

(2006) 07 BOM CK 0050
In the Bombay High Court
Case No : Writ Petition No. 4430 of 2006

Indranath Thorat

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 10-07-2006

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2007) 1 BomCR 279 : (2006) 6 MhLj 140

Hon'ble Judges : N.V. Dabholkar, J;M.G. Gaikwad, J

Bench : Division Bench

Advocate : P.R. Patil, for the Appellant; S.K. Tambe, AGP for Respondents No. 1 to 4, 6 and 7, V.H Dighe and S.K. Shinde, for the Respondent

Final Decision : Allowed

Judgement

N.V. Dabholkar, J.—Heard learned Counsel for respective parties and rule is made returnable forthwith, by mutual consent.

2. The petitioner has approached this Court with a writ petition under Article 226 of the Constitution of India, praying for a writ of mandamus or directions in the nature of mandamus, thereby seeking cancellation of appointment of respondent No. 5 as returning officer and also for quashing and setting aside the election programme declared by respondent No. 5, of respondent No. 6-Society. Further directions are sought to respondent No. 4 Registrar (Cooperative Societies) to appoint an administrator for respondent No. 6-society.

As is evident from the name, respondent No. 6 is a supervisory union and a co-operative society. According to the petitioner, the term of the present managing committee of respondent No. 6 has come to an end on 3-4-2006. The managing committee is empowered to appoint returning officer for the purpose of holding elections of the next managing committee, three months before expiry of its term and, therefore, according to the petitioner, respondent No. 6 ought to have appointed returning officer on or before 3-1-2006. The existing managing

committee appointed the returning officer by its resolution, only on 15-5-2006, which is clearly in breach of the rule applicable and, therefore, appointment of respondent No. 5, as returning officer, is said to be illegal and void-ab-initio. The said appointment was also approved by respondent No. 4-Assistant Registrar. But, once the managing committee had failed to appoint the returning officer, at least three months before expiry of its term, according to the petitioner; the only course available under the rules is that of appointment of returning officer by the Assistant Registrar and mere approval by Assistant Registrar to the returning officer appointed by managing committee by its resolution dated 15-5-2006, does not remove the defect in the appointment of respondent No. 5 as returning officer. It is also alleged that respondent No. 5 is friend and supporter of chairman i.e. respondent No. 8.

In order to support the allegation that respondent No. 5 is not an impartial returning officer, it is pointed out that the chairman himself prepared the provisional voters list, although as per Rule 5 of the Election Rules, applicable, it is the duty of the Executive Officer-cum-member Secretary, i.e. Assistant Registrar to prepare such voters list. The names of as many as 15 societies, which are not supporting present managing committee are dropped from the provisional voters list, although they are situated in the area of operation of respondent No. 6-Society. As against it, 28 member societies which are not within the area of operation (as a result of carving out of revenue taluka Rahata of some villages from revenue talukas of" Shrirampur and Kopargaon each) are included in the provisional voters list. The mandatory time limit of 30 days for calling names of representatives of member societies, is violated, by the chairman himself, undertaking the exercise of inviting resolutions regarding nominations from the member-societies and that too within a period less than 30 days. In fact,. it is the duty of the Executive Officer-cum-Member Secretary i.e. Assistant Registrar (Co-operative Societies) to undertake such responsibility.

It is also alleged that adequate publicity is not given to election programme and thus returning officer is acting at the behest of the outgoing chairman. It is also said that the Assistant Registrar, who is supposed to be watch-dog of implementation of provisions of the Co-operative Societies Act, 1960 (for short, "the said Act"), is also acting as a tool in the hands of outgoing managing committee, because he is continued at Shrirampur for five years under political patronage.

The petitioner has. therefore, prayed for quashment of appointment of respondent No. 5 as returning officer, also schedule of election as fixed by him and for appointment of an administrator of respondent No. (6. since the term of the existing managing committee has come to an end.

3. Separate replies are filed on record, by respondent Nos. 4 and 8. In fact, affidavit on behalf of respondent No. 4 is filed by Assistant Registrar (Cooperative Societies) Rahuri. who is holding additional charge of Assistant Registrar (Co-operative Societies), Shrirampur. In fact Assistant Registrar (Cooperative

Societies), Shrirampur is impleaded as respondent No. 7 in his personal capacity, as well. However, no reply is filed by him in his personal capacity.

4. Respondent No. 8 in his reply, has pointed out that the term of present managing committee has not come to an end on 3-4-2006 as believed and pleaded by the petitioner. This is because, previous election had taken place in the year 2001 and first meeting of the then elected managing committee had taken place on 2-7-2001. Thus, according to respondent No. 8. term of the present managing committee would come to an end only on 2-7-2006. In fact, this contention is also supported by respondent No. 4, by filing a copy of resolution of the first meeting of managing committee that was elected in the year 2001. as Exhibit R-I.

Respondent No. 4. in his affidavit, has also explained an error in reply that was addressed by him to one Bhanudas Murkule (Exhibit A to petition), by which it was informed that the term of managing committee is to expire on 3-4-2006. It can thus be confirmed that the term of the present managing committee is to come to an end on 2-7-2006, since the tenure is of five years from the first meeting of the newly elected managing committee.

It is not disputed that appointment of respondent No. 5 as returning officer, was resolved by existing managing committee in its meeting dated 15-5-2006. which was referred to respondent No. 4-Assistant Registrar, by communication dated 24-5-2006 and it is said that respondent No. 4 has approved the said appointment by his communication dated 30-5-2006 (Exh.D. to petition).

According to respondents, provisional voters list under the signature of the Executive Officer/the Chairman, was furnished to returning officer, who published the same on the notice board. Objections, if any to incorporation or deletion of any names in such list, can be raised by the petitioner before the returning officer.

Regarding irregularity in the appointment of returning officer, by appointment of a lawyer and not an officer from the Department of Co-operation, respondent No. 8 has pointed out that the petitioner himself is a member of managing committee of Ukkalgaon Vivdh Karyakari Shakari (Vikas) Seva Sanstha Marydit, Taluka Shrirampur and the managing committee of the said society by resolution dated 19-11-2005, has appointed an Advocate as returning officer for holding election of that society. It said that all member societies, after passing resolution, have sent their nomination for incorporation in the provisional voters list.

So far as 28 societies, which are now within territorial limits of revenue taluka Rahata. and therefore, within jurisdiction of Rahata Taluka Dekhrehk Sangh. are concerned, Dispute No. 1 of 2005, was raised u/s 11 of the said Act. by Kamalapur V.K.S.S After hearing parties concerned, by order dated 26-10-2005, Shrirampur Taluka Dekhrehk Sangh (respondent No. 6) was directed by Assistant Registrar to delete names of those 28 societies. The said order of the Assistant Registrar is challenged by respondent No. 6 by filing revision before the Divisional Joint Registrar (Co-operative Societies), Nashik and the same is

pending.

Lastly, it is contended that the petitioner has alternate remedy u/s 91 of the said Act. after declaration of results of the election and. therefore, the writ petition may not be entertained.

5. As can be seen from the pleadings, the petitioner has challenged legality and validity of appointment, of respondent No. 5 as returning officer, and consequently, election programme as fixed by him. Even provisional voters list as published by respondent No. 5. is subjected to exception, although Advocate Shri P. R. Patil, during the course of his arguments, submitted that the objections are also raised before the returning officer. It is contended that, by virtue of Section 73-H and more particularly Sub-section (2.) thereof, managing committee having failed to appoint returning officer before commencement of last three months of its tenure, it has failed to make arrangements for holding elections before expiry of its term and. therefore, entire election programme is vitiated and it requires to be started afresh by this Court, directing respondent No. 4 to appoint independent and impartial returning officer. And since the term of present managing committee has come to an end, may be on 2-7-2006, now an appointment of administrator is said to be a must, also in view of Section 73H(2) of the said Act.

6 According to learned Counsel for the respondents, time table for election is not mandatory and in any case, there is no "wilful default" on the part of managing committee, either in appointment of returning officer on time, or in arranging for and holding elections before expiry of its term. Appointment of respondent No. 5 as returning officer having been approved by respondent No. 4. It can be treated as deemed appointment by respondent No. 4 and. therefore, there is no illegality in the appointment of respondent No. 5 as returning officer. According to the respondents, since the managing committee has taken reasonable steps for holding election, soon before expiry of its term, it cannot be alleged of having committed "wilful default", as contemplated by Section 73-H(2) of the said Act and, therefore, prayer for appointment of administrator cannot be considered favourably.

7. After having taken an assessment of the pleadings of the respective parties, it will be useful to reproduce provisions relied upon by the learned Counsel, and particularly of the petitioner, as foundation of the case of the petitioner. Section 73-H of the said Act reads thus:

73H. Responsibility of committee to hold election before expiry of term.- (1) It shall be the duty of the committee of every society to arrange for holding the election of its members before the expiry of its term.

(2) Where there is a wilful failure on the part of the committee to hold the election to the committee before the expiration of its term, the committee shall cease to function on the expiry of its term and the members thereof shall cease to hold office and the Registrar may himself take over the management of the

society or appoint an Administrator (who shall not be from amongst the members of the committee the term of which has so expired) and the Registrar or Administrator shall hold election within a period of six months and the committee shall be constituted before the expiration of that period.

Shri P. R. Patil, learned Counsel for the petitioner, has provided a copy of bye-laws of respondent No. 6 society, as also election rules, which are schedule A to bye-law No. 39(A). However, both these documents are in vernacular and, therefore, we are trying to record hereinbelow, as accurate as possible, a translation/substance of bye-laws and rules, which are required to be considered for the purpose of adjudication of present writ petition.

Bye-law 39(A). Election for the managing committee shall be held after every five years and in accordance with the election rules annexed to the bye-laws (Schedule A). The members are eligible for re-election but first managing committee will be appointed by the Registrar and tenure of that committee shall be of one year and if necessary, same can be extended by one more year.

Bye-law 43. The term of the managing committee elected as per bye-law 39(A) shall be 5 years, commencing from the date of first meeting of the said committee.

Bye-law 44. Meeting of the newly elected managing committee shall be convened by Member-Secretary and the same shall be held within 30 days from the date of general meeting in which the members are declared elected.

From the copy of bye-laws provided, it is evident that the same are signed by as many as 17 members and this is probably because, model bye-laws seem to have been adopted by respondent No. 6-society.

A copy of election rules is also provided, as part and parcel of Exhibit B to petition, which is at paperbook pages 21-A to 21-F. It appears that these election rules earlier were not approved and when approved, those were forwarded by Commissioner (Co-operation) to all Member-Secretaries and Executive Officers of Taluka Supervisory Co-operative Societies, vide his communication dated 9-4-1998. It was directed that these election rules are the Schedule A, as referred to in bye-law No. 39-A and elections for the managing committee of Taluka Supervisory Societies should be held in accordance with these rules. A copy of these rules provided at pages 21-A to 21-F, is in vernacular language and we are again recording translation/substance, as accurate as possible, of the relevant rules.

Rule 5 of the said Rules is pertaining to provisional voters list and it lays down that the Member Secretary and Executive Officer of Taluka Supervisory Union shall prepare the provisional voters list, four months before the date of expiry of the term of the managing committee. The member societies, which are the members at the end of previous co-operation year (31 st March), are to be incorporated in the said provisional voters list. The same is to be prepared in

alphabetical order of the names of the member societies. After such provisional voters list is ready, all member-societies should be invited by the Member Secretary and the Executive Officer to send their nominations, supported by resolutions and such nominations should be received within one month.

Rule 6 is pertaining to appointment of an election officer/returning officer and ordinarily, the same is to be done by Taluka Sahakari Dekhrehk Sangh, subject to approval by the Assistant/Deputy Registrar (Co-operative Societies). The person to be nominated as returning officer is required to be such, who has no concern with the society. However, the second clause of the said rule lays down that this appointment is required to be done at least three months before expiry of the term of the managing committee and in case of default on the part of the managing committee so to appoint the election officer/returning officer more than 3 months before expiry of its term, the powers to appoint election officer/returning officer shall be with the Assistant Registrar/Deputy Registrar. In the said Rule 6, there is third clause, which puts responsibility of providing man power and all necessary facilities for the purpose of conducting election, to the returning officer, upon Member-Secretary and Executive Officer of the society.

Rule 7 is pertaining to provisional list of voters, and returning officer is required to publish the same (as prepared under Rule 5) three months before expiry of the term of the managing committee. The provisional list of voters is required to include the names of member societies and names of the nominees in accordance with the information available. The provisional voters list is required to be published on the notice board of the office of the society, as well as office of Assistant/Deputy Registrar of co-operative societies. Objections, if any, are required to be dealt with, within a period of one month and during this one month only, any other member society desiring to include its name in the voters list, is required to apply to the returning officer for the purpose. After expiry of this one month, no names can be added to the voters list.

As per Rule 8, final voters list is required to be published on the next day after expiry of this period of one month provided for objections, if any, to the voters list.

Rule 9 provides time schedule for conducting actual election. The date for accepting nominations is required to be 15 days after publication of final voters list and couple of days are permitted for scrutiny of nominations. The list of valid nominations is required to be published immediately after the scrutiny. Thereafter, there is a time gap of fortnight (15 days) for withdrawal of nominations and on the next day after expiry of 15 days for withdrawal, final list of contesting candidates is required to be published. Polling is required to be fixed not earlier than 10 and not later than 15 days from the publication of the list of contesting candidates. Counting and declaration of results is to be followed immediately after the polling.

We may state here itself that, if we take into consideration election Rules 5, 6, 7

and 9 together, it can be seen that the entire time-table or conducting election commences, when last four months of the tenure of the existing managing committee begin and if the time-table is taken day-to-day, it can be calculated that the day of polling and counting, as well as declaration of results, falls between a span when there are 10 to 15 days left for the expiry of the term of existing managing committee. The existing managing committee is required to prepare provisional voters list four months before expiry of its term, through its Member-Secretary and Executive Officer. When there is time of still three months of the tenure, the managing committee is required to appoint returning officer, who is to publish the proposed voters list prepared by the Member-Secretary, soon after his appointment. Suffice it to say that the scheme of the election of the new managing committee is packed within last four months of existing managing committee.

8. After taking into consideration, the facts and circumstances of the case, as also rival contentions raised by learned Counsel for the petitioner on one side and learned Counsel representing the present chairman and the State, answer to following two issues would enable us adjudicate writ petition in a just and proper manner.

(i) Whether, appointment of respondent No. 5 as returning officer by respondent No. 6 vide its resolution dated 15-5-2006, in spite of implied approval by respondent No. 4. is illegal and void-ab-initio ?

(ii) Whether, election process is required to be commenced and completed before expiry of the term of the existing managing committee?

9. However, before coming to discussion on above two issues, we may also remind ourselves that the petitioner has also raised an objection to the provisional voters list. It is contended that 15 member societies, which are within the field of operation of respondent No. 6, are deleted from the provisional voters list and 28 member societies are continued on the provisional voters list, although those societies are no more within the area of operation of respondent No. 6-society, as a result of establishment of new revenue taluka of Rahata and also establishment of independent Dekhrehk Sangh for that taluka.

As rightly argued by learned Counsel for the respondents, this issue need not be considered by this Court at this stage. Admittedly, petitioner has raised an objection to the provisional voters list and the objections are bound to be dealt with on merit by returning officer-respondent No. 5. In fact, learned Counsel Shri P. R. Patil for the petitioner, also conceded that, he does not expect this Court to rectify provisional voters list and thus prepare a final voters list. But, he has relied upon this factual aspect in order to support his argument that respondent No. 5 is a person interested in respondent No. 8 and, therefore, is not acting as an independent and impartial returning officer.

In the replies filed by respondents, it is brought to the notice of this Court that, a dispute i.e. Dispute No. 1 of 2005 was filed by Kamalapur V.K.S.S. before the

Assistant Registrar, regarding 28 societies which are said to have gone out of the area of operation of respondent No. 6-society because of establishment of independent revenue taluka of Rahata.

By order dated 26-10-2005, respondent No. 6 was directed by Assistant Registrar to delete names of these 28 societies. Respondent No. 6 has filed a revision before the Divisional Joint Registrar of Co-operative Societies, Nasik, against the said order. However, it is not the contention of the respondents that any interim stay is obtained against the order of deletion of names of 28 societies. Therefore, inclusion of names of these 28 societies, as submitted by Advocate Shri P. R. Patil, will have to be considered as irregularity that had crept in, in the election process in spite of vigil and supervision over the same by returning officer-respondent No. 5 and Assistant Registrar (Co-operative Societies)-respondent No. 4.

Couple of more irregularities were pointed out by Advocate Shri P. R. Patil. The chairman himself, by communications dated 11-5-2006 and 15-5-2006, has invited nominations and resolutions from the member-societies, instead of Member-Secretary of the society doing so and permitting a period of one month for the purpose, as required by election Rule 5. However, the later irregularity stands mitigated when it is admitted position that all the member-societies have sent their nominations.

10. Coming to the issue at serial No. (ii) in paragraph 8 above, learned Counsel for the petitioner has placed reliance upon Section 73-H and learned Counsel for the respondents have laid emphasis on the phrase "to arrange for holding the election" as contained in Sub-section (1) of the said Section 73-H. It is contended that since the present managing committee has taken steps to appoint returning officer, preparation of provisional voters list and publication of the same through the returning officer and setting the election process in motion, the members of the managing committee have complied with the requirement of Section 73-H and, therefore, Section 73-H(2) does not come into play. It was submitted that in any case, there is nothing to show that there was "wilful failure" on the part of the managing committee to arrange to hold the elections and, therefore, prayer for appointment of administrator, as contemplated by Section 73-H(2) cannot be considered. The crux of the submissions was that if existing managing committee sets the election process in motion before expiry of its term, although by not adhering to the time-table as laid down in the rules, Sub-section (I) of Section 73-H will have to be considered as fulfilled and, therefore, there will be no necessity to invoke Sub-section (2) of the said section. Although it was argued that rules do not have force of statute, it cannot be ignored that election rules are part and parcel of bye-laws, which are adopted by the society, and once adopted, the society must adhere to the rules and hold election in accordance with the rules as contemplated by bye-law 39-A.

So far as interpretation of Section 73-H is concerned, we may point out that the title of the said section reads thus:

Responsibility of committee to hold election before expiry of term.

Although Sub-section (1), and more particularly later half of the same, begins with the words "to arrange for holding election ", the said sub-section ends with a tailpiece "before expiry of its term". If these two parts are read in conjunction thus, "to arrange for holding the election before expiry of its term", such reading would be in harmony with the title of the section. It does not seem to be the intention of the legislature that only arrangements for holding elections should be completed before expiry of the term, but the elections are required to be held before expiry of the term. This is further evident from Sub-section (2), which lays down that in case of "wilful failure" on the part of the committee to hold the election before expiration of its term, the committee shall cease to function on expiration of its term and the members thereof shall cease to hold the office. In such an eventuality, the Registrar is expected either to take over management himself, or to appoint an administrator. The intentions of the legislature are very clear in Sub-section (2) of Section 73-H. The existing managing committee must complete the process of election before expiry of its term and as already discussed earlier, if the process is started with preparation of provisional voters list by the Member-Secretary, four months before expiry of the term of the existing managing committee, the election process ends on a day, when expiry of term of existing managing committee is 10 or 15 days away. The new committee is expected to hold a meeting within 30 days from the declaration of results of elections. Thus, they are not required to push out the existing committee before expiry of its term but it can hold the meeting after 10 to 15 days from the date of declaration of results of the elections, thereby allowing the existing managing committee to complete its term of five years. When the effect of title of the section, language used in Sub-section (1) and more particularly Sub-section (2) of Section 73-H, is taken into account together with time-table of the elections as given in the election rules, it is clear that holding of election i.e. completion of election process before expiry of the term of existing managing committee, is a mandate prescribed by the statute within Section 73-H of the said Act and in any case, the managing committee has no right to continue beyond its tenure of five years. The answer to second issue, therefore, will have to be in affirmative.

It is the responsibility of the existing committee to complete the election process on a day within 10 to 15 days before expiry of its term and vacate the office on the day of expiry of term, by allowing new managing committee to hold first meeting immediately on the next day, or any day thereafter, but within 30 days from the declaration of results. In case of failure to so hold the elections, they cease to hold the office and the committee must cease to function as a statutory effect.

11. Much emphasis was laid on the word "wilful" as contained in Sub-section (2) of Section 73-H of the said Act. We must say that it is not for anyone else but for existing managing committee to explain reasons, and satisfactory reasons, as to why election process could not be completed before expiry of its term. In case

there is no explanation, or explanation is not satisfactory, failure will have to be termed as "wilful".

Coming to the facts of the present case, in the paperbook at page 24 (Exhibit E), there is a circular from Assistant Registrar (Co-operative Societies), a copy of which is also addressed to respondent No. 6-society, indicating that the Assistant Registrar (Co-operative Societies), Shrirampur, is appointed as Executive Officer and Member-Secretary of the said society, and the incumbent having taken charge as such, on 2-5-2005.

Along with reply filed on behalf of respondent No. 4, at Exhibit R-3, is a copy of communication dated 22-2-2006. By this communication, the Assistant Registrar (Co-operative Societies), Shrirampur, has informed the Assistant Executive Officer of respondent No. 6-society that the tenure of the existing managing committee was coming to an end on 1-7-2006 and, therefore, it was necessary to take steps for election of new managing committee in accordance with approved bye-laws and election rules. The communication indicates that the Member Secretary should prepare the provisional voters list, so as to enable the authorities to start the election process. On the face of this communication, which reminded at least a month and a week before commencement of last phase of three months of the existing managing committee (2-4-2006 to 1-7-2006), it is not open for the present managing committee to say that, there was no "wilful failure" in holding the election before expiry of its tenure.

12. Once we hold that the time schedule prescribed by election rules for holding election of new managing committee is mandatory, because of mandate prescribed by Section 73-H to hold and complete the election process before expiry of the term, the action on the part of the managing committee to pass resolution only on 15-5-2006 appointing returning officer must be said to be beyond its powers. If the existing managing committee had failed to nominate the returning officer before last phase of three months commenced i.e. on or before 1-4-2006, the power to appoint returning officer reverted to the Assistant Registrar (Co-operative Societies) and the returning officer appointed by the resolution, merely because the same is approved by the Assistant Registrar, would not validate action of the managing committee, which action was in breach of the time table and consequently, mandate laid down by Section 73-H. The said appointment, therefore, will have to be set aside, by answering first issue also in the affirmative.

13. Consequently, writ petition succeeds. The appointment of respondent No. 5 as returning officer is quashed and set aside. Since the term of existing managing committee has come to an end on 1-7-2006, the Assistant Registrar (Co-operative Societies) shall take necessary steps, either to takeover management himself or to appoint an administrator, as contemplated by Section 73-H(2) of the Maharashtra Co-operative Societies Act, 1960. He shall also proceed to appoint a returning officer, who shall publish fresh election programme, so as to conclude before expiry of the term of the administrator,

which is six months as per Section 73-H(2) of the said Act.
Rule is made absolute, accordingly.