

(2005) 04 BOM CK 0101

In the Bombay High Court

Case No : Writ Petition No. 6045 of 2004

Pradeep Yogeshwar Nimje

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 21-04-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 101, 115

Constitution of India, 1950 — Article 215, 226, 227

Maharashtra Co-operative Societies Act, 1960 — Section 149, 152, 154, 35, 35(1)

Citation : (2005) 4 ALLMR 45 : (2005) 5 BomCR 227 : (2005) 4 MhLj 105

Hon'ble Judges : Dharmadhikari B.P., J

Bench : Single Bench

Advocate : P.C. Madkholkar, for the Appellant; Khade, A.G.P. for respondent Nos. 1 to 3, S.P. Bhandarkar and S.G. Bangade, for the Respondent

Final Decision : Dismissed

Judgement

Dharmadhikari B.P., J.—By this petition under Article 226 of Constitution of India, petitioner challenges the order dated 2nd December, 2004, passed by respondent No. 2 and it further prays for setting aside of the order dated 24-4-2003 passed by Deputy Registrar i.e. respondent No. 3 in this petition and to declare the voters list published by respondent No. 4 election officer to be null and void. The petition also contains prayer to initiate action against respondent No. 2 under Article 215 of Constitution of India for committing will full disobedience of the orders passed by this Court and for stay of results (of election) declared in pursuance of this order by said respondent No. 2 Divisional Joint Registrar.

2. There has been an earlier round of litigation and as such, brief history is essential. Petitioner states that annual general meeting of a co-operative housing society by name Yogeshwar co-operative housing society was held on 13-8-1999 and in election held therein petitioner was elected as Chairman of society. The last respondent who happens to be the step brother of petitioner is alleged to have illegally removed the records of society and is alleged to have shown

elections on 12-8-2001 in which last respondent has shown himself elected as Chairman. As this election was recognised by Deputy Registrar (Housing), petitioner filed Dispute No 152/2002 before Co-operative Court, Nagpur u/s 91 of Maharashtra Cooperative Society's Act, hereinafter referred to as "Act". The Co-operative Court held elections of last respondent allegedly conducted on 12-8-2001 to be illegal and also elections dated 13-8-1999 in which petitioner was elected as Chairman to be illegal. The respondent No. 3 was directed to hold fresh elections of Managing Committee. Last respondent filed appeal before State Co-operative Appellate Court u/s 97 of Act and the Appellate Court disposed of the appeal on 15th January, 2003. Petitioner contends that the Appellate Court passed two mutually contradictory orders in relation to the annual general meeting dated 14-8-1998. By one order, proceedings of annual general meeting dated 14-8-1998 showing the elections of Managing Committee members headed by opponent No. 2 was declared illegal, improper and void. By the second orders, same was declared to be legal and proper. In view of this, petitioner has joined the said Presiding Officer of Appellate Court by name as party respondent in person in this petition, the petitioner contends that though his dispute was allowed by Co-operative Court, the last respondent continued to hold the office and managed the affairs of society to his advantage. The respondent No. 4 was appointed as election officer and a voters list as on 31st March, 2001 was prepared. Petitioner states that as on that date there was only 23 members entitled to vote and respondent. No. 4 who acted hand-in-gloves with last respondent prepared voters list showing and 111 members. Petitioner therefore objected to it but his objection was rejected. He questioned it before respondent No. 3 and respondent No. 3 rejected the same on 24-4-2003. Petitioner then states that he filed revision challenging that rejection by respondent No. 3 before respondent No. 2 who refused to accept the filing and the same was therefore forwarded under certificate of posting. It appears that petitioner also approached State Government and the Government directed respondent No. 2 to decide said revision and to declare result of election thereafter. However society questioned this direction in writ petition and the Government withdrew that order. Petitioner approached this Court in Writ Petition 3012/2003 and got stay. The Divisional Joint Registrar in said writ petition took the plea that no such revision was ever filed and as such, there was no question of deciding the revision and writ petition should be dismissed. Respondents in that petition contended that petitioner obtained the stay orders/directions from State Government by misleading it and when this was disclosed to State Government, State Government rightly withdrew its own order. Divisional Joint Registrar had informed State Government that such revision which sought interference in election was not tenable and he had no authority to decide it. The petitioner contended that this plea of respondent No. 2 is incorrect and he relied upon a summons dated 27-5-2003 issued by his office fixing the said revision on 3 June, 2003 for hearing. This Court heard the parties and in view of disputed position. Though it fit to permit petitioner to file fresh revision before Divisional Joint Registrar and said authority was directed to decide the revision on merits within two months. Stay earlier

granted in Writ Petition (W.P. 3012/ 2003) was continued during pendency of revision. Petitioner accordingly filed revision before respondent No. 2 and respondent No. 2 has decided the same on 2nd December, 2004. Said respondent held that the matter and the grievance made by petitioner pertain to election which is cognizable by Co-operative Court and he lacked jurisdiction. He therefore dismissed the revision and that order is challenged in present writ petition.

3. I have heard Advocate P.C. Madkholkar, for petitioner Advocate S.P. Bhandarkar for respondent No. 6, learned A.G.P. Mrs. Khade for respondents 1 to 3 Advocate Bangade for respondent No. 5. Rule, Made returnable forthwith and heard by consent.

4. Counsel for petitioner urges that there was clear direction by this Court to decide the revision on merits and respondent No. 2 has deliberately avoided to do so and has favoured last respondent. He contends that serious consequences have ensued and as such, proceedings for contempt of this Court must be initiated against said respondent. He further argues that right from beginning last respondent has played fraud and secured the post of Chairman in undemocratic manner. He contends that even Co-operative Appellate Court has passed mutually contradictory orders and said respondent, has derived benefit thereof. He contends that in such circumstances Writ Court has to take cognizance of the matter and the fraud should not be allowed to be perpetrated. He points out from audit report that as on 31-3-2001 there were only 23 general body members entitled to vote and, taking advantage of the above orders of Co-operative Appellate Court, last respondent managed to obtain a voters list containing 111 names from respondent No. 4 and thus, again defeated the democratic process of election. Learned Counsel argues that the officers of co-operative department are also favouring last respondent and thus, in extraordinary circumstances, this Court must in writ jurisdiction set right everything. He states that reason put forth now by respondent No. 2 to reject revision were also pressed into service when this Court decided earlier writ petition and, when this Court directed said respondent to decide revision on merits in spite of such reasons, said respondent was duty bound to adjudicate the revision on merits. It is his argument that as decision of revision on merits would have gone against last respondent, said respondent No. 2 has avoided the decision itself. In support of this argument, Advocate Madkholkar, has also taken the Court through papers of earlier writ petition and has relied upon some cases.

5. Advocate Bhandarkar, appearing for last respondent has raised preliminary objection pointing out that result of elections are already declared and as such election petition is the only remedy for petitioner. He contends that the petitioner cannot now substitute the elected body and such relief is not possible in present petition. He further states that petitioner himself participated in the process of election undertaken by respondent No. 4 and his nomination paper was rejected in scrutiny. Petitioner challenged unsuccessfully this rejection before the

appellate authority. He also has cast his vote in election. Hence, petitioner cannot challenge the election on such grounds. He further states that relief asked for in this petition were also asked for in Writ Petition 3012 of 2003 and as those reliefs are not granted. They are deemed to have been rejected and second writ petition for same reliefs is hit by res judicata. He further states that decision by respondent No. 2 is decision on merits and no case for initiation of action under Article 215 of Constitution is made out. He further states that grievance made against the alleged mutually contradictory orders of Co-operative Appellate Court is also misconceived because it is the last respondent alone who challenged said order in writ petition and present petitioner did not bother to challenge it and acquiesced in it. He further states that the relief of holding election only with 23 general body members cannot be considered in writ petition. He states that there were 112 members and respondent No. 4 has correctly prepared the voters list. He also argues that no revision was at all filed and points out the dishonest conduct in this respect of petitioner.

6. Learned A.G.P. Mrs. Khade adopts the arguments above and further points out that respondent No. 3 in appeal has independently verified the records and found that number of members as reflected in voters list was correct. She contends that hence petitioner has to file election petition only.

7. Advocate Madkholkar, in reply, points out the material on record to show that revision was earlier filed and petitioner never missed and authority. He further states that certified copy of audit note is also produced on record to show that there are only 23 members entitled to vote. He further contends that reference of audit note by Co-operative Court is to different audit and not the one on which petitioner is placing reliance. He further points out how voters list has been fabricated by last respondent by inviting attention to subsequent addition of figure "9" before figure "50" against the names voters at Serial No. 103, 104 and 105 to show that they have deposited Rs. 950/- each though in fact they did deposit only Rs. 50/-each. He contends that as last respondent has secured the power by playing fraud with assistance of co-operative department, this Court has to interfere in writ jurisdiction.

8. From the facts and arguments, it is clear that the petitioner is contending that election of last respondent stands vitiated because the same has been conducted on the basis of wrong voters list. Petitioner asserts that number of voters is only 23. Along with the petition petitioner has filed audit report for the period 1-4-1999 to 31-3-2001. Said audit note shows that there are 23 ordinary members and 551 nominal members. As against this last respondent has placed on record audit note for the period 1-4-2001 to 31-3-2002 and according to this, there are 112 ordinary members and 903 nominal members. Said respondent has also produced inquiry report dated 30-10-2004 by D.I. Sawalaxher Inquiry Officer which mentions that in audit report for the period 1995 to 2001, 23 ordinary members are shown. However the Co-operative Court has directed preparation of voters list on the basis of record of Society and respondent No. 4

has prepared said list on the basis of registers maintained in form "I" and form "J" and also as per receipt book cash book and record of payment of membership fee, entrance fee etc. He states that list of total 111 members prepared as voters list by respondent No. 4 is correct. Even the order of respondent No. 3 Deputy Registrar shows that in appeal he has verified on 24-4-2003 above registers, share certificates. Counter-file, cashbook, proceedings of executive committee meetings and general body meetings. On the basis of said material, respondent No. 3 has arrived at a finding that list of total 111 ordinary members prepared by respondent No. 4 as voters list is correct.

9. Reference in this respect need to be made to judgment of Co-operative Court in Dispute No. 1502/2002. Present petitioner with four others was disputant while last respondent with four others were opponents 2 to 5 in it. Disputants/present petitioner contended that they have been elected as managing committee members on 14-8-2001 while last respondent contended that they were elected as such on 12-8-2001. Co-operative Court has framed issue No. 13 in this respect. The question of voters list is considered by it in paragraph 12 and it concluded that petitioner as also last respondent unauthorisedly and illegally prepared false records of their respective elections. If further found that the co-operative department issued 2 different audit reports for same period to them. It has found that Exhibit 39 contained originally printed amount of Rs. 50/- only but latter on figure "9" has been prefixed before it to make it Rs. 950/- only. The Co-operative Court has expressed surprise as to how very responsible officers issued such 2 different copies of same audit report. It refused to accept any one of them because neither petitioner nor last respondent produced any independent material to substantiate their stand as also did not examine the auditor. It is to be noted that these 2 voters list at Exhibit 27 and 39 contained 105 names as shareholders and was used for the alleged election then in dispute. Present petitioner contended before Co-operative Court that meeting dated 14-8-2001 in which he and other disputants were elected was attended by 98 members. It is thus clear that petitioner never asserted before Co-operative Court that there were only 23 shareholders entitled to vote as on 31-3-2001. It is to be noted that he did not challenge the adverse order of Co-operative Court in appeal and also did not challenge the appellate order in writ petition. It is also to be noted that in view of this position on record the Co-operative Court directed holding of fresh elections and audit note could not be the basis for determining the number of voters. Even in this petition, petitioner has not produced any other material to demonstrate that there were only 23 members. In the absence of such material, the grievance of petitioner on merit cannot be accepted. Exact number of member entitled to vote as on 31-3-2001 is thus a disputed question of fact. This Court cannot ascertain it in writ jurisdiction. Hence, petitioner cannot be given relief as sought for by this Court. Moreover, it can not be forgotten that petitioner participated in the said election and took a chance to get elected. Though role of co-operative department in this connection is not free from doubts, no cognizance thereof can be taken here in the absence

of adequate material on record and as it calls for verification of facts which have direct bearing on election in dispute now.

10. The earlier order dated 15th October, 2004 of this Court in Writ Petition 3012 of 2003 has the effect of only permitting petitioner to file revision afresh before respondent No. 2 and it was directed to be decided on merit to avoid the controversy about filing/non filing of disputed revision by petitioner. All the concern parties accepted the course of action as directed in the order. However, this Court did not decide any other point as all such points could be decided in Revision which petitioner was permitted to file. If this Court was to decide any point in writ petition itself, filing of revision afresh by petitioner would have been rendered meaningless at least to that extent. All points were therefore open for all parties and there is no question of any "res judicata" in the matter. This Court only avoided the technical issue of limitation which could have arisen because of liberty given to petitioner to file fresh revision. The issue regarding maintainability of revision, in view of remedy of election petition was very much open and has been accordingly considered by the revisional authority i.e. respondent No. 2. Just as respondents cannot take the plea of res judicata because of earlier decision in writ petition, petitioner therein also cannot contend that said point stood concluded in view of liberty to file revision afresh given by this Court therein. It was open to respondent No. 2 to consider all issues and respondent No. 2 has not committed any breach of direction of this Court in the matter. The arguments of contempt raised by petitioner in this respect are misconceived.

11. There cannot be any debate that preparation of voters list is the part of election programme and once election programme has commenced, judicial interference in it is to be avoided. The Act contains 2 different channels for ventilation of grievances of members in relation to working of co-operative societies. The forum of Deputy Registrar, Divisional Joint Registrar is one channel while the forum of Co-operative Court and Co-operative Appellate Court is other channel. Jurisdiction of both these channels/forums is mutually exclusive and separate. Reference in this respect can be made to Division Bench judgment of this Court between K.V. Sunderam and Anr. v. Raj Rajeshwari Co-operative Housing Society, reported at 1980 M.L.J. 4. There, the Division Bench was considering the dispute regarding expulsion of members of co-operative society and held that the same cannot be filed u/s 91 of the Act. In paragraph 19 the Division Bench after considering Section 35(1), Section 152 and Section 154 observed as under :-

"Thus notwithstanding the fact that Section 91 does not expressly exclude the proceedings u/s 35, on a harmonious construction of the provisions of Sections 35, 152 and 154 on one side and Sections 91, 97 and 149 on other, will have to be held that each one of these two sets of provisions must independently operate in their own fields and the correctness of the order u/s 35 cannot therefore, be subjected to scrutiny or adjudication in proceedings u/s 91."

11-A. It cannot be disputed that election of co-operative society are to be challenged by filing dispute/election petition u/s 91 before Cooperative Court. In view of the above verdict of Division Bench. It is clear that therefore such an exercise cannot be undertaken by authorities functioning u/s 152 or 154 of the Act. The finding recorded by respondent No. 2 that he has no authority to interfere with the election is therefore just and proper, and does not call for any interference in writ, jurisdiction. 12. Coming to the case law on which reliance has been placed by parties, judgment of Hon''ble Apex Court in case between Ramachandra Ganpat Shinde and another Vs. State of Maharashtra and others, states that in extraordinary circumstances writ Court can interfere in matters of election also. It is to be noticed that there with collusion and contrary to law, voters list was materially altered in circumstances which constituted an abuse of judicial process by obtaining consent orders and the Hon''ble Apex Court found that it was a fraud which deserved to be set aside. In the facts of present case, it is not possible for this Court to record any such finding. In case between Surya Dev Rai Vs. Ram Chander Rai and Others, the effect of amendment to the statute on powers of High Court under Articles 226 and 227 has been considered and it has been observed that being part of basic structure of Constitution, said jurisdiction cannot be tempered with. Again, no such question arises in present case as the basic facts are not clear. In Juhu Co-operative Housing Society Ltd. Vs. State of Maharashtra and Others, . This Court has considered obligation of revisional authority u/s 154 of the Act and has held that the revisional authority exercises wider powers than revisional jurisdiction u/s 115 of the Code of Civil Procedure. It is held that it is the duty of such revisional authority to apply its mind to the matter placed before it and to take appropriate decision thereon and not to dispose of the matter in cavalier manner. Facts there reveal that grievance was in relation to Section 101 proceedings. In view of discussion above, here it cannot be said that revisional authority has acted with any irregularity in the exercise of jurisdiction. Similarly in Kays Concern Vs. Union of India (UOI) and Others, , the Hon''ble Apex Court has considered the exercise of revisional jurisdiction by Central Government u/s 54 of Mineral Concession Rules and found that when immaterial circumstance though brought to its notice, is ignored by Central Government such order suffered from patent error and deserved to be quashed. Facts of present petition are totally different and hence this ruling has no application here. In 2002 (2) B.C.R. 149 : 2002 (1) M.L.J. 659 between Shri Sant Sadguru Janardan Swami v. State of Maharashtra, the Hon''ble Apex Court found that once the election process has been set in motion, the High Court under Article 226 of the Constitution should not stay the continuation of election process even though there may be some alleged illegality or breach of rules while preparing electoral roll and any such breach can be called in question after declaration of result by means of an election petition. As already observed above, no such contingency warranting exercise of extraordinary jurisdiction of this Court is shown by petitioner in present petition and the law as stated above, therefore is squarely applicable.

13. Under the circumstances, I find that petitioner has not made out any case for interference in writ jurisdiction and the petition therefore fails, it is dismissed with no orders as to costs.