — Section 27(1)

Representation of the People Act, 1951 — Section 100, 101

Citation : AIR 1969 Bom 433 : (1969) 71 BOMLR 485 : (1969) MhLj 746

Hon'ble Judges : Nair, J;Chandrachud, J

Bench : Division Bench

Advocate : B.Y. Deshmukh, for the Appellant; S.B. Bhasme, for the Respondent

Judgement

Nain, J.—This is a petition under Articles 226 and 227 of the constitution of India for setting aside an order dated 8th August 1968 made by the learned Assistant Judge, Kolhapur, in Miscellaneous application No. 76 of 1967 in an election petition and for declaring the petitioners to be duly elected as members of Panchayat Samiti Panhala from Wadiratnagiri constituency.

2. On 31st July 1967 election for Panchayat Samiti Panhala from Wadiratnagiri constituency was held. It was a two-member constituency. The petitioners Nos. 1 and 2 and respondents Nos. 1 to 3 were the candidates for these two seats. Respondent No. 4 is the Returning Officer and respondent No. 5 is the learned Assistant Judge.

3. The votes were counted on 2nd August 1967 by the Returning Officer and he found that the petitioner No. 1 polled 69 votes, respondent No. 1 polled 69 votes and respondent No. 2 having polled the highest number of votes was declared to be elected and as there was a tie between the petitioner No. 1 and the respondent No. 1. following the procedure prescribed by Sec 26 of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961. Act No. V of 1962 hereinafter for the sake of brevity referred to as the Act, the Returning Officer

having been empowered in that behalf by the Collector decided by lots and as the lot fell for petitioner No. 1, he was declared to be elected in the second seat.

4. Against the declaration of results by the Returning Officer, the respondent No. 1 filed an election petition u/s 27 of the Act. The learned Assistant Judge who heard the appeal appointed a Commissioner for recounting the votes. Before the learned Commissioner 17 voting papers were in dispute. The learned Commissioner could not take a decision with regard to these 17 voting papers. The learned Commissioner therefore counted the remaining votes and made a report to the trial Court. the trial Court scrutinised these 17 voting papers and ultimately found the result of the election to be as under :-

(1) Petitioner No. 1 ... 65 votes.

(2) Petitioner No. 2 ... 66 votes.

(3) Respondent No. 1 ... 66 votes.

(4) Respondent No. 2 ... 68 votes.

(5) Respondent No. 3 ... 1 vote.

5. There was no difficulty about respondent No. 2 as he had secured the highest number of votes. He was, therefore, declared to be elected. The difficulty arose with regard to petitioner No. 2 and respondent No. 1 who had each secured 66 votes and there was a tie between them. The learned trial Judge came to the conclusion that as petitioner No. 2 had filed no petition u/s 27 and had not even appeared in the proceedings, he could not be declared to be elected. He, therefore, declared the respondent No. 1 to be elected. Accordingly, the learned trial judge declared the respondents Nos. 1 and 2 to be elected and he dismissed the petition of the petitioners. Against the said decision, the present petition has been filed.

6. As the case of the 1st and 2nd petitioners is on a different footing. Mr. Deshmukh appearing for the petitioners first dealt with the case of the petitioner No. 2 No declaration had been made in his favour although he had secured the same number of votes as respondent No. 1 on the ground that the petitioner No. 2 had filed no petition u/s 27 of the Act and had not appeared in the proceedings.

7. The first contention of Mr. Deshmukh on behalf of the petitioner No. 2 was that the further or second proviso of Section 27 (5)(b) provided that if, after computation by the Court, an equality of votes is found to exist between any candidates and the addition of one vote will entitle any candidate to be declared elected, one additional vote shall be added to the total number of valid votes found to have been received in favour of such candidates selected by lot drawn in the presence of the Judge in such manner as he may determine. Mr. Deshmukh contended that as there was a tie between the petitioner No. 2 and the respondent No. 1 the learned Judge ought to have followed the procedure prescribed by the second or the further proviso and should have cast lots

between these two candidates and added one vote in favour of the person selected by lot and on the basis of such addition he should have declared the result. The contention of Mr. Deshmukh was that as the learned Judge had not followed this procedure, the declaration of election in favour of the respondent No. 1 was void.

8. In order to appreciate this contention, it is necessary to set out the provisions of the first five sub-sections of Section 27 of the Act. They read as under:

"27(1). If the validity of any election of a Councillor or the legality of any order made or proceedings held u/s 26 is brought in question by any candidate at such election or by any person qualified to vote at the election to which such question refers such candidate or person may, at any time within fifteen days after the date of the declaration of the result of the election or the date of the order or proceeding apply to the District Judge of the District within which the election has been held, for the determination of such questions.

(2) An enquiry shall thereupon be held by a Judge, not below the rank of an Assistant Judge, appointed by the State Government either specially for the case, or for such cases generally, and such Judge may, after such enquiry as he deems necessary pass an order confirming or amending the declared result of the election or the order of the officer empowered by the Collector in that behalf u/s 26, or setting the election aside. For the purposes of the said enquiry, the Judge may exercise any of the powers of a Civil Court, and his decision shall be conclusive. If the election is set aside, a date for holding a fresh election shall forthwith be fixed u/s 14.

(3) All applications received under sub-section (1) -

(a) in which the validity of the election of Councillors to represent the same electoral division is in question, shall be heard by the same Judge, and

(b) in which the validity of the election of the same Councillor elected to represent the same electoral division is in question, shall be heard together.

(4) Notwithstanding anything contained in the Code of Civil Procedure, 1908. the Judge shall not permit (a) any application to be compromised or withdrawn or (b) any person to alter or amend any pleading unless he is satisfied that such application for compromise or withdrawal or application for such alteration or amendment is bona fide, and not collusive.

(5) (a) If no holding such enquiry the Judge finds that a candidate has, for the purpose of election, committed a corrupt practice within the meaning of sub-section (6), he shall declare the candidate qualified for the purpose of that election and of such fresh election of that election held under sub-section (2) and shall set aside the election of such candidate if he has been elected.

(b) If in any case to which clause (a) does not apply, the validity of an election is in dispute between two or more candidates, the Judge, after a scrutiny and

computation of the votes recorded in favour of each candidate, is of opinion that in fact any candidate in whose favour the declaration is sought has received the highest number of the valid votes, the Judge shall after declaring the election of the returned candidate to be void declare the candidate in whose favour the declaration is sought, to have been duly elected:

Provided that for the purpose of such computation no vote shall be reckoned as valid if the Judge finds that any corrupt practice was committed by any person known or unknowns, in giving or obtaining it;

Provided further that, after such computation if any equality of votes is found to exist between any candidates and the addition of one vote will entitle any candidate to be declared elected, one additional vote shall be added to the total number of valid votes found to have been received in favour of such candidate selected by lot drawn in the presence of the Judge in such manner, as he may determine."

Sub-section (1) of Section 27 provides that if the validity of any election of a Councillor is brought in question by any candidate at such election or by any voter such candidate or voter may at any time within 15 days after the date of the declaration of the result file an election petition. It will be observed that the election petition may be filed either by a candidate or by a voter and the election petition may bring into question the validity of an election of a Councillor. The candidate or the voter who files the petition need not seek a declaration of election in favour of any candidate. He may rest content with challenging the validity of the election and seek no further orders with regard to declaration in favour of any candidate.

9. Sub-section (2) provides that on an election petition being filed an inquiry shall be held by a Judge designated by the State Government and such Judge may after such inquiry as he deems necessary pass an order confirming or amending the declared result of the election or he may set aside the election.

10. Clause (a) of sub-section (5) provides that if no holding such inquiry the Judge finds that a candidate has for the purpose of election committed a corrupt practice, he shall declare the candidate qualified for the purpose of that election and for a fresh election and shall set aside the election of such candidate if he has been elected. This sub-section does not provide that a person getting the next highest number of votes shall be declared to be elected in place of the qualified candidate.

11. Clause (b) of sub-section (5) provides that in cases in which there is no corrupt practice, but the validity of an election is in dispute between two or more candidates, the Judge after a scrutiny of voting recorded in favour of each candidate is of the opinion that in fact any candidate in whose favour the declaration is sought has received the highest number of the valid votes, the Judge shall, after declaring the election of the returned candidate to be void, declare the candidate in whose favour the declaration is sought, to have been

duly elected. It will be observed that u/s 27 will be observed that u/s 27 (5) (b) the Judge has power after setting aside an election to declare only a candidate in whose favour a declaration is sought in the petition to be duly elected. If in a petition u/s 27(1) the candidate or the voter who has filed the election petition seeks no more than a declaration as to the validity of an election of a Councillor and does not seek a declaration in favour of any candidate the Judge has nothing more to do than to declare the election of the returned candidate to be void. He can only declare a candidate to be duly elected in his place provided in the petition of the candidate or the voter a declaration is sought in his favour and not otherwise. If, for example, in a three-member-constituency, B is declared to be elected and the petition whether filed by candidate A or even by a voter seeks that A can only be declared to be elected if he has secured the highest number of votes. But candidate C can in no case be declared to be elected even if he has secured the highest number of votes, because he is not a person in whose favour a declaration is sought in the petition.

12. The second or the further proviso to clause (b) of sub-section (5) provides for the case of a tie between any two candidates and for casting of lots in the presence of the Judge of lots in the presence of the Judge. In our opinion this contingency would only arise if there is a tie between candidates in whose favour a declaration is sought or between such candidate and a candidate who has been declared to be elected. The contingency will not arise if the tie is between a candidate in whose favour a declaration is sought or who has been declared to be elected and a candidate who has neither sought to file an election petition himself, seeking a declaration in his own favour nor has a voter sought a declaration in his favour. The learned Judge has obviously followed this view of the matter and has come to the conclusion that the contingency for casting lots between the petitioner No. 2 and the respondent No. 1 did not arise as in the election petitioner there was neither a declaration sought in favour of petitioner No. 2, nor did the petitioner No. 2 even care to appear in the proceedings.

13. Mr. Deshmukh contended that Section 27(1) does not provide that an election petition must necessarily seek a declaration in favour of any candidate and that an election petition can merely challenge the validity of the election of a Councillor. He contended that it is for the Court to declare any candidate to be elected whether a declaration is sought in his favour or not, because under sub-section (2) an inquiry is held with regard to the votes of all the candidates. There does not appear to us to be much substance in this contention, because sub-section (2) provides only for the holding of an inquiry and not for any declaration of results. Declaration of result is provided for in section 27(5) clauses (a) and (b). Clause (a) applies in cases of corrupt practices and clause (b) applies in cases where there are no corrupt practices. In case where there are corrupt practices the election of the person guilty of the corrupt practices is to be set aside and no one is to be declared to be elected in his place. Where there is no corrupt practice the Judge has the power to set aside the election of a successful candidate and to declare the person who secured the highest number of votes

elected in his place, provided a declaration is sought in his favour in the petition and not otherwise.

14. Mr. Deshmukh then contended that sub-section (2) of Section 27 gives power to the Judge, after an inquiry, to confirm or amend the declared result or to set aside the election. He contended that the power to amend would cover the power to declare as duly elected any candidate who had secured the highest number of votes even if no declaration was sought in his favour. There appears to be no substance in this contention also, because as we have stated above, sub-section (2) provides only for an inquiry being held and not for declaring any person to be elected in place of a person whose election is set aside. That can only be done only under sub-section (5) (b) which provides that such a declaration is sought.

Sub-section (2) merely gives power to amend, but that power to amend would be subject to the provisions of sub-section (5) (b). The words of Section 27(5) (b) indicate that there must be dispute as to validity between two or more candidates. The dispute can only be between a candidate who files an election petition u/s 27(1) or on whose behalf a voter files an application and the candidate who has been declared to be elected. That a voter has filed petition on behalf of a candidate will be indicated by the fact that the voter seeks a declaration in his favour. If the voter does not seek a declaration in favour of any candidate, the only result will be that the election of a candidate may be set aside, but no one will be declared to be elected in his place. It is true that Section 27(5)(b) provides that votes recorded in favour of each candidate must be computed. But it then proceeds to provide that if in the opinion of the Judge a candidate in whose favour the declaration is sought has received the highest number of votes, the Judge shall set aside the election of the returned candidate and declare the candidate with the highest number of votes, in whose favour a declaration is sought to be duly elected. There can be no manner of doubt that under clause (b) of sub-section (5) only a person in whose favour a declaration is sought by the candidate who has filed the petition or by the voter alone can be declared to be elected, and not any other candidate even if he secures the highest number of votes.

15. The next contention of Mr. Deshmukh is that the second or the further proviso to Section 27(5)(b) is an independent provision and it is not necessary under that proviso that a declaration should be sought in favour of a candidate in order to enable that he should be declared elected. His contention is that this is an independent provision which carves out an exception out of section 27(5)(b) and the limitation imposed by clause (b) of a declaration only in favour of a candidate in whose favour a declaration is sought does not apply to the proviso. There appear to us to be two objections to this contention. The first objections is that the proviso while it provides for casting of lots in case of a tie does not provide that the Judge shall declare the candidate who succeeds in the casting of lots to be duly elected. If, as is contended by Mr. Deshmukh, the proviso were an independent provision of law, it would provide that the person successful in the

casting of lots would be declared to be duly elected by the Judge. In absence of any such provision in the proviso after the casting of lots, the Judge has to go back to the main provision of clause (b) for declaring any person to be duly elected. Here he will have to meet with the difficulty that he can only make such declaration in favour of a person in whose favour a declaration is sought. This by itself would negative the contention of Mr. Deshmukh that the proviso is an independent provision of law. In our opinion, proviso merely provides for the contingency of a tie and as to what is to be done in the event of a tie. But it does not permit a declaration of being duly elected to be made in favour of a person who succeeds in the casting of lots. Before such a declaration is made, the Judge will have to see whether a declaration is sought in his favour or not. It can only mean that if in casting of lots a candidate in whose favour a declaration is not sought succeeds, he cannot be declared to be duly elected. The second objection to such interpretation would be that it would create an anomaly. While the candidate in whose favour no declaration is sought could not be declared to be elected even if in a two-member constituency where there are three or more candidates he secures the highest number of votes, there would be a chance of his being elected on casting of lots in case of a tie even if he secures a smaller number than the highest. The interpretation that we propose to put on the proviso will leave no room for such anomaly. In our opinion, the proviso must be so construed, as to harmonize with the main provision of clause (b); such construction will also be consistent with the legal maxim "*vigilantibus non dormientibus jura subvention*" - Laws come to the assistance of the vigilant and not of those that are sleeping.

16. We are, therefore, of the opinion that even under the further or the second proviso to Section 27(5)(b) of the Act a candidate who is a party to a tie or equality of votes cannot be declared to be elected if no declaration is sought in his favour in the petition. That being so, it is unnecessary for a Judge to cast lots between a candidate in whose favour a declaration is sought or who has been declared to be elected and a candidate in whose favour no declaration is sought. In this particular case, no useful purpose would have been served by the learned Judge casting lots between petitioner No. 2 and respondent No. 1 who secured equal number of votes, because no declaration was sought in favour of petitioner No. 2. In our opinion, the learned Judge was right in declaring the respondent No. 1 to be elected.

17. On behalf of the petitioner No. 1 Mr. Deshmukh invited us to scrutinise the result of the learned trial Judge scrutinizing the 17 disputed voting papers and to come to a conclusion different from the one to which the learned trial Judge had come. He contended that as a result of our scrutiny the petitioner No. 1 who gets 65 votes, that is one vote less than the petitioner No. 2 and the respondent No. 1 and three votes less than the respondent No. 2 would be found to secure the highest number of votes. Scrutiny of votes is, however, a question of fact and in a petition under Articles 226 and 227 of the Constitution of India, we would not be justified in sitting in appeal over the learned Judge designated to hear election

petitions u/s 27 and to come to a different conclusion on a finding of fact. We have, therefore, declined to accede to this request on behalf of the petitioner No. 1

18. In the result, the petition fails and is dismissed with costs.

19. Petition dismissed.