(1997) 09 BOM CK 0066

In the Bombay High Court

Case No : Letter Patent Appeal No. 25 of 1997 in Writ Petition No. 3734 of 1997 with Civil Application No. 4622 of 1997

Amar Sinh Pandit APPELLANT

Vs

The State of Maharashtra and others RESPONDENT

Date of Decision : 30-09-1997

Acts Referred:
Constitution of India, 1950 — Article 226, 227

Citation : (1998) 1 ALLMR 409 : (1998) 2 BomCR 575

Hon'ble Judges : V.K. Barde, J;B.B. Vagyani, J

Bench : Division Bench

Advocate : R.N. Dhorde, holding for N.B. Khandare and K.B. Bhise, for the Appellant; V.D. Sapkal, A.G.P., D.N. Suryawanshi and R.B. Raghuwanshi, holding for R.T. Nagaroje, for the Respondent

Judgement

V.K. Barde, J.—Heard Shri R.N. Dhorde, learned Counsel for petitioner. Leave to delete respondent No. 7 granted.

2. This Letters Patent appeal is arising because of dismissal of Writ Petition No. 3734/1997 in limine by the Hon''ble Single Judge of this Court. The facts giving rise to this litigation in brief are as follows :-

3. The respondent No. 5-Beed District Central Co-operative Bank (hereinafter referred to as the Bank) is the Cooperative Society and is a specified society u/s 73-G of the Maharashtra Co-operative Societies Act, 1960 (hereinafter referred to as the Act). The programme for the election of the director board of the Bank is published by the respondent No. 2-Collector and the respondent No. 3 is appointed as the Returning Officer. The present petitioner is the delegate of the affiliated Cooperative Society of the Bank, namely, Seva Sahakari Society, Rakshas Bhuvan, for the purpose of the election to the director board. As per the bye-laws of the Bank, a delegate nominated by the affiliated society can contest the election and, therefore, the petitioner presented his nomination form before the Returning Officer. The scrutiny of the nomination papers was held on

2-9-1997. The respondent No. 6 raised objection to the nomination of the writ petitioner contending that the petitioner was disqualified from contesting the election as per the provisions of section 73-F of the Act. It was contended that the petitioner was running the business of sale of motor cycles known as Vijay Auto Lines at Beed and was dealer for TVS Suzuki Motor Cycles. The Bank had given loans for purchase of motor-cycles and such borrowers had purchased motor-cycles from the shop of the petitioner. So he was not eligible to contest the election. On receiving this objection, the Returning Officer served notice on the petitioner and called upon him to file his say alongwith his evidence to rebut the objection on 3-9-1997. The petitioner filed his written say and after hearing both the sides, the Returning Officer upheld the objection and rejected the nomination paper of the petitioner.

4. Being aggrieved by the said decision, the petitioner filed appeal before the Additional Commissioner, Aurangabad Division, as per the provisions of section 152-A of the Act. The learned Additional Commissioner after hearing both the sides rejected the appeal as per his order dated 12.9.1997.

5. Petitioner thereafter filed Writ Petition No. 3734/1997 in this Court. The petitioner raised various points to challenge the order passed by the Returning Officer and the decision given by the Additional Commissioner. It is the contention of the petitioner that the provisions of section 73-F of the Act are not attracted. As per the provisions of the Act and the Rules under the Act, the function and object of the Bank is to provide loans to member societies. The Bank cannot provide loan to the individual members. The list of the persons to whom loans were given by the Bank was filed by the respondent No. 6 before the Returning Officer, but those persons were not members of the Bank and they were employees of the Bank. So even if loan is given by the Bank to any of its employees and if such employee has purchased vehicle from the petitioner, the provisions of section 73-F are not attracted because such person was not member of the Bank.

6. It is also contended that the Director Board of the Bank had passed a resolution No. 7(1) and as per that resolution, loans were sanctioned to the employees of the Bank and not to the member of the Bank. The petitioner had produced a certificate issued by the Inspector, Shops and Establishment, Beed, showing that the petitioner was not owner of the said establishment and in such circumstances, the petitioner cannot be disqualified. He has also contended that the petitioner is not owner of the establishment - Vijay Auto Lines.

7. It is further contended by the petitioner that the Returning Officer suo motu before the date of scrutiny had called for information from the Sales Tax Office and he relied upon that information and ignored the certificate dated 3-9-1997 produced by the petitioner showing that the petitioner was not the owner of the said establishment. It is contended that if there is any defect in the nomination paper, that can be cured at any time before the scrutiny, but the Returning Officer did not take into consideration the circumstance that Vijay Auto Lines had

been transferred by the petitioner to his brother before the date of scrutiny.

8. Many allegations are made against the Returning Officer regarding his action and petitioner has raised the contention that the Returning Officer was bias against him and he rejected the nomination paper of the petitioner because of the political pressure brought upon him. The petitioner, therefore, prayed that the order passed by the Returning Officer and further confirmed by the Additional Commissioner in the appeal be quashed and set aside. The respondents Nos. 2 and 3 be directed to accept the nomination paper of the petitioner and the petitioner be allowed to contest the election from Georai Taluka Constituency for the respondent No. 5 Bank.

9. The Hon''ble Judge of this Court, after hearing the parties, dismissed the writ petition in limine holding that the nomination paper was rightly rejected and it is further held that there is alternative remedy i.e. in the form of election petition which can be filed by petitioner after conclusion of the elections and the points raised by the petitioner can be considered in such election petition. So there was no necessity to interfere in the orders passed by the Returning Officer and Additional Commissioner by exercising the powers under Articles 226 and 227 of the Constitution of India and, therefore, the writ petition was rejected in limine.

10. Hence, the present Letters Patent Appeal is filed on the following grounds :

The petitioner has contended that it ought to have been held that the provisions of section 73-F of the Act are not applicable to the case of the petitioner. The disqualification provided u/s 73-F of the Act is curable and the petitioner had cured the disqualification before the date of scrutiny. It ought to have been held that Vijay Auto Lines was not in the name of the present petitioner on the date of scrutiny and before passing of the order by the Returning Officer. It is further contended that the Hon''ble Single Judge erred in interpreting section 73-F r/w sub-Clause (6) of section 2 of the Act r/w Rule 10 of the Maharashtra Co-operative Societies Rules, 1961, under the Act r/w bye-laws. It is further contended that the Bank had given loans to its employees and there is no resolution passed by the Bank admitting such employees as members of the Bank and, therefore, the provisions of section 73-F are not applicable. The Hon''ble Single Judge wrongly placed reliance on the affidavits produced on record by the respondent No. 5 in the writ petition. The Hon''ble Single Judge wrongly placed reliance on the documents which were not produced before the Returning Officer on the date of scrutiny. The Hon''ble Single Judge wrongly presumed that loan was granted to the member of the Bank when there was the affidavit filed by the Bank in the writ petition that no resolution was passed by the Bank granting membership to the employee. The Hon''ble Single Judge erred in holding that the petitioner is the ultimate beneficiary and, therefore, is covered u/s 73-F of the Act. The explanation of the term ''near relation'' is not taken into consideration by the Hon''ble Single Judge which excludes the brother from the near relations. It also ought to have been held by the Hon''ble Single Judge that Respondent No 6 had not produced any evidence before the Returning

Officer to substantiate the objection. It is, therefore, prayed that the appeal be allowed and the judgment in the writ petition be quashed and set aside.

11. Heard Shri R.N. Dhorde, learned Counsel holding for Shri N.B. Khandare and Shri K.B. Bhise, Advocates, for petitioner; Shri V.D. Sapkal, Assistant Government Pleader for respondents Nos. 1 to 4; Shri D.N. Suryawanshi, learned Counsel for respondent No. 5; and Shri R.B. Raghuwanshi, learned Counsel holding for Shri R.T. Nagargoje, Advocate, for respondent No. 6.

12. The learned Counsel for petitioner strongly contended that the provisions of section 73-F are not attracted. It is being contended by the respondent No. 6 that Shri Muke, an employee of the Bank, had taken loan from the Bank and had purchased motor -cycle from the shop of the petitioner. However, there is no evidence indicating that Shri Muke was the member of the Bank and in such circumstances even if he had obtained loan from the Bank and even if he had purchased motor-cycle form Vijay Auto Lines, the petitioner cannot be disqualified on that ground. The Bank had sanctioned loans to its employees and there is nothing on record indicating that any of such employees was made member of the Bank. There may be provisions that an employee of the Bank should become a nominal member by paying fee of Re. 1/- to claim the loan from the Bank, but so long as it is not proved that the employee had applied to be a nominal member of the Bank and the Bank has admitted him as a nominal member by passing resolution of board of directors as per the bye-laws of the Bank, it cannot be said that the employee had become member of the Bank and the loan was granted to a member of the Bank. There is no such evidence on record and, therefore, it is wrong to hold that as Shri Muke had purchased motor-cycle from Vijay Auto Lines after obtaining loan from the Bank, the petitioner is disqualified.

13. The second point argued by the learned Counsel for the petitioner is that the petitioner was the owner of Vijay Auto Lines. However, he had transferred that business to his brother. So on the date of scrutiny, the petitioner was not the owner of Vijay Auto Lines. The disqualification that could have been attached to him u/s 73-F of the Act was cured. There is the certificate under the Shops and Establishment Act dated 3-9-1997 which indicates that vijay Auto Lines was owned by Jaysingh Shivajirao Pandit - the brother of the present petitioner. The learned Counsel for the petitioner pointed out that section 73-F of the Act provides that member or his near relation should not be dealer in such goods and the term ''near relation'' is explained as wife, husband, father, mother, son, daughter, son-in-law or daughter-in-law. Brother is not included in near relation. Vijay Auto Lines stand in the name of brother of the petitioner and, therefore, he cannot be disqualified u/s 73-F.

14. The third point raised by the learned Counsel for the petitioner with respect to provisions of section 73-F is that the present petitioner is not the member of the Bank. He is delegate appointed by-affiliated cooperative society and in that capacity, he is contesting the election. Section 73-F disqualifies a member of the

Bank from contesting the election. As the petitioner is not member of the Bank, he cannot be disqualified u/s 73-F of the Act.

15. It is also argued by the learned Counsel for the petitioner that the Returning Officer had acted with mala fides. The record shows that the scrutiny was to be held on 2-9-1997. The respondent No. 6 had filed objection petition on 2-9-1997 but even before that i.e. on 1-9-1997 the Returning Officer had called for information form the Sales Tax Officer regarding the ownership of Vijay Auto Lines. So the Returning Officer had already decided to reject the nomination paper of the petitioner. The objection raised by the respondent No. 6 is very vague. It is not supported by any evidence and even than it was accepted by the Returning Officer. So the decision is taken with mala-fide intention and it must be set aside.

16. The learned Counsel for the petitioner has argued that the remedy under Article 226 of the Constitution of India is independent of any provisions under the Act. The High Court has vast jurisdiction to interfere by exercising the powers under Article 226 of the Constitution of India if it is noticed that injustice is being caused. Merely because an election petition can be filed because of the wrong rejection of the nomination paper, the High Court should not hesitate to exercise the powers under Article 226 of the Constitution of India. If the order passed by the Returning Officer rejecting the nomination paper is prima-facie illegal, unjust, then it has to be set aside by exercising the powers under Article 226 of the Constitution of India. He has, therefore, argued that the Hon''ble Single Judge ought to have exercised the powers under Article 226 of the Constitution of India, ought to have interfered in the order passed by the Returning Officer.

17. The learned Assistant Government Pleader has argued that not only that election programme is published, but now all the stages except the stage of voting are completed. If at such a late stage, any Interference is caused in the election by the High Court by exercising powers under Article 226 of the Constitution of India, it will not be proper. There are rulings of the Bombay High Court as well as of the Supreme Court wherein it is mentioned that the High Court should exercise restraint in interferring in election once the election process is set in motion. The petitioner''s grievance is that his nomination paper is wrongly rejected. The petitioner can challenge wrong rejection of the nomination paper by filing election petition as per section 144-T r/w Rule 81 of the Maharashtra Specified Co-operative Societies (Elections to Committee) Rules, 1971 (hereinafter referred to as 1971 Rules). The learned A.G.P. has also argued that the nomination paper was rightly rejected by the Returning Officer u/s 73-F of the Act. He has denied the contention of the petitioner that the Returning Officer acted with mala-fide intention.

18. The learned Counsel for respondent No. 6- Shri Raghuwanshi has also argued that there should not be interference in election programme at such a late stage and the High Court should not exercise the powers under Article 226 of the Constitution of India. The teamed Counsel for the respondent No. 6 has further

argued that Shri Mute was the employee of the Bank. He had applied for loan for purchasing motorcycle. The Bank had sanctioned loan to Shri Muke with the condition that he must become nominal member of the Bank by paying fee Re. 1/-. So it has to be presumed that when loan was given to Shri Muke, he had become nominal member of the Bank as per the service conditions, rules and the condition laid down in the sanction order for the loan. He has further pointed out that no evidence was produced before the Returning Officer to show that Shri Muke was not member of the Bank, but there was the document before the Returning Officer which showed that it was a pre-condition to obtain loan from the Bank to be a nominal member of the Bank and Shri Muke had obtained the loan from the Bank. So there was nothing wrong on the part of the Returning Officer to hold that Shri Muke was member of the Bank. So in the given circumstances, the decision given by the Returning Officer is legal and proper and it can not be disturbed in a writ petition. The learned Counsel for the respondent No. 6 has argued that the appeal be not admitted.

19. To consider the arguments advanced by the learned Counsel of the parties, it is necessary to consider section 73-F of the Act which reads as follows:-

''In the case of a society, which gives loans to members for purchasing machinery, implements, equipment, commodities or other goods, or which deals in such goods, no member, who or whose near relation is a dealer in such goods or is director of a company or a partner in a firm carrying on business in such goods, shall be eligible for being elected or appointed as a member of the committee of such society.

Explanation- For the purposes of this section, the expression "near relation" means a wife, husband, father, mother, son, daughter, son-in-law, or daughter-in-law."

The learned Counsel for the petitioner has placed stress on the circumstance that there is no evidence to indicate that Shri Muke, an employee of the Bank, who had obtained loan from the Bank and had purchased motor-cycle from Vijay Auto Lines, was the member of the Bank. The only evidence which was brought before the Returning Officer was that the Bank had sanctioned loan to Shri Muke and that Vijay Auto Lines is a dealer in TVS Suzuki Motor-Cycles. The Returning Officer has observed in his order dated 3-9-1997 that Vijay Auto Lines is agency owned by Amarsingh Pandit, the candidate for the election and Vijay Auto Lines deals in the goods for which the Bank grants loans and, therefore, Shri Amarsingh Pandit is disqualified from contesting the election because of the provisions of section 73-F. It is further observed that the person who has to obtain loan from the Bank has to become nominal member of the Bank and then only the loan is paid and this fact is disclosed from the order sanctioning loan dated 11-12-1996. So it is argued that the Returning Officer has only drawn a presumption that the person who had obtained loan from the Bank had become member of the Bank without there being evidence that he had actually become member of the Bank. The learned Counsel for the petitioner has, therefore, contended that as there was no evidence before the Returning Officer that the person had become member of the Bank, the circumstances did not warrant to disqualify the petitioner.

20. However, we do not agree with this argument. The provision of section 73-F is not such that a member of the Bank must have obtained loan from the Bank and must have purchased the goods from the business of the candidate on the basis of the loan sanctioned by the Bank. The section provides that if the society gives loan to member for purchasing machinery etc., it means that it should be the business or the policy of the society, here the Bank, to gives loans to members for purchasing such goods. It is not necessary that the Bank must have sanctioned loan to members and it is also not necessary that such member must have purchased goods from the shop of the candidate. If the rules of the society make provision that loan can be granted to a member for purchasing such goods, then a person who is dealer in such good is prohibited from contesting the election of the Board of Directors.

21. The learned Counsel for the petitioner has argued that as per the bye-laws of the Bank, the Bank sanctions loan to individual member. As per the objects of the Bank laid down in the bye-laws, the Bank is to finance co-operative societies in the Beed District affiliated to the Bank and the Bank is to advance loans to agriculturists admitted as ordinary or nominal members on personal security or upon security of immovable or movable property including crops or produce for raising of crops or for marketing agricultural produce. So as per the objects, the Bank is not expected to advance loans to nominal members for purchasing motor-cycles-vehicles etc. It is, therefore, contended that this Bank cannot give loan to members for purchasing motor-cycles and, therefore, the provisions of section 73-F are not applicable.

22. However, it has to be noted that the Bank had sanctioned loan to Shri Muke, an employee of the Bank, for purchase of motor-cycle as per the Resolution No. 7(1) passed by the executive committee on 28-11-1996 and one of the conditions for sanctioning the loan was that Shri Muke had to become a nominal member of the Bank by paying Re. 1/- as nominal membership fee. So it clearly appears that the Bank has laid down a policy to sanction loans to employees for purchase of motor vehicles on employee''s becoming nominal member of the Bank. It is not necessary in this proceeding to go into the question whether the Bank is authorised to grant such loan and whether Bank had acted beyond its authority. The fact remains that the executive committee of the Bank had passed the resolution that the employees would be given loan for purchase of vehicle under certain conditions and one of the conditions is that the employee shall become a nominal member of the Bank. So the Bank is authorised to give loans to nominal members for purchasing motor vehicle and, therefore, section 73-F can be made applicable. Whether Shri Muke was member or was not a member is immaterial. The material fact is that the Bank has the policy of giving loans to members for, purchasing motor-cycle.

23. It is strongly contended by the learned Counsel for the petitioner that the petitioner had transferred his business - Vijay Auto Lines to his brother Jaisinh and this was brought to the notice of the Returning Officer on 3-9-1997. There is also the certificate issued by the Sales Tax Officer, Beed, that Vijay Auto Lines is the business carried on by Jaisinh Shivajirao Pandit - the brother of the present petitioner. So even if there was the earlier certificate issued by the Sales Tax Office that Vijay Auto Lines was owned by petitioner Amarsingh, that was not the position on 3-9-1997. The disqualification was cured by the petitioner before passing of the order by the Returning Officer on scrutiny of the nomination paper and the Returning Officer ought to have accepted the documents produced by the petitioner and ought to have held that petitioner was not the owner of Vijay Auto Lines.

24. The stand taken by the petitioner itself makes-It clear that he was the owner of Vijay Auto Lines. Vijay Auto Lines is the dealer for TVS Suzuki Motor, Cycles. However, so far as the record maintained by Beed Municipal Council under the provisions of Shops and Establishment Act, a change in name was effected showing that Jaisinh - the brother of present petitioner was the proprietor of the establishment and similar change was effected on the record of the Sales Tax Department. However, there was not a single document before the Returning Officer showing that before 2-9-1997, the petitioner had transferred the establishment - Vijay Auto Lines by any document such as sale deed or gift-deed to Jaisinh - his brother. There was also no document before the Returning Officer that the dealership which was originally given to Vijay Auto Lines of which the petitioner was the proprietor was changed by the manufacturer in the name of Vijay Auto Lines of which Jaisinh was the proprietor. It clear appears that some documents were hurriedly created by giving application in the office of the Municipal Council and Sales Tax Department to change the name of the proprietor but such change is not real change in the ownership of the business. The date of scrutiny was 2-9-1997 and till that date the business of Vijay Auto Lines was not validly transferred in the name of any other person by the petitioner. So the entries in Municipal Record under Shops and Establishment Act were not sufficient to hold that the business - Vijay Auto Lines was not owned by the petitioner when already there was other evidence indicating that the business was owned by the petitioner. So the evidence which was brought before the Returning Officer by the petitioner was not sufficient to overrule the objection raised by respondent No. 6.

25. The learned Counsel for the petitioner has strongly placed reliance on the wordings of section 73-F especially -- "..... no member .....". The learned Counsel for the petitioner has contended that the disqualification is attached to a member who or whose near relation is a dealer in the goods for which the loan is given by the Bank. The present petitioner is not member of the Bank. It is nowhere brought on record that he was ever member of the Bank. He is the member of the affiliated society. He is delegated by the affiliated society as per Rule 5 of 1971 Rules and in that capacity, he is contesting the election as per the

bye-law of the said society. He is not contesting the election as per the bye-law of the said society. He is not contesting the election as member of the Bank. The disqualification prescribed u/s 73-F is applicable to the member of the Bank and not to such delegate. The election law is a technical law and it must be interpreted strictly. When the term "member" is used u/s 73-F, it must be given the meaning which is attributed to it under the Act or under the bye-law. The petitioner not being the member of the Bank as defined under Clause 19 of section 2 of the Act or any of the clauses of bye-laws of the Bank, he cannot be disqualified u/s 73-F. To understand the meaning of the word "member" used in section 73-F of the Act, it has to be noted as to how the Bank is constituted The bye-law No. 7 of the Bank describes the membership. The various types of co-operative societies functioning in Beed District are the affiliated members of the Bank. Besides that, any individual can be admitted as member of the Bank as per Rule 8 and as per Rule 10, nominal membership is given. So an individual can be member of the Bank as well as affiliated society can be member of the Bank. The further relevant provision is bye-law No. 28 regarding construction of Board of Directors. The bye-law No. 28(a) reads as follows :---

''The management of business and affairs of the Bank shall be entrusted to a Board of Directors which shall hold office five years, consisting of not more than 23 members as under :--

(a) not more than nine Directors representing Agricultural Credit Multipurpose and Service Co-operative including farming societies, one Director representing each taluka in the District."

The various other constituencies for the representatives on board of directors under various sub-clauses of bye-law No. 28 are given. The petitioner is contesting the election from the Constituency No. 28-a, as described above, from Georai Taluka as being the delegate of Seva Sahakari Society, Rakshas Bhuvan.

26. The provision regarding delegate is made under Rule 5 of 1971 Rules. The affiliated society of the specified society has to nominate its delegate for the purpose of elections. The committee of the affiliated society has to pass a resolution naming such delegate. It goes without saying that a member of the affiliated society can only be a delegate of the affiliated society.

27. This position is made further clear by the bye-law No. 28(8) of the Bank which lays down the qualification of director of the Bank. It reads as follows:

"No person shall be eligible to be candidate for directorship on behalf of affiliated society unless he is a member of the managing committee of any affiliated society for at least one year prior to the date of nomination ....."

It means that a delegate of an affiliated society who desires to contest the election on the Board of Directors from the constituency as described under bye-law No. 28(a) must be a member of the managing committee of the affiliated society for atleast one year. It, therefore, connotes that he also must be the member of the affiliated society. Then only he can be member of the managing committee of the affiliated society and then only in his capacity as delegate if so delegated can contest the election on the board of directors.

28. Hence, it follows that the term "no member" used in section 73-F has to be construed as applicable to the member of the Bank as well as member of the affiliated society who desires to contest the election on the board of director. It can not be narrowly interpreted as only the member of the Bank, that means individual member of the Bank.

29. The spirit of section 73-F is that a person who is dealing in the goods commodities for which the Bank is advancing loans to its members should not be on director board. This principle will have to be made applicable equally to an individual member of the Bank and also to a delegate of the affiliated society who is member of the affiliated society and, therefore, indirectly member of the Bank. If this provision is not made equally applicable to all types of members, then the very purpose of enacting this provision will be lost. The Court is expected to give the interpretation of the provisions of law which will further the purpose for which the provision is made and not which will destruct the purpose of that provision. Nobody can take objection to the provision that a person who is dealing in the goods for which the Bank is granting loans should not be on the director board of the Bank. The reasons are obvious for which such a provision is made and, therefore, any person who wants to be member of the director board of the Bank must not have disqualification u/s 73-F of the Act.

30. The interpretation advanced by the learned Counsel for the petitioner to the term "no member" that member means member of the Bank and not the member of the affiliated society who happens to be delegate of the affiliated society and contesting the election in that capacity cannot be accepted. The term "no member" used u/s 73-F, therefore, has to be made applicable to the individual members of the Bank as well as to the members of the affiliated society who as delegate of the affiliated society wants to contest the election for the Board of Directors.

31. Hence, considering all these circumstances, the arguments advanced by the learned Counsel for the petitioner cannot be accepted to hold that the petitioner is not disqualified u/s 73-F of the Act. The Returning Officer on the basis of the evidence which was brought before him rightly rejected the nomination paper and, therefore, the appeal u/s 152-A of the Act was also rightly rejected by the Additional Commissioner. The observations made by the Hon''ble Single Judge while dismissing the writ petition, therefore, can not be disputed.

32. The Hon''ble Single Judge has refused to interfere is the order passed by the Returning Officer which was maintained by the Additional Commissioner in appeal by exercising the powers under Articles 226 and 227 of the Constitution of India. The learned Counsel for the petitioner has raised contentions on this aspect of the matter also and he has relied upon the ruling of the Division Bench

of this Court in the matter between Pandurang Hindurao Patil v. State of Maharashtra & others, 1983 MLJ 1081 and has specifically drawn our attention to paragraph No. 43 which reads :

"We are, therefore, of the view that a writ petition under Article 226 of the Constitution challenging an order of Returning Officer rejecting or accepting a nomination paper cannot be rejected on the ground that such a petition does not lie. However, whether in a given case this Court will entertain a petition and will interfere or not will depend on the facts and circumstances of each case."

It is the contention of the learned Counsel for the petitioner that here the Returning Officer has gone out of way while exercising his powers as per Rule 23 of the 1971 Rules. The date for scrutiny was fixed as 2-9-1997 but on 1-9-1997 itself, the Returning Officer had called for information from the Sales Tax Officer regarding ownership of Vijay Auto Lines. There was no objection raised on that point to the nomination paper of the petitioner on 1-9-1997 and, therefore, he had no occasion to ask for such information. This shows the bias or mala-fides on the part of the Returning Officer and when the order is passed with mala-fide intention, it must be struck down by exercising powers under Article 226 of the Constitution of India.

33. The learned A.G.P. and the learned Counsel for respondent No. 6 have argued that the Returning Officer had acted within his jurisdiction. Merely because he called for information on 1-9-1997 itself does not mean that he was acting with mala-fide intention. It is even contended by the learned Counsel for the respondent No. 6 that on 1-9-1997 itself application was presented before the Returning Officer that an attempt was made to collect information from the Sales Tax Office regarding ownership of Vijay Auto Lines, but the authorities had not given any information, so the information be sought by the Returning Officer and because of that application, the Returning Officer had called upon the Sales Tax Officer to furnish information about the ownership of Vijay Auto Lines.

34. The sub-clause (2) of Rule 23 of 1971 or 1961 Rules reads as follows:

"The Returning Officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination, and may, either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary, reject any nomination on any of the following grounds, that is to say :-

....."

So the rule makes it clear that it is the responsibility of the Returning Officer to scrutinise the nomination papers and to find out whether it is proper and acceptable. The scrutiny may be done on the basis of any objections raised to the nomination paper or on his own motion. So it is not necessary that every time, there should be an objection to the nomination paper. The Returning Officer while scrutinising the nomination paper if finds that without there being any objection by any party, the nomination paper as it is can not be accepted for any of the reasons mentioned in Clause (2) of Rule 23, he has the power to reject the nomination paper. So merely because the Returning Officer acted on his own, it cannot be said that he acted with mala fide intention.

35. It also has to be noted that the question of mala-fides or bona- fides is a question of fact. The High Court while exercising powers under Article 226 of the Constitution cannot consider such questions of facts. This matter can be well thrashed out in an election petition that can be filed u/s 144-T of the Act. So far as the circumstances brought on record, no prima-facie case for mala-fides on the part of the Returning Officer is made out. So it will not be proper to exercise the powers under Article 226 of the Constitution in this matter.

36. Furthermore, the Hon''ble Single Judge has rightly held that the question of rejection of nomination paper can very well be raised in an election petition u/s 144-T of the Act r/w Rule 81 of 1971 Rules and the matter can be thrashed out there after recording elaborate evidence if so necessary. The present case is not one where the High Court should exercise the powers under Article 226 of the Constitution of India.

37. Ruling on which the learned Counsel for the petitioner has relied upon itself makes it clear. The observations in paragraph No. 22 of the said judgment are relevant:

"The second question relates to the exercise or the non-exercise of the power under Article 226 on the facts of each case and this must be governed by the well-known principles. One of the principles relevant will be that where an election process is challenged, if the order of the. Returning Officer is on the face of it so patently erroneous or without jurisdiction, it will be improper to ask the petitioner to wait till the whole process of election is over and then challenge that order by way of an election dispute u/s 91 of the Act which is a time consuming procedure."

38. In the present case, as discussed above, the order passed by the Returning Officer does not appear patently erroneous or without jurisdiction and, therefore, even oh the basis of the observations made by the Division Bench of this Court in the matter between Pandurang v. State of Maharashtra, it is not necessary to interfere in the order passed by the Returning Officer under Article 226 of the Constitution of India. The Letters Patent Appeal, thus, is being dismissed in limine.

39. In view of the order passed above, Civil Application No. 4622/1997 does not survive and hence disposed of.

