
(2011) 09 GUJ CK 0001

In the Gujarat High Court

Case No : Special Civil Application No. 13256 of 2011

Motibhai Hirabhai Samand

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 07-09-2011

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2011) 09 GUJ CK 0001

Hon'ble Judges : V.M. Sahai, J;K. S. Jhaveri, J

Bench : Division Bench

Advocate : B.M. Mangukiya and Bela A. Prajapati, for the Appellant; N.J. Shah, AGP for Respondents 1 and 2 and V.C. Vaghela, for Respondents 3, for the Respondent

Final Decision : Allowed

Judgement

K.S. Jhaveri, J.—Rule. Mr. N.J. Shah learned Assistant Government Pleader for Respondents No. 1 & 2 and Mr. V.C. Vaghela learned Counsel for Respondent No. 3 waive service of rule. With the consent of the parties, the matter is taken up for final disposal today itself.

2. This petition under Article 226 of the Constitution of India is directed against the order dated 29.08.2011 passed by Respondent No. 2, Election Officer, Surendranagar District Co-operative Milk Producers" Union Ltd., Wadhwan & Deputy Collector, Wadhwan Sub-division, Surendranagar whereby, the nomination of the Petitioner came to be rejected on the alleged ground that the Petitioner had acquired disqualification under the Election Rules of Surendranagar District Co-operative Milk Producers" Union Ltd.

3. The facts in brief giving rise to the filing of the present petition are as under;

The Surendranagar District Co-operative Milk Producers" Union Ltd. (hereinafter referred to as "the Union" for short) is a Co-operative Society duly registered under the provisions of the Gujarat Co-operative Societies Act, 1961 (for short,

"the Act") and is a "specified society", as defined u/s 74-C of the Act. The elections of Members of Executive Committee of the Union are conducted by the District Collector as per the provisions of Chapter XI-A of the Act.

4. The Respondent No. 2, who is authorized to act as District Collector by the State Government, issued Notification for holding elections of the Executive Committee of the Union. As per the election program, the nomination forms were to be scrutinized on 29.08.2011 and the list of validly nominated candidates is to be declared on 30.08.2011. The withdrawal of nomination forms had to be done on or before 01.09.2011 and the list of contesting candidates is to be published on 01.09.2011. The date of voting is fixed on 14.09.2011. The Petitioner filled in the Form in the prescribed manner. However, Respondent No. 3 filed his Objections to the nomination of the Petitioner inter alia stating that the Petitioner had been disqualified under Rule 32(f) of "The Gujarat Specified Co-operative Societies (Election to Committees) Rules, 1982" (hereinafter referred to as "the Rules" for short) by order dated 25.11.1987 passed by the District Registrar, Co-operative Societies, Surendranagar.

5. Before proceeding further, it would be relevant to note that the Petitioner had challenged the said order dated 25.11.1987 passed by the District Registrar, Co-operative Societies, Surendranagar before the Gujarat State Co-operative Tribunal by way of filing Appeal No. 139 of 1988. However, the said appeal was dismissed by order dated 29.09.1992. Being aggrieved by the order dated 29.09.1992, the Petitioner had preferred a writ petition before this Court being S.C.A. No. 9084 of 1992. The said petition was dismissed for want of prosecution by order dated 12.06.2006. A criminal case being Criminal Case No. 536 of 1989 was also registered against the Petitioner and other accused person wherein, both the accused persons were convicted for the offence punishable u/s 147(A) of the Act and were imposed punishment of payment of fine of Rs. 100/-each and in default thereof, they were ordered to undergo simple imprisonment for one day, by order dated 25.11.1992. Against the order of conviction passed in Criminal Case No. 536 of 1989, the Petitioner had preferred Special Criminal Application No. 829 of 1993 before this Court, which came to be dismissed by order dated 28.09.2006.

6. However, Respondent No. 3 herein rejected the nomination of the Petitioner by impugned order dated 29.08.2011. Being aggrieved by the same, the Petitioner has preferred the present petition under Article 226 of the Constitution of India.

6.0. Mr. B.M. Mangukiya learned Counsel for the Petitioner submitted that Rule 32 of the Rules cannot be pressed in service against the Petitioner since it does not provide that an order recorded u/s 93 of the Act would invite disqualification in respect of all Societies. He submitted that the said Rule shall apply only in respect of that Society in which the person proposed to contest election acquires any disqualification as specified in the said Rule.

6.1. Mr. Mangukiya learned Counsel further submitted that under the provisions

of Section 76-B(2) of the Act, a person shall stand disqualified to contest election in any Society for a period not exceeding four years from the date of order of disqualification and not for all time to come. He submitted that the order of disqualification of the Petitioner became final on 12.06.2006 and therefore, the Petitioner would stand disqualified only up to 11.06.2010 and not beyond that. He, therefore, submitted that the impugned order passed by the Election Officer is without jurisdiction and contrary to the provisions of the Act and Rules framed thereunder.

6.2. Mr. Mangukiya further submitted that the Petitioner was convicted for the offence punishable u/s 147(A) of the Act by the competent criminal Court for which he was imposed punishment of making payment of fine of Rs. 100/-. He submitted that Section 145-F of the Act provides that only such person shall be disqualified to contest election who has been convicted for any offence and sentenced to imprisonment for not less than two years, unless a period of five years has elapsed since his release. Therefore, the premise on which the impugned order has been passed, is illegal and contrary to the provisions of the Act.

6.3. Mr. Mangukiya has drawn our attention to two unreported decisions of this Court rendered in Letters Patent Appeal No. 1191 of 2002 & cognate matter dated 19.10.2010 and more particularly, on the observations made in Para-21, which reads as under;

21. As is seen from the above extracted Rules, one of the qualifications for becoming a Member of the Committee of the Society is as provided in Sub-rule (1)(f) of Rule 32 which states that no order should have been made against the concerned person u/s 93. The meaning and implication of this provision would be that a person against whom an order has been made u/s 93 of the Act, shall not be qualified or eligible for appointment as a Member of the committee. In other words, passing of an order u/s 93 would disqualify the person concerned for appointment as a member of a Committee. Rule 32(1)(f) is silent as regards the period for which such disqualification would prevail, giving rise to the interpretation that such disqualification would be of a permanent nature and would attach to all Committees of all Societies, as has been held by the learned Single Judge. The question that arises is whether such an absolute prohibition is contained in any provision of the Statute, under which Rules have been framed. Section 168 of the Act confers power upon the State Government to make rules for carrying out the purposes of the Act. Sub-section (2)(b) of Section 168 stipulates that such rules may be made "to provide for all matters expressly required or allowed by the Act". As is seen from Section 93, this provision does not deal with the disqualification of a Member of a Committee, at all. The purport and object of this Section is to ensure recovery of assets of the Society which are misapplied or wrongfully retained by an office-bearer of the Society. It authorises levy of compensation from the organisers or present or past or deceased office-bearers of the Society, for any damage due to misfeasance or breach of trust.

However, this Section also covers cases of misapplication of funds or property of the society, in addition to any act of misfeasance or breach of trust. Rule 32(1-A) provides that a Member of the committee who incurs any of the disqualifications specified in Sub-rule (1) shall vacate the office, failing which he shall be removed by the Registrar provided that the Registrar shall, before making such order of removal, give the person concerned an opportunity of being heard. The power of removal of a member of a committee who has incurred any of the disqualifications specified in Rule 32(1) is conferred upon the Registrar. The source of this power can be traced to Section 76-B, more particularly 76-B(2). This provision confers upon the Registrar, power to disqualify an officer who has been removed for persistent default or negligence in performance of his duties, from holding any office or contesting elections in the concerned Society and in any other society for a period not exceeding four years from the date of the order. Thus, it is clearly stipulated in the said Sub-section (2) of Section 76B that disqualification from the concerned Society or any "other society", shall not exceed a period of four years from the date of passing of the order. There is an express power of disqualification provided in the said provision which clearly indicates the intention of the Legislature which is that the Registrar is empowered to disqualify a person against whom an order of removal u/s 76-B(1) has been passed and such disqualification shall operate as a bar to hold office in the society or contest elections in the society from which the officer is removed or any other society, for a period not exceeding four years. Discretion is, therefore, vested in the Registrar to make an order of disqualification for any period of time, provided it does not exceed four years. The extent of power conferred by Section 76-B(2) is very clearly delineated and the power conferred upon the Registrar under Rule 32(1-A) is clearly relatable to this Sub-section. This being the clear legal position, the absence of a specific period of disqualification in Rule 32(1)(f) would not lead to an interpretation that the disqualification would be permanent. Such an interpretation does not flow from the clear and unambiguous provisions of the Act.

6.4. Mr. Mangukiya has also drawn attention of the Court to another unreported decision of this Court rendered in Special Civil Application No. 4625 of 2011 dated 28.04.2011 and more particularly, on the observations made in Para-3, which reads as under;

3. The facts as far as relevant for the purposes of the present petition are that the name of Petitioner No. 2 was included in the preliminary voters" list as representative of the Petitioner No. 1. But an objection was raised by Respondent No. 2 on the basis that Petitioner No. 2 was, by order dated 06.01.2007 of the District Registrar, Co-operative Societies, Nadiad, disqualified from holding any post in any Cooperative Institution. That order was made in purported exercise of power under Rule 32 of the Gujarat Co-operative Societies Rules, 1965 (for short "the Rules"), after an order being made under the provisions of Section 93 of the Act. Since that order amounted to permanent disqualification of the Petitioner concerned and there was a subsequent decision dated 19.10.2010 of Division

Bench of this Court in Letters Patent Appeal No. 1191 of 2002, even the District Registrar opined in his letter dated 03.04.2011 that the disqualification could continue at the most for four years. Relying upon the opinion of the District Registrar, as immediately rendered by him by his letter dated 03.04.2011, the Election Officer ordered removal of name of Petitioner No. 2 from the voters list by the impugned order dated 04.04.2011.

7.0. Mr. N.J. Shah learned Assistant Government Pleader appearing on behalf of Respondents No. 1 & 2 and Mr. V.C. Vaghela learned Counsel appearing on behalf of Respondent No. 3 supported the impugned order and submitted that the Petitioner was disqualified on the basis of cogent evidence that was available against him.

8.0. Mr. V.C. Vaghela learned Counsel for Respondent No. 3 raised preliminary objection regarding the maintainability of the petition by submitting that earlier the Petitioner had preferred writ petition before this Court being S.C.A. No. 9084 of 1992, which was dismissed vide order dated 12.06.2006. This petition involves similar cause of action and hence, it is not maintainable in the eyes of law.

8.1. Mr. Vaghela further submitted that the Petitioner has an alternative remedy under the provisions of Section 145-U of the Act wherein, it has been provided that any dispute relating to election shall be referred to the Tribunal. He, therefore, submitted that the Petitioner ought to have filed appropriate application before the Tribunal instead of filing the present petition.

9. We have heard learned Counsel for the respective parties and perused the documents on record. We have also gone through the relevant provisions of the Act and Rules framed thereunder and also the decisions relied upon by the parties.

10. Before we embark upon the merits of the case, it would be beneficial to discuss certain facts, which are undisputed. In the past, the Petitioner had been disqualified vide order dated 25.11.1987 passed by the competent authority. The Petitioner had challenged the said order before the Gujarat Co-operative Tribunal by way of filing an appeal, which was dismissed by order dated 29.09.1992. Against the said order, the Petitioner had preferred a writ petition before this Court being S.C.A. No. 9084 of 1992, which was also dismissed by order dated 12.06.2006. The Petitioner had not challenged the said order dated 12.06.2006 passed by this Court before the higher forum and therefore, the same has attained finality.

11. The Election Officer passed the impugned order mainly on the ground that the Petitioner had acquired disqualification under the provisions of Rule 32(1)(f) of the Rules since an order was recorded against the Petitioner u/s 93 of the Act. Rule 32 pertains to qualifications for appointment as Members of the Committee. Sub-rule (1)(f) of Rule 32 provides that a member of a Society, who is entitled to vote, shall be eligible for appointment as a Member of a Committee, if no order is made against him u/s 93 of the Act. It is in this background that we are required

to consider whether the order made u/s 93 of the Act leads to permanent disqualification in respect of that particular Society only or for all Societies and if not, then for what period the disqualification shall operate.

12. Section 93 of the Act pertains to the power of Registrar to assess damages against delinquent, promoters, etc. of the Society. A conjoint reading of Rule 32(1)(f) of the Rules and Section 93 of the Act would go to show that a person against whom an order has been made u/s 93 of the Act, shall not be qualified or eligible for appointment as a Member of the Committee. Rule 32(1)(f) is silent as regards the period for which such disqualification would prevail. It also does not give rise to an interpretation that such disqualification would be of a permanent nature and would attach to all Committees of all Societies. Therefore, the question that arises is for what period a Member shall remain disqualified for appointment as a Member of the Committee.

13. Necessary provisions have been made in the Act for appointment, removal, disqualification, etc. of Members of the Society. Section 76-B(2) of the Act confers upon the Registrar, power to disqualify an officer who has been removed for persistent default or negligence in performance of his duties from holding any office or contesting elections in the concerned Society and in any other Society for a period not exceeding four years from the date of the order. It is clearly stipulated therein that disqualification from the concerned Society or any "other Society", shall not exceed a period of four years from the date of passing of the order. In other words, the authority is empowered to disqualify a person for any period of time not exceeding four years. Thus, the absence of a specified period of disqualification in Rule 32(1)(f) of the Rules would not lead to an interpretation that the disqualification is permanent, particularly, when a specific provision pertaining to the period of disqualification has been enacted in the Act.

14. It is true that Rule 32(1)(f) is silent regarding the period of disqualification but, when the Act itself prescribes disqualification for a maximum period of four years, viz. in Section 76-B(2), to interpret Rule 32(1)(f) in a manner suggesting that it provides for permanent disqualification, would result in the Rule exceeding the limits of the power expressly stipulated in the Act, which cannot be the intention of the Legislature. Therefore, it is necessary that Rule 32(1)(f) is read in such a manner so as to make it consistent with the provisions of the Act. In the instant case, the order of disqualification attained finality on 12.06.2006. Therefore, the Petitioner would remain disqualified for the period up to 11.06.2010 only and not for all times to come in view of the provisions of Section 76-B(2) of the Act. Therefore, the impugned order of the Election Officer holding the Petitioner to be disqualified under the provisions of Rule 32(1)(f) of the Rules is without jurisdiction, bad in law and contrary to the provisions of the Act. It appears from the record that earlier also, i.e. in the year 2008, in the elections of the same Society, the nomination of the Petitioner was rejected, which was challenged by the Petitioner before this Court by way of filing Special Civil Application No. 10980 of 2008. The said matter has been admitted on

09.09.2008 and is pending.

15.0. So far as the contention regarding conviction recorded against the Petitioner is concerned, it has been provided in Section 145-F(c) of the Act that a person shall be disqualified for being elected and for being a Member of the Committee of any specified society, if he has been convicted by a Court in India for any offence and sentenced to imprisonment for not less than two years, unless a period of five years has elapsed since his release.

15.1. Here, the Petitioner was convicted for the offence punishable u/s 147(A) of the Act by the competent Court vide order dated 25.11.1992 passed in Criminal Case No. 536 of 1989 and was imposed punishment of making payment of fine of Rs. 100/-. As is clear from Sub-section (c) of Section 145-F of the Act that a person shall stand disqualified only if he has been convicted by a Court in India and has been sentenced to imprisonment for a period not less than two years and unless a period of five years has elapsed from the date of his release. It is true that the Petitioner was convicted by the competent Court but, he has not been sentenced to any imprisonment. The punishment imposed was to pay fine of Rs. 100/-, which was duly paid by him. Therefore, the ground of conviction recorded by the Election Officer is not germane to the provisions of law and without jurisdiction.

16. The preliminary objection raised by learned Counsel for Respondent No. 3 regarding maintainability of this petition does not attract much attention in view of the fact that nomination of the Petitioner has been rejected on grounds which are not only contrary to the law declared by this Court in Letters Patent Appeal No. 1191/2002 dated 19.10.2010 and also against another decision of this Court rendered in Special Civil Application No. 4625/2011 dated 28.04.2011 wherein, the competent authority, by relying upon the said decision of this Court rendered in Letters Patent Appeal No. 1191/2002 dated 19.10.2010, had opined that disqualification could continue at the most for four years. Hence, the preliminary objection raised by learned Counsel Mr. Vaghela is devoid of any merits.

17. As regards the availability of alternative remedy u/s 145-U of the Act is concerned, it may be noted that alleged disqualification is under the provisions of Rule 32(1)(f) of the Rules. Section 145-U of the Act, essentially, pertains to disputes relating to elections. Hence, in our opinion, the Petitioner was justified in invoking the writ jurisdiction of this Court instead of approaching the Tribunal concerned.

18. In view of the above discussion, we are of the considered opinion that the impugned order passed by Respondent No. 2-authority is illegal, without jurisdiction and contrary to the provisions of the Act and Rules framed thereunder. Since the elections are scheduled to be held on 14.09.2011, a direction to accept the nomination of the Petitioner would subserve the process of fair election since he has been deprived of his right to contest the elections for wrongful reasons. Hence, the petition is required to be allowed.

19. For the foregoing reasons, the petition is allowed. The impugned order dated 29.08.2011 passed by Respondent No. 2-authority is quashed and set aside. We hold the nomination of the Petitioner to be valid and legal and accordingly, direct Respondent No. 2-authority to include the name of the Petitioner for the forthcoming elections scheduled on 14th September 2011, to permit him to contest the elections and subsequently, also to declare the results. Rule is made absolute. Direct service permitted.

20. Mr. N.J. Shah learned Assistant Government Pleader shall inform about the passing of this order to the concerned authorities, more particularly, Respondent No. 2, for necessary consequential action immediately via telephonic / fax message.