

(1998) 08 BOM CK 0013

In the Bombay High Court

Case No : Writ Petition No. 3826 of 1997

Sau Mantabai Mendhe

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 28-08-1998

Acts Referred:

Constitution of India, 1950 — Article 226, 227, 243ZG

Citation : (1999) 101 BOMLR 412

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

Bench : Division Bench

Judgement

J.N. Patel, J.—The petitioner seeks a writ of mandamus and/or direction for quashing and setting aside the election of respondent No. 4 as Sarpanch held on 27.11.1997 in a meeting of Gram Panchayat, Kakda, presided over by the respondent No. 3 who held that the petitioner was not entitled to contest the election and rejected her nomination, which, according to the petitioner, is per se bad and illegal. The petitioner, therefore, seeks direction of this Court that the respondent No. 3 should hold election for the post of Sarpanch immediately.

2. The petitioner came to be elected as a Member of the Village Panchayat, Kakda, from Ward No. 1 in open category, in the General Elections held on 25.11.1997. The petitioner claims that she belongs to Other Backward Classes (OBC). It is the case of the petitioner that as per the roster, the post of Sarpanch was reserved for women belonging to OBC category and, therefore, she was entitled to file her nomination and contest the said post. The petitioner, therefore, filed her nomination which came to be rejected by the respondent No. 3, on the sole ground that the respondent No. 4, being the only candidate who has been elected from the reserved constituency for women of OBC category would be entitled to become Sarpanch, and as the petitioner has not been elected from the said reserved category but elected from the open category, she cannot be considered and allowed to contest for the post of Sarpanch.

3. Return in this matter is filed by respondent No. 2, It has been contended

therein that the petitioner has been elected to the Gram Panchayat, Kakda, from Ward No. 1 which was from general/open category, whereas respondent No. 4, Sau. Nita w/o Sanjay Petkar came to be elected as Member of Kakda Gram Panchayat from Ward No. 4 which was reserved as Women Constituency and, therefore, under the provisions of letter issued by the Government, bearing No. GP/1097/Pra. Kra/38/21A, Rural Department, Mantralaya, Mumbai 32, dated 19.5.1997, and the letter issued by the Government under the directives of the High Court, bearing No. A.P. Ele/1027/Pra. Kra/2658/96, dated 13.3.1997 regarding election of President of Zilla Parishad and Chairman of Panchayat Samitis, it was presumed that the same ratio will be applied to the election for the Sarpanch of Gram Panchayats and it is, therefore, considered proper that the person for the post of Sarpanch of the Gram Panchayat should be elected from the same reserved constituency if the post of Sarpanch is reserved for that particular reserved constituency and, therefore, though the petitioner was elected from the general category and she is a lady candidate, her candidature was not accepted for the post of Sarpanch, Gram Panchayat, Kakda, as the said post was reserved for "Ladies".

4. The respondent No. 4, though represented by the Counsel, has not filed any return.

5. Shri Jugal Kishore Gilda, learned Counsel appearing for the petitioner, submits that the requirement is that the Sarpanch should be a lady candidate and the petitioner, being a lady and she belongs to OBC category, was qualified to be appointed as Sarpanch and, therefore, the rejection of her nomination by respondent No. 3 was illegal and bad in law. Shri Gilda has relied upon the case of Kasambhai F. Ghanchi v. Chandubhai D. Rajput 1998 (1) Mh. L.J. (1) : 1998 (1) Bom. L.R. 160, wherein the Supreme Court held:

It is a fundamental principle of democratic election that a person who is more popular is elected, popularity being measured by the number of votes which the person gets. If because of their popularity a larger number of Scheduled Castes, Scheduled Tribes, Backward Classes or women get elected to the municipality than the number of reserved seats that would be welcome. When the idea is to promote weaker sections of the society, and to improve their lot, it would be a contradiction in terms if members belonging to that section are debarred from standing to the office of the President because such a candidate is popular enough to get elected from a general constituency. Reservation is with reference to the category/caste to which the person belongs and not the nature of constituency from which he/she was elected.

When as per the roster the President is to be one who belongs to the category of Scheduled Caste then all members of the municipality who belong to the category of Scheduled Caste irrespective of the seat to which they had been elected, would be eligible to stand for election.

Shri Gilda therefore, submitted that the analogy of the ratio in the case of

Kasambhai (cited supra) can be made applicable to the present case and, in the circumstances, the impugned order deserves to be quashed and set aside and the petition should be allowed.

5. Smt. Wandile, the learned Assistant Government Pleader appearing in the matter, fairly concedes the legal position.

6. Shri C.N. Adgokar, learned Counsel appearing for the respondent No. 4, submits that there is an alternative remedy available to the petitioner and this Court should not intervene in this matter in exercise of its extraordinary jurisdiction, otherwise he has no quarrel over the proposition that the petitioner is entitled to contest the post of Sarpanch.

7. We will first take up the contention of the learned Counsel for respondent No. 4, that alternative remedy is available in the matter to the petitioner and the petitioner could have well challenged the election of respondent No. 4 by filing a dispute before the Collector as provided under Sub-section (5) of Section 33 of the Bombay Village Panchayats Act, 1958 (for short, "the Panchayats Act"), within a period of 15 days from the date of election. He further submitted that as the petitioner has not taken any steps to get the dispute referred to the Collector within the period of 15 days from the date of election of the respondent No. 4 as Sarpanch, she cannot seek the same relief before this Court by invoking the writ jurisdiction of this Court. To this, it is the contention of Shri Gilda that the impugned order on the date it was passed was in accordance with the Government Letter dated 19.5.1997 and it was in keeping with the decision in *Saraswati Devi Vs. Smt. Shanti Devi and Others*, , which has been subsequently overruled by the Supreme Court and, therefore, the petitioner did not revert to the remedy as provided under Sub-section (5) of Section 33 of the Bombay Village Panchayats Act. It is submitted that it is after the decision of the Supreme Court in the case of *Kasambhai* (cited supra) that the right of the petitioner to contest as Sarpanch, though elected from open category, came to be crystalised and, therefore, the petitioner has approached this Court by invoking its writ jurisdiction. It is further contended that the petitioner is also entitled to seek this relief as the illegality should not be allowed to continue and the Court can very well correct the same in exercise of its writ jurisdiction.

8. On hearing the parties, we are satisfied with the grievance of the petitioner that her nomination came to be rejected under a misconception and because of the Government Resolution issued by the Government in keeping with the decision of the Supreme Court in *Saraswati Devi's* case (cited supra), which came to be reconsidered by the Supreme Court in *Kasambhai's* case (cited supra), wherein the Supreme Court held that, "the conclusion which was arrived at in *Saraswati Devi's* case did not flow from the language of the relevant provisions and it is not consistent with the concept of reservation. With respect, it does not lay down the correct law." But we are required to take our "hands off" in view of the decision of the Supreme Court in the case of *Boddula Krishnaiah and another Vs. State Election Commissioner, A.P. and others*, , in which the

Supreme Court held that once the election process has been set in motion, though the High Court may entertain or may have already entertained a writ petition, it would not be justified in interfering with the election process giving direction to the Election Officer to stall the proceedings or to conduct the election process afresh, in particular when election has already been held in which the voters, were allegedly prevented to exercise their franchise. This decision of the Supreme Court was relied upon and followed by the Division Bench of this Court in the case of Farook Ali Khan and others Vs. Maharashtra State Election Commission and others, , in which the Court was seized with the dispute relating to the Municipal Corporation Election. The Court took the view that in the absence of any alternate remedy and the prohibition contained in Article 243-ZG of the Constitution of India, the Court would have judicially reviewed the impugned order. Similarly, in the case of Raju Vitthalrao Boche v. State of Maharashtra Write Petition No. 641 of 1997, a Division Bench of this Court, again referred to and relied upon the Boddula Krishnaiah's case (cited supra) and observed that though this Court had jurisdiction to entertain a dispute arising out of elections it declined to exercise the same since the election process had already commenced at the time the petitioner came to the Court by filing the writ petition and by then the elections were also concluded. Therefore, this Court was of the view that the petitioner must be relegated the remedy of the election petition and declined to exercise its extraordinary writ jurisdiction under Articles 226 and 227 of the Constitution of India. Thereafter, this Court has taken consistent view that it should not exercise its writ jurisdiction so as to interfere with the election process or a dispute arising out of the election, as there is an alternative remedy available at law for redressal by filing an election dispute.

Mr. Gilda, the learned Counsel for the petitioner pointed out to us that now as this Court proposed not to exercise its extraordinary writ jurisdiction and intervene in the matter, directions may be issued to the petitioner to avail alternative statutory remedy, which will now be not available to her as limitation to prefer an election dispute has expired and as such protect the interest of the petitioner. In that, he has relied upon the decision of the Supreme Court in Danda Rajeshwari Vs. Bodavula Hanumayamma and others, . It is submitted by Mr. Gilda that the Court may pass similar directions in this case also. We accept the contention, that the petitioner will have to be given the benefit of limitation by issuing appropriate directions, as we have decided not to intervene in the matter, in exercise of our extraordinary jurisdiction, so that the petitioner can have a meaningful exercise by approaching the Collector by way of an election dispute.

9. In the peculiar facts and circumstances of the case, and considering the ratio of the judgment rendered in Kasambhai's case, (cited supra), the petitioner cannot be left without a remedy. Her right to contest election of Sarpanch is denied. The error in rejection of her nomination surfaced only; after the Apex Court overruled its earlier decision in Saraswati Devi's case (cited supra). By the time, the petitioner realised the error and illegality in rejection of her nomination,

the limitation for filing an election dispute was over. As rightly submitted by Shri Gilda, the petitioner is claiming her right to contest the election of Sarpanch on the basis of her eligibility which is not in dispute. Secondly, the term of the Panchayat is for a period of five years and presently in the case only 7 to 8 months have passed away and still sufficient period is available. The petitioner is seeking a very limited relief of ordering re-election on the background that her nomination was wrongly rejected, which can be gone into by the Collector in an election dispute under Sub-section (5) of Section 33 of the Panchayat Act.

10. Considering the situation, which has changed due to the decision of the Apex Court in Kasambhai's case (cited supra) and in order to do justice between the parties, we find that it will be proper to direct the petitioner to file an election dispute before the Collector. The legal position as it stands enables and entitle the petitioner to contest for the post of Sarpanch is also not disputed by the respondents and, therefore, we find that the petitioner is entitled to take reverse to the remedy provided under Sub-section (5) of Section 33 of the Panchayats Act, as it was otherwise not available to her within the prescribed time, but for the decision in Kasambhai's case (supra). The petitioner came to be disqualified on the basis of the interpretation being made by the Circular issued by the Government in accordance with the Saraswati Devi's case which is not found to be correct, in view of the decision of the Apex Court in Kasambhai's case (cited supra). It is because of such incorrect interpretation that the petitioner was deprived of her right to contest the election.

11. We therefore, direct the petitioner to prefer an election dispute before the Competent Authority under the said Act, within a period of two weeks from today. On such election dispute/petition being filed, the Competent Authority will dispose of the same on merits and in accordance with law. With these directions, nothing survives in the petition. Rule discharged with no order as to costs.