

(2009) 08 GUJ CK 0035

In the Gujarat High Court

Case No : Special Civil Application No. 7461 of 2009

Patel Chandrakant Thakorbbhai

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 13-08-2009

Acts Referred:

Constitution of India, 1950 — Article 226, 329(b)

Gujarat Agricultural Produce Markets Act, 1963 — Section 11, 11(1), 27

Citation : (2009) 3 GLH 343

Hon'ble Judges : M.S. Shah, J;K.M. judge Thaker, J

Bench : Division Bench

Advocate : V.C. Vaghela, for the Appellant; Tushar Mehta, A.A.G. with Mr. Nikunt Raval AGP For Respondent 1, Notice Served By Ds For Respondents 1 - 7, Mr B.S. Patel For Respondent 5 and Mr. Dipen A. Desai For Respondents 8 - 12, for the Respondent

Judgement

Mr. Mohit S. Shah, J.—Rule. Mr. Nikunt Raval learned AGP waives service of Rule for respondent Nos. 1 to 4. Heard Mr. Tushar Mehta learned Additional Advocate General, Mr. V. C. Vaghela learned Advocate for petitioner, Mr. B. S. Patel learned Advocate for respondent No. 5 and Mr. Dipen Desai learned Advocate for respondent Nos. 8 to 12. In this petition, the petitioner has challenged the final voters" list dated 15. 7. 2009 for traders constituency in the matter of elections to Agriculture Produce Market Committee, Karjan in Baroda District [hereinafter referred to as "the APMC"].

2. The broad facts leading to filing of the present petition, as emerging from the record, are as under: -

2.1 The Director of Agricultural Marketing and Rural Finance (hereinafter referred to as "the Director") passed order dated 25. 5. 2009 (Annexures B & C) fixing the following program for elections to the APMC.

1 The date for declaration of election program 29.05.2009:

- 2 The date for the APMC to send the list of voters to the Authorised Officer 05.06.2009
- 3 The date for publication of the preliminary list of voters 12.06.2009
- 4 The last date of receiving objections against the above list 26.06.2009
- 5 The date for publication of provisional voters" list or the revised draft voters" list 03.07.2009
- 6 The last date for submitting objections against the above list 10.07.2009
- 7 The last date for publication of the final list of voters 15.07.2009
- 8 The date for filing nomination forms 17.08.2009
- 9 The date of scrutiny of nomination forms 18.08.2009
- 10 The date for withdrawal of nomination forms 21.08.2009
- 11 The date of poling 01.09.2009
- 12 The date of counting 02.09.2009

2.2 The APMC granted trader's license to a large number of persons at its meeting held on 20. 5. 2009. Thereafter, the APMC forwarded the list of voters to the authorised officer on 5. 6. 2009. The authorised officer addressed a communication to the APMC that many of the persons whose names were included in the list of voters for the traders" constituency did not have trader's license. This communication was noted in the agenda notice dated 11. 6. 2009 convening the meeting of the APMC on 15. 6. 2009 for grant of license in respect of the applications received between 20th and 27th May, 2009. Thereafter, the preliminary list of voters was published on 12. 6. 2009. At the APMC meeting held on 15. 6. 2009, the APMC granted trader's license to 139 persons, out of which 100 licenses were fresh licenses, whereas 39 licenses were licenses by way of renewal.

2.3 When the names of these persons were also included in the provisional list of voters published on 3. 7. 2009, the petitioner submitted his objections against inclusion of a large number of persons in the list of voters for traders" constituency, who were granted license on 15. 6. 2009 after declaration of the election program on 25. 5. 2009 on the basis of the applications which were made on 25th and 27th May. 2009. By the impugned order dated 15. 7. 2009 (Annexure - A), the authorised officer rejected the petitioner's objections and published the final list of voters on the same day. Hence, this writ petition.

3. Mr Vaghela, learned Advocate for the petitioner has vehemently submitted that the APMC had send the draft list of voters for the traders" constituency to the authorised officer on 5. 6. 2009 consisting of about 397 persons, out of whom 139 persons were granted trader's license on 15. 6. 2009 after

declaration of the election program and based on their applications made on 25/27. 5. 2009. Out of those 139 persons, 100 persons had applied for the first for such license after the Director of Agricultural Marketing and Rural Finance declared the election to APMC. Including names of such persons in the list of voters was contrary to the statutory Rules and also: in flagrant breach of the law laid down by this Court in *Shrutbandhu H. Popat vs. State of Gujarat & Ors.* in 2007(3) GLR 1942 and *Kalubhai Ranabhai Akabari vs. State of Gujarat* in 2007(3) GLH 57.

It is submitted that the impugned order granting their inclusion in the final list of voters is completely destructive of the democratic process and a fraud on the elections.

4. Elections to Agriculture Produce Market Committee (hereinafter referred as to the "APMC" or "Market Committee") are: governed by the Gujarat Agricultural Produce Market Committee Act, 1963 (hereinafter referred to as the "Act") and the Agricultural Produce Market Rules, 1965 (hereinafter referred to as the "Rules")

4.1 Section 11(1) of the Act provides for composition of the APMC as under: "11. Constitution of market committee - (1) Every market committee shall consist of the following members, namely: -

(i) eight agriculturists who shall be elected by.....

(ii) four members to be elected in the prescribed manner from amongst themselves by the traders holding licenses;

(iii) two representatives of the Cooperative marketing societies... .."

4.2 Part III of the Rules provides for election of market committee. Rule 6 provides that the person whose name is entered in a list of voters shall be qualified to vote at an election to which the list of voters relates. Rule 10 provides that the election shall be held between such hours and on such date and at such place as may be fixed by the Director. Thus, the power to fix various stages of election is conferred on the Director of Agricultural Marketing and Rural Finance.

The relevant portion of Rule 5 reads as under: -

"Different lists of voters: - For the purpose of Section 11, there shall be in respect of a market committee three separate lists of voters in Gujarati as follows, namely: -

(1)

(2) under clause (ii) of sub-Section (1) of Section 11 of the Act a list of traders holding general licenses in the market area;

(3)

Rules 7 and 8 contain provision for preparation of list of voters. Rule 7 in so far as is relevant for the purpose of this petition reads as under: -

"7. Preparation of list of voters for general election: - (1) when ever a general election to market committee is to be held:

(i)

(ii) the market committee shall communicate the full names of the traders holding general licenses in the market area together with the place of or residence of each such trader; and

(iii)....

to the authorised officer before such date as the Director may by order fix in that behalf, provided that the date to be so fixed shall not be later than sixty days before the date of the general election. " Sub-rule (2) provides that the authorised officer shall within seven days from the date fixed under Sub-rule (1) cause to be prepared the lists of voters as required by rule 5 on the basis of the information received under sub-rule (1) and if necessary after making such inquiry as he may deem fit.

5. After considering the relevant provisions of the Act and the Rules, this Court has held in *Shrutbandhu H. Popat vs. State of Gujarat & Ors* in 2007(3) GLR 1942 and *Kalubhai Ranabhai Akabari vs. State of Gujarat* in 2007(3) GLH 57 that the election officer and the Election Tribunal have no jurisdiction to examine the challenge to grant, renewal, refusal, suspension or cancellation of a trader's license and that such a challenge will have to be considered by the competent authorities under sub-Sections (3), (4) and (5) of Section 27 of the APMC Act after making proper scrutiny and after giving an opportunity of hearing to the affected parties. In the said decisions, this Court has also held that persons who are granted licenses after the date of declaration of the elections are not to be included in the voters' list.

In *Kalubhai Ranabhai Akabari* (supra), this Court has also held that the relevant date for determining the eligibility of a ? person for inclusion in the voters' list would be the date by which the Authorized Officer is to be communicated the names as indicated in sub-rule (1) of Rule 7 of the Rules. A person who had not obtained the traders license on the relevant date [the date on which the authorized officer was to be communicated by the APMC the names of voters under Rule 7(1)] could never be included in the list of voters.

6. In the facts of the present case there is no dispute about the fact that the persons at serial numbers 249 to 397 in the final voters' list for the constituency of traders were not granted traders license by APMC till 14. 6. 2009. In fact these persons who have been joined in the representative capacity through respondent Nos. 6 and 7 and also respondent Nos. 8 to 12 who have been permitted to be joined at their own request, had applied to the APMC for traders license on 25. 5. 2009 and 27. 5. 2009. 25. 5. 2009 was also the date on which the Director

passed order declaring election programme which was published in the newspaper dated 28. 5. 2009. The licenses were granted/renewed by the APMC on 15. 6. 2009 after the preliminary voters" list was published under Rule 8(1) on 12. 6. 2009. Such licenses were granted to in all 139 persons, out of which 100 licenses were fresh licenses and 39 licenses were renewed licenses.

Mr. Vaghela, learned Advocate for the petitioner makes it clear that the petitioner does not challenge the inclusion of those 39 persons whose licenses were renewed on 15. 6. 2009 and that the challenge in this petition is confined to inclusion of those 100 persons who were granted fresh license on 15. 6. 2009 on the basis of their applications alleged to have been made to APMC on 25. 5. 2009 and 27. 5. 2009.

7. The petitioner had lodged his objections as per the objection dated 10. 7. 2009 against inclusion of the names of the above persons (in whose favour APMC granted license on 15. 6. 2009) in the provisional list of voters published on 3. 7. 2009. However these objections were overruled by the Election Officer by the impugned order dated 15. 7. 2009 and on the same date the final voters" list was published for the constituency of traders.

8. In view of the aforesaid decisions of the two Division Benches to which one of us (Mr. Justice M. S. Shah) was a party, it is clear that 100 persons, out of the persons at serial numbers 249 to 397, who were granted fresh traders license for the first time by the APMC on 15. 6. 2009 on the basis of their applications alleged to have been made between 25. 5. 2009 and 27. 5. 2009, could not have been included in the final voters" list.

9. It is true that ordinarily this Court is not to interfere with the decisions of the Election Officer before the elections are held and that it is for the election Tribunal to examine the challenge to the decisions of the Election Officer. However in Pundlik Vs. State of Maharashtra and Others, , the Apex Court has held that though preparation of list of voters is one of the stages of election and though normally the High Court would not interfere in exercise of powers under Article 226 of the Constitution at the stage of preparation of list of voters, however, where voters" list is prepared in clear violation of the statutory rules, such action of the Election Officer could be immediately challenged by filing petition under Article 226 of the Constitution.

10. In Election Commission of India Through Secretary Vs. Ashok Kumar and Others, , the Apex Court has laid down following principles.

"(1) If an election, (the term election being widely interpreted so as to include all steps and entire proceedings commencing from the date of notification of election till the date of declaration of result) is to be called in question and which questioning may have the effect of interrupting, obstructing or protracting the election proceedings in any manner, the invoking of judicial remedy has to be postponed till after the completing of proceedings in elections.

(2) Any decision sought and rendered will not amount to calling in question an election if it subserves the progress of the election and facilitates the completion of the election. Anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the election.

(3) Subject to the above, the action taken or orders issued by Election Commission are open to judicial review on the well-settled parameters which enable judicial review of decisions of statutory bodies such as on a case of mala fide or arbitrary exercise of power being made out or the statutory body being shown to have acted in breach of law.

(4) Without interrupting, obstructing or delaying the progress of the election proceedings, judicial intervention is available if assistance of the Court has been sought for merely to correct or smoothen the progress of the election proceedings, to remove the obstacles therein, or to preserve a vital piece of evidence if the same would be lost or destroyed or rendered irretrievable by the time the results are declared and stage is set for invoking the jurisdiction of the Court.

(5) The Court must be very circumspect and act with caution while entertaining any election dispute though not hit by the bar of Article 329(b) but brought to it during the pendency of election proceedings. The Court must guard against any attempt at retarding, interrupting, protracting or stalling of the election proceedings. Care has to be taken to see that there is no attempt to utilise the Courts indulgence by filing a petition outwardly innocuous but essentially a subterfuge or pretext for achieving an ulterior or hidden end. Needless to say that in the very nature of the things the Court would act with reluctance and shall not act except on a clear and strong case for its intervention having been made out by raising the pleas with particulars and precision and supporting the same by necessary material."

11. The above principles are qualified by the Apex Court by the following observations in the same judgment: -

"28. Election disputes are not just private civil disputes between two parties. Though there is an individual or a few individuals arrayed as parties before the Court but the stakes of the constituency as a whole are on trial. Whichever way the lis terminates it affects the fate of the constituency and the citizens generally. A conscientious approach with overriding consideration for welfare of the constituency and strengthening the democracy is called for. Neither turning a blind eye to the controversies which have arisen nor assuming a role of over-enthusiastic activist would do. The two extremes have to be avoided in dealing with election disputes."

12. The two previous decisions of this Court have made it clear that if APMC grants fresh licenses to a large number of persons after declaration of the election programme, such action would be destructive of the democratic process for elections to APMC. The scheme of the Rules also makes it clear that if a

person is granted traders license after the date on which the APMC is to send the list of traders with license; obviously such person cannot be included in the list of voters as already indicated above. On 5. 6. 2009, the APMC had sent the list of voters, which included a large number of persons who were not even granted trader's license and who had applied for license only on 25. 5. 2009 and 27. 5. 2009 after the Director passed the order on 25. 5. 2009 fixing the election programme.

13. Mr. Tushar Mehta, learned Additional Advocate General with Mr. Nikunt Raval learned AGP for the respondent Nos. 1 to 4, Mr. B. S. Patel for respondent No. 5 and Mr. Dipen Desai learned Advocate for respondent Nos. 8 to 12 have opposed the petition and submitted that this petition may not be entertained as the petitioner had not lodged any objection against the preliminary voters' list published on 12. 6. 2009 and that it was only after publication of the revised draft list or provisional voters' list on 3. 7. 2009 that the petitioner lodged objections on 10. 7. 2009. Hence, the Authorized Officer was not bound to consider such objection and that if Authorized Officer had accepted such objections, such action would have been illegal and without jurisdiction as held in Rameshbhai Dalsangbhai and Others etc. Vs. The Director, Agriculture Market and Rural Finance Office and Others, and in Mehsana District Co-op Purchase & Sales Union Ltd vs. Dhadhusan Beej Utpadak Rupantar and Vechan Karnari Sahkari Mandali Ltd & Ors., 1998 (1) GLH 170.

14. In order to appreciate the above contentions, we may quote Rule 8 which reads as under: -

"8. Provisional and final publication of lists of voters: -

(1) As soon as a list of voters is prepared under rule 5, it shall be published by the Authorised Officer by affixing a copy thereof at the office of the market committee and at some conspicuous place in the principal market yard in the market area along with a notice stating that any person whose name is not entered in the list of voters and who claims that his name should be entered therein or any person who thinks that his name or the name of some other person has been wrongly entered therein or has not been correctly entered, may, within fourteen days from the date of the publication of the notice, apply to the authorised officer for an amendment of the list of voters.

(1-A) After receiving applications if any, under sub-rule (1) a revised draft list of voters shall be published by the Authorised Officer by affixing a copy thereof on the notice board of Agricultural Produce Market Committee and at some conspicuous place in the principal market yard of the market area, alongwith a notice stating that any person who wishes to raise any objection against any new name entered in this list, may apply within seven days from the date of publication of this notice to the authorised officer for an amendment in the revised draft list of voters.

(2) If any application is received under [sub-rule (1-A)]. the Authorised Officer

shall decide the same and shall cause to be prepared and published the final list of voters, after making such amendments therein as may be necessary in pursuance of the decision given by him on the application. The final list shall be prepared at least thirty days before the date fixed for the nomination of candidates for the election."

15. It is required to be noted that sub-rule (IA) was inserted in Rule 8 because when a draft list of voters is published under sub-rule (1) and objections are raised by a person whose name is not included in the said list, if the Election Officer finds substance in those objections he would include the name of such person and if the next list is published as the final list of voters, a person objecting to inclusion of name of that person will not get an opportunity to submit his objection to the election officer. Ordinarily, therefore, if the names of certain persons are included in the preliminary voters' list as well as in the revised draft list, a third party would not be permitted to raise an objection against the revised draft list.

16. However, when the Election Officer included the names of the concerned persons who were granted by APMC trader's license after the Director passed order on 25. 5. 2009 fixing the election programme and even after publication of the preliminary list of voters on 12. 6. 2009, the issue goes to the root of the matter. Some times the Courts have to deal with cases where two conflicting principles are in operation. When a person makes a will bequeathing his property to his son, upon the death of the father the law requires that the property of the deceased must devolve upon the legatee son. However, if the said son murders his father, would the law allow that son to inherit property from his father under that will ? The Court would certainly not allow such legatee son to take advantage of his own wrong.

17. Similarly in the facts of this case, the Court is required to consider and decide as to -

(i) whether the principle laid down in Chaudhary Rameshbhai Dalsangbhai (supra) and in Mehsana District Co-op Purchase & Sales Union Ltd (supra) should be required to be implemented, or

(ii) whether the inclusion of the concerned persons in the voters' list on 15. 7. 2009, to which objections were already raised on 10. 7. 2009, be permitted to hold the field when their inclusion in the voters' list was not only illegal, but also a fraud on the election process, as held in the two Division Bench decisions of this Court, because they were granted license on 15. 6. 2009 on the basis of their applications made on 25/27. 5. 2009 after the Director fixed the election programme on 25. 5. 2009.

18. In the facts and circumstances of the case, we have no manner of doubt that the principles laid down by two Division Benches of this Court in Shrutbandhu II. Popat (supra) and in Kalubhai Ranabhai Akabari (supra) must be held to prevail over the principle that the Authorized Officer would not entertain the objections

against the inclusion of names of persons in the provisional voters" list, who were already included in the preliminary voters" list.

19. We again record the concession made by Mr. Vaghela, learned Advocate for the petitioner that the petitioner does not object to inclusion of the names of all those persons who were granted trader's license by way of renewal.

20. In the result, the petition is allowed. The impugned order dated 15. 7. 2009 (Annexure - A to the petition) is quashed and set aside in so far as the same confirms inclusion of 100 members who were granted fresh licenses on 15. 6. 2009 after the Director of Agricultural Marketing and Rural Finance passed the order on 25. 5. 2009 fixing the election programme. The names of the said 100. persons represented by respondent Nos. 6 and 7 shall be deleted from the final voters" list for the constituency of traders for elections to APMC. Karjan (District Baroda).

However, in view of the statement being made by Mr. Vaghela for the petitioner that the petitioner does not challenge inclusion of names of 39 persons whose licenses were renewed on 15. 6. 2009, their inclusion in the final voters" list is not disturbed.

Rule is made absolute accordingly.

Mr. Dipen Desai for respondent No. 8 requests for stay of implementation and operation of this order. In the facts of the case, the request is rejected.