

(2012) 01 BOM CK 0142
In the Bombay High Court
Case No : Writ Petition No. 830 of 2011

Mhalu Naik

APPELLANT

Vs

Assistant Election Officer and Returning Officer and Others

RESPONDENT

Date of Decision : 06-01-2012

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2013) 2 ABR 1009

Hon'ble Judges : U.V. Bakre, J;A.P. Lavande, J

Bench : Division Bench

Advocate : M.S. Sonak and D.J. Pangam, for the Appellant; S.S. Kantak, Advocate General, A. Kakodkar, Addl. Govt. Advocate, A.N.S. Nadkarni and H.D. Naik, for the Respondent

Final Decision : Dismissed

Judgement

A.P. Lavande, J.—By this petition, the petitioner has sought the following reliefs:

(A) This Hon''ble Court be pleased to issue an appropriate writ, order or direction to quash and set aside the name of the respondent No. 4 in the final list of contesting candidates dated 23.12.2011;

(B) This Hon''ble Court also be pleased to issue a declaration that the petitioner and other eight candidates are declared elected unopposed to the membership of the Board of Directors of Madgaum Urban Co-operative Bank Limited (Respondent No. 3);

(C) Pending the hearing and final disposal of this petition, this Hon''ble Court be pleased to stay the elections scheduled on 8.1.2012.

(D) For ad interim ex parte reliefs in terms of Prayer Clause (C) above;

(E) For such other and further relief that this Hon''ble Court deems fit and proper;

(F) For costs.

The case of the petitioner is as under:

The petitioner is a Director of respondent No. 3 Bank, which is a Co-operative Society, constituted under the provisions of the Goa Co-operative Societies Act, 2001 ("the Act" for short). Vide Notification dated 5.12.2011, respondent No. 1 notified election programme to the Board of Directors of the Bank. It is the case of the petitioner that the election programme is in contravention of Rule 61 of the Goa Co-operative Societies Rules, 2003 (for short "the Rules"). In terms of the schedule of programme, the last date for filing nomination was 12.12.2011 upto 12.30 p.m. and the date fixed for scrutiny of the nomination papers was 13.12.2011. The schedule of the election programme is as under:

(Contd. on Col. 2)

2. According to the petitioner, the Board of Directors of the Bank consists of nine elected members. Respondent No. 1 conducted the scrutiny of the nomination papers on 14.12.2011 and passed an order on the same day in which it has been stated that respondent No. 4 had personally withdrawn the nomination. The petitioner has annexed a copy of the said order to the petition. It is further the case of the petitioner that in the final list of contesting candidates which was published on 23.12.2011, the name of respondent No. 4 appears and, therefore, inclusion of respondent No. 4 in the final list of contesting candidates is illegal, arbitrary and unconstitutional. According to the petitioner, the name of respondent No. 4 ought not to have figured in the final list of contesting candidates and if his name is excluded, only 9 Directors remain in the fray and as such, there is no question of holding election to the Board of Directors.

3. An affidavit has been filed by respondent No. 4 in which it has been stated that the petition is bad for non-joinder of necessary parties, inasmuch as eight other candidates contesting the election to the Board of Director of the Bank have not been joined. The petitioner has alternate remedy of raising dispute u/s 83 of the Act and, as such, the petition is not liable to be entertained. It has been further stated that the petitioner has suppressed certain vital facts and as such, the petition is liable to be dismissed at the threshold. It is further the case of respondent No. 4 that on 20.12.2011, respondent No. 1 issued names of the candidates whose nominations were received and the name of respondent No. 4 appeared at serial Nos. 2 and 5. A copy of the list has been annexed, which confirms this fact. It is further the case of respondent No. 4 that on 22.12.2011, which was the last date of withdrawal of the nomination, he addressed a letter dated 22.12.2011 to respondent No. 1 withdrawing his candidature at serial No. 2. It is, therefore, the case of respondent No. 4 that his name rightly figures in the final list of contesting candidates and as such, no case has been made out for interference by this Court to delete the name of respondent No. 4 from the final list of contesting candidates.

4. On behalf of respondent Nos. 1 and 2, two affidavits of respondent No. 1 have been filed. In the first affidavit dated 2nd January, 2012 filed by Ms. Shivane S.

Borkar, it has been stated that on 22nd December, 2011, respondent No. 4 addressed a letter withdrawing candidature at serial Nos. 2 and 5. However, it has been further stated that it was verified from respondent No. 4 whether he sought to withdraw the nomination papers reflecting at serial No. 2 and after ascertaining the same, he was allowed to withdraw. It has been further stated that in the certified copy of the proceeding sheet dated 14.12.2011 supplied to the petitioner, the operative part of the order dated 23rd December, 2011 was inadvertently typed at the end of proceedings sheet prepared after scrutiny which was held on 14th December, 2011 and the operative part of the order is of the order dated 23rd December, 2011.

In further affidavit dated 4th January, 2012 filed by respondent No. 1, in para 2, it has been stated that in para 11 of her affidavit dated 2nd January, 2012 the words "and serial No. 5" have been wrongly typed and need to be deleted. A copy of the proceedings of scrutiny held on 14th December, 2011, as well as a copy of the proceedings of withdrawal held on 22nd December, 2011, have been annexed to the said affidavit.

5. Mr. Sonak, learned counsel for the petitioner submitted that he is not pressing the ground taken in the petition that the election is being held in breach of Rule 61 of the Rules. According to Mr. Sonak, respondent No. 1 has committed too many mistakes/errors and the respondent No. 1 has acted in a casual and cavalier manner in discharge of her duties. The respondent No. 1 having passed the order dated 14th December, 2011, which is a statutory order, the petitioner is entitled to rely upon the same and contend that the name of respondent No. 4 has to be deleted from the final list of contesting candidates. According to the learned counsel, the final list of contesting candidates displayed on 23rd December, 2011 is contrary to the order dated 14th December, 2011, as well as the order dated 22nd December, 2011. According to the learned counsel, the order dated 22nd December, 2011 clearly states that the final list of contesting candidates is published by deleting the names of the contesting candidates i.e. Shri Atmanand Sadashiv Pednekar and others and, as such, the name of respondent No. 4 could not have appeared in the final list of contesting candidates. Therefore, according to Mr. Sonak, even if the operative part of the order dated 14th December, 2011, as supplied to the petitioner, is taken as operative part of the order dated 22nd December, 2011 yet, the name of respondent No. 4 ought not to have appeared in the final list of contesting candidates. Placing reliance upon Rule 71 of the Rules, Mr. Sonak submitted that there is no question of withdrawal of nomination, but what is contemplated is withdrawal of candidature and, as such, the action of respondent No. 1 in retaining the name of respondent No. 4 in the final list of contesting candidates, is patently unsustainable in law. According to the learned counsel, respondent No. 1 is not entitled to justify the statutory orders passed by her, by filing affidavits. According to the learned counsel, availability of alternate remedy is no bar for entertaining a writ petition and this is a self imposed restriction, imposed by the High Court while entertaining writ petitions challenging the election

process. According to the learned counsel, considering the factual and legal position, this is a fit case in which this Court should exercise extraordinary jurisdiction under Article 226 of the Constitution of India. The petitioner does not deserve to be relegated to alternate remedy of raising dispute u/s 83 of the Act, after the election is held. According to the learned counsel, all the contesting members are not necessary parties to the petition and it is respondent No. 4 only who would be affected by any relief that may be granted by this Court.

In support of his submissions, Mr. Sonak relied upon the following judgments:

- 1) Suleman Fakruddin Ansari Vs. S.B. Kulkarni and Another, .
- 2) Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, : Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, .
- 3) Kandru Venkateswarlu and Others Vs. Government of A.P. and Others, .
- 4) Deoraj Vs. State of Maharashtra and Others, .
- 5) Maram Sujathamma and Others Vs. State Election Commission and Others, .
- 6) Dalsing Shamsing Rajput v. State of Maharashtra and others, 2006 (5) Bom CR 691 : (2006 (5) ABR (DOC) 28 (Bom).

6. Per contra, Mr. Kantak, learned Advocate General appearing for respondent Nos. 1 and 2 submitted that the grievance of the petitioner is of improper acceptance of the nomination paper and, as such, this Court should not exercise the extraordinary jurisdiction under Article 226 of the Constitution of India and, in case, the petitioner is not successful in getting elected, he can very well resort to the remedy u/s 83 of the Act. Learned Advocate General drew our attention to the affidavit filed by respondent No. 1 and the annexure to the affidavit dated 4th January, 2012 and submitted that the same clearly discloses that respondent No. 4 had withdrawn his nomination at serial No. 2 on 22.12.2011 and as such, expressed his intention to contest the election pursuant to his nomination at serial No. 5. According to the learned counsel, letter dated 22.12.2011 addressed by respondent No. 4 to respondent No. 1, cannot be construed as withdrawal of his candidature and in the absence of the clear intention on the part of respondent No. 4 disclosing his intention to withdraw his candidature, the action of respondent No. 1 in retaining the name of respondent No. 4 in the final list of contesting candidates cannot be faulted. According to the learned Advocate General, in terms of Rule 71 of the Rules, a candidate has to withdraw his candidature by an application, in writing, and deliver it personally to the Returning Officer within the stipulated time as specified in the election programme and in the present case, in view of the letter dated 22.12.2011 addressed by respondent No. 4 to respondent No. 1, it cannot be said that respondent No. 4 expressed his intention to withdraw his candidature. According to the learned Advocate General, considering the facts of the present case and the legal position, this Court may not entertain the present writ petition filed by

the petitioner.

7. Mr. Nadkarni, learned Senior counsel appearing on behalf of respondent No. 4, adopted the submissions made by the learned Advocate General and further submitted that the withdrawal of candidature cannot be thrust upon respondent No. 4 and having regard to the letter dated 22.12.2011 addressed by respondent No. 4 to respondent No. 1, a clear intention to withdraw his candidature cannot be spelt out. On the contrary, the same clearly discloses that respondent No. 4 was interested in contesting the election. According to the learned counsel, withdrawal has to be construed strictly and cannot be by inference. According to the learned counsel, only on account of the discrepancy between the operative part of the order and the minutes recording the proceedings, respondent No. 4 can not be penalised by deleting his name from the contesting candidates. According to the learned counsel, the petitioner has effective alternate remedy by way of a dispute u/s 83 of the Act and having regard to the settled law, this is not a fit case to entertain the petition under Article 226 of the Constitution of India. According to the learned counsel, it is settled law that an act of a Court or Tribunal should prejudice none and in the present case, respondent No. 4 cannot be penalised on account of any error committed by respondent No. 1 while passing orders under the Act.

In support of his submissions, Mr. Nadkarni placed reliance upon the following judgments :

- 1) R. Arunachala Naidu Vs. S.R. Balakrishna and Co., .
- 2) Shri Sant Sadguru Janardan Swami (Moingirid Maharaj) Sahakari Dugdha Utpadak Sanstha and Another Vs. State of Maharashtra and Others, .
- 3) Avtar Singh Hit Vs. Delhi Sikh Gurdwara Management Committee and Others, .

8. We have carefully considered the rival submissions, perused the record and gone through the original record and also the judgments relied upon by the learned counsel appearing for the respective parties.

9. Perusal of the record discloses that in the copy of the order dated 14.12.2011, passed by respondent No. 1 which was supplied to the petitioner, respondent No. 1 has incorporated operative part of the order dated 22.12.2011 which was passed after recording the minutes of the proceedings for withdrawal of nomination papers held on 22.12.2011. Minutes of the proceedings of withdrawal held on 22.12.2011 discloses that respondent No. 1 has mentioned therein that at 4.36 p.m. respondent No. 4 visited the office and handed over withdrawal application requesting her to withdraw his nomination form at serial No. 2. Respondent No. 1, after considering the request, allowed him to withdraw the nomination form at serial No. 2. However, operative part of the order dated 22.12.2011 discloses that the final list of contesting candidates was to be published by deleting the names of several candidates, including that of respondent No. 4. Thus, the operative part of the order is contrary to the

minutes of the proceedings. The copy of the application dated 22.12.2011 addressed by respondent No. 4 to respondent No. 1 which has been relied upon by respondent No. 4, discloses that by the said application, respondent No. 4 had withdrawn his nomination under serial No. 2 only. Therefore, it is clear that by the said letter respondent No. 4 did not withdraw his nomination at serial No. 5 as per the list of candidates whose names were found valid as on 20th December, 2011. No doubt, Rule 71 of the Rules provides that any candidate may withdraw his candidature by application in writing and deliver it personally to the Returning Officer within the stipulated time as specified in the election programme and in case, he gives such an application, he shall not be allowed to withdraw his application. Therefore, Mr. Sonak is right in contending that Rule 71 contemplates withdrawal of candidature and not withdrawal of nomination. But it cannot be disputed that unless a clear intention on the part of the candidate to withdraw his candidature is spelt out, the name of such a candidate cannot be deleted from the final list of contesting candidates. In the present case, the petitioner has not thrown challenge to the authenticity of the application dated 22.12.2011 addressed by respondent No. 4 to respondent No. 1 and, as such, the only conclusion which can be drawn is respondent No. 4 did not intend to withdraw his candidature and his application dated 22.12.2011 cannot be construed as withdrawal of candidature in terms of Rule 71 of the Rules. No doubt, in view of Rule 71, the application filed by respondent No. 4 withdrawing his nomination at serial No. 2, has no legal sanctity, but, in the absence of any clear intention on the part of respondent No. 4 to withdraw his candidature, we find it difficult to accept the submission of Mr. Sonak that in the operative part of the order dated 22.12.2011, respondent No. 1 could not have included the name of respondent No. 4 in the final list of contesting candidates which was displayed on 23.12.2011. We find merit in the submission of Mr. Nadkarni that respondent No. 4 cannot be made to suffer on account of error/mistake committed by respondent No. 1 in passing the order dated 22.12.2011. Perusal of the minutes of the proceedings clearly discloses that respondent No. 4 had withdrawn his nomination at serial No. 2 and he never expressed any intention to withdraw the nomination at serial No. 5. Therefore, in our considered opinion, the error/mistake on the part of respondent No. 1 in the operative part of the order dated 22.12.2011 cannot come to the rescue of the petitioner to the detriment of respondent No. 4. If the argument made on behalf of the petitioner is accepted, the net result would be that respondent No. 4 would be deprived of his right to contest the election, although he had filed two nomination papers and did not express his intention to withdraw his candidature. No doubt, the record clearly supports the submission of Mr. Sonak that respondent No. 1 has acted in most casual manner not only while furnishing a certified copy of the order dated 14.12.2011, but even while filing the affidavit dated 2nd January, 2012 and while passing the order dated 22.12.2011. Respondent No. 1 ought to have realised that she was passing statutory orders affecting the rights of contesting candidates and was filing an affidavit dealing with the contentions of the petitioner. The approach of respondent No. 1 has been most casual. However,

this fact, by itself, would not entitle the petitioner to the reliefs claimed.

10. Mr. Sonak, placing reliance upon the judgment of the Apex Court in the case of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, , in which the Apex Court has made a reference to the observations of Bose, J. in Gordhandas Bhanji, submitted that public orders, publicly made in exercise of statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting's and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself. The principle is well settled. However, this principle is not attracted in the present case inasmuch as we are not permitting respondent No. 1 to justify her orders by giving reasons in the affidavits. We have already held that the operative part of the order dated 22.12.2011 is contrary to the minutes of the proceedings and, as such, cannot be construed against respondent No. 4 so as to prevent respondent No. 4 from contesting the election to the Board of Directors of the Bank.

11. Since we have already held on merits that the action of respondent No. 1 in including the name of respondent No. 4 in the list of contesting candidates cannot be faulted, we do not deem it necessary to refer to several other authorities cited by Mr. Sonak appearing for the petitioner and Mr. Nadkarni appearing for respondent No. 4, on the aspect of maintainability of the petition. Since, we are of the considered opinion that the action of respondent No. 1 in including the name of respondent No. 4 in the final list of contesting candidates cannot be faulted, we do not deem it necessary to deal with other submissions made regarding the maintainability of the writ petition on the ground of availability of alternate remedy in election matters.

12. Before we conclude, we would like to deal with one aspect of the matter. We have already accepted the submission of Mr. Sonak that respondent No. 1 has been very casual in discharge of her duties. The respondent No. 1 ought to have realised that she was discharging the statutory duties which would affect the rights of contesting candidates. The petition was filed on the basis of a certified copy of the minutes of the proceedings held on 14th December, 2011, which was supplied to the petitioner. We have already accepted the stand of respondent No. 1 that the operative part of the Order dated 22.12.2011 was typed as operative part of the order dated 14.12.2011. The petitioner is justified in filing the petition on the basis of the certified copy of the order dated 14.12.2011 since the operative part of the order clearly discloses that the name of respondent No. 4 was to be deleted from the final list of contesting candidates. It is only on account of the negligence and casual approach of respondent No. 1 that the petitioner herein had to file the present petition and only thereafter respondent No. 1 came out with explanations regarding the errors committed. A person who is discharging statutory functions has to bear in mind that his/her actions are

bound to affect the rights of several persons and, as such, is expected to be very vigilant while discharging the duties and functions under the Act. In the present case, respondent No. 1, to say the least, has not discharged her statutory duties under the Act, as expected of a diligent officer and, therefore, although we do not find any ground to interfere with the action of respondent No. 1, we deem it appropriate to impose costs on respondent No. 1, personally. In view of the above discussion, we are of the considered view that the action of respondent No. 1 in including the name of respondent No. 4 in the final list of contesting candidates dated 23.12.2011 cannot be faulted. Hence, we are not inclined to entertain this writ petition. Consequently, the writ petition stands dismissed subject, however, to a direction that respondent No. 1 shall personally pay the costs, which we quantify at Rs. 5,000/-, to the petitioner. The costs shall be deposited by respondent No. 1 in this Court, within a period of four weeks. Liberty to the petitioner to withdraw the costs.