



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO. 280/2023

Meerabai W/o Dnyaneshwar Chatare,
Aged about 38 years, Occupation Household,
R/o Sheri (Kh), Tq. Telhara, Dist. Akola.

PETITIONER

.....VERSUS.....

1. Returning Officer to the Election/ Tahsildar,
Gram Panchayat Sheri (Bk), Tahsil Office Telhara,
Dist. Akola.
2. Nita Jayant Khandalkar, Aged Major, Occupation :
Household, R/o Sheri (Bk), Tah. Telhara, Dist. Akola.

RESPONDENTS

Shri S.D. Chopde, counsel for the petitioner.
Ms N.P. Mehta, Assistant Government Pleader for the respondent no.1.
Shri O.Y. Kashid, counsel for the respondent no.2.

CORAM : A. S. CHANDURKAR AND MRS. VRUSHALI V. JOSHI, JJ.

DATE ON WHICH ARGUMENTS WERE HEARD : AUGUST 18, 2023

DATE ON WHICH JUDGMENT IS PRONOUNCED : NOVEMBER 04, 2023

JUDGMENT (PER : A.S. CHANDURKAR, J.)

RULE. Rule made returnable forthwith and heard the learned counsel for the parties.

2. In the elections for the post of Sarpanch at Gram Panchayat Sheri (Budruk), Tahsil Telhara, District Akola, the said post was reserved for Ladies (General Category). The petitioner and the second respondent were the only contestants in the said election. Gram Panchayat Sheri (Budruk) was divided into three Wards. In Ward No.1 there were 461 voters, in Ward No.2 there were 357 voters and in Ward No 3 there were 440 voters. The

elections were held on 18.12.2022 in which 385 voters from Ward No.1 exercised their right of franchise; 317 voters exercised their right of franchise from Ward No.2; while 317 voters exercised their right of franchise from Ward No.3. It is the case of the petitioner that when the vote of 235th voter was being cast from Ward No.1 there was some defect in the Electronic Voting Machine as a result of which the said Electronic Voting Machine was required to be changed. After change in the Electronic Voting Machine, remaining voters cast their votes. The votes were counted on 20.12.2022. Though 1019 voters had cast their votes it was shown that only 1018 votes had been counted. From Ward No.1 though 385 votes were shown to have been cast, the votes counted were only 384. The result of the said election was declared by the first respondent. While the petitioner was shown to have polled 507 votes the second respondent was shown to have polled 508 votes. Three voters did not cast their votes in favour of either of the candidates. The second respondent was declared elected by a margin of one vote. An objection was raised by the petitioner before the first respondent. After re-count the results were declared and the second respondent was elected as Sarpanch. Being aggrieved the petitioner has prayed that the election of the second respondent as Sarpanch be set aside and an enquiry be held in the matter of difference in the number of votes polled and votes counted.

3. At the outset, Shri O.Y. Kashid, learned counsel appearing for the second respondent raised an objection to the maintainability of the writ petition on the ground that under Section 15 of the Maharashtra Village Panchayats Act, 1959 (for short, 'the Act of 1959') the remedy of questioning the validity of an election was available before the Civil Court. Since the petitioner was challenging the election of the second respondent, the aforesaid statutory remedy ought to be availed by the petitioner. Referring to the complaint made by the petitioner before the first respondent it was submitted that the statements made therein indicated that the petitioner was alleging conspiracy on the part of the rival group as a result of which there was a difference of one vote secured by the petitioner. In other words, it was submitted that the matter would require recording of evidence and such course was permissible only under the statutory remedy as provided. It was not the case of the petitioner that there was an error in calculating the number of votes polled. It therefore could not be said that the remedy under Section 15 of the Act of 1959 was not available to the petitioner. It was thus submitted that the writ petition as filed may not be entertained and the petitioner be relegated to the Civil Court to avail the remedy provided by Section 15 of the Act of 1959. Moreover though the elections in question were held on 18.12.2022 the grievance in this regard was raised only after counting of the votes on 20.12.2022. Hence there was no reason to exercise jurisdiction under Article 226 of the Constitution of India.

4. Shri S.D. Chopde, learned counsel for the petitioner submitted that a ground based on defect in the Electronic Voting Machine could not be raised while challenging the results declared at the election of the Sarpanch. Since no remedy to challenge an election on the ground that there was a defect in the Electronic Voting Machine was available, the petitioner has invoked the jurisdiction under Article 226 of the Constitution of India. Referring to the decision of the Division Bench in *Ashruba Yogiraj Sanap & Others Versus State of Maharashtra & Others* [2009 (2) AIR Bom R 155], it was submitted that when an issue with regard to a defect in the Electronic Voting Machine was raised there was no remedy provided under Section 15 of the Act of 1959 and this Court could entertain such challenge. There were no disputed questions raised and only the aspect of number of votes polled and the number of votes counted were required to be examined. Since the difference in the margin of votes was only one this was a fit case for this Court to examine in exercise of jurisdiction under Article 226 of the Constitution of India. The learned counsel referred to the record maintained by the Election Officer that was produced for perusal. In these facts there was no reason to require the petitioner to approach the Civil Court and exhaust the remedy under Section 15 of the Act of 1959. The relief prayed for in the present proceedings ought to be granted.

Ms N.P. Mehta, learned Assistant Government Pleader for the first respondent produced the record of the Election Officer and submitted that the entire process of polling and thereafter counting of the votes had

been undertaken by complying with the prescribed procedure. There was no illegality committed by the Election Officer and hence appropriate orders be passed by the Court.

5. At the outset, it would be apposite to refer to what has been held in *Ashruba Yogiraj Sanap* (supra) wherein a somewhat similar issue fell for consideration. In paragraph 9, it has been observed as under :-

“9.

.....

It is settled law that the right to vote is a statutory right. It is, therefore, an accepted position that the right to vote including the right to be elected are not a part of the fundamental rights guaranteed to a citizen, but are statutory rights conferred by the statute. Once an Act creates a right, provides a remedy and the mechanism for redressal of grievances including challenge to an election by way of an election petition, it will not be possible to accept as a matter of rule that this Court would interfere in the exercise of its extraordinary jurisdiction. No doubt, the jurisdiction of a civil Court u/S. 15-A would be excluded. Such a statutory bar, however, does not include exclusion of the extraordinary jurisdiction of this Court under Article 226. Courts' exercising extraordinary jurisdiction would normally bear in mind the mandate of Article 243-O of the Constitution of India. The other aspect of the matter is that remedy against the declaration of results in an election petition is by way of an election petition. Both the Constitutional provision as also statutory provision, therefore, mandate the results of any election shall not be called in question except by way of an election petition. Section 15-A further mandates that it shall be in terms of provisions of Section 15. The challenges, therefore, which can be raised in an election petition are only those as provided u/S. 15. Once the challenges are set out, it would not be open to this Court to invent new grounds of challenges for setting aside the results of an election, which have not been provided by the statute. In our

opinion, therefore, as the grounds raised in the petition do not fall within the ambit of Section 15 of the Act an election petition would not lie. Consequently, considering the clear mandate of Section 15-A, the results of an election cannot be called in question. The grievance here is defect in voting machine. Such a challenge cannot be raised in an election petition. It is, therefore, possible to visualise a rare case where this Court could still invoke its jurisdiction under Articles 226 and 227 of the Constitution of India. To what extent and in what circumstances and at what stage is a large issue, which we do not propose to answer considering the facts in the present case.”

6. Reference is also required to be made to a recent decision in *Laxmibai Versus Collector, Nanded & Others [(2020) 12 SCC 186]* wherein the scope of interference under Article 226 of the Constitution of India in the context of the provisions of Article 243-O of the Constitution of India has been considered. The proceedings therein arose from a challenge to an order of disqualification that was issued under Section 14-B of the Act of 1959 for failure to submit election expenses within the prescribed period. The Hon'ble Supreme Court examined the scope of entertaining a dispute relating to an election of a local body by the High Court in a writ petition under Article 226 of the Constitution of India. It was held that the remedy of an aggrieved person against the acceptance or rejection of nomination of a candidate was by way of an election petition. The Act of 1959 was a complete Code providing machinery for redressal of grievances pertaining to election as contained in Section 15 of the Act of 1959. Though the High Court could exercise extraordinary jurisdiction under Article 226 of the Constitution of India, such jurisdiction was discretionary in nature and may

not be exercised when an efficacious alternate remedy was available and especially in view of the restraint in terms of Article 243-O of the Constitution of India.

7. From the facts of the present case it can be seen that a dispute has arisen in view of difference of accounting for one vote which was shown to be polled when the total number of votes polled are compared with the votes counted. In Ward No.1 votes polled were 385 while those counted were 384. It is on this basis that the challenge has been raised to the election of the second respondent as Sarpanch. In the writ petition it has been specifically pleaded by the petitioner that in view of the defect in the Electronic Voting Machine, the result of the election was materially affected. The relevant pleadings in Ground-I read as under :-

“I. There is a difference of one vote and the petitioner has also lost the election by one vote. The petitioner can not be made to suffer due to fault in electronic voting machine. In the present case the result of election is materially affected due to fault in electronic voting machine. It is therefore, in the above said peculiar facts and circumstances on record, the result of election in the present case vitiated needs to be quashed and set aside by this Hon’ble Court.”

(emphasis supplied)

8. It is one thing to attribute defeat in the election to a fault in the Electronic Voting Machine and it is another thing to contend that the result of the election was materially affected resulting in loss in the election. It is well settled that for bringing home the challenge to an election on the

ground that the result was materially affected would require a finding to be recorded on the basis of relevant material that for reasons urged, the result of the election was materially affected. In other words, unless evidence is recorded and witnesses are examined who could vouch the fact that in view of the defect in the Electronic Voting Machine the result of the election was materially affected, it would not be possible to record any conclusive finding in this regard. Merely stating that there was a defect in the Electronic Voting Machine which also would be require to be proved would not be sufficient to conclude that the result of the election was vitiated on this count. It is thus clear that on the plain statement that there was a difference of one vote in the total number of votes polled and those counted would not be sufficient to unseat the second respondent notwithstanding the fact that she was elected by margin of one vote. Unless the Court is in a position to record an unequivocal finding that but for the defect in the Electronic Voting Machine the petitioner would have been elected to the post of Sarpanch, we do not find that any relief can be granted to the petitioner. Even if it is accepted that an exceptional case can be considered under Article 226 of the Constitution of India in the light of the law laid down in *Ashruba Yogiraj Sanap & Others* (supra) notwithstanding the fact that the ground urged is one not provided for by Section 15(5) of the Act of 1959, we do not find that there is sufficient unimpeachable material on record to hold in favour of the petitioner.

9. For aforesaid reasons, we do not find that the petitioner can be granted the relief sought by her. The writ petition is thus dismissed. Rule stands discharged with no order as to costs.

(MRS. VRUSHALI V. JOSHI, J.)

(A.S. CHANDURKAR, J.)

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