IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L.) NO. 33675 OF 2024

Aashish Kishor Gadkari .. Petitioner

Versus

1. The Election Commission of India
2. The Returning Officer ...Respondents

Mr. Arshad Shaikh, Senior Advocate *a/w. Mr. Prashant Trivedi i/b Ms. Khushboo Jain, for Petitioner.*
Mr. Akshay Shinde, *for Respondents.*
Mr. Himanshu Takke, AGP, *for State.*

CORAM : ARIF S. DOCTOR &
SOMASEKHAR SUNDARESAN, JJ.

Date : November 6, 2024
(Vacation Court)

Judgement (PC):

1. Rule. By consent of the parties, rule made returnable forthwith, and taken up for final hearing and disposal.

Factual Background:

2. This petition challenges the rejection of a nomination filed by the Petitioner to contest as a candidate in the forthcoming elections of the Maharashtra Legislative Assembly in 'the 173 Chembur Constituency'. The nomination form and the supporting affidavit along with requisite documents are said to have been filed by the Petitioner, with deposit of the requisite fees, with the Returning Officer communicating the

objections and deficiencies which needed to be rectified. Scrutiny was scheduled for 11:00 a.m. on October 30, 2024.

3. According to the Petitioner, the Returning Officer did not allow the Petitioner to rectify the defects listed in the list of objections raised upon scrutiny thereof, which essentially was that the Petitioner had not been administered the oath. According to him, the non-administration of the oath was the only objection raised and this was not the fault of the Petitioner since he was available at the designated office for filing of nomination.

4. On October 30, 2024, the Petitioner contends, the nomination form of the Petitioner was rejected on the ground that the nomination form had not been signed by the proposer, although the name of the proposer had been stated in the form. The Petitioner states that he was under the bona fide belief that the name of the proposer ought to be mentioned and his signature was not a pre-condition. The Petitioner alleges that not having been given a reminder and not allowing him to rectify the defect at 11:00 a.m. on October 30, 2024, has resulted in injustice being meted out to him and it has vitiated the impartial administration of the electoral process.

5. According to the Petitioner, if two views are possible, a liberal view should be taken, and the Petitioner ought to have been allowed to rectify his defects. Consequently, the Petitioner's case is that the Returning Officer had arbitrarily rejected the nomination and this Court, in exercise of its jurisdiction under Article 226 ought to interfere and permit the Petitioner's name to be included in the ballot paper since there is significant time before the actual conduct of the election scheduled for November 20, 2024.

Preliminary Objection:

6. When the matter was called out, Mr. Akshay Shinde, Learned Counsel for the Respondents and Mr. Himanshu Takke, the Learned AGP raised a preliminary objection to submit that no writ petition invoking Article 226 of the Constitution of India can at all be entertained in connection with rejection of a nomination prior to the election. The only recourse for a candidate who is aggrieved by the rejection of a nomination would be to file an Election Petition subsequent to the conduct of the elections. Consequently, according to the Respondents, the Writ Court cannot even get into the facts of the case.

7. In support of the aforesaid contentions, they would submit that the

law is clear right from the case of *N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency & Ors.*[1] (***Ponnuswami***) and thereafter in *Mohinder Singh Gill & Anr. Vs. The Chief Election Commissioner, New Delhi & Ors.*[2] (***MS Gill***). More importantly they submitted that a decision of the Full Bench of this Court in *Karmaveer Tulshiram Autade & 4 Ors. Vs. The State Election Commission & 9 Ors.*[3] (***Full Bench***), which dealt with two writ petitions to reconcile conflicting views of earlier benches of this Court, had dealt with the law on the scope of intervention by writ courts under Article 226 of the Constitution of India, and has held that Article 243-O of the Constitution of India constitutes a bar on entertaining writ petitions under Article 226 of the Constitution challenging the rejection of nomination in an election.

8. In contrast, Mr. Arshad Shaikh, the Learned Senior Counsel appearing on behalf of the Petitioner submitted that it is fallacy to contend that writ courts are totally powerless with regard to consideration of a challenge to arbitrary conduct on the part of returning officers, and that the only recourse would be to an election petition presented after the elections. According to him, ***Ponnuswami*** had been decided in the infancy of the Republic and there has been a sea-change in

1 *AIR 1952 SCC 64*
2 *(1978) 1 scc 405*
3 *Civil Writ Petition (St.) No. 26 of 2021 dated January 13, 2021*

the approach of the Supreme Court to interpretation of the Constitution and the approach to fundamental rights being denied. Mr. Shaikh then placed reliance upon a decision of a Division Bench of this Court in *Suleman Fakruddin Ansari Vs. S.B. Kulkarni, I.A.S., Municipal Commissioner, Poona and another*[4] (***Suleman***) which he pointed out was an excellent example of how precisely the writ courts are not powerless to deal with patently arbitrary conduct on the part of returning officers, and how rejected candidates are not remedies outside election petitions. Mr. Shaikh would submit that it is inaccurate to state that the returning officers would have untrammeled power outside the scope of judicial review of their conduct by writ courts exercising jurisdiction under Article 226 of the Constitution.

9. It was pointed out that having considered ***Ponnuswami***, the Calcutta High Court had considered the scope of writ courts' jurisdiction in *Narendra Nath Chatterjee vs Commissioners Of Bally Municipality*[5]. In ***Suleman,*** the Bombay High Court noticed that the Calcutta High Court had ruled that the writ court is entitled to interfere even at a pre-election stage. In a nutshell, it was held in ***Suleman*** that enormous time and money that would be wasted in disrupting an election after the poll, would be saved if the High Court is approached well in advance and the

4 *AIR 1963 BOMBAY 183*
5 *AIR 1962 Cal. 53*

matter can be heard and disposed of before polling is due to take place, particularly when there is an evident error apparent on the face of the record.

10. Mr. Shaikh then submitted that the decision of the ***Full Bench*** was in relation to elections to the Panchayat where a tribunal would be available as an alternate efficacious remedy whereas in connection with elections to the State Legislative Assembly, there is no Tribunal as envisaged in ***Ponnuswami.*** He took pains to point out that the judgement of the Division Bench of this Court in the case of ***Suleman*** had not been brought to the attention of the ***Full Bench***.

Analysis and Findings:

11. We have given our anxious consideration to the submissions made by the Learned Counsel for the parties. Suffice it to say that the ***Full Bench*** of this Court has indeed considered the march of the law, indeed in the context of Panchayat elections, to hold that writ courts are barred from entertaining petitions under Article 226 of the Constitution of India, by reason of Article 243-O, which contains a *non-obstante* provision. The ***Full Bench*** has declared that two decisions of this Court holding to the contrary did not lay down correct law. The elections involved in the matter at hand are elections to the State Legislative Assembly, which is

governed to Article 329 of the Constitution, the provisions of which are in *pari materia* and near-identical to the provisions of Article 243-O insofar as they contain a bar on Courts interfering in electoral matters. It has been held that such bar would include the exercise of jurisdiction under Article 226 of the Constitution.

12. It may be noted that the ***Full Bench*** decision was rendered on January 13, 2021. It may be noted that a three-judge Bench of the Supreme Court, in *State of Goa & anr. v. Fouziya Imtiaz Shaikh & anr.*[6] (***Fouziya***), also dealing with Panchayat and Municipal elections, has rendered a detailed judgment on the inter-play between the scope for writ petitions under Article 226 and election petitions, interpreting the same provisions stipulating a bar on interference by courts in electoral matters. The law on the subject has been summarized in ***Fouziya*** in the following terms :

> ***68.*** *A conspectus of the aforesaid judgments in the context of municipal elections would yield the following results:*
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> ***68.1.*** *Under Article 243-ZG(b), no election to any municipality can be called in question except by an election petition presented to a Tribunal as is provided by or under any law made by the legislature of a State. This would mean that from the date of notification of the election till the date of the declaration of result a judicial hands-off is mandated by the non obstante clause contained in Article 243-ZG debarring the writ court under Articles 226 and 227 from interfering once the election*

[6] (2021) 8 SCC 401

process has begun until it is over. The constitutional bar operates only during this period. It is therefore a matter of discretion exercisable by a writ court as to whether an interference is called for when the electoral process is "imminent" i.e the notification for elections is yet to be announced.

68.2. If, however, the assistance of a writ court is required in sub serving the progress of the election and facilitating its completion, the writ court may issue orders provided that the election process, once begun, cannot be postponed or protracted in any manner.

68.3. The non obstante clause contained in Article 243-ZG does not operate as a bar after the Election Tribunal decides an election dispute before it. Thus, the jurisdiction of the High Courts under Articles 226 and 227 and that of the Supreme Court under Article 136 of the Constitution of India is not affected as the non obstante clause in Article 243-ZG operates only during the process of election.

68.4. Under Article 243-ZA(1), the SEC is in overall charge of the superintendence, direction and control of the preparation of electoral rolls, and the conduct of all municipal elections. If there is a constitutional or statutory infraction by any authority including the State Government either before or during the election process, the SEC by virtue of its power under Article 243-ZA(1) can set right such infraction. For this purpose, it can direct the State Government or other authority to follow the Constitution or legislative enactment or direct such authority to correct an order which infracts the constitutional or statutory mandate. For this purpose, it can also approach a writ court to issue necessary directions in this behalf. It is entirely up to the SEC to set the election process in motion or, in cases where a constitutional or statutory provision is not followed or infracted, to postpone the election process until such illegal action is remedied. This the SEC will do taking into account the constitutional mandate of holding elections before the term of a municipality or Municipal Council is over. In extraordinary cases, the SEC may conduct elections after such term is over, only for good reason.

68.5. Judicial review of a State Election Commission's order is available on grounds of review of administrative orders. Here again, the writ court must adopt a hands-off policy while the election process is on and

interfere either before the process commences or after such process is completed unless interfering with such order sub serves and facilitates the progress of the election.

68.6. Article 243-ZA(2) makes it clear that the law made by the legislature of a State, making provision with respect to matters relating to or in connection with elections to municipalities, is subject to the provisions of the Constitution, and in particular Article 243-T, which deals with reservation of seats.

68.7. The bar contained in Article 243-ZG(a) mandates that there be a judicial hands-off of the writ court or any court in questioning the validity of any law relating to delimitation of constituency or allotment of seats to such constituency made or purporting to be made under Article 243-ZA. This is by virtue of the non obstante clause contained in Article 243-ZG. The statutory provisions dealing with delimitation and allotment of seats cannot therefore be questioned in any court. However, orders made under such statutory provisions can be questioned in courts provided the statute concerned does not give such orders the status of a statutory provision.

68.8. Any challenge to orders relating to delimitation or allotment of seats including preparation of electoral rolls, not being part of the election process as delineated above, can also be challenged in the manner provided by the statutory provisions dealing with delimitation of constituencies and allotment of seats to such constituencies.

68.9. The constitutional bar of Article 243-ZG(a) applies only to courts and not the State Election Commission, which is to supervise, direct and control preparation of electoral rolls and conduct elections to municipalities.

68.10. The result of this position is that it is the duty of the SEC to countermand illegal orders made by any authority including the State Government which delimit constituencies or allot seats to such constituencies, as is provided in Proposition 68.4 above. This may be done by the SEC either before or during the electoral process, bearing in mind its constitutional duty as delineated in the said proposition.

[Emphasis Supplied]

13. In particular, the declaration of the law in Paragraph 68.5 of ***Fouziya*** (extracted above) clearly lays down the principle that writ courts must adopt a hands-off policy when the election process is on, but may interfere either before the process commences or after such process is completed, unless interference sub-serves and facilitates the progress of the election. Therefore, to put in a nutshell, the law as it stands, is that it cannot be stated as an absolute proposition that the writ courts are totally denuded of any jurisdiction whatsoever under Article 226, when there is a challenge made before the electoral process or after completion of the electoral process. Likewise, it must be noticed that an interference is warranted even when an election process is on, provided the interference subserves and facilitates the progress of election, rather than result in vitiating the election. Conversely, ***Fouziya*** would point to the position that a writ court exercising jurisdiction under Article 226 would have a narrow scope of interference even during the electoral process, insofar as it meets the purpose of progressing and facilitate the election.

14. Put differently, if administrative actions of returning officers and the State Election Commission vitiates the progress of the elections, the writ court may indeed consider whether to formulate an appropriate intervention in accordance with these principles. Therefore, the review of facts necessary to arrive at such a view would be necessary since that

would entail examination of the existence of a jurisdictional fact.

15. Indeed, the decisions of the ***Full Bench*** as well as the three judge Bench of the Supreme Court in ***Fouziya*** relate to Panchayat elections. However, considering the provisions of Article 329 are near-identical to the provisions of Article 243-O, it would only be appropriate to apply the same principles in connection with the elections to the State Legislative Assembly as well. Consequently, the writ court must be very careful to ensure that outside such narrow scope, no intervention is made that interferes with the progress of the election.

Application to Facts:

16. In the facts of this case, the cause of action as pleaded by the Petitioner, arose anywhere between October 28, 2024 and October 30, 2024. The Petition has been filed on November 5, 2024, one day after the final list of candidates was published on November 4, 2024. The interests of such candidates to contest against one another has already been crystallized. Any intervention after this stage would disturb their rights, and they too would have to be heard. All of this would vitiate the smooth progress of the election process that is already underway, and the principles of intervention laid out in ***Fouziya*** would not be met.

17. It is a matter of record that examination of the nomination was scheduled for 11:00 a.m. on October 30, 2024. Rectification of the objections pointed out by the Returning Officer would therefore have to be completed prior to 11:00 a.m. on October 30, 2024. There is no scope for giving any discretion to the Returning Officer to go beyond such deadline and enable parties to have the ability to supplement and continue with rectifications even after such deadline. It is a matter of public record that the time at which the scrutiny would commence was well known in the schedule published by the Election Commission.

18. The oath which had to be administered had not been completed although a deadline of 12:00 noon on October 29, 2024 was indeed communicated to the Petitioner, as is seen from the checklist of objections given to the Petitioner by the Returning Officer. Besides, in the facts of this case, Mr. Shaikh has fairly stated that the proposer had not signed the nomination form since the Petitioner was under the *bona fide* belief that naming the proposer was adequate compliance.

19. In view of the foregoing, it is evident that even if one were to take a view that the writ court could exercise the limited jurisdiction that it has, in line with ***Fouziya*** and ***Suleman***, in the facts of the instant case, the jurisdictional facts of exercise of such jurisdiction does not exist. A

nomination that is not even signed by the proposer could well be regarded as being no nomination at all. The time deadline by which the oath had to be administered had evidently not been met. In an election process, time as to performance of the activities stipulated in the schedule is of the essence. If there is any administrative decision that vitiates the progress of the process, a writ court may intervene, but in the instant case, in view of the facts involved, no case has been made out for intervention since not only was the oath not administered within the stipulated time, but also, the nomination form itself is not signed by the proposer.

20. Consequently, in our opinion, this is not a fit case for any consideration by us to effect any intervention within the scope of powers available in exercise of powers under Article 226 of the Constitution.

21. Consequently, rule is discharged and the writ petition is disposed of with no intervention being made.

22. We make it clear that apart from the discussion contained above on whether we ought to consider any intervention, we have not intended to express any opinion on or pronounce upon any issue including any issue of fact. All contentions on merits are expressly kept open and the

Petitioner is at liberty to pursue such remedies as he may be advised as being available in law.

23. This order will be digitally signed by the Private Secretary/Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

[SOMASEKHAR SUNDARESAN, J.] **[ARIF S. DOCTOR, J.]**

Shraddha