
(1993) 06 BOM CK 0058

In the Bombay High Court

Case No : Writ Petition No. 1990 of 1991

Sawaleram Sakharam Datir and Others

APPELLANT

Vs

Karbhari Ahilaji Choudhari and Others

RESPONDENT

Date of Decision : 16-06-1993

Acts Referred:

Citation : (1993) 3 BomCR 700

Hon'ble Judges : N.P. Chapalgaonker, J

Bench : Single Bench

Advocate : A.H. Kasliwal, for the Appellant; P.R. Deshmukh, for respondent Nos. 1, 2, 4 to 11 and 13 to 17, V.H. Dighe, for respondent Nos. 3 and 12, R.N. Dhorde, for respondent No. 18, P.R. Malpani, Adv, for respondent No. 19 and P.B. Varale, A.G.P. for respondent Nos. 20 to 24, for the Respondent

Final Decision : Dismissed

Judgement

N.P. Chapalgaonker, J.—Elections to elect Directors of respondent No. 19 - Karkhana was held on 10th May, 1989. Results were announced two days thereafter and respondent Nos. 1 to 18 were elected as Director of respondent No. 19 - Karkhana. This election came to be challenged under the provisions of section 144D of the Maharashtra Co-operative Societies Act, 1960 (hereinafter referred to as "Co-operative Societies Act" for the purpose of brevity), before the Additional Commissioner, Nasik Division, Nasik, in Election Petition No. 308/1989 and by his judgment and order dated 11th July, 1990, he was pleased to dismiss the Election Petition. This judgment and order has been challenged before this Court in this writ petition under Article 227 of the Constitution of India in its powers of superintendence.

2. Though several points were raised in the Election Petition, Shri A.H. Kasliwal, learned Counsel appearing for petitioners, was fair enough to limit his contention to only three points. Firstly he submitted that the election programme declared for the impugned election was invalid inasmuch as 15 days time was not left between the date of scrutiny of nomination papers and last date for withdrawal of

candidature as was mandatorily required by sub-section (2) of section 152A of the Co-operative Societies Act. Therefore, this omission vitiates the whole election. The second contention raised by Shri Kasliwal is that now it is an accepted principle that all the voters in an election to Co-operative Society are entitled to vote for all seats, but in the instant case, voters were not allowed to vote for all the seats and constituencies. The bye-laws restricted their right to vote and, therefore, the bye-laws are also invalid. The third contention raised by him is that about 20 villages were included in the area of operation of respondent No. 19 - Karkhana, much after the qualifying date for the preparation of list of voters and, therefore, inclusion of 330 voters from these villages was unjustified and since they were allowed to vote, election process stands vitiated. He also submitted that the foundation for valid election is the valid list of voters and since the list of voters for this election was defective, election deserves to be set aside. Shri R.N. Dhorde, Shri V.H. Dighe and Shri P.R. Deshmukh, learned Counsel appearing for respective respondents, submitted that the contentions raised in the election petition were vague and no evidence was submitted by the petitioners in support of the contentions raised by them. They also contended that the provisions of section 152-A(2) are not mandatory in nature and it has not been shown that the non-observance of the said rule has prejudiced either the petitioners or any other candidate at the election. They further contended that the constituencies were drawn and the voting rights were restricted as per provisions of the bye-laws and as there was no specific challenge to the bye-laws in election petition, petitioner cannot now challenge the election on that basis.

3. I will firstly take second and third contention raised by Shri Kasliwal for consideration. The villages about which Shri Kasliwal has made a grievance, appears to have been included in the area of operation of respondent No. 19 - Karkhana, sometime in the month of July 1983, as is evident from the order of the Regional Deputy Director of Sugar, Ahmadnagar, annexed to the return filed by the respondent at page 365. Consequential amendments were made in the bye-laws of the Karkhana specifying the constituencies and these villages were included in different constituencies. This amendment was approved in the General Body Meeting held on 29th January, 1989. Therefore, the contention raised by Shri Kasliwal appears to be factually incorrect. Though the villages were distributed in different constituencies as per bye-laws after the preparation of provisional list of voters, these villages were very much part of area of operation of respondent No. 19 - Karkhana therefore, all the members therein had right to vote in the election.

4. The second contention raised by Shri Kasliwal is about right to vote. According to Shri Kasliwal, all voters should have been allowed to vote for all 18 posts of Directors to be filled in at the said election. Bye-law No. 31(a)(1) provides that the Directors to be elected under Bye-law No. 29(a) are to be elected by voters mentioned in Bye-law Nos. 18(1) and 18(a) and the Director mentioned in Bye-law No. 29(c) is to be elected by the voters mentioned in Bye-law Nos. 18(2) and 18(b). This bye-law, according to Shri Kasliwal, is violative of the general

principle of elections in the Co-operative sphere that all members are entitled to vote for all seats in all constituencies. Firstly, there is no foundation for the submission made by Shri Kasliwal. There is no such general principle in the elections to the Co-operative Societies. Various Co-operative Societies have divided members into different constituencies and, if the constituencies are different, bye-laws may provide that the members of that constituency would elect a representative of that constituency and would restrict the right to vote. A Division Bench of this Court in *D.P. Patil and another v. Chikali Vividh Karyakari Society Ltd. and others* 1984 C.T.J. 147, was pleased to interpret provisions of section 73-C(3) of the Co-operative Societies Act and was pleased to hold that the statutory provision does not contemplate separate constituencies of borrowing and non-borrowing members. But it does not mean that there cannot be any constituencies and restriction on voting, if the bye-law so provide and is not contrary to the statutory provisions. In the instant case, there is no challenge to the bye-laws in the election petition and even today, the learned Counsel was unable to point out as to how the so called restriction on the voting right has violated any of the provisions of the statute which would override the bye-laws. Therefore, this contention also will have to be rejected.

5. Shri Kasliwal mainly relies on his third contention, that the mandatory provisions of section 152-A(2) have not been complied in the present election and, therefore, the election stands vitiated. Shri Kasliwal invited my attention to the programme of election declared by the Collector, Ahmadnagar. The date of scrutiny of nomination papers is 17th April, 1989 and the last date for withdrawal of nomination papers is 25th April, 1989. The provisions of sub-section (2) of section 152-A of the Co-operative Societies Act reads as under :

"Notwithstanding anything contained in this Act or the rules or the bye-laws made thereunder, the list of validly nominated candidates shall be subject to the decision of any appeal filed under sub-section (1), and the period between the date of scrutiny of nomination papers and the last date of the withdrawal of candidatures shall not be less than fifteen days."

Relying on this provision, Shri Kasliwal submits that the non-obstante clause with which this sub-section begins and the fact that this is a law governing elections, it will have to be held that the said provisions is mandatory one. According to him, while declaring the election programme, it cannot be assessed as to whether any nomination paper would be rejected and whether such person would file an or if an appeal is filed, any period less than 15 days is likely to create many difficulties in carrying out the election as per schedule. Therefore, the legislature has made this mandatory provision and non-observance of this provision would be fatal to the elections. In support of his submission, Shri Kasliwal relied on a judgment of this Court *Utrane Vividh Karyakari Seva Sahakari (V) Socy. Ltd. and Others Vs. Laxman Dalpat Patil and Others*, . Shri Kasliwal mainly relied on para 8 of the said judgment which reads as under:

"In the present case the date for scrutiny of nomination papers was fixed as 5th

September, 1987. The last date for withdrawal of nomination was 8th September, 1987. There was, therefore, a clear contravention of the provisions of section 152-A(2). In the present case, however, in view of the challenge to the rejection of nomination papers which was upheld, ultimately the elections were postponed from 18th September to 27th September, 1987. Nevertheless there was no extension of date for withdrawal of the nomination papers. It is urged by Mr. Joshi that the elections should not be set aside merely because of the infringement of section 152-A(2). In the present case, however, there is a more substantial infringement referred to earlier, which necessitates setting aside of the entire election because the basic method of voting has been incorrect."

It is true that this Court has observed that, if the period between the date of scrutiny and last date for withdrawal of nomination is less than 15 days, then there is clear contravention of provisions of section 152-A(2). However, this Court has not set aside the election on the very ground. The election came to be set aside on more substantial infringement regarding the right of non-borrower members to vote in borrowers constituency.

6. It is true that the rules, whether they are mandatory or directory, are made for observance and not for ignoring them. Whether the rule is mandatory or directory should be a question to be decided in the light of so many factors. The intention of the legislature will have to be ascertained for the decision on the point. In a decision of the Supreme Court, *The State of Uttar Pradesh and Others Vs. Babu Ram Upadhyaya*, following observations are made :

"For ascertaining the real intention of the legislature, the Court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered."

Applying this yardstick, if we look to the provisions of sub-section (2) of section 152-A, it is abundantly clear that the provision intends to leave sufficient time for decision of the appeal challenging rejection of the nomination paper. Therefore, proper election programme should always be in conformity with sub-section (2) of section 152-A of the Co-operative Societies Act. Respondent No. 20 - Collector, Ahmadnagar, appears to have been guided by Rule 16 of the Maharashtra Specified Co-operative Societies (Election to Committee) Rules, 1971 (hereinafter referred to as "Specified Co-operative Societies Rules" for the purpose of brevity). Rule 16 lays down a schedule specifying the time gap between the two stages of the election. It provides that the list of valid nominations shall be published not later than two days after the date of scrutiny and the last date for withdrawal of candidature shall be within 7 days from the date of publication of list

of valid nominations. If the aforesaid 2 days and 7 days taken together, 9 days time gap is provided between the date of scrutiny and the last date for withdrawal of candidature. Section 152-A was inserted in the Co-operative Societies Act by Maharashtra Act No. 20 of 1986, and the Government should have taken care to amend Rule 16 of the Specified Co-operative Societies Rules in conformity with sub-section (2) of section 152-A of the Co-operative Societies Act. Though there can be no doubt that the provision of the substantive law would prevail over the rule made thereunder, continuation of the rule on the statute book misdirects the authorities who are entrusted with the job of conducting elections and the present election programme is one of such instances. It is desirable that the attention of the authorities is drawn to the anomaly and they amend Rule 16 of the Specified Co-operative Societies Rules in conformity with the provisions of section 152-A(2) of the Co-operative Societies Act.

7. Shri Kasliwal further contended that the use of the word "shall" indicates that the command of the legislature is imperative in nature and in no case, election programme can have time gap of 15 days between the two aforesaid stages of election. It is true that the language shall be one of the guiding factors while interpreting whether a provision is mandatory or directory. But the real guidance would be coming from the purpose of the legislature and the effect which would result from non-observance of the provision. If an election programme is declared and immediately one is required to consider validity of the election programme, non-observance of sub-section (2) of section 152-A by itself will be sufficient to struck down the election programme. But when the election programme proceeded further and it has not been shown that there were any rejection of nomination papers and the appeals arising therefrom were pending, not leaving sufficient time gap of 15 days may not materially affect the election. In the instant case, it is an admitted fact that there were no appeals filed before the Additional Commissioner against the rejection of any of the nomination papers in the instant election. There may be instances wherein non-observance of the provisions of section 152-A(2) would have materially affected the elections or prejudiced one of the candidates. In that case, non-observance may have different result. It is also worthy to note that the petitioners did not challenge the election programme before commencement of the election, on this ground. They participated in the election. Looking to the purpose for which the provision was made and the intention of the legislature behind it, it will have to be held that the non-observance of section 152-A(2) would vitiate the election, in cases, wherein it is shown that it has prejudiced the candidate or has materially affected the election. But in cases wherein there were no appeals filed u/s 152-A, non-observance of the provisions of sub-section (2) would not vitiate the election.

8. Shri R.N. Dhorde, learned Counsel appearing for respondent No. 18, submitted that every non-observance of a rule will not vitiate the election but it will have to be shown by the person challenging the election that the said non-observance has materially affected the election. In support of this submission, he relied on a judgment of Supreme Court, Paokai Haokip Vs. Rishang and Others, . While

taking into consideration this submission of Shri Dhorde, we will have to consider the relevant rules. Rule 81 of the Specified Co-operative Societies Rules provides for declaring election to be void on certain grounds. Rule 81(d) read with Clause (iv) is quoted below :

"Grounds for declaring election to be void---If the Commissioner is of opinion---

(a)

(b)

(c)

(d) that the result of the election, is no far as it concerns a returned candidate, has been materially affected-

(i)

(ii)

(iii)

(iv) by any non-compliance with the provisions of the Act or any rules made thereunder, the Commissioner shall declare the election of the returned candidate to be void."

It, therefore, follows that the rules permit declaration of an election invalid on the ground of non-compliance of any of the rules, if it is pointed out that the said non-observance has materially effected the election and there is nothing in the statute which overrides this provision of the rule. The impugned election cannot be said to have been effected by the non-compliance of sub-section (2) of section 152-A Co-operative Societies Act and challenge to election on this ground must fail.

9. It is necessary to make it clear that this Court is not approving the non-observance of section 152-A(2) of the Co-operative Societies Act, in the election under challenge. The officers entrusted with the job of conducting election to the Specified Co-operative Societies are duty bound to observe this rule and their disobedience by not complying this provision is, in cases, likely to cause loss to the exchequer as well as the public, if the elections are vitiated on this ground and, therefore, they should be careful in observing this rule.

10. For the foregoing reasons, challenge in the writ petition to the impugned election must fail. Writ petition is dismissed. Rule is discharged. In the circumstances of the case, there shall be no order as to costs of this writ petition.