
(2011) 09 BOM CK 0071

In the Bombay High Court

Case No : Writ Petition No. 4837 of 2009

Anant Ramchandra Dakshindas

APPELLANT

Vs

Divisional Joint Registrar and Others

RESPONDENT

Date of Decision : 08-09-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 113
Constitution of India, 1950 — Article 13(3), 14, 162, 226, 227
Maharashtra Co-operative Societies Act, 1960 — Section 152, 165, 83, 88
Maharashtra Co-operative Societies Rules, 1961 — Rule 107(11), 107(5), 107(9)

Citation : (2012) 1 BomCR 68 : (2012) 1 MhLj 152

Hon'ble Judges : B.P. Dharmadhikari, J;A.P. Bhangale, J

Bench : Division Bench

Advocate : R.B. Pendharkar and Belsare, for the Appellant; Bharti Dangre, Additional Government Pleader for Respondents No. 1, 6, 7 and 8 and S.Y. Deopujari, for Respondent No. 9-I, II and III, for the Respondent

Judgement

1. In this petition filed under Articles 226 and 227 of the Constitution of India, the challenge is to the order dated 24.2.2009 passed by the Divisional Joint Registrar (respondent No. 1) with further challenge to a circular dated 3.2.2003 issued by Respondent No. 7 Commissioner for Cooperation. It is contended that said circular is unconstitutional and ultra vires the powers of said Respondent. There is also an interim prayer to stay the effect and operation of communication dated 4.9.2007.

2. The impugned order dated 24.2.2009 is passed by Respondent No. 1 as an appellate authority u/s 152 of the Maharashtra Cooperative Societies Act, 1960 and that appeal was preferred by present Petitioner against the enquiry report dated 24.4.2007. The Appellate Authority has dismissed that appeal. The circular dated 3.2.2003 is issued by the Office of Commissioner for Cooperation and Registrar of Cooperative Societies specifying the condition subject to which an enquiry officer for conducting enquiry under Sections 83 and 88 of the Maharashtra Cooperative Societies Act can be appointed. The communication

dated 4.9.1987 of which stay is sought is notice of attachment under rule 107(5), 107 (9) and 107(11)(k)(d) of the Maharashtra Cooperative Societies Rules, 1961.

3. It is not in dispute that challenge to appellate judgment mentioned supra lies before the learned single Judge of this Court because of Chapter XVII, rule 18 (entry 12) of the Bombay High Court Appellate Side Rules, 1960. However, the petition has been filed before the Division Bench with contention that as validity of circular dated 3.2.2003 has been assailed, the learned single Judge lacks jurisdiction.

4. In this background, we have heard Mr R.B. Pendharkar, learned Senior Advocate with Mr Belsare, learned counsel for Petitioner and Ms B.D. Dangre, learned Additional Government Pleader for Respondents No. 1,6,7 and 8 as also Mr S.Y. Deopujari, learned counsel for Respondent No. 9-I, II and III at length.

5. Learned Senior Advocate after inviting attention to provisions of Chapter XVII rule 17 of the Appellate Side Rules has contended that general arrangement/intention is to have all such challenges considered by a Bench consisting of two Judges, rule 18 makes an exception to this general provision and, therefore, needs to be approached accordingly. Attention is invited to the fact that orders passed by the Authorities under the Maharashtra Cooperative Societies Act can be assailed before learned single Judge and as per explanation added at the end of rule 18, the expression "order" has been explained to mean any order passed by any judicial or quasi judicial authority "empowered" to adjudicate under the Maharashtra Cooperative Societies Act. The meaning of word "empower" as explained in Black's Law Dictionary (16th Edn) is also pressed into service for the said purpose. It is urged that circular assailed, therefore, cannot be viewed as an order and circular could not have formed subject-matter of challenge before Appellate Authority. Attention is also invited to a proviso added just above the said explanation in rule 18 itself to show that validity of any Statute or any Rule or Regulation cannot form subject-matter of consideration of such challenge before single Judge. It is pointed out that the words employed therein are only illustrative and other similar type of instruments like Ordinance, Bye-laws or Circular or resolution which may have similar tendency and impact are not specifically mentioned therein. It is contended that by implication, it is apparent that intention of framers was to have such other instruments challenged before the Division Bench only. Support is also derived from scheme emerging from Section 113 of the CPC and Article 228 of the Constitution of India.

6. The judgment of Division Bench of this Court in the case of Prabhakar Sadasheo Nandanwar Vs. State of Maharashtra and Others, is pressed into service to show how Entry 44 then appearing in rule 44 has been construed as illustrative in nature. To further substantiate this contention, our attention has also been invited to the fact that inspite of material amendment in scheme of rule 18, entry 18 and entry 35 which operate in the same field have continued in the Appellate Side Rules. It is urged that when basic design of framers is to

permit only limited challenge before learned single Judge, by interpretative process, that design needs to be protected and, therefore, it is essential to hold the language employed in last proviso to rule 18 also as illustrative. Reliance is also placed upon Chapter 11 in Maxwell Law of Interpretation (12th Edn). It is urged that in such situation, this Court is duty-bound to follow the law as explained by the Division Bench of this Court in Prabhakar Sadasheo Nandanwar's case (supra). It is also pointed out that if this Court is inclined to take any other view, Reference then needs to be made to a larger Bench. Attention is also invited to Full Bench Judgment of this Court in the case of Chandrakant and ors v. State of Maharashtra and ors reported at 1976 BCI (O) 85 to urge that there the question was whether Circular, Order or Resolution or part thereof laying down rules or principles of general application requiring observance in recruitment or in fixation of seniority for Government servants and duly authenticated by signature under the endorsement "By order and in the name of Governor of Maharashtra" and intending to be applicable straightway are or amount to Rules framed in exercise of powers conferred under proviso to Article 309 of the Constitution of India though the same do not expressly state that they are made or issued in exercise of the powers conferred under the proviso to Article 309 and are not published in the Government Gazette. Attention is invited to paragraph 32 of the said Full Bench judgment where the question has been answered holding that such circulars, orders or resolutions can amount to rules framed in exercise of powers conferred under the proviso to Article 309 of the Constitution. Learned Senior Advocate, therefore, states that challenge in the present matter, therefore, is rightly filed before the Division Bench.

7. Learned Additional Government Pleader has relied upon the very same explanation and last proviso to rule 18. It is contended that the proviso only requires matters in which validity of any Statute or Rules or Resolutions made thereunder is questioned, to be placed before - the Division Bench and not otherwise. It is urged that circular dated 3.2.2003 assailed in this petition is only an administrative instrument which does not meet the requirement of this proviso. Attention is invited to Article 162 of the Constitution to urge that said circular has been issued only in furtherance of those powers administratively. Reliance is also placed upon judgment of Honourable Apex Court in G.J. Fernandez Vs. State of Mysore and Others, , particularly paragraph 12 thereof, to show that there, instructions issued in the PWD Manual are held to be administrative in nature and not conferring any right upon Petitioner to seek vindication for its violation. Similarly, Division Bench judgment of this Court in the case of Dowell Leasing and Finance Ltd. Vs. Radheshyam B. Khandelwal, Anup Investments carrying on Business in the name and Style of Anup Investments, Ajay Chajjer, carrying on business in the name of Akash Investments and The Bombay Stock Exchange Ltd., is pressed into service to show difference in nature of a rule, Regulation or bye-law.

8. In reply, learned Senior Advocate has contended that words, "Statute",

"Rules" or "Regulations" used in last proviso to rule 18 need to be understood in the background of Article 13(3) of the Constitution of India and if validity of any such instruments which is law within the meaning of that Article is assailed, the matter must be considered by the Division Bench only.

9. The Division Bench of this Court in the case Prabhakar Sadasheo Nandanwar's case (supra) was required to interpret the provisions of Chapter 17, rules 18 (44), 1, 4 and 17 of the Appellate Side Rules and Article 14 of the Constitution of India. Entry 44 then in existence in the Appellate Side Rules permitted a challenge to orders passed by different Committees constituted by the State Government for verification of caste claims of SC and ST candidates before learned single Judge. The use of words "Scheduled Castes and Scheduled Tribes" in said Entry led to controversy. If the candidate aggrieved by adjudication of such Committee was not from SC or ST category, his grievance was required to be looked into by the Division Bench and if he was from those categories, the grievance needed to be looked into by learned single Judge. It also led to another debate as only such SC/ST candidate could have filed further appeal viz. Letters Patent Appeal before the Division Bench. It is in this background that Entry has been construed and after noticing this apparent contradiction and Article 14 of the Constitution of India, the Division Bench has observed that the mention of Scheduled Caste and scheduled Tribe in Item 44 is illustrative and not exhaustive. Thus, other candidates who were also aggrieved by adjudication of the committee but did not belong to either SC or ST category were subject to Entry 44 and hence were expected to file petition before learned single Judge. Entry 44 has been deleted on 29.11.2002 and hence, that facet is now only of academic importance. The challenge to determination of caste claim by such committee is now being considered by the Division Bench only. However, law as explained therein still holds good. In paragraph 8 of its judgment, the Division Bench has found that the Bombay High Court Appellate Side Rules have been made for convenience of administration of justice and normally the matters are to be heard by the Division Bench. Looking to the heavy burden of work and large number of litigants approaching it, it was necessary to properly regulate and to provide for quick disposal of some matters and hence, appropriate matters have been assigned to learned single Judge or to single Bench so that simultaneously two Judges become available to do that job with equal ability. With that intention, exception in the shape of rule 18 has been created. The Division Bench, therefore, has held that said rule 18 is required to be read liberally keeping in mind the object with which special exception of hearing by single Bench is created to the general rule of Division Bench hearing.

10. We are, therefore, unable to find any ratio in said judgment which requires us to construe above-mentioned last proviso Entry 44 liberally. Here, opening part of rule 18 itself shows use of words envisaging wider or larger scope. The said opening part reads as under:

18. Single Judge's powers to finally dispose of applications under Article 226 or

227 - Notwithstanding anything contained in Rules 1,4 and 17 of this Chapter, applications under Article 226 or under Article 227 of the Constitution for applications styled as applications under Article 227 of the Constitution or applications styled as applications under Article 227 of the Constitution read with Article 226 of the Constitution arising out of...

All possible challenges under Articles 226 and 227 which arise from order of quasi-judicial authority are, therefore, placed before Single Bench, except to the limited extent i.e. when validity of any Statute or then Rule or Regulation framed thereunder also forms part of such challenge. Hence, the clause which explains expression "order" or then the meaning of "empower" therein is, therefore, not relevant for present purposes. The above-mentioned last proviso again shows that when the matter in dispute is or relates to challenge to validity of any Statute or any Rules or Regulations "made there under", such application shall be heard and disposed of by a Division Bench. Thus, words "matter in dispute" contained in this proviso show that it indicates only one facet or angle of challenge involved in such application under Article 226 or Article 227 which arises out of order passed by judicial or quasi-judicial authority. In other words, framers have recognized possibility of such a facet or nature of challenge in a matter arising out of an order passed by quasi-judicial authorities functioning under various enactments enumerated in various entries of Rule 18 of Chapter XVII and directed that only in that contingency such application under Article 226 or Article 227 needs to be placed before Division Bench. When in such matter which arises out of order passed under the Maharashtra Cooperative Societies Act, there is also dispute or challenge to validity of any of its Sections or any Rules or Regulations made thereunder or then to any other Statute, Rule or Regulation made under any such statute, then only such matter/application needs to be heard and disposed of by Division Bench.

11. The word used in this proviso viz. "Statute" is followed by words "any rules or Regulations" and thereafter the words used are "made there under .Therefore, if challenge is to Rules or Regulations made under the Maharashtra Cooperative Societies Act or any other Statute, the matter again need to be placed before the Division Bench. The provisions of the Maharashtra Cooperative Societies Act under its Section 165 contemplate framing of Rules only. It does not contemplate framing of any Regulation. The impugned circular has not been demonstrated to be a Rule or then under any particular section of the Act. In any case, said circular itself cannot be construed as a rule or Regulation or statute. There is no argument that it is issued in exercise of legislative power or then in exercise of Rule making or Regulation framing power delegated to the issuing authority by the Maharashtra Cooperative Societies Act. Its bare perusal shows that said circular dated 3.2.2003 is administrative in nature. Status of a Statute or of Rule/ Regulation framed under Statute cannot be conferred upon it. Hence, challenge thereto cannot be viewed as a challenge to Statute or Rules or Regulations.

12. Contention that the words implied in last proviso are only illustrative may

require further consideration in appropriate matters as, apparently, the words like "Ordinance" or then other similar instruments which are of the same status and nature as the statute, and Rules or Regulations made under Statute are not expressly mentioned therein. However, in view of our conclusion reached, here it is not necessary for us in this matter and at this stage to go into that controversy. Question whether instrument challenged can be conceived as a Statute or Ordinance or Rule or Regulation falling under said last proviso to the Appellate Side Rules may arise in various matters and will require answer in the background of parent Legislation. We are not in a position to accept the contention that "law" as envisaged in Article 13(3) is covered or even meant to be covered under the said last proviso to rule 18.

13. Our attention has also been invited to Section 113 of the CPC to point out that even the Civil Court which is the Court of unlimited jurisdiction in civil causes has not been given power to look into certain challenges and those challenges are required to be referred to the High Court by the Civil Court. Attention is also invited to Article 228 of the Constitution in this connection. It is urged by learned Senior Advocate that the Appellate Authority like Respondent No. 1 is not competent to examine the challenge to validity of circular or other similar documents raised before it and hence, challenge of present nature is cognizable by the Division Bench of this Court. We find that though the Authority may not be competent to look into such challenge to circular, when such circular is not Statute or Rule or Regulation, learned single Judge of this Court can look into validity thereof.

14. We, therefore, hold that the matter needs to be placed before the learned single Judge of this Court. Registry to list it accordingly.