(1968) 11 BOM CK 0023

Bombay High Court

Case No: Sp. C.A. No''s. 1343 and 1344 of 1968

Rajaram Ganpat Patil		APPELLANT
	Vs	
Yeshwant Datto Patil		RESPONDENT

Date of Decision: Nov. 6, 1968

Acts Referred:

- Constitution of India, 1950 - Article 226, 227, 261, 320(3)(c)

Citation: (1969) MhLj 669

Hon'ble Judges: Y.V. Chandrachud, J; J.L. Nain, J

Bench: Division Bench

Advocate: M.L. Pendse, for the Appellant; M.A. Rane for Respondent No. 1 and C.R. Dalvi, Asstt Govt. Pleader, for the Respondent

Final Decision: Allowed

Judgement

Y.V. Chandrachud, J.
This is a petition under Articles 226 and 227 of the Constitution by which the petitioners, who have been elected in the Mhalunge Village Panchayat election, challenge the order passed by the learned Joint Civil Judge, Junior Division, Kolhapur, setting aside their election on an application filed by respondent No. 1. The facts leading to this petition are as follows.

2. The village of Mhalunge which is at a distance of 12 miles from Kolhapur was divided into three wards A, B and C for the purposes of election to the Village Panchayat. There were three seats in every ward, one of them being reserved for women. We are concerned in this petition with the election to ward B in which there are 386 voters.

3. On March 28, 1907, the Mamlatdar of Karveer issued a notification under rule 7 (1) of the Bombay Village Panchayats Election Rules, 1959 (hereinafter called ''the Rules") publishing the programme of elections to the Mhalunge Village Panchayat. The notification mentioned that the last date for filing notifications would be April

13, 1967, that the nominations will be scrutinized on April 15, 1967 and that the election will be held on April 29, 1967. The three petitioners and respondents Nos. 1 to 4 contested the election to Ward B. The result of the election was declared on April 30, 1967, and the petitioners were declared to have been elected. The three petitioners secured 261, 255 and 264 votes respectively, while respondents Nos. 1 to 4 secured 4, 103, 111 and 107 votes respectively.

4. On May 13, 1967, respondent No. 1 filed an election petition u/s 15 of the Bombay Village Panchayat Act, 1958 (hereinafter called "the Act") to the learned Joint Civil Judge. Junior Division, Kolhapur, challenging the election of the petitioner*!. The election of the petitioners was challenged on the grounds, in so far as they are relevant now, that rule 3 (ft) and rule 7 (I) were contravened. The case of respondent No. 1 is that rule 3 (5) was contravened in that the notification issued by the Mamlatdar under rule 7 (1) was not published at least 15 days before the date fixed for the nomination of candidates and that no public notice was given of the places where copies of the relevant lists of voters were kept open for public inspection. Rule 7 (1), according to respondent No. 1, was contravened, because the date for the scrutiny of nominations was not the date immediately following the date fixed for the nomination of candidates, It may be recalled that the last date for filing nominations was fixed as April 13, whereas the date for the scrutiny of nominations was fixed as April 15.

5. The petitioners contended by their written statement (exh. 29) that the notification issued by the Mamlatdar under rule 7(1) was in fact published in the village on March 28 and not on March 31, and that a false report was made by the Sarpanch of the village that the notification was published on the 31st. According to the petitioners, the Sarpanch lost his majority in the elections and he, therefore, discovered an easy means of invalidating the elections by purporting to admit that an illegality was committed by his office in publishing the notification of the Mamlatdar on the 31st instead of the 28th of March.

6. The Mamlatdar of Karveer who is respondent No. 8 to this petition also filed a written statement (exh. 39) explaining that the scrutiny of nomination papers was not fixed on April 14, which was the date immediately following the last date for filing nominations, because 14th was a public holiday on account of Ambedkar Jayanti,

7. The rival parties led evidence before the learned Judge in support of their respective versions. Respondent No. 1 examined the Sarpanch to say that the notification issued by the Mamlatdar under rule 7 (1) was published on the 31st and not on March 28, 1967. According to the Sarpanch, the notification was received in his office but the Gram Sevak of the Panchayat was on unauthorised leave from March 20, and that he, the Sarpanch, accidentally found the notification of the Mamlatdar lying in the drawer of the Gram Sevak''s desk. The Sarpanch stated in his evidence that on thus finding the notification on the 31st, he had it immediately

published.

8. The learned trial Judge has accepted the evidence of the Sarpanch and has held that the notification regarding the election programme was published in the Mhalujige village on the 31st and not on March 28, 1967. Admittedly the notification does not mention the place where copies of lists of voters were kept open for public inspection and this, according to the learned Judge, is a contravention of rule 3 (5) of the Rules. The learned Judge has also taken the view that even though April 14 was a public holiday, the second part of the proviso to sub-rule (1) of rule 7, which requires that the nominations must be scrutinized on the date immediately following the date fixed for the nomination of candidates, admits of no exception and therefore, it was illegal to fix the 15th as the date for the scrutiny of nominations. According to the learned Judge, the provisions contained in sub-rule (5) of rule 3 and sub-rule (1) of rule 7 are mandatory in character and their contravention must necessarily vitiate the elections. It was urged before the learned Judge that respondent No. 1 had failed to show that the non-observance of the particular provisions had caused him any prejudice, but the learned Judge has taken the view that since a mandatory requirement was violated, absence of prejudice was a matter of no relevance. The learned Judge has, without a pleading or argument in that behalf, set aside the election on an additional ground, namely, that the notification issued under rule 7(1) was not published at least one month prior to the date fixed for filing nomination papers. It is common ground before us that in this the learned Judge has clearly erred, because there has been a subsequent amendment which reduces the period from one month to fifteen days.

9. It is necessary to remember that our jurisdiction under Articles 226 and 227 of the Constitution is limited and that we should not re-appreciate evidence and substitute our conclusion of fact for that recorded by the Tribunal below. There are, however, larger issues involved in this matter. Besides, the finding of fact recorded by the learned Judge that the notification issued by the Mamlatdar under rule 7 (1) was published in the village of Mhaluuge not on March 28 but on March 31, 1967 is so predominantly based on unwarranted assumptions that it seems to us impossible to accept that finding. The learned Judge observes that the Mamlatdar of Karveer had issued the notification on March 28 and one should assume that the notification was dispatched by him to the Sarpanch of Mhalunge by post. Not only is there no warrant for this assumption-and common experience in such matters runs counter to such an assumption-but there is a covering letter sent by the Mamlatdar to the Sarpanch along with the notification of the 28th which furnishes intrinsic evidence to show that the notification was not dispatched by post but was personally forwarded through a messenger. The covering letter, a part of which is addressed to the Sarpanch, requests the latter in clear terms that the notification accompanying the letter should be published "to-day itself". It is, in our opinion, impossible that the Mamlatdar, who, as is clear from the covering letter, was alive to the urgency of the publication of the notification on the very same day, would take the risk of

dispatching the notification by post.

10. The view of the learned Judge that the notification was not published on March 28 is largely influenced by the assumption which he has made that if the notification was dated March 28, 1967, it might not have been received by the Sarpanch at a distance of twelve miles away from Kolhapur on the 28th itself. But then Mr. Rane, who appears on behalf of respondent No. 1, says that the Sarpanch was examined by respondent No. 1 as a witness and the Sarpanch has stated in his evidence that the notification was published at his instance on the 31st and not on the 28th, Now this is where a larger issue is involved. It is undisputed that the Sarpanch contested the election to the Mhalunge Village Panchayat and that though he was elected as a candidate, he lost his majority. It would also appear from the record that after he ceased to be the Sarpanch in the normal course of affairs, the Collector had considerable difficulty in taking over charge of the office from him. That, however, is another matter and that consideration cannot be permitted to influence our appreciation of the Sarpanch''s evidence. What is important is that though the Sarpanch was requested by the Mamlatdar to make an immediate report as to the publication of the notification, the Sarpanch did not make any report to the Mamlatdar that he had published the notification on the 31st. In these circumstances, the learned Judge need not have felt constrained to accept the word of the Sarpanch that the Gram Sevak had gone on unauthorised leave from March 29, that the notification issued by the Mamlatdar under rule 7 (1) was found lying unattended in the desk of the Gram Sevak, that the Sarpanch accidentally hit upon it on the 31st and that he took immediate steps to have the notification published. We are conscious that we are re-appreciating evidence and we are fully conscious of the limitations on our jurisdiction under Article 227 of the Constitution. We, however, feel compelled in the interests of justice to interfere with the order passed by the learned trial Judge, because if the evidence such as the one given by the Sarpanch in this case is accepted, the results of elections would have to depend upon the sweet will of the Sarpanch''s. A Sarpanch, who loses an election or his majority, might allege after the election results are declared that certain illegalities were committed by him or by someone in his office and whether those illegalities have been committed or not would have to depend upon his bare word. We are, therefore, of the opinion that the learned Judge should have exercised the caution of seeking for some corroboration to the bare word of the Sarpanch. This is not a case in which in the very nature of things it might have been difficult to look out for some corroboration, because the best corroboration would have been a contemporaneous report made by the Sarpanch in accordance with the request made by the Mamlatdar that a report regarding the publication of the notification in the village should be immediately forwarded. There is no such report on the record and the Sarpanch has in fact admitted in his cross-examination that he did not make any contemporaneous report to the Mamlatdar. We, therefore, take the view that the Sarpanch, finding that he had lost the majority, has given an untruthful account

in regard to the date of publication of the notification.

11. It must, therefore, be held that what was required to be done in the ordinary course of business was in fact done and that, as stated by the petitioners in their evidence, the notification of the Mamlatdar was published in the village not on the 31st but on the 28th itself. If the notification was published on the 28th, the last date for filing nominations could be fixed as April 13 and therefore, one of the three challenges made by respondent No. 1 to the election of the petitioners must clearly fail.

12. The second challenge to the election is that the place where the lists of voters were kept for public inspection is not mentioned in the notification of the Mamlatdar dated March 28, 1967. Now, sub-rule (5) of rule 3, which is stated to have been contravened on account of this omission, says, in so far as is relevant, that the Mamlatdar shall give a public notice of the places where copies of the relevant lists of voters are kept open for public inspection. It is dear that in the notification issued by the Mamlatdar, the place where copies of the relevant lists of voters were kept for public inspection is not specified. The question which arises for consideration is whether the non-observance of the provision contained in sub-rule (5) of rule 3 would vitiate the election.

13. It is contended by Mr. Rane that the provision of sub-rule (5) is mandatory and a failure to comply therewith must vitiate the election. Now, it is true that sub-rule (5) is in an imperative form, for it says that the Mamlatdar shall, at least fifteen days before the date fixed for the nomination of candidates for every general election of the village Panchayats give a public notice of the places where copies of the relevant lists of voters are kept open for public inspection. However, as observed by the Privy Council, in Montreal Street Rail-way Company v. Normandin (1917) A C 170, no general rule can be laid down in construing whether the provisions of a statute are directory or imperative and that in every case the object of the statute must be looked at. This principle was adopted by the Federal Court in the case of AIR 1945 67 (Federal Court) . These two cases have been cited with approval by the Supreme Court in State of U.P. Vs. Manbodhan Lal Srivastava, . In that case the Supreme Court was considering the question whether the provisions of Article 320 (3) (c) of the Constitution are mandatory. The particular provision is couched in mandatory terms, for it says, briefly, that the Union Public Service Commission "shall be consulted" on all disciplinary matters affecting a certain class of persons. It was held by their Lordships that the use of the word "shall" in a statute though generally taken in a mandatory sense, does not necessarily mean that in every case it shall have that effect, that is to say, unless the words of the statute are punctiliously followed, the proceeding, or the outcome of the proceeding, would be invalid. The following passage from Crawford on ''Statutory Construction''-Article 261, p. 316, which is referred to by their Lordships at page 546 of their judgment is useful for our purposes and it runs thus:

The question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon (be language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other.

14. In the light of this principle, it would be necessary to consider the purpose and the intendment of sub-rule (5) of rule 3. It would also be necessary to consider the possible prejudice that may be caused to a voter or to a candidate if the particular provision is not complied with. The requirement of the sub-rule is that the Mamlatdar must give a public notice of the places where copies of the relevant lists of voters are kept open for public inspection. Sub-rule (4) of the same rule provides that copies of lists of voters maintained under the rule shall be kept open for public inspection at the village Chavdi, if any, and at the village Panchayat office. Speaking generally, the constituencies in village Panchayat election are compact. In the case before us, the village was divided into three small wards, the number of voters in ward B being 386. It would normally not be difficult for any person interested in perusing or scrutinising the list of voters to ascertain whether the lists of voters have been kept open for public inspection and if so, where. We are not suggesting that the provision contained in sub-rule (5), any more than the other provisions of the Act and the Rules, may be ignored by persons who are charged with the duty of conducting the elections. However, as observed by Chagla C. J. in Bhairulal Chunilal Vs. State of Bombay, , the effect of the non-observance of a rule has to be assessed in every case. In that case, a certain person was elected by the Councilors of a Municipality as a President, and in his capacity as a President he discharged certain functions under the Election Rules in regard to the election of Councilors. His own election was invalid and it was contended that as he could not have validly discharged his functions as a President qua the elections of Councilors, the election of the Councilors was invalid. It was held that the election of the Councilors could not be set aside, because, at best, nothing more than an irregularity had occurred. This view was taken for the reason that the invalidity of the election of the President himself would not bring about a corresponding infirmity or invalidity in the election of the Councilors. A similar view has been taken by a Division Bench of this Court in Eknath Shankar Lonkar Vs. Gorakh Krishna Patil, where identical symbols were assigned to different candidates contesting an election from the same ward on behalf of the same party. The test applied by the learned Judges for ascertaining whether the election could be set aside on the ground that certain rules were contravened was whether the allocation of similar symbols could have caused any confusion in the minds of voters, and if so, whether any prejudice was in fact caused to any particular candidate.

15. Applying these principles to the case before us, we are of the view that the non-observance of a part of sub-rule (5) of rule 3, in that the places where the copies

of the relevant list of voters were kept open for public inspection were not mentioned in the notification of the Mamlatdar, will not vitiate the election. It is not alleged that the copies of lists of voters were in fact not kept open for public inspection, for it seems to us that the substance of the matter really is whether the copies of lists of voters are in fact kept open for public inspection. It is also not alleged that by reason of the omission in the notification to mention the places where copies of the lists of voters were kept open for public inspection, any person was unable to ascertain whether he was a voter in a particular ward or whether he was a voter at all. As the copies of the lists of voters were indisputably displayed both at the Chavdi and the Village Panchayat Office, no prejudice could possibly have been caused to any voter or to any candidate by reason of the notification not specifying the places where the lists of voters were kept open for public inspection.

16. As the copies of the lists of voters were in fact kept open for public inspection and as no prejudice is shown to have been caused by the particular omission to specify the places, we are of the opinion that the omission is a mere irregularity. The election cannot, therefore, be set aside for the technical reason that the notification did not specify the places where the copies of lists of voters were kept open for public inspection. The second ground of challenge to the election must, therefore, fail.

17. The third ground on which the election of the petitioners was challenged is that the second part of the proviso to sub-rule (1) of rule 7 has not been complied with. It provides that the Mamlatdar shall by notification publish the election programme fixing the various dates for the nomination of candidates, the scrutiny of nominations, the recording of votes and the counting of votes, provided that "the date for the scrutiny of nominations shall be the date immediately following the date fixed for the nomination of candidates". The notification issued by the Mamlatdar on March 28, 1967, mentioned April 13, 1967, as the last date for filing nominations and April 15, 1967, as the date for the scrutiny of nominations. The argument is that the last date for filing nominations was fixed as April 13, that therefore April 14, should have been fixed as the date for scrutiny of nominations and as the 15th and not the 14th of April was fixed for the scrutiny of nominations, the elections are vitiated. It is unnecessary to refer once again to the principle which we have discussed above that the mere use of the word "shall" does not mean that the particular provision must be punctiliously followed. The Mamlatdar who is respondent No. 8 to this petition had filed his written statement before the learned Joint Civil Judge explaining that the scrutiny of nominations was not fixed for the 14th as it was a public holiday on account of Ambedkar Jayanti. We do not think that the Mamlatdar was justified in postponing the date for scrutiny of nominations for the mere reason that the date immediately following the date fixed for the nomination of candidates happened to be a public holiday. But, as stated earlier, every non-compliance with what prima fade appears to be a mandatory provision cannot have the effect of invalidating the elections. The object of the rule that

nominations must be scrutinised on the date immediately following the date fixed for nomination of candidates is that no time should be lost between the last date of nominations and the date for scrutiny of nominations. The reason why the scrutiny of nominations is required to be done expeditiously is that the candidates who have offered themselves for election must know immediately whether their nominations have been accepted, so that they can commence their campaigns. Now the first part of the proviso to sub-rule (1) of rule 7 provides that an interval of at least fifteen days must be kept between the date fixed for the nomination of candidates and the date fixed for the recording of votes. Normally, a period of not more than fifteen days is thus kept and therefore, it is necessary to scrutinise the nominations immediately after the period for filing nominations has expired. It is, however, not alleged in this case that the Mamlatdar had any oblique motive in postponing the scrutiny of nominations or that the postponement of scrutiny of nominations by one day had caused prejudice to any voter or candidate. The non-compliance, therefore, with the provision contained in the second part of the proviso to rule 7 (1) cannot, in our opinion, invalidate the election.

18. This disposes of the grounds on which the election of the petitioners was assailed by respondent No. 1. The learned Judge has, on his own, held that a mandatory provision contained in sub-rule (2) of rule 7 has been contravened, as the notification contemplated by Rule 7(1) was not published at least one month prior to the date of filing the nominations. No arguments were advanced before the learned Judge on this point, but it seems that he made some research on his own and came to the conclusion that there was one more valid challenge to the election of the petitioners. We appreciate that the learned Judge pursued the matter for himself, but there is always some risk in a Judge taking up a point and deciding the case on that point without putting the point to the Bar. If the learned Judge were to put his point of view to the advocates, they would have drawn his attention to the amendment to sub-rule (2) under which the period has been reduced from one month to fifteen days.

19. For these reasons, we set aside the order passed by the learned Judge and make the rule in this petition absolute with costs against respondent No. 1.

20. This judgment will also govern the companion petition, Special Civil Application No. 1344 of 1968. The rule in that petition will be made absolute with costs against respondent No. 1.

21. One more petition was filed before the learned Joint Civil Judge by which the election of the Sarpanch himself was challenged. The Sarpanch seems to have submitted to the orders of the Tribunal. In fact, he ensured an adverse order by admitting the various allegations in the petition. The petition was allowed and his election was also set aside. The Sarpanch has not taken any proceeding to challenge the order of the learned Judge setting aside his election and, therefore, the order in regard to his election would remain unaffected by this judgment. We must hasten to

add that we should not be taken as suggesting that if the Sarpanch were to file such a proceeding, we would have necessarily interfered on his behalf.