

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****SPECIAL CIVIL APPLICATION NO. 8455 of 2016**

PATEL TUSHARBHAI DINESHBHAI....Petitioner(s)

Versus

STATE ELECTION COMMISSION &amp; 4....Respondent(s)

Appearance:

MR VC VAGHELA, ADVOCATE for the Petitioner(s) No. 1

MR HS SONI, AGP for the Respondent(s) No. 2

DS AFF.NOT FILED (N) for the Respondent(s) No. 2 - 5

MS ROOPAL R PATEL, ADVOCATE for the Respondent(s) No. 1

**CORAM: HONOURABLE MR.JUSTICE S.R.BRAHMBHATT  
and  
HONOURABLE MR.JUSTICE A.Y. KOGJE****Date : 08/06/2016****ORAL ORDER (PER : HONOURABLE MR.JUSTICE S.R.BRAHMBHATT)**

Heard learned Counsel for the parties.

2. The petitioner, who happens to be Up-sarpanch of Koidam Gram Panchayat, has approached this Court by way of this petition with following prayers:-

"A. Your Lordships may be pleased to admit and allow this petition;

B. Your Lordships may be pleased to issue writ of mandamus or writ in the nature of mandamus or any other appropriate writ order or direction quashing and setting aside the notification dated 23/5/2016 passed by the respondent No.3 declaring the election of sarpanch of village Koidam in Virpur taluka of Mahisagar district.

C. Your Lordships may be pleased to issue writ of prohibition or writ in the nature of prohibition prohibiting the respondent No.3 and 4 from further proceeding with the election of Sarpanch of village Koidam.

D. Pending admission and final disposal of this petition Your Lordships may be pleased to stay the execution, implementation and operation of the notification dated 23/5/2016 passed by the respondent No.3 declaring the election of sarpanch of village Koidam in Virpur taluka of Mahisagar district as well as further be pleased to restrain the resp.3 and 4 from proceeding with the election program of Sarpanch of village Koidam.

E. Any other and further relief/s that may be deem, just and proper may kindly granted in the interest of justice."

3. Thus, what is essentially challenged by way of this petition is notification dated 23.05.2016 issued by the respondent No.3 declaring election to the post of Sarpanch of village Koidam in Virpur taluka of Mahisagar district on the ground that the same is contrary to the mandate of the State Election Commission and is also contrary to the provisions of the Gujarat Panchayats Act, 1993 (hereinafter to be referred to as "the Panchayats Act" for the sake of brevity) and hence, the same is

required to be quashed and set aside.

4. Facts in brief leading to filing of the present petition as could be gathered from the memo of the petition would indicate that the petitioner is resident of village Koidam and he was elected as Upa-sarpanch of Koidam Gram Panchayat on 22.01.2012. The election to Koidam Gram Panchayat was held on 29.12.2011. The first meeting was held on 22.01.2012, wherein the petitioner was elected as Upa-sarpanch of the village. The said Gram Panchayat's term is thus expiring on 21.01.2017.

4.1 The post of Sarpanch of village Koidam was reserved for general woman candidate and one lady was elected as Sarpanch of Koidam Gram Panchayat. Thereafter, election of District Panchayat of Mahisagar district was held on 29.11.2012 and the Sarpanch of Koidam Gram Panchayat Smt.Jamnaben Bariya contested for the seat in the District Panchayat as delegate from Koidam Gram Panchayat and got elected and she resigned from the post of Sarpanch on 09.12.2015 and on her resignation, the petitioner was given charge of the post of Sarpanch as he was Upa-sarpanch available on 02.01.2016. Resignation of Sarpanch Smt.Jamnaben Bariya came to be accepted by Taluka Panchayat, Virpur vide its resolution No.7 dated 21.03.2016, which in turn was forwarded to the Collector, Mahisagar district on

18.04.2016.

4.2 The State Election Commission vide notification dated 03.05.2016 directed all the District Collectors, who happen to be Election Officers for all the districts in the State, to declare election of members of the Panchayats, Sarpanch of Panchayats, where vacancy had arisen, but not to declare the election of Sarpanch or member whose vacancy has occurred but the remaining term is less than a year. On account of the provisions of Section 61 of the Panchayats Act, vacancy of Sarpanch in village Koidam could not have been filled in in view of the fact that the term of the Gram Panchayat was expiring within the stipulated period of 12 months as mentioned in the said Section, which stood amended. The respondents Nos.2 and 3 are said to have issued notification dated 03.05.2016 in violation of the provisions of Section 61 and being aggrieved and dissatisfied with the same, the present petition is preferred for the reasons stated therein.

5. Learned Counsel appearing for the petitioner contended that as per the provisions of Section 54 of the Panchayats Act, the resignation of Sarpanch is to take effect only from its acceptance by the competent authority and in the instant case, as it is submitted by Counsel for the petitioner, the then Sarpanch Ms.Bariya

tendered her resignation only on 03.12.2015 and the same was accepted by the competent authority, i.e. Taluka Panchayat of Virpur on 21.03.2016. Therefore, the vacancy for the post of Sarpanch could be said to have occurred only from the date of acceptance of resignation, which happened to be 21.03.2016 and as the Panchayat's term is only up to 21.01.2017, the same could not be said to be filled in light of the provisions of Section 61 of the Panchayats Act. The period from the date of occurrence of vacancy and the date on which the term of the Panchayat being expiring being less than 12 months as mentioned, attempt on the part of the respondent No.3 and other respondents in filling up the post of Sarpanch by way of election is contrary to the provisions of law and therefore, is required to be quashed and set aside.

6. Learned Counsel for the petitioner also invited Court's attention to the mandate issued by the State Election Commission, typed copy whereof is produced at page No.26A dated 03.05.2016 and he led emphasis upon para-3 in the said communication in which it is mentioned that as per the amendment in Section 61 of the Panchayats Act, election to the post of Sarpanch or member is not to be held where the term of the Panchayat is expiring within a period of one year. Relying upon this communication, it was urged by Counsel for the petitioner

that the respondent No.3 acted contrary to the mandate issued by the State Election Commission and as he has acted without jurisdiction and authority, his action is required to be declared as such and deserves to be quashed and set aside.

7. Learned Counsel appearing for the petitioner further contended that the provisions of Section 29 of the Panchayats Act, which restrains the member from holding membership in two Panchayats also cannot be pressed into service as is sought to be pressed in to service on behalf of the respondents to support their action. Plain and simple reading of the entire Section would indicate that the occurrence of vacancy cannot be said to be automatic, as provisions of Section 29, with special emphasis upon sub-section (3) of the said Section, would indicate that it is a volition envisaged in the member so elected or chosen into other Panchayat to decide as to which Panchayat he would like to continue with and he has to communicate his decision in respect thereof to the competent authority and on failure thereof, the competent authority is empowered to declare the seat vacant. If this provision is read in juxtaposition with provisions of Section 54, one would clearly be persuaded to hold that the vacancy so far as the post of Sarpanch in this Panchayat is concerned,

cannot be said to have occurred when the then Sarpanch Ms.Bariya got elected in District Panchayat.

8. Learned Counsel appearing for respondent No.1 contended that close perusal of the provisions of 243(O) would persuade this Court to non-suit the petitioner as the petition cannot be said to be maintainable in light of the aforesaid provisions. Without prejudice to the aforesaid contention, she further submitted that close perusal of the provisions of Section 29 and its real interpretation would persuade this Court to hold that the vacancy cannot be said to have occurred only when the resignation was tendered and accepted, but it can well be said that the vacancy had occurred when the then Sarpanch Ms.Bariya got elected in the District Panchayat and therefore, the vacancy cannot be said to have occurred within 12 months from the date when Panchayat's term is getting over.

9. It was contended on behalf of respondent No.1 that the embargo embedded in Section 61 would not deter the respondents from continuing with the procedure as close reading thereof would also indicate that the embargo is on occurrence of vacancy and the expiry of term. In the instant case, provisions of Section 29 read with Sections 54 and 61 would clearly indicate that there exists no case on the part of the petitioner for

maintaining this petition and therefore, the same is required to be dismissed.

10. The Court has perused the petition, annexures and heard Counsel for the parties. Before advertng to the rival contentions of the Counsel, it would be most appropriate to set out a few indisputable aspects emerging therefrom which are required to be listed as under, viz.:-

I. The elections to the Gram Panchayts were held in the year 2012 and the first meeting of the Gram Panchayat was held on 22.01.2012. Thus, in accordance with law, the term of the Gram Panchayat is admittedly coming to an end on 21.01.2017.

II. The post of Sarpanch in village Koidam, i.e. village in question is reserved for general woman candidate and in fact, one Smt.Jamnaben Bariya was elected as Sarpanch on that post.

III. The election to District Panchayat, Mahisagar district was held on 29.11.2012. The said election was contested by then Sarpanch Smt.Jamnaben Bariya as delegate from Koidam Gram Panchayat and she was



elected to that Panchayat. Thus, one can safely conclude that there was clear vacancy of the then Sarpanch Smt.Jamnaben Bariya, being elected as member of Mahisagar District Panchayat in the election which was held on 29.11.2012.

IV. The resignation of the Sarpanch from the post was tendered on 09.12.2015, which was accepted in March 2016.

V. The present petitioner was given charge of the post in his capacity as Upa-sarpanch thereafter and the notification for filling in the post was issued on 23.05.2016, which is the subject matter of challenge so far as election to the post of Sarpanch of Koidam Gram Panchayat is concerned.

11. Against the aforesaid factual backdrop, the Court is called upon to examine the claim of the petitioner for quashment of the notification dated 23.05.2016 so far as it provides for election to the post of Sarpanch of Koidam Gram Panchayat.

12. Provisions of Sections 29, 54 and 61 need to be set out as under:-

"29. (1) No person shall, save as expressly authorised by this Act, be a member of two or more panchayats.

(2) Where a person while being a member of one panchayat, intends to stand as a candidate for membership of another panchayat, he may stand as a candidate for such membership notwithstanding anything contained in sub-section (1):

Provided that if he is chosen for the seat for which he stood as a candidate, the seat already held by him shall become vacant on the date on which he is so chosen unless the seat so held is in another panchayat and the term of that panchayat is to expire within a period of four months from the date on which he is so chosen.

(3) If any person is simultaneously chosen as a member of two or more panchayats, the person shall, within fifteen days from the date or the later of the dates on which he is so chosen, intimate to the competent authority, one of the panchayats in which he wishes to serve and thereupon his seat in the panchayat other than the one in which he wishes to serve, shall become vacant.

(4) Any intimation given under sub-section (3) shall be final and irrevocable.

(5) In default of intimation referred to in sub-section (4) within the aforesaid period, the competent authority shall determine the

seat which he shall retain and thereupon the remaining seats from which he was chosen, shall become vacant.

**54.** (1) (a) The Sarpanch may resign from his office by tendering his resignation in writing to the Competent authority but the resignation shall not take effect until it is accepted by the competent authority.

(b) The Upa-sarpanch may resign from his office by tendering his resignation in writing to the panchayat but the resignation shall not take effect until it is accepted by the panchayat.

(2) Any other member of the panchayat may resign from his office by tendering his resignation to the Sarpanch and the resignation shall take effect on the date on which it is accepted by the Sarpanch.

(3) If any dispute regarding any resignation arises, it shall be referred for decision to such officer, as the State Government may, by general or special order, appoint in that behalf and the decision of such officer shall be final.

Provided that no such dispute shall be entertained after the expiry of a period of thirty days from the date on which the resignation takes effect.

**61.** (1) Any vacancy in the office of a Sarpanch or Upa-sarpanch or member of a

panchayat of which notice has been given to the competent authority in the prescribed manner shall be filed by the election of a Sarpanch, Upa-sarpanch or as the case may be, member, who shall hold office so long only as the Sarpanch, Upa-sarpanch or member, in whose place he has been elected, would have held office if the vacancy had not occurred.

Provided that if vacancy of a member occurs within four months preceding the date on which the duration of the panchayat expires under section 13, it shall not be filled.

(2) The meeting for the election of the Sarpanch or Upa-sarpanch of a village panchayat under sub-section (I) shall be convened by the competent authority on such date as it may fix and the election shall be held in the same manner in which the election of a Sarpanch or Upa-sarpanch is held under section 51 and the provisions of that section shall, so far as may be, apply in respect of such election.

13. The provisions of Section 29 and the wordings in which it is couched persuades this Court to hold that there is a clear restriction upon a person to hold dual membership except in case which has been provided in the Section itself. Apart therefrom, by statutory amendment, the person is not entitled to hold membership in two Panchayats and the provisions of Section 29(2) and the proviso would clearly indicate that during his membership

in 'A' Panchayat, if a member is contesting election or is being chosen to be a member of another Panchayat then from the date on which he is being so chosen, the earlier Panchayat membership is said to have been vacant and the vacancy is said to have occurred. Therefore, learned Counsel for the petitioner is not justified in contending that the provisions of Section 29(3) would be applicable as it talks about the member being chosen simultaneously in two Panchayats. As it is not a case in the present instance, the entire controversy would rather be governed and guided by the provisions of Section 29(2), in which occurrence of vacancy is not made dependent upon the election left in a person for electing or volunteering to occupy the membership in Panchayat. Therefore, in this case, the provisions of Section 29(2) being so clear, we have no hesitation in holding that the vacancy could be said to have arisen from and on the date when the then Sarpanch of Koidam Gram Panchayat was declared elected in the District Panchayat and as it is not a case of simultaneous election, there is no scope for invoking sub-section (3) of Section 29 as is sought to be made out by the Counsel for the petitioner.

14. We are also not impressed by the submission canvassed on behalf of the petitioner that by virtue of provisions of Section 54, the resignation is said to have

effected only when the same is accepted. If this submission is examined on logic and in light of other provisions then it would amount to rendering provisions of Section 29(2) nugatory as the said provision in terms provides for occurrence of vacancy on the eventualities envisaged thereunder, viz. Election of the member of Panchayat in another Panchayat. Therefore, we have no hesitation in holding that the election of the then Sarpanch Smt.Bariya in the District Panchayat was the exigency which would said to have render her post of Sarpanch vacant in the Gram Panchayat for which the election is declared under notification dated 23.05.2016 and as that had happened beyond a period of 12 months as envisaged under Section 61, the embargo of Section 61 would be of no avail for challenging the notification in question. As we have decided the matter on merits, we do not propose to examine the question of maintainability as sought to be made out by Counsel for respondent No.1.

15. As a result thereof and for the aforesaid discussion, the petition being devoid of any merits deserves to be dismissed. The same is accordingly dismissed. Notice is discharged. No order as to costs.

**(S.R.BRAHMBHATT, J.)**

(A.Y. KOGJE, J.)

SHITOLE

