
(1984) 07 MP CK 0007
In the Madhya Pradesh High Court
Case No : M.P. No. 232 of 1983

Shreekrishan Nathuram and another	Vs	APPELLANT
State of Madhya Pradesh and others		RESPONDENT

Date of Decision : 20-07-1984

Acts Referred:

Madhya Pradesh Municipalities Act, 1961 — Section 20

Citation : (1985) MPLJ 24

Hon'ble Judges : U.N. Bhachawat, J; K.M. Agarwal, J

Bench : Division Bench

Advocate : R.C. Lahoti, for the Appellant; R.A. Roman, Dy. Govt. Advocate for State, for the Respondent

Final Decision : Dismissed

Judgement

U.N. Bhachawat, J.

This is a petition under Article 226 of the Constitution of India, whereby the petitioners seek a writ of certiorari for quashing the selection of respondents Nos. 7 and 8, viz, Smt. Savitribai and Sumatchand, as councillors of Municipal Council, Mungawali.

The short facts leading to the present petition, essential for its decision, are these.

1. The Municipal Council, Mungawali, is to be constituted by 13 councillors (11 elected and 2 selected). If the elected councillors do not include at least one woman, the selected councillors have to include one woman. On an election of the councillors of the said Municipality having taken place, 11 persons, all males, were elected. A meeting of these elected councillors for the selection of the two councillors, one of whom had to be a woman, was held on 15-6-1983.

2. At this meeting, which was scheduled for the selection of the councillors, seven persons had filed their nominations. These seven persons included

respondents Nos. 5 to 8 also. On the scrutiny of the nomination papers, five nominations were found to be valid. Respondents Nos. 5 to 8 were amongst those five duly nominated candidates. One Chandra Mohan, a duly nominated candidate, later withdrew his candidature. Thus, only four candidates remained in the arena as contesting candidates and they were respondents Nos. 5 to 8.

3. The selection proceedings were conducted by respondent No. 3, the Sub-Divisional Officer, Mungawali. This process of selection for the two councillors from amongst the four duly nominated candidates was held in two phases. In the first phase, selection was to be made from amongst respondents Nos. 5 and 8, viz., Bihari and Sumatchand (male candidates) and in the second phase the selection was to be made from amongst respondents Nos. 6 and 7, viz., Smt. Ramkalibai and Smt. Savitribai. In these two phases the selection was made one after the other.

4. The selection was to be made by the elected councillors by means of a single transferable vote. The voters were the duly elected 11 councillors. In the first phase, from amongst the male candidates, respondent No. 8 Sumatchand came out successful, as he got six first preference votes out of eleven votes, and except in one ballot, there was no second preference. Accordingly, he was declared elected. In the second phase, amongst the woman candidates, respondent No. 7 Smt. Savitribai secured nine first preference votes and respondent No. 6 Smt. Ramkalibai got two first preference votes, and in the ballot papers there was no second preference. Accordingly, Smt. Savitribai, respondent No. 7, was declared elected. The details of these proceedings are contained in Annexure P-1 to the petition.

Being aggrieved by the aforesaid selection results, the present petition has been filed by these two petitioners, who are neither councillors nor were candidates at this selection. The only ground on which the selection has been challenged is that the holding of separate selection for the two councillors from amongst the male and woman candidates is in utter violation of Rule 51 of the Madhya Pradesh Municipalities (Preparation, Revision and Publication of Electoral Rolls, Election and Selection of Councillors) Rules, 1962 (for short, hereinafter referred to as "the Rules").

1. The petition is resisted by the contesting respondents, viz., respondents Nos. 1, 2, 3, 4, 7 and 8. respondents Nos. 5 and 6, the losing candidates, have not filed any return either denying or admitting the claim of the petitioners. The contesting respondents have, inter alia, contended in their return to the effect that (i) the petition under Article 226 of the Constitution is not maintainable, inasmuch as section 20 of the M.P. Municipalities Act, 1961 (hereinafter, for short, referred to as "the Act") is the sole repository of the manner for challenging the validity of an election or selection by an election petition, and (ii) the result of the selection goes to show that even if in a single phase the selection was held, the result would have been the same. In other words, the result of the selection by the alleged violation has not been materially affected.

After having heard elaborate arguments of the learned counsel for the parties, we are satisfied, for the reasons to follow, that the petition deserves to be dismissed.

1. It would be relevant to extract hereinbelow the provisions contained in sections 20 and 22 of the Act, so far relevant:

20. Election petitions.--(1) No election or selection under this Act shall be called into question except by a petition presented in accordance with the provisions of this section.

(2) Such petition may be presented on one or more of the grounds specified in section 22--

(a) by any candidate at such election or selection; or

(b) (i) in the case of an election of Councillor, by any voter of the ward concerned;

(ii) in the case of a selection of Councillor, by any Councillor;

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Grounds for declaring election or selection to be void. --

(1) Subject to the provisions of sub-section (2) if the Judge is of the opinion --

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(d) that the result of the election or selection, in so far as it concerns a returned candidate, has been materially affected--

(i) by the improper acceptance of any nomination; or

(ii) by the improper acceptance or refusal of any vote or reception of any vote which is void; or

(iii) by the non-compliance with the provision of this Act or of any rules or orders made thereunder save the rules framed u/s 29 in so far as they relate to preparation and revision of list of voters;

he shall declare the election or selection of the returned candidate to be void.

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On a plain reading of section 20 of the Act it is obtainable that the statute provides a remedy for challenging the election or selection under the Act. The right of election or selection is "not a common law right. It is a right granted under a statute and, therefore, the remedy provided by that statute to challenge the election or selection should be adopted. In this respect we hall quote with advantage a decision of the Supreme Court in M. Karunanidhi Vs. Dr. H.V. Hande and Others, , wherein their Lordships have, while approving the dictum of Willes J., in Wolverhampton New Water Works Company v. Hawkesford (1859) 6 C B (N

S) 336 at.336 observed:

It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of.

This principle has been further reiterated by their Lordships of the Supreme Court in *Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others*, .

2. It is true that by virtue of the provisions contained in section 20 of the Act, extracted hereinabove in para. 4.01 of this judgment, the remedy of an election petition is available in case of selection only to a candidate at the selection of the councillor, i.e., the voter. This has been the formidable argument of the learned counsel for the petitioners that since the remedy of an election petition is not available to the present petitioners, they are entitled to challenge the selection by way of a petition under Article 226 of the Constitution. It is true that the provision of section 20 of the Act does not take away the right of the petitioners of the remedy available under Article 226 of the Constitution. Section 20 cannot be read in derogation of the powers of this Court under Article 226, but at the same time, we cannot be oblivious of the well settled law that the exercise of jurisdiction of the High Court under Article 226 of the Constitution in granting writs is purely discretionary and seldom can an applicant ask for it as of right. Prerogative writs are not issued as a matter of course. There can be no standard of discretion which should guide the Court in exercising its powers under this provision of law as very much depends upon the facts and circumstances of each case. The area of discretion is so large that it is impossible to expect a set pattern of judicial uniformity, of course, the exercise of the discretion should not be arbitrary, as arbitrariness is the very negation of exercise of discretion. If any case law is needed on the point, reference may be made to the decision of the Supreme Court in *A.M. Allison Vs. B.L. Sen*, wherein their Lordships have said at p. 231:

Proceedings by way of certiorari are "not of course." (Vide Halsbury's "Laws of England" Hailsham Edition, Vol. 9, paras 1480 and 1481, pp. 877-878). The High Court of Assam had the power to refuse the writs if it was satisfied that there was no failure of justice, and in these appeals which are directed against the orders of the High Court in applications under Article 226, we could refuse to interfere unless we are satisfied that the justice of the case requires it.

3. The persons, who had a right to select, are the eleven councillors--the voters at the selection. They are the persons who can be said to be directly aggrieved. They had a right, if aggrieved, to challenge the selection in question. They have not done so. Though there is no bar, as already stated by us, on the present petitioners filing a petition under Article 226, there is no direct grievance of these persons. The only argument that was advanced by the learned counsel for the petitioners was that the grievance of the petitioners is that they being the

residents of the town concerned, have a right to see that the Municipal Council is properly constituted. The eleven Councillors are elected by direct election by the electorates who have a right to vote. The Councillors who are so elected under the rules, represent all the electors of the town and are the custodians of the interests of the voters. The selection of the Councillors is left to them and, therefore, they, in their capacity as the representatives of the voters of the town, exercise their right of selecting the councillors. Once by virtue of law, the interests of the electors having been entrusted to the elected representatives the councillors, it is too remote a cause that as electors, the petitioners have a right to raise a grievance regarding the selection of the councillors. During the course of the arguments, learned counsel for the petitioners has made a reference to decided cases, some of which may be referred hereinafter. In these decided cases, a view has been taken that a person, who has no right to file an election petition, is competent to file a petition under Article 226 of the Constitution, and the High Court, on finding an illegality, can interfere in it. As we have already stated hereinabove, there is no quarrel on this principle, but the question remains: is this a fit case wherein this Court should exercise its discretion of entertaining the petition under Article 226 and interfering in the result of the selection?

(1) *Raghuvans Prasad v. Mahendra Singh* 1967 M P L J 941 : 1968 J L J 125.

(2) *Govindrao v. State of M.P.* 1968 M P L J 634 : 1968 J L J 896.

On reading these authorities, it is obtainable that what this Court has laid down is only this that a person who has no remedy by way of an election petition, can file a petition under Article 226 of the Constitution and this Court may in its discretion interfere with the election or selection. It does not say anything beyond this. Here we may refer to two other decisions of this Court, (i) In *Thakurprasad v. V. S. Mehta* 1965 M P L J 480 this Court while dealing with a petition under Article 226 and Article 227 of the Constitution expressed the view at p. 484:

When a new right is created by a statute or special law and that statute or special law further provides for a machinery for redress, the party complaining that his rights under the statute or special law have been violated, must resort to the remedies provided by the statute or special law.

(ii) *Babulal Tiwari v. State of M.P.* 1965 M P L J Note 125. In a petition under Article 226 of the Constitution of India, which was filed by a person other than the one competent to file an election petition, it was held:

that no election petition having been filed against any of the councillors u/s 20 of the Municipalities Act and time for that having been expired, their election had become final. In *Jagan Nath Vs. Jaswant Singh and Others*, , while saying that the statutory requirements of election law must be strictly observed, it had been emphasized that the success of a candidate who had won at an election should not be lightly interfered with.

Learned counsel for the petitioners strenuously urged that in view of the patent illegality in the procedure for selection of the councillors by observing Rule 51 of the Rules in breach, this Court, in exercise of its extraordinary powers under Article 226, should set aside the selection. The learned counsel's submission has been that ipso facto the illegality, the selection stands vitiated and there is no need of going into the question of material effect. The learned counsel in support of his argument relied on a decision of the Delhi High Court in *Mevaram Arya v. Delhi Administration* A I R 1984 Del 123. The facts of this case, in our view, are quite distinguishable from the facts of the instant case. At the outset, we may say that in para. 55 of this decision, it has been clearly mentioned:

We may note that though in the reply, objection had been raised to the maintainability of the writ petition by relying on section 26 of the 1966 Act this point was specially given up and not pressed at the time of arguments by Dr. Chitley, who addressed us only on the merit of the petition.

This clearly indicates that the question of maintainability of the petition was not raised in that case. Another remarkable distinguishing feature in that case is that there was no controversy as to the actual result that may or may not follow. To quote --

Of course, the controversy before us is to the principle of method of voting and not to the actual result that may or may not follow.

Further, it is also to be noted that in this decision of the Delhi High Court, the controversy was as to the interpretation of the expression "elected by the members of the Council from amongst themselves," i.e., whether this expression necessarily denotes a system of proportional representation by means of a single transferable vote or of majority vote. The High Court interpreting this expression held that it means the system of single transferable vote and further held that the method adopted of majority vote through a motion was wrong. It further considered that the adoption of this method had a material effect on the result of the election. To quote--

The respondents do not accept that there is any legal infirmity in the method adopted namely majority vote through a motion. It is the validity of these respective contentions that has to be examined in the present proceedings. The insistence on choice of the method of voting by the respective parties is not because of any emotional attachment to the particular method being supported. It has a practical consequence. Thus if the principle of majority vote by which the election has been held is followed then the majority party in the Metropolitan Council as represented by the respondents 6 to 8 is in a position to elect all the three representatives to the Authority while if the alternative method of voting on the principle of proportional representation by means of single transferable vote is to be followed (then in the absence of any floor crossing) the result may be that the petitioner's party will be able to elect one of its own party member as representative to the authority out of three representatives that are to be

elected to the Authority.

This goes to show that the material effect on the result of the election was also taken into account. We may point out here that, in the instant case, the illegality alleged is not about the method of voting. The method adopted is a single transferable vote; the allegation of illegality, which we hold is correct, is about the holding of the selection separately for the male candidates and the woman candidates, whereas, in strict adherence to Rule 51 of the Rules, this should have been in one phase, i. e., the voting should have been once for all the four contesting candidates.

1. We have now to see whether this illegality has in any way materially affected the result of the selection. In our view, it has not. The number of votes obtained by the successful and unsuccessful candidates, detailed hereinabove in para. 2.04 of this judgment, goes to show that the voters had no preference for the defeated candidates over the successful candidates, i. e., respondents Nos. 7 and 8. Had the voters a preference for the losing candidates, nothing prohibited them to give first preference to the losing male candidate when the selection for the male candidates was held, and to the woman losing candidate, when the selection for the woman candidates was held. It may be noted that the selection in the two phases took place in quick succession. Thus, the result of the selection would not have been materially affected if the proper procedure would have been adopted.

2. We may here recall section 22(1) (d) of the Act which provides that a selection, on the ground of non-compliance with the provisions of the Act or the Rules, would be set aside only when it is proved that the result of selection in so far as it concerns a returned candidate has been materially affected. This, being the requirement for setting aside the selection of a returned candidate in an election petition, cannot be ignored, while considering and deciding a petition under Article 226. If this view is taken. it would be tantamount to reducing the provisions contained in section 22 as an otiose. We are, therefore, unable to accept the contention of the learned counsel for the petitioners, put forth with great strain, ability and ingenuity that ipso facto the illegality in the procedure, the selection should be declared to be vitiated.

We would like to pick up the thread which we have left at para. 4.03 of this judgment as to the question of maintainability of this petition, in the facts and circumstances of the case, at the instance of the petitioners. We would like to point out that this petition has been filed to circumvent the provisions of sections 20 and 22 of the Act. May it be the vital provision of material effect. This fact is borne out from an application filed on behalf of respondent No. 5 (I.A. No. 2803 of 1984), who was a candidate at the selection at the fag end of the case, when it was argued for two days, for being transposed as a petitioner. This application is not bona fide, and we are rejecting it, as we had already orally declared on the 11th July 1984, when it had come up for consideration. We may also point out here that an application (I.A. No. 2802/84) for the amendment of the petition

was filed, but during the course of the arguments, the learned counsel for the petitioners submitted-and in our view rightly, that what he wanted to urge has already been urged by him in his argument and, there-fore, in that view he did not press the application. Therefore, this application (I.A. No. 2802/84) is rejected as not pressed.

The upshot of the foregoing discussion is that it is not a fit case where we should exercise our discretion for allowing the petition despite the technical breach of Rule 51 of the Rules. We, accordingly, dismiss the petition. However, looking to the facts and circumstances of the case we make no order as to costs. The outstanding amount of security be refunded to the petitioners.