

HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

S.B. Civil Miscellaneous Appeal No. 946/2023

Kamlesh Kumar Bairwa S/o Shri Motilal, Resident Of Haripura Ki Dhani, Ward No. 23, Chaksu, District Jaipur

----Appellant

Versus

1. Returning Officer (Sdm), Municipality Chaksu, District Jaipur.
2. Vinod Kumar Rajoriya S/o Shri Phoolchand, R/o Ward No. 17 (Old No. 13), Main Indira Bazar, Chaksu, District Jaipur.

----Respondents

For Appellant(s) : Mr. R.N. Mathur Senior Advocate
assisted by
Mr. Manish Parihar
Mr. Tanveer Ahmed
Mr. Ajay Kumar Meena
Mr. Rakesh Kumar Dhawan

For Respondent(s) : Mr. Kamlesh Kumar Birwa, Returning
Officer (SDM) present in personal

Mr. Rajendra Prasad Senior Advocate
assisted by
Mr. Prahlad Sharma
Mr. Lakhna Sharma
Mr. Ram Prasad Sharma
Mr. Prem Prakash Sharma for
respondent No.2.

HON'BLE MR. JUSTICE PRAVEER BHATNAGAR

Order

09/05/2023

1. The respondent by filing the preliminary objections has questioned the maintainability of the present appeal, in which the appellant has assailed the impugned judgment dated 20.04.2023 passed by the learned District Judge, Jaipur Metropolitan-I

(hereinafter referred to as the 'trial court'), wherein the election petition filed by the respondent under the Rajasthan Municipalities Act, 2009 (hereinafter referred to as the 'Act of 2009') was allowed declaring the appellant disqualified from the membership of the Municipal Council and to the post of Chairperson.

2. Learned Senior Counsel would argue that the impugned judgment was passed under Section 44 of the Act of 2009 against it there is no provision for filing the appeal. An appeal can be filed only if there exists a statutory provision in the Act itself. Therefore, in the absence of a specific provision in the statute, the appeal is not maintainable.

3. He further argues that the appellant himself has questioned the maintainability of the Election Petition filed under Section 31 of the Act of 2009 and specifically averred that the Election to the post of Chairperson can only be questioned by filing the Election Petition under Section 44 of the Act of 2009. Therefore, the appeal before this Court against the impugned judgment dated 20.04.2023 is not maintainable.

4. Learned Senior Counsel appearing for the appellant would draw attention towards para 3 of the plaint, wherein the present applicant (plaintiff-respondent) specifically pleaded about the grounds for disqualifying the appellant (defendant) to continuing as a Member and Chairperson in the Chaksu Municipality as per the provisions of Section 24 of the Act of 2009. He further argues that the applicant himself has instituted the petition under Section 31 of the Act of 2009, for disqualifying the appellant as a Member of the Council. He further invites Court's attention towards Section 24 and Section 31 of the Act of 2009

which explicitly deals with the grounds for disqualification of the Member and the mode of its challenge through an election petition. He contends that the learned trial court has elaborately dealt with the objection while determining Issue No.6 and concluded that the petition is covered under Section 31 of the Act of 2009 as the relief of disqualifying the appellant to the post of Chairperson is consequential to the main relief.

5. Learned Senior Counsel further submits that it is a prerequisite to be elected as a Member of the Council before holding the post of Chairperson in the municipality. Therefore, the preliminary objections about the maintainability of the appeal against the impugned judgment passed under Section 31 of the Act of 2009 are misconceived and liable to be rejected.

6. Before delineating the core issue of maintainability it would be appropriate to state the provisions concerning the filing of the election petition under Section 31 and Section 44 of the Act of 2009. Section 31 of the Act of 2009 enumerates that:-

"31. Election petition.- (1) An election petition calling in question an election of any person as member of a Municipality may be presented by any candidate at such election or any elector within one month from the date of election in the prescribed manner to the District Judge having jurisdiction over the municipal area.

Explanation – For the purpose of this Section, **"elector"** means a person who was entitled to vote at the election to which election petition relates, whether he has voted at such election or not.

(2) The election petition may be presented on one or more of the following grounds, namely:-

(a) that on the date of election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under this Act, or

(b) that any corrupt practice specified in section 29 has been committed by a returned candidate or his election agent or by any other person, with the consent of a returned candidate or his election agent, or

(c) that any nomination has been improperly rejected, or
(d) that the result of the election, in so far as it concerns a returned candidate has been materially affected -
(i) by the improper acceptance of any nomination, or
(ii) by any corrupt practice committed in the interest of the returned candidate by a person other than that candidate or his election agent or a person acting with the consent of such candidate or election agent, or
(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or
(iv) by any non-compliance with the provisions of this Act or of any rules or orders made thereunder, or
(e) that in fact the petitioner or some other candidate received a majority of the valid votes, or
(f) that, but for the votes obtained by the returned candidate by corrupt practices, the petitioner or some other candidate would have obtained a majority of the valid votes.

(3) In hearing the election petition, the District Judge shall follow such procedure and exercise such powers as may be prescribed."

Section 44 of the Act of 2009 provides as under:-

"44. Determination of validity of election of Chairperson or Vice-Chairperson.- (1) The election of a Chairperson or Vice- Chairperson under section 43 shall not be called in question except by an election petition presented to the District Judge having territorial jurisdiction, over the municipal area:

Provided that where an election petition is presented as aforesaid to a District Judge, he may, for the reasons to be recorded in writing, transfer the same for hearing and disposal to a Judge subordinate to him.

Explanation.- The District Judge or any other Judge to whom an election petition is or transferred and by whom it is heard in accordance with the provisions of this section is hereinafter referred to as the Judge.

(2) Such petition may be presented by a candidate who has been defeated or whose nomination has been rejected in such manner, on such grounds and within such period as may be prescribed, along with a deposit of **one thousand rupees**.

(3) In hearing the petition, the Judge shall follow such procedure and exercise such powers as may be prescribed.

(4) Without prejudice to the generality of the provision contained in sub-section (3), the Judge may, if the petition is found to be frivolous, direct that the deposit mentioned in sub-section (2) shall be forfeited to the State Government."

7. Hon'ble Division Bench of this Court in the matter of Babulal Jain vs. The District Judge & Ors. : D.B Spl. Appeal No. 710/2016, decided on 21.11.2016 while interpreting the provisions of Sections 31 and 44 of the Act of 2009 regarding conferring jurisdictions to file the election petitions in the Court of the District Judge only (in case of Section 31 of the Act of 2009) and the power of the District Judge to transfer the election petition to the other Additional District Judge (as in case of Section 44 of the Act of 2009) and weighing the consequence of losing the status of Member, Municipal Council viz a viz to Chairperson/Vice-chairperson made the following observation:-

"Once a person has been elected as Member or as Chairperson or Vice-Chairperson he can be removed on any of the grounds mentioned in Section 39 of the Act. By virtue of the Rajasthan Municipalities (Election) (Amendment) Rules, 2014, published in the Gazette on 11.07.2014, a person elected as a Member is eligible to be considered for election as a Chairman under Rule 79. Similarly, a person elected as a Member is eligible to contest to the post of Vice-Chairman. But if the election of the Member or Chairperson or Vice-Chairperson is to be called into question it can be only way of an election petition under Sections 31 and 44 of the Act respectively. If the election of a Chairperson or Vice-Chairperson is challenged successfully he still retains his Membership of the Municipality. But if he loses his status as elected Member of the Municipality, the loss of status as Chairperson or Vice-Chairperson is automatic without the need to challenge it separately. In the circumstances, the Legislature thought it proper that in the former case if the Membership itself was an issue the power should remain with the District Judge alone while in the latter case, the District & Sessions Judge can transfer the case to any other Additional District & Sessions Judge. This is the reason for insertion of the proviso to Section 44 of the Act which is otherwise absent in Section 31. If the Legislature had desired that an election petition questioning Membership could also be either tried by the District & Sessions Judge or transferred to another Additional District & Sessions Judge, there is no reason why the Legislature could not have made that specific incorporation in Section 31 itself alike Section 44 of the Act."

(emphasis supplied)

8. Thus it is obvious that the Membership of the Council is a class in general and the post of Chairperson or Vice-chairman is one of the species of it. Meaning thereby post of Chairperson or Vice-chairperson exists in the Municipality due to the existence of a Member of the Council. If a person ceases to function as a Member of the Council he cannot remain to hold the post of Vice-chairman or the Chairman. But if a Chairperson or Vice-chairperson is declared disqualified then he may still retain his Membership in the Council. It is pertinent to indicate that without referring to Section 31 of the Act of 2009 the relief of disqualifying a Member is not permissible. On the other hand, under Section 44 of the Act of 2009 claim for declaring a Member of the Council disqualified, is altogether forbidden.

9. Further, the grounds for questioning the disqualification of a Municipal Member are comprehensive and exhaustive, whereas the grounds for assailing the disqualification of the Chairman/Vice-chairman are confined to Section 44 read with Section 43 of the Act of 2009.

10. Learned District Judge has elaborately dealt with the issue of maintainability and rightly inferred while dealing with issue No. 6 that the mandate of declaring a Member of the Council disqualified is significant relief and disqualification to the post of Chairperson is its innate consequence.

11. It is also settled law that to determine whether the suit is one for a declaration simpliciter or for a declaration with consequential relief, the plaint has to be read as a whole. Any

camouflage attempt by the plaintiff to twirl the matter to disguise the Court cannot be a reason to deny or grant the relief.

12. Therefore, the preliminary objections by the respondent regarding the maintainability of the appeal filed by the appellant against the impugned judgment dated 20.04.2023 are misconstrued and sans merit, hence dismissed.

13. List the appeal on 12.05.2023.

(PRAVEER BHATNAGAR),J