
(1995) 09 MP CK 0033
In the Madhya Pradesh High Court
Case No : L.P.A. No. 85 of 1995

Virendra Mahajan

APPELLANT

Vs

State of Madhya Pradesh and Others

RESPONDENT

Date of Decision : 22-09-1995

Acts Referred:

Constitution of India, 1950 — Article 226, 243ZG

Madhya Pradesh Municipalities Act, 1961 — Section 20, 21(2), 22, 43, 45

Citation : (1996) J LJ 85 : (1996) 41 MPLJ 267 : (1996) MPLJ 267

Hon'ble Judges : U.L. Bhat, C.J.; R.S. Garg, J

Bench : Division Bench

Advocate : N.C. Jain, for the Appellant; V.K. Tankha, for the Respondent

Final Decision : Allowed

Judgement

U.L. Bhat, C.J.

This appeal is directed against the order of the learned Single Judge allowing Writ Petition No. 7 of 1995, setting aside the election of the 4th respondent in the Writ Petition (appellant herein) as President of Gadarwara Municipality and declaring the writ petitioner (4th respondent herein) as President in his place.

General elections to Municipalities in the State under the provisions of the M. P. Municipalities Act, 1961, (for short the Act), as amended by Act No. 17 of 1994, were held in December 1994. The consequential elections to the posts of President and Vice-President of Municipalities were also held in the same month. Such election was held with reference to Gadarwara on 29-12-1994, at a meeting of the newly elected Councillors, presided over by the District Collector. The appellant and the 4th respondent contested for the post of President. Twenty-one Councillors were present and cast their vote. Eleven voted for the 4th respondent and ten for the appellant. The Collector declared one vote polled in favour of the 4th respondent herein as invalid on the ground that the particular voter had affixed a circle around the cross-mark required to be put on the ballot

paper and thereby it is possible to identify the voter. Thus, both the candidates were found to have received ten valid votes each. Adopting the system of lots as required by law, the appellant was declared elected.

The unsuccessful candidate, namely the writ petitioner (4th respondent herein) challenged the election by way of writ petition contending that the vote rejected as invalid was really not invalid as it could not be said that there was any mark in the ballot paper to identify the particular voter and the Returning Officer, namely, the Collector had ignored principles of law applicable regarding the invalidity of the votes. The writ petition was opposed by the President (appellant herein) who contended, inter alia, that jurisdiction of courts in the matter of Municipal elections except by way of election petition under the law has been taken away under Article 243ZG of the Constitution. Thus, the election can be challenged only by way of election petition as contemplated in Section 20 of the Act and, therefore, the writ petition was not maintainable. He further contended that reasonable possibility of identification of voter would be sufficient and the facts of the case reveal a plan of strategy to satisfy the writ petitioner that the particular Councillor had voted for him and the identity of the particular Councillor was known to everyone including the parties and the rejection of the vote was justified. The writ petitioner in reply contended that election petition would lie only to challenge election of the Councillors and not that of President and Vice-President and, therefore, the writ petition was maintainable.

The learned Single Judge posed the question whether the writ petition was liable to be dismissed on the ground of existence of alternative remedy but did not answer the question. On the merits, learned Single Judge held that the appellant should plead and prove existence of previous arrangement as per which a particular Councillor put the mark so as to identify himself and there is no pleading or evidence in the behalf and there is nothing in the mark itself to indicate his identity, that the Returning Officer did not consider the matter in its correct perspective and was not justified in rejecting the vote. Thus, it was found that the writ petitioner had secured eleven valid votes and against it, ten valid votes were secured by the appellant (4th respondent). Accordingly, the order of declaration of the result made by the Collector was set aside and the petitioner was declared elected President.

The following questions arise for consideration in the appeal :-

- (i) Is the writ petition barred under Article 243ZG of the Constitution of India?
- (ii) Is the writ petition barred u/s 20 of the Act?
- (iii) Is there an efficacious alternative remedy available to the petitioner?
- (iv) Was the rejection of one vote cast in favour of the writ petitioner illegal?
- (v) Was learned Single Judge justified in setting aside the declaration of result made by the Collector and declaring the writ petitioner elected ?

Point No. (i) :

Chapter IX-A comprising Articles 243P to 243ZG was incorporated in the Constitution of India by the Constitution (Seventy-fourth) Amendment Act, 1992. Articles 243G to 243Z deal with constitution and composition of Municipalities, Ward Committees, reservation of seats, duration of municipalities, disqualifications for membership and other matters. Article 243ZA relates to elections to the municipalities. Article 243ZF deals with continuance of existing laws and municipalities. Article 243ZG relates to bar of interference by Courts in electoral matters.

Article 243ZG of the Constitution of India reads thus :

"243-ZG. Bar to interference by Courts in electoral matters. -

Notwithstanding anything in this Constitution. -

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 243ZA shall not be called in question in any Court;

(b) no election to any Municipality shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State."

Article 243ZA of the Constitution of India reads thus :

"243-ZA. Elections to the Municipalities. - (1) The superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Municipalities shall be vested in the State Election Commission referred to in Article 243K.

(2) Subject to the provisions of this Constitution, the Legislature of a State may, by law, make Provision with respect to all matters relating to, or in connection with, elections to the Municipalities."

According to clause (b) of Article 243ZG of the Constitution, notwithstanding anything in the Constitution, no election to any municipality shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State. It is necessary to understand the meaning and scope of the expression of the words "election to any municipality" since the bar relates to calling in question only election "to any municipality". The words "election to any municipality" are found in Article 243ZG(b) and Article 243ZA. According to clause (1) of Article 243ZA of the Constitution, the superintendence, direction and control of the preparation of electoral rolls, for, and the conduct of, all elections to the Municipalities shall be vested in the State Election Commission referred to in Article 243K. According to clause (2) of Article 243ZA, subject to the provisions of the Constitution, the Legislature of a State may, by law, make provisions with respect to all matters relating to, or in connection with, elections

to the Municipalities. Article 243K which occurs in Chapter-IX dealing with elections of the Panchayats states that superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Panchayats shall be vested in a State Election Commission consisting of a State Election Commissioner to be appointed by the Governor. The only article which refers to the offices of Chairpersons in the Municipalities is Article 243T(4), which contemplates reservations to Scheduled Castes, Scheduled Tribes and women in such manner as the Legislature of the State may, by law, provide. Clause(4) of Article 243T refers separately to provision for reservation of seats in any municipality and provision for reservation of offices of Chairpersons of Municipalities. It must necessarily follow that election to seats in a Municipality and election of officers of Chairpersons in a Municipality should also be dealt with separately. "Election to a Municipality" can only take in and refer to elections to seats i.e. elections of Councillors to a Municipality. Election of office-bearers of a Municipality cannot be regarded as election to Municipality. There is no question of preparation of electoral roll for the office of President and Vice-President and the State Election Commission has nothing to do with the election to the office of the President and the Vice-President. There is no provision in the Act also vesting any power of superintendence or control with the State Election Commission over the elections to the offices of the President and the Vice-President. In these circumstances, the words "election to the Municipalities" in Article 243ZA and Article 243ZG can refer only to election of Councillors to Municipalities and cannot comprehend elections to offices of the Municipalities. Thus, bar under clause (b) of Article 243ZG can relate only to calling in question election of Councillor of a Municipality and not indirect election of President or Vice-President of a Municipality.

Point Nos. (ii) and (iii) :

It is necessary to examine the provisions of the Act as they stood before 1994 Amendment and the provisions as amended. Under the unamended provisions election and selection of Councillors was contemplated while the amended provisions contemplate election of Councillors and nomination of Councillors. Additionally, members of the House of the People and the members of the Legislative Assembly of the State representing constituencies which comprise wholly or partly the Municipal area, members of the Council of States registered as electors within the municipal area are also regarded as members of Municipal Council, though these categories of Councillors shall have no right to vote in the meeting of the Council in accordance with the provisions of Chapter IX-A. Various provisions have been incorporated in the Act regarding the State Election Commission, reservation of seats etc.

Under the unamended provisions of Section 36 of the Act, every Council shall continue for four years from the date appointed under sub-section (2) of Section 55 for its first meeting while under the amended provisions, duration shall be five years. Section 45 of the Act as it originally stood required that every election or

selection of a Councillor and every election or appointment of the President or Vice-President shall be notified in the Gazette by the prescribed authority and declared that such persons shall enter upon their respective offices from the date of such notification, provided that even in the absence of notification, for the purpose of selection of Councillors u/s 19 of the Act and election of President and Vice-President u/s 43 of the Act, a Councillor shall be deemed to have entered in his office from the date of his election. In other words, while ordinarily, a gazette notification was necessary in the case of election of Councillor, the Legislature took care to ensure that delay in publication of Gazette notification did not delay election of President and/or Vice-President. The provision was amended in 1988 deleting the deeming part of the provision. Under the unamended Act, Section 55 required the Chief Municipal Officer to convene a meeting of elected Councillors within one month of general election for the purpose of election of President, Vice-President etc. It was in view of this provision that the deeming part of the provision in Section 45 was found redundant. Section 55 as it stands now has not brought about any change. The first meeting shall be convened within one month of every general election. Absence of Gazette notification of the election of Councillors has no impact. Section 43 relating to election and term of President and Vice-President has undergone some changes. Under sub-section (2) of Section 43 of the Act as it existed before 1994, the President and the Vice-President elected at the first meeting shall hold office for a period of two years from the date they enter their respective offices. This has to be read in the light of provision in Section 45 as it existed before 1994 requiring every such election to be notified in Gazette. Section 43 was amended to state that a President and Vice-President elected shall hold office for a period of two and half years from the date on which he is elected to his office. In other words, they hold office from the moment they are declared elected without waiting for any gazette notification. This change has been reflected by making appropriate change in Section 45. Sub-section (5) of the amended Section 43 requires every election of President and Vice-President to be notified in the official gazette. Section 45 as amended states that every election of the Councillors from wards shall be notified by the State Election Commission in the official gazette. This means that two changes have been brought about by Act No. 17 of 1994. The original provision did not indicate who is to notify the election of Councillor or President or Vice-President in the official gazette.

Under the new provision, while election of President and Vice-President shall be notified by the State Government, election of the Councillors shall be notified by the State Election Commission, thereby indicating that the State Election Commission has no responsibility in the matter of election of President and Vice-President. Second change is that the requirement of gazette notification of election of President and Vice-President has been shifted from Section 45 to Section 43 of the Act. But as we have indicated above, absence of gazette notification has no legal consequence in regard to holding of office since the elected President and Vice-President are to hold office for a period of two and

half years from the date of election without waiting for any gazette notification. In the light of these statutory changes, we shall now examine Original and amended provisions of Sections 20 and 21 of the Act. Section 20 relates to election petitions. Section 21 of the Act deals with the relief that may be claimed by petitioner. Section 22 prescribes the grounds for declaring election or nomination to be void. Section 24 of the Act deals with the decision on election petition.

Sub-section (1) of Section 20, as it stood before amendment, stated that no election or selection under the Act shall be called in question except by a petition presented in accordance with the provisions of this section. The word "Selection" has been substituted by "nomination" by the Amendment Act. Sub-section (2) of Section 20 indicates who can present and file an election petition. A candidate at the election or selection may file an election petition. In the case of election of Councillor, any voter of the ward concerned may file an election petition. In the case of "selection" or "nomination" of Councillor, any Councillor can file an election petition. Clause (i) of sub-section (3) of Section 20 of the Act states that no petition presented under sub-section (2) shall be admitted unless it is presented within thirty days from the date on which the result of such election or selection was notified in the gazette notification. Thus, the gazette notification prescribes the outer period of limitation for presenting an election petition. Clause (a) of sub-section (2) of Section 20 is very wide in its amplitude. Sub-section (1) relates to election under the Act which must take in not only election of Councillors but also elections of President and Vice-President. Any candidate at any election under the Act can present an election petition under clause (a) of sub-section (2) of Section 20 of the Act. There is no change made in this regard by the Amendment Act of 1994. Thus, going by the provisions of Section 20, an election petition would lie and election petition could be presented by a candidate challenging election of President and Vice-President in such election. This was certainly the position under the Act as it stood before amendment.

This view is supported by decisions of this Court. In *Ramabai Diwakarrao Deoras and Anr. v. S. D. O. Balaghat and Ors.* 1966 MPLJ 72, a writ petition was filed challenging the election of President and Vice-President of a Municipality by voters and not by unsuccessful candidate. The Court held that since election petition could be filed only by a candidate to the election, the petitioner who is not a candidate has no right of filing election petition and the writ petition would lie. In *Raghuvans Prasad v. Mahendra Singh and Ors.* 1967 MPLJ 941 a Councillor of a Municipality challenged elections of President and Vice-President by way of writ petition. Since the Councillor was not a candidate for the office of President and Vice-President, it was held that he could not file an election petition and therefore, writ petition would lie. To the same effect is the decision in *Govind Rao Anandrao Joshi and Anr. v. State of M. P. and Ors.* 1968 MPLJ 634. We are thus fortified in our view that a candidate at an election to the office of President and Vice-President can file election petition against a successful candidate. Section 22 which deals with grounds for declaring election to be void refers to the ground of

improper acceptance or refusal of any vote or reception of any vote which is void. The ground which the writ petitioner sought to urge would fall within the scope of sub-clause (ii) clause (d) of sub-section (1) of Section 22 of the Act and he could raise this ground in the election petition.

The only question is whether the changes brought about in Section 21 of the Act have any negative impact on the right of the candidate to file election petition against the President or the Vice-President. Section 21 deals with the relief that may be claimed by the petitioner. Section 21 reads as follows :

"21. Relief that may be claimed by petitioner - (1) A petitioner may claim -

(a) a declaration that the election or nomination of all or any of the returned candidates is void; and

(b) in addition thereto a further declaration that he himself or any other candidate has been duly elected.

(2) The expression "returned candidate" means a candidate whose name is notified in the Gazette u/s 45."

Sub-section (i) of Section 21 relates to relief which can be claimed in the election petition. Declaration that election of all or any of the returned candidates is void and further declaration that the petitioner or any other candidate has been duly elected may be claimed by the election petitioner. Sub-section (2) of Section 21 of the Act purports to define the expression "returned candidate." No change has been brought about in sub-section (2) of Section 21 of the Amendment Act, 1994. The expression "returned candidate" is defined as meaning a candidate whose name is notified in the Gazette u/s 45. Section 45 as it stood before 1994 Amendment required that every election or selection of a Councillor and every election or appointment of President and Vice-President shall be notified in the Gazette by the prescribed authority. By the 1994 Amendment, the provisions of Sections 43 and 45 were amended. By the Amendment Act of 1994, the requirement of Gazette notification in the case of President and Vice-President is incorporated in sub-section (5) of Section 43 of the Act and Section 45 of the Act is confined only to the election of Councillor. It is contended by learned counsel for the writ petitioner (4th respondent) that since the expression "returned candidate" in Section 21(2) means a candidate whose name is notified in the Gazette u/s 45 but not u/s 43, the expression "returned candidate" does not include "returned President" or "Vice-President." Thus, it is said that by way of election petition, declaration of election only of a councillor as void can be sought and declaration of election of President and Vice-President as void cannot be sought. This contention is highly legalistic and does not take into consideration the changes brought about in the legislative scheme by the Amendment Act, 1994. It is true that the Legislature which shifted from Section 45 to Section 43 the requirement of Gazette notification in the case of election of President and Vice-President should have amended sub-section (2) of Section 21 so as to contain a reference to "gazette notification" u/s 43 of the Act also. By mere

omission to bring about this consequential change in Section 21(2), it cannot be said that the Legislature intended to take away the pre-existing right of a candidate to file an election petition against the President and Vice-President. This is clearly a case of casus omissus.

It is instructive to read the separate judgment delivered by Sarkar, J. in *M. Pentiah and Others Vs. Muddala Veeramallappa and Others*, . Learned Judge observed that the provisions in Section 1.6(1) of the Hyderabad District Municipalities Act should be read with the addition of certain words so as to carry out the intention of the Legislature and without doing violence to the language used, as without doing so, that may lead to absurd consequence. The Supreme Court in *Hameedia Hardware Stores, represented by its partner S. Peer Mohammed Vs. B. Mohan Lal Sowcar*, . considered the provisions in Section 10(3) (a) of the T. N. Buildings (Lease and Rent Control) Act 1960. The provision consisted of three clauses. Clause (i) dealt with residential building and contemplated requirement of landlord to put him in possession of a residential building, if the landlord required it for his own occupation or for the occupation of any member of his family and if he or any member of his family is not occupying a residential building of his own in the city. Clause (ii) related to non-residential building for the purpose of keeping a vehicle if the landlord requiring it for his own use or for the use of any member of his family. Clause (iii) related to any other non-residential building, where a landlord or any member of his family is not occupying for purposes of a business which he or any member of his family is carrying on, a non-residential building in the city. Question was whether the landlord should prove under clause (iii) that he required it for his own use or for use of any member of his family, which words are found in clauses (i) and (ii) but not (iii). The Court observed :-

"The State Legislature cannot be attributed with the intention that it required a more stringent proof by insisting upon proof of bona fides of his requirement or need also where a landlord is seeking eviction of a tenant from a garage then in the case of a non-residential building which is occupied by large commercial house for carrying on business. The learned counsel for the respondent was not able to explain as to why the State Legislature gave greater protection to tenants occupying premises used for keeping vehicles or adapted for such use than to tenants occupying other types of non-residential buildings. It is no doubt true that the Court while construing a provision should not easily read into it words which have not been expressly enacted but having regard to the context in which a provision appears and the object of the statute in which the said provision is enacted the Court should construe it in a harmonious way to make it meaningful."

As we have indicated, before the Amendment Act 1994, the law was definitely that a candidate could file election petition against the election of President or Vice-President. The Legislature has not indicated any intention to take away such a right. To say that the Legislature intended to do so does not stand to reason or logic. The Legislature cannot be said to have intended to take away that right by

redesigning Section 43 and Section 45 and retaining the language of Section 21(2) of the Act. It appears to us that sub-section (2) of Section 21 of the Act was really unnecessary since the expression "returned candidate" really does not require a definition. The definition must have been originally conceived by way of abundant caution. Therefore, the Court has to understand the language used in sub-section (2) of Section 21 so as to bring about the legislative intention without doing any violence to the language. Section 21(2) of the Act must be understood by us in a pragmatic way as indicating that the expression "returned candidate" means a candidate whose name is notified in the Gazette or meaning a candidate whose name is notified in the Gazette u/s 43 or Section 45. That is the only reasonable manner in which the Court can understand the provision.

The learned Single Judge who posed the question of existence of alternative remedy did not consider it and did not answer it. For the reasons indicated above, we hold that a candidate at election to the office of the President or the Vice-President, as the case may be, has a right to file an election petition against "returned candidate" on any of the grounds referred to in Section 22 of the Act. The ground urged by the writ petitioner in this case is available u/s 22 of the Act. He, thus, had an efficacious alternative remedy and there are no circumstances warranting the entertainment of a petition under Article 226 of the Constitution and granting relief to him in the circumstances of the case. This is particularly so since the ground urged by him is that the mark put on a ballot paper by a Councillor is one by which the vote by the Councillor can be identified, as contemplated in Rule 11 of the M P. Municipalities (President and Vice-President) Election Rules, 1962 and this ground may require some factual or evidential foundation for its acceptance. We are therefore satisfied that the learned Single Judge was wholly in error in entertaining and allowing the writ petition since an efficacious and alternative remedy was available to the writ petitioner. In this view, we do not propose to consider the merits of the case.

In the result, the impugned order is set aside and the writ petition is dismissed. Appeal is accordingly allowed. We direct the parties to bear the costs throughout.