CASE NO.:
Appeal (civil) 4056 of 2006

PETITIONER:
Jayrajbhai Jayantibhai Patel

RESPONDENT:
Anilbhai Jayantibhai Patel and Ors.

DATE OF JUDGMENT: 11/09/2006

BENCH:
K.G. BALAKRISHNAN & D.K. JAIN

JUDGMENT:
J U D G M E N T
[Arising out of S.L.P.(Civil) No.4663 of 2006)

D.K. JAIN, J.:

Leave granted.

2. The Appellant, arrayed as the first Respondent in three writ petitions (Special Civil Applications No. 22379, 22385 and 22391 of 2005 with Civil Applications No. 12966 and 12967 of 2005), questions the legality of a common judgment and order dated 23rd February, 2006 rendered by a Division Bench of the Gujarat High Court. By the impugned Judgment, election of the Appellant as President of Anand Municipality has been set aside and Respondent No. 1, namely, Vijaybhai Haribhai Patel has been declared as the elected President of the said Municipality.

3. General elections to the office of the councillors to constitute Anand Municipality in the State of Gujarat were held on 25th October, 2005. Out of total 42 councillors, 19 were elected as candidates sponsored by Bhartiya Janta Party (for short "the B.J.P") and the other 23 candidates were elected as independent candidates. On 29th October, 2005, the Collector of Anand District issued a notice in terms of Section 32 of the Gujarat Municipalities Act, 1963 (hereinafter referred to as "the Act") read with Rules 3 and 4 of the Gujarat Municipalities (President and Vice-President) Election Rules, 1964 (hereinafter referred to as "the Election Rules"), notifying the programme for election to the posts of President and Vice-President of the said Municipality on 8th November, 2005 at 1.00 P.M. in the Municipality Meeting Hall. At the meeting, conducted and presided over by the Resident Deputy Collector, nominated by the Collector and hereafter referred to as the Presiding Officer, out of 42 elected councillors, 38 were present. Two B.J.P. councillors did not attend the meeting on account of some resentment with the party leadership and two independent councillors, namely, Anilbhai Patel and Meenaben Gohil were unable to attend the meeting as they had been arrested by the police at about 12.30 P.M. on the date of meeting.

4. As per the Election Rules, after the term of the President and Vice-President is determined at the meeting, the Presiding Officer is required to invite nominations for elections to the said posts. Accordingly, the Presiding Officer invited nominations. Two councillors

offered their candidature for the office of President. Election was held for the said post wherein 19 councillors cast their votes in favour of the appellant and the remaining 19 councillors cast their votes in favour of the said Vijaybhai Haribhai Patel. In view of equality of votes, following the procedure laid down in Section 32 (4) of the Act, the Presiding Officer drew lots and declared the Appellant elected as President of the Municipality with effect from 8th November, 2005 for a term of 2= years.

5. Being aggrieved, three councillors challenged the election of the Appellant by means of the aforementioned three Special Civil Applications under Article 226 of the Constitution of India, inter-alia, on the grounds that councillors Anilbhai Nathubhai Patel and Meenaben Pratapbhai Gohil were respectively arrested in relation to an offence under the Copyrights Act and for an offence under the Bombay Prohibition Act just a few minutes before the election meeting at 1.00 P.M. on 8th November, 2005 with the sole object to somehow prevent both of them from casting their vote at the elections for the posts of the President and Vice-President as the B.J.P. leadership was unable to win over any of the 21 independent candidates, who had formed a group under the banner of "Anand Shaher Vikas Manch" (for short "the Vikas Manch") and had sponsored two independent councillors for the said posts; the B.J.P. resorted to unfair means as well as abuse of the government machinery by getting false F.I.Rs. registered on 5th November, 2005. It was alleged that when the said two councillors were about to enter the meeting hall at about 12.30 P.M. on 8th November, 2005, the police officers, arrayed as respondents in the writ petitions, and their staff arrested the said councillors; prevented them from entering the meeting hall; they were not produced before the Judicial Magistrate till 5.00 P.M. with the malafide intention to see that they were released on bail only after the General Meeting was over and the election results were declared and that their absence tilted the election results in favour of the candidates sponsored by the B.J.P. because both the said councillors were to vote for the candidate sponsored by the Vikas Manch and two of the B.J.P. councillors had already aired their grievances and had decided not to attend the meeting. It was averred that the police officials acted in a high handed and arbitrary manner at the behest of two local B.J.P. MLAs with the malafide intention to help B.J.P., the party in power in the state, and their official candidate to win the election. The stand of the writ petitioners was that all these facts were brought to the notice of the Presiding Officer, who, ignoring their protest, drew the lots and declared the result.

6. At this juncture we may note that subsequently the writ petitioners were permitted to amend their petitions to incorporate the prayer for declaring respondent No. 1 as having been elected as the President.

7. Taking into consideration about a dozen circumstances, culled out in the impugned judgment, the High Court has come to the conclusion that the two councillors were detained with the sole intention of preventing them from attending the meeting convened for election of President and Vice-President of the Municipality and has, thus, set aside the election of the Appellant. Accepting the stand of the two councillors, as projected in the affidavits filed by them that they wanted to vote in favour of the presidential candidate sponsored

by the Vikas Manch, the Court has directed that the votes of the said councillors be treated as having been cast in favour of the first Respondent and has consequently declared him as having been elected as President of Anand Municipality.

8. The appellant is, thus, before us.

9. Mr. Shyam Diwan, learned senior counsel appearing for the appellant, whose election as President has been set aside by the High Court, in the first place, submitted that the Presiding Officer having acted strictly as per the procedure prescribed in Section 32 of the Act for the election of the President, the High Court ought not to have exercised its extra ordinary jurisdiction under Article 226 of the Constitution of India. Referring to the procedure laid down in sub-section 4 of Section 32 of the Act, learned counsel would submit that the two candidates having got equal number of votes in their favour the Presiding Officer had no option but to resort to draw of lots and declare the result accordingly. It is, thus, urged that under the given circumstances his decision to declare the election result cannot be categorised as arbitrary or irrational, warranting interference and therefore, the High Court was not justified in entertaining the writ petition and setting aside the election of a duly elected President. On merits, learned counsel would submit that being primarily in the nature of hearsay evidence, the High Court committed a manifest error of law in relying upon the press reports and video recordings to return a finding that the two councillors were detained with malafide intention to prevent them from casting their vote, particularly when there was neither any specific pleading or allegation nor any evidence to the effect that either the appellant or his party was instrumental in getting the two councillors arrested. Placing reliance on Quamarul Islam Vs. S.K. Kanta and Ors. , learned counsel contended that the High Court has lost sight of the salutary principle of the election law that the one who brings forth the charge of "corrupt practices" is under an obligation to discharge the onus of proof in this behalf by leading cogent, specific, reliable, trust-worthy and satisfactory evidence, which was wanting in the instant case. It is asserted that the election of the appellant having been set aside by the High Court on a mere probability that the two independent councillors would have voted in favour of the first Respondent, the impugned decision cannot be sustained on the touchstone of the dictum of this Court in Jamuna Prasad Mukhariya & Ors. Vs. Lachhi Ram & Ors. . Drawing support from the observations made by this Court in The Regional Manager & Anr. Vs. Pawan Kumar Dubey , and Ajit Kumar Nag Vs. General Manager (PJ), Indian Oil Corporation Ltd., Haldia & Ors. to the effect that the allegation of malice of fact demands proof of a high degree of credibility, learned counsel contends that in the absence of any cogent material, the High Court committed a manifest error of law in returning a finding of malafide against the police officials on the basis of a bare bald allegation of malafides.

10. Mr. Vakil, learned senior counsel appearing for the first Respondent, while supporting the decision of the High Court, has submitted that in the light of the overwhelming evidence brought on record by the writ petitioners, the decision of the High Court cannot be termed as perverse warranting interference by this Court.

Learned counsel has contended that in the light of the depositions of the two councillors in their affidavits, affirming that they would have voted in favour of the first Respondent, the findings recorded by the High Court in favour of the Respondent cannot be said to presumptuous or without any basis. Defending the decision of the High Court in declaring the said respondent as the elected President, learned counsel has urged that the Court is fully competent to rectify the electoral process and grant full redressal for the injustice meted out to the said respondent.

11. Thus, the first question requiring consideration is as to whether on the facts of the instant case, the High Court was justified in exercising its power of judicial review and setting aside the election of the appellant?

12. Article 226 of the Constitution is designed to ensure that each and every authority in the State, including the State, acts bonafide and within the limits of its power. However, the scope of judicial review in Administrative matters has always been a subject matter of debate despite a plethora of case law on the issue. Time and again attempts have been made by the Courts to devise or craft some norms, which may be employed to assess whether an administrative action is justiciable or not. But no uniform rule has been or can be evolved to test the validity of an administrative action or decision because the extent and scope of judicial scrutiny depends upon host of factors, like the nature of the subject matter, the nature of the right affected, the character of the legal and constitutional provisions applicable etc. While appreciating the inherent limitations in exercise of power of judicial review, the judicial quest has been to find and maintain a right and delicate balance between the administrative discretion and the need to remedy alleged unfairness in the exercise of such discretion.

13. Having said so, we may now refer to a few decisions wherein some broad principles of judicial review in the field of administrative law have been evolved.

14. In Council of Civil Service Unions Vs. Minister for the Civil Service , Lord Diplock enunciated three grounds upon which an administrative action is subject to control by judicial review, viz. (i) illegality (ii) irrationality and (iii) procedural impropriety. While opining that "further development on a case by case basis may not in course of time add further grounds" he added that principle of "proportionality" may be a possible ground for judicial review for adoption in future. Explaining the said three grounds, Lord Diplock said:

By "illegality" he means that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it, and whether he has or has not, is a justiciable question; by "irrationality" he means "Wednesbury unreasonableness". It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided, could have arrived at it; and by "procedural impropriety" he means not only failure to observe the basic rules of natural justice or failure to act with procedural fairness, but also failure to observe procedural rules that are

expressly laid down in the legislative instrument by which the tribunal's jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

15. The principle of "Wednesbury unreasonableness" or irrationality, classified by Lord Diplock as one of the grounds' for intervention in judicial review, was lucidly summarised by Lord Greene M.R. in Associated Provincial Picture Houses Ltd. Vs. Wednesbury Corpn. as follows:

"\005the court is entitled to investigate the action of the local authority with a view of seeing whether it has taken into account matters which it ought not to take into account, or conversely, has refused to take into account or neglected to take into account matters which it ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that the local authority, nevertheless, have come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere."

16. In State of U.P. & Anr. Vs. Johri Mal , this Court has observed thus:

"The scope and extent of power of the judicial review of the High Court contained in Article 226 of the Constitution of India would vary from case to case, the nature of the order, the relevant statute as also the other relevant factors including the nature of power exercised by the public authorities, namely, whether the power is statutory, quasi-judicial or administrative. The power of judicial review is not intended to assume a supervisory role or don the robes of the omnipresent. The power is not intended either to review governance under the rule of law or do the courts step into the areas exclusively reserved by the suprema lex to the other organs of the State. Decisions and actions which do not have adjudicative disposition may not strictly fall for consideration before a judicial review court."

17. Recently in Rameshwar Prasad & Ors. (VI) Vs. Union of India & Anr. , wherein a proclamation issued under Article 356 was under challenge, Arijit Pasayat, J. observed thus:

"A person entrusted with discretion must, so to speak, direct himself properly in law. He must call his attention to matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules he may truly be said to be acting unreasonably. Similarly, there may be

something so absurd that no sensible person could ever dream that it lay within the powers of the authority.

It is an unwritten rule of law, constitutional and administrative, that whenever a decision-making function is entrusted to be subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only, eschewing the irrelevant and the remote."

18. Having regard to it all, it is manifest that the power of judicial review may not be exercised unless the administrative decision is illogical or suffers from procedural impropriety or it shocks the conscience of the court in the sense that it is in defiance of logic or moral standards but no standardised formula, universally applicable to all cases, can be evolved. Each case has to be considered on its own facts, depending upon the authority that exercises the power, the source, the nature or scope of power and the indelible effects it generates in the operation of law or affects the individual or society. Though judicial restraint, albeit self-recognised, is the order of the day, yet an administrative decision or action which is based on wholly irrelevant considerations or material; or excludes from consideration the relevant material; or it is so absurd that no reasonable person could have arrived at it on the given material, may be struck down. In other words, when a Court is satisfied that there is an abuse or misuse of power, and its jurisdiction is invoked, it is incumbent on the Court to intervene. It is nevertheless, trite that the scope of judicial review is limited to the deficiency in the decision-making process and not the decision.

19. The following passage from Professor Bernard Schwartz's book Administrative Law (Third Edition) aptly echo's our thoughts on the scope of judicial review:

"Reviewing courts, the cases are now insisting, may not simply renounce their responsibility by mumbling an indiscriminate litany of deference to expertise. Due deference to the agency does not mean abdication of the duty of judicial review and rubber-stamping of agency action: [W]e must accord the agency considerable, but not too much deference; it is entitled to exercise its discretion, but only so far and no further."

Quoting Judge Leventhal from Greater Boston Television Corp. Vs. FCC , he further says:

"\005the reviewing court must intervene if it "becomes aware\005 that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making..."

20. Tested on the touchstone of the above principles, we are of the view that on facts in hand the High Court was fully justified in exercising its power of judicial review and set aside the election of the appellant.

21. Chapter III of the Act contains provisions relating to

the President, Vice-President etc. Section 31 stipulates that the Municipality shall be presided over by a President, who shall be elected by the councillors from among themselves in the manner prescribed by the rules made by the State Government. Section 32 deals with the election of President and Vice-President. Sub-section (4) thereof provides that if in the election of the president or the vice-president there is an equality of votes, the result of the election shall be decided by lot to be drawn in the presence of the Collector or the officer presiding in such manner as the Collector or as the case may be, the officer may determine.

22. Election Rules lay down the procedure for election of President and Vice-President. Rule 10 of the said Rules, which is of some relevance, reads as follows:-

"Rule 10: Power to call meeting at postponed date. \026 If at any meeting called for the election of the President, the election is not held for any reason whatsoever, the Presiding Officer shall have power to call the meeting on any other day."

23. There is no denying the fact that in the light of clear stipulation in sub-section 4 of Section 32 of the Act, because of equality of votes the election result had to be decided by draw of lots and this is what the Presiding Officer did. But, the moot question is whether the detention of the two councillors was such a trivial factor in the subject election, which could be overlooked by the Presiding Officer? It is manifestly clear from the material on record that he was made aware of the said development. In the light of some of the circumstances, viz., (i) after arresting councillors Anilbhai Patel and Meenaben Gohil at around 12.30 P.M., just half an hour before the scheduled time for elections, the police officers did not produce them before the Magistrate immediately, but took them around Anand town in the police van and produced them before the Magistrate only at about 5.00 P.M., by which time the elections were already held and the results were also declared; (ii) no circumstance brought on record by the police to show that it would have been inexpedient to wait till the elections were over before effecting arrest of Anilbhai Patel and Meenaben Gohil. Both the councillors are residents of Anand and their co-accused in the respective offences were released by the police officers themselves after arresting them on 5.11.2005; and (iii) there was no circumstance to show that the two councillors would have escaped and avoided arrest if they were allowed to go inside the meeting hall for voting at 1.00 P.M. and if they were not arrested till the meeting for electing President and Vice-President was over. We have no hesitation in holding that the detention of the two councillors, a few minutes before the election meeting was a relevant factor which ought to have been taken into account by the Presiding Officer to decide whether to continue with the election or to postpone it and call the meeting on some other day in terms of Rule 10. Failure to do so not only offends against procedural propriety, it makes his decision to go ahead with the election meeting perverse and irrational, a facet of unreasonableness, warranting interference under Article 226 of the Constitution. In this view of the matter, we are of the opinion that the High Court has not committed any error of law and/or jurisdiction in setting aside the election of the appellant as President of the Anand

Municipality.

24. Since we feel that the principle Res ipsa Loquitur is squarely attracted on facts in hand, it is unnecessary to comment on the conduct of the police officials, which in any case does not commend us.

25. The next question which remains to be considered is as to whether, having set aside the election of the appellant, the High Court was justified in declaring respondent no.1 as the President?

26. It was strenuously urged by learned counsel for the appellant that the first respondent having lost in the draw of lots, the High Court had no jurisdiction to declare him elected as President of the Municipality. The submission is that having set aside the election, the High Court, at best, could have directed the Collector to hold a fresh election for the said post.

27. There is substance in the submission of the learned counsel. In Tata Cellular Vs. Union of India , this Court has observed that the judicial restraint has two contemporary manifestations, namely, one the ambit of judicial intervention and the other, the scope of the Court's ability to quash an administrative decision on its merits. Judicial review is not concerned with reviewing the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself. Unless that restriction on the power of the Court is observed, the Court will, as opined in Chief Constable of the North Wales Police Vs. Evans , "under the guise of preventing the abuse of power, be itself guilty of usurping power", which is the case here.

28. In the instant case, admittedly both the candidates had got equal number of votes polled and the appellant was declared as elected on the basis of draw of lots, held as per the prescribed procedure. Admittedly, the controversy did not relate to counting of votes. Under the circumstances, the direction of the High Court that the votes of the two arrested councillors be treated as having been cast in favour of the first respondent, in our view, is based on pure speculation that they would have definitely voted for him. In our opinion, the High Court has erred on this aspect of the matter and therefore, to that extent the impugned judgment cannot be sustained. Accordingly, the order of the High Court, declaring the first respondent as the President of the Anand Municipality is set aside.

29. In the result, the appeal partly succeeds and is allowed to the extent indicated above, with a direction to the Collector to reconvene the general meeting of the Municipality for the election of the President within two months of the receipt of copy of this order. In the facts and circumstances of the case, there shall be no order as to costs.