HIGH COURT OF JUDICATURE AT BOMBAY

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

LETTERS PATENT APPEAL NO.115 OF 2009
IN
WRIT PETITION NO.2362 of 2009

Shri Shailesh Narayan Shinde,
Age about 38 years, Occupation Business,
Residing at Survey No.74A, B.T.Kawade Road,
Eastern Court, C-7, Ghorpadi Gaon,
Pune – 411 001. .....Appellant

versus

1. Shri Chetan Vitthal Tupe,
   Age about 38 years, Occu -
   Agricultural and business,
   Residing at Magar Patta,
   Hadapsar, Pune 411028.

2. The Pune Municipal Corporation,
   A Corporation established under the
   BPMC Act, 1949 having it's Office at
   Corporation Building, Shivajinagar,
   Pune – 411 005 through it's
   Municipal Commissioner
   (Summons may kindly be served on
   The Municipal Corporation).

3. The Election Returning Officer No.6,
   Hadapsar Regional Office,
   Pune Municipal Corporation, Pune.

4. Shri Prashant @ Mama Vasant Tupe,
   Age about 38 years, Occu – Business,
   Residing at Survey No.165, Near Suvarna
   Mitra Mandal, Malwadi, Hadapsar,
   Pune – 411 028.

5. Shri Dada Pandharinath Tupe,

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HIGH COURT OF JUDICATURE AT BOMBAY

Age about 45 years, Occu – Service,
Residing at Survey No.165, behind
Poonam Laundry, Malwadi, Hadapsar,
Pune – 411 028.

6. Shri Navnath Vitthal Kamble,
Age about 44 years, Occu – Business,
Residing at Survey No.49, Palm Groves
Society, B.T.Kawade Road, Ghorpadi Gaon,
Pune – 411 028.

7. Shri Sunil Somaji Jagtap,
Age about 40 years, Occu – Business,
Residing at Survey No.165, Near Nav
Chaitanya Mitra Mandal, Malwadi,
Hadapsar, Pune – 411 028.

8. Shri Deepak Haribhai Kudale,
Age about 40 years, Occu – Business,
Residing at Survey No.165, Near Nav
Chaitanya Mitra Mandal, Malwadi,
Hadapsar, Pune – 411 028.

9. Shri Dada Gyanaba Salvi,
Age about 45 years, Occu – Business,
Residing at Near B.J.Shirke Co.,
Bhimnagar, Mundhava, Pune 411 028

10. Shri Prakash Shivram Kamathe,
Age about 35 years, Occu – Business,
Residing at Shinde Vasti (Gosavi Vasti),
Hadapsar, Pune 411 028. ..... Respondents

WITH
LETTERS PATENT APPEAL NO.116 OF 2009
IN
WRIT PETITION NO.2386 OF 2009

Shri Shailesh Narayan Shinde,
Age about 38 years, Occupation Business,
Residing at Survey No.74A, B.T.Kawade Road,

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HIGH COURT OF JUDICATURE AT BOMBAY

Eastern Court, C-7, Ghorpadi Gaon,
Pune – 411 001. .....Appellant

versus

1. The Pune Municipal Corporation,
A Corporation established under the
BPMC Act, 1949 having it's Office at
Corporation Building, Shivajinagar,
Pune – 411 005 through it's
Municipal Commissioner
(Summons may kindly be served on
The Municipal Corporation).

2. The Election Returning Officer No.6,
Hadapsar Regional Office,
Pune Municipal Corporation, Pune.

3. Shri Chetan Vitthal Tupe,
Age about 38 years, Occu -
Agricultural and business,
Residing at Magar Patta,
Hadapsar, Pune 411028.

4. Shri Prashant @ Mama Vasant Tupe,
Age about 38 years, Occu – Business,
Residing at Survey No.165, Near Suvarna
Mitra Mandal, Malwadi, Hadapsar,
Pune – 411 028.

5. Shri Dada Pandharinath Tupe,
Age about 45 years, Occu – Service,
Residing at Survey No.165, behind
Poonam Laundry, Malwadi, Hadapsar,
Pune – 411 028.

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Age about 44 years, Occu – Business,
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Pune – 411 028.

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HIGH COURT OF JUDICATURE AT BOMBAY

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Hadapsar, Pune – 411 028.

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10. Shri Prakash Shivram Kamathe,
Age about 35 years, Occu – Business,
Residing at Shinde Vasti (Gosavi Vasti),
Hadapsar, Pune 411 028. ..... Respondents

Mr.S.S.Kanetkar i/by A.B.Tajane, for the appellants.
Mr.S.G.Aney, Senior Advocate with Mr.R.V.Govilkar and Ms.Ujwala Sawant, for respondent No.1 in LPA No.115 of 2009 and for respondent No.3 in LPA No.116 of 2009.
Mr.A.P.Kulkarni, for respondent Nos.2 and 3 in LPA No.115 of 2009 and for respondent Nos.1 and 2 in LPA No.116 of 2009.

CORAM: P.B.MAJMUDAR &
MRS.MRIDULA BHATKAR, JJ.

DATE: 10th AUGUST, 2011

ORAL JUDGMENT (PER MRS.MRIDULA BHATKAR, J.) : -

1. Both these appeals are directed against the common judgment passed by the learned Single Judge dated 19th and 20th March,

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HIGH COURT OF JUDICATURE AT BOMBAY

2009, by which the learned Single Judge allowed the writ petitions filed by the respondent No.3 of LPA No.115 of 2009 and that of Pune Municipal Corporation. The learned Single Judge accordingly quashed and set aside the order dated 19-01-2007 passed by the 7th Additional Judge, Small Causes Court, Pune, in Election Petition No.1 of 2007. The Small Causes Court, Pune, had initially allowed the Election Petition filed by the present appellant. However, the said order is set aside by the learned Single Judge. Hence, the above appeals.

2. By an order dated 20th December, 2006, the Collector of Pune District, declared the elections of the Municipal Corporation for the City of Pune. The said elections were to be held in the month of February 2007. The candidates were to submit their nomination forms till 15-01-2007. The appellant was a duly nominated candidate of the Bhartiya Janata Party. The appellant accordingly submitted his nomination form on 15-01-2007 for the election to the Ward No.42. The Election Returning Officer i.e. respondent No.3, scrutinized the nomination forms on 16-01-2007. During the scrutiny, the Election Returning Officer found that the certificate submitted by the appellant showing his name in the electoral roll of Ward No.45 was not signed. The appellant was present at the time of scrutinizing the nomination forms and requested the Election Returning Officer to keep back the scrutiny of his

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HIGH COURT OF JUDICATURE AT BOMBAY

nomination form, as he can produce valid certificate showing his name in the electoral roll in Ward No.45. The Returning Officer on the request of the appellant, kept back the nomination form and went ahead with the scrutiny of the other nomination forms till 6.30 p.m. on that day. However, till the end of the day, the appellant could not produce valid certificate duly singed by the authorities and therefore, the Election Returning Officer invalidated the nomination form of the appellant in the absence of any evidence in support of his claim of a voter from the electoral roll of Ward No.45, rejected the nomination form of the appellant. Thus, the candidature of the appellant from Ward No.42 was cancelled. Aggrieved by the said rejection of nomination form, the appellant filed Election Petition No.1 of 2007 before the Court of Small Causes, Pune, objecting the process of election and the results of the election of Ward No.42. Respondent No.1 in LPA No.115 of 2009 is an elected Corporator candidate from Ward No.42. The Court of Small Causes, Pune, allowed the said Election petition, thereby declaring that the election of respondent No.1 from Ward No.42 is void and it was held that fresh election shall be held for Ward No.42. Being aggrieved and dissatisfied by the order of the Small Causes Court, Pune, the respondent No.1 in LPA No.115 of 2009 and the Pune Municipal Corporation filed two separate writ petitions before the learned Single Judge.

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HIGH COURT OF JUDICATURE AT BOMBAY

3. Learned counsel appearing for the appellant strenuously submitted that the learned Single Judge has erred in holding that the rejection of the nomination form of the appellant by the Election Returning Officer, was correct. He submitted that in view of the provisions of the Bombay Provincial Municipal Corporation Act, 1949 (hereinafter referred to as the said "Act") a candidate contesting election for the Municipal Corporation, is required to submit nomination form as per the prescribed Form A and in that particular format, it is not necessary for the candidate to furnish documents in respect of his residential status. However, in the present case, the appellant along with nomination form, has submitted certificate showing his name in the electoral roll of Ward No.45. However, the said certificate was not signed by any authority. Learned counsel for the appellant further submitted that if the production of such document in support of the contents of the nomination form, was not the requirement, then the Election Returning Officer could not have taken any objection about the proof of such document. Moreover, if it was not the requirement, the said document was infact irrelevant and to submit such irrelevant document, was a minor defect and it could not have been considered by the Election Returning Officer as a substantial defect in the nomination form of the appellant. Learned counsel for the appellant contended that the Election Returning Officer at the time of scrutiny was

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HIGH COURT OF JUDICATURE AT BOMBAY

supposed to have the voters list of all the Wards and from the voters list of Ward No.45, he ought to have verified the position of the appellant as a voter in Ward No.45 or not. Learned counsel submitted that infact the appellant had produced the electoral roll of Ward No.45 and yet, the Election Returning Officer insisted for the production of the certificate, which was not signed by the authority and which ought to have been signed at the time of issuing the said certificate and in the whole process, the appellant was not at fault. It is submitted that the Election Returning Officer being the quasi-judicial authority, could not have demanded the proof of such document.

4. In order to buttress the above submissions, learned counsel for the appellant placed reliance on the Election Rules in Schedule D Chapter I of the said Act, wherein the process of conducting Municipal Elections has been laid down. Learned counsel also placed reliance on Rule 9 sub-rule 9, where the duty of the Returning Officer at the time of scrutiny of the nomination forms is mentioned. He submitted that sub-rule 9 is required to be read along with sub-rule 10 of Rule 9. Learned counsel for the appellant submitted that Rule 10 specifically provides that the Returning Officer shall not reject any nomination paper on the ground of any defect which is not of substantial nature.

5. Learned counsel for the appellant has placed reliance on

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HIGH COURT OF JUDICATURE AT BOMBAY

the decision of the Supreme Court in the case of ***Vidhyadhar V/s. Mankikrao and Anr***.[1] wherein it was held that if the party has not entered into a witness box and the evidence which is given by the witness is not denied by the opposite party by cross-examining him as a witness, then adverse inference is to be drawn against the party not entering the witness box. Learned counsel for the appellant pointed out that in the instant case, the Election Returning Officer did not enter the witness box and therefore, the evidence tendered by the witness i.e. appellant that he produced the electoral roll of Ward No.45 is not denied and the said fact could not have been accepted by the learned Single Judge. Learned counsel further placed reliance on the decision of the Supreme Court in the case of ***Ram Bhual V/s. Ambika Singh***, [2] where the defect of minor nature and not of substantial character, then the rejection of form is held to be illegal. Learned counsel further placed reliance in the case of ***Santosh Yadav V/s. Narender Singh***,[3] wherein it was held that once the Tribunal has arrived at a conclusion that the election is to be set aside, then the learned Single Judge could not have set aside the said order.

6. The learned counsel for the appellant strenuously contended that the learned Single Judge has wrongly relied upon and

1 AIR 1999 SC 1441
2 AIR 2005 SC 4233
3 AIR 2002 SC 241

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HIGH COURT OF JUDICATURE AT BOMBAY

referred to the provisions of the Mumbai Municipal Corporation Act, 1888, instead of the B.P.M.C.Act, 1949, as the election to the Pune Municipal Corporation is governed by the provisions of the latter Act. Learned counsel for the appellant, on the aspect whether the rejection of the nomination form is on the basis of minor defect or substantial defect, relied on a decision of the Supreme Court in the case of ***Harikrishna Lal V/s. Babulal Marandi***. [1] He also placed reliance on the decision of the Supreme Court in the case of ***Uttamrao Shivdas Jankar V/s. Ranjitsinh Vijaysinh Mohite Patil***,[2] wherein the variance in the signature of the proposer was objected and it was held that the Returning Officer is not required to held such detailed enquiry at the time of examination of nomination papers and to find out whether the signature of the candidate is genuine or not.

7. Per contra, learned counsel for the respondents have submitted that the Election Returning Officer has power to verify the nomination papers submitted by the candidates as he was authorized to so and that he rightly took an objection to the certificate which was produced by the appellant as the same was unsigned. It is argued by the learned counsel for the respondents that the Election Returning Officer did not reject the nomination form of the appellant at the first instance, but he

1 (2003) 8 SCC 613
2 (2009) 13 SCC 131

::: Downloaded on - 20/05/2019 13:18:24 :::

HIGH COURT OF JUDICATURE AT BOMBAY

took an objection and gave time to the appellant to remove the objection. However, the appellant could not produce the certificate duly signed by the concerned authority and could not reach within the stipulated time. Learned counsel for the respondents submitted that the scrutiny of the nomination papers was scheduled on a particular date and was to be completed on 16-01-2007 itself before the stipulated time. Learned counsel further submitted that on that day before the Election Returning Officer, nearly 120 nomination forms were there for the scrutiny as the said Returning Officer was in-charge of 11 Wards. Learned counsel further contended that the learned Single Judge has appreciated the matter from its proper perspective and has rightly allowed the petitions by setting aside the order of the Small Causes Court, Pune. Rule 9 sub-rule 9 infact casts duty on the Election Returning Officer to make proper and correct scrutiny of all the nomination forms and if the Election Returning Officer fails to do so, then the consequences would have been grave. The Election Returning Officer on the relevant day, while verifying the nomination forms, was performing his obligation under the Act and this Act of the Returning Officer cannot be said to be contrary to the law and it was not necessary for him to satisfy himself by finding out as to whether the appellant is a resident of a particular ward. Learned counsel for the respondent submitted that if Election Returning Officer would not have

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HIGH COURT OF JUDICATURE AT BOMBAY

taken such objection, then it would have amounted to improper acceptance of the nomination form. In support of the above submissions, learned counsel placed reliance in the case of ***Mathura Prasad V/s. Ajeem Khan.***[1] Relying on the said ruling, it is pointed out that it was laid down that it was not the duty of the Returning Officer to look through the entire electoral roll of a particular Ward, even it would have been produced before him to find out and to fix the identity of the candidate and it is not the requirement of the law.

8. In the present case, the question arises for consideration is as to whether the rejection of nomination for want of proof of name in the electoral roll, is of a minor defect or of a substantial nature. The Returning Officer has a power to examine the nomination papers of each candidate under Rule 9 sub-rule 9 of the Act, which reads as under : -

> (9) On the date fixed for the scrutiny of the nominations the Returning Officer shall examine the nomination papers and shall decide objection if any, and may, either on such objections or on his own motion, after such summary enquiry as he thinks necessary, reject any nomination paper on any of the following grounds, namely -
>
> (a) that the candidate is not qualified to be elected or is disqualified under the Act;
>
> (b) that the proposer or seconder is not duly qualified to nominate the candidate;
>
> (c) that there is failure or comply with any provision of the Act or rules made thereunder or any order of the State Election Commission;
>
> (d) that the identity of the candidate or, as the case

1 AIR 1990 SC 2274

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HIGH COURT OF JUDICATURE AT BOMBAY

> may be, of the proposer or seconder, can not be established with their electoral number as specified in the nomination paper;
>
> (e) that the signature of the candidate or as the case may be, the proposer or seconder, on the nomination paper, is not genuine or that the same is obtained by fraud.
>
> (f) if a candidate has filed more than one nomination papers, nothing contained in clauses (c), (d) and (e) shall apply to his other nomination papers and his nomination shall not be rejected only on the ground that one of his nomination papers has been rejected under this rule.

9. Rule 10 of the Act, is also to be read along with Rule 9, which is as follows : -

> (10) The Returning Officer shall not reject any nomination paper on the ground of any defect which is not of substantial nature.

10. The purpose of the scrutiny is obviously to maintain the purity in the election process and at least precaution is to be taken as wrong candidature should not be allowed to go on. If the Returning Officer without proper verification accepts the nomination form and if any election dispute is raised, then the election of elected candidate may be set aside if it was found that his nomination form was wrongly accepted. The Returning Officer is required to hold summary enquiry at the time of acceptance of nomination form. The nomination form is required to be submitted as per the prescribed format i.e. Form A prescribed under Chapter I Rule 9 of the Act. In the said form, it is obligatory on the part of

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HIGH COURT OF JUDICATURE AT BOMBAY

the candidate to fill up particular clause, which reads as follows :

> "Ward in the election roll of which the name of the candidate is included".

11. This is the crucial clause in the present matter. The appellant admittedly has filed his candidature for Ward No.42. However, he is the resident of Ward No.45. He claimed that he is resident and voter from Ward No.45. Naturally, while filing up this particular clause, the appellant mentioned his voter number of Ward No.45. In the present case, the appellant was contesting election from the Ward of which he was not a voter and respondent No.3 Election Returning Officer, was in-charge of total 11 Wards, including Ward No.42 and hence, nomination papers of all the candidates who were contesting elections from all these 11 wards were before the Returning Officer. However, he was not in charge of Ward No.45 of which the appellant claimed to be a voter. The respondent No.3 did not have complete electoral rolls of Ward No.45 with him, though electoral rolls of all the 11 wards was with at the time of scrutiny for the purpose of verification of the nomination papers. The Election Returning Officer at the time of scrutinizing all these nomination forms and particularly, the nomination form presented by the appellant, found that the certificate issued by the Corporation about the voters number and the Ward Number of the appellant was not signed. Initially, it was unsigned

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HIGH COURT OF JUDICATURE AT BOMBAY

copy, therefore, the ERO asked him to produce authenticated copy or to produce any other evidence. As per the requirement of Clause 9, it was obligatory on the part of the candidate to disclose the electoral roll wherein the name of the candidate is included and thus, the appellant has mentioned his Ward as Ward No.45. The appellant rushed to the authority to procure that certificate signed. However, as per the record, the appellant could not produce the same in time and therefore, his nomination paper was treated as invalidated and was rejected.

12. Undoubtedly, the Election Returning Officer is empowered to make scrutiny and examine nomination papers and it was obligatory on him to make proper and careful scrutiny of all the nomination papers. It was his duty to be vigilant and careful to see that there should not be any wrong candidature in the election and therefore, the Election Returning Officer, in our view, has rightly *suo motu* and on his own motion, though, there was no objection from any other candidate, pointed out the defect in the document submitted by the appellant. If the appellant would have been voter of Ward No.42 or of any other ward of which the electoral rolls were available with the ERO, then the appellant would have been in a position to show his name in the electoral roll of that particular ward. However, the appellant not being the voter of Ward No.42 and being the voter of Ward No.45, the ERO rightly asked the appellant to satisfy him on

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HIGH COURT OF JUDICATURE AT BOMBAY

the point that he is a voter of Ward No.45. As per Rule 9, it is the duty of the Returning Officer to satisfy himself about the defect in the nomination form and the candidate is required to satisfy the Returning Officer by producing appropriate evidence that he is a voter of Ward No.45. It is required to be noted that the Returning Officer gave sufficient time to the appellant to produce such signed certificate, but the appellant was failed to produce the same within the prescribed time. The appellant chose to rely on that certificate which was unsigned and therefore, it was the duty of the Officer to see that the said certificate should have been signed and should be authenticated. Whether the defect in a particular case is minor or substantial is a question which is to be decided in the facts and circumstances of each case. On this aspect, learned counsel for the appellant has relied on the decision of the Supreme Court in the case of Harikrishna Lal (Supra), wherein different situations were discussed in respect of the nomination forms or acceptance of the nomination forms on the point of minor and substantial defect, by the Supreme Court. There may be a defect in the name of the candidate, may be a defect in the signature of the proposer or seconder or may be omission in the name. However, the situation in all these cases are distinguishable from the present case because of the peculiar facts as quoted earlier, that the appellant was from the other ward and the Election Returning Officer was

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HIGH COURT OF JUDICATURE AT BOMBAY

not in charge of Ward No.45, where the name of the appellant is appearing as a voter. We make it clear that factually or in reality, the name of the appellant appearing in the voters list of Ward No.45, is not in dispute. Taking objection does not mean that a particular fact is denied. The objection was taken in respect of the authenticity of the documents produced by the appellant and so also, the proof in respect of the relevant clause mentioned in the nomination form, was legally required by the ERO. Whether the Election Returning Officer went overboard by insisting for the signed document, can be said only by applying the test of reasonable due care. The demand of such document was made to satisfy his conscious as there was no other proof to show that the appellant was a voter of Ward No.45. The Election Returning Officer was reasonably vigilant in asking said document to the appellant and in our view, the Election Officer did not made excessive demands while performing his duties as quasi judicial authority. Learned counsel for the appellant submitted that total number of nomination papers before the said ERO for scrutiny were 128 and the time given for the scrutiny was fixed as per sub-rule 11 of Rule 9 of the Act. The election officer is bound to complete scrutiny or verification of the nomination forms within the stipulated time.

13. Considering the aforesaid provisions of the Act and the fact that the Election Returning Officer was in-charge of 11 wards and the

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HIGH COURT OF JUDICATURE AT BOMBAY

voluminous nomination forms and the electoral rolls, it was physically not possible for the Election Returning Officer to find out the name of the appellant by calling the electoral roll of Ward No.45. Learned counsel for the appellant pointed out that the place of the scrutiny of the nomination forms and the office of the Divisional Commissioner, Pune, was six kilometers away and therefore, it was physically not possible to bring electoral roll for the verification. Be that as it may, in view of the above discussion, we are of the view that the ultimate decision taken by the learned Single Judge is required to be upheld, may be on different ground. The ultimate decision taken by the learned Single Judge is accordingly upheld. We do not find any substance in the appeal, which are accordingly dismissed with no order as to costs.

(MRS.MRIDULA BHATKAR, J.) **(P.B.MAJMUDAR, J.)**

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