

(1982) 01 BOM CK 0036

In the Bombay High Court

Case No : Writ Petition No. 2209 of 1981 (Nag.)

B.S. Potey

APPELLANT

Vs

B.A. Joshi, District Deputy Registrar

RESPONDENT

Date of Decision : 13-01-1982

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1982) 84 BOMLR 363 : (1983) MhLj 543

Hon'ble Judges : Joshi, J;Ginwala, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Ginwala, J.—The Yavatmal District Central Co-operative Bank Limited is a society specified u/s 73G of the Maharashtra Co-operative Societies Act, 1960 (hereinafter referred to as "the Act"). Members of the committee of a specified society are elected under the provisions of the Maharashtra Specified Co-operative Societies Elections to Committee Rules, 1971 (hereinafter referred to as "the Election Rules"). The petitioner was elected as a member of the committee of the said bank on October 25, 1978 representing the Maregaon Block Development Constituency. On March 20, 1979 he tendered his resignation as a member of the committee and the Chairman of the Bank accepted this resignation on that very day and intimated the vacancy to the District Deputy Registrar, Co-operative Societies, Yavatmal (respondent No. 1) on March 23, 1979. The vacancy caused due to the resignation of the petitioner was required to be filled in under the provisions of Rule 72 of the Election Rules. The elections to the Committees of specified societies are governed by Chapter XI-A of the Act and u/s 144-C occurring in that chapter, it is the Collector who has to fix the date for the election and the election has to be conducted under his control by such returning officer as he may appoint in this behalf. In pursuance of this provision the District Registrar requested the Collector, Yavatmal to hold the bye-election to fill in the vacancy caused by the resignation of the petitioner. Accordingly the

Collector published a provisional list of voters on July 20, 1979 and he also published the final list of voters on August 30, 1979. He could not hold the bye-election because on September 5, 1979 the State Government (respondent No. 3) postponed the elections of committees of specified societies generally. However, the State Government directed the Collector to hold election on January 21, 1980 and the Collector in his turn published the provisional list of voters on August 20, 1981.

2. On September 4, 1981 the District Deputy Registrar in the purported exercise of his power u/s 77A of the Act, appointed respondent No. 2 as director in the board of directors of the said bank for the remaining period of tenure of the present board of directors or till the date of declaration of results of the election to be held under Rule 72 of the Election Rules, whichever is earlier. In the preamble to this order the District Deputy Registrar traced the history as to how the seat had become vacant and proceeded to state that that seat was vacant even till the date when he passed that order and that it was necessary to fill the said vacancy. It is this order passed by the District Deputy Registrar on September 4, 1981 which is under challenge before us in this writ petition under Article 226 of the Constitution.

3. The challenge of the petitioner to the impugned order is two-fold. He firstly contends that Section 77A of the Act did not confer any power on the District Deputy Registrar to fill in the vacancy caused by his resignation as such a contingency was not covered by any of the clauses of Sub-section (1) of Section 77A which embodied conditions precedent for exercising the power under that section. In other words, it is contended that none of the Clauses (a) to (e) of Sub-section (1) of Section 77A were applicable to the facts of the present case and hence the District Deputy Registrar did not derive any power under that section to appoint respondent No. 2 and to fill in the vacancy even for a shorter period till the result of by-election held under Rule 72 of the Rules. The second leg of the argument is that the power conferred on the District Deputy Registrar u/s 77A is subject to a further condition as contained in the first proviso which requires him to publish a notice on the notice board at the head office of the society, inviting objections and suggestions with respect to the proposed order within a period specified in the notice and to consider all such objections and suggestions received by him within that period, before making the order of appointment under Sub-section (1) of Section 77A. It is contended that this requirement has been followed in its breach and that the second proviso which engrafts an exception on the first is not attracted in the present case as no immediate action was called for, and no circumstances existed which would make the publication of the notice to be impracticable. It is, therefore, the case of the petitioner that respondent No. 2 is holding the office of the director of board of directors of the said bank which is same thing as member of the committee of the said bank, without any legal authority and hence the petitioner prays for the said order being quashed. By an amendment to the petition the petitioner has further averred that as a sequel to the impugned order the State Government

has directed the Collector not to proceed with by-election for the said vacancy and it has been submitted before us that because of this direction by the State Government to the Collector, the tenure of respondent No. 2 as a member appointed u/s 77A would be indefinitely prolonged.

4. The petition is contested by respondent Nos. 1 and 2. Respondent No. 1, the District Deputy Registrar, has firstly contended that the petition is not maintainable as the petitioner has no locus standi to file the present petition as he cannot have any legitimate grievance and has not suffered any legal injury due to the impugned order. In justification of the impugned order respondent No. 1 contends that the seat was giving vacant since March 20, 1979, because of the direction given by the Government from time to time it could not be filled in and the cause of agriculture which was being represented on the board of directors by the petitioner was suffering and hence it was expedient for him to fill in the vacancy caused by the resignation of the petitioner. He submits that in these circumstances he was satisfied that the matter required immediate action and hence he passed the impugned order. It had been alleged in the petition that respondent No. 1 had passed this order under political pressure, but he has denied this. The return filed by respondent No. 1 does not throw any light on the contention of the petitioner that he could not invoke his powers u/s 77A for filling the vacancy caused by the resignation of the petitioner. The return is conspicuously silent on this important issue.

5. Respondent No. 2. as could be expected, has supported the impugned order. He reiterated the contention advanced by respondent No. 1 that the petitioner had no locus standi. Respondent No. 2 has alleged that the petitioner had not been validly elected as a member of the committee of the said bank inasmuch as he was disqualified as he was defaulter and he could not have represented the co-operative societies which he purported to do. It has been alleged by respondent No. 2 that these facts have been deliberately suppressed by the petitioner in his petition. According to respondent No. 2 since the very election of the petitioner at the out-set was invalid, there was failure to elect a member for the said constituency after the election was held and if that was so, the District Registrar was within his power to appoint him by virtue of Clause (b) of Sub-section (1) of Section 77A of the Act.

6. At the outset Mr. D.K. Khamborkar, the learned Counsel for respondent No. 2 raised a preliminary objection before us as to the maintainability of the petition on the ground that the Yavatmal District Central Co-operative Bank Limited had not been impleaded in this petition. He submitted that the Bank was a necessary party to this petition for two reasons, viz. that it could have produced the material to show as to what was the urgency for filling in the vacant seat and secondly it could have also shown as to how the appointment of respondent No. 2 was advantageous to the functioning of the bank. According to Mr. Khamborkar, this has a bearing on the failure on the part of the District Deputy Registrar to comply with the proviso to Sub-section (1) of Section 77A, Thus, according to Mr.

Khamborkar, because of the failure on the part of the petitioner to implead the said Bank, this material has not come on record and hence according to him, the petition, without the Bank before this Court, is not tenable. We do not find any substance in this preliminary objection for the simple reason that the impugned order has been passed by respondent No. 1 and it was for him to place all the relevant material before this Court to justify his action. He has filed his return and we believe that whatever contentions he could urge, he has put forth. He has also stated in para. 3 of his return that he passed the impugned order because the cause of agriculture which was represented by the petitioner in the board of directors was suffering. Now if this was the consideration on which he passed the impugned order, he must have in his possession material to that effect. If that was so, it was for him to produce that material before us for which the presence of the Bank was not necessary. We, therefore, find that the petition is not bad for want of proper or necessary parties.

7. In so far as the merits of the case are concerned, it would be convenient at this stage to reproduce Sub-section (1) of Section 77A under which the District Deputy Registrar has purported to pass the impugned order. This sub-section is in the following terms:

77A. (1) Where the Registrar is satisfied that,-

- (a) at the first constitution of the committee of any society there is a failure to elect all or any of the members of the committee;
- (b) the term of the committee of any society or of any of its members has expired or for any other reason election is held and there is a failure to elect all or any of the members required to fill the vacancies;
- (c) any committee is prevented from entering upon office;
- (d) a new committee has failed to enter upon office on the date on which the term of office of the existing committee expired; or
- (e) a new committee cannot for any reason be constituted before the expiry of the term of office of the existing committee.

the Registrar may, either suo motu or on the application of any officer of the society, by order appoint-

- (i) any member or members of the society to be the member or members of the committee to fill the vacancies;
- (ii) a committee, consisting of not more than three members of the society, or one or more administrators, who need not be members of the society, to manage the affairs of the society till a new committee enters upon office:

Provided that, before making such order, the Registrar shall publish a notice on the notice board at the head office of the society, inviting objections and suggestions with respect to the proposed order within a period specified in the

notice and consider all objections and suggestions received by him within that period:

Provided further that, it shall not be necessary to publish such notice In any case where the Registrar is satisfied that immediate action Is required to be taken or that It Is not reasonably practical to publish such notice.

8. The question which we have to consider at the threshold is whether this sub-section could be pressed into service by the District Deputy Registrar for filling in the vacancy which had occurred on account of the resignation tendered by the petitioner on March 20, 1979. As we have stated above, any casual vacancy which occurs due to death, resignation, disqualification, or removal of a member of a specified society or because of such member becoming incapable of acting previous to the expiry of his term of office or otherwise has to be filled in as provided by Rule 72 of the Election Rules. It would, therefore, appear that a provision .has been made in the said Rules which have been framed by the State Government in exercise of the powers conferred on it by Sub-section (2) of Section 144F, Sub-section (4) of Section 144-T, Section 144-X and Clauses (xi) and (ixxv) of Sub-section (2) and Sub-section (1) of Section 165 of the Act. Reading Sub-section (1) of Section 77A it would appear that the power which has been conferred on the Registrar, which we believe has been delegated to the District Deputy Registrar is hemmed by certain pre-conditions. It would appear that the Registrar can exercise his power only when any of the contingencies as contemplated by Clauses (a) to (e) exist. It follows that if none of these contingencies exist, the Registrar would not be within his right to make appointment as a member of the committee to fill in the vacancy. It would further appear that even if the contingencies as contemplated in Clauses (a) to (e) are present, the Registrar cannot straightway proceed to make the appointment. Before making the order of appointment he has to follow the procedure laid down in the first proviso and this procedure can be dispensed with only when the circumstances enumerated in the second proviso are present. It is within the four corners of these limitations that the Registrar is supposed to exercise his power of appointment under Sub-section (1) of Section 77A.

9. While applying the provision contained in Sub-section (1) of Section 77A to the facts of the present case it must be remembered that the District Deputy Registrar was purporting to fill in the vacancy which had been caused by the resignation of the petitioner before holding a by-election as required by Rule 72 of the Election Rules. It is in this background that the action of the District Deputy Registrar will have to be tested.

10. Obviously Clauses (c) to (e) would not be attracted in the present case as they relate to a committee. We are then left with Clauses (a) and (b). Clause (a) deals with a vacancy on account of failure to elect a member at the first constitution of the committee. In other words, if at the election held for the constitution of the committee all or any of the members of the committee could not be elected, the Registrar on his own or on an application of any officer of the

society would be entitled to appoint any member or members of the society to be the member or members of the committee to fill in the vacancies. Mr. Khamborkar has made an attempt to bring the present case under this clause. In substance his contention is that at the time when the petitioner was elected as director of the bank on October 25, 1978, he was not only not qualified for being elected, as he was not a member representing a society, but on the other hand he was disqualified as he was a defaulter within the meaning of Rule 58 of the Maharashtra Co-operative Societies Rules, 1961. According to Mr. Khamborkar, if the petitioner was not legally entitled to be elected at the general election at which the committee was first constituted, his election has to be ignored as null and void and in that event it could be said that there was a failure to elect a member for the constituency which the petitioner purported to represent.

11. In our view, there is little substance in this contention of Shri Khamborkar. Having regard to the provisions of the Act and the Election Rules, it appears that the election of a disqualified person does not ipso facto render the seat vacant. It would appear that when the election of a member is in dispute, such dispute has to be resolved by resorting to an election petition as contemplated by Section 144-T of the Act within the specified time. On such a petition being filed, the Commissioner, who is authorised to hear the petitions, has to make a declaration that the election is void. It is thereafter that Rule 72 comes into play and the vacancy has to be filled in by holding by-election. It would, therefore, appear that a disputed election does not make the seat vacant unless and until it is declared void by the Commissioner under Rule 79 of the Election Rules. Mr. Khamborkar would, therefore, not be right in saying that there was failure to elect a member to represent the constituency from which the petitioner was elected - consequently giving power to the District Deputy Registrar to fill in the vacancy by nominating respondent No. 2. In our view, Clause (a) would not come to the rescue of the District Deputy Registrar.

12. Coming to Clause (b) it would appear at once from the language of this clause that the Registrar would be entitled to fill in the vacancy only if an election is held to fill the vacancy and it has resulted in failure to elect the member concerned. It is clear from the language of Clause (b) that Registrar does not acquire the power to appoint a member by resorting to this clause unless and until an effort has been made to fill in the vacancy by holding an election. In other words, election to fill in the vacancy is a pre-requisite for exercise of power.- It is undisputed that before the impugned order was passed, no by-election had been held to fill in the vacancy caused by the resignation of the petitioner. Indeed, the failure to "hold election for a long time by the Collector is being relied upon by the District Deputy Registrar for justifying the impugned order. The very stand taken by him negatives the application of Clause (b) to the facts of the present case.

13. From what we have said above it is crystal clear that none of the contingencies as contemplated by Clauses (a) to (e) existed at the time when the

District Deputy Registrar proceeded to fill in the vacancy by passing the impugned order. On this count alone, therefore, it is not possible to sustain the said order. Obviously it has been passed without any power or authority and hence it does not confer any right whatsoever on respondent No. 2 to be a member or director of the board of directors of the said Bank. In the view which we have taken, it is not necessary for us to consider the second contention urged by the petitioner, viz. that the District Deputy Registrar has failed to observe the procedure prescribed in the first proviso to Sub-section (1) of Section 77A. The question of following this procedure would arise only if he had power to appoint respondent No. 2 in the vacancy.

14. The only question which then remains to be considered is whether the petitioner can maintain the present petition inasmuch as his right is not affected by the impugned order. Mr. Bapat, the learned Counsel for the petitioner, has pointed out that the petitioner is elected by the Gram "Vividha Karyakari Society to represent it to vote at the election of the director of the said Bank and hence he will be entitled to contest the election for filling the vacancy caused by his resignation. According to Mr. Bapat. therefore, the petitioner is a person interested in the election of the Board of Directors which has to be held for filling of the vacancy. Mr. Bapat has based this contention on the averments which have been made in para. 6(c) of the petition which has been inserted by amendment on November 19, 1981. In para. 6(c) it has been averred by the petitioner that after the impugned order was made by the District Deputy Registrar, the State Government has directed the Collector not to proceed with the by election and according to the petitioner, this position to withhold the by-election has been taken by the State Government as a counsel to the impugned order. In substance, therefore, it is contended by the petitioner that-because of the impugned order and consequently the appointment of respondent No. 2 as member of the committee, the right of the petitioner to contest the election for the vacancy which has been filled by the impugned order, is affected. It is pertinent to note that though the State Government has been made a party by the said amendment, it has not come forward to deny the allegation which has been contained in para. 6(c) as above. It, therefore, would appear that the by-election has been withheld by the State Government for the reason that the vacancy which was required to be filled in by the by-election has already been filled in by the District Registrar by appointing respondent No. 2. In this background, therefore, it can be said that the petitioner is prejudicially affected by the impugned order. In this connection we may refer to the observations of the Supreme Court in *Godde Venkateswara Rao Vs. Government of Andhra Pradesh and Others*, wherein it has been said that ordinarily the petitioner who seeks to file an application under Article 226 of the Constitution should be one who has a personal or individual right in the subject-matter of the petition and a personal right need not be in respect of a proprietary interest but it can also relate to an interest of a trustee. It has been further observed that apart from this, in exceptional cases as the expression "ordinarily" indicates, a person who has

been prejudicially affected by an act or omission of an authority can file a writ petition even though he has no proprietary or even fiduciary interest in the subject-matter thereof. We have pointed out above that the order passed by the District Deputy Registrar appointing respondent No. 2 is patently illegal and is beyond the powers conferred on him u/s 77A of the Act. We, therefore, consider this to be a fit case in which the petitioner, who has an interest in the by-election which would be caused if the said order is vacated, can maintain the petition. We, therefore, see no force in the contention that the petitioner has no locus standi to maintain the present petition.

15. In the result the writ petition is allowed and the rule is made absolute in terms of the first part of Clause (1) of the prayer clause. In the circumstances of the case there shall be no order as to costs.