

(2005) 10 BOM CK 0124
In the Bombay High Court
Case No : Writ Petition No. 4467 of 2005

Ravi Amrutrao Bagde

APPELLANT

Vs

Commissioner, Amravati Division and Others

RESPONDENT

Date of Decision : 27-10-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 7
Maharashtra Co-operative Societies Act, 1960 — Section 144T, 152A, 73FF, 73FF(1)
Maharashtra Specified Co-operative Societies (Elections to Committees) Rules, 1971 — Rule 16, 23, 23(4), 23(5)

Citation : (2006) 1 ALLMR 781 : (2006) 3 BomCR 359 : (2006) 2 MhLj 33

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

Bench : Single Bench

Advocate : A.A. Naik, for the Appellant; C.S. Kaptan and Thakre, AGP for respondent Nos. 1, 2 and 3, for the Respondent

Judgement

B.P. Dharmadhikari, J.—As per election programme last date of submitting nomination was 9-8-2005, date of scrutiny was 11-8-2005 and date of publication of List of valid nominations was 12-8-2005. Respondent No. 4 submitted three nomination papers in said election from reserved constituency for scheduled caste, scheduled tribes etc. It is his contention that during scrutiny objection was raised that he was defaulter u/s 73FF of Maharashtra Co-operative Society's Act and returning officer gave him time of one-day to point out that he is not defaulter and accordingly on 12-8-2005 he produced no due certificate and still his nomination paper came to be rejected. The said error is corrected on 25-8-2005 by Divisional Commissioner in appeal u/s 152A of Maharashtra Co-operative Society's Act. The petitioner has approached against this appellate order contending that no such time till 12-8-2005 was given to said respondent by returning officer and in any case, 9-8-2005 was the last date for filing of nominations and therefore, said respondent has to demonstrate that he was not disqualified on 9-8-2005. Petitioner points out that payment of arrears i.e. amount in default has been made on 12-8-2005 and said payment cannot wipe

out the disqualification already incurred. This Court has passed interim Orders and stayed election only from this constituency as it was found that there was some deliberate mischief to accommodate respondent No. 4 in the matter. It is in this background that the writ petition is taken up for final hearing at the stage of admission itself by consent of parties. Hence Rule is made returnable forthwith.

2. I have heard Advocate Naik for petitioner, Advocate Kaptan for respondent No. 4 and learned AGP Advocate Thakre for respondent Nos. 1, 2 and 3.

3. After pointing out the facts in brief as stated above, Advocate Naik has raised two points for attacking the impugned appellate Order.

(1) Last date of nomination i.e. 9-8-2005 is the relevant date for finding out whether respondent No. 4 was qualified or not. Subsequent payment by him either on 11-8-2005 or 12-8-2005 is not relevant and does not save the situation for him. The appellate Order passed by Divisional Commissioner is therefore without jurisdiction.

(2) Returning officer (respondent No. 2) did not grant any time to respondent No. 4 on 11-8-2005 and all his nomination papers were rejected on 11-8-2005. No nomination paper has been rejected on 12-8-2005.

4. Taking the second point first, learned advocate for petitioner invites attention to affidavit reply filed by respondent No. 2 returning officer in which he has expressly stated that he rejected all three nomination papers of respondent No. 4 on 11-8-2005 and he did not grant time to anybody, including respondent No. 4, till 12-8-2005 to remove the disqualification. He states that respondent No. 4 did not request for grant of such time at all. He has also pointed out that returning officer has maintained a register in which he has kept details of candidates to whom time was given and in it name of respondent number 4 does not figure. Advocate Naik points out that list of valid nominations was published at 3 PM on 12-8-2005 while respondent No. 4 submitted no due certificate to returning officer at 3.25 PM on that day. He points out that these events are apparent from record and there is no scoring or overwriting to cast any doubt about it. He states that Divisional Commissioner in his affidavit before this Court has stated that while considering/hearing appeal of respondent No. 4, he made oral inquiry and Assistant Returning Officer disclosed in open Court before Divisional Commissioner that he (assistant returning officer) granted time till 12-8-2005 to respondent No. 4. He states that Divisional Commissioner while acting as appellate authority is supposed to act on the basis of records of returning officer and not on the basis of some oral information de hors the record. In any case, according to him Assistant Returning Officer was not competent to extend time and further direction to accept nomination paper of respondent No. 4 could not have been issued after the list of valid nominations received was published by respondent No. 2. He also invites attention to the certified copy of nomination paper allegedly rejected on 12-8-2005 produced by respondent No. 4 before this Court to point out as to how the date column in certified copy is left blank and

how it is not true certified copy of original. It is also pointed out that respondent No. 2 maintained the register of rejected nominations and in it nomination papers of respondent number 4 figure at serial numbers 1, 2 and 4 and all these nomination papers are rejected on 11-8-2005.

5. He further states that as per settled law on the point, there is no scope for giving time in such circumstances and disqualification cannot be removed by payment effected after the last date prescribed for filing nomination papers. He invites attention to judgments of this Court reported at 1987 Mh.LJ. 944 between Muralidhar. v. Sudhakar and 1994(2) Mh.LJ. 1439 between Bhaulal v. Returning Officer in support. He further states that date of scrutiny has been treated as last date for removing disqualification in judgment reported at 1995(1) Mh.LJ. 208 between Ramesh v. Additional Commissioner. However, in latter judgment reported at Vijaysingh Krishnarao Parbat Vs. Returning Officer, Janata Sahakari Bank Ltd., Janata Sahakari Bank Ltd. and District Deputy Registrar of Co-operatives, again the view expressed by Division Bench in 1987 has been reiterated and 1995 judgment of learned single Judge has been distinguished. He further states that recently in judgment reported at 2004(5) Mh.L.J. 205 : 2005(4) All MR 318 between Navnath Shirale v. The Returning Officer 1987 view has been followed. He also relies upon the last judgment to point out that in such circumstances remedy of election petition cannot operate as bar and this Court can do justice between parties by invoking its extraordinary jurisdiction. He has also relied upon judgment reported at Nanaji Bhokre Vs. Commissioner, Amravati Division, Amravati and others, : to contend that appeal against rejection of nomination paper goes to Divisional Commissioner u/s 152A of Act while election petition u/s 144T thereof also goes to same officer or his subordinate and hence, election petition raising such dispute is not contemplated as said officer has already taken one view of the matter.

6. Advocate Kaptan invites attention to provisions of Section 73FF of the Act and also to provisions of Rule 23 of the Maharashtra Specified Co-operative Societies Election to Committee Rules, 1971 (referred to as "Rules" hereafter) and argues that except in the judgment of Ramesh v. Additional Commissioner (supra) in none of the judgments relied upon the petitioner, said provisions on its effect has been considered. He states that 1987 Mh.LJ. 944 between Muralidhar v. Sudhakar is based upon concession of advocates and; in 1994(2) Mh.LJ. 1439 between Bhaulal v. Returning Officer and latter judgment reported at Vijaysingh Krishnarao Parbat Vs. Returning Officer, Janata Sahakari Bank Ltd., Janata Sahakari Bank Ltd. and District Deputy Registrar of Co-operatives, the view expressed by Division Bench in 1987 has been reiterated. He invites attention to paragraphs 5, 6 and 8 of this last judgment in support of his contention. He further states that recently in judgment reported at 2004(5) Mh.LJ. 205 : 2005(4) All MR 318 between Navnath Shirale v. The Returning Officer, judgment reported at 1995(1) Mh.LJ. 208 between Ramesh v. Additional Commissioner has been mentioned in the light of its appreciation in Vijaysingh Krishnarao Parbat Vs. Returning Officer, Janata Sahakari Bank Ltd., Janata Sahakari Bank Ltd. and

District Deputy Registrar of Co-operatives, . According to him the said judgments do not laid down the law about a candidate being defaulter and its curing in the light of Rule 23 of the Rules. He refers to paragraphs 16, 17, 19 and 20 of 1995 judgment and argues that 1995 judgment between Ramesh v. Additional Commissioner nowhere states that curable defect cannot be removed during extended time and on the contrary, according to him, said judgment permits removal of such defect found during scrutiny during extended time given by Returning Officer under Rule 23 of the Rules. He points out paragraphs 12, 13 and 14 of judgment reported at 2004(5) Mh.L.J. 205 : 2005(4) All MR 318 between Navnath Shirale v. The Returning Officer to further his argument that the 1995 judgment (supra) has not been correctly appreciated by these subsequent judgments. He contends that the law laid down in 1995 judgment has not been appropriately considered in latter two rulings (supra) and by taking this Court through the judgments delivered by Hon. Apex Court, he has built up an argument that 1995 judgment still needs to be followed and last date of nomination cannot be treated as cut-off date to find out eligibility of candidate for election. He has further stated that if this argument cannot be accepted then a reference needs to be made to larger Bench. These arguments revolve around the abovementioned judgments of this Court and as such, I find it more appropriate to refer to them at appropriate places while considering those judgments. He has further contended that affidavit of respondent No. 1 that before him in open Court Assistant Returning Officer stated that he gave time to respondent No. 4 till 12-8-2005 needs to be accepted as against affidavit of respondent No. 2 Returning Officer. It is his argument that in the light of Rule 23 (5) of Rules, view taken by respondent No. 1 in appeal is not perverse and hence, interference in writ jurisdiction is not necessary. He argues that the issue can be left to be sorted out in election petition.

7. Though, prior to 9-9-2005 objection to the interference of this Court in the matter was raised by respondents, no such objection has been pressed into service on behalf of respondents when I have taken the matter for final decision. The election were scheduled on 10-9-2005 and by a speaking Order after hearing of the parties at length, this Court stayed the election of representative from constituency meant for Scheduled Castes/Scheduled Tribes until further orders and permitted rest of the election to proceed further. At that time this Court prima facie recorded a finding that there was some mischief in the matter requiring investigation after the Returning Officer and Tahasildar file their respective affidavits. At that time it was the contention of learned AGP Advocate Thakre that nomination paper of respondent No. 4 was rejected on 12-8-2005. It was disclosed that there were two nomination papers and one came to be rejected on 11-8-2005 while the other one was rejected on 12-8-2005. Respondent No. 4 produced certified copy of nomination paper allegedly rejected on 12-8-2005 and said certified copy was only of second page thereof and not of entire nomination paper. It was found to be issued by tahasildar, Amaraoti who was not the Returning Officer. It was also found that certified copy was not the

Xerox Copy of any of the two nomination papers. Both the nomination papers (Xerox) were found to have been rejected on 11-8-2005. The Returning Officer had not produced original records in spite of instructions therefore by this Court. All these events which prompted this Court to grant stay are mentioned in detail in order dated 9-9-2005. This Court had called for reply affidavit from tahasildar as also Returning Officer. Latter on this Court also directed AGP Advocate Thakre to place on record the copy of office version as it was found that it was not containing any express instruction that nomination paper was rejected on 12-8-2005. This Court also called for affidavit of respondent number one who passed appellate Order. Reference to all these will be made in this order as and when necessary.

8. First question which arises for determination is whether time was given to respondent No. 4 or not? From affidavit filed on record by respondent No. 2 it is more than apparent that he did not give such time to respondent No. 4. The contention of respondent No. 4 is that at the time of scrutiny of nomination paper on 11-8-2005 respondent No. 2 returning Officer gave him time till 12-8-2005. This contention is denied on affidavit by respondent No. 2. Even the Appellate Authority i.e. present respondent No. 1 has not stated in his affidavit that time was given by respondent No. 2. On the contrary he has stated that during the hearing of appeal of respondent No. 4 he asked in open Court about grant of such time and Assistant Returning Officer orally told him that he has given time to respondent No. 4. It is not the case of respondent No. 4 that he was given time by Assistant Returning Officer. The respondent No. 1 has not stated that upon perusal of records he found that such time has been granted. As an Appellate Authority, respondent No. 1 was under obligation to verify the facts from record. As this fact of a extension of time is not borne out from records, it appears that Assistant Returning Officer has not made factually correct statement. Such uncorroborated oral statement could not have been accepted and acted upon by respondent No. 1. The respondent No. 2 Returning Officer has maintained registers and one such register is about the nomination papers in which he ? granted time to candidates. The time has been granted after making entries against name of candidate in said register and time granted is only of few hours. Nobody has been given time by respondent No.2 till next day i.e. till 12-8-2005. The Returning Officer has also obtained signatures of candidates to whom time has been given in token of communication of time granted to them during scrutiny. This register does not contain name of respondent No. 4 at all and is proof of fact that said respondent did not seek extension of time and no such extension was at all given to him. This story of grant of time is falsified also by the register in which respondent No. 2 Returning Officer has maintained details of nomination papers rejected. The said register contains details of three nomination papers of respondent No. 4 at serial numbers 1, 2 and 4 and it carries remark to show that all these three nomination papers have been rejected on 11-8-2005. Thus, there was no scope for anybody to give time to respondent No. 4 in the matter after rejection of his nomination papers.

9. It was argued by learned Counsel for respondent No. 4 that responsible Officer like respondent No. 1 has filed affidavit before this Court that Assistant Returning Officer disclosed to him orally at the time of hearing in open Court that he granted time to respondent No. 4 till 12-8-2005. He further states that certified copy of nomination paper produced by respondent number 4 does not show any date as date of rejection of nomination paper and said place is blank in certified copy. He states that the date "11-8-2005" has been latter on inserted in original of nomination paper from which certified copy is given to him. He further contends that the bias against respondent No. 4 is further demonstrated by the fact that though he tendered the proof of payment at 2.35 pm on 12-8-2005, the same has been altered to 3.35 to create show that it was tendered beyond 3 pm i.e. beyond time given to him on 11-8-2005. He therefore states that if possible view of the matter has been taken by respondent No. 1 in appeal and remedy of filing election petition is available to the petitioner. According to him, no interference is therefore warranted in writ petition. It is to be noted that respondent No. 4 has nowhere disclosed that time was given to him by Assistant Returning Officer. On the contrary he has stated that Returning Officer granted in time of one-day under Rule 23(5) of Rules. The original register maintained by Returning Officer does not disclose that time was given to respondent No. 4. it is clear from other register that all nomination papers of present respondent No. 4 were rejected on 11-8-2005 itself and as such, there was no scope for granting any time to him. These registers are not doubted or disputed by respondent No. 4 and he has also not expressed any malice/bias against respondent No. 2 Returning Officer. In this background, in view of material on record, the alleged statement of Assistant Returning Officer that he gave time to respondent No. 4 till 12-8-2005 cannot be accepted. The learned AGP Advocate Thakre has stated that respondents are still conducting inquiry as to how the certified copy of nomination paper came to be issued to respondent No, 4. The affidavit filed by Naib-tahasildar Shri Jogi discloses that he issued certified copy mechanically without verify its contents from original. The Returning Officer in his affidavit dated 20-9-2005 has stated that respondent number 4 submitted three nomination papers and all nomination papers were rejected on 11-8-2005 itself. The Returning Officer/Sub-Divisional Officer, Amaraoti has filed affidavit dated 1-10-2005 mentioning that show cause notices have been issued to all concerned on 16-9-2005 after obtaining expert opinion. It is stated by him that the office version first given to learned AGP Advocate Thakre prima facie gave impression that nomination paper was rejected on 12-8-2005 but, nomination paper was rejected on 11-8-2005 itself. He has also stated that respondent No. 4 never prayed for any time on 11-8-2005. In view of records, I do not find it necessary to travel more deep into this controversy. If on 11-8-2005 really time was given to respondent No. 4, the authorities would have accepted the compliance on 12-8-2005. About the absence of date in certified copy of second page of nomination paper produced by respondent No. 4, it can only be said that the third nomination paper (original) from which said certified copy is stated to have been prepared does not contain blank space against date and original shows that

it was rejected on 11-8-2005. The original will therefore prevail and receive more credence. At the same time, it cannot be forgotten that on 9-9-2005 this Court was told that there were only two nomination papers submitted by respondent No. 4. It also cannot be forgotten that admittedly respondent No. 4 was in arrears of Rs. 285804/- only (Two lakh eighty five thousand eight hundred and four) which he deposited on 12-8-2005 only with a view of contest this election. The entire state of affairs revealed in this matter establishes that the machinery responsible for conduct of elections was brought under pressure and influence by respondent No. 4. Respondent No. 4 earlier made all efforts to avoid grant of any interim order and has tried to obtain advantage of certified copy of only second page of Third nomination paper to demonstrate that it was rejected on 12-8-2005. I hope that truth in this respect will come out in inquiry being conducted by respondents. However, in such circumstances interference by this Court in its extra-ordinary jurisdiction is definitely warranted.

10. Next question is whether the respondent No. 2 or anybody else could have given such time to respondent No. 4? Answer to this question can be found in Rules and also in the scheme of election as clarified by various judgments.

11. Rule 23 of Maharashtra Specified Co-operative Societies Election to Committee Rules, 1971 provide for scrutiny of nomination papers. Sub-rule (5) is relevant for present purposes and it reads :--

The Returning Officer shall hold the scrutiny on the date appointed in his behalf under Rule 16 and shall not allow any adjournment of the proceedings except when such proceedings are interrupted or obstructed by riot or open violence or by causes beyond his control; Provided that, in case any objection is raised by the Returning Officer or is made by any other person, the candidate concerned may be allowed time to rebut it not later than the next day and the Returning Officer shall record his decision on the date to which proceedings have been adjourned.

Thus, Rule permits Returning Officer to grant time to respondent No. 4 to rebut objection. In the facts of present case, it is apparent that no such time has been granted and, therefore, reliance on this provision by respondent No. 4 in defence is misplaced. Even otherwise, the time is to be given to rebut the objection that respondent No. 4 was not disqualified on the date when he submitted "his nomination paper or on last date prescribed for submission thereof. Thus curing or removal of disqualification by making amends/payments is not contemplated. The time is given only to show that objection raised is incorrect and the candidate was not disqualified on last date of nomination. Word rebut means to refute or to disprove an accusation, to meet in argument or proof, to drive back or to return an answer. To make payment after taking time to rebut would not be showing that the objection raised is either incorrect or false. It would constitute an admission that objection raised was correct. I feel that granting of time by Returning Officer to cure such disqualification is not contemplated by proviso to Rule 23(5) of the Rules.

12. Last question which arises for consideration is whether such time could have been given even by Assistant Returning Officer to respondent No. 4 at the stage of scrutiny. Indirectly, the question also arises what is the last date for making amends for or for removing disqualification. Is it last date prescribed for filing a nomination paper or the disqualification can be permitted to be cured even thereafter.

13. It will be appropriate to refer to only two judgments to find out which is relevant date for deciding whether candidate is eligible to contest election or not. Vijaysingh Krishnarao Parbat Vs. Returning Officer, Janata Sahakari Bank Ltd., Janata Sahakari Bank Ltd. and District Deputy Registrar of Co-operatives, again the view expressed by Division Bench in 1987 has been reiterated and 1995 judgment of learned single Judge has been distinguished. In paragraph 4 of this judgment, the rival contentions are mentioned and reliance was also placed by one side on abovementioned 1995(1) Mh.LJ. 208 judgment. In paragraph 5 it has been held that said decision nowhere lays down the law to the effect that person can cure default at any time after the last date of filing of nomination papers. In paragraph 6 it has been held that observations made therein are in peculiar set of facts and it is expressly mentioned that it is also not the ratio of that decision. In paragraph 8 it is observed that:--

8. The necessity of clearing the default prior to the last date of filing of the nomination paper was well clarified by learned single Judge of this Court in Bhaulal Rajdhar Sonvane's case (supra). In fact, there is a reference to the Division Bench decision in that regard. No doubt, the Division Bench decision was on the basis of concession of counsel before the Court. However, to conclude otherwise than that the person seeking to contest election for managing committee of a co-operative society should not be a defaulter on the last date for filing of the nomination, would virtually render the provisions of Section 73FF to be nugatory and meaningless. Undoubtedly, default is not permitted to be a permanent stigma but at the same time the provisions apparently disclose that in order to enable a member of society to be eligible for and to contest the election for the managing committee of the society, he cannot continue to be a defaulter even on the last date on which a person can decide to proceed to contest the election. The contention that the last date for decision to contest would be on the last date of withdrawal of nomination and that therefore, relevant date for the purpose of decision as to whether the candidate is a defaulter or not has to be the date of withdrawal of nomination, is unacceptable. The last date of withdrawal is not provided with the intention to have a decision about the eligibility of the person to contest the election but only to decide whether he still persists with his decision to contest or not. But the candidate must be eligible to contest the election and such eligibility has to be satisfied on or before the last date of filing of the nomination paper and the decision as regards the candidates disinterest to contest the election after the scrutiny is of no consequence for the purpose of deciding the eligibility criteria for contest in the election. Being so, a person to be eligible to contest the election has to disclose himself to be not a

defaulter at least on or before the last date of filing of nomination paper. Clearing of default subsequent to the said date would not enure to the benefit of such candidate and would not entitle him to contest the election. Very recently in judgment reported at 2004(5) Mh.LJ. 205 : 2005(4) All MR 318 between Navnath Shirale v. The Returning Officer 1987 view has been taken.

14. 1995(1) Mh.LJ. 208 between Ramesh v. Additional Commissioner has been heavily relied upon by respondent No. 4. It is the contention of Advocate Kaptan said judgment clinches the controversy. The paragraphs relied upon by respondent No. 4 thereof are as under :--

16. For facilitating the decision on the point involved, a reference may be made to the scheme contemplated by the Act for purposes of election and the first meeting of managing committee to be elected. The first point to be noted is that, in the context of members who are to be appointed or nominated by authorities or who are to be co-opted by members, the relevant-date for deciding whether or not they are eligible, would obviously be the date, on which such a decision is to be taken. That date may not have anything to do with the date on which nominations are filed by eligible member for being elected to the committee or the date on which the Returning Officer is supposed to scrutinize the nomination papers. The date of filing of nomination or the date of scrutiny is a question that is to be answered only in the context of election of the members. It is, thus, clear that, in the absence of any specific date having been given in Section 73FF(1) of the Act and in Rule 23 of the Specified Co-operative Societies Election to Committee's Rules, the date on which the nomination papers are filed is not a date on which necessarily the member eligible to file the nominations should be without any disqualification. Under Rule 16 of the Maharashtra Specified Co-operative Societies Election to Committee Rules, a programme is to be determined by Collector and the rule lays down that the date for making nominations, the date for publication of nominations received and the date of scrutiny of nominations, etc. are to be prescribed. Neither the Rules nor the Act prohibit eligible members for filing their nomination papers, after such a programme is declared, a day or two before the last date of filing nomination papers. A person who had filed nomination papers a couple of days before the last date fixed for filing nomination papers may be a defaulter within the meaning of explanation to Section 73FF(1)(i) and if the date relevant for determining whether he was disqualified or not, is to be the last date of filing of the nominations, it is possible to conceive that person who had filed the nomination paper a couple of days before the last date of filing of nomination, would not be considered to be a defaulter, if he were to pay to the concern society all his dues before the last date of accepting the nomination papers. Again, it is not that a person who could be considered defaulter on the date on which the election programme was declared, could not cure the defect by paying to the concern society the entire amount due from him and wipe out the stigma of being a defaulter before the last date of filing of the nomination papers. It is not that the Statute or the Rules framed thereunder considers a defaulter

committed in the past as a perpetual stigma disentitling him from filing the nomination papers. On the other hand, the wordings of Section 73FF(1)(i) and of entire Clause (c)(ii) of explanation to Section 73FF(1)(i) are drafted in the present tense so as to refer the present position relevant during the period at or after the commencement of the election process, whereas Clauses (ii) and (iii) of Sub-section (1) of Section 73FF, refer implicitly to the events, which had taken place in the past. In other words, Section 73FF(1)(i) requires that in order to incur the disqualification, the person "is a defaulter of any society" (emphasis supplied) and the explanation is inclusive of certain contingencies, which may, or may not refer to the defaulters committed in the past. Obviously, this inclusive definition cannot be said to mean a perpetual disqualification to a person, who had been, at some time in the past, a defaulter within the meaning that is given in Clause (c)(ii) of the explanation to Section 73FF(1)(i). This discussion would make it clear also that disqualification contemplated by Sub-section 73FF(1)(i). is a temporary disqualification for particular election and that has reference to a particular point of time. It is not that the disqualification spoken of there is not curable at all times. The explanation cannot be construed to mean that a person who was defaulter, say about 10 to 15 years ago, and who had since paid all of his dues, could be treated as a defaulter for the elections held 10 to 15 years after the default, if the payments were already made by him in the previous years. To conclude, it may be said that disqualification of being a defaulter is curable one.

17. If that disqualification is a curable disqualification, there is no reason to suppose that a person, who has, with awareness or with unawareness, remained in arrears of the dues to the society till the date on which he filed the nomination should not be allowed to mend his mistake and do away with the temporary curable disqualification that he had earned. If this is so, there is no reason to suppose that the Returning Officer is to consider the question of disqualification with reference to the date on which the nomination paper was filed and not with reference to the date on which decision of scrutiny was to be recorded. 19. We are aware that the fact that the above-mentioned decisions are decisions mostly under the provisions under Order VII, Rule 7 of the Code of Civil Procedure. We are also aware of the fact that the Returning Officer appointed for the purposes of holding the elections in question, is not a Court and the provisions of the CPC would not govern a proceeding or inquiry held by him. We are further aware of the principal that contesting the election or, for that matter, getting elected to a particular post, is not a fundamental right and, therefore, the Election Law is to be construed very strictly. But, when an executive authority is to pass certain orders under the Election Law, in respect of which the Statute or the Rules framed thereunder do not provide any guideline, the principal underlying the doctrine of moulding the reliefs in consonance with the future developments may be applied as far as that can be done without causing any injustice to anybody. Rule 23(4) permits such Officer explicitly not to reject any nomination paper on the ground of any defect, which is not of substantial character. Again, proviso to

Rule 23(5) permits him to allow the candidate against whom the objection has been taken to rebut the objection. The expression "rebut" necessarily implies tendering of material which could show that the disqualification did not subsist at the time at which the orders were to be passed by the Returning Officer.

15. Bare reading of the above paragraphs is sufficient to show that this ruling (supra) does not say that Returning Officer has to consider the situation prevailing at the time when he took decision on objection raised to any nomination paper. On the contrary the last line in paragraph 19 clearly shows that the candidate only can produce material to show that he was not disqualified the time when the orders were to be passed by Returning Officer i.e. at the time of scrutiny. It is to be noted that under Rule 23(5) of the Rules time can be given to candidate to show that disqualification did not subsist and not to show that disqualification is cured. The process of election includes all steps right from publication of voters list, filing of nomination papers till declaration of result. The nomination or co-option will not necessarily involve all such steps. The candidate who offers himself for election has to be qualified/eligible on the date when he submits the nomination paper. Scrutiny is of nomination paper and therefore, of eligibility of candidate at the time when he filed it. As period of more than one day is provided in Election programme for filing nomination, in order to avoid discrimination and to facilitate consideration on uniform basis, everybody who submits nomination paper has been given time till last date prescribed for filing of nomination paper to make amends for or cure default/disqualification. The candidate has to be therefore eligible and not disqualified on this last date. There is no question of candidate offering himself again for said election after last date for filing nomination is over or during scrutiny. Scrutiny is of nomination as filed and Rule 23(4) only requires that the nomination paper cannot be rejected on defects which are not of substantial nature. Character/illegibility of candidate as defaulter or otherwise is a defect which is of substantial nature and this is substantiated by requirement of Rule 23(5) which permits candidate time to show that he was not disqualified. Rule 23(5) does not permit candidate to take steps to cure the defect discovered during scrutiny. I find that the position has been correctly evaluated by Vijaysingh Krishnarao Parbat Vs. Returning Officer, Janata Sahakari Bank Ltd., Janata Sahakari Bank Ltd. and District Deputy Registrar of Co-operatives, and in judgment reported at 2004(5) Mh.L.J. 205 : 2005(4) All MR 318 between Navnath Shirale v. The Returning Officer.

16. Before turning to this ruling (supra), it would be suitable to refer to arguments on the point by respondent No. 4. Advocate Kaptan has contended, that the 1995 ruling (supra) lays down the correct Law and all subsequent judgments have overlooked and ignored it. These judgments are therefore per incurium and in any case, as there is conflict of views, matter needs to be referred to larger bench. He has placed reliance upon M/s. A-One Granites Vs. State of U.P. and Others, particularly paragraphs 9 to 14 to point out when judgment can be said to be not binding or precedents sub silentio and without arguments and hence of no moment. He has also relied upon State of U.P. and Another Vs.

Synthetics and Chemicals Ltd. and Another, paragraphs 39, 40, 41 also for this purpose. He states that in such circumstances, this Court has to refer the matter to larger Bench and points out the procedure carved out by Hon. Apex Court in such matters by referring to its judgment reported at Pradip Chandra Parija and Others Vs. Pramod Chandra Patnaik and Others, particularly paragraph 6 thereof. It will be therefore necessary to first find out whether there is any such non-application of mind in two subsequent judgments i.e. Vijaysingh Krishnarao Parbat Vs. Returning Officer, Janata Sahakari Bank Ltd., Janata Sahakari Bank Ltd. and District Deputy Registrar of Co-operatives, and 2004(5) Mh.LJ. 205 : 2005(4) All MR 318 between Navnath Shirale v. The Returning Officer.

17. In 2004(5) Mh.L.J. 205 : 2005(4) All MR 318 between Navnath Shirale v. The Returning Officer, the question before this Court was whether the Appellate order directing Returning Officer to accept nomination paper rejected by him on the ground of defaults was sustainable or not. Appellate Authority found that amount was cleared before filing of nomination and hence disqualification did not exist. In this background, the petitioner in that case contended that as amount was not paid within 30 days of its becoming due, nomination paper was rightly rejected by Returning Officer. In paragraph 13 of judgment, this Court has made reference to 1987 ruling (supra) and particularly paragraph 12 thereof where in the Hon. Division Bench found that disqualification should exist on last date fixed for filing of nomination, as till that date nomination papers could be filed. Not only this, in paragraph 16 there is reference to 1994 Mh.L.J. 1439 between Bhaulal Sonawane v. Returning Officer which is delivered prior to 1995 ruling (supra) on which Advocate Kaptan is heavily relying. In paragraph 16, support has been taken from paragraph 3 of 1994 ruling (supra) in which principle underlying the disqualification so far as election is concerned has been stated that the candidate should not be a defaulter on the last date of nomination. In earlier paragraph i.e. paragraph 14 reference has been made to 1995 ruling (supra) and it has been found as per said ruling (supra) also if the candidate pays his dues before the date of nomination, there is no disqualification. Even consideration of 1995 ruling (supra) by abovementioned 2003 ruling (supra) is also reflected in paragraph 15 thereof. Ultimately, the view of Appellate Authority has been upheld. In said judgment, while deciding writ petition 7135/2004, it has been held that payment made by respondent No. 3 therein on 17 November, 2004 which was the date of scrutiny did not wipe out the default and his nomination paper could not have been accepted. In paragraph 30, reference has been made to 2003 ruling (supra) and appreciation therein of 1995 ruling (supra). In fact paragraphs 5 and 6 of 2003 ruling (supra) are reproduced and relied upon in this 2004(5) Mh.LJ. 205 : 2005(4) All MR 318 between Navnath Shirale v. The Returning Officer. Thus, I find that arguments of Advocate Kaptan about their being any conflict of views or subsequent judgments being rendered per in-curium, not binding or precedents sub silentio and without arguments and hence of no moment, are not relevant in the facts of present case. No contingency for reference to larger Bench is made out here. It is also to be noted

that the 1994 ruling (supra) or 1987 ruling (supra) of this Court are not considered in 1995 ruling (supra) of this Court.

18. Advocate Kaptan has also invited attention to rulings of Hon. Apex Court reported at Manni Lal Vs. Parmai Lal and Others, to contend that once disqualification is wiped out, it ceases retrospectively from beginning. In the facts before Hon. Apex Court election of respondent was challenged on the ground of his conviction 2 days after filing of nomination paper. Respondent was declared successful in election and subsequently, his appeal against conviction was allowed by High Court. The election petition filed by petitioner before Hon"ble High Court was also dismissed by High Court. It is in this background that the Hon"ble Apex Court held in paragraph 4, that acquittal is effective from the date of conviction, and conviction and sentence are deemed to be set aside with effect from the date they were recorded. The conviction was wiped out and did not exist at all. Here, the facts of present case are entirely different. The respondent No. 4 was disqualified on the last date of filing of nomination paper and subsequent payment will not cure or wipe out that disqualification which crystallised for the election then scheduled. However, respondent No. 4 is not disqualified permanently and in subsequent election, if he is not in arrears on the last date of nomination, he can very well contest. The concept of acquittal by Court in appeal in Criminal jurisprudence has no relevance in this case.

19. Thus, I find that the impugned order passed by respondent No. 1 on 25-8-2005 is unsustainable and also without jurisdiction. The same is therefore, quashed and set aside. The order of respondent No. 2 Returning Officer rejecting all nomination papers of respondent No. 4 is restored back. Respondent No. 2 to proceed further to hold elections for scheduled caste/scheduled tribe constituency as early as possible in accordance with law. Rule made absolute in above terms with costs payable by respondent No. 4. Costs quantified at Rs. 3000/-.