

(1989) 06 BOM CK 0036

In the Bombay High Court

Case No : Writ Petition No. 1266 of 1989

Save Moreshwar Dina Nath

APPELLANT

Vs

Shantaram Kale and Others

RESPONDENT

Date of Decision : 21-06-1989

Acts Referred:

Bombay Provincial Municipal Corporations Act, 1949 — Section 1, 19
Constitution of India, 1950 — Article 226
Evidence Act, 1872 — Section 3

Citation : (1989) 2 BomCR 619 : (1989) 91 BOMLR 629

Hon'ble Judges : I.G. Shah, J;B.N. Deshmukh, J

Bench : Division Bench

Advocate : S.C. Bora, for the Appellant; A.S. Bobde, A.G., for respondent Nos. 1, 3 and N.K. Kakde, Govt. P., for respondent No. 3, A.M. Kanade, for respondent Nos. 7, 10, 14, 16, 20, 25, 29 to 31, 33 to 35, 42 to 45, 47, 48, 51 to 54, 56, 59 and 60 to 62, A.B. Naik, for respondent No. 16, P.R. Deshmukh and R.N. Dhorde for respondent No. 2, S.A. Deshmukh and R.S. Deshmukh for respondent Nos. 1, 5, 6, 8, 9, 11, 13, 15, 17 to 19, 21 to 24, 26 to 28, 32, 36, 37, 38 to 41, 46, 49, 50, 55, 57 and 58, A.H. Kasliwal, for respondent No. 36, Shivajirao Scindia, for respondent No. 12, U.B. Binwade, for respondent No. 45 and M.B. Sabnis, for the Respondent

Final Decision : Allowed

Judgement

B.N. Deshmukh, J.—The petitioner, who is an elected Councillor of the Municipal Corporation, Aurangabad, has filed this petition for declaration that he be declared elected as Mayor of the Aurangabad Municipal Corporation, as he has secured more votes than his rival candidate respondent No. 5 Narendra Patil, in an election held for that purpose. It may be noted that for the term "councillor", parties have used the term "corporator".

2. The facts, which are not in dispute, are that the petitioner is the elected councillor of the Aurangabad Municipal Corporation. So also respondent No. 5 is the elected councillor of the Aurangabad Municipal Corporation. Respondent No.

1 is the Mayor of the Aurangabad Municipal Corporation and is also the presiding officer for the election of the Corporation for this year.

3. The Municipal Corporation consists of 60 elected councillors, who are entitled to vote at the election of Mayor and Deputy Mayor. A meeting was actually held on 18th May, 1989 at 11 a.m. for the purpose of electing Mayor and Deputy Mayor of the Aurangabad Municipal Corporation. There were several candidates, who were nominated for both the elections. For the present, we are not concerned with the election of the Deputy Mayor, as the same did not take place. In this petition, we are merely concerned with the election of the Mayor. After withdrawal of the candidature by others, the petitioner and respondent No. 5 were the only two candidates who remained in the field for the election of Mayor. The voting has also taken place.

4. The case of the petitioner is that out of 60 councillors, 59 councillors voted at the election. After counting of votes, the petitioner received 30 votes and Respondent No. 5 received 29 votes. At that point of time, respondent No. 1, who is not only the Mayor, but also the Presiding Officer for he said election, tried to insert one vote on the ground that he has a right of giving one vote as "casting vote". Accordingly, one additional vote was inserted by respondent No. 1 after the ballot box, was opened and the votes were actually counted. According to the petitioner, initially there were only 59 votes in the ballot box. After counting of votes was done, respondent No. 1 obtained one ballot paper from the polling officer and after marking it by his own pen, the ballot paper was inserted by the Mayor, respondent No. 1.

5. Thereafter, the petitioner gave applications, copies of which are annexed with this petition as Exhibits "B" and "D", requesting the Presiding Officer, namely, the Mayor-Respondent No. 1 to declare the result of the voting by declaring the Petitioner as elected, as he has secured 30 votes and his opponent. Respondent No. 5, has secured only 29 votes. In view of the inequality of votes, between the petitioner and respondent No. 5, there is no question of any casting vote and, therefore, the petitioner requested to declare him as elected. The first application is admittedly received by respondent No. 1 under his signature and the time of receipt of the application is also mentioned as 1.45 p.m. On second application at Exhibit "D" the time of receipt is mentioned as 2.20 p.m. These two applications are signed, not only by the petitioner, but also by other two councillors.

6. After some time, a representation was addressed to the Mayor-Respondent No. 1 by as many as 58 Councillors requesting him to cancel the entire proceedings, which had taken place in the meeting on that date and to hold a repoll on 31st of May, 1989. The cancellation of the proceedings of the meeting was requested as per the provisions contained in Chapter II of the Schedule of the Bombay Provincial Municipal Corporations Act, 1949 (hereinafter referred to as "the said Act"), more particularly under provisions of Clause (m) of section 1 of the said Chapter II, which governs Proceedings of the Corporation.

7. After filing of this petition, a notice is issued on 22-5-1989 to hold a repoll, as per the resolution of the meeting dated 18-5-1989. The notice of the meeting for repoll is annexed along with the petition at page 191 of the Paper Book.

8. The petitioner, therefore, in this petition challenges in effect holding of the meeting for repoll on 31st of May, 1989.

9. Shri Bora, learned Counsel for the petitioner, contended that the resolution to cancel the proceedings of the meeting dated 18th of May, 1989 is passed by the Corporation in excess of powers vested in it. The fact that the resolution was not opposed by any councillor cannot be deemed to vest a right in the Corporation to cancel the proceedings of the meeting. Reference can be made to the provisions of section 1(m) of Chapter II of the said Act at this stage. The relevant provisions are as under :---

"1. Provision regulating Corporation's proceedings.---

(m) any meeting may, with the consent of a majority of the councillors present be adjourned from time to time to a later hour on same day or to any other day, but no business shall be transacted and, except as is hereinafter provided, no proposition shall be discussed at any adjourned meeting other than the business or proposition remaining undisposed of at the meeting from which the adjournment took place....."

In this petition, we are concerned with the main provision of Clause (m) of section 1, which empowers to adjourn the meeting by consent of the majority. Clause (m) does not empower or authorise to cancel the business which is already transacted in a meeting on that day. What is provided is that if the meeting is adjourned as per this clause, then, in the next meeting, the further business, which has remained to be carried out, shall be disposed of. But the provisions do not provide for cancellation of the business, which is already transacted in the meeting.

10. We have asked the learned Counsel for all the respondents and also for the petitioner, as to whether there is any other provision in the said Act enabling the councillors, even by majority or unanimity, to cancel the business, which is already transacted in the meeting, and we were told at the Bar that there is no other provision in the said Act in that respect. Shri Bobde, the learned Advocate General, who appeared for respondents Nos. 1, 3 and 4, had fairly conceded that the resolution regarding repoll is not in conformity with the provisions of the said Act and that the resolution is in excess of the powers vested in the councillors. Therefore, there is no question of repoll, as the resolution passed in the meeting. The same view was expressed by the learned Counsel, Sarvashri P.R. Deshmukh and S.A. Deshmukh, also. However, Shri Scindia, appearing for respondent No. 12, contended that even there is no provision for repoll in the statute, in view of the prevailing circumstances and in view of the adjournment of the meeting and in the light of the resolutions passed by the councillors this Court can direct the repoll. We are afraid that in view of the clear statutory provisions, it is not

possible for this Court to order repoll. The resolution to have a repoll is, therefore, required to be set aside. The meeting called for that purpose on 31st of May, 1989 was also bad, but as the interim relief was granted by this Court restraining from holding such a meeting, the meeting, actually had not taken place. But the meeting so convened was illegal and in contravention of the powers vested in the authorities.

11. The main bone of contention in this contention in this petition is that the petitioner has claimed that the counting of votes had taken place; 30 votes were polled in favour of the petitioner and 29 votes were polled in favour of respondent No. 5. Secondly, in view of the inequality of votes polled in the election respondent No. 1, as the Presiding Officer had no right to give "casting vote; the vote" which was inserted by respondent No. 1 after ballot box was opened and votes were counted by respondent No. 1, is no vote in the eye of law and, therefore, the same is required to be ignored, being not legally cast vote.

12. Respondents Nos. 1 and 5 have, on the other hand, contended that the scrutiny of the votes had itself not taken place; the counting of votes had also not taken place; and Respondent No. 1 -Mayor, being a councillor, has cast his vote when the ward-wise votes were being cast by the councillors. That, when his turn, as per the word-wise list, came for voting respondent No. 1 has cast his vote and therefore, there is no question of inserting vote, after the opening of ballot box and after counting of votes; as such his vote is required to be taken into account.

13. The controversy between the parties, therefore, relates to the number of votes, which were in the ballot box. According to the petitioner, before the ballot box was opened, only 59 councillors had exercised their right to vote, and accordingly, there were only 59 ballot papers in the box and one ballot paper was inserted by respondent No. 1 after counting of votes from the ballot box was over. On the contrary, the contention of respondents Nos. 1, 2 and 5 in this connection is that all 60 councillors, including respondent No. 1, had cast their votes before the ballot box was opened. The dispute, therefore, relates to the one vote, which is cast by Respondent No. 1, at the said election.

14. Before going to the merits of the case, a development, which took place after the petition was filed, is required to be considered and dealt with. The petitioner has filed his counter-affidavit on 19th June, 1989, in which it is mentioned that the petitioner had a meeting with his Advocate, Shri Bora, in connection with the writ petition, and, at that time, Shri Bora expressed his desire as to whether a meeting could be arranged between him and the officers of the Corporation, such as, the Secretary, Polling Officers and Scrutiny Officers, with a view to get a clear picture of the events and the proceedings of the meeting dated 18th of May, 1989. Shri Magare, Shri Marathe and Shri Kumawat, some of the concerned officers, gave their willingness for such meeting. It is further averred that on 3rd of June, 1989 at about 11 p.m., the meeting took place between the petitioner, his Advocate Shri Bora and one Shri Sadavarte, and a dialogue took place

between them. The petitioner has further averred that the conversation between him, his Advocate Shri Bora and Shri Sadavarte is recorded in the tape-record in his air-conditioned office situated at Khadakeshwar. Further, on 7th of June, 1989, a meeting took place at 10 p.m. between the petitioner, his Advocate Shri Bora and Shri Marathe, who acted as Polling Officer on 18th of May, 1989 in the same office of the petitioner at Khadakeshwar. The conversation that took place in this meeting is also tape-recorded. Similarly, tape-recording is done of the conversation held on 9th of June, 1989 at 10 p.m. between the petitioner, his Advocate Shri Bora and Shri Magare, who is the Secretary of the Corporation. At 11 p.m. on 9th of June, 1989, another meeting took place between the Petitioner, his Advocate Shri Bora and Shri Kunawat. The conversation of that meeting is also tape recorded.

15. The petitioner has averred in his counter-affidavit that none of the officers of the Corporation, whose dialogue was tape-recorded, were aware of the fact of tape-recording. Two sealed envelopes one containing the tapes of the above mentioned various dialogues, and the other containing the transcripts of the same are produced before us by Shri Bora. The envelopes are sealed in accordance with the rules framed by this Court under Article 227 of the Constitution of India. We have directed to keep both the envelopes intact under the seal of this Court.

16. The point regarding admissibility of these tapes and their transcripts was agitated on both sides. Shri Bora contended that such evidence is admissible and cited before us three decisions of the Supreme Court for that purpose, which are (1) S. Pratap Singh Vs. The State of Punjab, ; (2) Yusufalli Esmail Nagree Vs. The State of Maharashtra, ; and R.M. Malkani Vs. State of Maharashtra, . On the other hand, the learned Advocate-General contended that the evidence is inadmissible, in as much as the evidence is created after filing of the petition with a purpose. Such evidence is a manufactured evidence to suit the convenience of the petitioner. According to him, the conversation recorded cannot be said to be relating to the contemporaneous events. He relied upon the decision of the Supreme Court in Ram Singh and Others Vs. Ram Singh, . He further contended that the decisions cited by Shri Bora also indicate that this evidence is inadmissible more so in a petition under Article 226 of the Constitution, dealing with an election matter.

17. We have gone through the decisions cited before us. The only decision, which is more relevant so far as the petitions under Article 226 are concerned, is the decision of the Supreme Court in S. Pratap Singh's case (supra). In that decision, it is observed, that the tape-recordings were referred to by the petitioner in his writ petition as part of the evidence on which he proposed to rely in support of his assertions as regards the substance of what passed between him and the Chief Minister of Punjab and the members of the latter's family on the several matters which were the subject of allegation in the petition. The written statement of the respondent State was filed only after they had their own

copies of the tape-records so that they were in a position to verify (a) whether the voice recorded was that of the person whose voice it professed to be (b) whether there had been any interpolations or omissions, and (c) whether there had been any other tampering with the records. In the counter affidavit filed by the State there was no denial of the genuineness of the tape-records, no assertion that the voices of the persons which were recorded in the tape-records were not those which they purported to be or that any portion of the conversation which would have given a different colour to it had been cut off.

18. After considering the ratio laid down by the Supreme Court in various decisions, we are of the opinion that the evidence produced by Shri Bora in these two envelopes is admissible. However, the same cannot be read in evidence in the present case, because in all these cases, the main thing, which is required to be considered while considering the admissibility of these documents and reading them in evidence, is, whether the voice recorded was of that person whose voice it professed to be. In the present case, apart from the words of the petitioner, there is no evidence indicating that the voice recorded is the voice of the professed person. Such evidence is required to be taken cautiously. More so, in a case like the present one. Admittedly, the evidence is brought into existence after the writ petition is filed. The rule of caution requires us that the same cannot be read in evidence. More particularly so, when the persons whose voice is tape-recorded are not parties to the petition. There is also a denial, though non-specific, on behalf of respondent No. 1 in this connection.

19. Coming to the main controversy between the parties. The ballot papers were produced before us, as directed by us, in a sealed envelope. The ballot papers are separately placed in on envelope. There is a writing on the envelope, which mentions, "used ballot papers for the election of Mayor", and further mentions that there are 60 ballot papers. At the left hand side of this envelope, there are some words, which are scored off, but the words are readable inspite of scoring. At the top it was written, "fouk lghph er if=dk" (ballot paper without signature). Below that, in different ink, it is written, "ballot paper of the Hon"ble Mayor". These two statements written at the left hand side corner of this envelope are scored off. For the purpose of this petition, we have marked this envelope as Envelope No. 1.

20. The second envelope mentions, "total ballot papers-75, for the section of the Mayor dated 18th May, 1989". Below that is written, "used ballot papers-1 to 60, unused ballot papers-61 to 75". This envelope is marked by us as Envelope No. II. The writing on these is signed by the Secretary of the Aurangabad Muncipal Corporation.

21. These two envelopes were put in a container which was also sealed and which mentions, " the election for the post of Mayor, 1989 dated 18th May, 1989". Then written is, "ballot papers. Used ballot papers 60. Unused ballot papers 61 to 75". This is also signed by the Secretary of the Corporation.

22. We have opened both envelopes, Envelope No. I and Envelope No. II. In Envelope No. I, we found 60 ballot papers. The first 30 ballot papers are in favour of the petitioner. From 31 to 60, ballot papers are in favour of respondent No. 5. The controversy relates to the ballot paper, which we find at last of all these 60 ballot papers.

23. Shri Bora, learned Counsel for the petitioner, contended that this last ballot paper is the ballot paper used by respondent No. 1 for casting his vote after the ballot box was opened and the votes were counted. According to him, this ballot paper bears the mark of pins, indicating that this ballot paper bears the mark of pins, indicating that this ballot paper was attached to some other document by a pin. His second contention is that looking to the marking on the ballot paper, it is clear that initially, the mark was made with one pen and, thereafter, on that mark, another mark is reproduced by a different pen, which was provided for at the election for making the ballot papers. According to him, this ballot paper was issued at Sr. No. 48 at the time of ward-wise voting by the councillors to respondent No. 1.

24. In view of this allegations, we have seen the ballot paper, which is under challenge. We find that the pin marks are present on this ballot paper. We have also shown this ballot paper to all the learned Counsel appearing in the matter. There is no doubt that this ballot paper bears the pin mark. We have also seen the counter-foils contained in Envelope No. II. Envelope No. II mentions, "counter-foils of the ballot papers used from 1 to 60; and the entire ballot papers which are not used, from 61 onwards". We have seen the counter-foil at Sr. No. 48. We have seen the pin mark on this counter-foil also. We have also seen the other ballot papers and the counter-foils. There are no such pin marks on other ballot paper, or, on other counter-foil. The ballot papers, as well as the counter-foils were made available for inspection to all the learned Counsel. It is nobody's case that the other ballot paper or any other counter-coil contains the pin mark. We have also seen some of the ballot papers and the counter-foils. Regarding other ballot papers, we do not find such markings of pin, either on the counter-foil or on the ballot paper.

25. Shri Bora, learned Counsel for the petitioner, therefore, contended that apart from the affidavits filed by the petitioner, or on his behalf, the intrinsic evidence on record by way of markings of pin on the ballot paper supports the contention of the petitioner and falsifies the story put forward by respondent No. 1 regarding the time, period and manner in which respondent No. 1 has cast his vote at the said election on that date.

26. We have seen the averments of the petitioner in the petition on this connection. The petitioner has stated that the voting commenced at about 12.10 p.m. After voting was over, respondent No. 1 asked the polling officer to bring the ballot box on his table. Thereafter, the ballot box was opened and the counting of votes took place in the presence of respondent No. 1, candidates and their respective scrutinisers. All the votes were counted and separated in tow

separate trays, kept on the table, in the presence of respondent No. 1, polling officers and the scrutinisers of the contesting candidates. It is averred that voting and counting of votes was a peaceful affair and after the counting was over, it was revealed that out of 60 councillors, 59 councillor had exercised their right of voting. It was further revealed that out of 59 votes polled, the petitioner Shri Save secured 30 votes, as against his rival candidate. Respondent No. 5 Shri Narendra Patil, who secured only 29 votes . It is further averred that as per the rule, after the counting is over, the Presiding Officer was under obligation to immediately declare the results of the election. In the present case, the petitioner having secured 30 votes as against 29 votes to his rival candidate respondent No. 5, ought to have been declared as the Mayor by respondent No. 1, but he did not declare the petitioner as elected to the post of Mayor and this omission on the part of Respondent No. 1 is against the provisions of the said Act and the Rules. It is further averred that by securing one more vote against his rival candidate, the right had accrued in favour of petitioner to be declared as Mayor. In paragraph 11 of the petition, it was averred that instead of declaring the petitioner as declared to the post of Mayor, respondent No. 1 declared in the meeting that he has a right to cast his "casting vote". It is averred that there was no occasion for respondent No. 1 for exercising his right of casting vote, as the petitioner had secured more votes than his rival candidate.

27. In paragraph 12 of the petition, the petitioners has categorically averred that ignoring strong protest by the petitioner and several others. Respondent No. 1 was bent upon to exercise his casting vote, as has been claimed by him. He accordingly called for the ballot paper on his table. Ballot paper was provided to him. He marked the said ballot paper by his own pen and inserted the said ballot paper in the tray, where the counted ballot paper of respondent No. 5 were kept. He has further averred that this conduct of respondent No. 1 was objectionable and unfair. It is further said that the vote cast by Respondent No. 1 in this manner, after the counting was over is illegal.

28. Shri Bora also placed reliance on the letters addressed by the petitioner to Respondent No. 1, which are produced at Exhibits "B" and "D". Exhibits "B" is signed by the petitioner and one more councillor, Shri Chandrakant Khaire (Leader of Shiv Sena). In paragraph 2 of this letter, it is mentioned that after the counting, Shri Save (the petitioner) obtained 30 votes and Shri Narendra Patil (Respondent No. 5) obtained 29 votes. If the Mayor wanted to cast his vote, he should have done so before the counting and during the relevant period provided for the poll. After the counting by the Commissioner, 30 votes were Polled in favour of the petitioner and 29 votes were polled to the other candidate. There being inequality of votes in the voting, there is no question of giving casting vote. Therefore, as Shri Save had obtained 30 votes, he should be declared elected. In the last paragraph it is further mentioned that the result is required to be declared, as per law. The voting by the Mayor after the counting is illegal and hence objections to that vote were taken. This application, Exhibit "B", was received by Respondent No. 1 under his signature at 1.45 p.m. The receipt of the

two applications, Exhibits "B" and "D", is not disputed by Respondent No. 1.

29. The second letter is produced at Exhibit "D", which is also received by Respondent No. 1, who was Presiding Officer of the meeting at 2.20 p.m. This letter is signed by the petitioner and two other councillors. Sarvashri Chandrakant Khaire and Motiram Ghadamode. In this letter also, it was brought to the notice of Mayor that there is no propriety in giving casting vote, as the petitioner and respondent No. 5 have not obtained equal number of votes. The vote given by respondent No. 1 as casting vote, after the time for poll was over and counting was completed is not legal. Finding that respondent No. 5 has polled less votes, the Mayor had given one vote as casting vote. That vote is invalid vote, as the same is given after the counting is over.

30. The third document, to which a reference can be made at this stage, is Exhibit "C", which is a letter addressed by Shri Ghadamode, who is counting agent for the election of Mayor. This relates to the objection taken by another councillor Shri Gangadhar Gadhe regarding the ballot paper of one Shri Sugrim Ridlon on the ground that he had shown his ballot paper. To that objection, Shri Ghadamode had contended that the objection to the ballot paper of Shri Sugrim Ridlon is taken after the counting is over and, therefore, the Mayor was requested not to consider the said objection, as the same is taken after the counting was over.

31. Shri Bora therefore, contended that in view of this documentary evidence, apart from the affidavits on record, it should be held that the vote cast by respondent No. 1 is invalid and if the vote of Respondent No. 1 is held invalid, then there are 30 valid votes cast in favour of the petitioner and 29 valid votes cast in favour of Respondent No. 5. Shri Bora further contended that in view of the clear provisions of the rules in this connection the petitioner should be declared elected. For that purpose, he relied on the provisions of rules 53 to 58 of the Rules framed as the Additional Rules for conducting meetings of the Corporation, Committees, etc. of the City of Aurangabad.

32. Rules 47 to 58 of the said Rules deal with election of Mayor and Deputy Mayor. Rule 45 provides for the manner of ballot voting and rule 46 deals with the result in case of a tie: Rule 53 is as follows :

"If there are only two candidates, then one, who gets the larger number of votes, shall be declared elected."

As there were two candidates in the field and if the vote of respondent No. 1 is invalid, then, relying on this rule. Shri Bora contended, the petitioner should have been declared elected at the end of the counting. But, that is not done.

33. Shri Bora also invited our attention to the affidavits filed by the correspondents of the newspapers, viz., Shri Nishikant Anantrao Bhalerao, who is correspondent of Daily Marathwada published from Aurangabad; Shri Nagesh Narayanrao Gajbhiye, correspondent of UNI; Shri Sanjiv Pandharinath Unhale,

Journalist covering the news items for Daily Kesari and Daily Navashakti; Shri Gopal Vinayak Sakrikar, Correspondent of Daily Maharashtra Times and Shri Shantaram Joshi, Journalist of Daily Tarun Bharat. The affidavits of these correspondents are produced at pages 175 to 184 of the Paper Book. In these affidavits, the journalists have contended that they were invited to attend the meeting held to elect the Mayor and Deputy Mayor on 18th of May, 1989. Accordingly, they attended the meeting and they have seen the proceedings of the meeting from the press gallery. They have stated that they have seen the counting of votes and after counting of votes, it was revealed that the petitioner had polled 30 votes, while respondent No. 5 had secured 29 votes. Apart from these affidavits, the extracts of the news items relating to the meeting to elect the Mayor on 18th May, 1989 were produced along with the petition as Exhibit "E" collectively. These extracts are from the newspapers Maharashtra Times published from Bombay, Marathwada published from Aurangabad; Ajantha published from Aurangabad; Aurangabad Citizens published from Aurangabad and Lokmat published from Aurangabad. All these news items are date lined on 19th May, 1989. In all these news items, it was mentioned that in the meeting after the counting, the Petitioner had polled 30 votes, while respondent No. 5 had polled 29 votes. Apart from the counting and polling, the other details of the meeting were also reported, with which we are not presently concerned. There is also averment in the petition to the effect that the fact of reporting in the newspapers, coupled with news items broadcast on Radio and Television stating that the petitioner had polled 30 votes as against 29 polled by Respondent No. 5. Relying on this, Shri Bora contended that the contention of the petitioner is supported by the consistent news appearing in all the newspapers and in other medias, regarding counting of votes and securing of one vote more by the petitioner.

34. The learned Advocate-General contended that in a petition under Article 226, affidavits of the parties only can be considered and the affidavits of persons, who are not parties to the petition cannot be considered. His further contention is that the petition raised disputed questions of fact and, therefore, is not maintainable. This Court has no jurisdiction to decide a question of fact. So also, this Court shall not interfere in election matter, when the election is still in progress. His further contention is that there is adequate remedy provided under the said Act. He has further contended that the authority is competent to decide the question regarding the validity of votes and interferences by this Court at this stage would be premature and is unwarranted, as the result is yet to be declared. Objections, if any, to the vote or votes can be raised before the competent authority and they will be decided by the appropriate authority at the appropriate time, but as the election proceedings are pending, we should not interfere in the matter.

35. Shri P.R. Deshmukh, appearing for respondent No. 2, contended that the procedure as required by the rules is not completed before the counting. The scrutiny of votes, which is required to be made as per the rules, is not at all made. Unless each and every vote is scrutinised before the counting, it cannot be

said that the counting is legal and validly done. According to him there is not even an averment to that effect in the petition, much less evidence is produced to indicate that scrutiny of all the ballot papers had taken place before the counting.

36. Shri S.A. Deshmukh, appearing for respondent No. 5 and some other respondents had contended that the scrutiny had not taken place at all. No inference can be drawn on the basis of some marks on the ballot paper of respondent No. 1. The petitioner has failed in establishing that respondent No. 1 has not given his vote during the polling time. Moreover, he has contended that the unfinished work of the election can be finished by the competent authority and this is not the stage when this Court should interfere in the matter.

37. The other learned Counsel for the Respondents were also heard on the points raised in the petition. They either adopted arguments of learned Advocate-General or of Shri Bora.

38. It may be noted at this stage that no decision of any Court was brought to our notice to contend that in a writ petition under Article 226 of the Constitution, the affidavits filed by persons, who are not parties to the petition, cannot be looked into. But, reliance was placed on the decision of the Supreme Court in Babubhai Muljibhai Patel Vs. Nandlal Khodidas Barot and Others, , to contend that the affidavit by itself is not sufficient, unless the person is made available for cross-examination to the other side. Then alone, such evidence can be taken into consideration. In that case, as number of affidavits were filed on behalf of the appellants and the respondents and number of councillors had also filed affidavits on both sides, the Court felt, in the facts of that case, that some of the persons, who had filed the affidavits are required to be examined and made available for cross-examination to the other side. That was challenged in the Supreme Court contending that instead of calling each and every person, who had filed the affidavit, for examination and cross examination, the High Court had selected few and they were made available for cross-examination. The Supreme Court, while dealing with this question, found that the High Court was correct and it was not necessary to produce all those persons, who had filed affidavits as witnesses in the Court.

39. Normally, the petitions under Article 226 are decided on the basis of affidavits and in a given case, the High Court may find it necessary to have oral evidence by calling the witnesses and by giving opportunity of cross-examination.

40. The ratio laid down in Babubhai Patel's case itself shows that the proposition that the affidavits of persons other than the parties to the petition cannot be relied upon in a petition under Article 226 of the Constitution cannot be entertained. Such affidavits can be considered along with the affidavits of the parties.

41. Coming to the question of the validity of vote cast by respondent No. 1. It is true that the validity could have been decided by the competent authority,

namely, the Presiding Officer, i.e. respondent No. 1. A reference to the relevant rules is required to be made at this stage.

42. In the provisions appearing in Chapter II of the said Act, Clause (g) of section 1 provides:-

"every meeting shall be presided over by the Mayor, if he is present at the time appointed for holding the same, and if the office of Mayor is vacant or if the Mayor, is absent, by the Deputy Mayor, or in the absence of the Deputy Mayor, by such one of the councillors present as may be chosen by the meeting to be Chairman for the occasion:"

Respondent No. 1 is, therefore, the presiding authority for the meetings of the Municipal Corporation. As the election of Mayor and Deputy Mayor takes place in the meeting, such meeting is also presided over by the Mayor. In the present case also, on 18th May, 1989. Respondent No. 1 had presided over the meeting in the capacity as Mayor. So, for the purpose of election of Mayor, the presiding authority at the meeting is Mayor, viz., respondent No. 1. Respondent No. 1 being the presiding authority is required to play a major role in the entire election process. A mere glance at the relevant provisions appearing in Chapter II of the said Act indicates the nature of role, which is required to be played by the presiding authority. Rule 45(a) of the Additional Rules for conducting meeting of the Corporation, Committees, etc., of the City of Aurangabad, provides that the presiding authority shall appoint scrutineers, shall also show the councillors present at the meeting that the ballot box is empty, shall then lock and seal it for use, he should then hand over the locked ballot box, keeping the key with himself, to an officer of the Secretary officer, called for this purpose with polling officer. The councillors' room or some other suitable place should be reserved as polling place and the polling officer should remain in that room. In Rule 45 (g), it is provided :---

"On the close of time fixed under Clause (f), the polling officer should bring the ballot box to the Presiding Authority who shall immediately declare that the poll is closed and no ballot paper will be issued or received after such declaration. The Presiding Authority, after opening the ballot box, should take out the voting papers from the box and after initialling them should hand over the same to the scrutineers."

In Rule 45(h), it is stated :---

"If, at any time during the course of voting, the Polling Officer sees a member looking into another's voting paper or showing his voting paper to somebody, he shall set aside that voting paper without putting it into the ballot box and bring the facts to the notice of the Presiding Authority who shall thereupon cause that voting paper to be cancelled."

Thus, under Rule 45(h), the Presiding Authority is empowered to cancel a vote on the ground that the vote was shown by the voter. In Clause (i), it is said that

if the ballot paper is spoiled, it is for the Presiding Authority to permit to supply another ballot paper. Not only that, in rule 51, it is provided that the votes of the candidates shall be counted by the Presiding Authority with the assistance of the Municipal Secretary or any other officer or servant from the Secretary's office. It is also further provided that in case a candidate does not nominate a representative at the time of the counting, the Presiding Authority has a right to nominate any of the councillors to act as the representative. If we read all the rules together, the entire process is under the control of the presiding authority.

43. As the vote of respondent No. 1 is challenged and as the fate of the election depends on the challenged vote, if the matter is sent back for consideration as unfinished work in the election to the meeting presided over by respondent No. 1, the decision on the validity of vote of respondent No. 1 is required to be taken by respondent No. 1 himself. It is well-settled that one should not be a Judge in his own cause. In view of this, it would not be proper and just to send the matter back on the ground that unfinished work of election can be done in the meeting of the Corporation.

44. There is also another reason as to why the matter cannot sent back to a meeting, which will be presided over by respondent No. 1. If we hold that the vote cast by respondent No. 1 in this election cannot be treated as a vote in the eye of law, as the vote was not given by him during the period of poll, but the same was given by him after the polling time was over and, not only that, but after the votes were counted and on completion of the counting, the vote was tried to be inserted in the tray in which the ballots polled in favour of respondent No. 5 were kept, in that event, sending the matter for consideration of the meeting of the Corporation will be a mere technical formality, because, in view of the finding recorded herein after by us, the valid votes which are received by the petitioner will be 30 and the valid votes which are received by respondent No. 5 will be only 29. What remains thereafter is a formal declaration to be made, namely, the result of election. We do not think that the matter should be sent back merely for a formal decision to be taken in the meeting. We feel, in the present circumstances, that it would be unnecessary to send the matter back to a meeting of the Corporation to merely declare the result of the election, which would be fait accompli due to the decision of this Court.

45. The matter cannot be sent back and entrusted to the election officers now, because all of them have filed their affidavits on this side or that side. The fair play required in election matters deters us from sending matter back now.

46. In regard to the validity of vote of respondent No. , we have no option than to decide the question in this petition in the circumstances mentioned above.

47. Apart from the statements made in the petition, which are controverted by respondent No. 1, regarding the manner in which the vote is given by respondent No. 1, if we were required to decide on the basis of affidavits alone, probably there was hardly any scope for intervention in favour of the petitioner. But, there

is other evidence on record, which is so cogent and consistent to draw the inference that the votes were scrutinised, counted and thereafter respondent No. 1 inserted his vote in the tray and not in the box.

48. The case of respondent No. 1, respondent No. 5 and other Respondents supporting Respondent No. 5 is that the scrutiny of the votes has not taken place and the counting of votes has also not taken place. We have seen the writings on the sealed envelopes and the writing on the container of the envelopes, containing the ballot papers and the writing on the container of the envelopes, containing the ballot papers and the counter-foils. On the container, it is written, "ballot papers, which are used, is 60", while "number of unused ballot papers are from 61 to 75". On Envelope No. I, which contains ballot papers, what is mentioned is that 60 ballot papers are used in the election of the Mayor. As mentioned above, there is some writing which is scored off. After scoring also, the writing is visible. It is "fouk lghph er if=dk-".

Below that, in different ink and different hand, it is mentioned, "ballot paper of the Hon"ble Mayor". Though these two sentences mentioning "unsigned ballot paper" and the "ballot paper of the Mayor" are scored off, we have seen the affidavits of the concerned officers. There is no explanation coming forward as to who wrote those writings and who scored them off. We have seen the affidavit filed by Shri Magare (at page 95 of the Paper Book). What he has averred in this connection is:---

"...because of the adjournment of the meeting, all the used ballot papers initiated (sic) by the Presiding Officer and which were in one tray were collected and put in one envelope by the scrutiny officer and the said envelope was thereafter sealed, the same was signed by me. The booklet containing the counterfoils of the used ballot papers numbering (60) and the remaining unused ballot papers numbering (15) were put in another envelope and this envelope also was sealed. It was also signed by me."

He has also mentioned that the container of these two envelopes is also signed by him. From this, it is clear that the unscored off statements were written by Shri Magare and the seal is put on these two envelopes and also the container. He has not mentioned whatsoever regarding the scoring off of the words appearing on Envelope No. I, though the words scored off have a bearing in the matter. If the words which are scored off were innocent or were unconcerned, then non mentioning in the affidavit regarding them was of no consequence. But the scored words are important and have a bearing. Those words, after scoring off also are readable. These words are written in different ink and probably by different hand. The words followed thereafter mention, "ballot paper of the "Hon"ble Mayor". This assumes importance, because if the vote of Respondent No. 1 was properly cast, during the polling hour, then there was no necessity to mention the vote of the Mayor separately. That indicates that after the polling hours were over, the vote is given by respondent No. 1. In any case, the matter which ought to have been explained by the officers, who were in charge of the

election, has not at all been explained and the officers, including respondent No. 1, have not mentioned anything regarding the writing and scoring off of these words. This is one of the circumstances, which has a bearing on the inference which is required to be drawn.

49. On all these three envelopes, container and envelopes Nos. I and II, the number of ballot papers used is mentioned as 60. Unless the votes are counted may be physically, the number of used votes cannot be mentioned on either the container or the envelopes. After opening envelopes No. I, what we noticed, and we brought to the notice of all the learned Counsel appearing in this case, is the manner in which the ballot papers were kept in the envelope. 1 to 30 ballot papers serially in favour of the petitioner were kept and 31 to 60 ballot papers serially were in favour of respondent No. 5. If the counting had not really taken place, then the order in which the ballot papers were noticeable would have been different. The manner in which they are kept serially, firstly in favour of the petitioner and, thereafter, the ballot papers which were in favour of respondent No. 5, indicates that the votes were, in fact, counted and kept in that order.

50. We have, therefore, no doubt in our mind that these circumstances indicates that not only the ballot box was opened, but the votes were in fact, counted.

51. It was argued on behalf of some of the respondents opposing the petition that the physical counting of the votes does not amount to the counting of votes after scrutiny. It must be borne in mind that such case is not made out in the affidavits of these respondents, nor other respondents opposing the petition have ever stated that the votes were physically counted. Their entire case is that the votes were never counted at all. The argument regarding scrutiny will also have to be negatived, because, even though the petitioner has stated in the petition that the votes were declared and the petitioner had polled 30 votes and respondent No. 5 had polled 29 votes, it is nowhere stated that was the result of mere physical counting and not of counting after scrutiny. This argument cannot be accepted, because if the votes would not have been scrutinised, then the votes would have been placed in the envelope in a scattered manner and not in orderly manner. For placing 30 votes of the petitioner one after the other, each vote must have been carefully seen as to in whose favour the said vote was cast and, thereafter that was maintained in that order. If the scrutiny of the ballot papers would not have taken place, then the votes would not have been placed in the manner in which we find they were placed in the envelope. So also when the counting takes place it must be presumed that the scrutiny of the votes is also done.

52. There is other evidence on record. Exhibits "B", "C" and "D" (pages 32, 33 and 34 of the paper Book), are the documents which come into existence immediately after the election. The receipt of these documents by respondent No. 1 is not at all disputed. In the letters at Exhibits "B" and "D", a request was made on behalf of the petitioner and some others that as a result of counting, the counting, the petitioner had polled 30 votes and respondent No. 5 had polled

29 votes; the attempt is being made in spite of the protest by respondent No. 1 to give casting vote after the counting is over. Not only that, it is further mentioned in their representation to the Mayor that as the votes are unequal, there is no question of casting vote being given. What remained is to declare the result, and the Mayor was requested to declare the result. The first such representation, Exhibit "B", is received by respondent No. 1 at 1.45 p.m., while the second representation, Exhibit "D", is received by him at 2.20 p.m., practically half an hour of the first representation.

53. The third document, which has a bearing on this aspect, is Exhibit "C", which is a letter written by one Shri Ghadamode, counting agent for the election of Mayor. This letter is addressed to the Mayor in connection with the objection raised by one of the councillors, Shri Gangadhar Gadhe, to the ballot paper of councillor Shri Sugrim Ridlon. The Mayor was requested by this letter to over rule the objection on the ground that the objection is taken after the counting is over. Such objection cannot be entertained to any ballot paper or to any vote. All these documents were received by the Mayor on the same day immediately after the poll was over and the counting of the ballot papers was made. If really the scrutiny and counting had not taken place, these applications would have been rejected by the Mayor on the ground that scrutiny and counting of the ballot papers is yet to take place. But, even after receipt of these applications, there is no such thing mentioned on these applications. The conduct of respondent No. 5 in accepting the representation and not mentioning anything on them indicates that the counting was already done.

54. The contention regarding the validity of the vote of respondent No. 1 will have to be considered in this background. The case of the petitioner is that after the counting of votes and finding that respondent No. 5 has polled one vote less than the petitioner at the point of time, respondent No. 1 has taken the ballot paper from the polling officer and inserted that ballot paper in the tray in which the ballot papers in favour of respondent No. 5 were kept. In the affidavit in reply, respondent No. 5 and other respondents opposing the petition have denied this allegation. There are affidavits by Shri Marathe, who was admittedly the polling officer on that date. The affidavit of Shri Marathe is filed on behalf of both, the petitioner as well as the opposing respondents. On earlier occasion, in the affidavit dated 29th May, 1989, he has stated that he was appointed as polling officer to act in the election on that date. That he was assigned the duty of issuing ballot papers for casting votes. The ballot papers were issued to all as and when their names were called out, in accordance with the order of ward wise list. There were in all 60 wards. Such ballot paper was issued to Dr. Shantaram Kale, the Mayor of Aurangabad City, and after issuing such ballot paper, he obtained Dr. Kale's signature on the counter-foil of the ballot paper. He has further deposed that the voting commenced at 12.10 in the afternoon and closed at 1.10 p.m. All the corporator voters had cast their votes during the said period. In his second affidavit, at page 192, dated 16th June, 1989, Shri Marathe has stated that the earlier affidavit was not sworn in with free will and voluntarily.

Therefore, he was giving the second affidavit. Regarding the vote cast by respondent No. 1, Mayor, what he has said in his second affidavit is :---

".....In the meeting dated 18th of May, 1989, names of the Corporators were called out ward wise. I say that name of Dr. Kale was also called out at Serial No. 48. I say that initially I gave the ballot paper to Dr. Kale who signed over the counter of the said ballot paper. I say that Dr. Kale without casting his vote returned the said ballot paper to me. I say that I had attached the said ballot paper returned by Dr. Kale to the counterfoil with a pin. I say that thereafter remaining Corporators had cast their votes. I say that during the voting period i.e. from 12.10 till 1.00 p.m. only 59 corporators had cast their votes. I say that Dr. Kale did not cast his vote during the voting time."

He has further said that after the voting period was over. Dr. Kale, the presiding officer, asked the concerned person to open the ballot box. That, thereafter, the ballot box was opened and all the ballot papers taken out of the box. After the scrutiny of ballot papers was over, Dr. Kale asked him to bring ballot paper. He gave the ballot paper to him. He gave the ballot paper to him. He has further deposed that he had given the ballot paper, which was attached with the help of pin to the counter-foil at Sr. No. 48, to Dr. Kale. He further said that Dr. Kale had marked the said ballot paper and inserted the paper in the already separated ballot papers which were laying in the tray.

55. The learned Counsel for the opposing respondents commented on the affidavit of Shri Marathe that he has no regard for truth and no importance shall be attached to the affidavit filed by Shri Marathe, as he has filed the first affidavit stating different thing. We have gone through the affidavits of Shri Marathe in detail. What he has stated in the first affidavit is that he was appointed as a polling officer and his duty was to distribute the ballot papers. Accordingly, he distributed the ballot papers in the order of ward wise councillors. There were in all 60 wards. Such ballot paper was issued to Dr. Shantaram Kale, the Mayor of Aurangabad City, and after issuing such ballot paper, he obtained Dr. Kale's signature on the counter-foil of the ballot paper. He clarifies in detail in the second affidavit. In the second affidavit, he has stated that the ballot papers were distributed by him. A ballot paper was handed over to Respondent No. 1, when the turn of issuing ballot paper to the person elected from Ward No. 48 had come. But, at that time, instead of casting his vote, Dr. Kale had given back the ballot paper to him. He took the ballot paper back and pinned it to the counter-foil from where the ballot paper was detached. The contradiction in the two affidavits is regarding the votes by the councillors. What Shri Marathe has said in the first affidavit is that voting commenced at 12.10 in the afternoon and closed at 1.10 p.m. All the corporator voters had cast their vote during the said period. There is no reference particularly to the voting by Dr. Kale who was not only the councillor, but also the Mayor at that time. We have seen the ballot papers and counter-foils. The counter-foil at Sr. No. 48 bears the name of Respondent No. 1 and also bears his signature. The inspection of the ballot paper and the counter-

foil even by naked eye indicate the in marks on both, the counter-foil as well as the ballot paper. The appearance of pin marks on the ballot paper or on the counter foil are not at all explained by respondent No. 1. As stated earlier, we have seen the ballot papers and the counter-foils of practically all the votes. We do not find pin marks either on the counter-foil or on the ballot paper of any other voter. In the absence of any explanation in that regard coming forward from respondent No. 1, the circumstances of appearance of pin marks both on the counter foil and on the ballot paper lend support to the affidavit dated 16th June, 1989 filed by Shri Marathe, who is also the polling officer. We do not feel that the affidavit of Shri Marathe should be thrown away merely because he has filed affidavit on earlier occasion also. We prefer to rely on second affidavit, because it tends to reflect true state of affairs in view of appearance of pin marks on both, the ballot paper and the counter-foil. And if respondent No. 1 had really cast the vote at that time, then the question of pin would not arise. But it arose because respondent No. 1 must have returned the ballot paper without voting. The ballot paper which was detached from counter-foil was required to be kept by the help of the pin at Sr. No. 48.

56. It was also argued that the second affidavit filed by Shri Marathe suffers as it intends to disclose the secrecy of ballot paper and it should not be considered on that count by this Court. There is no substance in this contention, as the secrecy of ballot paper is not all disclosed. At any rate, filing of an affidavit in the Court of law bringing certain facts to the notice of the Court, being polling officer, cannot amount to disclosure of secrecy of ballot paper.

57. In view of this, we are of the opinion that respondent No. 1 did not cast his vote during the polling hours. The vote of respondent No. 1 was not included in the ballot box, but the same was tried to be given or inserted after the scrutiny and counting was over and after finding that the petitioner had polled 30 votes, while respondent No. 5 had polled only 29 votes.

58. In Election Commission of India Vs. Shivaji and Others, , while considering a case under the Representation of the People Act, the Supreme Court has held that the term "election" in Article 329(b) of the Constitution connotes entire process culminating in a candidate being elected. High Court's jurisdiction under Article 226 to entertain petition challenging the election is taken away.

59. Several other authorities were cited before us during the course of the hearing to contend that this Court has no jurisdiction to interfere in such matters and also that the discretion vested in the Court should not be utilised in the present case. In K.K. Shrivastava and Others Vs. Bhupendra Kumar Jain and Others, , it is held that where there is an appropriate or equally efficacious remedy, the Court should keep its hands off and this is more particularly so where the dispute relates to an election. Still more so where there is a statutorily prescribed remedy which almost reads in mandatory terms. In D.L.F. Housing Construction (P) Ltd. Vs. Delhi Municipal Corpn. and Others, , it was held that in a case where basic facts are disputed and complicated questions of law and facts

depending on evidence are involved the writ Court is not the proper forum for seeking relief. In *Babhtmal Raichand Oswal v. Laxmibai R. Tarte* and another AIR 1976 S.C. 1297, the Supreme Court held that there is no scope for interference in the finding of facts. The decision in *Ganpat Ladha Vs. Sashikant Vishnu Shinde*, is also to the same effect that a finding of fact cannot be interfered with either under Article 226 or under Article 227 of the Constitution of India. There is no dispute with the proposition. But the circumstances in which this Court is required to interfere have been elaborately dealt with in earlier paragraphs. The fact is that the process of election was tried to be forestalled by a resolution and the progress of election was stopped in between and was not allowed to be concluded by declaration result. This Court is called upon to interfere to remove the clog on election process. The contention that this Court shall not interfere when the election is progressing is mis-placed in the present case. In fact, this Court is called upon to remove the blockade in the way of progress of the election, because after polling was over and votes were counted, instead of declaration of result of the election, the entire meeting proceedings were cancelled, in which meeting the proceedings of election had taken place, and to go for a repoll was resolved, which is not contemplated or provided for under the provisions of the relevant statute. The learned Advocate-General has fairly conceded that the resolution passed by the Corporation on that date cancelling the entire proceedings of the election is unjustified and was in excess of powers vested in them. The cancellation of the election proceedings operated as an obstacle in the election progress. The petition is filed by the petitioner to remove that obstacle in the way of the election process. If the election would have been concluded on that date and taken to logical end by declaration of result, the question of interference by this Court under Article 226 of the Constitution at this stage would not have been necessary. But, this Court is called upon to interfere and use the discretion vested in it to remove the obstacle which was created by passing a resolution, which was in excess of the powers vested in the Corporation. The authorities cited before us therefore have no relevance to the facts of the present case. We are, in fact, called upon to interfere to remove the obstacle in the way of the entire election process, which terminates only by the declaration of the result. Even though the petitioner is party to the resolution which cancelled the entire proceedings and resolved for a repoll, in the petition the petitioner has explained the circumstances in which he is party to the resolution. We need not go into the details, as all have agreed that the resolution cancelling the proceedings of election is bad in law. But the election was cancelled after voting and completion of counting and before declaration of result in this case by passing a resolution by the councillors. In view of this, in fact, in the present petition, we are called upon to interfere to complete the entire progress of the election which had taken place on that date. Interference to remove obstacle in the election is different thing than interference in the election process itself.

60. It was also argued by the learned Advocate-General and other learned

Counsel that there is an alternative remedy available u/s 16 of the said Act by way of an election petition. In the present case, the remedy was of no avail, as the process of election was cancelled before the declaration of result itself. The question to challenge the election thereafter does not arise, because the resolution itself provided for a repoll contrary to the provisions of the said Act. If the election is cancelled and the result is not allowed to be declared at the remedy by way of an election petition cannot be said to be adequate and efficacious.

61. In the result, this petition is allowed and rule is made absolute. The petitioner is declared elected as Mayor of respondent No. 2-Aurangabad Municipal Corporation. The declaration of the petitioner as Mayor shall be deemed to be from the month of May 1989 for the purposes of section 19 of the Bombay Provincial Municipal Corporations Act, 1949. No order as to costs.

62. At this stage, Shri S.A. Deshmukh, learned Advocate appearing for Respondent No. 5 and some other Respondents, orally applies for leave to appeal to the supreme Court. Leave is refused.

63. Shri S.A. Deshmukh also prays for staying the operation of this judgment and order for a period of two weeks. Prayer of stay is rejected.