
(2005) 12 BOM CK 0068

In the Bombay High Court

Case No : Writ Petition No. 6594 of 2005

Geeta Shirish Chaudhari

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 09-12-2005

Acts Referred:

Constitution of India, 1950 — Article 222, 226, 227

Citation : (2006) 6 BomCR 303 : (2006) 3 MhLj 420

Hon'ble Judges : Naresh H. Patil, J

Bench : Single Bench

Advocate : V.D. Hon, for the Appellant; K.G. Patil, Assistant Government Pleader for respondent Nos. 1 to 3, N.D. Sonawane and V.J. Dixit and R.T. Nagargoje, for the Respondent

Final Decision : Dismissed

Judgement

Naresh H. Patil, J.—Rule. Rule made returnable forthwith. By consent of the parties, taken up for hearing.

2. This petition is directed against the judgment and order passed by the Divisional Commissioner, Konkan Division Mumbai in Appeal No. Desk/Eln-194 of 2005 dated 14-9-2005.

3. Brief facts necessary for deciding the issue are stated as under:

The petitioner contends that the elections to the Managing Committee of Maharashtra State Co-operative Milk Mahasangh Limited Mumbai were to be held. According to the election programme, the filing of nomination paper was started from 5-9-2005. The scrutiny was to be held on 8-9-2005. The date of withdrawal of nomination was 23-9-2005 and the polling was scheduled on 11-10-2005. The petitioner - Sow Geeta Shirish Chaudhari filed her nomination paper. Respondent No. 6 - Mahendrasing Nimba Pawar also filed his nomination paper with the Returning Officer - respondent No. 3 herein. The petitioner contends that respondent No. 6 has been held to be disqualified as per the

provisions of Section 73FF read with Section 78 of the Maharashtra Co-operative Societies Act, 1960 (hereinafter referred to as "the Act 1960") by the Assistant Registrar Co-operative Societies (Dairy), Jalgaon as he was held to be a defaulter on 31-3-2003 for an amount of Rs. 50,550/-. An order was passed by the Assistant Registrar Co-operative Societies (Dairy) Jalgaon on 25-8-2005 disqualifying respondent No. 6 from the Managing Committee of respondent No. 5 - Warkhede (Bk) Dudh Utpadak Co-operative Society Limited Warkhede (Bk), Taluka Chalisgaon, District Jalgaon. It was further contended that the Secretary of respondent No. 5 - Society certified that respondent No. 6 had committed default in payment of an amount of Rs. 25,000/- of the goods purchased from the said Society and thus respondent No. 6 is defaulter for the said amount. It is the contention of the petitioner that the Returning Officer, after going through the objection raised by the petitioner and the relevant order and documents produced along with the objection, was pleased to pass order on 9-9-2005 holding that respondent No. 6 is disqualified as he was a defaulter of respondent No. 5 Society. It is contended that the Returning Officer has also considered the order passed by the Assistant Registrar Co-operative Societies (Dairy) Jalgaon wherein respondent No. 6 was held to be disqualified by resorting to the provisions of Section 73FF of the Act, 1960. Based on these pleadings, the petitioner submitted that respondent No. 6 is disqualified to contest the said election.

4. The Returning Officer by an order dated 9-9-2005 rejected the nomination paper of respondent No. 6. Being aggrieved by the rejection of the nomination paper respondent No. 6 preferred an appeal to the Divisional Commissioner Konkan Division Mumbai u/s 152-A of the Act, 1960. The appeal came to be allowed by the Divisional Commissioner and the order passed by the Returning Officer was quashed and set aside. The Returning Officer was directed to take necessary steps to include name of respondent No. 6 in the list of the contesting candidates. This order came to be passed on 14-9-2005. Present writ petition under Article 227 of the Constitution is filed against this order of the Divisional Commissioner allowing the appeal of respondent No. 6.

5. In response to the notice issued by this Court, the Assistant Returning Officer filed affidavit-in-reply on 20-9-2005 and further affidavit-in-reply was filed by the Deputy Collector and the Returning Officer on 6th October, 2005. Respondent No. 6 filed his affidavit-in-reply to the petition to which affidavit-in-rejoinder is filed by the petitioner.

6. The learned Counsel for the petitioner Shri. Hon submitted that respondent No. 6 was disqualified to contest the election as he had incurred disqualification enumerated u/s 73FF of the Act, 1960 and the Secretary of respondent No. 5 Society submitted a certificate that respondent No. 6 is a defaulter as he had to pay Rs. 25000 to the Society. Therefore, on both counts respondent No. 6 is not entitled to contest the election as he had incurred a disqualification. The Returning Officer, according to the learned Counsel, had heard the parties at the

time of the scrutiny which was conducted on 8-9-2005 and passed necessary orders.

7. The learned Assistant Government Pleader, Shri Kishore Patil submitted that the scrutiny was done on 8-9-2005. Record was maintained regarding the said scrutiny and appropriate order was passed by the Returning Officer on 8-9-2005 itself. At the instance of the parties a separate order was passed on 9-9-2005 copy of which was handed over to respondent No. 6 which was the subject-matter of the appeal filed by respondent No. 6 before the Divisional Commissioner. According to the learned A.G.P., respondent No. 6 has incurred a disqualification and it was erroneous on the part of the Divisional Commissioner to reverse the order of the Returning Officer by setting it aside and allowing respondent No. 6, who is a defaulter, to contest the election.

8. Learned Counsel appearing for respondent No. 6 submitted that on 8-9-2005 no order disqualifying respondent No. 6 was passed whereas it was incumbent on the part of the Returning Officer to scrutinise the nomination papers and pass order after the scrutiny was over. The order of rejection of nomination paper came to be passed on 9-9-2005. The reason for rejecting the nomination was based on a Fax message received from the Maharashtra State Co-operative Milk Mahasangh Mumbai (hereinafter referred to as "the Mahasangh") on 9-9-2005 itself. In the submission of the learned Counsel for respondent No. 6, nomination could not have been rejected on the Fax message received from the Mahasangh. In absence of cogent and relevant material placed before the Returning Officer the order passed by the Returning Officer was improper and illegal. Learned Counsel supported the order passed by the Divisional Commissioner. It was further argued by the learned Counsel for respondent No. 6 that the petition deserves to be dismissed as there is alternative efficacious remedy provided u/s 144-T of the Act, 1960. This petition is not maintainable under Article 227 of the Constitution of India. It is further submitted that the relevant documents, some of which are crucial, have not come before this Court in spite of notice issued by this Court and, therefore, it is highly suspicious as to whether the Returning Officer had relied upon the material placed before him at the appropriate time for passing the impugned order and whether the order was passed on 8-9-2005 or on 9-9-2005.

9. I have considered the submissions advanced by the learned Counsel for the parties and perused the documents and original record. This petition is filed under Article 227 of the Constitution of India. The order of the Returning Officer rejecting the nomination paper of respondent No. 6 was the subject-matter of appeal filed by respondent No. 6 before the Divisional Commissioner. The Divisional Commissioner while allowing the appeal observed that the Returning Officer passed the order of rejection of the nomination paper on 9-9-2005 on the basis of a letter issued by the Mahasangh on 9-9-2005. The said letter was received after the date of scrutiny was over i.e. 8-9-2005 which could not be basis for rejecting the nomination paper on a subsequent date of the date which

was fixed for scrutiny of the nomination paper. The Appellate Authority further observed that the procedure for declaring the person as defaulter has not been completed, since no notice of demand etc. has been issued to such a person calling upon him to pay the dues. According to the Appellate Authority this is against the principles of natural justice.:

10. The provisions of Section 152A of the Act, 1960 speak of appeal to be filed against rejection of nomination paper and the said decision shall be final and no further appeal or revision would lie against the decision of the appellate authority.

11. During the arguments it transpired that respondent No. 6 had filed a proceedings against the order passed by the Assistant Registrar, Co-operative Societies (Dairy) Jalgaon on 25-8-2005 to the higher forum which is pending adjudication. There is dispute between the parties regarding a certificate which was issued by the Secretary of respondent No. 5 Society indicating that respondent No. 6 was a defaulter. From the record I find counter certificate dated 1-9-2005 and explanation given to the said certificate. The Returning Officer passed the order on 9-9-2005 wherein the reason for rejecting the nomination paper was a Fax communication received from the Mahasangh on 9-9-2005. No reference is made to the order passed by the Assistant Registrar, Co-operative Societies (Dairy) Jalgaon on 25-8-2005 wherein respondent No. 6 was held to be disqualified u/s 73FF of the Act, 1960. My attention was drawn to the proceeding sheet which was submitted by the learned Assistant Government Pleader prepared by the Assistant Returning Officer on 8-8-2005. Perusal of the said proceeding sheet which is a typed copy signed by the Returning Officer, shows that the scrutiny was started on 8-9-2005 at 11.00 a.m. It is further mentioned that the petitioner had raised written objection that respondent No. 6 was declared as a defaulter, and therefore, respondent No. 6 was declared as disqualified and his nomination paper stood rejected. But while passing the order by the Returning Officer rejecting the nomination paper of respondent No. 6 there is no reference given to any objection taken by the petitioner regarding the disqualification incurred by respondent No. 6 nor there was any reference to other documents which the Assistant Returning Officer or the Returning Officer perused before drawing the proceeding sheet indicating rejection of nomination paper of respondent No. 6.

12. In the affidavit-in-reply Sudhir Ramchandra Pugaonkar, the Assistant Returning Officer, stated that Xerox copies of six documents are produced in this Court whereas the deponent could produce original documents relating to the scrutiny proceeding of 8-9-2005. The Xerox copies include (1) the objection raised by the present petitioner vide her application dated 8-9-2005, (2) Xerox copies of proceeding book submitted by the present petitioner before the Returning Officer dated 1-7-2005, (3) Certificate dated 6-9-2005 issued by Secretary of respondent No. 5 Society, (4) application dated 8-9-2005 made by the Secretary of respondent No. 5 Society and (5) certificate dated 1-9-2005 issued by the Secretary of respondent No. 5 Society. Some copies of judgment

and order dated 25-8-2005 passed by the Assistant Registrar Co-operative Societies at Jalgaon were also produced.

13. In the affidavit-in-reply filed by the Deputy Collector and Returning Officer it was averred that the Returning Officer received a Fax communication from respondent No. 5 Society on 8-9-2005 at 9.00 p.m. The Secretary of the said Society through the said message requested the Returning Officer to provide information regarding the disqualification of respondent No. 6 as he is defaulter of the said Society. The order, according to the deponent, was passed on 9-9-2005 by the Assistant Returning Officer, who was empowered by an order dated 26-8-2005. According to the deponent, scrutiny was to be done from 11.00 a.m. to 3.00 p.m. The deponent further averred that the Fax message was received by the Returning Officer after the scrutiny process was over and was not considered on that date but the order was passed on 9-9-2005 by the Assistant Returning Officer rejecting the nomination of respondent No. 6 is not correct. It was further stated that respondent No. 6 had produced a document/certificate dated 8-9-2005 at 5.00 p.m. which reflected that he is not a defaulter of the respondent No. 5 Society which was signed by the Secretary of the said Society. It was further stated by the deponent that to avoid injustice which could be caused to respondent No. 6 he called the Secretary of the Society and respondent No. 6 in person and both of them were present before the Assistant Returning Officer at 11.00 a.m. on 9-9-2005. On the basis of all these documents the order dated 9-9-2005 was passed which was impugned before the Divisional Commissioner. The deponent further stated that inadvertently the reference of the objection application dated 8-9-2005 raised by the petitioner has not been made in the order passed by the Assistant Returning Officer.

14. The affidavit submitted by the Returning Officer and the material placed before this Court indicate that while rejecting the nomination paper of respondent No. 6 the only reference made was to the Fax message received from the Mahasangh. It was the basis for rejecting the nomination paper. The Divisional Commissioner therefore observed that based on such a communication received from the Mahasangh rejection of the nomination on the next date of the scrutiny was improper.

15. The provisions of Section 144T of the Act, 1960 read thus:

144T. Disputes relating to elections to be submitted to the Commissioner or other specified officer. - (1) Notwithstanding anything contained in Section 91 or any other provisions of this Act, any dispute relating to an election shall be referred to the Commissioner of the Division in which such election is held or to an officer not below the rank of Additional Commissioner of a Division authorised by the State Government in this behalf (hereinafter in this section either of them as the context may require is referred to as "the specified officer")

(2) Such reference may be made by an aggrieved party by presenting an election petition to the specified officer within a period of two months from the date of

declaration of the result of the election.

Provided that, the specified officer may admit any petition after the expiry of that period, if the petitioner satisfies the specified officer that he had sufficient cause for not preferring the petition within the said period.

(3) In exercising the functions conferred on him by or under this Chapter, the specified officer shall have the same powers as are vested in a Court in respect of, -

(a) proof of facts by affidavit;

(b) summoning and enforcing the attendance of any person and examining him on oath;

(c) compelling discovery or the production of documents; and

(d) issuing commissions for the examination of witnesses.

In the case of any such affidavit, an officer appointed by the specified officer in this behalf may administer the oath to the deponent.

(4) Subject to any rules made by the State Government in this behalf, any such petition shall be heard and disposed of by the specified officer as expeditiously as possible. An order made by the specified officer on such petition shall be final and conclusive and shall not be called in question in any Court.

16. There is effective machinery provided under the Act, 1960 to deal with election disputes by a competent forum. It is not that the petitioner is remediless after the elections results are declared. The issue raised by the petitioner is as to whether nomination paper which was filed by respondent No. 6 was to be accepted or not. Considering the scope and ambit of powers and jurisdiction conferred on this Court while entertaining writ petition under Article 222 of the Constitution of India it is not appropriate for this Court to entertain the disputed questions of fact more particularly relating to the matters concerning which alternate and effective remedy is provided under the statutory provisions of the Act 1960. In this connection, a useful reference can be made to judgments of the Apex Court.

In *Sadhana Lodh Vs. National Insurance Company Ltd. and Another*, it is held that supervisory jurisdiction of the High Court under Article 227 is confined only to see whether inferior Court or Tribunal has proceeded within its parameters and not to correct an error apparent on the face of the record much less of an error of law.

In *Roshan Deen Vs. Preeti Lal*, it is held that the power conferred on the High Court under Articles 226 and 227 of the Constitution is to advance justice and not to thwart it. The very purpose of such constitutional powers being conferred on the High Courts is that no man should be subjected to injustice by violating the law. The look out of the High Court is, therefore, not merely to pick out any

error of law through an academic angle but to see whether injustice has resulted on account of any erroneous interpretation of law. If justice became the by-product of an erroneous view of law the High Court is not expected to erase such justice in the name of correcting the error of law.

17. Learned Counsel for the petitioner in support of his submission has placed reliance on the following judgments.

Pundlik Kadhav v. District Deputy Registrar, Co-operative Societies, Chandrapur reported in 1990 Mh.LJ. 925. In this case, petitioner was a member of a Society and borrowed loan in 1979. He was in arrears on 18-8-1986 when he was elected as one of the Directors of the Chandrapur District Co-operative Central Bank from the Sale Purchase Society of which he was a member. In pursuance of a notice issued u/s 137 of the Act, 1960 directing him to pay all outstanding loans by 24-10-1986, the dues were cleared on 21-10-1986. On 8-1-1987 the District Deputy Registrar served a notice on the petitioner u/s 78(1) to show cause why he should not be removed from directorship of the Bank being a defaulter and he was accordingly removed by order dated 7-12-1987. This order was upheld by the higher forums. In the writ petition it was held that even if the dues were paid subsequently, that would only extinguish the debts but it would not in any case remove the disqualification that is created by the statute. Though the petitioner paid all the debts on 21-10-1986 he would not be absolved of the disqualification if he was disqualified on 18-8-1986 on the date when he contested election to the Bank. This judgment has been upheld by the Apex Court in *Pundalik v. District Deputy Registrar* 1991 C.T.J. 577.

In *Bar Council of Delhi and Others Vs. Surjeet Singh and Others*, wherein it is held that, when election was held on the basis of void and ultra vires rule relating to preparation of electoral roll, petition under Article 226 of the Constitution was maintainable.

In *Madhusudan Parashramji Gujar Vs. Assistant Registrar for Co-operative Societies, Dist. Amravati and Others*, the Returning Officer rejected the nomination of the respondents on the ground that they were not owners of two shares. In appeal u/s 152-A the Assistant Registrar held that had respondents been given an opportunity of hearing, then they would have removed the objection and consequently he gave direction that if respondents remained present then the society should accept the amount of Rs. 200 and continued their nomination as valid. While allowing the writ petition under Article 226 it is held that the Assistant Registrar had exceeded his powers u/s 152-A by giving untenable direction to accept the share value from the respondents. It was further held that the only question that the Assistant Registrar ought to have considered was whether nomination was correctly rejected and as to whether the respondents were disqualified on the date of rejection of their nominations.

In *K. Venkatachalam Vs. A Swamickan and Another*, it is held that, when a disqualified person gets elected and sits and votes in the House, bar to Court's

jurisdiction does not apply.

In Nanaji Bhokre Vs. Commissioner, Amravati Division, Amravati and others, it is held that, order passed by Divisional Commissioner in appeal u/s 152-A of the Act 1960 having been given finality, it would not be open for inferior officer like Additional Commissioner to sit over finding reached by Divisional Commissioner. There being a likely cloud over the right of the Election Tribunal to decide dispute u/s 144-T and alternate remedy not being available, writ petition under Article 226 of the Constitution could be entertained.

18. Learned Counsel for respondent No. 6 in support of his contention has placed reliance on the following judgments:

In Maniklal Peerchand Lunawat v. The Rupee Co-operative Bank Limited reported in 1989 C.T.J. 337 a Division Bench of this Court declined to entertain the writ petition as the point involved disputed question and secondly after the elections are over the petitioner had more effective remedy by way of election petition.

In Bhaiyyaji Sitaram Kannamwar v. Assistant Registrar reported in 2002 C.T.J. 1 initially nomination for election was rejected on the ground of default. On appeal, the Assistant Registrar set aside the order of rejection of nomination form and directed the Election Officer to include the names in the list of valid candidates. Writ Petition under Article 226 of the Constitution of India was filed against the order of the Assistant Registrar. It was held that, since the petitioner has an alternate remedy of filing the election petition, writ petition under Article 226 of Constitution of India cannot be entertained.

19. Considering the material placed on record before this Court prima facie I find that the nomination paper was rejected by the Returning Officer based on a Fax communication received by the Mahasangh. Therefore, the Divisional Commissioner entertained the appeal filed by respondent No. 6 by setting aside the order passed by the Assistant Returning Officer and allowing respondent No. 6 to file nomination paper. It was stated by the learned Counsel for respondent No. 6 that after passing of the order by the Divisional Commissioner the name of respondent No. 6 was entered into the list of valid contesting candidates on 15th September, 2005.

20. Considering the nature of controversy and the disputed questions of facts raised in this petition I do not find that interference of this Court in exercise of writ jurisdiction under Article 227 of the Constitution of India is imminent at this stage. The parties are at liberty to resort to the statutory forums provided under the Act, 1960 for redressal of their grievance at an appropriate stage.

21. For the reasons stated above, I am not inclined to interfere into the impugned order passed by the Divisional Commissioner Konkan Division Mumbai.

22. The writ petition fails and is accordingly dismissed. Rule stands discharged. Interim relief stands vacated. No order as to costs.

23. Learned Assistant Government Pleader to intimate the operative order of this Court to the concerned authorities.