

(2023) 12 BOM CK 0031
In the Bombay High Court
Case No : Writ Petition No. 3133 Of 2023

Gajanan Deorao Matthawar And Others	APPELLANT
Vs	
Returning And Others	RESPONDENT

Date of Decision : 14-12-2023

Acts Referred:

Maharashtra Co-Operative Societies Rules, 1961 — Rule 58
Maharashtra Co-Operative Societies Act, 1960 — Section 78A, 73CA, 73CA(i),
73CA(ii), 73CA(iii), 73CA(iv), 73CA(v), 73CA(vi), 73CA(vii), 73CA(viii), 73CA(ix),
73CA(3), 91, 95(4)

Citation : (2023) 12 BOM CK 0031

Hon'ble Judges : Avinash G. Gharote, J

Bench : Single Bench

Advocate : R.L. Khapre, R.G. Kavimandan, H.R. Dhumale, V.B. Bhise, A.M. Ghare

Final Decision : Allowed

Judgement

Avinash G. Gharote, J

1. Heard Mr. R.L. Khapre, learned Senior Counsel for the petitioners; Mr. H.R. Dhumale, learned Assistant Government Pleader for the respondent no.1; Mr. V.B. Bhise, learned counsel 5 for the respondent no.2 and Mr. A.M. Ghare, learned counsel for the respondent no.3. Rule. Rule made returnable forthwith. Heard finally with the consent of the learned counsel for the rival parties.

2. On 30/11/2023, this Court recorded the following 10 position :-

(A) The petition challenges the order dated 01/04/2023 passed by the Cooperative Court, Amravati under Exh.5 whereby the application has been rejected and the judgment in appeal there against dated 29/04/2023 passed by 15 the Cooperative Appellate Court dismissing the appeal.

(B) The petitioner no.1 has filed a dispute under Section 91 of the Maharashtra Co-operative Societies Act, 1960 ("MCS Act", for short hereinafter) bearing Dispute No.37 of 2023 claiming a relief of quashing and setting aside the election

of the 20 respondent no.3 as the Managing Committee Member of the respondent no.2-Society on account of the fact that the respondent no.3 stood disqualified under the provisions of Section 73 CA read with Section 78 A of the MCS Act for not having complied with the provisions of By-Law No.42 (G) (1) of the respondent No.2- Society, which order was passed by the Assistant Registrar, Cooperative Society, Pandharkawda on 5 23/07/2021 (pg.31). It is contended that the term of the society having expired, the elections to the Managing Committee for the period 2023 to 2028 was held in which the respondent no.3 had also filled in his nomination form for the post of member of the Managing Committee. The nomination form was filed on 10 20/02/2023 (pg.33) along with which Schedule-A affidavit also came to be filed under the signature of the respondent No.3 in which it was stated that the respondent No.3 had not incurred any disqualification as contemplated by Section 73CA (i) to (ix) of the MCS Act (pg.35). It is contended that this was clearly an 15 act of intentional suppression on the part of the respondent no.3 as the respondent no.3 was aware of the order dated 23/07/2021 (pg.30) by which he stood disqualified. Consequent to the election of the respondent no.3 as the member of the Managing Committee an election dispute under Section 91 of the MCS Act 20 came to be filed by the petitioners in which an application under Section 95(4) of the MCS Act was filed seeking an interim relief for restraining the respondent No.3, from acting as a Managing Committee Member of the respondent No.2-Society (pg 78) was also filed. This application came to be rejected by the learned Cooperative Court by order dated 01/04/2023 (pg.87) on 5 account of the fact that the respondent No.3 was already declared elected and the petitioners were entitled to challenge the election.

(C) As the Cooperative Appellate Court at Nagpur was not functioning, Writ Petition No.2223 of 2023 came to be 10 filed by the petitioner no.1 in which by order dated 03/04/2023, the following directions were passed.

"7. By way of an ad interim order, the following directions are issued.

1) The respondent no.3 is permitted to cast his vote in the 15 meeting to be held at 5:00 p.m. today. However, his ballot shall be kept in a separate sealed envelop and shall be opened only upon the direction of the Cooperative Appellate Court.

The Election Officer shall count the other ballots, and in case of a tie intimate the same to the Coop. Appellate Court. 20

2) The entire result of the election shall be subject to the result of the appeal, which may be presented to the Cooperative Appellate Court.

3) The petitioner shall present an appeal to the Cooperative Appellate Court day after tomorrow, which shall then be presented to the learned Incharge Appellate Court.

The parties shall appear before the learned Incharge Appellate Court on 06.04.2023 at 11 a.m. The learned Cooperative Court shall decide an appeal

thereafter within a period of 30 days from 06.04.2023. 30

4) No separate notices for appearance to the petitioner and the respondent no.3 shall be necessary to be given by the Cooperative Appellate Court.

5) The petitioner shall serve the respondent no.3 in the appeal before the Cooperative Appellate Court within one 5 week from the date of issuance of notice by all modes permissible in law.”

(D) The petitioner no.1 thereafter filed an appeal before the learned Cooperative Appellate Court, who by the 10 impugned judgment dated 29/04/2023 (pg.118), has dismissed the appeal and directed the opening of the envelope in which the vote of the respondent no.3 was recorded.

(E) A challenge thereto is by way of the present writ petition, in which by order dated 19/05/2023 the opening of the 15 envelope was stayed.

(F) Mr. Khapre, learned Senior counsel for the petitioners, submits that once the respondent no.3 had incurred a disqualification as was reflected from the order dated 23/07/2021 (pg.30) it was necessary for him to disclose the fact 20 of his disqualification while filing the nomination for the reason that Section 73CA (3) of the MCS Act debarred the respondent no.3 from contesting any election till the expiry of the period of next term of five years of the Managing Committee from the date on which he had so ceased to be the member of the Managing Committee. Instead of doing this, the respondent no.3 by the affidavit dated 20/02/2023 (pg.35) filed along with his nomination, gave a declaration on oath that he had not incurred any disqualification as provided by Section 73CA(i) to (ix) of the MCS Act. The contention of the learned Senior counsel is of an intentional suppression by the respondent no.3 regarding the state of affairs, for had he made such a disclosure regarding the order dated 23/07/2021, he would have been ineligible to contest the elections. It is further contended that since there are 13 members in the Committee, the vote of the respondent no.3 would have a crucial difference in the matter as in the elections to the Chairman and Vice-Chairman held on 03/04/2023, the Chairman has been elected by a majority of 7:6 whereas there is a tie in respect of the Vice-Chairman of 6:6 and the vote of the respondent no.3 which has been directed to be kept in a sealed envelope would be the crucial factor in the matter. It is thus contended that both the Courts below have erred in law in refusing to grant an injunction as sought for, for the reason that the very election of the respondent no.3 was infirm on account of the order of disqualification dated 23/07/2021 (pg.30) which is still in force as the appeal filed there against is still pending. (G) Mr. Ghare, learned counsel for the respondent no.3, submits that the expression ‘by-laws’ in Section 73CA (iv) of the MCS Act was inserted on 28/03/2022 and therefore, as on the date of the order dated 23/07/2021 that could not have been the ground for disqualification of the respondent no.3. He further contends that on this count the order dated 23/07/2021 was nullity and therefore, could not have been acted upon as it had no force in law and therefore, for this reason the affidavit filed by

the respondent no.3 along with his nomination (pg.35) was correct and proper. It is also contended that had an objection been taken at the time of scrutiny by the petitioners, the position could have been decided then and there only, which having not been so done, it is now not open to the petitioners to question the election of the respondent no.3 subsequent in point of time. It is further contended by relying upon a decision in Shri Santosh Harishchandra Kuchankar and others Vs. The State of Maharashtra, through its Secretary, Department of Co-operation, Marketing and Textiles, Mantralaya, Mumbai and others (Writ Petition No.2853/2018, decided on 16/01/2019) that the order of removal has penal consequences of disqualification and therefore, it was necessary for the respondent no.3 to have been noticed, before any disqualification could be claimed to have been incurred by him. It is further contended that the order dated 23/07/2021 does not direct that the respondent no.3 has been disqualified for a period of five years from the date of the said order and unless and until appropriate procedure has been followed by giving notice to the respondent no.3, it cannot be held that the respondent no.3 stood disqualified as the disqualification is not automatic. He further contends that since the respondent no.3 has been duly elected, the proper course of action would be to open the sealed envelope and the election of the respondent no.3 could always be made subject to the result of the dispute under Section 91 of the MCS Act which could be directed to be decided within a stipulated period of time. It is also contended that by way of an interim order, a final relief is being sought and therefore, the rejection by the Courts below is also correct and proper.

(H) Mr. Khapre, learned Senior counsel for the petitioners, in rebuttal contends that the amendment to Section 73CA(iv) of the MCS Act is dated 28/03/2022 as against which the date of nomination of the respondent no.3 was dated 21/02/2023, considering which, on the date of filing of the nomination, the respondent no.3 had already incurred the disqualification. He further invites my attention to the provisions of Rule 58 of the Maharashtra Co-operative Societies Rules, 1961 ("MCS Rules, 1961, for short hereinafter) to contend that the disqualification on account of violation of the by-laws, was 5 already in the Statute Book as Rule 58 of the MCS Rules, 1961 included the word 'by-laws' and therefore mere insertion of the same in Section 73CA(iv) of the MCS Act by virtue of the amendment with effect from 28/03/2022, would not have any adverse effect on the order of disqualification passed by the 10 Assistant Registrar (pg.30).

(I) Mr. Dhumale, learned Assistant Government Pleader for the respondent no.1, supports the impugned order by contending that it was open for the petitioners to object to the nomination at the relevant time and having not so done, deprives them of the right to challenge the election of the respondent no.3.

(J) Mr. Bhise, learned counsel for the respondent no.2-Society, contends that the respondent no.2 will abide by the decision of this Court on the issue.

3. The passing of the order dated 23/07/2021 by the Assistant Registrar Co-

operative Societies, Pandharkawada (pg.30) whereby the respondent no.3 was disqualified on account of violation of the mandate of Bye-Law No.42 (G)(1) of the respondent no.2-Society is not disputed. Though it is contended by Mr. Ghare, learned counsel for the respondent no.3 that the said order dated 23/07/2021 is non est for the reason that the expression "bye-laws" has been included in Section 73 CA (1) (iv) of the MCS Act by way of the amendment dated 28/03/2022 and therefore, the order would be without jurisdiction, it is necessary to note that the word "bye-laws" already stood included in Rule 58 of the Maharashtra Co-operative Societies Rules, 1961 ("MCS Rules, 1961, for short hereinafter), which provides for disqualification of Committee and its members, which for the sake of ready reference, is quoted as under :

"58. Disqualification of committee and its members

When on communication by the Chief Executive Officer of society or otherwise, the Registrar comes to know that any member of the committee incurs disqualification as mentioned in section 73CA and the Bye-laws, the Registrar shall, after giving an opportunity of being heard, issue an order of cessation of membership of such member from the committee of the society:

Provided that, the Registrar shall decide the matter within sixty days from the date of such communication or otherwise."

4. All that has been done by the amendment dated 28/03/2022 by inserting the word "bye-laws" in Section 73 CA (1) (iv) of the MCS Act is to bring it in consonance with Rule No.58 of the MCS Rules, 1961. It would thus be apparent that disqualification of a member of the Committee on account of the violation of the bye-laws of a society, was already a ground, which was available even prior to the amendment dated 28/03/2022. It therefore cannot be said that the order passed by the learned Assistant Registrar Cooperative Societies was a nullity on account of absence of jurisdiction, as the right to do so, can clearly be traced to Rule 58 of the MCS Rules, 1961. 15

5. Even otherwise, once it is an accepted position on record that the order dated 23/07/2021 by the Assistant Registrar Cooperative Societies disqualifying the respondent no.3 is in existence, the consequent effect as provided in Section 73 CA (3) of the MCS Act, which holds that a Committee Member who has ceased to be a member on account of having incurred disqualification under Clause (i) (ix) of Sub Section 1 thereof shall not be eligible to be elected as a member of the Committee till the expiry of the period of next term of five years of the Committee, from the date on which he has so ceased to be a member of the Committee, would come into operation as it is a statutory mandate and the respondent no.3, on account of the same was ineligible to fill in the nomination for the election held on 19/03/2023 for the period of 2023-28.

6. It is not disputed, that the respondent no.3 was aware of the order dated 23/07/2021 disqualifying him by the Assistant Registrar for which an appeal already stands filed against it at the behest of the respondent no.3, which is still

pending, considering which, there was a duty and obligation cast upon the respondent no.3 while filling in the nomination to disclose the existence of the order and its consequences. As against this, the affidavit in Schedule-A filed by the respondent no.3, while filling in his nomination for the election to be held on 19/03/2023 would indicate that he has made a categorical statement that he has not incurred any disqualification, as contemplated by Section 73 CA (1) (i) to (ix) of the MCS Act which is apparent from the copy of the affidavit placed on record at page 35. This clearly would amount to an intentional suppression on part of the respondent no.3 of a specific order of disqualification dated 23/07/2021 (pg.30) which made him ineligible to contest the election. It therefore does not lie with the respondent no.3 to contend, that since no objection was raised to his nomination at the time of scrutiny, before the Election Officer, the election conducted consequent thereto would be legal and proper, for the reason that rightly or wrongly, the respondent no.3 by virtue of the order dated 23/07/2021 had incurred a disqualification, which in light of the mandate of Section 73 CA (3) of the MCS Act, made him ineligible to contest the election for a further period of five years from the date of incurring the disqualification, which period was yet to expire. Since the disqualification was statutory in view of the language of Section 73 CA (3) of the MCS Act, as a result of the order dated 23/07/2021, the question of issuing any notice to the respondent no.3 for imposing the same, though it was not so mentioned in the order dated 23/07/2021 did not arise at all. Santosh Kuchankar (supra) relied upon by Mr. Ghare, learned counsel for the respondent no.3, in my considered opinion, does not lay down a proposition, that in case the order of disqualification does not mention the consequences of such disqualification, such consequences would not follow and therefore, is of no assistance to him.

7. The order below Exh.5, an application for interim relief under Section 95 (4) passed by the learned Cooperative Court merely rejects the application on the ground that the result of the election was declared and the petitioner was entitled to challenge the election of the respondent no.3 by means of an election petition, without considering the order of disqualification dated 23/07/2021 and the consequences contemplated by Section 73 CA (3) of the MCS Act and therefore cannot be sustained (pg.86). The judgment in appeal by the learned Cooperative Appellate Court goes on a proposition that since an objection was not raised to the nomination paper submitted by the respondent no.3 the Returning Officer had no occasion to deal with the question and since the petitioner had failed to do so which opportunity was available to him, there was absence of due diligence and by way of an interim order the election of the respondent no.3 cannot be enjoined. No raising of an objection to the nomination filed by the respondent no.3, or for that matter, even raising of such objection and its rejection, would not have the effect of nullifying the effect of the order of disqualification dated 23/07/2021, and the subsequent mandate of Section 73 CA (3) of the MCS Act, which once the order of disqualification is passed, automatically steps in, as there is no requirement for passing of a

separate order for that purpose. It also proceeds on an incorrect premise that it was an arguable question whether the disqualification alleged incurred would debar the candidate from filing nomination to the next election, which is clearly in ignorance of and contrary to the mandate of Section 73 CA (3) of the MCS Act.

8. It is a settled position of law that when a statute contemplates a particular state of affairs, the same has to follow, when the requirement for it to apply has been satisfied. As indicated above, in the instant case, even before the filing of the nomination by the respondent no.3 on 20/02/2023 he had already incurred a disqualification by virtue of the order dated 23/07/2021 (pg.30) and by virtue of mandate of Section 73 CA (3) of the MCS Act was not eligible to contest the election. Thus, the bar to contest the election, on disqualification, being a statutory one, the mandate of the statute, will have to be enforced and cannot be given a go-bye merely on the assumption that the election could be challenged. In fact, in the instant matter, the dispute under Section 91 of the MCS Act challenges the very election of the respondent no.3 itself and in fact is an election petition in that sense of the term as is reflected from the prayers made in the dispute (pg.72).

9. It is, therefore, apparent that since the respondent no.3 had incurred a statutory disqualification as contemplated by Section 73 CA (3) of the MCS Act, in view of the order dated 23/07/2021 which is still in force, a prima facie case has been made out. The election of the respondent no.3 therefore, in light of the language of Section 73 CA (3) of the MCS Act, would clearly be non est, considering which, the balance of convenience is clearly in favour of the petitioners. Permitting the respondent no.3 to exercise rights, claimed to have been accrued to him on account of his election, in view of his ineligibility, would be an injury, which cannot be permitted to be continued, as permitting the respondent no.3 to do so, would mean that the order of disqualification dated 23/07/2021 and the statutory mandate of Section 73 CA (3) of the MCS Act would have no meaning whatsoever, which cannot be countenanced in law.

10. In light of the above discussion, the impugned order namely the one below Exh.5 passed by the learned Cooperative Court, Amravati, dated 01/04/2023 (pg.87) and the judgment passed by the learned Cooperative Appellate Court in A.O. No.4/2023 dated 29/04/2023 are therefore hereby quashed and set aside and the application below Exh.5 is hereby allowed. The writ petition is accordingly allowed in the above terms.

11. Rule is made absolute in the aforesaid terms. No order as to costs.

(AVINASH G. GHAROTE, J.)

At this juncture, Mr. Ghare, learned counsel for the respondent no.3 seeks suspension of this order for a period of six weeks.

The request is declined for the reason that it has been held that the respondent no.3 already stood disqualified and therefore had no right to file his

nomination in the election for the subsequent term of the Managing Committee.