

(2003) 11 BOM CK 0037

In the Bombay High Court

Case No : Writ Petition No. 1945 of 2003

Bhajandas Gorekh Bhuirkar

APPELLANT

Vs

The District Election Officer and Others

RESPONDENT

Date of Decision : 04-11-2003

Acts Referred:

Citation : (2004) 1 ALLMR 749 : (2004) 1 BomCR 9 : (2004) 1 MhLj 923

Hon'ble Judges : D.G. Karnik, J;A.P. Shah, J

Bench : Division Bench

Advocate : C.J. Sawant and V.K. Choudhari, R.V. More, Y.D. Mulani, AGP, for the Appellant; Asha Joshi, for the Respondent

Judgement

D.G. Karnik, J.—By order dated 28th March, this Court issued notice to the respondents that the matter would be heard and finally disposed of at the admission stage itself. The petition was accordingly heard finally on 6th October 2003 and the judgment was reserved which we pronounce today.

2. The petitioners are borrower members of the Respondent No. 3 which is a Co-operative Society registered under the Maharashtra Co-operative Societies Act, 1916 (for short "the Act"). The respondent No. 3 is a Vividh Karyakari Seva Sahakari Society. The respondent No. 1 is the Election Officer attached to the office of District Deputy Registrar of Co-operative Societies, Solapur. The respondent Nos. 4 to 26 are the candidates to the election of the managing committee (for short "the Committee") of the respondent No. 3 Society. Under the Bye laws of the respondent No. 3 Society the Committee consists of 17 members out of which 10 members are elected from the borrower members and one members is to be elected from non borrower members. Six seats are reserved, 1 seat for persons belonging to Scheduled Caste and Scheduled Tribes, 1 seat for persons belonging to Other Backward Classes, 1 seat for persons belonging to Nomadic Tribes/Special Backward Class and 1 for the Women.

3. Under bye-law No. 38A of the approved bye-laws of the respondent No. 3

Society (hereinafter referred to as "bye-laws), the electorate of the respondent No. 3 Society is divided in two constituencies and voters list is also to be published in two parts viz.

i) "A" Class Borrower Members" Constituency

ii) "B" Class Non-borrower Members" Constituency.

The election to both the constituencies of borrower members as well as non-borrower members are to be held simultaneously but in different constituencies. "A" Class borrower constituency are entitled to vote only to the candidates contesting elections from that constituency and "B" Class non-borrower members are entitled to vote only to the candidate contesting from that constituency. All members belonging both to the borrower as well as non-borrower constituencies are entitled to vote for the elections of the reserved seats for candidates belonging to weaker sections and Backward classes, women etc.

4. An election programme for the election of the Committee of the respondent No. 3 Society for the years 2002-03 to 2007-08 was declared by the respondent No. 1 on or about 7th February 2003. Under the said election programme, nominations were to be filed on or before 4th March 2003. Scrutiny of the nomination papers was to be made on 5th March and list of candidates whose nominations were accepted was also to be published on the same date. The last date of withdrawal of nomination was 19th March 2003 and the voting was to take place on 30th March 2003. Counting of votes was to begin on 31st March 2003 and results were to be declared immediately after the counting. The petitioner apprehended that as per bye-law No. 38A of the bye-laws of the respondent No. 3 Society borrower members would be allowed to vote only in the constituency of borrowing members and non-borrower members would be allowed to vote only for 1 seat meant for non-borrower members. According to the petitioners, this is contrary to law and all the members of the respondent No. 3 society are entitled to vote for all the posts of the committee members. The petitioner who is a non-borrowing member, has filed the present petition alleging that he would not be allowed to vote for the post of borrower members, for a direction that borrower members as well as non-borrower members be allowed to vote for all the seats. By an interim order dated 28th March 2003, the Division Bench of this Court granted ad-interim relief directing that all the non-borrower members as well as borrower members be allowed to vote for all the seats subject to the final decision of the Writ Petition. Accordingly, the elections have taken place but are subject to the decision of this Writ Petition.

5. The learned counsel for the petitioner relied upon the decision of a Division Bench of this Court in *Dinkar Pandurang Patil and Anr. v. Chikali Vividh Karyakari Society Ltd. and Ors.* reported in 1984 C.T.J. 147. The said decision has been followed by another Division Bench of this Court in *Machindranath Bandu Kale and others Vs. Satali V.K.S. SOciety Ltd. and others*, and a single Judge in *Utrane*

Vividh Karyakari Seva Sahakari(V) Society v. Laxman Dalpat Patil reported in 1989 Mh.L.J. 1125. The learned counsel for the petitioner also referred to and relied upon the judgment of the Supreme Court in Babaji Kondaji Garad v. The Nasik Merchants Cooperative Bank Ltd. Nasik and Ors. reported in 1984 (37) C.T.J. 272.

6. The first judgment of the Division Bench of this Court was rendered in the case of Dinkar P. Patil v. Chikali V.K.S. Ltd. (Supra) and has been referred to and followed by the two subsequent judgments of this Court. It is therefore necessary to refer to this judgment in some details. In that case, the respondent was an agricultural co-operative Society. Under bye-law No. 38 of the bye-laws of that Society, not more than one representative of non borrower members was to be elected to the Managing Committee. A notification regarding the election of the Managing Committee of the Society was published which prevented the non-borrower members from voting at the election of the borrower members. Some members of the Society therefore, challenged the correctness of the notification before the Divisional Joint Registrar. In the absence of any express bye-laws creating any separate constituency for non-borrower members justifying restriction on their voting right, the Division Joint Registrar found this restriction against the non-borrowing members to be illegal. The order of the Divisional Joint Registrar was challenged before the High Court. Reliance was placed on Sub-section (3) of Section 73C of the Act, which at the relevant time read as under:-

73C (3) "In the case of an Agricultural Credit Society which gives loans to individuals for the raising of crops. there shall not be more than one representative on the committee of such society, of members who have not taken any loans from the society: and that representative shall be elected or appointed only from amongst members, who have not taken loans. Such representative shall not be eligible for being elected or appointed as a designated officer."

The Division Bench held that the section only contemplated representation of the non-borrower members in the Society and further held that the representation of the elected representative of a non-borrower members from amongst them still did not justify an inference of legislative intention to constitute any separate constituency of such non-borrower members. It was only held that Section 73C does not by itself create a separate constituency for non-borrowing members and unless a separate constituency was created, there was only one constituency of all the members with the reservations of a seat for non-borrower members. But since the constituency was one, all the members, borrower as well as non borrower, were entitled to vote for election to all the posts of the committee members.

7. The decision of the Division Bench in Chikali V.K.S. Society's case may superficially appear to support the contention of the petitioner that under the Act there is only one constituency of all the members of the Society with certain

reservations like the reservation of one seat for a non-borrower members but the reservation to be made u/s 73C does not by itself create separate constituencies. It is true that section 73C by itself does not create separate constituencies of borrower and non-borrower members. But there is nothing in the Act which prevents a Society from creating, under its bye-laws, separate constituencies for borrower members and non-borrower members. The bye-laws of a given Society may create separate constituencies for borrower members and non-borrower members. If such separate constituencies are created then the bye-laws may provide that the voters belonging to one constituency, say of a borrower members, would be entitled to vote only for the election of the committee members from the constituency of borrower members and non borrower members would be entitled to vote for election of a committee member from the constituency of non-borrower members. In this connection, a reference may be made to the observations of the Division Bench in the case of Chikali V.K.S. Society itself. In paragraph No. 6 of the judgment, the Division Bench observed:

"Instances of voters being divided into separate constituencies restricting their such voting rights to the candidates standing from such constituencies are not unknown to the law of elections, where the number of voters happen to differ depending on their place of residence or nature of their membership. The Act and the Rules to which out attention was drawn do not show how precisely the members of the Committee are to be elected. It appears to have been left to each Society to regulate such procedure by its bye-laws.

Thus, one would have to look to the bye-laws of the Society to find out whether separate constituencies are created by the said bye-laws for borrower members and non borrower members. A translation of bye-law No. 38A of the bye-laws is annexed at page No. 13A of the petition by the petitioner himself. The bye-law No. 38A reads as under.

38 A) (1) A Class borrower member constituency

(2) B Class Non-borrower member constituency

The voting of both the constituencies shall be taken by secret ballot at one time, but in different sections. A Class members shall be voting only for the "A" Class constituency members of borrowers as well as B Class non-borrower members shall be voting only for the candidate contesting the election from B Class non-borrower members. A and B Class members shall be entitled to vote for the economically weaker section as well as the schedule caste schedule tribes candidate.

Note:

1) A class borrower member - the member who has taken loan any time after his enrolment shall be neglected in this class.

2) B Class non-borrower members - the member who has not taken loan from the Society any time after becoming the member and who has held at least one

complete share of the society shall be neglected.

3) Weaker Section - Economically Weaker section means the members whose income from all sources in the preceding year is less than in rural area is Rs. 3,600/- and in urban area Rs. 4,200/-.

8. Bye-law No. 38A is a special bye-law in the present case which creates two constituencies. One of a borrower members and another of a non-borrower members. Constituency of borrower members is called as "A" class constituency and constituency of non-borrower members is called as "B" class constituency. Under the bye-law No. 38A. "A" class members are entitled to vote only for election of committee members belonging to "A" class constituency of borrower members and "B" class non-borrower members are entitled to vote at the election of committee member contesting from non borrower members constituency. These two separate constituencies are created by the bye-law No. 38A itself. There was no such bye-law similar to the present bye-law No. 38A, in the case of Chikali V.K.S. Society. As stated in paragraph No. 6 of the judgment of the Division Bench in Chikali V.K.S. Societies case, it is open to the Society to provide for formation of different constituencies as per its bye-laws. Thus, the decision in the case of Chikali V.K.S. Society is distinguishable on facts, and does not support the petitioner. On the other hand, it does contemplate creation of separate constituencies under the bye-laws. If such constituencies are created by the bye-laws, the voting right would be governed as per the bye-laws and voting rights of members belonging to one constituency can be restricted to voting at the election of committee member from that constituency.

9. The learned single Judge of this Court in the case of Utrane V.K.S. Society v. Laxman (Supra) followed the decision of the Division Bench in Chikali V.K.S. Society's case. The facts of that case are distinguishable as in that case also there was no bye law similar to bye law No. 38A in the present case.

10. The Division Bench of this Court in Machindranath Bandu Kale v. Satali V.K.S. Society (Supra) also followed the judgment of the earlier Division Bench in Chikali V.K.S. Society's case (Supra). In paragraph No. 3 of the judgment, the Division Bench observed:

"Bye-laws 38(a) provides that one member from amongst non borrowing members will be elected on the committee. The said bye-laws also does not restrict the right of vote only to non-borrowing members. In the circumstances, we hold that both u/s 73-C(3) of the Act and under the Bye-law 38(a) of the Society, right to vote for electing one member from out of the non borrowing members will vest best both on non borrowing members as also on borrowing members. The view which we have taken is consistent with the view taken in the aforesaid case of Dinkar Pandurang Patil v. Chikali Vividh Karyakari Society Ltd. and Ors."

Ltd. and others." (underlining supplied)

Thus, bye-laws of Satali V.K.S. Society also did not have any bye-law similar to bye-law No. 38-A in the present case. The said judgment is also therefore, distinguishable.

11. The learned counsel for the petitioner placed strong reliance on the observations (appearing at page 278 of the report) of the Supreme Court in *Babaji Kondaji Garad v. Co-operative Bank Limited* reported in 1984 (Vol.37) C.T.J. 272. At page 278 of the said report, the Supreme Court observed:

"The next question is how the reserved seats are to be filled in? The section itself clearly manifests legislative intention when it says that if no such persons are elected or appointed, the reserved seats may be filled in by co-option. Therefore, the pride of place is accorded to election of persons eligible to fill in reserved seats. Let there be no mistake that there is no reserved constituency which may divide the society or the electorate. The constituency is the general constituency. Only the seats are reserved. This would imply that the general body of members will elect persons eligible to fill in reserved seats."

The question before the Supreme Court was how the reserved seats were to be filled in and in that context, the Supreme Court held there was no reserved constituency which would divide the electorate. As there was no "reserved constituency", it was held that all the voters were entitled to vote for all the posts including the reserved post. What is implicit in these observations is that where there are "reserved constituencies" all voters would not be entitled to vote for all constituencies. In the present case, there are reservations for economically weaker sections as well as scheduled caste and scheduled tribes and women. These are only reservations without separate constituencies for them and hence all members are entitled to vote at their election. Apart from these reservations, two separate constituencies are created under Bye-law No. 38A, one for the borrower members and another for the non-borrower members. For these two separate constituencies, only members belonging to that constituency are entitled to vote as per the bye-law No. 38A. The decision of the Supreme Court in *Babaji Kondaji Garad v. Co-operative Bank Ltd.* (Supra) therefore does not assist the petitioner.

12. In the present case, the petitioner has not challenged and we are not called upon to decide the validity of the bye-law No. 38A of the respondent No. 3 Society. We have accordingly, proceeded on the assumption that the bye-law No. 38A of the bye-laws of the respondent No. 3 society is valid and binding on the members. Bye-law No. 38A of respondent No. 3 Society creates two separate constituencies, one of the borrower members and another of the non-borrower members. A member belonging to one of the constituency is not entitled to vote at election of the members of the Managing Committee from the other constituency under the said bye-law. The contention of the petitioner that though he was a non-borrower member, he was entitled to vote at the election of the respondent No. 3 Society for all constituencies including the constituency of borrower members cannot be accepted. The petition would, therefore have to be

dismissed.

13. By virtue of an ad-interim order passed on 28th March 2002, all the members were allowed to vote for the election to all the posts of the Managing Committee. We are informed at the bar that the votes cast by the non borrower members and the borrower members at the election of the Managing Committee are not segregated and are not kept separately. It is therefore, not possible to ascertain how many valid votes were cast in favour of the elected candidates by eligible voters from their constituency. The ad-interim order specifically made it clear that it was subject to the final result of the petition. In the circumstances, the entire election from the constituencies of borrower and non-borrower members would have to be set aside. As regards the 6 posts reserved for scheduled caste, scheduled tribe, economically weaker section, other backward classes, nomadic tribes and special backward class and reservation for women (in all six posts), members from both the constituencies were entitled to vote as per bye-law No. 38-A, and have voted accordingly. In the circumstances, their elections need not be set aside.

14. We therefore set aside the election of 10 members of the Managing Committee from the constituency of borrower members and election of one member of the Managing Committee from the constituency of non borrower members. We direct the respondent Nos. 1 and 2 to hold fresh elections to 10 posts of Committee members from "A" Class borrower members" constituency and one post from as possible and in any event, within a period of four months hereof.

15. The learned counsel for the respondents prayed for stay of this order. The order is stayed for a period of four weeks.

All concerned to act on a copy of this order duly authenticated by the Associate.