

(2013) 07 MP CK 0171

In the Madhya Pradesh High Court

Case No : Civil Revision No. 493 of 2011

Smt. Rekha Choudhary

APPELLANT

Vs

Smt. Suman Ahirwar and Others

RESPONDENT

Date of Decision : 03-07-2013

Acts Referred:

Madhya Pradesh Municipal Corporation Act, 1956 — Section 441D, 441D(2), 441F
Representation of the People Act, 1951 — Section 101

Citation : AIR 2013 MP 189 : (2013) ILR (MP) 2464 : (2013) 4 MPJR 82

Hon'ble Judges : N.K. Gupta, J

Bench : Single Bench

Advocate : P.D. Gupta in C.R. No. 493/2011 and Mr. Pranay Verma in C.R. No. 275/2012, for the Appellant; Sanjay K. Agrawal, Advocate for the Respondent No. 1, Shri Santosh Yadav, Panel Lawyer for the Respondent No. 7. in C.R. No. 493/2011 and Shri Sanjay K. Agrawal, Advocate for the respondent No. 1, Shri Santosh Yadav, Panel Lawyer for the Respondent No. 8. in C.R. No. 275/2012, for the Respondent

Judgement

N.K. Gupta, J.—Both civil revisions are connected with the common judgment passed by the learned District Judge, Sagar in Election Petition No. 25-A/2010, therefore the same are decided by the common order. By way of the present civil revisions, the applicants have challenged the judgment dated 9.12.2011 passed by the learned District Judge, Sagar in Election Petition No. 25-A/2010, whereby the election of one Kamla Kinnar was declared void and the respondent No. 1 Smt. Suman Ahirwar was declared to be elected for the post of "Mahapaur" (Mayor) to the Municipal Corporation, Sagar.

2. The brief facts of both the cases are that an election to the post of "Mahapaur" took place in the year 2009. After adopting the due procedure the results were declared on 15.12.2009. Six candidates had contested the election. Out of them one Kamla Kinnar was declared elected with 64683 votes, whereas the respondent No. 1 Smt. Suman Ahirwar bagged 21250 votes, whereas Smt. Rekha Choudhary applicant in the Civil Revision No. 493/2011 received 11799

votes. Each of the remaining candidates could not get the votes more than two thousand in the election. The respondent No. 1 of Civil Revision No. 493/2011 had moved an election petition on the basis that the seat for "Mahapaur" of the Municipal Corporation, Sagar was reserved for a woman candidate of Scheduled Caste and the candidate who was declared elected was neither a woman nor a person belonging to Scheduled Caste. After recording the evidence, the learned District Judge, Sagar found that the elected candidate was not competent to contest the election, and therefore its election was declared void. Simultaneously it was declared that runner up candidate i.e. Smt. Suman Ahirwar was declared to be elected as "Mahapaur" of the Municipal Corporation, Sagar.

3. I have heard the learned counsel for the parties at length.

4. The learned counsel for the applicant in Civil Revision No. 493/2011 has submitted that the elected candidate had received 64683 votes, whereas the respondent No. 1 Smt. Suman Ahirwar received only 21250 votes, and therefore if the candidate Kamla Kinnar would not have fought the election, it cannot be said that its votes could be received by Smt. Suman Ahirwar. Under such circumstances, it cannot be said that the respondent No. 1 Smt. Suman Ahirwar had received majority of votes, and therefore she could not be declared elected. In this connection, the learned counsel for the applicant has placed his reliance upon the judgment of Hon"ble the Apex Court in the case of Prakash Khandre Vs. Dr. Vijaya Kumar Khandre and Others, and in the case of Manohar Nathurao Samarth Vs. Marotrao and Others, to show that the respondent No. 1 could not be declared elected only because she was in a runner up position.

5. The learned counsel for the applicant in Civil Revision No. 275/2012 has submitted that according to the provisions of Section 441-F of the Madhya Pradesh Municipal Corporation Act, 1956 (hereinafter referred to as "Act, 1956"), any person aggrieved by the decision passed by the District Court in election petition could file a revision within 30 days from such decision, and therefore though the applicant was not the contesting person in that election, she was entitled to file a civil revision. The learned counsel for the applicant in Civil Revision No. 275/2012 has similarity in submission made in the Civil Revision No. 493/2011.

6. On the other hand, the learned counsel for the respondent No. 1 has submitted that the contention of the learned counsel for the applicants was dependent upon the provisions of the Representation of the Peoples Act, 1951 (hereinafter referred to as "RP Act"), whereas the provisions relating to election are different in the RP Act and the Act of 1956, and therefore the law laid down by Hon"ble the Apex Court in the matter of RP Act is not applicable in the present case and the District Judge has rightly held that the respondent No. 1 was elected.

7. After considering the submissions made by the learned counsel for the parties (it be noted here that the Civil Revision No. 482/2011 filed by the alleged

returned candidate Kamla Kinnar, was dismissed being withdrawn on 24.8.2012 and the proposition relating to declaring the election of Kamla Kinnar to be void is not required to be discussed here), and it appears that only one short question is involved in the present revisions that whether the respondent No. 1 could be declared elected or not. In this context, the provisions of Section 101 of the RP Act may be perused, which are as under:-

101. Grounds for which a candidate other than the returned candidate may be declared to have been elected.-- If any person who has lodged a petition has, in addition to calling in question the election of the returned candidate, claimed a declaration that he himself or any other candidate has been duly elected and 2[the High Court] is of opinion-

(a) that in fact the petitioner or such other candidate received a majority of the valid votes; or

(b) that but for the votes obtained by the returned candidate by corrupt [***] practices the petitioners or such other candidate would have obtained a majority of the valid votes,

[the High Court] shall after declaring the election of the returned candidate to be void declare the petitioner or such other candidate, as the case may be, to have been duly elected.

8. Similarly, the provisions of the Act, 1956 relating to declaration of a candidate other than returned candidate to be elected as mentioned in Section 441-D(2) of the Act, 1956, may be perused, which are as under:

441--D. Decision of Election petition.-- At the conclusion of the trial of an election petition, the Court shall make an order-

....

(2) If any person who has filed an election petition has, in addition to calling in question the election or [nomination] of the returned candidate, claimed declaration, that he himself or any other candidate has been duly elected or [nominated] and the Court is of opinion-

(a) that in fact the petitioner or such other candidate received a majority of the valid votes; or

(b) that but for the votes obtained by the returned candidate the petitioner or such other candidate would have obtained a majority of the valid votes;

the Court shall, after declaring the election or [nomination] of the returned candidate to be void, declare the petitioner or such other candidate, as the case may be, to have been duly elected or [nominated].

By the language of the aforesaid provisions, it is apparent that any declaration regarding the election of returned candidate to be void does not include the declaration of the next candidate as elected candidate. It is nowhere mentioned

in both the Acts that the runner up candidate shall be declared elected. On the contrary, it is provided that it is to be established by the person who claims to be elected that he would have received majority of such valid votes those were received by the returned candidate if the returned candidate would not have fought the election.

9. The learned counsel for the respondent No. 1 has submitted that under the provisions of Section 101 of the RP Act the votes received by the returned candidate through a corrupt practices shall be excluded, whereas there is no such provision u/s 441-D of the Act, 1956. In the present case, the election of the returned candidate was not declared to be void on the basis of incompetency of the candidate. There is no information from the Election Authority that some of the votes obtained by the returned candidate were obtained by any corrupt practices. When there was no evidence that the returned candidate obtained the votes on the basis of corrupt practices, then the remaining provisions of Section 101 of the RP Act is similar to the Section 441-D of the Act, 1956. It is pertinent to note that the returned candidate in the election received 64683 votes whereas first runner up candidate received 21250 votes and second runner up candidate received 11799 votes. If the votes of first runner up candidate and second runner up candidate are added, then still the returned candidate received more votes than their consolidated votes. If the returned candidate would not have fought the election, then no criteria could be shown by the respondent No. 1 that how many votes she would have received in absence of the returned candidate. In the election there is no method to ascertain that in the absence of the returned candidate Kamla Kinnar, the respondent No. 1 or the applicant of Civil Revision No. 493/2011 would have received the votes which were at present received by the returned candidate. Looking to the difference of votes, it cannot be said that the respondent No. 1 got the majority of votes that she could be declared elected when the election of returned candidate was declared void.

10. In this context, the judgment of Hon'ble the Apex Court in the case of Prakash Khandre (*supra*) may be perused, particularly the para 14, which is as under:

However, in an election where elected candidate is declared to be disqualified to contest election and there are more than two candidates contesting election, there is no specific provision under the Act under which the person who has secured the next highest number of votes could be declared as elected. The Act is silent on this point. Further, it cannot be presumed that the votes secured by the disqualified elected candidates would have been wasted or would have been secured by the next candidate who has secured more votes. If disqualified candidate was not permitted to contest the election then how the voters would have voted in favour of the candidate who has secured more votes than other remaining candidates would be a question in the realm of speculation and unpredictability. In such a situation, declaring the election of the returned candidate on the ground of his initial disqualification to contest the election by

itself would not entitle the election petitioner or any other candidate to be declared elected.

Similarly, in para 21 of the aforesaid judgment Hon''ble the Apex Court has held as under:

The Court also considered the dictum in the case of Viswanath (supra) and observed that the ratio decidendi of said case is applicable only where (a) there are two contesting candidates and one of them is disqualified; and (b) the election is on the basis of single non-transferable vote.

11. On the basis of the law laid down by Hon''ble the Apex Court in the case of Prakash Khandre (supra), it is apparent that if there is no law laid in any enactment relating to election proceeding that when the election of the returned candidate is declared void, then the runner up candidate be declared elected then unless it is established that he could get majority of the votes in absence of the returned candidate that candidate cannot be declared elected. If only two candidates were contesting the election, then if the election of the returned candidate is declared void, then it can be presumed that in the absence of that returned candidate, the runner up candidate would have received entire votes which were received by the returned candidate, and therefore in such a case runner up candidate can be declared elected.

12. In the present case, six candidates fought the election and there is no method to assess that if the returned candidate Kamla Kinnar would not have participated in the election, then how many votes would have been received by the remaining candidates. Under such circumstances, looking to the law laid down by Hon''ble the Apex Court in the case of Prakash Khandre (supra), it cannot be said that the respondent No. 1 would have received the majority of the votes in absence of the returned candidate Kamla Kinnar, and therefore according to the provisions of Section 441-D of the Act, 1956 the respondent No. 1 could not be declared as elected candidate. The learned District Judge, Sagar did not discuss on the point before considering the matter relating to the declaration of respondent No. 1 to be elected as "Mahapaur" of the Municipal Corporation, Sagar. Under such circumstances, both the civil revisions filed by the applicants can be accepted. The respondent No. 1 cannot be declared elected when the election of the returned candidate Kamla Kinnar has been declared void.

13. On the basis of the aforesaid discussion, the civil revisions filed by the applicants are allowed. The portion of the impugned judgment dated 9.12.2011 passed by the learned District Judge, Sagar, by which the respondent No. 1 Smt. Suman Ahirwar was declared to be elected to the post of "Mahapaur" is hereby set aside. It is directed that since the election of the returned candidate Kamla Kinnar was already declared void, and no other candidate can be declared elected, then it is for the Returning Officer to arrange for fresh election. There is no order as to costs. A copy of this order be sent to the trial Court along with its record for information.