
(2015) 07 BOM CK 0070
In the Bombay High Court
Case No : Writ Petition No. 4026 of 2015

Sau. Vidya Jitendra Tupkar

APPELLANT

Vs

The Returning Officer/Assistant Registrar Co-operative
Society and Others

RESPONDENT

Date of Decision : 17-07-2015

Acts Referred:

Multi-State Cooperative Societies Act, 2002 — Section 29(c), 43, 43(1)(n), 84

Citation : (2015) 07 BOM CK 0070

Hon'ble Judges : Z.A. Haq, J

Bench : Single Bench

Advocate : T.S. Kene, for the Appellant; S.P. Deshpande, Advocates for the Respondent

Final Decision : Allowed

Judgement

Z.A. Haq, J—Heard Shri T.S. Kene, learned Advocate for the petitioner, Shri S.P. Deshpande, learned Advocate for the respondent No. 1-Returning Officer, Shri A.M. Ansari, learned Advocate for the respondent No. 2-society and Shri S.P. Dharmadhikari, Senior Advocate assisted by Shri R.B. Dhore, Advocate for the respondent No. 3.

2. Rule. Rule made returnable forthwith.

3. The petitioner has challenged the decision of the respondent No. 1-Returning Officer rejecting her nomination paper for the elections of the respondent No. 2-society which is a multi-state co-operative society.

4. It is undisputed that the petitioner is a member of the respondent No. 2-society. The elections of the respondent No. 2-society are scheduled for 09-08-2015 and for it, the election programme came to be published on 06-07-2015. The petitioner submitted her nomination paper which came to be rejected by the respondent No. 1-Returning Officer on the ground that the petitioner has not attended three consecutive general body meetings of the

respondent No. 2-society and her absence has not been condoned by the members of the general body meetings.

5. Shri T.S. Kene, learned Advocate for the petitioner has submitted that the petitioner was not given notice of the meetings in respect of which it is contended that the petitioner has not attended the meetings. It is further submitted that the case of the respondents is that the notices of the meetings were sent to her under certificate of posting, which is a false ground raised by the respondents. It is submitted that the meetings are held on 11-08-2012, 18-08-2013 and 03-08-2014. It is submitted that the service of notice under certificate of posting has been stopped by the Government since 20-02-2011. It is further submitted that the name of the petitioner continues in the voters' list and therefore, it cannot be said that she incurs disqualification and is not eligible for contesting the elections. It is submitted that the decision is taken by the respondent No. 1-Returning Officer in the matter without granting any hearing to the petitioner. It is prayed that the decision of the Returning Officer be quashed and it be directed to accept the nomination form of the petitioner and include her name in the list of validly nominated candidates for the purpose of the elections.

6. Shri S.P. Dharmadhikari, learned Senior Advocate has submitted that undisputedly the petitioner absented herself in three consecutive meetings and therefore, she incurred disqualification automatically as per the provisions of Section 43(1)(n) of the Multi-State Co-operative Societies Act, 2002 (hereinafter referred to as the "Act of 2002"). It is submitted that the decision on the point of disqualification of the member who absents himself from three consecutive board meetings has to be taken in the third meeting and if the absence is not condoned, it has to be treated that the members have not condoned the absence of the absent member and consequently the disqualification will operate. The learned Senior Advocate has relied on the provisions of Clause-7(iii) of the Bye-laws of the respondent No. 2-society and has submitted that the provisions of Section 43(1)(n) of the Act of 2002 read with Clause 7(iii) of the Bye-laws make it clear that if the decision to condone the absence is not taken, then it implies that the disqualification as contemplated by Section 43(1)(n) of the Act of 2002 operates.

It is further submitted that the petition filed on behalf of the petitioner need not be entertained as alternate efficacious statutory remedy under Section 84 of the Act of 2002 is available to the petitioner. In support of the submission, reliance is placed on the judgment given by the Division Bench of this Court in the case of Shri Ravindra Navelkar and another vs. Union of India, through the Secretary and 27 others in Writ Petition No. 415 of 2007 on 12-03-2008. It is submitted that the petition be dismissed.

7. Shri A.M. Ansari, learned Advocate for the respondent No. 2-society has submitted that the disqualification of the present petitioner is under Section 43(1)(n) of the Act of 2002 and the relevant bye-law would be Clause 33(i)(n) of the Bye-laws of the respondent No. 2-society. The learned Advocate has adopted the

other submissions made on behalf of the respondent No. 3.

8. Shri S.P. Deshpande, learned Advocate for the respondent No. 1 has pointed out from the impugned order that the notices of the meetings which are held on 11-08-2012, 18-08-2013 and 03-08-2014 were published in the daily Lokmat dated 11-07-2012, daily Nav-Bharat dated 18-07-2013 and daily Tarun-Bharat dated 12-07-2014 and it is submitted that the arguments made on behalf of the petitioner that she was not served with the notices of the meetings cannot be accepted. It is further submitted that the petitioner has not disputed that she was absent in three consecutive meetings of the board and in this situation, it was incumbent on her part to produce on the record alongwith her nomination paper, the decision of the members taken in the general body meeting showing that her absence is condoned. The submission is that in the absence of any such decision being placed on the record, the Returning Officer has rightly rejected the nomination paper of the petitioner treating that she has incurred disqualification under Section 43(1)(n) of the Act of 2002.

9. As far as the objection raised by the respondents on the ground of availability of alternate efficacious statutory remedy is concerned, considering the facts of the case, I am not inclined to relegate the petitioner under Section 84 of the Act of 2002. Moreover, the present matter involves interpretation of provisions of Section 43(1)(n) and Section 29(c) of the Act of 2002. The objection raised on behalf of the respondents that the petition need not be entertained as the petitioner has alternate efficacious statutory remedy available, is rejected.

10. After considering the submissions made on behalf of the learned Advocates for the respective parties, in my view, the points which arise for consideration are :

Whether Section 43(1)(n) of the Act of 2002 requires a decision by the members in the general body meeting on the point that the member who absents himself from three consecutive meetings has incurred disqualification or his absence can be condoned.

Whether there has to be a positive decision by the members, in the general body meeting on the above point.

Section 43(1)(n) of the Act of 2002 reads as follows :

"43. Disqualifications for being a member of board -

(1) No member of any multi-State co-operative society or nominee of a member, society of a national co-operative society shall be eligible for being chosen as, or for being, a member of the board of such multi-State co-operative society or a national co-operative society, or of any other co-operative society to which the multi-State co-operative society is affiliated, if such member -

(n). absents himself from three consecutive general body meetings and such absence has not been condoned by the members in the general body."

In my view, Clause (n) of sub-section (1) of Section 43 of the Act of 2002 is in two parts :

- (i) Absents himself from three consecutive general body meetings.
- (ii) and such absence has not been condoned by the members in the general body.

11. The provisions of Section 43(1)(n) of the Act of 2002 are penal in nature and therefore, it has to be strictly interpreted. It cannot be accepted that the disqualification operates automatically if there is no decision either way, of the members in the general body meeting regarding condonation of the absence. When the provision confers power on the members to condone the absence, it necessarily implies that an opportunity is required to be given to the person against whom the decision is taken. As a necessary corollary, it follows that there has to be positive decision by the members in the general body meeting, either to condone the absence or refusing to condone the absence. If there is no such decision either way, it cannot be said that the provisions of Section 43(1)(n) of the Act of 2002 will operate automatically which may result in disqualifying the member from exercising his statutory right of contesting the elections. The judgment given by the Division Bench of this Court in the case of Bhaskar Atmaram Joshi Vs. State of Maharashtra and Others, AIR 1976 Bom 206 : (1976) MhLj 229 , supports the view that the penal provisions are required to be strictly interpreted.

12. Shri S.P. Dharmadhikari, learned Senior Advocate has submitted that the decision to condone or not to condone the absence has to be taken in the meeting in which the member in whose regards the decision is taken, is absent for the third consecutive time. Clause 7(iii) of the Bye-laws lays down that the decision on the point of condoning the absence has to be taken by 2/3rd majority of the members attending the general body meeting. This is a pointer to the requirement that there has to be positive decision in the meeting on the point of condoning the absence or otherwise and, in my view, unless such decision is taken, there cannot be disqualification of the member.

13. In the present case, there is another relevant aspect which requires consideration. The voters list was sent to the Returning Officer on 10-06-2015 and after deciding the objections received by him, the voters list came to be finalised on 24-06-2015. It is an admitted position that the name of the petitioner is included in the voters" list. There had not been any objection for inclusion of the name of the petitioner in the voters" list. The petitioner submitted the nomination paper on 10-07-2015. Had there been any disqualification, the name of the petitioner could not have been included in the voters" list. It is submitted on behalf of the respondents that the inclusion of the name of the petitioner in the voters" list has nothing to do with her entitlement to contest the elections for the board of directors.

The provisions of Section 29(c) of the Act of 2002 provide that no person shall be

eligible for being member of the multi-state co-operative society if, he has not attended three consecutive meetings of the multi-state co-operative society and such absence has not been condoned by the members in the general meeting. If, inspite of absence in three consecutive general body meetings, the name of the petitioner is continued in the voters" list and it is not treated that she has incurred disqualification to continue as the member of the society, in my view, the disqualification as provided under Section 43(1)(n) of the Act of 2002 cannot operate against such member.

14. Shri S.P. Dharmadhikari, learned Senior Advocate has submitted that the occasion to consider the claim of the petitioner for condoning her absence in the general body meetings will arise only if she applies for it and as the petitioner has not applied for condonation of her absence, it has to be treated that her absence has not been condoned by the members in the general body meetings. For the reasons recorded by me earlier that the provisions of Section 43(1)(n) of the Act of 2002 being penal in nature, they have to be strictly construed and as I find that the provisions of Section 43(1)(n) of the Act of 2002 coupled with Clause 7(iii) of the Bye-laws cast an obligation on the members attending the general body meeting to take a positive decision on the point of condoning the absence or not, the submission as made cannot be accepted.

15. In view of the above, the petition is allowed. The impugned order passed by the respondent No. 1-Returning Officer on 14-07-2015 is set aside. The respondent No. 1-Returning Officer is directed to accept the nomination form of the petitioner and to include her name in the list of validly nominated candidates for the elections which are scheduled on 09-08-2015.

Shri T.S. Kene, learned Advocate for the petitioner submits that the petitioner has submitted two nomination papers and in view of the judgment passed by this Court, both her nomination papers would be accepted. It is submitted that the last date of withdrawal of nomination papers was 16-07-2015. The learned Advocate requests that the petitioner be permitted to withdraw one nomination form. The request made on behalf of the petitioner being reasonable, it is granted. The respondent No. 1-Returning Officer shall permit the petitioner to withdraw one nomination paper, which request should be made by the petitioner today.

Rule is made absolute in the above terms. In the circumstances, the parties to bear their own costs.

Steno copy of this judgment be supplied to the learned Advocates for the parties.