

(2017) 07 BOM CK 0256
In the Bombay High Court
Case No : 08127 of 2017

Dattatraya s/o. Pandharinath Chamle

APPELLANT

Vs

The State of Maharashtra, & Ors.

RESPONDENT

Date of Decision : 06-07-2017

Acts Referred:

Constitution of India, Article 226, Article 227 - Power of High Courts to Issue certain writs - Power of superintendence over all courts by the High Court
Maharashtra Co-op

Citation : (2017) 07 BOM CK 0256

Hon'ble Judges : Sunil P. Deshmukh

Bench : SINGLE BENCH

Advocate : V.D. Salunke, B.B. Yenge, S.P. Tiwari, N.V. Gaware, S.N. Patil

Final Decision : Allowed

Judgement

1. Rule. Rule made returnable forthwith and heard learned advocates for the parties finally by consent.

2. Petitioner is a contesting candidate for a seat reserved for Other Backward Class (OBC) category in the ongoing elections of Vividh Karyakari Seva Sahakari Society, Konali, Taluka Devni, District Latur. Election programme as appearing at Exhibit "A" shows that various dates were scheduled for specific purposes. Relevant for the matter in issue appear to be distribution of nomination forms and its acceptance was scheduled during the period from 07th June, 2017 to 13th June, 2017. List of received nominations was to be published during said period. 14th June, 2017 was the date scheduled for scrutiny of nominations and 15th June, 2017 was for declaration of validly nominated candidates. Period between 15th June, 2017 to 29th June, 2017 had been for withdrawal of nominations. 30th June, 2017 was the date scheduled for distributing election symbols and 01st July, 2017 was scheduled for publication of the list of contesting candidates along with symbols and 09th July, 2017 is the date

scheduled for voting.

3. The petitioner contends that respondent no.04, namely, Maroti Laxman Chamle had purportedly submitted nomination form for contesting said elections as an OBC candidate for the seat reserved for said category. Nomination form had been submitted by respondent no.04 on 13th June, 2017, claiming and declaring to be belonging to OBC category along with further declaration about true copy of the certificate depicting OBC category having been annexed.

4. Upon scrutiny, a brief endorsement about reasons for rejection of nomination of respondent no.04 has been recorded referring to failure to submit certificate about him belonging to OBC category. Matter appears to have been taken in appeal by respondent no.04 around 15th June, 2017 and an order came to be passed thereon on 17th June, 2017 observing that on 17th June, 2017 while hearing had been scheduled, certificate and true copy of requisite caste certificate has been produced by respondent no.04 and in view of the same his nomination has been accepted setting aside decision of the Returning Officer rejecting nomination of respondent no.04.

5. Thus, the petitioner is before this court challenging order passed by appellate authority dated 17th June, 2017 questioning propriety, legality as well as jurisdiction of appellate authority. It is submitted that undisputedly till the nominations had been finalized, no certificate of caste by respondent no.04 had been made available before the Returning Officer. Despite time having been allowed for producing requisite certificate, respondent no.04 had failed to produce the certificate within the time extended. The Returning Officer, as such, has rejected nomination of respondent no.04. Order passed by the Returning Officer is pursuant to the provisions of law, particularly Rule 21, Sub-Rule 03 of the Maharashtra Co-operative Societies (Election to Committee) Rules, 2014 and its proviso, whereunder it is obligatory for a candidate to produce caste certificate along with nomination form. Non-compliance of the requirement under Rule 21 entails rejection and as such, the Returning Officer has rightly rejected nomination of respondent no.04.

6. Mr. Salunke, learned Counsel appearing for the petitioner, submits that intriguingly the matter was carried in appeal without making validly nominated candidates party to the appeal and resultantly an order came to be passed without petitioner being heard, depriving him of a legitimate and lawful opportunity as would emerge from various decisions of this Court. He submits that the appellate authority has obviously travelled beyond its powers, authority and jurisdiction and has allowed on the day of hearing, production of caste certificate by respondent no.04. He submits that in absolute disregard to the stipulation and rules and rather in ignorance thereof, has passed the order only for the reason that a caste certificate has been produced on 17th June 2017. It has not been examined as to whether the same would be legal, proper and valid, whether same would be in accordance with rules and law. Without examining as to whether in appeal, validly nominated candidates have been impleaded, the

same has been decided. Impugned order is wholly misconceived in fact and law. He submits that the area of examination for an appellate authority is correctness or otherwise of order passed by the Returning Officer and not beyond that, pointing out that there is not even a whisper by appellate authority in respect of the same. He submits that no sooner the impugned order is passed, than he had moved the High Court. This court had issued notice. Accordingly, respondent no.04 has been duly served. Learned Counsel submits that appellate order is a patently illegal crossing limits of jurisdiction and even otherwise it is unsustainable on the grounds referred to herein before.

7. Mr. Salunke, during the course of his submissions has relied on a judgment of Supreme Court in the case of S. Sundaram Pillai & others Vs. R. Pattabiraman & others [AIR 1985 SC 582], pointing out paragraphs no.30, 37 and 89 thereof, submitting that Judges should avoid interpreting statute in the light of their own views and they may adopt a purposive interpretation. He submits that paragraph 37 deals with the gist as to what is the function of proviso which generally is intended to limit the enacted provision so as to except something which would have otherwise been within it or in some measure to modify enacting clause. In the circumstances, he submits, although it may be argued that the provisions allow contest by reserved category candidates, rejection of nomination for non-submission of certificate pursuant to the rules is not justifiable, would not a proper argument as the elections are governed by statutory rules. He submits, declaration under the nomination will have to be supported by a document in the form of certificate in order to have validity to the nomination. A bare claim without being supported by the material, according to the rules, is liable to be rejected under the Maharashtra Co-operative Societies (Election to Committee) Rules, 2014, which precisely the Returning Officer has done taking into account the requirement under the Rules. Thus, the action and decision of rejection can hardly be faulted with and cannot be dubbed as improper or illegal. The nomination form of respondent no.04 had been deficient, lacking the certificate on the crucial date and that has been rightly rejected.

8. Mr. Salunke further submits that appellate authority has grossly exceeded powers, authority and jurisdiction. He further submits that appellate authority has committed error in absolutely disregarding the Maharashtra Co-operative Societies (Election to Committee) Rules, 2014, and particularly rule 21 and relevant proviso. The appellate authority has expanded scope of powers which is not allowed under the statutory provisions. The Returning Officer has rejected nomination form of respondent no.04 in accordance with rules according to the election programme which appellate authority has completely overlooked.

9. Mr. Salunke has further relied on a judgment in the case of Abdul Khalekh Mohd. Musa Vs. Ramkrishna Maroti Bangar & others [1985(2) Bom.C.R. 250] and has referred to paragraphs no.07 and 08 therein explaining and discussing the scope of scrutiny of nomination papers. He submits that in present case, even during extended period, respondent no.04 had failed to furnish the certificate

and this imperative aspect has been overlooked by appellate authority. He submits, for absence of validly nominated candidates, the appeal even otherwise has been defective.

10. He refers to yet another judgment of this Court in the case of Sow. Gangabai w/o. Nikantrao Jadhav Vs. The State of Maharashtra & others [2000 C.T.J. 7] to buttress his submission that in deserving cases interference is necessary and is a must. The court should not deter from doing so even before the last date for filing nomination papers. He has further relied on a judgment of this court in the case of Pandurang Hindurao Patil Vs. the State of Maharashtra & others [1984 C.T.J. 125] to reinforce his submission that this court shall not be baulked by the general assumption that the courts would not cause interference in election process.

11. On the other hand, Mr. Gaware, learned Counsel appearing for respondent no.04, contends that it is under the constitutional policy, seats are required to be reserved for OBC category in the management of co-operative societies. Pursuant to the policy, certain amendments have been carried out to the Maharashtra Co-operative Societies Act, 1960, around 2013. He contends that co-operative societies have been added under Article 19 by amendment, as such formation of co-operative societies is a fundamental right. He further submits that law on interference in the process of election is clear and that there have been several decisions referring to the same. He submits that powers under Articles 226 and 227 are not required to be invoked in undeserving cases especially in the matters of elections and elections in present matter have reached almost final stage wherein symbols have already been allotted including to respondent no.04 and except voting, all other stages are now over. The petitioner has alternate remedy available for prosecution of his cause even after the elections.

12. Mr. Gaware goes onto submit that it is absolutely not a case that respondent no.04 does not belong to OBC category or for that matter, he does not possess a certificate in respect of the same. Respondent no.04 has during the course of election process, received a certificate and has accordingly submitted the same before appellate authority. The requirement of submission of caste certificate is not under a substantive provision. In the circumstances, according to him, while a substantive provision does not require submission of a certificate, such a requirement, as contended, under the rules would not take away a valid right to contest on submission of caste certificate. He submits that requirement under rule for submission of caste certificate can hardly be said to be mandatory and in quite few decisions, in similar situation, it has been held by the court that, at the most, it can be directory.

13. Mr. Gaware relies on a judgment of Division Bench of this Court in the case of Dadasaheb Arjun Gulve Vs. State of Maharashtra & others [2008(2) Bom.C.R. 712], putting emphasis on paragraphs no.05 and 10 therein. Said case appears to be dealing with the provisions of the Maharashtra Municipal Councils, Nagar

Panchayats and Industrial Townships Act, 1965, and particularly Section 5-B, whereunder it appears a disqualification had been incurred for want of submission of caste validity certificate within the prescribed period. While dealing with the case, Division Bench has observed that object of having persons from reserved categories elected may be defeated even in genuine cases where persons are belonging to backward classes, where they had received caste certificate and had not been able to obtain caste validity certificate from the Scrutiny Committee before last date of filing of nomination paper. Proviso to Section 5B of the Mumbai Municipal Corporation Act, 1888, was added in order to enable the persons belonging to backward classes to contest elections by producing at the time of nomination paper caste certificate along with a proof of having applied for verification of caste certificate and filing an undertaking for production of caste validity certificate within the prescribed period. The Court was dealing with a case wherein the candidate had incurred disqualification for failure to submit caste validity certificate within the prescribed period for no fault of his, the procurement of which hardly had been in his control.

14. Mr. Gaware further submits that even otherwise the high court is supposed to go very slow in the matters wherein nominations have been accepted and for said purpose, he purports to rely on a judgment of Honourable learned single judge of this Court in the case of Geeta Shirish Chaudhari Vs. State of Maharashtra & others [2006(6) Bom.C.R. 303]. He submits, it has been considered in that while effective machinery has been provided under the Act of 1960 to deal with election disputes by a competent forum, it is not that the petitioner would be without remedy after the election results are declared and in the circumstances, it is not appropriate for this court to entertain a writ petition. It appears that the court had declined to interfere with under writ jurisdiction looking at the context and nature of controversy involved in that matter and disputed questions having been involved.

15. Mr. Gaware has also referred to a judgment of this Court delivered in Writ Petition No. 7783 of 2016 [Govind Tukaram Birajdar Vs. The State of Maharashtra & 03 others] dated 26th July 2016, to emphasize that the court had declined to interfere with election process when elections had reached almost at the last stage.

16. He submits that looking at object underlying the Constitution, respondent no.04 shall not be deprived of opportunity of contesting election by accepting his nomination paper, as ordered by appellate authority, for technical reasons like the one which has been pressed into service by the petitioner.

17. He submits that even otherwise, the rule which is relied on is not a substantive rule but only a proviso and mere use of word "shall" will not be a determinative factor.

18. The proviso cannot take away object and purpose underlying the main provision to let a candidate from reserved category contest elections especially

while in the present case, it is not in dispute that the petitioner belongs to OBC category. He submits that having regard to the object underlying main provision, the proviso shall not be fashioned in a way which would undo the object underlying main provision. In any case, according to him, a proviso cannot be read to be mandatory and at the most, it can be said to be directory.

19. Mr. Gaware goes onto submit that as a matter of fact, having regard to the nature of elections and the constitutional policy and the provisions of the Maharashtra Co-operative Societies Act, 1960, and the rules framed thereunder, it may be said that submission of caste certificate along with the nomination form may not be necessary and reference to that he belongs to reserved category may be sufficient. In the present case, not only respondent no.04 claims to be from reserved category but he has declared to be so in the nomination form and as such, it was sufficient for his candidature to be validated from the reserved category. This was necessary to be considered by the Returning Officer and, as such, had erred rejecting nomination form of respondent no.04.

20. Mr. Gaware has placed reliance on a judgment of Supreme Court in the case of Bachahan Devi & another Vs. Nagar Nigam, Gorakhpur & another [2008 DGLS(SC) 160 = 2008 AIR(SC) 1282] placing emphasis on paragraphs no.11, 12 and 13 thereof which read as under :-

"11. The delicate question that remains to be examined is what is the position in law when both the expression "shall" and "may" are used in the same provision.

12. Mere use of word may or shall is not conclusive. The question whether a particular provision of a statute is directory or mandatory cannot be resolved by laying down any general rule of universal application. Such controversy has to be decided by ascertaining the intention of the Legislature and not by looking at the language in which the provision is clothed. And for finding out the legislative intent, the Court must examine the scheme of the Act, purpose and object underlying the provision, consequences likely to ensue or inconvenience likely to result if the provision is read one way or the other and many more considerations relevant to the issue.

13. Several statutes confer power on authorities and officers to be exercised by them at their discretion. The power is in permissive language, such as, it may be lawful, it may be permissible, it may be open to do, etc. In certain circumstances, however, such power is coupled with duty and must be exercised."

21. Mr. Gaware urges to consider that there is no dispute about respondent no.04 belonging to OBC category. Respondent no.04 had applied before the date of scrutiny of nomination, however, could not secure the same before the scrutiny was over. He, therefore, urges the court to dissuade itself from interfering with in the matter where the elections have reached the stage of voting.

22. Looking at the subject matter in the case of Dadasaheb Arjun Gulve (*supra*), it does not appear that there can be any analogy as the present situation has a different context altogether. In the present matter, effect of non-submission of caste certificate at the time of filing nomination and its scrutiny would have to be seen. Statutory rules prescribe submission of caste certificate along with the nomination in order to see that a contesting candidate has material to show to be belonging to reserved category.

23. In the given scenario, it clearly emerges that on the date of scrutiny of nominations, nomination form of respondent no.04 had been deficient of the required certificate pursuant to provisions of rules, despite some latitude had been given by the Returning Officer to produce the same. Consequently the nomination has been rejected. While appeal had been preferred by respondent no.04, on the day of hearing of the appeal, the certificate came to be submitted before appellate authority. Such submission of course is not in accordance with the requirements of the rules nor anything has been brought to the fore on behalf of respondent no.04 that, the defect and omission, in submission of nomination form pursuant to the election programme is a defect or omission rectifiable at a later point of time. Section 152A of the Maharashtra Co-operative Societies Act provides for an appeal against rejection of nomination. It does not appear that appellate authority has been invested with powers to allow removal of deficiencies and/or cure defects at appellate stage. In the appeal, correctness of the order by Returning Officer was under scrutiny. The action of submission of caste certificate before the appellate authority is an action beyond the period stipulated under the election programme. Here, it appears that the appellate authority has committed an error in going beyond its powers, authority and jurisdiction by letting respondent no.04 submit certificate during the hearing of appeal. That apart, the impugned order gives a miss to the election programme and relevant rules, particularly rule 21(2) and its proviso. It is, therefore, apparent that there is a gross error committed by the appellate authority in allowing the appeal, going beyond the election programme and without taking into account relevant rules.

24. Even otherwise, other circumstances would be necessary to be taken into account. While a declaration has been made in nomination form that a copy of certificate has been attached, yet what emerges is that, he has submitted a note that he has applied for a certificate. Further it emerges that even on the date of scrutiny, requisite certificate could not be produced by respondent no.04. Over and above this, the certificate which has been purportedly produced before the appellate authority shows that the same had been delivered to the petitioner only after submission of the appeal and as such, even on the date of submission of appeal, same had not been available nor there was any reference in the memorandum of appeal to that the certificate being issued. The appeal memo is alleged to be defective for not making validly nominated candidates as parties to the appeal, according to the submissions made on behalf of the petitioner relying on certain judgments. It is not a situation that there are no other contesting OBC

category candidates. In the circumstances, although it is being argued that the court should not intercept in the election process where nominations have been accepted, yet in the present case, the appellate authority has misconceived its power, authority and jurisdiction and committed error in allowing appeal. As such, the impugned order passed by the appellate authority deserves to be set aside.

25. In the light of above, the Writ Petition is allowed in terms of prayer clause "C". The order dated 17.06.2017, passed by the Assistant Registrar of Co-operative Societies, Deoni, District Latur, in Appeal No.01/2017, filed by respondent no.04 under Section 152A of the Maharashtra Co-operative Societies Act, 1960, stands quashed and set aside and election programme to proceed with accordingly.

26. Rule made absolute in the above terms. There shall be no order as to costs.