

(1996) 12 BOM CK 0025

In the Bombay High Court

Case No : Writ Petition No's. 2983 and 3000 of 1996

Sudhakar Deoraaji Wele and Another

APPELLANT

Vs

Commissioner, Nagpur Division and Others

RESPONDENT

Date of Decision : 10-12-1996

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1997) 99 BOMLR 499 : (1997) 2 MhLj 379

Hon'ble Judges : V.S. Sirpurkar, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

V.S. Sirpurkar, J.

Rule. Heard finally with the consent of the parties. The petitions are dismissed for the reasons to follow.

REASONS

1. This judgment shall dispose of both these writ petitions.
2. In Writ Petition 3000 of 1996, the petitioner challenges the order passed by the Commissioner, Nagpur Division, Nagpur (respondent No. 1), by which the Commissioner has allowed the appeal filed by respondent No. 3 - Sunil Chandrakantaji Raut, whereby he has set aside the order of the Returning Officer (respondent No. 2) rejecting the nomination paper of the respondent No. 3. Both the petitioner as well as the respondent No. 3 were the contesting candidates in the election to the Wardha Zilla Cooperative Milk Society of which the respondent No. 2 was the Returning Officer. The Returning Officer rejected the nomination papers of both the petitioner Sudhakar Wele and the respondent No. 3 Sunil Raut, on the ground that the societies which these two persons were representing had not complied with the conditions laid down in bye-law No. 19.1.5. The objections were taken to the nominations of both these persons,

namely, the petitioner and the respondent No. 3. It was contended before the Returning Officer that the societies had not supplied the prescribed quantity of milk in three years prior to the election. It was contended before the Returning Officer that the bye-law was not applicable to the societies.

3. Against the order of the Returning Officer, the respondent No. 3 only filed an appeal as provided in Section 152A of the Co-operative Societies Act. In the appeal, the petitioner was joined as a party as he was an objector to the nomination of the respondent No. 3. The Commissioner, Nagpur Division, Nagpur, who is the appellate authority, allowed the said appeal holding that bye-law No. 19.1.1 to 19.1.4 were complied with by the society which the respondent No. 3 had represented. Insofar as the bye-law No. 19.1.5, he held that those conditions were applicable only to the societies who had been the members of the district level societies at least for a period of more than one cooperative year. He pointed out that the co-operative year for the respondent No. 3's society was yet to be commenced and since the society had not completed that period, the provision was not applicable to it at all and as such there was no question of the respondent No. 3 being disqualified on that account.

4. Shri P.C. Madkholkar, learned Counsel appearing on behalf of the petitioner/objector, very strenuously suggested firstly that no proper opportunity was given to the petitioner of being heard, though the petitioner was a party to the said appeal. That does not appear to be so. It has been contended by the learned Counsel on behalf of the other respondents, including the Commissioner, Nagpur Division, Nagpur, that such opportunity was given. Annexure-B itself suggests that a communication has been sent to the petitioner regarding the date of hearing of the appeal, which was on 28.11.1996 at 11 O'clock. The round-about explanation of the petitioner for not having reached the Commissioner Office is not at all acceptable. He thought it to be a mischief played by some others. Such explanation is only to be rejected.

5. Shri Madkholkar further submitted that the order was wholly incorrect on the merits of the matter. In fact, the Commissioner has followed a decision by this Court of M.S. Deshpande, J., in Writ Petition No. 2374 of 1991 decided on 24.9.1991, where the facts are identical and the provision of bye-law was also identical. This very provision of bye-law 19.1.5 has been considered and the learned Judge has held that such societies, the co-operative year in whose case has not commenced or complete, are not governed by the said provision and the representatives of such societies would be perfectly justified in contesting the elections validly. I respectfully follow the said decision. Therefore, there is no question of interference in the case. The petition is, thus, devoid of merits and is liable to be dismissed as such.

6. The respondents had, however, objected to the very maintainability of the petitions on the ground that there was an alternative remedy available to the petitioner by challenging the election, if any, only in an election petition provided by Rule 81 of the Maharashtra Specified Co-operative Societies Elections to

Committees Rules, 1971. The respondents contended that such writ petition at the instance of the petitioner cannot be filed.

7. Similar such objection was taken in Writ Petition No. 2983 of 1996 also. Before we consider the preliminary objection, it will be better to see the merits of that petition also. In that petition also, the order passed by the Commissioner, Nagpur Division, Nagpur, allowing the appeal filed by the respondent No. 4 Purushottam Kesharao Kadam, is challenged. The facts are that the said respondent No. 4 had offered himself as a candidate, so also the petitioner Bhaurao Laxmanrao Deshmukh. The names of the petitioner as well as respondent No. 4 were in the voters' list of the "D" Constituency, i.e., of the Federal Society. The petitioner took an objection to the name of the respondent No. 4, to the effect that the respondent No. 4 was indebted to the society, as per the award dated 26.11.1990 of the Co-operative Court, Nagpur, in Dispute No. 507/83 and, hence, he was disqualified. The Returning Officer rejected this nomination in the scrutiny held on 21.11.1996 and held the respondent No. 4 to be disqualified from contesting the election. Accordingly, the nomination paper of the respondent No. 4 stood rejected, against which he filed an appeal u/s 152-A of the Co-operative Societies Act before the Commissioner, Nagpur Division, Nagpur and in that appeal, the Commissioner took the view that since the respondent No. 4 had paid back the whole dues on the date of scrutiny the said disqualification, if any, stood removed and, thus, allowed the appeal setting aside the order of the Returning Officer.

8. Shri A.B. Choudhary, learned Counsel appearing on behalf of the petitioner-Bhaurao Laxmanrao Deshmukh, pointed out that the Commissioner erred in taking the view that the relevant date for considering the disqualification was not the date of filing of nomination but the date of scrutiny. He relied on number of decisions of this Court to that effect. Shri Choudhary also pointed out that the Commissioner wrongly relied upon a non-existent case of Seema Subhash Ralebhat v. State of Maharashtra 1995 AIHCC 4656. He argued that there was no question of the Commissioner holding that the disqualification attributed u/s 73FF stood removed because of the payment made on the date of scrutiny and as such the respondent No. 4 was not liable to be allowed to contest the election.

9. The tenability of this petition was also excepted by the learned Counsel appearing on behalf of the respondents and it was pointed out that this Court had no jurisdiction under Article 226 of the Constitution of India to entertain the petition which would have the effect of stalling the election process, in any manner. It is pointed out that the list of validly nominated candidates was already finalised and all that remained was the grant of symbols and the voting.

10. The Subject of the tenability no more remains res integra. The Courts have almost unanimously declared that in the matters, such as this, there is no absolute bar to the entertainment of the petition itself, and it cannot be said that jurisdiction under Article 226 of the Constitution of India. The consensus of the case law is that there undoubtedly is a grey area where the Courts could still

entertain the petitions under Article 226 of the Constitution of India and interfere in the matters of elections. This position is obtained more particularly from the reported decision of the Supreme Court in Ramachandra Ganpat Shinde and another Vs. State of Maharashtra and others, . That was a case where the election process was sought to be interfered with on account of the defective electoral rolls. The apex Court found that it was an order of the High Court issued under Article 226 of the Constitution of India, which was a foundation for the preparation of the defective rolls. The Supreme Court, therefore, held that the basis for the electoral rolls is contrary to the Act, Rules and the Bye-laws being the High Court order itself. Firstly, the said High Court order was not during the election process, nor could such order be set aside by the Election Tribunal in any election petition, because that would be again against the judicial discipline. Once it is held that the Election Tribunal had no power to determine the correctness or otherwise of the orders passed by the High Court. The only appropriate forum would be High Court itself, or an appeal to the apex Court, to correct the said order if need be, and no other forum. Relying on this judgment, the case reported, in Sushil Patel v. Collector, Bhandara 1994 (2) Mh. L.R. 131, was also decided and the view was taken that there also an illegality in the electoral roll had crept in because the interim order passed by the High Court was wrongly interpreted by the Collector. The Division Bench of this Court has also observed in Karbhari Maruti Agawan and Others Vs. State of Maharashtra and Others, , that there is no rule of jurisdiction prohibiting the exercise of jurisdiction of the High Court under Article 226 of the Constitution of India, in the matters relating to preparation of voters' list in the matter of elections of specified co-operative societies. Thus, the only position, which is obtained, is that even in the matter of elections, there is no jurisdictional bar to interfere in a writ petition under Article 226 of the Constitution of India. However, there has to be a justification for that the Court could still interfere where it finds that the Election Tribunal would not be able to decide the controversy in question legally and validly; where the Election Tribunal is unable to decide a question, the High Court would still be justified in interfering in the election process to correct the illegality committed. It will be, therefore, required to be seen as to whether in the present case, such situation has arisen or not and whether what is being sought to be achieved by this writ petition can be gone into or enquired by the Election Tribunal or not.

11. Here, the learned Counsel has pointed out that the Commissioner has acted in a wholly incorrect manner in holding that the disqualification of the respondent No. 4 Purushottam stood removed because of the payment of the arrears on the day of scrutiny. According to the learned Counsel, on the date of the nomination the respondent No. 4 was disqualified and if that was so, merely because on the day of scrutiny he made certain payments as was required of him, that could not remove the disqualification and on that ground his nomination paper could not have been directed to be accepted.

12. Rule 81 provides for the ground of declaring the election to be void. Rule 81-

a suggests that if the Commissioner of opinion that on the date of his election a returned candidate was not qualified or was disqualified to be chosen to fill the seat under the Rules, the election could be declared void. Rule 81-c provides that if any nomination paper had been improperly rejected, even then the election could be declared to be void. Rule 81-d provides that where the result of the election, insofar as it concerns a returned candidate, has been materially affected by the improper acceptance of any nomination, there also the election could be declared to be void.

Reading Rule 81, it would be clear that in case the respondent No. 4 is elected, his election would have to be challenged, and in that election petition, it would be perfectly justifiable for the Election Tribunal to consider as to whether on the date of his election, he was so disqualified for being chosen to contest the election. That would be a subject perfectly within the jurisdiction of the Election Tribunal. The petitioner herein is vociferously contending that the respondent No. 4 was not qualified on account of the fact that there were arrears against him as ordered by the Co-operative Court and he had not cleared the same when he filled up the nomination form and, therefore on that account his nomination form was liable to be rejected. The petitioner can, therefore, allege before the Election Tribunal that the respondent No. 4 was not qualified.

13. Shri Choudhary, however, relied upon another Single Bench decision of this Court reported in Nanaji Bhokre Vs. Commissioner, Amravati Division, Amravati and others, , (Sirpurkar, J.) and pointed out that as per this decision, once the Commissioner had decided the question regarding the valid nomination of the candidate, there could be no further election petition on the same question. In Nanaji's case, the petition was filed by a candidate whose nomination paper was rejected by the Returning Officer and his appeal u/s 152A was also decided by the Additional Commissioner who found that the petitioner was engaged in the business similar to the one carried out by the Society and as such he was disqualified from contesting the election. It was held in that case that such petitioner would have been required to ask the Election Tribunal the same question regarding his qualification to contest the election and if it was so, it could be that in an election petition the matter could have gone before the Additional Commissioner also u/s 144-T and then it would be a travesty of legal proceedings, because in that case, the Additional Commissioner would have been required to decide the correctness of the order of the Commissioner upholding the rejection of nomination paper of the petitioner. Relying on this ratio, Shri Choudhary says that here also the Commissioner has finally decided the question of the disqualification of the respondent No. 4 - Purushottam and, therefore, if an election petition is to be filed, it would be the same question which will have to be gone into by the Election Tribunal. I am afraid, the judgment in Nanaji's case is being read too widely by the learned Counsel. Firstly, the facts in that case are entirely different. There, it was a candidate himself who has appealed against his rejection and the appeal was dismissed and, therefore, the election petition had to be essentially at the instance of "such candidate" only. In the case before us,

such election petition would not be by such candidate but some other person like petitioner. Therefore, the scope of the election petition would be essentially different when it is filed not by the candidate as in Nanaji's case but by a person like petitioner. The person like petitioner would have to file an election petition under Rule 81-a. The scope, therefore, in the two election petitions would be entirely different. It cannot be said that in the election petition, if filed by the presener, the Election Tribunal would be deciding the same question. The apart, in such election petition by the petitioner, the elected candidate could still show that though he had made a payment on the date of the scrutiny, he was still not disqualified on the date of his election. What the Commissioner had decided here was not as to whether the respondent No. 4-Purushottam was disqualified or not but as to whether the Returning Officer was right in rejecting his nomination papers.

14. The observations in Nanaji's case (cited supra) were more directed to show that the writ petition was maintainable rather than to hold as subsequent petition untenable. The decision has to be read as a whole. It is specifically observed in para-6 of that decision that the petitioner under Article 226 of the Constitution of India had been entertained in that case because of the peculiars facts of that case. In that view of the matter, the reliance on Nanaji's case on the part of Shri Choudhary is uncalled for. If this objection is held to be as without any basis, then it cannot be said that there is any scope for the interference with the election in the present writ petition. It will have to be held that there is no grey area as was indicated in Sushil Patel's case (cited supra) or even in the decision of Karbhari Maruti Agawan's case (also cited supra). Shri Choudhary heavily relied on the letter decision. However, the facts of that case are-entirely different. That is a case where the dispute was regarding the preparation of electoral rolls and not a dispute as in the present case. The Division Bench in that case took notice of the peculiarity of the rules in respect of preparation of the voter's list in the election to the specified Societies and observed:

Specified Societies Rules provide publication of two separate programmes, one for preparation of the voters' list and another commencing from filling of the nominations. Before the election process enters in the stage of nominations, the list of the voters is already finalized and it would not be desirable to entertain any challenge to the list of the voters after the nominations are filled. Need to complete to elections in time and allow validly elected body to take over charge at the scheduled time can never be lost sight of. The availability of an alternate efficacious remedy after the elections are over will also have to be considered. But if something goes into the root of the validity of the election can be corrected in time without disturbing the election schedule, then interference would certainly be warranted.

Such is certainly not the stage here. The challenge is the second aspect of the programme and an interference as this stage would certainly stultify the election programme.

15. In that view of the matter, it was to be held that both these petitions have no merits and have to be dismissed and are accordingly dismissed with costs.