

(2023) 01 BOM CK 0063

In the Bombay High Court

Case No : Writ Petition No. 13018 Of 2022

Namdev And Others

APPELLANT

Vs

State Of Maharashtra And Others

RESPONDENT

Date of Decision : 16-01-2023

Acts Referred:

Maharashtra Cooperative Societies Rules, 1961 — Rule 32, 33

Conduct Of Elections Rules, 1961 — Rule 78

Maharashtra Cooperative Societies Act, 1960 — Section 26, 38, 38(1), 39, 91

Citation : (2023) 01 BOM CK 0063

Hon'ble Judges : Arun R. Pedneker, J

Bench : Single Bench

Advocate : K.R. Doke, G.O. Wattamwar, V.H. Dighe, P.D. Bachate

Final Decision : Allowed

Judgement

Arun R. Pedneker, J

1) Rule. Rule made returnable forthwith. By consent, heard finally.

2) By the present writ petition, the petitioners are challenging the order passed by respondent No. 3 – District Cooperative Election Officer i.e. District Deputy Registrar, Cooperative Societies, Osmanabad dated 6.12.2022 by which the names of 76 persons / members / petitioners are excluded from the final voters list published on 9.12.2022. The petitioners are restricting their challenge to the 70 petitioners only. The petitioners also submit that they do not wish to contest the elections of respondent No. 5 Society, but would only pray to include their names in the final voters list so as to enable them to cast their vote.

3) Brief facts giving rise to the present writ petition can be summarised as under :-

Respondent No. 5 – Vivid Karyakari Seva Sahakari Society, Jaywantnagar, Tq. Bhoom, District Osmanabad was established on 27.7.1954. The petitioners are members of respondent No. 5 Society and some of them were also previous

office bearers. As there was no election conducted for the years 2020-2022 due to Covid-19 pandemic, the Sub Auditor Cooperative Societies Bhoom came to be appointed as administrator of respondent No. 5 Society. Respondent No. 3 – District Cooperative Election Officer / District Deputy Registrar vide order dated 14.11.2022 had published programme for preparation of provisional voters list and finalization of final voters list. As per the programme the provisional voters list was published on 16.11.2022 and the period for calling objections was given as 16.11.2022 to 25.11.2022. The date for deciding the objections was fixed on 5.12.2022 and publication of final voters list was fixed on 9.12.2012. In the provisional voters list, there were 317 names. Common objections were raised to the 76 names by respondent Nos. 6 and 7, on the ground that their names are not found in I and J register maintained by the Society and as such, they are not valid voters of the society.

4) In view of the objections raised, respondent No. 3 Election Officer directed respondent No. 4 – Assistant Registrar Cooperative Societies, Bhoom, calling upon him to submit the report on the objections raised. Respondent No. 4 Assistant Registrar submitted the report on 2.12.2022, translation of which reads as under :-

"Office of Asst. Registrar,

Bhoom, Tq. Bhoom,

Dt. 02.12.2022.

To,

The Hon'ble Election Officer

& Dist. Dy. Registrar Co-op., Societies, Osmanabad.

Sub.:- Objection as to the Provisional List of Voters.

Ref.:- Order of the Office dated 28.11.2022

1. Please refer to the above subject and Reference :-

2. That, as per the above referred letter from your office it is directed to submit the self explanatory report along with the self opinion, in respect of the objections raised in regards to the provisions voters list.

3. Accordingly, in view of the same I submit that, I have not received the Register I & J, the Register of share held by members, the office copy of the share certificate. Moreover, the objectors have not submitted any documentary evidence along with the objection. Hence by Scrutinizing the available / Alternate record of the society, I am submitting the report in following manner :-

A. The names of voters at Sr. No. 1 to 4, 6 to 35, 38, 39, 44, 47, 48, 52, 60, 61, 63 are the borrower members of the society.

B. The names of members at Sr. No. 36, 37, 42, 43, 45, 46, 49, 50, 54, 55, 56, 57 were included and kept in list of voters as per the order dated 24.12.2012 passed in accordance with the decision of the Hon'ble High Court in W.P. No. 4857/2012.

C. The persons mentioned at Sr.no. 53 and 58 were included as per the resolution of meeting of director dated 03.01.2009 and they have paid share capital and entry fees on 31.03.2009.

D. The persons mentioned at Sr.no. 65, 66, 68, 71, 72, 73, 74, 75 and 76 were included as per the resolution of meeting of director dated 05.04.2018 and they have paid share capital and entry fees on 13.04.2018.

E. The names mentioned at Sr.no. 59, 62 and 64 were repeated in provisional list hence their names liable to be deleted from one place.

F. The names mentioned at Sr.No. 05, 40, 41, 51, 69 and 70 are not seen in the list of members of the society.

G. The name at Sr.No. 136 raised by petitioner is the borrower member and outstanding due is there against him, hence his name is liable to be deleted.

Hence this report along with my opinion is submitted for further necessary action.

Sd/-

Asst. Registrar Co-op.,

Societies Bhoom."

5) Based on the report, respondent No. 3 Election Officer by order dated 6.12.2022 disqualified 76 voters, directing not to include the names of 76 persons in the final voters list. The translation of the said order dated 6.12.2022 is as under :-

"District Co-operative Election Officer and Dist. Dy. Registrar Co-op. Societies, Osmanabad

Dt. 06.12.2022

To,

1. Narayan Maharudra Morale, R/o. Jaywantnagar, Tq. Bhoom.

2. Namdeo Gokul Nagargoje, R/o. Jaywantnagar, Tq. Bhoom.

Sub.:- Objection as to provisional voters list.

Ref.:- 1)Your objections

2) Say filed by the society on objection.

3) Report of Asst. Registrar Co.Op. Society, Bhoom on objection. Kindly have look at the above objection.

2. That, in regard to above subject, the provisional voter list is published by their office. Accordingly, the following objections were received by the office within time. The hearing was kept in office on the above objections on 01.12.2022. In the hearing by considering the argument of the objector, the report submitted by the society and the report of the Ld. Asst. Registrar Co-op., Society Bhoom, following decision is given.

V.K.S.S. Society Ltd. Jaywanthnagar, Tq. Bhoom. Election of Board of Director, 2022-2027.

Decision of the objection over provisional voter list.

Sr. No.

Objectors Name

Subject of Objection

Decision of Objection.

1.

Narayan Maharudra Morale and Namdeo Gokul Nagargoje

Excluding name of 76 member from the final voter list

1) The Ld. Asst. Registrar Co.Op., Society submitted in his report that he has not received / got the register in form I and J, register of share held by members office copy of share certificate granted to member and recommended to delete 9 names of member out of 76, and to include 67 names in the final voter list.

2) That, accordingly to the hearing / argument of objector report of Asst. Registrar which says that the I & J register of society is not available. Hence the objection of the objector is allowed & 76 names from the provisions voter list

Decision is given as per the objection of the objector, if any one facts aggrieved, he can approach competent court.

Sd/-

District Co-operative Election Officer

Dist. Dy. Registrar Co-op. Societies,

Osmanabad."

Aggrieved thereby the present writ petition is filed.

6) It is the contention of the petitioners that respondent No. 3 Election Officer non suited the petitioners on the basis that I and J register is not available with the society. Mr. K.R. Doke, learned counsel for the petitioners submitted that if the I and J register is not available, then entire list of members would go. The

learned counsel further submitted that respondent No. 4 Assistant Registrar submitted report to respondent No. 3 Election Officer. From the report, it is reflected that the I and J register is not available with the society, but other secondary evidence is available and that most of the petitioners are borrower members of the society. There are resolutions and the share certificates and other documents in support of membership of the petitioners as indicated in the report. There is also earlier order passed by this Court in W.P. No. 4857/2022 wherein some voters/ petitioners were included in the voters list. The report of respondent No. 4 Assistant Registrar indicates that barring 9 members (6 of which are petitioners herein), there is evidence qua remaining petitioners being valid members of the society. In spite of said report, the respondent No. 3 Election Officer has illegally directed removal of the petitioners from the voters list.

7) The learned counsel relies upon the judgment delivered by this Court in the case of Tirupati Motiram Mohite and Ors. Vs. The State of Maharashtra and Ors. in Writ Petition No. 3323/2022 decided on 10.03.2022, whereby this Court had interfered with the election process and directed inclusion of the voters in the final voters list and has further directed that till the inclusion is done the final voters list is stayed.

8) Mr. P.D. Bachate, learned counsel appearing for respondent Nos. 6 and 7, objectors relies on the case of Jyoti Basu and Ors. Vs. Debi Ghosal and Ors. reported in (1982) 1 SCC 691 and submits that right to elect, to be elected or to dispute election are neither fundamental rights nor common law rights but are simply statutory rights and they are subject to statutory limitation. The statute provides that the names of members have to be reflected in the I and J register to be valid voters, then the members are necessarily required to be in the I and J register to be a valid voters and since they were not found to be in the I and J register, the respondent No. 3 authority/ Election Officer was right in deleting the names of the petitioners from the final voters list. The learned counsel further submits that if the petitioners names were not in I and J register, then their names are rightly excluded and they cannot be included by exercising powers under common law remedy and can only be rectified by filing election petition as provided in the statute.

9) Mr. V.H. Dighe, learned counsel for respondent No. 3 Election Officer submits that I and J register is required to be maintained under section 38 of the Maharashtra Cooperative Societies Act, 1960 r/w. Rule 32 and 33 of the Maharashtra Cooperative Societies Rules 1961. Section 38 of the Act provides that :-

“38. Register of members.—

(1) Every society shall keep a register of its members and enter therein the following particulars, that is to say,—

(a) the name, address and occupation of each member ;

- (b) in the case of a society having share capital, the share held by each member;
- (c) the date on which each person was admitted a member;
- (d) the date on which any person ceased to be a member; and
- (e) such other particulars as may be prescribed :

Provided that, where a society has by or under this Act, permitted a member to transfer his share or interest on death to any person, the register shall also show against the member concerned the name of the person entitled to the share or interest of the member, and the date on which the nomination was recorded.

(2) The register shall be prima facie evidence of the date on which any person was admitted to membership, and of the date on which he ceased to be a member.”

Rule 32 and 33 of the MCS Rules of 1961 are as under :-

32. Register of Members

The register of members to be kept by every society under sub-section (1) of Section 38 shall be in Form 'I'.

33. List of Members

The list of members to be kept by every society under Section 39 shall be in Form 'J'. The society at the close of every financial year, shall prepare the list of active members in Form "J-1" and the list of non active members in Form "J-2" as per the provisions of section 26 of the Act.

Mr. Dighe, learned counsel further submits that the election is in advance stage and that the nominations are filed and 18.1.2023 is the last date of withdrawal of nominations and that any interference at this stage in the election process would affect the election process and is not permissible. He submits that alternate remedy is available of challenging the order of respondent No. 3 Election Officer under section 91 of MCS Act, 1960 r/w. Rule 78 of 2014 Election Rules.

10) Having considered the rival submissions, it needs to be noted that the report given by the respondent No. 4 Assistant Registrar clearly indicates that I and J register is not available with the society or the administrator and that none of the voters including the objectors name are from the I and J register. The respondent No. 4 Assistant Registrar is duty bound to examine the Act, Rules and bye-laws of the Society before finalisation of the final voters list. If the names of the members are not reflected in the I and J register then the respondent No. 3 Election Officer should have depending upon the mandate of law, either discard the entire list or could have allowed the secondary evidence qua their membership.

11) In the instant case, as all the voters on the provisional voters list are included in the list on the basis of secondary evidence, it was not permissible for

the respondent No. 3 Election Officer to single out the present petitioners and remove their names from the final voters list on the basis that their names are not in the I and J register.

12) The deletion of 76 voters from total of 317 would materially affect the election process and the managing committee members elected from the truncated voters list may not represent the will of the majority.

13) Thus, the order passed by respondent No. 3 Election Officer is patently illegal. This Court in the case of Bankewad Digambar Bhojanna and Ors. Vs. The State of Maharashtra and ors. in Writ Petition No. 11701/2022 decided on 12.12.2022 has held in para 6 as under :-

"6. It has been held by this court that preparation of voters list is a part of election process and in the Full Bench judgment of this court in the case of Dattatray Ganaba Lole and others Vs. Divisional Joint Registrar, Co- operative Societies and others, 2021 SCC Online Bom. 4578, it has been held that the writ remedy should not be invoked in respect of any of the intermediate steps in the election and only remedy available to the aggrieved party is to file election dispute under Section 91 of the Maharashtra Co-operative Societies Act, 1960 read with Rule 78 of the 2014 Election Rules. However, in case of patent illegality this court may interfere with the electoral process in cooperative societies by taking other factors into consideration such as stage of election and effect it would have on election process."

14) Since I have already held that there is patent illegality in the order passed by respondent No. 3 Election Officer and that non inclusion of the large number of voters will materially affect the election outcome and the elected representatives may not represent the will of the majority and thus, the order dated 6.12.2022 passed by the respondent No. 3 Election Officer is set aside. In view of the undertaking given by the petitioners that they do not wish to contest the elections if their names are included in the final voters list, there would be no destabilizing effect on the elections and the elections can proceed as per the schedule. The respondent No. 3 Election Officer is directed to include in the final voters list the names of petitioners (excluding ineligible 6 petitioners) who were found eligible by respondent No. 4 Assistant Registrar.

15) The petitioners have given undertaking to this Court that they do not wish to contest the elections and only wish to cast vote in the election. As such, there would be no necessity to re-fix the date of filing nomination. The election programme can be proceeded ahead without altering the date of filing of nomination and/or date of withdrawal of nomination. However, the final voters list with inclusion of additional voters would undergo necessary modifications.

16) In view of the same, the writ petition is allowed with above directions.

Rule is made absolute in aforesaid terms.