

Bhanwarbai And Others @APPELLANT@Hash Madhya Pradesh State Election Commission and Others

Court: Madhya Pradesh High Court (Indore Bench)

Date of Decision: Jan. 16, 2025

Acts Referred: Madhya Pradesh Panchayat Raj Adhiniyam 1993 &mdash, Section 17, 22, 25, 32, 36(1)(a)(i)(ii)
Madhya Pradesh Up-Sarpanch (President and Vice President) Nirvachan Niyam, 1995 &mdash Rule 3, 4, 6, 6(5), 9,10,
11, 12, 13(5), 14, 15, 16, 21, 22

Hon'ble Judges: Vivek Rusia, J, Gajendra Singh, J

Bench: Division Bench

Advocate: Kuldeep Bhargava, Ajay Bagadia, Ayush Kumar Choudhary, Devansh Awal, Vishwajit Joshi, Pratyush Mishra

Final Decision: Allowed

Judgement

JUDGMENTTAG-JUDGMENT

Vivek Rusia, J

Appellants have filed this writ appeal being aggrieved by the order dated 02.11.2022, whereby the Writ Court has dismissed the Writ Petition

No.17927 of 2022 with a liberty to them to take recourse of appropriate remedy of election petition, if they are so advised, to ventilate their grievance.

2. The present appeal is filed solely on the ground that when the writ petition was filed, no alternate remedy was available to the writ petitioners as the

election of President of Janpad Panchayat Ujjain was not notified. The election petition is liable to be filed only after notification of the election,

therefore, the Writ Court ought to have decided the writ petition on the facts and circumstances prevailing at the time of filing of the writ petition.

However, as a precautionary measure, the appellants have filed an election petition as the limitation to filing the election petition was going to expire.

In support of his contention, learned counsel for the appellant has placed reliance on judgments passed by the Division Bench of this Court in the case

of Chandra Bhan Singh V/s State of M.P. and others, 2001 (2) M.P.L.J. 419, Ghanshyam Tiwari and another V/s State of M.P. and others, ILR

(2010) M.P. 1517 and Pradhuman Verma V/s State of M.P. and others, 2017 SCC OnLine MP 2305.

The facts of the case in short are as follows:

3. Appellants No.1 to 10 are the elected members of Janpad Panchayat Ujjain and appellants No.11 to 13 are the representatives of the three other

members of the said Panchayat as at that time they were suffering from Covid-19 and were under quarantine. The election of Janpad Panchayat was

held on 25.06.2022 and certificates to that effect were issued on 14.07.2022. After the aforesaid election of Janpad Panchayat, the Presiding Officer

issued an election program for conducting an election to the post of President and Vice President on 27.07.2022 under the provisions of the M.P. Up-

Sarpanch (President and Vice President) Nirvachan Niyam, 1995 (hereinafter referred as "Rules, 1995"). According to appellants/writ

petitioners, 3 elected members were suffering from Covid-19 disease and were unable to cast their votes, therefore, they authorized appellants No.11

to 13 to cast their votes. The applications to that effect were submitted before the Presiding Officer along with the Covid certificate. Similarly, 4

elected members i.e. appellants No.1 to 4 requested for the casting of votes through a companion being an illiterate. The Presiding Officer rejected all

the applications that conducted the election and declared respondent No.5 as the elected candidate by securing 12 votes.

4. Immediately, the petitioner rushed to this Court by way of Writ Petition No.17927 of 2022 that the election had been illegally held. According to the

appellants out of 25 members, 13 members were not permitted to cast the votes and all the 12 members casted their votes in favour of respondent

No.5 and he was illegally declared as elected President of Janpad Panchayat. Even appellant No.10 who was contesting the election of President was

deprived of voting, therefore, the entire election is liable to be conducted afresh.

5. Vide order dated 04.08.2022, by way of Writ Court, it was made clear that if notification under Rule 22 has not been issued till now, it should not be

issued till the next date of hearing. The respondents were served and they filed the reply and interim relief was directed to continue from time to time.

6. The respondents No.1 to 3 filed the reply by submitting that the writ petition is not maintainable for want of efficacious remedy of election petition

as the certificate elected President in the name of respondent No. 5 has been issued on 27.07.2022. On merit, it is submitted that the Returning

Officer issued the notices to all elected members in accordance with Rule 12 of Rules, 1995 i.e. 5 days before the meeting. The said notice was

served to all the elected members of the Janpad Panchayat Ujjain for the date of election scheduled on 27.07.2022. The election program was affixed

on the notice board of the Panchayat Office. Attendance was taken and as many as 21 members were present and voting was started. Three of the

elected members filed an application mentioning that they are suffering from the disease Covid-19 hence, their companion may be allowed to vote.

Similar applications were also filed by the 7 elected members mentioning that owing to illiteracy, their companion may be allowed to vote. The

Presiding Officer rejected the applications submitted by Ms. Anita, Mr. Rajesh and Ms. Sharmila mentioning that their application was not in

accordance with Rule 6(5) as the companion has to be the nearest family member. It is also submitted that there were 2 nomination forms and the

election was held by secret ballot. After voting the Presiding Officer has declared respondent No.5 securing the highest number of votes i.e. 12 and

declared duly elected by issuing form No.V. The petitioners choose not to vote for the reasons best known to them. Therefore, for that, neither the

Presiding Officer nor respondent No.5 can be blamed. Respondent No.5 also filed the reply that after the issuance of the election certificate, the writ

petition is not maintainable.

7. After hearing the learned counsel for the parties, vide order dated 02.11.2022, the Writ Court has dismissed the writ petition on the ground that the

petitioners have remedy to take recourse of election petition if they are so advised, hence, this writ appeal before this Court.

8. In this writ appeal, apart from 13 appellants, 6 other elected ward members have filed an application seeking intervention in favour of the appellants.

In para 4 of the application, they have specifically pleaded that they are witness to the entire election process. The petitioners are right in saying that

they were neither permitted to enter the premises nor permitted to cast their votes because they belong to the other group for the post of President

and Vice President.

9. Shri Kuldeep Bhargava, learned counsel appearing for the appellants has vehemently argued that the Writ Court has wrongly dismissed the writ

petition on the ground that the writ petitioners have the remedy of filing an Election Petition. The petitioner filed the writ petition on 02.08.2022 and on

that day the election was not notified, therefore, the writ petition was very much maintainable because the election petition could not have been filed

without notifying the election.

10. The respondent filed the reply by submitting that the election of the President of Janpad Panchayat had already been notified on 27.07.2022,

therefore, at the time of filing of the writ petition, the writ petitioners had a remedy to file an election petition. But so far as the merit of the case is

concerned, the issue is whether, in each fact and circumstance, the Writ Court ought to have entertained the writ petition on merit itself.

We have heard the learned counsel for the parties at length and perused the record of the case.

11. Section 22 of the M.P. Panchayat Raj Adhiniyam provides the composition of Janpad Panchayat, as every Janpad Panchayat shall consist of

members elected from the constituencies. Section 23 provides the division of blocks into the constituency and sub-section (3) provides the reservation

of the seats for OBC and ST & SC category candidates. Section 25 provides the election of the President and Vice President of Janpad Panchayat by

the elected members. After every election of Panchayat, the State Election Commission shall immediately hold the election for President and vice

President of Janpad Panchayat in such a manner, as may be prescribed. There is also a provision of reservation for the President of Janpad

Panchayat and women under sub-Section (2) of Section 25. In the exercise of the power conferred under sub-Section (1) of Section 95 read with

Sections 17, 25 and 32 of the M.P. Panchayat Raj Adhiniyam, the State Government made the rules for the election of Up-sarpanch, President and

Vice President i.e Rules, 1995.

12. Rule 3 provides the procedure for the determination of reserved seats of the Chairperson of Panchayat. Likewise, Rule 4 provides a procedure for

the determination of reserved seats for Up-Sarpanchas and Vice President of Janpad Panchayat and Zila Panchayat. Rule 6 provides the appointment

of election staff. Rule 9 provides the general duty of the Presiding Officer at a meeting to convene for election to maintain order thereat and to see

that the election is fairly held. Rule 10 provides that the Panchayat shall within the period of fifteen days from the date of election of Panchas,

Sarpanchas, Members of Janpad and Zila Panchayat, elect an UP-Sarpanch, a President and Vice President, as the case may be. The Collector /

Additional Collector shall fix the date for the election of Up-Sarpanch, President and Vice President within a prescribed time and inform the

Competent Authority. Rule 11 provides a meeting to be convened by a Competent Authority and thereafter the notice under Rule 12 shall be issued to

all members of Janpad Panchayat who are entitled to take part in the election proceeding. Rule 13 provides that the meeting for the election of UP-

Sarpanch or President and Vice President shall be in the office of Panchayat or at any other place within the Panchayat areas, as may be specified in

the notice. The said meeting shall be presided over by an officer nominated by the Competent Authority, and he will be called as the Officer. For

Janpad Panchayat, the Sub Divisional Officer or Deputy Collector or Tehsildar shall be a Presiding Officer who shall prepare the programme of

election of Up-Sarpanch or President and Vice President and announce it in the meeting.

13. Rule 14 provides the procedure for nomination. Rule 15 says that the election is to be held by secret ballot where the number of candidates is more

than one. Rule 16 provides the manner of recording votes, counting votes and declaration of results. Sub-Rule (5) gives power to the Presiding Officer

to provide a companion to a voter if owing to illiteracy, blindness or other physical infirmity, and unable to cast his vote. After recording its satisfaction,

the Presiding Officer may permit him or may accept or reject such prayer. Immediately, after voting is over, the Presiding Officer shall open the ballot

box and after counting shall declare the result in form V. As the case may be, the candidate shall be declared elected under Rule 16. The Presiding

Officer shall issue a certificate of election in form VI. A Presiding Officer must prepare a record of the proceedings of the meeting and sign it after

the conclusion of the meeting and thereafter, shall publish it on the notice board in form VII.

14. Rule 21 provides that if at a meeting, the proceedings of elections are interrupted or obstructed by any riot or open violence or any sufficient

cause, the Presiding Officer shall announce an adjournment of election to a date later and where the election is so adjourned by Presiding Officer, he

shall forthwith inform the District Collector and Competent Authority, therefore, in the present case, whether the Presiding Officer ought to have

exercised the power under Section 21 by postponing the election.

15. In the present case, 25 members were elected in the general election and they were entitled to cast the vote for election of President and Vice

President. On the date of the election, 3 members applied that they were suffering from COVID-19, therefore, they were permitted to cast the vote

by their respective representatives. 3 members were illiterate, therefore, they also requested to cast the vote through a companion. Such an application

is filed under Rule 13(5), but all the applications were rejected in any common order which is not on record. The writ petitioners allege that they were

not permitted either even to enter into the place of voting or cast their votes. There were 13 in number in which appellant No.10 submitted a

nomination form for contesting the election for the post of President. As per form No.5 BhanwarBai W/o Dhule Singh secured zero votes and

respondent No.5 Vindhya Kunwar W/o Devendra Singh secured 12 votes and which means that all 12 votes were cast, in favour of the respondent

No.5. Appellant No.1 BhanwarBai who contested the election was not even permitted to cast the very unusual vote, as the contesting candidate was

not permitted to cast the vote in her favour. When out of 24 members, 13 were not permitted to enter the premises to cast the vote which forms a

majority, thus, respondent No.1 who secured 12 votes one-sided cannot said to be elected by a fair election.

16. Rule 21 gives authority to the Presiding Officer to adjourn the election to a later day if the proceedings are interrupted or obstructed by any riot or

open violence or any sufficient cause is there. Here, the application of 6 candidates was rejected. The situation was that 13 ward members did not

cast their votes which included contesting candidates also, therefore, the majority of the ward members were not there in the place of voting to cast

their votes in the election. Now, in this appeal, apart from these 13 members, 6 have also stood in their support and against respondent No. 5 and are

saying that the election was not fair as the 13 writ petitioners were not permitted to enter into the election, therefore, respondent No. 5 Vindhya

Devendra Singh who was though elected but not elected in a fair manner, thus, she has no authority to continue on the said post. The Division Bench

in the cases (supra) repeatedly held that despite the availability of the remedy of the election petition, the Writ Court can entertain the writ petition

when the right to contest an election and hold a free and fair election as a valuable right in a democratic society is denied.

17. A similar issue came up before this Court in the case of Suresh Choudhary V/s Atarlal Verma and others [2006 (3) MPLJ 506]. Paragraphs

Nos.17 & 18 are reproduced below:

“17. Thus, from the aforesaid provisions, it is clear as noon day that a candidate was required to declare about money dues to the Panchayat. The

elected candidate was also aware of the fact of his own disqualification. It was within his special knowledge section 36 deals with disqualification for

being office bearer of Panchayat. Sub-section (2)(a) of section 36 reads as under:

36. (2) If any person having been elected as an office bearer of Panchayat:-

(a) subsequently becomes subject to any of the disqualification mentioned in sub-section (1) and such disqualification mentioned in sub-section (1) and

such disqualification is not removable or being removable is not removed for becomes office bearer concealing his disqualification for it which has not

been questioned and decided by any election petition under section 122.

18. If the aforesaid provision is read in proper perspective there remains no scintilla of doubt that the respondent No. 1 had deliberately not mentioned

the factum of disqualification. It is interesting to note that the respondent No. 1 has chosen not to file counter affidavit. Other respondents have

categorically and unequivocally stated that respondent No. 1 was proceeded under section 40 and was removed from the post and disqualification was

attached. This was within the special knowledge of respondent No. 1. Despite the same he chose not to disclose the said aspect. There cannot be any

doubt that had the said fact been disclosed his nomination paper would not have been accepted. In the absence of any counter affidavit and

submissions made by other respondents it is quite vivid that the respondent No. 1 has played fraud on the statute. An election a democratic polity has

its sacrosanctity respondent No. 1 has endeavoured to create a concavity in the same. Such a thing in a democratic set up is not permissible. He is not

entitled to hold the office as he was not eligible to contest the election. A person who is not entitled to contest the election and the fact is absolutely

tell-tale and clear as day like a shine on the sea shore and does not require any inquiry, his continuance cannot be accepted. The writ petition would

be maintainable as such a person cannot be allowed to participate in a proceeding of Jilla Panchayat as a Member and his election has to be declared

as illegal. Ergo, a writ of quo-warranto would be maintainable and relief can be granted.

The aforesaid judgment has been affirmed by the Division Bench of this Court in the case of Atar Lal Verma V/s Suresh Choudhary and others in

Writ Appeal No.87 of 2006 decided on 15.11.2006 and also by the Apex Court in case Atar Lal Verma V/s Suresh Choudhary and others in SLP

(Civil) No.21736 of 2006 decided on 12.01.2007.

18. A similar issue came up before another Division Bench of this Court in the case of Suresh Baba V/s Virendra Tyagi and others, 2011(1) M.P.L.J.

454 in which it has been held that the writ of quo warranto is liable to be issued when the disqualified person has been elected as office bearer of the

Panchayat. Paragraphs No.13, 14, 15 & 16 are reproduced below:

“13. On bare perusal of section 36(1)(a)(i)(ii) of the Adhiniyam, a person shall be ineligible to be the office bearer of the Panchayat, who has,

either before or after the commencement of this Act, been convicted of any other offence other than mentioned in Clause (i) and had been sentenced

to imprisonment for not less than six months, unless a period of five years or such less period as the State Government may allow in any particular

case has elapsed since the date of his release. Needless to say and undisputedly the appellant was released only on 15- 8-2009 and five years have

not yet been elapsed and, therefore according to us, rightly it has been held by the learned writ Court that the appellant was having disqualification for

holding the office of Sarpanch.

14. The purpose of quoting the preamble in the beginning of the judgment is that the 'Adhiniyam' has been enacted for the purpose of acquiring

welfare of citizens and particularly of the residents as well as the voters of the locality for whom this Adhiniyam has been enacted. The preamble of

every statute although has not an enacted part of that particular statute, but certainly it explores the scope, object and purpose for which the particular

statute is enacted.

15. If we permit the appellant to continue to hold a post of Sarpanch, it would amount to throttling the real aim and object to legislate section 36(1)(a)

(i) and (ii) of the Adhiniyam because the appellant has been recently released from the jail after undergoing the sentence of life imprisonment imposed

on him for committing two murders, and 5 years requisite period as envisaged under section 36 (1) of the Adhiniyam have not yet been expired from

the date of his release.

16. We do not find any merit and force in the submissions of the learned counsel for the appellant that section 36(1) of the Adhiniyam does not create

any bar to fight the election of Sarpanch because this provision deals with disqualification only after the election has taken place. According to us, if

this logic is accepted, then even disqualified person would be permitted to fight the election, which is not the intention of the Law and in order to give

logical and workable interpretation, according to us, section 36 (1) of the Adhiniyam would also be applicable for the candidates to contest the election,

who are disqualified under section 36 (1) of the Adhiniyam.

We also do not find any merit in the contention of the learned counsel for the appellant that in view of sub-section (2) of section 36 of the Adhiniyam,

if any person having been elected as an office bearer of Panchayat, is removable only after filing the Election Petition. According to us, sub-section

(2) of section 36(1) of the Adhiniyam is to be read in context to section 36(1) of the Adhiniyam.

19. In the case of Shiv Singh Rawat V/s State Of Madhya Pradesh And Ors., 2008 (2) M.P.H.T. 41, the Division Bench of this High Court held as

under:

“8. In view of the aforesaid, the concept of 'release' that was endeavoured to be scanned by Mr. Bhati remains in the realm of much ado about

nothing as the said respondent has remained in custody for a period of three years and was not released. It is worth noting here that the respondent

No. 9 was convicted by the judgment dated 28-9-2000. The same is perceptible from the judgment passed in Criminal Appeal. We would be failing in

our duty if we do not state that, as it was mentioned before us that the appeal of the respondent No. 9 was dismissed, we called for the record and

perused the order.

9. The election was held for the post of member in the year 2004 and that of President in 2005. On a bare reading of Section 36(1)(a)(ii) it is quite

clear that a person will not be eligible to hold a post for a period of 5 years if he has been sentenced for not less than six months. In the case at hand

the respondent No. 9 was sentenced for a period of three years. He remained in custody, as is patent, till 2003. He could not have contested till 2008.

Yet, for unexplainable reasons, he was allowed to contest and also got elected. Thus, indubitably he is disqualified to be in the office in question.

20. In view of the aforesaid judgments, the writ petition is always not barred when in a given facts and circumstances, if the High Court believes that

there was no free and fair election and the statutory rights available to the candidates were denied, then the writ petition is liable to be entertained.

21. After the dismissal of the writ petition, petitioners have preferred an election petition before the Prescribed Authority, but now, the proceedings

have been stayed in Writ Petition No.18858 of 2023, and the fact remains that the elections were held in the year 2022 and now 3 years have been

passed. Respondent No.5, who was declared elected in an undemocratic manner is continuing on the post and has no authority to continue on the said

post. Respondent No.5 cannot be declared elected when the opposite candidate is not permitted to cast the vote. The presiding officer ought to have

adjourned the date of election for which he has the authority to do so under the rules. If the petitioners are relegated to pursue the election petition,

then by the time the election petition is decided, he will complete his tenure of 5 years. Hence, the election of respondent No.5 to the post of President

Janpad Panchayat Ujjain is liable to be declared illegal and void.

22. It is important to notice that out of 25 elected members 13 were not permitted to cast a vote or did not cast a vote and all these 13 filed the Writ

Petition and now writ appeal against the election of respondent No.5 hence, they were not going to cast the vote in her favour, thus, respondent No.5

cannot be treated elected in free and fair election.

23. In view of the above, this Writ Appeal stands allowed and the order of Writ Court is set aside. The relief claimed in the W.P. No. 17927 of 2022 is

hereby allowed. The election of respondent No.5 / Vindhya Kunwar W/o Devendra Singh to the post of Janpad Panchayat Ujjain is set aside. Let a

fresh election of the President be held.

24. Let a signed photocopy of this order be kept in the connected writ petition also.