

(1989) 10 BOM CK 0017

In the Bombay High Court

Case No : Writ Petition No. 3017 of 1985

Shrikrushna Sadashiv Dhamankar

APPELLANT

Vs

The Nasik Merchants Co-operative Bank Ltd. and Others

RESPONDENT

Date of Decision : 27-10-1989

Acts Referred:

Constitution of India, 1950 — Article 227

Representation of the People Act, 1951 — Section 82, 83

Citation : AIR 1990 Bom 90 : (1990) 1 BomCR 223

Hon'ble Judges : Puranik, J;Jahagirdar, J

Bench : Division Bench

Advocate : Milind Sathe and G.B. Terdalkar, for the Appellant; P.N. Joshi, Bhimrao N. Naik for V.B. Rajure, for the Respondent

Judgement

Jahagirdar, J.—This petition under Article 227 of the Constitution of India seeks to challenge the order passed by the Additional Commissioner of Nasik Division, dismissing the election petition which was filed by the petitioner challenging the election of respondents Nos. 4 to 11 to the Managing Committee of the Nasik Merchants Cooperative Bank Ltd., which is respondent No. 1 in this petition. Respondents Nos. 2 and 3 are the District Collector of Nasik and the Sub-Divisional Officer of Nasik Division -- they having had to discharge certain functions in connection with the election that was held. The election was challenged by the petitioner on a ground which is available u/s 144-I(6) of the Maharashtra Co-operative Societies Act, 1960. Respondents Nos. 12 to 14 were joined in the petition because, according to the petitioner, respondents Nos. 4 to 11 have committed corrupt practice during the election for themselves and for respondents Nos. 12 to 14.

2. The facts leading to the filing of the election petition must now be mentioned. Respondent No. 1 is a specified society under the provisions of the Maharashtra Co-operative Societies Act, 1960, hereinafter referred to as "the Act". For this reason, its elections are governed by the provisions contained in Chapter XI-A of

the Act, and the Maharashtra Specified Co-operative Societies Elections to Committee Rules, 1971. In December, 1981, the election to the Managing Committee was held after following the usual procedure and on 14th of December, 1981, the results of the election to the Managing Committee were declared. Respondents Nos. 4 to 11 were declared elected to the committee of respondent No. 1 society.

3. On 9th of February, 1988, the petitioner filed a petition, being Election Petition No. 44 of 1982, challenging the election of respondents Nos. 4 to 11 on the ground that they had committed corrupt practices during the election as contemplated u/s 144-1 of the Act. Unfortunately, that petition was not heard for some time. On the other hand, in the meantime, another election petition had been filed by one Babji Garad challenging the same election. That petition was allowed by the Commissioner. However, this Court in writ petition No. 392 of 1982 set aside the Commissioner's order. Garad approached the Supreme Court and the Supreme Court in its judgment ruled that the elections held on 14th of December, 1981 were ex facie illegal, invalid and contrary to law because of non-compliance with the mandatory provisions of Section 73-B of the Act. This judgment in Babaji Kondaji Garad Vs. Nasik Merchants Co-operative Bank Ltd., Nasik and Others, . It should be noted that pursuant to the judgment of the Supreme Court, fresh elections to the Managing Committee of respondent No. 1 society were held in June, 1984 and some at least of the present contesting respondents have been elected again.

4. Now we return to the petition, namely Election Petition No. 44 of 1982, filed by the petitioner challenging the election of some to the Managing Committee. As already mentioned above, this petition was filed on the ground that respondents Nos. 4 to 11 indulged in corrupt practices during the elections. Section 144-I of the Act enumerates those acts which are to be regarded as corrupt practices. In sub-section (6) of the said section, it has been provided that making special advances of loans or otherwise favouring any elector or group of electors between the date of declaration of programme for an election and the date of declaration of the result thereof shall be deemed to be a corrupt practice. It was the case of the petitioner that respondents Nos. 4 to 11, who were at the relevant time members of the Managing Committee, sanctioned large scale loans which could be characterised as special loans between the date of the declaration of the programme for the election and the date of declaration of the result thereof.

5. The Additional Commissioner, being a specified officer within the meaning of Section 144-T of the Act, heard the petition, received evidence and ultimately by his order dated 28th of June, 1985 dismissed the petition on the ground, among others, that the election petition was not accompanied by the affidavit as required by Section 144-V of the Act. The Additional Commissioner, however, held that several loans were sanctioned during the relevant period irregularly and that would amount to corrupt practices as defined in Section 144-I of the Act.

However, he thought that this alone was not sufficient to upset the election of respondents Nos. 4 to 11 because . "the petitioner has not proved that by making advance of loan the opponents 4 to 11 have actually improved their prospects in the election in getting the votes of the electors in their favour." Hence this petition under Article 227 of the Constitution of India.

6. Mr. B. N. Naik, the learned Advocate appearing for respondents Nos. 5 to 11, took a preliminary objection to the maintainability of this petition by contending that the elections, which were held on 14th of December, 1981, have been in fact and in law wiped out from the record by the judgment of the Supreme Court in Babaji Kondaji Garad Vs. Nasik Merchants Co-operative Bank Ltd., Nasik and Others, . If, therefore, it is alleged that anything was done by the successful candidates, in law it should be regarded that that thing has not been done. That is how fresh elections were held on June, 1984. No relief of whatsoever kind can now be given in respect of the elections held on 14th of December, 1981 in view of the judgment of the Supreme Court in Babaji Kondaji Garad's case.

7. In our opinion, this argument is not available to the respondents at this stage. This is so because earlier during the course of hearing of the election petition the respondents had taken up this contention before the Additional Commissioner. The Additional Commissioner, by his order dated 12th of April, 1984, answered this question against the respondents and held that the election petition was maintainable despite the judgment of the Supreme Court in Babaji Kondaji Garad's case. Respondents Nos. 4 to 11 filed a writ petition, being writ petition No. 2024 of 1984, in this Court. Interim relief was granted in this petition, but subsequently, on 13th of December, 1984, this Court vacated the interim relief and directed the Additional Commissioner to proceed with the hearing of the election petition. Thereafter, on 25th of July, 1985, the said writ petition was withdrawn and rule was discharged by this Court.

8. This necessarily means that the respondents abandoned up to the stage of the High Court the challenge which they had made to the maintainability of the petition of the petitioner on the ground that the decision of the Supreme Court in Babaji Kondaji Garad Vs. Nasik Merchants Co-operative Bank Ltd., Nasik and Others, rendered the election petition infructuous. It is no answer to this petition to say, as Mr. Naik sought to say, that the finding of the maintainability of the election petition was an interlocutory order which the respondents could agitate in a subsequent petition challenging the final order. In our opinion, this cannot be so. The maintainability of a petition was not an interlocutory order in the sense that it decided nothing; it was a step in the further hearing of the election petition. The respondents did choose to approach this Court and subsequently withdrew the petition after the stay was vacated by this Court. It was not necessary for the respondents to withdraw the petition merely because the interim stay was vacated since any order that could be passed by the Additional Commissioner in the election petition could have been made subject to any order that this Court would have passed in the petition which challenged the

maintainability of the petition itself. After abandoning the earlier challenge to the maintainability of the election petition in view of the decision of the Supreme Court in Babaji Kondaji Garad's case, the respondents cannot be allowed to agitate the same question in this petition filed by the original petitioner.

9. The Additional Commissioner has held the provisions of Section 144V of the Act are mandatory and in particular the requirements that the election petition, which alleges corrupt practice, must be accompanied by an affidavit in support of the allegation of such corrupt practice and the particulars thereof are mandatory. Admittedly, the petition filed by the petitioner u/s 144T of the Act was not accompanied by an affidavit in support of the allegation of the corrupt practices alleged and the particulars thereof. In our opinion, this is the main question which is to be decided in this petition because if the petitioner fails on this question, other questions need not be gone into. If the petitioner succeeds on this question, we would have followed a course to be mentioned later in this judgment.

10. In order to understand the controversy, it would be advantageous to briefly refer to some of the provisions contained in the Act and the relevant rules. Section 144-T of the Act provides that disputes relating to elections must be submitted to the Commissioner or other specified officer for decision. Such a reference may be made by an aggrieved party by an election petition within a period of two months from the date of declaration of the result of the election. The specified officer, however, may admit a petition after the expiry of two months if he is satisfied that the petitioner had sufficient cause for not preferring the petition within the said period. An election cannot be challenged in any manner other than the one provided in Section 144-T of the Act. The provisions of Section 144-V of the Act need to be fully reproduced. They are as follows:--

"144-V. Contents of petition. (1) An election petition shall -

(a) contain a concise statement of the material facts on which the petitioner relies;

(b) set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and

(c) be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908, for the verification of pleadings;

Provided that, where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in support of the allegation of such corrupt practice and the particulars thereof.

(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition."

11. Mr. Sathe, the learned Advocate appearing for the petitioner, has cited several judgments in support of his contention that the mere use of the word "shall" is not determinative of the fact that the provision for filing the affidavit along with the petition is mandatory. He has also invited our attention to some of the decisions of the Supreme Court, under the Representation of the People Act. There is a plethora of decisions on the question as to how to determine whether some provisions are mandatory or directory -- in particular on the effect of the use of the word "may" or "shall" in the provisions under the different Acts.

12. Mr. Sathe is right when he says that the mere use of the word "shall" does not indicate that the relevant provision is mandatory. But, in our opinion, he is only partly right because the mere use of the word "shall" by itself may not be decisive of the question whether a particular provision is mandatory. But it is no gainsaying that the use of the word "shall" prima facie indicates that the relevant provision is mandatory. The examination of the other provisions of the statute may displace this prima facie presumption and may lead one to the conclusion that looking to the context in which the word "shall" is used, the provision may be regarded as directory.

13. It is not necessary to embellish this judgment with several authorities which have been cited before us. They are all of the view that the question as to whether a provision which used the word "shall" is mandatory or directory should be decided looking to the context in which it is used. Under some circumstances, undoubtedly, the expression "shall" may be construed as "may". However, the term "shall" in its ordinary significance is mandatory. If this is so, the Court would normally give that meaning. This course may not be adopted if such an interpretation leads to some absurd or inconvenient consequence, or if it becomes inconsistent with the intention of the Legislature. As has been pointed out in *Khub Chand and Others Vs. State of Rajasthan and Others*, , the construction of the expression "shall" depends on the provisions of a particular Act, the setting in which the expression appears, the object for which the direction is given, the consequences that would flow from the infringement of the direction and other relevant considerations.

14. After ascertaining the real intention of the Legislature, the Court would be justified in considering, among other things, the nature and scheme of the Act and the consequences which would follow from construing the word "shall" in one way or other. The Court would also be justified in considering the impact of other provisions whereby the necessity of complying with the provisions in question is avoided. Undoubtedly, a provision is often regarded as mandatory if a consequence for its breach is provided in the statute, but that is not the invariable rule. The serious or trivial consequences that flow from non-compliance with what is regarded as a mandatory provision has also to be borne in mind by the Court. If the breach of a particular provision is likely to defeat or delay the intention of the Legislature as can be gathered from the other provisions of the statute, then that provision ought to be held mandatory. This

question has been discussed in great details by the Supreme Court in *The State of Uttar Pradesh and Others Vs. Babu Ram Upadhyaya*, . However, as already mentioned above, it is not necessary to cite large number of decisions on this question because the question has to be decided looking to the intention of the Legislature in so far as it is possible to gather the same from the language of the statute and the consequences that would follow if the provision is not complied with.

15. From the provisions of Section 144-V of the Act, reproduced above, it is clear that the Legislature intended that an election petition shall contain a certain minimum amount of facts which are material for the decision of the election petition. Clause (b) of Section 144-V(1) specifically provides that the election petition must set forth full particulars of any corrupt practice that the petitioner alleges and not merely the material facts. The said provision also requires the petition to contain as full a statement as possible of the names of the parties alleged to have committed the corrupt practice. Further, the date and place of the commission of each corrupt practice has to be mentioned.

16. From this it is clear that the Legislature intended to treat the trial of an election petition which alleges corrupt practices on the part of the respondents more seriously. That is why though in other petitions it would be enough if an election petition is signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, the Legislature required that where the petitioner alleges any corrupt practice "the petition shall also be accompanied by an affidavit in support of the allegation of such corrupt practice and the particulars thereof." In other words, the particulars which are required to be set forth as per Clause (b) in an election petition challenging the election on the ground of corrupt practice have to be supported by an affidavit. Looking to this intention of the Legislature, we are of the opinion that an election petition ought to be accompanied and not followed by an affidavit as mentioned in the proviso to Clause (c) of Section 144-V(1) of the Act. The use of the peremptory word "shall" raises a prima facie presumption that the provision is mandatory and this presumption is not displaced by anything else contained in the Act or the Rules. On the other hand, the presumption is reinforced by the special importance given to an election petition challenging the election on the ground of corrupt practice.

17. A closer look at Section 144-V of the Act suggests that the petition must be complete when it is presented. An incomplete petition not containing the particulars mentioned in Section 144-V of the Act and otherwise not in compliance with the said provisions cannot be treated as a petition at all u/s 144-T of the Act. If we hold that the proviso to Clause (c) of Sec. 144-V(1) is directory and not mandatory, then we would be justified in trying to find out whether there are any provisions either in the Act or in the Rules whereby the time for filing the affidavit and otherwise complying with the requirements of Section 144-V has been provided for. This search has ended in vain because there is no such provision at all. Neither in the Act nor in the Rules any provision

is made for completing the formalities, if they can be called so, required u/s 144-V of the Act. If the provision is held to be directory, then it would be saying that practically there would be no time within which the requirements of Section 144-V are to be complied with. This would protract the hearing of an election petition. This entrusts the concerned specified officer with untrammelled discretion to give time or to give such time as he deems necessary for complying with the requirements of Section 144-V of the Act. Such an interpretation would result in mischievous consequences, inasmuch as the object of deciding an election petition as expeditiously as possible, at least before the next elections are held, would be defeated. The Legislature itself has provided in Section 144-T(4) of the Act that subject to any rules made by the State Government in this behalf, an election petition shall be heard and disposed of by the specified officer as expeditiously as possible. Unguided discretionary power in the specified officer that would necessarily be implied if the provision is held to be directory will defeat the very object of the expeditious disposal of an election petition. Adjournments will be asked for and will be granted. The working of the Managing Committee which, in the meantime, has taken charge will be constantly under shadow. This would necessarily lead to general inconvenience. These are the consequences which must follow if the provision is held to be directory and not mandatory. In our opinion, looking to these consequences and the intention of the Legislature as expressed in Sections 144-T and 144-V of the Act, the provision that an election petition alleging corrupt practice shall be accompanied by an affidavit must be held to be mandatory.

18. Mr. Sathe, however, suggests that the other provisions to be found in the Rules indicate that the relevant provision is directory and not mandatory because, according to him, where it was intended that a petition must be dismissed, such a provision has been made. In particular, he referred to Rule 74 of the Maharashtra Specified Co-operative Societies Elections to Committee Rules, 1971.

The said rule is as follows:--

"74. Presentation of election petitions.-

(1) An election petition calling in question any election may be presented by any candidate or any voter within two months from the date of declaration of the result of the election.

(2) Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and one spare copy for the use of the Commissioner and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition."

In Rule 76 it is provided that the Commissioner may dismiss an election petition which does not comply with the provisions of Rule 74. In these provisions Mr. Sathe reads a meaning that it is only when the election petition does not comply with the provisions contained in Rule 74 that the Commissioner may dismiss the

election petition and not otherwise.

19. In our opinion, what is being mentioned in a rule cannot control the meaning of the relevant provision of an Act. Secondly, Rule 74 does not deal with any particular or detail which is covered by Section 144-V of the Act. Sub-rule (1) of Rule 74 deals with the presentation of an election petition within two months from the date of declaration of the result. The Commissioner is not enjoined to dismiss a petition which is filed beyond the period of two months because, as we have already seen above, Section 144-T provides for extension of the period of limitation if sufficient cause is shown for the same. It is for this reason that the Commissioner has been given the discretion not to dismiss an election petition which is not presented within a period of two months as contemplated in Rule 74(1). Similarly, sub-rule (2) of Rule 74 deals with certain matters which are not covered by Rule 74(1). In these cases, where there is no compliance with the requirement of sub-rule (2) of Rule 74 the Commissioner has been given the discretionary power of dismissing or not dismissing an election petition. Neither in the Act nor in any of the Rules, there is any provision for condoning the deficiency in the compliance with the requirements of S. 144-V of the Act. This must, in our opinion, necessarily mean that a petition to be validly presented must strictly comply with the requirements mentioned in the said Section. If there is no compliance with such requirements, that petition in law cannot be regarded as a petition at all.

20. Mr. Sathe's argument is that an election petition which does not comply fully with the requirements of Section 144-V is also covered by Rule 74(1) and if there is any deficiency, the Commissioner is given discretion not to dismiss such a petition. We do not agree with Mr. Sathe on this point. The discretionary power given to the Commissioner under Rule 76(2) is only in respect of an election petition which is a valid petition as contemplated u/s 144-V of the Act and which is not presented within a period of two months. The Commissioner has no power to condone the deficiencies of an election petition in complying with the requirements provided for in Section 144-V of the Act. A petition which is not in strict compliance with the requirements of Section 144-V of the Act is not a petition at all and Rule 74 will not apply to the same.

21. For the above reasons, we are of the opinion that the Additional Commissioner was justified in dismissing the petitioner's election petition on the ground that the petition was not accompanied by the affidavit in support of the allegation of corrupt practice.

22. Some of the findings of the Additional Commissioner are incorrect. If it were necessary for us to decide this petition, we would have held that the Additional Commissioner was wrong in holding that it was necessary for the petitioner to prove that the large-scale sanction of loans was made with the sole purpose of inducing the workers to vote in favour of respondents Nos. 4 to 11. We are also of the opinion that the Additional Commissioner was wrong in holding that the candidates who withdrew from the election should have also been made parties

to the election petition and the defect of non-joinder of such persons as parties was fatal to the petition. There is nothing in the Act or the Rules which requires that all persons who had originally joined the election fray should be joined in the election petition. In the present petition, the petitioner is challenging the election of only those persons who were elected and who, according to him, had indulged in corrupt practices.

23. On the finding of corrupt practices also, we have to make certain observations. Though the Additional Commissioner has given a finding which is apparently in favour of the petitioner, namely, that respondents Nos. 4 to 11 indulged in corrupt practices, after going through the entire judgment of the Additional Commissioner we found very difficult to correlate the material which has been scantily mentioned in the judgment with the relevant rules and regulations which are alleged to have been contravened. At one stage, the Additional Commissioner has stated that he called all the cases pointed out in one statement from the bank and he carefully went through them. We are exercising the jurisdiction of this Court under Article 227 of the Constitution. The manner in which the evidence has been discussed by the Additional Commissioner has made it impossible for us to judge whether there is an error of law. Faced with this situation, if we had held that the election petition was maintainable, we would have been constrained to remand the case to the Additional Commissioner to record proper findings relating to each of the corrupt practices by discussing the evidence in relation to that corrupt practice. It is true that the petitioner in this petition has annexed to the petition practically the entire material which was probably before the Additional Commissioner, but we are not a Court of appeal and it would be neither possible nor permissible for us to wade through this entire material and record findings of fact.

24. Moreover, the impugned election took place in the year 1961. In the year 1984, pursuant to the judgment of the Supreme Court, that election was set aside and fresh election has been held. Unfortunately, the election petition was decided belatedly by the Additional Commissioner in the year 1985. It has now been heard by us in the year 1989.

25. In the light of all the above facts, we would have been reluctant even to remand the case to the Additional Commissioner. In our opinion, that would not be in the interest of justice.

26. In the result, we discharge rule in this petition with no order as to costs.

27. Rule discharged.