

(1998) 03 BOM CK 0057

Bombay High Court

Case No: Writ Petition No. 1375 of 1997

Ashok Kondiba Yenpure and
another

APPELLANT

Vs

The State of Election
Commission and others

RESPONDENT

Date of Decision: March 5, 1998

Acts Referred:

- Bombay Provincial Municipal Corporations Act, 1949 - Section 19(1A)
- Constitution of India, 1950 - Article 243
- Maharashtra Municipal Corporation (Reservation of Offices of Mayor) Rules, 1994 - Rule 3

Citation: AIR 1998 Bom 180 : (1998) 2 ALLMR 281 : (1998) 3 BomCR 583 : (1998) 2 MhLJ 741

Hon'ble Judges: B.P. Saraf, J; A.Y. Sakhare, J; A.B. Palkar, J

Bench: Full Bench

Advocate: S.M. Gorwadkar, for the Appellant; R.V. More, R.G. Ketkar, V.A. Thorat, Smt. Revati Mohite-Dere, V.M. Parshuram and S.B. Shetye, Addl. Govt. Pleader, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Dr. B.P. Saraf, J.

The question that falls for determination in this writ petition is whether a Councillor of Municipal Corporation who is elected to a reserved seat is eligible to contest the election for the office of Mayor when it falls in the general category. In other words, the controversy is whether all the members of the Corporation, whether elected on reserved seat or general seat, are eligible for election to the office of Mayor when it falls in a general category.

2. The petitioner, Ashok Kondiba Yenpure, is a Councillor of the Pune Municipal Corporation. He was elected to that post from a ward which was unreserved/open

category ward. In the year 1997, the office of Mayor of the Pune Municipal Corporation was unreserved. The petitioner submitted his nomination paper for election to the said office of Mayor of Pune for the year 1997. The respondent No. 5 Mrs. Vandana Chavan, who was elected as a Councillor from a ward reserved for woman candidates, also filed her nomination for election to the office of Mayor of Pune. The nomination of the petitioner as well as respondent No. 5 were accepted by the Municipal Secretary, Pune Municipal Corporation, who was the Returning Officer for the election. The petitioner was aggrieved by the acceptance of the nomination of the respondent No. 5 by the Returning Officer. He, therefore, filed this writ petition challenging the acceptance of her nomination by the Returning Officer on the ground that having elected to the post of Councillor from a ward reserved for woman candidate she was not eligible to contest the election for the office of Mayor which was unreserved in the meantime, on 15th March, 1997, the election took place in which respondent No. 5 was elected as the Mayor of Pune. The petitioner amended his writ petition accordingly. The case of the petitioner is that a Councillor elected from a general category is only entitled to contest the election for the office of Mayor in the year in which the said office is not reserved for a specific category and is meant for a general category.

3. When the matter came up for hearing before the Division Bench, it was submitted by the learned Counsel for the petitioner that the above controversy stood concluded in favour of the petitioner by the decisions of this Court in Writ Petition No. 3110 of 1997, Momin Abdul Rashid Vs. Patil Vilas Raghunath and others, , Abdul Rashid Khan Mamoo Vs. The State of Maharashtra and others, , Writ Petition No. 2909 of 1997, Smt. Kusum Pandurang Khilare Vs. Smt. Sushilabai Mahadeo Swami and others, and the decision of Supreme Court in Saraswati Devi Vs. Smt. Shanti Devi and Others, . The learned Counsel for the respondents, however, pointed out that the decision of the Supreme Court in Saraswati Devi (supra), which has also been relied upon and followed by this Court in the decisions referred to above, had been referred to larger Bench and the hearing of the same was also over. We were told that the decision of the larger Bench in the matter was awaited. In view of the above, learned Counsel for the parties agreed that the hearing of this writ petition should be deferred. When the matter came up for hearing on 19-12-1997, the learned Counsel for the respondents informed that the controversy stood concluded against the petitioner by the latest decision of the Supreme Court in Kasambhai F. Ghanchi Vs. Chandubhai D. Rajput and Others, by which the earlier decision of the Supreme Court in Saraswati Devi's case (supra) was reserved. The learned Counsel for the petitioner, however, did not agree with the above submission. According to him, despite the decision of the Supreme Court in Saraswati Devi's (supra) case having been held not to be a good law by the Supreme Court in Kasambhai F. Ghanchi (supra), the decision of this Court where it has been held that only such candidates who belong to the general category and have been elected from wards which are earmarked or reserved for the general category candidates will alone be

eligible to contest still hold good. It was submitted by the learned Counsel that the ratio of the decision of the Supreme Court in Kasambhai F. Ghanchi (*supra*) is not applicable to this case. In view of the above stance of the learned Counsel for the petitioners, the Division Bench taking up this matter felt that this case may be decided by a larger Bench. The matter was, accordingly, placed before the learned Chief Justice for appropriate order. It is in this context that under orders of the Hon'ble Chief Justice this matter has been placed before this Bench.

4. We have heard Mr. Gorwadkar, learned Counsel for the petitioner who submits that general or open category or unreserved category is also a category in itself like other reserved categories and, that being so, only persons who belong to the general category and have been elected from wards which are earmarked or reserved for the general category would alone be entitled to contest for the office of Mayor when it falls in unreserved or general category. In support of this contention, reliance was placed on the decision of this Court in Momin Abdul Rashid (*supra*). Our attention was drawn to the following passage from para 9 of the above judgment.

"It would, therefore follow that even the general category is a category in itself as in the case of other categories such as scheduled castes, backward class etc. Hence the post of President which by rotation is earmarked for the general category candidates the same will be deemed to have been reserved for candidates belonging to that category only. The post will, therefore, be held as reserved for general category candidates. Hence only such candidates who belong to the general category and have been elected from wards which are earmarked or reserved for the general category candidates will alone be entitled to be eligible to contest."

Reliance was also placed by the learned Counsel on the decision of this Court in Abdul Rashid (*supra*) where a Division Bench of this Court held that :

"whenever the office of the Mayor was reserved either for Scheduled Castes or Scheduled Tribes, care should be taken to see that the candidates who were elected on seats reserved for such category alone were eligible and would be considered for election to the office of the Mayor, is in consonance with the scheme of section 19(1-A) of the Bombay Provincial Municipal Corporations Act and the Rules. The concerned elected member of the Municipal Corporation must have got elected on the seat available to the category for which the reservation has been made for Mayor's post. The concept or rotation clearly implies that for the contest of Mayorship by rotation, a reservation is made for members elected from a particular category and only those members can contest for Mayorship. On a combined reading of rule 3 of the Maharashtra Municipal Corporation (Reservation of Office of Mayor) Rules and the provisions of section 19(1-A), it is clear that the candidate who has not got elected from the category for which the Mayor's post is reserved, is not eligible to contest for the said post. Where the post of Mayor was reserved for Scheduled Tribes person belonging to such Tribe elected from the ward reserved for Scheduled Tribe even though it may be single ward alone is entitled to contest the

election for Mayorship. Since there was only one validly nominated candidate viz. The petitioner, he shall be liable to be declared as elected to the post of Mayor.

According to the learned Counsel for the petitioner, the above decisions still hold the field in so far as the election to the office of Mayor earmarked for general category is concerned despite the decision of the Supreme Court in Kasambhai F. Ghanchi (supra). Mr. V.A. Thorat, learned Counsel for respondent Nos. 5 and 6, on the other hand, submits that the entire controversy now stands concluded by the decision of the Supreme Court in Kasambhai F. Ghanchi (supra). According to him, once a post or office is unreserved, any candidate belonging to any category, including any of the reserved categories, can compete for election to the post or office.

5. We have carefully considered the rival submissions and perused the decision of the Supreme Court in Kasambhai F. Ghanchi (supra). On perusal of the same, we find that the controversy in this case stands squarely concluded by the above decision. Article 243-T of the Constitution provides for reservation of seats for scheduled castes, scheduled tribes and women in the municipality. Sub-Article (4) of the said article empowers the State Legislature, by law, to provide for reservation to the offices of the chair-persons in the Municipalities for the scheduled castes, scheduled tribes and women. The above article also envisages that such reservation of seats shall be by rotation. Sub-Article (6) empowers the State Legislature to make provision for reservation of seats in any Municipality or office of chair-person in the Municipalities in favour of backward class citizens. In exercise of the powers conferred by sub-Article (4) of Article 243-T of the Constitution, the Bombay Provincial Municipal Corporation Act, 1949 was amended. By the said amendment, by insertion of section 19(1-A), provisions were made for reservation of seats at the elections of the Municipal Corporation and for reservation of the office of Mayor in the corporation. Section 19(1-A) provides that there shall be reservation of the office of the Mayor in the Corporation by rotation for scheduled castes, scheduled tribes, women and backward class of citizen in the prescribed manner. In exercise of the powers conferred by section 19(1-A) of the Bombay Provincial Municipal Corporation Act, rules were framed by the State Government, known as "the Maharashtra Municipal Corporation (Reservation of Offices of Mayor) Rules, 1994". Under these rules, the State Government is required to specify the number of offices of Mayor in the Municipal Corporation in the State to be reserved for the scheduled castes, scheduled tribes, category of backward class of citizens and women (including the women belonging to the category of backward class citizens) on the principles set out therein. Under Rule 4 of the above Rules, the State Government is required to prepare a roster for a period of every one year for reservation of offices Mayors in all the Municipal Corporations in the State of the scheduled castes, scheduled tribes, category of backward class of citizens and the women. In compliance with the requirement of these rules, the State of Maharashtra issued notification dated 30th October 1996 reserving 8 offices out of 13 offices of Mayor in the Municipal

Corporations in the State for scheduled castes, scheduled tribes, backward class of citizens and women. It was expressly stated in the said notification that the offices of the Mayors of the remaining 5 corporations viz. Kolhapur, Pune, Nagpur, Kalyan and Navi-Mumbai Municipal Corporations shall be "unreserved". It is clear from the reading of Article 243-T, section 19(1-A) of the Bombay Provincial Municipal Corporation Act and the Maharashtra Municipal Corporation (Reservation of Offices of Mayor) Rules, 1994 and notification dated 30th October 1996 issued by the State Government for reservation of 8 offices of Mayor, that what is contemplated by the Constitution and the law and what has been done by the State Government is that 8 offices of Mayor have been reserved for scheduled castes, scheduled tribes, backward class of citizens and women. So far as these offices are concerned, a person belonging to the category for which the office is reserved can only seek election. So far as the balance offices are concerned, which are unreserved, all Councillors of the Municipal Corporation are eligible for election. In fact, there is no category like "general category". This is an expression often used to describe "unreserved" seats or offices. It is not that all seats or offices are reserved for one category or the other and that "unreserved" seats or offices are also reserved or earmarked for persons who do not fall in any of the categories for which reservation has been made. In the absence of reservation, all persons otherwise qualified are eligible to contest for the seats of Councillor or offices of Mayor irrespective of their caste, community or tribe. Reservation of the office of Mayor is intended only to ensure that specified minimum number of persons belonging to reserved category become Mayor of the Municipal Corporation. Such reservation cannot be construed to mean reservation of the unreserved seats for persons other than those for whom reservation is made. The unreserved seats are unreserved for all and anybody who is otherwise qualified to hold that office can seek election for that office and hold the same. In other words, all Councillors of the Municipalities, irrespective of the fact whether they have been elected on a reserved seat or unreserved seat or whether they belong to reserved category or unreserved category are eligible to seek election for the office of Mayor when it is unreserved or falls under the general category, whereas, when the office is reserved as per the roster for a person belonging to a particular category or castes, it is only a person belonging to the category or caste who can seek election for that office. This position is now well-settled by the decision of Supreme Court in Kasambhai F. Ghanchi (*supra*). In that case, the question that arose for consideration before the Supreme Court was whether a person who belongs to a backward class but had been elected to the Municipality from an unreserved seat could stand for election for the post of President of Municipality which was reserved for a backward class candidate or whether the candidate for that post could only be a person who was elected to the Municipality from a seat which was reserved for a backward class. The Supreme Court held that there is no intention or suggestion in Article 243-T that in case the office of the President is required to be filled by a member who is a scheduled caste, scheduled tribe backward class and woman then only a member who has been

elected from a reserved seat can stand for election. It was held that for the purpose of election to the post of President the reservation which was contemplated was only to the effect that the person elected belongs to the category of scheduled caste, scheduled tribe, backward class or woman as per the roster. It was observed that the legislative intent was that a person, whether elected from reserved or general seat but who belongs to the category out of which the President is to be elected, can seek election. It was observed :

"The idea of providing reservation for the benefit of the weaker sections of the society is not only to ensure their participation in the conduct of the affairs of the municipality but it is also an effort to improve their lot. The reservation ensures that the specified minimum number of persons belonging to that category became members of the municipality. If because of their popularity a larger number of Scheduled Castes, Scheduled Tribes, Backward classes or women get elected to the municipality than the number of reserved seats that would be welcome. When the idea is to promote the weaker sections of the society, and to improve their lot, it would be a contradiction in terms if members belonging to that section are debarred from standing to the office of the President because such a candidate is popular enough to get elected from a general constituency. It is fundamental principal of democratic election that a person who is more popular is elected popularity being measured by the number of votes which the person gets. The language of various legal provisions do not in any way suggest, expressly or by necessary implication, that even though a person who belongs to a reserved category and is popular enough to get elected from a general constituency should be barred from contesting the election of the President when that office is to be filled only by a reserved category person."

It was further observed :

"The legal provisions provide that office of the President of the municipality should go by rotation to members belonging to specific category and no more. These provisions do not provide that those members, though falling in the category of Scheduled Castes, Scheduled Tribe, Backward Classes or women must be only those who have been elected from the seats reserved for that category or persons. Reservation is with reference to the category/caste to which the person belongs and not the nature of constituency from which he/she was elected.

The Act and the Rules provide for reservation for Scheduled Castes, Scheduled Tribes ,Backward Classes and women. No reservation or classification is made word wise. To put it differently all members of the Schedule Castes, for example, will be regarded as belonging to one class irrespective of the fact whether they had been elected to a reserved seat or to a general seat. Similar is the position with regard to the backward classes, Scheduled Tribes and women. The law does not contemplate or provide for any further sub-classification of the type which has been suggested by the respondents. Just as all members of the municipality, irrespective of the fact

whether they had been elected to a reserved seat or not, are eligible for election to the post of the President when it falls in the general category, similarly when as per the roster the President is to be one who, say, belongs to the category of Scheduled Caste then all members Caste, irrespective of the seat to which they had been elected, would be eligible to stand for election. Neither the Act nor the rules stipulate that it is only such a member who has been elected to the reserved seat who would be eligible to stand for election to the post of President when it is the turn of that category of candidate to become the President of the municipality."

The Supreme Court also held that the earlier decision in Saraswati Devi (supra) did not lay down correct law.

6. In our opinion, the controversy in the present case is squarely covered by the above decision of the Supreme Court. The legal position is now clear that any Councillor belonging to any category can compete for the office of the Mayor when it is unreserved. There is no basis or justification for the contention that "unreserved" is also a type of reservation for persons other than those for whom reservation has been made under the law. In fact, everybody, including those belonging to the reserved categories or elected from the reserved categories, can contest for the office of Mayor when it is unreserved because by virtue of the reservation of a seat or office for persons belonging to a community, caste or tribe a person belonging to that community, caste or tribe does not cease to belong to the general category. He, therefore, cannot be disentitled to contest the office when, as per the roster, it is not reserved for the class or category of persons to which such person belongs. With respect, the decisions of this Court in Momin Abdul Rashid (supra) and Abdul Rashid (supra), wherein a contrary view has been taken, do not lay down the correct law in view of the decision of the Supreme Court in Kasambhai F. Ghanchi (supra).

7. From the above decision, it is clear that the respondent No. 5, who was elected from a ward reserved for woman, was eligible to contest for the office of Mayor when, as per the roster, it was "unreserved". The Returning Officer was correct in law in accepting her nomination and declaring her elected when she got highest number of votes of the Councillors. This petition is, therefore, devoid of any merit and the same is dismissed accordingly with no order as to costs.

8. Petition dismissed.