

(1997) 11 BOM CK 0033

In the Bombay High Court

Case No : Writ Petition No. 2525 of 1997

Raosaheb Kote

APPELLANT

Vs

The State of Maharashtra and others

RESPONDENT

Date of Decision : 26-11-1997

Acts Referred:

Bombay General Clauses Act, 1904 — Section 7
Constitution of India, 1950 — Article 213, 226, 243
Maharashtra Municipal Council and Nagar Panchayats Act, 1994 — Section 163(2)
Maharashtra Municipal Councils Nagar Panchayats and Industrial Township Act, 1965
— Section 9

Citation : (1998) 3 ALLMR 41 : (1998) 2 BomCR 826

Hon'ble Judges : B.H. Marlapalle, J;A.D. Mane, J

Bench : Division Bench

Advocate : Deelip Patil Bankar, for the Appellant; N.H. Patil, for the Respondent

Judgement

B.H. Marlapalle, J.—Heard learned Counsel for the respective parties.

2. Rule made returnable forthwith with the consent of the learned Counsel.

3. Shirdi village initially had a Village Panchayat under the Bombay Village Panchayat Act, 1958 and due to the vast growth in the population owing partly to the Shirdi temple devotees settled at Shirdi and increasing business activities, the town grew faster and in 1990 Village Panchayat was dissolved and "C" class Municipal Council was constituted. The Council was named as Shirdi Municipal Council and the Administrator took charge, who continued till 1994. In consequence of the Maharashtra Ordinance No. VII of 1994, the Municipal Councillors seats for "C" class Municipal Council were fixed at 10 and election programme came to be announced for the election of the 10 Municipal Wards of Shirdi Municipal Council. However, when their election was announced, section 9 of the Maharashtra Municipal Councils, Nagar Panchayats Act, 1965 (hereinafter referred to as the Municipal Act for short) came to be amended with effect from 31-5-1984 (or 31-5-1994) and as per the said amendments minimum number of

Councillors for "C" class Municipal Council came to be fixed at 17 instead of 10. The local population therefore, demanded that the election should be held for the post of 17 Councillors instead of 10 Councillors and when this was not conceded to, it appears that the elections were boycotted.

4. Fresh election programme was announced by the State Election Commissioner, so as to hold elections on 16-4-95 for the 10 posts of Councillors for the Shirdi Municipal Council and again the local population repeated their demand for minimum number of Councillors to be fixed at 17 in consonance with the provisions of section 9 of the Municipal Council Act, and boycotted the election. The Election Commission experienced the same action when fresh election programme was announced for the third time, so as to hold the election on 11-12-95 and again elections could not be held. It appears that in the meanwhile, on 12-5-95 some of the prominent citizens of Shirdi submitted a representation to the State Election Commissioner and requested him to fix the minimum number of Wards at 17 instead of 10 which was done under the Ordinance and the said Ordinance came to be repealed after the Amended Act became effective from 31-5-1994. A similar representation was submitted to the said authority again on 8-12-96. The State Election Commission yet announced fresh election programme for the 4th time for holding Shirdi Municipal Council elections on 3-6-1996. This time also the minimum number of Wards were fixed at 10 instead of 17 as was demanded and hence for the 4th time the elections were boycotted by the local population and not a single nomination was filed.

5. The petitioner who is resident of Shirdi has approached this Court for seeking a direction in the nature of Mandamus, so as to fix minimum number of Councillors at 17 for the Shirdi Municipal Council and for further direction to hold elections for 17 Wards of the Shirdi Municipal Council.

6. Respondent Nos. 2 and 3 have filed separate affidavits-in-reply and opposed the petition. It is a common ground of opposition that the minimum number of 10 wards were fixed for the Shirdi Municipal Council strictly in pursuance of the Maharashtra Ordinance No. X of 1994 and even if the Municipal Council Act was amended with effect from 31-5-94 and the said Ordinance was repealed, in view of section 163(2) of the Maharashtra Municipal Corporations and Municipal Councils (Amendment) Act, 1994 any action taken (including any election programme declared by the State Election Commissioner) under or in pursuance of the said ordinance, shall continue to have effect and section 7 of the Bombay General Clauses Act, 1904 shall apply with regard to effect of the said repeal. In short, it is contended that due to the provisions of section 163(2) of the said Act the action of the State Government as well as the State Election Commission is protected for the election which was announced under the Maharashtra Ordinance No. X of 1994 and that the petitioner cannot seek directions relying upon section 9(2) of the Municipal Councils Act, as amended from 31-5-1994.

7. On April 20, 1993, the Constitution (74th Amendment) Act, 1992 was published. The said 74th Amendment Act, 1992 came into force on 1st June

1993, and it laid down a basic framework to ensure that the Municipalities are in a position to function effectively as democratic units of self Government. By the said 74th Amendment Act of 1992, part II came to be introduced into the Constitution. Under Article 243-ZF of the Constitution, it is provided that the existing law governing the Municipalities shall continue for one year from 1st June 1993 notwithstanding anything inconsistent with part II of the Constitution. On 23-4-1994, the State Government established State Election Commission as contemplated under Article 243-ZA read with Article 243-K of the Constitution. On May 31, 1994 one year period from 1st June 1993 came to an end. On that day, Maharashtra Ordinance No. VII of 1994 came to be promulgated by the Governor under Article 213 of the Constitution. The object of the said Maharashtra Ordinance No. VII of 1994 was to amend Bombay Municipal Corporation Act 1888, Bombay Provincial Municipal Corporation Act 1949, The City of Nagpur Corporation Act, 1943 and the Maharashtra Municipal Councils Act, 1965 in order to bring the said enactments in line with the Constitution (74th Amendment) Act, 1992 and to give effect to the said 74th Amendment Act, 1992. The Ordinance was issued because the Legislature had not enacted the law by 31st May 1994, and it was further to amend existing law, particularly in view of the fact that under Article 243-ZF of the Constitution, the existing law was required to be brought in conformity with the Constitution (74th amendment) Act, 1992 and consequently, the Municipalities were required to be reconstituted under the amended law.

8. In the meantime, Legislative Assembly Bill No. XXV of 1995 - Maharashtra Municipal Corporations and Municipal Councils Amendment Bill 1994 was introduced in the Legislative Assembly on July 12, 1994 and on 30-7-1994 the said bill was referred to a Joint Committee of both Houses after obtaining the concurrence of the Legislative Council. The first sitting of the Committee took place on August 18, 1994 followed by eight other sittings. On November 17, 1994, the Joint Committee finalised the amendments to be incorporated in the Bill and Joint Committee adopted its report in the meeting held on 23-11-94. Accordingly, on 6-12-94 Maharashtra Act No. XLI of 1994 amending Bombay Municipal Corporation Act, 1888, Bombay Provincial Municipal Corporation Act 1949, City of Nagpur Corporation Act, 1943 and Maharashtra Municipal Councils Act, 1965 came to be published after receiving the assent of the Governor. At this stage it may be mentioned that during the pendency of the Reference to the Joint Committee, the period for which Ordinance No. VII of 1994 was promulgated, stood expired. In the circumstances on August 20, 1994 Maharashtra Ordinance No. X of 1994 replaced Maharashtra Ordinance No. VII of 1994. Ultimately, on 6-12-1994 Maharashtra Act No. XLI of 1994 received the assent of the Governor and in the circumstances, Maharashtra Ordinance X of 1994 stood repealed. Under the said Act, which is called as Maharashtra Amendment Act 1994 the deemed date from which the Act is given effect to, is 31st May 1994. It will not be out of place to mention that u/s 114 of the Maharashtra Ordinance No. X of 1994 minimum number of councillors in "C"

class Municipal Council was fixed at 10 and accordingly the election programme for the Shirdi Municipal Council was announced by the State Election Commissioner. This number was fixed on 10th October 1994 by the Director, Municipal Administration issuing an order. On 6-12-1994 tentative programme was issued by the State Election Commissioner to the Collector. Accordingly, the final election programme came to be published on 16-12-1994. Acceptance of nomination commenced on 16-12-94 and the elections were due to be held on or about 15-1-1995. 9. It is the contention of the petitioner that as the elections were boycotted by the local -population in protest of the minimum number of wards fixed for the Shirdi Municipal Council, the elections scheduled on or about 15-1-95 did not take place and subsequently the State Election Commissioner has announced fresh election programme. It is therefore, contended that when fresh election programme was announced by the State Election Commissioner, it was incumbent on the part of the State to fix the minimum number of wards in Shirdi Municipal Council strictly in pursuance of the provisions of section 9 as amended and which came into force on 31-5-94. This contention of the petitioner has been opposed by the respondent Nos. 2 and 3 mainly on the ground stated hereinabove and in support of their respective arguments reliance has been placed on the judgment of this Court (Division Bench) in the case of Kamlakar K. Taware v. State of Maharashtra and others, W.R No. 5167/94. In that case two points were considered by this Court, (i) whether elections to local bodies in the State sought to be held after 6-12-94 ought to be held in accordance with Maharashtra Act No. XLI of 1994 or whether they should be held in terms of Ordinance No. VII of 1994 read with Maharashtra Ordinance No. X of 1994, and(ii) whether such elections constituting/re-constituting the local bodies should be for the remainder term or whether it should be full-fledged 5 years as contemplated by Maharashtra Act No. XLI of 1994. To consider whether this judgment in Kamlakar's case (supra) is applicable or not, it will be useful to reproduce the relevant observations of this Court in Kamlakar's case (supra) as under :

"As stated hereinabove, the entire election process culminating in the election programme dated 16th December, 1994 proceeded on the basis of criteria contemplated in section 9 of the Municipal Councils Act as amended by Maharashtra Ordinance No. VII of 1994. It is not necessary once again to reproduce the entire programme. Right from the appointment of the State Election Commission, the composition of Municipal Councils/Corporations, the work of delimitation of the Wards which is based on the population as reflected in the 1991 Census divided by the number of Councillors as well as the preparation of draft Voters" list and final Voters" List was done under the procedure prescribed by the two Ordinances. It is true that the election programme is published after Maharashtra Amendment Act No. XLI of 1994 came into force, but in the present case, the beginning of the election has to be seen in the context of the introduction of Part IX-A into the Constitution and if so read, the process of election started under the Ordinances and the entire process right

upto publication of election - programme has been done under the Ordinances. In the circumstances, section 163(2) squarely applies, and it saves the entire action taken under the said two Ordinances notwithstanding the repeal of the Ordinances on 6th December 1994 when Maharashtra Amendment Act No. XLI of 1994 came to be published after receiving the assent of the Government."

"In the present case the word "election" is required to be interpreted in a wide sense so as to cover the entire process culminating in constitution/reconstitution of the Municipalities as laid down by the Apex Court in the judgment of N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others, . Similarly, in the case of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, . It has been laid down that the word "election" consists of a rainbow of operations. It is a compendious -expression which covers a very wide arena. In the context of Part IX-A of the Constitution, Ordinance No. VII of 1994 was enacted on May 31, 1994 because the State Legislature had not enacted the law by that time and under the said Ordinance, (he above provisions were amended. As stated hereinabove, the said Ordinance is required to be read with the order Removing Difficulties dated 25th July 1994 by which it is expressly provided that one of the consequences of dissolution under the proviso to Article 243-ZF was that the general elections shall be held within six months from the date of the dissolution."

"However, since the entire action has been taken under the Ordinances on the basis of the ratio of the population contemplated by the Ordinances and on the basis of the criteria laid down under the Ordinances amending section 9, the election programme was rightly issued by the State Election Commission for election of 55 Councillors and not 65. Similar is the case With the other Class of Municipal Councils Corporations. The entire argument of the petitioners proceeded on the basis that because the Amending Act provides for larger number of Councillors and because the election programme has come into force after enactment of Maharashtra Amending Act No. XLI of 1994, the election should be held, not in terms of the Ordinances, but in terms of the Amending Act No. XLI of 1994. It is also argued that the Amending Act comes into force retrospectively from 31 st May 1994. Large number of authorities with regard to repeal and saving clauses were cited by both sides. It is not necessary to examine the case law because the principles enunciated with regard to repeal and saving clauses are well settled and also because in the present case we are concerned with interpretation of section 163 of the Maharashtra Amendment Act No. XLI of 1994 which expressly saves steps taken in pursuance of the Ordinances and particularly in view of the context of the introduction of Part IX-A of the Constitution, we have examined the scope of the Constitutional Amendment as well as the Ordinances and the Amending Act No. XLI of 1994.

It is therefore, clear that in Taware"s case, this Court held that the election programme published on 6-12-94 under the Maharashtra Ordinances, though published after 31-5-94 from which date the Amended Act came into force, the

process of election and commenced before the Maharashtra Amendment Act, No. XLI of 1994 was brought into force and hence, the election programme announced by the Election Commissioner was protected u/s 163(2) of the Act. The law laid down by this Court in Taware's case, in our considered view is not applicable to the instant case inasmuch as the election programme published on 6-12-94 even for the Shirdi Municipal Council was not continued and/or did not remain in the force solely because the local population boycotted the election and a fresh election programme came to be declared on three subsequent occasions, so as to hold the said elections on 16-4-95, 11-12-95 and 3-6-96. It, therefore, cannot be said that the election programme declared on 6-12-94 remained in force and the elections to the Shirdi Municipal Council are required to be conducted in accordance with the said programme even when the petitioner has moved this Court by the instant petition. When the State Election Commissioner has announced a fresh election programme, the earlier election programme is superseded and the protection claimed u/s 163(2) of the Act shall not be available when such a fresh programme is published. When such a fresh programme is published, it is squarely within the ambit of the Amended Act and hence, as per section 9(2) of the Amended Act, the minimum number of wards are required to be fixed. For "C" class Municipal Council minimum number of wards are fixed at 17 and therefore, the respondent No. 3 ought to have fixed the minimum number of wards at 17 in pursuance of section 9(2) of the Municipal Councils Act. In spite of repeated representations submitted by the citizens of Shirdi town, the respondent No. 3 has not taken due steps and the insistence of the respondents that the minimum number of 10 wards fixed u/s 114 of Maharashtra Ordinance No. X of 1994 could not be changed even after fresh elections have been announced for Shirdi Municipal Council, is totally misplaced.

10. Section 9(2) of the Maharashtra Municipal Councils Act reads as under :--

"The Director shall from time to time by an order published in the Official Gazette, fix for each Municipal area-

(a) the-number of elected Councillors in accordance with the following table :

TABLE

Class of Municipal area Number of elected Councillors.

(i) "A" Class

The minimum number of elected; Councillors shall be 38, and for every 8,000 of the population above 1,00,000 there shall be one additional elected Councillor, so however, that the total number of elected - Councillors shall not exceed 65;

(ii) "B" Class

The minimum number of elected Councillors shall be 23, and for every 5,000 of the population above 40,000 there shall be one additional elected Councillor, so,

how ever that the total number of elected Councillors, shall not exceed 37;

(iii) "C" Class

The minimum number of elected Councillors shall be 17 and for every 3,000 of the population above 25,000 there shall be one additional elected Councillor, so, how ever, that the total number of elected Councillors shall not exceed 23;

Though, the petitioner contends that the total population of Shirdi town is more than 25,000, the respondent authorities are right in taking into consideration the population on the basis of 1991 census, as per which the population of the Shirdi town was 15,129. Considering this population the minimum number of elected Councillors for Shirdi Municipal Councils Act must be undoubtedly fixed at 17 for any fresh election i.e. to be held for Shirdi Municipal Council.

11. In the result we allow the petition and direct the respondent No. 3 to fix the minimum number of wards of Shirdi town at 17 as set out in section 9(2) of the Maharashtra Municipal Councils, Nagar Panchayats Act, 1965 and intimate the same to the State Election Commissioner - Respondent No. 2 for further necessary action so as to hold election to the Shirdi Municipal Council. The respondent No. 3 shall intimate respondent No. 2 accordingly within a period of one month from today and we expect the respondent No. 2 to proceed with fresh election programme expeditiously, so that an elected body takes charge of the Municipal Council administration as early as possible.

12. Rule made absolute in the above terms with no order as to costs.

13. Petition allowed.