

(2010) 10 GUJ CK 0018
In the Gujarat High Court

Case No : Special Civil Application No's. 13689 of 2009 and 1548, 5007 and 5170 of 2010

Rameshbhai Ganeshbhai Chaudhari

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 06-10-2010

Acts Referred:

Constitution of India, 1950 — Article 226
Gujarat Agricultural Produce Markets Act, 1963 — Section 11, 11(1), 2, 2(1)
Gujarat Agricultural Produce Markets Rules, 1965 — Rule 28

Citation : (2010) 10 GUJ CK 0018

Hon'ble Judges : S.R. Brahmbhatt, J;D.H. Waghela, J

Bench : Division Bench

Advocate : Mihir Joshi and Dipen A. Desai, for the Appellant; P.K. Jani, Government Pleader for State in SCA 13689/09, A.J. Desai, AGP for State in SCAs 1548, 5007 and 5170/10, P.C. Kavina and J.K. Mehta for Respondent 4, Avani G. Thakker, for Respondents 5, 8-9, 13-15, 17, 20 and 22-23, V.C. Vaghela, for Respondent 6 and Vijay Patel, for H.L. Patel, for Respondents 7 and 10-11, for the Respondent

Judgement

D.H. Waghela, J.—All these petitions are stated to be involving common issues and hence they are heard together for final disposal at the request of learned Counsel. SCA No. 13689 of 2009 was decided on 29.1.2010 by another Division Bench of this Court but, upon that decision being carried in appeal, the Supreme Court has remanded the matters by order dated 03.6.2010 in Civil Appeal No. 1706 of 2010 with the direction as under:

...Looking to the facts and circumstances of the case, we are of the opinion that it is a fit case which deserves to be remanded to the High Court for considering the objections of the Appellant herein elaborately and in more details, in accordance with law, after giving opportunity of hearing to both sides. Since the matter pertains to election of Market Committee, it is desirable that it would be heard afresh in accordance with law on merits at an early date. The impugned

order is, therefore, set aside. It is further necessary to order that until a final order is passed by the Division Bench, process of election would not commence.

2. In SCA No. 13689 of 2009, the Petitioner is an agriculturist operating in the market area of respondent No. 5, Agricultural Produce Market Committee (APMC), Sidhpur and has challenged as illegal the inclusion of respondents No. 5 to 23 societies in the provisional voters' list published on 17.12.2009 for election of the committee. According to him, against inclusion of the names of respondents No. 5 to 23 societies in the preliminary voters' list, he had submitted his objections but their names appeared in the final voters' list published on 29.12.2009 and hence, he approached this Court under Article 226 of the Constitution. The objections of the Petitioner were decided and rejected by the impugned order dated 17.12.2009 of authorised officer. The main objection of the Petitioner, which is the bone of contention all throughout, was that the aforesaid respondent co-operative societies were, by their very name and objectives, dealing with the activities of animal husbandry and milk produce, and hence could not be included in the constituency for "agriculturist" members of the APMC. The main contentions of the respondents herein were confined to the submissions that those co-operative societies were in fact as well dispensing agricultural credit in the market area and the Petitioner ought to have been relegated to the alternative appropriate remedy of raising an election dispute under Rule 28 of the Gujarat Agricultural Produce Markets Rules, 1965 (for short, "the Rules"), even as the election process had already commenced at the relevant time.

2.1 In SCA No. 1548 of 2010, similar grievance is made against inclusion in the voters' list of respondents No. 4 to 8 therein and the orders dated 18.01.2010 of the Authorized Officer rejecting the Petitioner's objections are called into question. This Court has, by order dated 05.03.2010 therein, stayed election of APMC, Harij.

2.2 In SCA Nos. 5007 of 2010 and 5170 of 2010, Petitioner societies have made a grievance against their representatives' exclusion from the voters' list by the impugned orders dated 19.4.2010 and 15.4.2010 respectively, which orders are based upon the earlier decision dated 29.01.2010 of this Court in SCA No. 13689 of 2009 referred hereinabove. This Court has, by interim orders dated 27.4.2010 and 22.4.2010 stayed elections of APMC, Deodar and APMC, Bhabhar respectively in the said petitions.

2.3 Thus, the common issue of legality or otherwise of inclusion of members of managing committees (MMCs) of various co-operative societies in the voters' list of respective APMCs has arisen as such societies are named as and alleged to be engaged in the activities related to animal husbandry. Such co-operative societies popularly known and named as "gopalak sanghs" with different prefixes are described hereunder for convenience as "respondents" and facts are taken from the main and first SCA No. 13689 of 2009.

3. Before embarking upon the analysis and discussion related to the main and major issue required to be resolved, it would be appropriate to address the preliminary issue of maintainability of the petitions despite availability of alternative remedy. There is little doubt and no serious controversy about the fact that the co-operative societies concerned have, as one of their objects and actual activities of dispensing agricultural credit, the factual aspect whereof is already ascertained by the authorised officer. It could also not be gainsaid that, after the above directions of the Apex Court, the election process has to commence anew and hence it cannot be contended that this Court may not intervene while the process of election is underway. Prima facie, the decision on the aforesaid main and major legal issue goes to the root of election process and may in any case be required to be finally decided by this Court.

3.1 It was, however, argued on behalf of the respondents that there was no exceptional circumstance or extraordinary requirement to justify interference by this Court by exercising extraordinary jurisdiction, when alternative remedy was available to the Petitioner. Full Bench decision of this Court in *Daheda Group Seva Sahakari Mandli Ltd. v. R.D. Rohit, Authorised Officer & Co-Operative Officer (Marketing)* 2006 (1) GCD 211 was relied upon for the following propositions laid down therein:

32. ...The sum and substance of those decisions apply to a situation where this Court would like to entertain a petition on the foundation that the order is ultra vires and/or without jurisdiction and/or is violating principles of natural justice. Thus, in an exceptional case, this Court can exercise the power of judicial review, which is a basic structure of the situation (sic: Constitution) in such cases more particularly, in the election process. One thing is clear that this Court ordinarily would not like to exercise its power under Article 226 of the Constitution when the process of election has been set in motion even though there may be some alleged illegality or breach of rules while preparing the electoral roll.

33. In view of the above discussion, we answer the Reference as under:

- i. A person whose name is not included in the voters' list can avail benefit of provisions of Rule 28 of the Rules by filing Election Petition.
- ii. As the authority under Rule 28 has wide power to cancel, confirm and amend the election and to direct to hold fresh election in case the election is set aside, remedy under Rule 28 is an efficacious remedy.
- iii. Even though a petition under Article 226 of the Constitution of India is maintainable though alternative remedy is available, the powers are to be exercised in case of extraordinary or special circumstances, such as where the order is ultra vires or nullity and/or ex facie without jurisdiction. The exclusion or inclusion of names in the voters' list cannot be termed as extraordinary circumstances warranting interference by this Court under Article 226 of the Constitution of India and such questions are to be decided in an Election Petition under Rule 28 of the Rules.

3.2 However, another Division Bench has taken a slightly different view on the basis of subsequent decisions of the Supreme Court and in a recent decision in *Patel Chandrakant Thakorbbhai v. State of Gujarat* 2009 (3) GLH 343, observed as under:

10. 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 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.

11. 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)....

(4)....

(5)....

3.3 In *Kalubhai Ranabhai Akabari v. State of Gujarat* 2007 (3) G.L.H. 57, this Court has clearly observed, in the same context, that the High Court may, in the facts of a given case, entertain a petition challenging illegality of the list of voters, even after commencement of the election process, if the list is not prepared in accordance with law.

Against the backdrop of aforesaid facts, stage of election process and judicial dicta, it is clearly appropriate, expeditious and in the interest of justice that the law in respect of inclusion of MMCs of co-operative societies in question is settled now. Therefore, the preliminary objection based on availability of alternative remedy is overruled.

4. Without raising any peripheral, factual or other issues, learned Counsel for the Petitioners have concentrated on addressing inclusion in the voters' list of the

members of the respondent co-operative societies, mainly on the basis of the amendment by way of Gujarat Act No. 21 of 2006 published in the Official Gazette on 31.3.2006 and Circular dated 13.7.2006 pursuant thereto, instructing all authorized officers to undertake election of the Market Committees keeping in view the aforesaid amendment.

5. The Statement of Objects and Reasons of the Gujarat Act No. 21 of 2006 and the relevant parts of the statutory provisions after amendment by the Gujarat Act No. 21 read as under:

Statement of Objects and Reasons:

Since the animal husbandry products are not agricultural produce and it is not the produce from the land, it is considered necessary to delete the animal husbandry products from the definition of the agricultural produce in Section 2 and also from the Schedule, appended to the Gujarat Agricultural Produce Markets Act, 1963. Incidentally, Clause (i) of Sub-section (1) of Section 11 of the said Act is also amended accordingly. This Bill seeks to amend the said Act to achieve the aforesaid objects.

Gujarat Agricultural Produce Markets Act, 1963:

An Act to consolidate and amend the law relating to regulation of buying and selling of agricultural produce and the establishment of markets for agricultural produce in the State of Gujarat.

Section 2 Definitions: In this Act, unless the context otherwise requires-

(i) "agricultural produce" means all produce, whether processed or not, of agriculture and horticulture, specified in the Schedule;

(ii) "agriculturist" means a person who ordinarily by himself or who by his tenants or hired labour or otherwise is engaged in the production or growth of agricultural produce, but does not include a trader or broker in agricultural produce, although such a trader or broker may also be engaged in the production or growth of agricultural produce;

(v) "co-operative marketing society" means a society registered or deemed to be registered as such under the Gujarat Co-operative Societies Act, 1961 (Gujarat Act of 1962) and engaged in the business of buying or selling of agricultural produce or of processing of agricultural produce and holding a licence;

Section 11 Constitution of market committee.

(1) Every market committee shall consist of the following members,namely:

(i) eight agriculturists who shall be elected by members of managing committees of co- operative societies (other than co- operative marketing societies and milk produce co- operative societies) dispensing agricultural credit in the market area;

(ii) four members to be elected in the prescribed manner from amongst

themselves by the traders holding general licences;

(iii) two representatives of the Co-operative marketing societies situate in the market area and holding general licences, to be elected from amongst the members (other than nominal, associate or sympathiser members) of such societies by the members of the managing committees of such societies:

Provided that....

(iv) one member to be nominated by the local authority....

Provided that....

(2)....

(3)....

(4)....

(5)....

Prior to the 2006 Amendment, Section 2(1) of the Act read as under:

Section 2(i) "agricultural produce" means all produce, whether processed or not, of agriculture, horticulture and animal husbandry, specified in the Schedule.

And Section 11(1)(i) formerly read as under:

(1) Every market committee shall consist of the following members, namely:

(i) eight agriculturists who shall be elected by members of managing committees of co-operative societies (other than co-operative marketing societies) dispensing agricultural credit in the market area.

6. Relying upon exclusion of the words "animal husbandry" in Section 2(i) and addition of the words "and milk produce co-operative societies" in Section 11(1) (i); and exclusion of all items under the head "animal husbandry products" from the Schedule, it was argued that the MMCs of co-operative societies, such as the respondent societies, which were primarily formed by and catering to the needs of cattle breeders producing animal husbandry products could not legally be included in the voters' list for the agriculturists' constituency. Elaborating that contention, it was submitted by learned Counsel Mr. Dipen Desai and learned senior advocate Mr. Mihir Joshi that milk produce co-operative societies have been excluded as a class from the constituency and their dispensing agricultural credit, incidentally or as a subsidiary part of their main objects and activities, could not be considered for the purpose of their inclusion in the voters' list. It was further submitted that when all the animal husbandry products were excluded from the Schedule so as to confine the operation of the Act to only agricultural and horticultural produce, excluding animal husbandry products, the co-operative societies dealing with animal husbandry products cannot have a place in the constituency, even without amendment of Section 11 of the Act. It

was also submitted that agricultural co-operative societies dispensing agricultural credit are in a separate class and any other co-operative society catering to the cattle breeders or dealing with animal husbandry products are not allowed to have any say in the constitution of the market committee in view of the amended statutory scheme. It was further argued that just as the co-operative marketing societies were, as a class, excluded from the constituency, "milk produce co-operative societies" were, as a class, excluded from the constituency popularly known as "agriculturists" constituency".

7. As against the above contentions of the Petitioners, it was submitted for the respondents, including the authorities of the State Government, that all co-operative societies dispensing agricultural credit were forming the agriculturists' constituency, with the only exception of co-operative marketing societies, and now the milk produce co-operative societies. It was submitted that the respondent societies were found, after enquiry, to be actually dispensing agricultural credit and hence could not be excluded from the constituency only by branding them as milk produce co-operative societies. It was submitted that factually and in reality even the co-operative societies having as its main object catering to the needs of and facilitating breeding of cattle, were extending agricultural credit as a part of their main activities, because many agriculturists were simultaneously breeding cattle and producing animal husbandry products. It was further submitted that, in reality, milk producers' co-operative societies are registered as such and they have a different pyramidal structure with primary milk producers societies at the local level, district co-operative milk producers' unions and Gujarat Co-operative Milk Marketing Federation at the State level. It was submitted by learned Counsel Mr. V.C. Vaghela and learned Counsel Mr. Vijay Patel that the model bye-laws of such milk producers' co-operative societies were different; whereas the respondent co-operative societies were registered as multi-purpose co-operative societies of cattle breeders, whose members could as well be agriculturists. The main activity of such members could be rearing of animals or farming for fodder and incidentally producing milk. But they were certainly not exclusively the co-operative societies of only milk producers insofar as credit facilities could be extended to them under the bye-laws which were shown and submitted to be different from the bye-laws of milk producers' co-operative societies.

8. It may be pertinent to note here that, as stated on oath by the Authorized and Co-operative Officer (Market) for APMC, Sidhpur, bye-laws of the societies in question specifically provided for dispensing agricultural credit and such societies had in fact advanced/dispensed agricultural credit to their members. The Secretary of APMC, Sidhpur has averred that milk producing societies were registered only for procuring milk and to aid cattle breeders, whereas the societies in question were Vividh Karyakari Sahakari Mandlies, i.e. multi-purpose co-operative societies. Even the Petitioner, objecting to inclusion of the MMCs of such cattle-breeders' societies, has averred that as per instructions dated 14.08.2003 issued by the Registrar, Co-operative Societies, Gopalak Multi-

purpose Co-operative Societies were required to be established to settle the "gopalaks" who were moving from one place to another along with their cattle, by establishing a society and giving them lands on which they could settle. It is clearly mentioned in the circular dated 21.09.2004 of the Registrar, Co-operative Societies that different multi-purpose co-operative societies are established with the main objective of extending agricultural credit, wherein persons of any cattle-breeding community could be members; while other milk producing co-operative societies were also registered in large numbers. Thus, there is a clear and discernible difference between multi-purpose co-operative societies extending agricultural credit and the co-operative societies exclusively dealing in milk produce or constituted for producing or procuring milk, which may be known as milk producers' society. However, there is no well-defined class of "milk produce co-operative societies", in fact or in law and no society is even alleged to be specially registered as such or to whom the above epithet could be applied.

8.1 In the recent decision of Division Bench of this Court in Jagdishbhai Ranchhodbhai Patel v. State of Gujarat (2008) GLHEL HC 220473, the Court has made the following pertinent observations:

13. ...Nothing in the language of Section 11 of the Act of 1963 suggests that the co-operative societies dispensing agricultural credit, which form the electorate for election of eight agriculturists, are required to carry on the function of dispensing agricultural credit exclusively or that if they take up any other function they would forfeit their right to elect eight agriculturist members.

15. ...In our opinion, so long as the Appellant societies are real and genuine; are dispensing agricultural credit in the market area; and are not the co-operative marketing societies within the meaning of Section 2(v) of the Act of 1963, the members continue to enjoy right to elect agriculturist-members of the market Committee.

16. We are also of the opinion that registration of a society under the Gujarat Co-operative Societies Act, 1961 (hereinafter referred to as, "the Act of 1961") is for the purpose of that Act. The classification made under that Act cannot govern the status of a society under the Act of 1963. We are, therefore of the opinion that the registration of the Appellant-Societies as credit co-operative societies under the Act of 1961 is of no consequence....

9. Considering the rival submissions in light of the statutory provisions, effect of the amendment and the precedents, none of which directly applies, it was seen that exclusion of animal husbandry products from the Schedule and from the definition of "agricultural produce" appears to have been intended to see that buying and selling of animal husbandry products was no longer to be regulated by the provisions of the Act. On the other hand, in the matter of constitution of the Market Committee, while representatives of co-operative marketing societies formed a distinct and separate constituency, no representation is intended or reserved for "milk produce co-operative societies". By virtue of the exceptions

carved in the constituency for agriculturists by bracketing two classes of co-operative societies in Section 11(1)(i), the constituency is made to consist of all kinds of co-operative societies, howsoever named, described or registered, if they are dispensing agricultural credit in the market area. While "co-operative marketing society" is defined in Section 2(v), the words "co-operative societies" or "milk produce co-operative societies" are not defined in the Act. Therefore, strictly interpreting the exception and exclusion, it has to be inferred that whichever co-operative society is dispensing agricultural credit in the market area is intended to be included in the constituency. That proposition finds indirect support from perusal of the definition of "co-operative marketing society" insofar as it is defined to be a society registered or deemed to be registered as such under the Gujarat Co-operative Societies Act and engaged in the business of buying and selling agricultural produce or of possessing agricultural produce and holding a licence. The words "as such" in the definition are of special significance because co-operative marketing society, even if it were having various objects and activities including extending agricultural credit, it would be distinguished by its birth-mark of having been registered as a co-operative marketing society. Instead of defining another class of co-operative societies by such birth-mark or some other essential indicator, the legislature has left the phrase "milk produce co-operative societies" undefined and left their identification to the authorities and the courts in case of dispute. Thus, the only legislative guidance provided in the provision is by indicating the society's activity of dispensing agricultural credit in the market area. Under such circumstances, the authorised officers were justified in holding a factual enquiry into the actual activities of the co-operative societies in question and they have found that such societies were genuinely dispensing agricultural credit in the market area.

9.1 Looking at the controversy from the different angle suggested by learned Counsel Mr. Vaghela and Mr. Vijay Patel, it clearly appears that there is a different set up and structure for milk producers' co-operative societies, whereas the respondent-societies are not even alleged to be falling into those categories of societies which were primarily or exclusively dealing with production, collection and supply of milk. Under such circumstances, exclusion of animal husbandry produce from the definition of "agricultural produce" and exclusion of "animal husbandry products" from the Schedule have no relevance for resolving the present controversy. Exclusion of animal husbandry products from the operation of the Act has nothing to do with continuing the representation in the APMC of co-operative societies extending agricultural credit. Unfortunately, neither the phrase "milk produce co-operative societies" nor "agricultural credit" is defined in the Act and otherwise also their application in a particular case calls for factual enquiry which the Authorized Officer undertakes in case of dispute, under Rule 28 of the Rules. Now, as and when voters' lists are prepared afresh for the election of APMCs concerned, factual disputes could be raised by the objectors and the decision of the Authorized Officer in that regard could as well be challenged in accordance with law.

10. In the facts and for the reasons discussed hereinabove, Special Civil Applications No. 13689 of 2009 and 1548 of 2010 are dismissed. Special Civil Applications No. 5007 of 2010 and 5170 of 2010 are allowed, with the direction that the orders dated 19.4.2010 and 15.4.2010 impugned therein are set aside. Interim relief operating in all the petitions are vacated. Rule issued in the first two petitions is discharged and Rule issued in the other two petitions is made absolute accordingly. It is clarified that the parties in all the petitions shall be at liberty to raise such objections as may be available to them when the election programme for fresh elections is declared, and such objections are to be decided on their own merits in accordance with law declared hereinabove. Before parting with the judgment, it is pertinent to observe that while amending the Act by the Amending Act No. 21 of 2006, the legislature could have defined the phrase "milk produce co-operative society" and even now it can be done by a suitable amendment to avoid multiple litigations and complications in the matter of elections to the APMCs in the Gujarat State.

Upon pronouncement of the judgment today, learned Counsel Mr. Dipen Desai requested to grant stay against operation of this judgment and order for a period of four weeks. Learned Counsel for the respondents submitted that elections for the institutions of local self-government being underway, the elections in the APMCs concerned are not likely to take place till the first week of November, 2010. Even otherwise, there is no justification for granting stay against operation of the present judgment and order. Therefore, the request is rejected.