
(1983) 06 GUJ CK 0004
In the Gujarat High Court

Vishnuprasad Dabyabhai Brahmbhatt	APPELLANT
Vs	
State and Others	RESPONDENT

Date of Decision : 21-06-1983

Acts Referred:

Constitution of India, 1950 — Article 226
Evidence Act, 1872 — Section 114
Gujarat Panchayats Act, 1961 — Section 23, 24, 26, 53, 53(1)

Citation : (1983) 2 GLR 1548

Hon'ble Judges : S.B. Majmudar, J

Bench : Single Bench

Judgement

S.B. Majmudar, J.—In this petition under Article 226 of the Constitution, the petitioner who is the Ex-Sarpanch of Matar Gram Panchayat constituted under the provisions of the Gujarat Panchayats Act, 1961 (hereinafter referred to as "the Act") has sought intervention of this Court for issuance of a writ of quo warranto or any other suitable writ, order or direction under Article 226 of the Constitution of India against respondent No. 7 herein who is the present sitting Sarpanch of the said Gram Panchayat. The petitioner contends that respondent No. 7 is not entitled to hold the office of the Sarpanch of the said Gram panchayat and that he has a legal and better claim over the same and consequently, respondent No. 7 should be treated to be the usurper of the said office. Other respondents who are State of Gujarat and other statutory functionaries under the Act have been joined in the petition on the allegation that they have not done justice to the petitioner and have not seen to it that respondent No. 7 usurper of the post of Sarpanch is properly ousted from his office.

2. In order to appreciate the grievance of the petitioner, it is necessary to glance through a few relevant facts. This petition has a chequered history and consequently, relevant facts will have to be traced from events spread over past number of years.

3. The petitioner was lawfully elected to the office of Sarpanch of the Matar Gram panchayat. He was directly elected as Sarpanch on 14-7-1978. As per Section 17(1) of the Act the term of the panchayat as constituted at its first meeting shall, save as otherwise provided in the Act, be five years from the date of the first meeting of the reconstituted panchayat. According to the petitioner, the first meeting of the reconstituted panchayat was held somewhere in the middle of July 1978 and consequently according to him, the petitioner as duly elected Sarpanch was entitled to function as surpanch till the month of July 1983. The petitioner's case is that during the time he was holding the post of Sarpanch, he was served with a show cause notice on 22-5-1980 issued by respondent No. 4-District Development officer, Kheda. By the said notice, the petitioner was called upon to show cause why he should not be removed from the membership of the Gram Panchayat Matar, u/s 49 of the Act on the basis of two-fold allegations contained in the said notice. These allegations were (i) that the petitioner did not hold auction of a stray cow in accordance with law as mentioned in the notice and (ii) that the petitioner did not prevent the panchayat member Jashbhai Bhikhabhai Patel from bidding at the auction of the said stray cow. The petitioner submitted his written reply to the show cause notice on 9/12-6-1980. Thereafter, a resolution was passed by the Executive committee of the Kheda District panchayat on 16-10-1980 ordering removal of the petitioner u/s 49(1) from his office as Sarpanch of the said panchayat. The petitioner carried the matter in appeal u/s 49 of the Act to the Development Commissioner, respondent No. 2 herein. During the pendency of the appeal, the appellate authority stayed operation of the order of removal as passed against the petitioner by the first authority. The petitioner's appeal ultimately came to be decided against the petitioner on 18-3-1981. The same was dismissed and interim stay granted in his favour was vacated. The petitioner challenged the appellate decision dated 18-3-1981 by filing special civil application No. 909 of 1981 in this court. In the said petition, earlier a notice was issued to the concerned respondents and ad-interim stay of removal order was granted. However, the said ad-interim stay was vacated by P. D. Desai, J. (as he then was) who by his order dated 8-4-1981 admitted the petition to final hearing but refused to grant interim stay of operation of the removal order. The petitioner unsuccessfully carried the matter regarding granting of interim stay in Letters Patent Appeal No. 109 of 1981 which came to be rejected by the Division Bench on 9-4-1981. In the meantime, the concerned respondent who were exercising statutory powers under the Act initiated proceedings for holding a fresh election to the post of Sarpanch on the basis of the removal order passed by the second respondent and as confirmed in appeal by the 5th respondent. It appears that the petitioner unsuccessfully tried to get the election proceedings stayed by this Court during the pendency of his petition. The result was that the election was held for electing new Sarpanch of Matar Gram Panchayat as the office of Sarpanch had fallen vacant on the removal of the petitioner from the said office. The aforesaid election was held as per the provisions of Section 53(1) of the Act on 14-6-1981. Respondent No. 7 contested for the said post and he was declared elected on 15-6-1981. Pursuant

to the aforesaid election to the post of Sarpanch, respondent No. 7 took charge of his new assignment and is holding the office of Sarpanch since then till today.

4. It is now time for me to note certain subsequent developments which have a direct bearing on the fierce controversy that has raged between the petitioner on the one hand and respondent No. 7 on the other in the present proceedings. The petitioner's main special civil application No. 909 of 1981 ultimately reached final hearing before me on 30.6.1982. It may be recalled that in the meantime, as mentioned above, respondent No. 7 had already got himself elected to the post of Sarpanch. But the petitioner for the reasons best known to him, did not think it fit to amend his petition and did not join respondent No. 7 as party-respondent in his pending petition nor did he challenge the result of election of respondent No. 7 dated 15-6-1981 pursuant to which he had assumed charge of the Sarpanch. The petitioner also did not amend his petition by getting inserted proper consequential prayer for being reinstated in the office of Sarpanch after displacing respondent No. 7, the new incumbent thereof. The fact that respondent No. 7 was already occupying the post of Sarpanch as a directly elected Sarpanch was noted by me while I disposed of special civil application No. 909 of 1981 on the basis of the record then existing and in the light of the submissions made on behalf of the petitioner and the prayer as put forward by the petitioner. The petitioner's special civil application No. 909 of 1981 came to be allowed by me by my judgment and order dated 30-6-1981 after hearing the learned Advocate for the petitioner as well as the learned Assistant Government Pleader for the concerned authorities acting under the Act. It may be noted that Matar Gram Panchayat which was duly served in the said petition did not think it fit to appear in the proceedings and to take any stand one way or the other. I allowed the petition and quashed the show cause notice dated 22.5.1980 as issued against the petitioner. The decision of the executive committee of the District Panchayat, Kheda removing the petitioner from the office of the Sarpanch was also quashed and set aside and the appellate order of the second respondent dated 18.3.1981 was also quashed and set aside. It was held by me that the show cause notice directing the petitioner to be removed from the post of Sarpanch and the consequential proceedings were vitiated in law and were honest.

5. It is in these circumstances that the petitioner approached the concerned authorities under the Act, requesting them to restore to him his original post of Sarpanch of Matar Gram Panchayat. The concerned authorities felt helpless in the matter in view of the provisions of the Act and Rules as there was already a sitting Sarpanch who had occupied the chair as a result of bye-election of Sarpanch of Matar Gram Panchayat which had taken place during the pendency of the petitioner's writ petition before this Court. The aforesaid inability of the concerned authorities under the Act to restore to the petitioner the original post of Sarpanch has driven the petitioner to this Court by way of the present proceedings. In the petition, earlier, a notice pending admission was issued and thereafter it was admitted to final hearing. It reached final hearing before me

last week. I heard the Learned Advocates for the petitioner as well as the respondents in support of their rival contentions.

6. Mr. N. K. Barot, Learned Advocate for the petitioner raised : the following contentions in support of the petition:

7. As the show cause notice as well as order of removal as passed against him and as confirmed by the appellate authority were quashed and set aside by me in special civil application No. 909 of 1981, after hearing the concerned parties including the Matar Gram Panchayat, the concerned authorities under the Act were bound to restore status quo ante in favour of the petitioner and to reinstate him in the office of the Sarpanch as the order of removal was treated to be nonest by this Court. As they had not done so, the present petition for a writ of quo-warranto or any other appropriate writ, order or direction has been filed. He further contended that it is true that respondent No. 7 was elected in bye-election, as this Court vacated the adinterim relief while admitting special civil application No. 909 of 1981 and did not grant any other relief against filling up of the vacancy of the post of Sarpanch of the said Panchayat. Still however, in the light of this Court's final judgment in the said petition, the petitioner who was an earlier elected Sarpanch became entitled to occupy his post as Sarpanch till the remaining term of the panchayat subsisted and as the petitioner had prior claim to the office of Sarpanch its subsequent incument was bound to make room for him and in the light of the High courts judgment in special civil application No. 909 of 1981, respondent No. 7 can be treated to be usurper of the public office atleast from the date on which this Court treated removal proceedings against the petitioner to be null and void meaning thereby from the date of the final decision of this Court in special civil application No. 909 of 1981.

9. Mr. M. C. Shah, learned advocate for respondent No. 7 who is the new incumbent of the office of Sarpanch and Mr. Anil Dave, learned Advocate for the concerned authorities under the Act who are joined as other respondents in this petition, in their turn, submitted that the petitioner could not be given any relief in the present proceedings on diverse grounds. Firstly, he did not challenge the bye-election of respondent No. 7 by joining him as a party to his pending petition No. 909/ 81 nor did the petitioner pray for reinstatement in the office of the Sarpanch if his removal was set aside by this Court in his pending petition. Thus, for the reasons best known to him, he did not think it proper to pray for that relief and he rested satisfied with the relief of setting aside of his removal order, which obviously resulted in eradication of the stigma which would otherwise have attached to him for the rest of his public life and which would have acted as a road block and disqualification for contesting the future election to the post of Sarpanch. This Court's decision in his favour has given this positive advantage to him.

Even though he could have prayed for consequential relief of reinstatement in his original post of Sarpanch, he did not think it proper to pray for the aforesaid relief and that is the reason why he did not join respondent No. 7 as party-

respondent in the said petition. Consequently, no fresh petition can be filed asking for a writ of quo-warranto against the respondent No. 7 when respondent No. 7 was lawfully declared to be elected Sarpanch of Matar Gram panchayat pursuant to the bye-election held in July 1981. It was further contended by the learned Advocates for the respondents that even in the present petition, the petitioner has not prayed for setting aside the election of respondent No. 7 to the post of Sarpanch. So long as that election stands, respondent No. 7 cannot be treated as usurper of public office as the original entry which was admittedly lawful cannot, in retrospect only because of this Court's judgment in special civil application No. 909/81 be considered to have become unlawful from any point of view. It was next contended that even the decision of this Court in special civil application No. 909/81 cannot be effectively pressed in service against respondent No. 7 as he was not a party to that petition and consequently the decision of this, court cannot be treated to be binding on him. That it is neither res-judicata nor is it a decision in rem. It was further contended that according to the provisions of the Act and the rules, once a Sarpanch is removed from his existing post, a vacancy arises qua the post held by him prior to his removal and as per the relevant provisions of the Act, such a vacancy can be filled in legally and validly by holding a bye-election. The person who gets elected in the bye-election becomes statutorily entitled to occupy the post for which he is elected for the remainder of the term of the panchayat and this, statutory right of a duly elected candidate cannot be whittled down by any decision regarding setting aside of the removal of the earlier incumbent of the said post. That if at all, such a relief against newly elected incumbent could have been granted only as a consequential relief in the earlier petition. But for the reasons best known to the petitioner, he did not think it proper to pray for such relief by joining respondent No. 7. Thus, he had waived his claim for reinstatement at the earlier occasion and now therefore, he cannot by pass the situation which has lawfully emerged and cannot avoid the logical consequence thereof by filing the present petition praying for a writ of quo-warranto.

10. In order to appreciate the aforesaid rival contentions of the learned Advocates of the respective parties, it is necessary to recapitulate a few relevant admitted and well-established facts and to consider their effect in the background of the relevant statutory provisions. It is true that the petitioner was elected as Sarpanch of Matar Gram Panchayat in the elections held in 1978. As per Section 17(1) of the Act, therefore, the petitioner became entitled to occupy the post of Sarpanch for a period of five years from the date on which the first meeting of the reconstituted panchayat was held. As seen earlier, the first meeting of the reconstituted panchayat was held somewhere in the month of July 1978. Consequently, the normal tenure of the petitioner's post as Sarpanch would have continued upto the month of July 1983. However, unfortunately, for him, his tenure ran through rough weather and removal proceedings were initiated against him which ultimately culminated into the order of the appellate authority confirming his removal from the post of Sarpanch on 18-3-1981 u/s

49(1) read with Section 49(3) of the Act. Once that eventuality happened, certain statutory consequences immediately followed. As per Section 23(1) (d) of the Act, the petitioner could not continue as a member of the panchayat as he had been removed from his post held by him under the provisions of the Act. As the petitioner could not continue as a member (Sarpanch) of the Matar Gram Panchayat, vacancy of the said post arose as laid down by Section 25(1) which provides:

If any member of a panchayat:

(a) who is elected, appointed or co-opted as such was subject to any of the disqualifications mentioned in Section 23 at the time of his, elected: appointment or cooption, as the case may be,

(b) during the term for which he has- been elected, appointed or coopted incurs any of the disqualifications, mentioned in Section 23, he shall be disabled from continuing to be a member and his office shall become vacant.

Thus, the petitioner's post became vacant. Moment that legal consequence resulted, Sub-section (2) of Section 25 got attracted which lays down:

In every case, the question whether a vacancy has arisen shall be decided by the competent authority. The competent authority may give its decision either on an application made to it by any person, or on its own motion....

Mr. Barot's contention is that in the present case, procedure of Section 25(2) does not appear to have been followed. It is pertinent, to note that the aforesaid contention of Mr. Barot does not find any place in the present petition, meaning thereby, Mr. Barot has not even pleaded such a contention in the present petition. It is obvious that this contention raises a mixed question of facts and law. As such a contention is not pleaded, it is obvious that the respondents have not got any opportunity to meet it. If such a contention was raised in the petition, the respondents could have pointed out as to how statutory requirement of Section 25(2) were followed in fact by the concerned authorities. In the absence of such pleading, the normal presumption as per illustration (e) of sec 114 of the Indian Evidence Act to the effect that all official acts are presumed to have been done in a proper manner would get attracted. It is further interesting to note that the petitioner has not challenged the bye-election of respondent No. 7 on the basis of the alleged non-compliance with the provisions of Section 25(2). Therefore, it has to be assumed for the present purpose that all legal procedural requirements of Section 25(2) were followed by the competent authorities acting under the statute.

Once a vacancy could be said to have arisen in the office of Sarpanch as laid down by Section 25(1) read with Section 25(2) on the petitioner being declared disqualified as aforesaid, Section 53 of the Act clearly got attracted. Section 53(1) of the Act is, material for the present purpose and hence it is extracted in extenso as under:

(1) Any vacancy in the office of a Sarpanch. Upa Sarpanch, Chairman, Vice-Chairman or member of a panchayat of which notice has been given to the competent authority in the prescribed manner shall be filled by the election of a Sarpanch. Upa-Sarpanch, Chairman or Vice Chairman or member, as the case may be, who shall hold office so long only as the Sarpanch, Upa-Sarpanch, Chairman. Vice Chairman or member, in whose place he has been elected, would have held office if the vacancy had not occurred.

Provided that if no member is so elected within two months from the date on which notice of the vacancy is given to the competent authority, the competent authority shall, as soon as possible, appoint a person who is qualified to be elected, and the person so appointed shall be deemed to have been duly elected under this sub-section.

Provided further that if vacancy of a member occurs within four months preceding the date on which the term of the panchayat expires u/s 17, it shall not be filled.

As per the aforesaid provision, the authorities under the Act were required to fill up by holding a bye-election the vacancy in the office of the Sarpanch which was caused on account of the removal of the petitioner from the said office. The said bye-election was accordingly held by the concerned authorities as per the provisions of Gujarat Gram and Nagar Panchayats Election Rules. Respondent No. 7 who contested the bye-election got elected and the result of his election was duly declared and notified. Movement that happened, he became entitled to occupy the post of Sarpanch for the remainder of the term for which the petitioner would have occupied the said post had he not incurred disqualification and had he continued to occupy his full term of office. It is obvious that the petitioner would have gone on occupying the post of Sarpanch atleast upto the month of July 1983. But unfortunately for him, he got disqualified in midstream and from July 1981, respondent No. 7 who got himself elected as new Sarpanch walked in his place and as per Section 53, remainder of the unexpired term of the tenure of the post of Sarpanch upto July 1983 got statutorily vested in respondent No. 7. It must be noted at this stage that bye-election contemplated by Section 53(1) to fill up any vacancy as mentioned in that provision is not one which is treated by the legislature as a stop gap arrangement. On the contrary, such a bye-election takes place on the basis that there is a clear vacancy where the incumbent who is elected would get fixed tenure till the remainder of the term. The very Act contemplates step-gap elections in certain contingencies as laid down by Section 51(1) and (2). These provisions project a different legislative intention. They read as under:

(1) The District Development officer may suspend from office the Sarpanch or Upa-Sarpanch of a gram panchayat or as the case may be, the Chairman or Vice-chairman of a nagar panchayat against whom any criminal proceeding in respect of an offence involving moral turpitude have been instituted or who has been detained in a prison during trial for any offence or who is undergoing such

sentence or imprisonment as would not disqualify him for continuing as a member of the panchayat u/s 23 or who has been detained under any law relating to preventive detention for the time being in force.

(2) Where any Sarpanch, Upa-Sarpanch. Chairman or Vice Chairman has been suspended under Sub-section (1) another member of the gram panchayat or as the case may be. nagar panchayat shall, subject to the conditions to which the election of the Sarpanch, Upa-Sarpanch Chairman or, as the case may be, Vice-Chairman so suspended was subject, be elected to perform all the duties and exercise all the powers of a Sarpanch Upa-Sarpanch. Chairman or Vice-Chairman during the period for which such suspension continues.

If we contrast Section 51(2) with Section 53(1), two different clear cut legislative intentions become visible. When the Sarpanch is suspended, his absence from the office is not treated to be one which creates a clear vacancy in the said post. Consequently, the legislature has contemplated a stop gap arrangement wherein any other member is permitted to get elected to occupy the Chair of the incumbent who is under suspension and that occupation is to last upto the period during which suspension of the original occupant continues. Thus, the original occupant so to say, is permitted to have a statutory lien on his post and only his right to actually occupy his post is treated to have been eclipsed during the period of his suspension. That right is not lost for ever. It is precisely for that reason that the new occupant who occupies that post as per the procedure of Section 51(2) is statutorily mandated to occupy it by way of a stop gap arrangement and so long as suspension of the original occupant of the post continues. Section 53(1) on the contrary reflects an entirely different legislative scheme. The vacancy in the office of Sarpanch is not treated by the legislature to be a temporary phenomenon. But on the contrary, it is treated as creating a permanent vacancy wherein by way of bye-election, new incumbent is invited to get elected as a new Sarpanch and. the remainder of the term of the office of Sarpanch, whatever may be the extent of that remainder, is statutorily vested in the new incumbent. It is also to be noted that u/s 51(2), election by way of stop gap arrangement is to be held from amongst the existing members only while u/s 53(1) a direct election is to be held from amongst all the voters of the gram, and any eligible voter can contest at the said direct election. Thus,, in substance, it is a fresh election of the Sarpanch, the earlier election having been given a go-bye by the statutory scheme itself. It is, therefore, not possible to agree with Mr. Barot for the petitioner that the scheme of Section 53(1) is analogous to that of Section 51(2) and even the incumbent who got elected in bye-election to a substantive vacancy u/s 53(1) can be treated to be an incumbent of the concerned post by way of a stop-gap arrangement till the concerned vacancy continues.

12. Mr. Barot next contended that if any other view is taken, the decision of this Court in special civil application No. 909 of 1981 would become practically redundant and otiose. Even this apprehension of Mr. Barot is not justified. In

case where a member of the panchayat has incurred any disqualification pursuant to his removal from the concerned office to which he was elected and when his removal gets confirmed by the appellate authority under the Act, he can certainly come to this Court by way of a writ petition. If he obtains an injunction against filling up of the vacancy u/s 53(1), no further complication would arise and the concerned Upa-Sarpanch can remain in charge of the office of Sarpanch till the disposal of the special civil application and till it is finally decided as to whether the concerned incumbent was liable to be removed or not. But in case, no such interim relief is obtained and if bye-elections are held according to Jaw, as in the present case, it will be for the concerned petitioner to pray for proper consequential relief alongwith the main relief of setting aside of the removal order. If he wants to get reinstatement to the original post which came to be occupied in the meantime by a new incumbent on account of bye-election held in the meantime, he has to join the new incumbent and challenge his election in the very petition in which he is seeking relief of quashing of the removal order. Relief of reinstatement to the original post would follow as a consequential relief. But if that is not done, as in the present case, it cannot be argued, merely on the basis of this Court's order, that as the petitioner's removal was declared to be null and void, the new incumbent in the office who was lawfully elected in the bye-election as Sarpanch, would automatically become a usurper of public office from the date of this Court's judgment onwards. Such a view, if taken will fly in the face of Section 53(1) of the Act and consequently, it cannot be countenanced at all. Even Mr. Barot's apprehension that the earlier decision of this Court would be rendered nugatory is misplaced as the petitioner for the reasons best known to him, selected one relief out of two available to him. In the earlier proceedings, he could have prayed for reinstatement to the original post after joining respondent No. 7 in the petition. Thus, while setting aside his removal order, proper consequential relief could have been granted. But he missed the bus and practically waived his right of being reinstated in the post of Sarpanch. Presumably, he seems to have felt content with getting the main relief of invalidation of removal order and getting rid of the stigma of misconduct. He also became entitled to contest fresh election as Sarpanch, as the removal order was declared to be null and void. Consequently, it cannot be said that earlier order of this Court would become infructuous or otiose, if respondent No. 7 is not ousted from the Office of Sarpanch at this stage. Even otherwise, there is an unsurmountable difficulty in the way of the petitioner in getting a writ of quo-warranto from this Court at this stage. It is an admitted position on the record of this case that respondent No. 7 was duly elected as Sarpanch of the Panchayat in June 1981 in the bye-election. The petitioner has never challenged the result of the bye-election by way of filing an election petition u/s 24 of the Act or even by challenging the said bye-election in the present proceedings. Mr. Barot made it clear that the petitioner has not challenged the result of the said bye-election. But his only argument is that because of the High Court's order treating the petitioner's removal from the Office of Sarpanch as null and void, as a logical corollary, it will follow that the

respondent No. 7's continued occupation of the said office would be rendered null and void and that the petitioner is not required to challenge the election of respondent No. 7. It is not possible to agree with this extreme contention of Mr. Barot. As respondent No. 7 has been validly elected to the Post of Sarpanch pursuant to the bye-election and so long as that election stands, Section 53(1) confers a statutory right on respondent No. 7 to occupy the Post of Sarpanch for the remainder of the term i. e. upto middle of July 1983 and so long as fresh elections are not held and so long as New Sarpanch is not elected to occupy the said post in the future Gram Panchayat which may get reconstituted accordingly. In these circumstances, to agree with the reasoning of Mr. Barot for the petitioner at this stage would be to bye-pass the result of a valid election in favour of respondent No. 7 and to indirectly treat the said result to be of no legal consequence. That cannot be done in the present proceedings. When the petitioner himself has not challenged the result of the said bye-election. Mr. Barot in fairness stated that the petitioner has not challenged the result of the bye-election as at the time when it was held, respondent No. 7 was validly elected as there was a clear vacancy to the office of the Sarpanch. But it is only in retrospect and in the light of the subsequent decision of this Court in special civil application No. 909 of 1981 when it was found that the petitioner's removal was null and void and honest that the petitioner is tempted to urge that respondent No. 7 cannot occupy the post of Sarpanch any longer as the petitioner has a prior claim over it. As shown earlier, statutory provisions contraindicate and do not at all support the case of the petitioner.

13. Mr. Barot invited my attention to a decision of the Supreme Court in the case of *The University of Mysore and Another Vs. C.D. Govinda Rao and Another*, wherein Gajendragadkar, J. speaking for Supreme Court had laid down the parameters of the powers of the High Court under Article 226 of the Constitution when called upon to issue a writ of quo-warranto. The observations on which reliance was placed by Mr. Barot read as under:

Broadly stated, the quo warranto proceeding affords a judicial enquiry in which any person holding an independent substantive public office, or franchise or liberty, is called upon to show by what right he holds the said office, franchise or liberty, if the inquiry leads to the finding that the holder of the office has no valid title to it, the issue of the writ of qua warranto ousts him from that office. In other words, the procedure of quo warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions: it also protects a citizen from being deprived of public office to which he may have a right. It would thus be seen that if these proceedings are adopted subject to the conditions recognised in that behalf, they lend to protect the public from usurpers of public office; in some cases, persons not entitled to public office may be allowed to occupy them and to continue to hold them as a result of the connivance of the executive or with its active help, and in such cases, if the jurisdiction of the courts to issue writ of quo warranto is properly invoked, the usurper can be

ousted and the person entitled to the post allowed to occupy it. It is thus clear that before a citizen can claim a writ of quo warranto, he must satisfy the court, inter alia that the office in question is a public office and is held by usurper without legal authority, and that necessarily leads to the enquiry as to whether the appointment of the said alleged usurper has been made in accordance with law or not.

There cannot be any dispute about the aforesaid settled legal position. On the facts of the present case, it is not possible to agree with the submission of Mr. Barot that respondent No. 7 became usurper of the public office moment this Court held in Spl. C. A. No. 909 of 1981 that the petitioner was wrongfully removed from the said post. In this connection, it is necessary to consider one submission of Mr. M. C. Shah, learned advocate for respondent No. 7 to the effect that the aforesaid decision of this Court cannot be treated to be binding to respondent No. 7 as he was not a party to the said petition. Mr. Barot readily agrees to the factual petition that the petitioner did not join respondent No. 7 as party to the earlier petition. He submitted that if he had joined him, the petitioner would have been reinstated in the office long back. But this is neither here nor there. The fact remains that respondent No. 7 was not joined as a party to special civil application No. 909 of 1981. Mr. Barot then contended that there was not necessity for the petitioner to join respondent No. 7 at that stage as in those proceedings, the petitioner was only challenging the order of removal which was passed against him by the concerned authorities acting under the relevant provisions of the statute. At that stage, respondent No. 7 was out of picture. The aforesaid contention of Mr. Barot would hold good to the limited extent viz. that so far as the order of removal was concerned, it could have been set aside after hearing the concerned statutory authorities and Matar Gram Panchayat who were parties to the earlier petition. But moment new incumbent had occupied the post of Sarpanch, if any relief of reinstatement was to be granted to the petitioner, he was required to join respondent No. 7. He did not do so at that earlier stage. Consequently, respondent No. 7 can validly contend before me at present that even the earlier, order of this Court cannot be said to be binding on him so far as his right to occupy the office of the Sarpanch is concerned. This is an additional hurdle in the way of the petitioner in getting any effective relief in the present proceeding on the allegation that respondent No. 7 is usurper of a public office.

14. I may profitably refer to the decision of the Division Bench of the Bombay High court in the case of Bhairulal Chunilal Vs. State of Bombay, . Chagia, C. J. speaking for the Division Bench has observed in the aforesaid decision as under:

It is well settled that where these are statutory provisions dealing with the conduct of an election the writ of quo warranto is displaced. An election then can only be challenged in the manner laid down by the statute.

15. In the present case, election of respondent No. 7 has not been challenged in the present proceedings and could not have been challenged as there was

already an Act remedy u/s 24. So long as election of respondent No. 7 is not challenged, his right to occupy the office of Sarpanch inhere in him statutorily u/s 53(1). It is interesting to note a further fact that as per the provisions of the Act, duly elected member of the panchayat can be ousted from his post either as a result of an adverse decision in election petition u/s 24 or on his incurring any disqualification as contemplated by Section 23 as a result of which his post is declared to be vacant as laid down by Section 26 of the Act or if he is removed from the office as per the provisions of Section 49 on the ground of misconduct or any disgraceful conduct or on any motion of no confidence passed u/s 48. In the present case, none of the aforesaid contingencies has taken place so far as respondent No 7 is concerned. Consequently, he cannot be removed from his office of Sarpanch which inhere in him for the remainder of the term as per Section 53(1). He cannot, therefore, be treated as usurper of the public office subsequent to the decision rendered by this Court in the proceedings to which he was not a party.

16. Mr. Barot ultimately made a frantic effort to save the situation by inviting my attention to Section 328 and submitted that if any difficulty arises in giving effect to the provisions of the Act or any schedule, the State Government may, as occasion requires, by order do anything which appears to it to be necessary for the purpose of removing the difficulty, and as the authorities acting under the statute had not removed respondent No 7 and reinstated the petitioner to the post of Sarpanch, the State Government had failed to exercise its power u/s 328. Even this provision cannot be of any assistance to the petitioner for the simple reason that it could have been pressed in service provided the State Government had felt that in the present case any difficulty had arisen in giving effect to the provisions of the Act. No such difficulty has arisen in the present case which would require the State Government to move in the matter. On the contrary, as per the provision of the Act, the respondent No. 7 could not be removed from his office by the State Government on the facts of the present case. Any attempt in that direction would have been illegal as impermissible under the Act. As per the express provision of the Act and the rules, respondent No. 7 who was duly elected as Sarpanch was entitled to continue as Sarpanch till the remainder of the term of Panchayat. Subsequent quashing of the removal order of the earlier Sarpanch cannot automatically result in ousting of the new incumbent duly elected to the said post in bye-election unless the competent authority or the court had ordered his ouster from the said post independently or as a consequential relief to the petitioner once his order of removal was set aside in a properly constituted proceedings. As such a situation never arose on the facts of the present case, respondent No. 7 became immune from any attack on the remaining part of his tenure as Sarpanch of the Matar Gram Panchayat.