

(1994) 02 BOM CK 0016
In the Bombay High Court
Case No : Writ Petition No. 2770 of 1991

Nanaji Bhokre

APPELLANT

Vs

Commissioner, Amravati Division, Amravati and others

RESPONDENT

Date of Decision : 22-02-1994

Acts Referred:

Constitution of India, 1950 — Article 226

Maharashtra Co-operative Societies Act, 1960 — Section 144T, 152A, 2(14), 73FF

Citation : AIR 1994 Bom 204 : (1994) 4 BomCR 364 : (1994) 2 MhLj 1277

Hon'ble Judges : V.S. Sirpurkar, J

Bench : Single Bench

Advocate : D.K. Deshmukh, for the Appellant; R.C. Madkholkar, Asstt. Govt. Pleader and D.L. Chambhare, for the Respondent

Judgement

1. The petitioner herein challenges the order passed by the Commissioner, Amravati Division, Amravati whereby the Commissioner dismissed the appeal filed by the petitioner against the order rejecting the nomination paper of the petitioner. The petitioner offered his nomination for the elections which were being held in respect of a society called Ner Taluka Sahakari Kharedi Vikri Sanstha Limited, Ner (hereinafter referred to as "the Society"). The said society is a specified society. The elections were due and were to be held as per the programme fixed by the respondent No. 1. Under the programme, the scrutiny of the valid nomination papers was to be held on 29-10-1991. An objection came to be lodged to the nomination paper of the petitioner on the ground that the brother of the petitioner was running the same or similar business as that of the society inasmuch as the said brother Anna Ganuji Bhokre was running a shop called "Vishal Krushi Kendra". The objection is on the record of the petition. In that objection it is reiterated that since the said brother was running the said "Vishal Krushi Kendra", therefore, on that count alone the petitioner had earned a disqualification under S. 73-FF(v) of the Maharashtra Co-operative Societies Act, 1960 (hereinafter referred to as "the Act"). The objection was accepted by the Returning Officer who rejected the nomination paper by the petitioner. In

appeal the petitioner pointed out that the said brother was a separate entity and he had nothing to do with that business of the brother inasmuch as there were already partitions effected. As a second limb of the argument, it was suggested that in fact the said shop was also closed for the last 3 years. The said appeal was filed under the provisions of the S. 152-A of the Act.

2. The Commissioner, Amravati Division, Amravati passed the order and dismissed the appeal finding that in fact the shop of the said brother of the petitioner, namely, Anna Ganuji Bhokre was doing its business in the year 1991 also. The Commissioner further found that there was a valid authorisation by the Agriculture Development Officer, Yavatmal in favour of the said shop in the year 1991 and, therefore, the Commissioner was of the view that since the shop was being run by the brother of the petitioner, the concerned authority, namely, the Returning Officer was right in rejecting the nomination paper of the petitioner. Aggrieved by this order, the petitioner has approached now this Court in the writ jurisdiction.

3. Shri D. K. Deshmukh, the learned counsel for the petitioner, challenged the order of the Commissioner as well as the Returning Officer firstly on the ground that both the authorities have completely misread the provisions of S. 73-FF(v). According to him, there are no material allegations made as per that section against the petitioner and this fact was completely missed by both the authorities.

4. Shri R. C. Madkholkar, learned Asstt. Govt. Pleader for respondent State, has supported the orders and has opposed the petition on the ground that the petitioner should be left to file an election dispute under S. 144T and in view of this alternate remedy being available to the petitioner, the petition should not be entertained. The second limb of the argument of Shri Madkholkar is that the orders are correct on merits since it is established that the brother had a shop running in the same jurisdiction and was doing substantially the same business as that of the society.

5. Considering the question of alternate remedy first, it will have to be seen as to whether the petition should be entertained at all as there is an alternate remedy of election petition under S. 144-T of the Act? Shri Deshmukh, however, forcefully contended that such remedy would not be available to the petitioner at all in view of the express language of S. 152-A of the Act. He relied upon the amendment made to S. 152-A. By amendment, an appeal was provided in case of a specified society. There is no dispute that the present society is a specified society under S. 73-G of the Act. Section 152-A as it stood earlier to the amendment provided for an appeal to the Registrar within -3 days of the rejection of the nomination by the Election Officer. There is a further rider that the Registrar shall dispose of such appeal within 10 days of the date of receipt of such appeal and the decision of Registrar shall be final and no further appeal or revision shall lie. This, section was amended by Maharashtra Act No. 10 of 1988 with effect from 20-6-1988 wherein a specific provision was made for the specified societies and it was provided that an appeal in case of the elections

pertaining to the Managing Committee of the specified societies shall lie to the Divisional Commissioner and the Divisional Commissioner has to dispose of the appeal within 10 days from the date of presentation of the appeal. Further the order of the Commissioner has been given a finality and it is provided that no further appeal or revision shall lie against the decision of the Divisional Commissioner in such appeal. Shri Deshmukh, therefore, pointed out that the order by which the appeal is decided by the Divisional Commissioner is final and there cannot be any challenge to this order. Shri Deshmukh further points out that in respect of the specified societies any election dispute has to be filed before the Divisional Commissioner only. The section further provides that even an Additional Commissioner of a Division could try such an election dispute if he is so authorised by State Government in this behalf. The submission of the learned counsel is, therefore, that where the question regarding the validity of the nomination paper is decided by the Divisional Commissioner himself and when the law has clothed that order with the finality, then it would be futile for such person to file a dispute under S. 144-T of the Act because it will go more or less to either the same officer, i.e., the Divisional Commissioner or even the inferior officer like Additional Commissioner. Shri Deshmukh points out that the power to try the election dispute under Sec. 144-T is delegated to an inferior officer like the Additional Commissioner. He, therefore, rightly contends that if the Commissioner has already decided upon the correctness or otherwise of the nomination paper and the validity thereof, then an inferior officer like Additional Commissioner would not be able to sit over the finding reached by the Divisional Commissioner in the appeal under S. 152-A. The argument is right. The Legislature has provided the orders passed u/s 152-A by the Divisional Commissioner with a total finality. Therefore, the same question could not be raised under the provisions of S. 144-T either before that officer himself, i.e., the Divisional Commissioner or before the lower officer like Additional Commissioner. Even if it is admitted that it is the Divisional Commissioner who shall himself be trying an election dispute he would be bound by his own order and it cannot be said that it would be possible for him to reopen and to assail the order passed by himself under the provisions of S. 152-A. That would be a travesty of the legal procedure. In that view of the matter, if the petitioner herein has suffered the order of the Divisional Commissioner who has held the rejection of the nomination paper to be proper, then the petitioner will not be able to file an election dispute challenging the order at all, contending that the rejection was not proper. It is to be remembered here that S. 152 operates only in case of the rejection of the nomination paper and against no other order. The reason appears to be obvious because if the nomination paper of a candidate is rejected in an incorrect manner it affects the whole election. It is probably for this reason that the Legislature has decided to get the question about the rejection of the nomination paper settled for once and all. Shri Madkholkar questions this interpretation and submits that if the appeal is not filed,,, the situation would be different and the Divisional Commissioner would be able to deal with that question. That indeed would be so because in that case there would be no order

under S. 152-A which has attained the finality and the jurisdiction of the Divisional Commissioner under S. 144-T would still be alive. It will have to be, therefore, held that there is no effective alternate remedy to the election petitioner.

6. There is one more reason why it will not be proper to send back the petitioner on this ground. The petition has been entertained in the year 1991. The stay has been granted to the whole election after hearing both the parties by this Court and it is thereafter that the stay came to be confirmed. Once, therefore, the writ petition is entertained it would not be proper to send back the petitioner now on the ground of availability of alternate remedy. In this behalf, Shri Deshmukh relied upon the decision in the case of L. Hirday Narain Vs. Income Tax Officer, Bareilly, where "the" Supreme Court observed in paragraph 12 that the High Court would not be justified in dismissing the petition when the petition was entertained and was heard on merits. Shri Madkholkar, however, takes a strong exception to this case and points out that this was a case under the provisions of Income Tax Act. He relied upon the judgment reported in Someshwar Sahakari Sakhar Limited and etc. Vs. Shrinivas Patil and others, etc., , which is a decision by the learned single Judge Shri Savant, J. of this Court holding that once the election process begins, the High Court should not interfere in the writ jurisdiction under Art. 226 of the Constitution. The learned single Judge therein relied upon two Division Bench decisions of this Court and on that basis came to the conclusion and held that where the election process had started, it would not be proper for this Court to entertain any writ petition and retard the election process thereby. Relying upon these cases strongly, Shri Madkholkar contends that the election process had not only started here but was in full swing when the stay was granted by this Court. He, however, submits that merely because the stay was granted by this Court and the elections were stayed, the Court should not now interfere with the said election process.

7. I have already pointed out that indeed there is no alternate remedy available to the petitioner because of the peculiar legal position obtained on account of Ss. 152-A and 144-T. Even assuming that Shri Madkholkar is right that once the election process starts this Court should not entertain a writ petition under Art. 226 as a general principle, it will be seen that the position cannot be true in respect of the facts of the present case. Firstly, the decisions relied upon by Shri Madkholkar pertained to the preparation of the election rolls and not in respect of the rejection of nomination papers in respect of which there is a specific appeal provided for under S. 152-A of the Act. Secondly, in those decisions there are no orders passed which would bring a cloud on the right of the Election Tribunal to decide that particular issue. In the present case, however, as has been stated above, the Election Tribunal will not be able to decide whether the nomination paper of the petitioner has been rightly rejected or not, because the earlier order passed by the Divisional Commissioner would be binding on the Election Tribunal. The principle, therefore, appears to be that where there is a likely cloud on the right of the Election Tribunal to decide the particular issue, this Court may choose

to interfere under Art. 226. This was the position obtained because of the reported decision of the Supreme Court in *Ramchandra Ganpat Shinde v. State of Maharashtra*; (1993) 4 SCC 215. There also the Supreme Court clarified the law and pointed out that there was some grey area wherein even in respect of the election disputes this Court would exercise its jurisdiction under Art. 226 where it found that the Election Tribunal would not be able to decide a particular issue because of the orders passed by the higher authorities like High Court or Supreme Court. In the present case though there is no order by the Supreme Court or the High Court there is a specific bar in the shape of S. 152-A and the order passed by if not by the higher authority the same authority, i.e., the Divisional Commissioner. Again because of the peculiar language of S. 152-A the said order has been given the finality by the language of that section and there is a non obstante clause suggesting that notwithstanding anything contained in any of the provisions, the orders passed by the Divisional Commissioner under S. 152-A in an appeal would have a complete finality. Therefore, it will have to be held that these orders could not be assailed under other provisions of the Act, i.e., S. 144-T. In that view of the matter, it will have to be held that the petitioner had no other alternate remedy and on that count, the petition cannot be thrown.

8. Coming to the merits of the order, unfortunately it seems that both the Returning Officer and the Divisional Commissioner have not bothered to go into the language of S. 73-FF(v) of the Act. This is how the section goes:

"S.73-FF. (1) Without prejudice to the other provisions of this Act or the rules made thereunder in relation to the disqualification of being a member of a committee, no person shall be eligible for being appointed, nominated, elected, co-opted or, for being a member of a committee, if he -

.....

(v) carries on business of the kind carried on by the society either in his name or in the name of any member of his family or he or any member of his family is a partner in a firm or a director in a company which carries on business of the kind carried on by the society;

Explanation:-- For the purposes of this clause, the expression "family" means a wife, husband, father, mother, brother, sister, son, daughter, son-in-law or daughter-in-law."

It is undoubtedly true that the brother of the petitioner is running a shop in his own name. It is further undoubtedly true that the said business is akin to the business of the society. However, what is really absent is that this business which is being run by the brother is not being carried for and on behalf of the petitioner. The look at the language would show that the disqualification is invited when the said business is carried on by the person who wishes to be elected or wants to continue as a member of the Managing Committee either in his name or surreptitiously in the name of his some other relative. Therefore, there has to be an allegation against the person that in fact it is the business of such person and

the same is being run in the name of his brother or a relative. Merely because a member of the family is running the business that by itself will not draw the disqualification. It will have still to be proved that there is some nexus between the concerned person and that business. The business if it is run by any of the member of the family of the person concerned ipso facto will not invite the disqualification. Now considering the complaint, it is nowhere suggested that the said brother is carrying on the business in fact on behalf of his brother, i.e., "the present petitioner or that it is in fact the business of the petitioner and, therefore, the petitioner should stand disqualified.

9. Shri Madkholkar, the learned Asstt. Govt, Pleader, however, drew my attention to the words that if such person is or any member of his family is a partner in a firm or a director in a company which carries on such business, then also that fact by itself would draw the disqualification. Here the situation is entirely different. "Firm" is defined under Sec. 2M4) of the Act which says that the "firm" means a firm registered under the Indian Partnership Act, 1932. There is no "allegation that there is in existence any such firm or that the brother of the petitioner is a partner in such firm. There is further no allegation that there is any company and that the brother of the petitioner is a director in such company. Shri Madkholkar questions the position and contends that it is really anomalous that if the brother merely remains a partner in the firm it is sufficient to draw the disqualification while if the brother actively docs a business as a proprietor will not draw such disqualification. It is not for this Court to question the wisdom of the Legislature but the real reason appears to be the business as a proprietor may not be as wide or as substantial as that of a firm or a company and, therefore, probably if the brother or any member of a family carries on business on his own and without being connected or without having any nexus with the concerned person, no disqualification would ipso facto follow. The Divisional Commissioner has completely ignored this aspect and has chosen to stamp the order of the Resuming Officer as a correct order merely on the ground that there is in fact such business going on in the name of the brother. The essential finding that it is the petitioner who is carrying on the business in the name of his brother is wanting. Since the "relevant finding is wanting the order passed by the Divisional Commissioner must be held to be incorrect. For the same reasons, the order passed by the Returning Officer must also be held to be incorrect. The objection is also completely silent. In fact if the last part of the objection is read, it will be seen that the section has been completely misunderstood even by the objector who was under the impression that if the business is being carried on by any of the family members then that by itself would draw the disqualification under the section. In short, there being no such material allegation as required u/s 73-FF(v) of the Act, it must be held that the Election Officer was in error in rejecting the -nomination paper and the Divisional Commissioner was also in error in confirming the said order. Both the orders will have, therefore, to be set aside.

10. In the result, the petition succeeds. The orders passed by the Divisional

Commissioner dated 31-10-1991 and by the respondent No. 2 the Returning Officer dated 29-10-1991 arc set aside and it is directed that the nomination paper by the petitioner should be accepted as a valid nomination paper. With these observations, the rule is made absolute but without any orders as to costs.

11. Petition allowed.