
(2017) 04 KAR CK 0014
KARNATAKA HIGH COURT
Case No: 201517 of 2017

Zahoor Khan and anr.

APPELLANT

Vs

Principal Secretary to
Urban Development
Department, Bengaluru
and others

RESPONDENT

Date of Decision: April 4, 2017

Acts Referred:

- Constitution of India, Article 226, Article 226, Article 226, Article 226, Article 227, Article 227, <a href

Hon'ble Judges: B. Veerappa

Bench: SINGLE BENCH

Advocate: N. Krishnacharya, R.V. Nadagouda, Shivaputra S. Udbalkar

Judgement

1. The petitioners who claim to be voters of Ward No. 23 of Wadi (Jn.), Chittapur taluk, Kalaburagi district are before this Court for a writ of certiorari to quash the impugned order, dated 10.03.2017 in VERNACULAR MATTER issued by the second respondent as per Annexure-F appointing the Election Officer, Assistant Election Officer, MCC Team and Accounts Officer for conducting elections to the Town Municipal Council (for short "TMC"), Wadi (Jn.) and also for a writ of mandamus directing the respondents to consider their representations dated 17.12.2016 as per Annexure-C dated 13.03.2017 as per Annexure-G.

I. FACTS OF THE CASE

2. It is the case of the petitioners that the first respondent has prepared the Ward Nos. 1 to 23 of TMC, Wadi (Jn.). The reservation categories for all the wards are only notified

relating to two categories i.e., (a) General and (b) S.T Women. The 1st respondent has deliberately not provided any opportunity or chance to the other categories of the reservations which has resulted in utter violation of fundamental rights of the voters. The existing wards for the previous election period were bifurcated showing the same as Ward Nos. 1 to 23 by including the voters of different areas in the said wards. The present formation of Ward Nos. 1 to 23 is not in accordance with the population of the said wards. It is further case of the petitioners that in the earlier formation of Ward No. 23, there was bifurcation between Vijay Nagar and Indira Nagar area. In the present formation of Ward No. 23, the said two areas are shown in Ward No. 23. The distance of said areas is about one kilometer. Therefore, the formation of the wards are not in accordance with the voters, areas and locations. The petitioners further contended that even in Ward No. 13 of TMC Wadi, the same errors committed for formation of the Ward. The formation of new ward given by respondent No. 1 is on 15.12.2016 as per Annexure-B and the objection filed by the petitioners as per Annexure-C on 17.12.2016.

3. It is further case of the petitioners that the 2nd respondent has passed an order appointing the Election Officers on 10.03.2017 and the petitioners raised objections on 13.03.2017 before the 2nd respondent as per Annexure-G. Thereafter, respondent No. 2 - Deputy Commissioner has issued the calendar of events on 20.03.2017. The petitioners further contended that the notification dated 20.03.2017 issued to conduct the elections of TMC, Wadi during pendency of the representation is wrong, illegal and against the law. The 2nd respondent has committed serious error in conducting the elections hurriedly without giving any opportunity to the residents of Wadi (Jn.) and also to the voters. The said defects and errors on the part of the respondents in conducting of elections to TMC, Wadi (Jn.) is not only against the law but also against the fundamental rights of the voters and therefore, the present writ petitions are filed for the relief sought for.

II. RIVAL CONTENTIONS OF THE PARTIES TO THE LIS

4. I have heard the learned counsel for the parties to the lis.

5. Sri. N. Krishnacharya, learned counsel for the petitioners vehemently contended that the formation of the Ward Nos. 1 to 23 made by the first respondent and the reservation showing only two categories of reservation in Ward Nos. 1 to 23 is illegal and against the law. He further submits that before issuing the Calendar of events, the respondents have not considered the objections filed by the petitioners, which has resulted in miscarriage of justice. The period fixed by the second respondent is very short to address their grievance. Therefore, he sought to quash Annexure-F dated 10.03.2017 issued by the Deputy Commissioner.

6. Per contra, Sri. R.V.Nadagouda, learned Additional Advocate General appearing for the respondents sought to justify the impugned action of the respondents. He contended that the State Government has issued a draft notification on 06.03.2017 in respect of TMC, Wadi (Jn.) for 23 Wards and invited objections from the general public within seven

days. Considering the objections from the general public, the final notification was issued on 15.03.2017. In the mean while, the Deputy Commissioner has appointed the Election Officer, Assistant Election Officer, MCC Team and Accounts Officer to conduct the election in respect of Ward Nos. 1 to 23 of Wadi (Jn.) by an order dated 10.03.2017. Thereafter, the Election Officer has issued notification dated 20.03.2017 publishing the Calendar of events.

7. The learned Additional Advocate General further contended that admittedly, the petitioners in these writ petitions have not challenged the reservation made by the State Government. The State Government after considering the objections from the general public to the draft notification, published the final notification on 15.03.2017. What has been challenged in these writ petitions is only the order passed by the Deputy Commissioner as per Annexure-F appointing the Election Officer, Assistant Election Officer, MCC Team and Accounts Officer. He further contended that once the Calendar of events are issued, this Court cannot interfere in the election process and the writ petitions are liable to be dismissed on that ground alone.

III. THE POINT FOR CONSIDERATION

8. In view of the aforesaid rival contentions urged by the learned counsel for the parties, the only point that arises for consideration is:

"Whether the petitioners have made out a case to quash the impugned order dated 10.03.2017 passed by the Deputy Commissioner appointing the Election Officer, Assistant Election Officer, MCC Team and Accounts Officer to conduct the elections in terms of the final notification issued on 15.03.2017, in the facts and circumstances of the present case?"

9. I have given my thoughtful consideration to the arguments advanced by the learned counsel for the parties and perused the entire material on record carefully.

10. Though the petitioners have filed the present writ petitions to quash, Annexure-F, dated 10.03.2017 issued by respondent No. 2/Deputy Commissioner appointing the Election Officer, Assistant Election Officer, MCC Team and Accounts Officer, they have not challenged the reservation made by the State Government in terms of the draft notification dated 06.03.2017 and final notification dated 15.03.2017. In fact, the petitioners have not produced the final notification in these writ petitions, deliberately. In the prayer, there is no challenge to the reservation made by the respondents. It is also

clear from the records that the petitioners have not pleaded as to which category they belong to and how they are affected and the petitioners have not filed any objections to the draft notification issued by the 1st respondent and the persons who filed objections are not before the Court.

11. The only ground urged in the present writ petitions is that the reservation made by the State Government in TMC, Wadi (Jn.) is against the law and in utter violation of fundamental rights of the voters of Wadi (Jn.). It is also not in dispute that the Calendar of events are issued by the Deputy Commissioner on 20.03.2017 and the present writ petitions are filed by the petitioners on 25.03.2017 challenging the order dated 10.03.2017 passed by respondent No. 2 appointing the Election Officer, Assistant Election Officer, MCC Team and Accounts Officer, i.e., subsequent to Calendar of events set in motion. Therefore, the petitioners are not entitled to the relief sought for in these petitions.

IV. CONSTITUTIONAL BAR TO ENTERTAIN THE PRESENT WRIT PETITIONS:

12. Under Article 243Z-G of the Constitution of India bar to interference by the Courts in electoral matters, which reads as under:

"243Z-G. 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 243Z-A 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."

13. It is an undisputed fact that though the writ petitions are filed by the petitioners for the relief sought for only on 25.03.2017, the affidavit has been filed on 27.03.2017. It is an admitted fact that once the calendar of events are issued, this court cannot interfere with the election process in view of Article 243-O of Constitution of India, which reads as under;

243-O. 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 243-K, shall not be called in question in any court;

(b) no election to any Panchayat 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.

V. STATUTORY BAR

14. Under the provisions of Section 21 of the Karnataka Municipalities Act, 1964 specifically state that no election of a Councillor shall be called in question except by an election petition presented to the Election Tribunal within fifteen days from the date of the declaration of the result of the election, which reads as under:-

21. Election Petitions: (1) No election of a Councillor shall be called in question except by an election petition presented to the Election Tribunal within fifteen days from the date of the declaration of the result of the election.

(2) An election petition calling in question any such election may be presented on one or more of the grounds specified in Section 23:-

(a) by any candidate at such election, or

(b) by any voter of the [ward] concerned.

(3) A petitioner shall join as respondents to his petition all the candidates at the election.

(4) An election petition

(a) shall contain a concise statement of the material facts on which the petitioner relies;

(b) shall with sufficient particulars, set forth the ground or grounds on which the election is called in question; and

(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908, for the verification of pleadings.

15. The provisions of Sections 22, 23 and 24 of the Karnataka Municipalities Act, 1964 deals with the relief claimed by the parties, grounds for declaring elections to be void and procedure to be followed by the Election Tribunal, which reads as under:

Section 22. Relief that may be claimed by the petitioner: (1) a petitioner may claim,

(a) a declaration that the election 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 who has been declared as duly elected.

Section 23. Grounds for declaring elections to be void: (1) Subject to the provisions of sub-section (2), if the Election Tribunal is of opinion,-

(a) that on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen as a Councillor under this Act, or

(b) that any corrupt practise has been committed by a returned candidate or his agent or by any other person with the consent of a returned candidate or his agent, or

(c) that any nomination paper has been improperly rejected, or

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

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

(ii) by any corrupt practise committed in the interests of the returned candidate by an agent or by any other person acting with the consent of such candidate or agent; or

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

(iv) by the non-compliance with the provisions of this Act or of any rules or orders made thereunder, the Election Tribunal shall declare the election of the returned candidate to be void.

(2) If in the opinion of the Election Tribunal, any agent of a returned candidate has been guilty of any corrupt practise, but the Tribunal is satisfied,

(a) that no such corrupt practise was committed at the election by the candidate, and every such corrupt practise was committed contrary to the orders and without the consent of the candidate;

(b) that the candidate took all reasonable means for preventing the commission of corrupt practices at the election; and

(c) that in all other respects the election was free from any corrupt practise on the part of the candidate or any of his agents. Then the Tribunal may decide that the election of the returned candidate is not void.

Section 24. Procedure to be followed by the Election Tribunal: The procedure provided in the Code of Civil Procedure, 1908, in regard to suits shall be followed by the Election Tribunal as far as it can be made applicable, in the trial and disposal of an election petition under this Act.

16. It is an undisputed fact that the Deputy Commissioner/District Election Officer has issued Calendar of events on 20.03.2017 as per Annexure-K, which reads as under:

VERNACULAR MATTER

VI. JUDGMENTS ON ELECTORAL MATTERS

17. The Hon"ble Supreme Court while considering the interference in the election matters when the election is set in motion in the case of N. P. Ponnuswami v. Returning Officer, Namakkal reported in AIR 1952 SC 64, has held as under:

9. The question now arises whether the law of elections in this country contemplates that there should be two attacks on matters connected with election proceedings, one while they are going on by invoking the extraordinary jurisdiction of the High Court under Article 226 of the Constitution (the ordinary jurisdiction of the Courts having been expressly excluded), and another after they have been completed by means of an election petition. In my opinion, to affirm such a position would be contrary to the scheme of Part XV of the Constitution and the Representation of the People Act, which as I shall point out later, seems to be that any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a special Tribunal and should not be brought up at an

intermediate stage before any Court. It seems to me that under the election law, the only significance which the rejection of a nomination paper has consists in the fact that it can be used as a ground to call the election in question. Article 329(b) was apparently enacted to prescribe the manner in which and the stage at which this ground, and other grounds which may be raised under the law to call the election in question, could be urged. I think it follows by necessary implication from the language of this provision that those grounds cannot be urged in any other manner, at any other stage and before any other Court. If the grounds on which an election can be called in question could be raised at an earlier stage and errors, if any are rectified, there will be no meaning in enacting a provision like Article 329(b) and in setting up a special Tribunal. Any other meaning ascribed to the words used in the Article would lead to anomalies, which the Constitution could not have contemplated, one of them being that conflicting views may be expressed by the high Court at the pre-polling stage and by the Election Tribunal, which is to be an independent body, at the stage when the matter is brought up before it.

12. It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willies, J. in *Wolver Hampton New Water Works Co. v. Hawkesford* (1859) 6 CB (NS) 336, at p. 356 in the following passage:

"There are three classes of cases in which a liability may be established founded upon statute, one is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of case is, where the statute gives that right to sue merely, but provided no particular form of remedy; there, the party can only proceed by action at common law. But there is a third class viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to".

The rule laid down in this passage was approved by the House of Lords in *Neville v. London Express Newspaper Ltd.*, (1919) AC368 and has been reaffirmed by the Privy Council in *Attorney General of Trinidad and Tobago v. Gordon Grant & Co.*, 1935 AC 532 and *Secretary of State v. Mask & Co.*, 44 Cal WN 709; and it has also been held to be equally applicable to enforcement of rights (see *Hurduttrai v. Off Assignee of Calcutta*, 52 Cal. WN 343, at p 349. That being so, I think it will be a fair inference from the provisions of the Representation of the People Act to state that the Act provides for only one remedy, that remedy being by an election petition to be presented after the election is over, and there is no remedy provided at any intermediate stage.

13. It was argued that since the Representation of the People Act was enacted subject to the provisions of the Constitution, it cannot bar the jurisdiction of the High Court to issue writs under Article 226 of the Constitution. This argument however is completely shut out by reading the Act along with Article 329(b). It will be noticed that the language used in that Article and in Section 80 of the Act is almost identical, with this difference only that the Article is preceded by the words "notwithstanding anything in this Constitution". I think that those words are quite apt to exclude the jurisdiction of the High Court to deal with any matter which may arise while the elections are in progress.

18. The Hon"ble Supreme Court, while considering the interference with the election process already set in motion in the case of *Boddula Krishnaiah v. State Election Commissioner* reported in, (1996) 3 SCC 416 : (AIR 1996 SC 1595), has held as under:

11. Thus, it would be clear that once an election process has been set in motion, though the High Court may entertain or may have already entertained a writ petition, it would not be justified in interfering with the election process giving direction to the election officer to stall the proceedings or to conduct the election process afresh, in particular when election has already been held in which the voters were allegedly

prevented from exercising their franchise. As seen, that dispute is covered by an election dispute and remedy is thus available at law for redressal.

12. Under these circumstances, we hold that the order passed by the High Court is not correct in law in giving direction not to declare the result of the election or to conduct fresh poll for 20 persons, though the writ petition is maintainable. The High Court, pending writ petition, would not be justified in issuing direction to stall the election process. It is made clear that though we have held that the respondents are not entitled to the relief by interim order, this order does not preclude any candidate including defeated candidate from canvassing the correctness of the election. They are free, as held earlier, to seek remedy by way of an election petition as provided in the Act and the Rules.

19. The Hon"ble Apex Court, while considering the Article 243Z-G(b) of the Constitution of India in the case of Kurapati Maria Das v. Dr. Ambedkar Seva Samajan and others reported in, (2009) 7 SCC 387 : (AIR 2009 SC 2475) has held as under:

19. In the first place, it would be better to consider as to whether the bar under Article 243-Z-G(b) is in absolute bar. The Article reads thus:

"243-Z-G(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."

At least from the language of clause (b), it is clear that the bar is absolute. Normally where such a bar is expressed in a negative language as is the case here, it has to be

held that the tone of clause (b) is mandatory and the bar created therein is absolute.

20. This Court in its recent decisions has held the bar to be absolute. First such decision is *Jaspal Singh Arora v. State of M.P.* ((1998) 9 SCC 594). In this case the election of the petitioner as the President of the Municipal Council was challenged by a writ petition under Article 226, which was allowed setting aside the election of the petitioner. In para 3 of this judgment, the Court observed;

"It is clear that the election could not be called in question except by an election petition as provided under that Act. The bar to interference by courts in electoral matters contained in Article 243-Z-G of the Constitution was apparently overlooked by the High Court in allowing the writ petition. Apart from the bar under Article 243-Z-G, on settled principles interference under Article 226 of the Constitution for the purpose of setting aside election to a Municipality was not called for because of the statutory provision for election petition."

21. The second such decision is *Gurudeep Singh Dhillon v. Satpal* (2006)10 SCC 616. In that decision, after quoting Article 243-Z-G(b) the Court observed that the shortcut of filing the writ petition and invoking constitutional jurisdiction of the High Court under Article 226/227 was not permissible and the only remedy available to challenge the election was by raising the election dispute under the local statute."

VII. CONCLUSION

20. On careful consideration of the entire material on record, it is clear that the petitioners have not challenged the reservation made by the State Government. What has been challenged is only the notification issued by the Deputy Commissioner appointing the Election Officer, Assistant Election Officer, MCC Team and Accounts Officer in terms of the Calendar of events issued. As already stated supra, the Calendar of events have been already issued on 20. 03. 2017 and the present writ petitions are filed on 25.03.2017. The petitioners have not made out any ground to interfere with the impugned order at this stage.

21. For the reasons stated above, the point raised in the present writ petitions has to be answered in the negative holding that the, petitioners have not made out a case for interference to quash the impugned order dated 10.03.2017 passed by the Deputy Commissioner/District Election Officer in view of the final notification dated 15.03.2017 and the same is in accordance with law.

22. In view of the aforesaid reasons, the petitioners have not made out any case to interfere with the election process at this stage when the Calendar of events has already been issued on 20.03.2017 and the election is already set in motion. Accordingly, the writ petitions are dismissed.

23. It is needless to observe that if the petitioners are aggrieved by the election of any of the returned candidates, it is always open for them to challenge the same by way of election petition under the provisions of Section 21 of the Karnataka Municipalities Act and in accordance with law.

Petitions dismissed.