

(2023) 03 BOM CK 0042
In the Bombay High Court
Case No : Writ Petition No.2688 Of 2023

Suresh Pannalal Sankhala

APPELLANT

Vs

Returning Officer And Others ?

RESPONDENT

Date of Decision : 16-03-2023

Acts Referred:

Constitution Of India, 1950 — Article 226
Maharashtra Co-Operative Societies Rules, 1961 — Rule 58, 58(1)(a)
Maharashtra Co-Operative Societies Act, 1960 — Section 73(CA), 73C(A)(A1), 75(2)
(1), 152

Citation : (2023) 03 BOM CK 0042

Hon'ble Judges : Arun R. Pedneker, J

Bench : Single Bench

Advocate : Vijay B. Patil, S.K.Kadam, V.D.Salunke

Final Decision : Allowed

Judgement

Arun R. Pedneker, J

1] finally.

Rule. Rule made returnable forthwith and heard

2] By the present Writ Petition, the petitioner is challenging the impugned order dated 28.02.2023 passed by the respondent no.1 – Returning Officer, Mahavir Nagari Sahakari Patsanstha Maryadit, Chopda, Taluka Chopda, District Jalgaon, rejecting the objections of the petitioner and accepting the nomination of the respondent no.3 Shantilal Tarachand Bothra for the election to the Co-operative Society, respondent no.2 – Mahavir Nagari Sahakari Patsanstha Maryadit Chopda, Taluka Chopda, District Jalgaon [for short 'society'].

Brief facts leading to filing the present Writ Petition is as under:

3] The elections of the respondent no.2 - Mahavir Nagari Sahakari Patsanstha Maryadit Chopda was due, as such, the election authority declared election of the

said society for the period of 2022 to 2027. The primary voters list came to be published on 04.01.2023. As per the election programme, the nomination came to be accepted from 20.02.2023 to 24.02.2023. The scrutiny of the nomination was from 27.02.2023 and the list of nominated candidate is published on 28.02.2023. The last date of withdrawal of nomination is from 28.02.2023 to 15.03.2023 and the last date of publication of nominated candidate is on 16.03.2023. The election will be taken place on 26th March, 2023.

4] The respondent no.3 filed his nomination for contesting the election of the member of Managing Committee of the Mahavir Nagari Sahakari Patsanstha Maryadit Chopda. The petitioner raised objection to the said nomination of the respondent no.3 on 27.02.2023 on the ground that the respondent no.3 was co-borrower to the hypothecation loan no.19/73 dated 30.08.2023 and hypothecation loan No.19/72 dated 30.08.2013 of Rs.25,00,000/- each. Both the loans are in default and being a co-borrower his nomination is liable to be rejected. It was also further submitted that the respondent no.3 is a defaulter of loan advanced by Sharadchandrika Nagari Sahakari Patpedhi. Similar objection was raised by one more member. Notices were issued by the respondent no.1 authority calling for explanation from the respondent no.3 and the respondent no. 2 – society. The respondent no.1 authority, by order dated 28.02.2023, rejected the objection of the petitioner and accepted the nomination of the respondent no.3. The order dated 28.02.2023 passed by the respondent no.1 Returning Officer, Mahavir Nagari Sahakari Patsanstha Maryadit Chopda observes as under :

True English translation of the order dated 28.02.2023 is as under :

Appropriate proceeding for the recovery of the said loan is undergoing at the Society level. Therefore, rejecting the candidature of Shri. Shantilal Tarachand Bothara due to both defaulted loan matters is neither as per rules nor justifiable. Similarly, Shri Shantilal Tarachand Bothara has repaid the loans of Sharadchandrika Urban Co-operative Society Limited, Chopada entirely and the photocopies of No Dues Certificate are being submitted herewith.

Similarly, it has become clear that in the judgment in the Appeal No. A-30/2020 u/s 152 of the Act before the Divisional Joint Registrar, Co-operative Societies, Nashik Division, Nashik dated 20-1-2021, that, Mrs. Sharmila Sudhir Jain, a director of the Society and co-borrower in the loan case of Sudhir Book Depot, does not fall under the definition of the term 'Defaulter' in terms of the provisions of the Section 73 Sub-section C clause A sub-clause A-1[1] of the Maharashtra Co-operative Societies Act, 1960 and these provisions do not attract to the case of a co-borrower as has been concluded. A copy of the said decision has been enclosed herewith. Therefore, it is requested that, as the objection raised by concerned objectioners Shri. Suresh Pannalal Sankhala and Mrs. Sugana Pravin Jain against the candidature of Shri. Shantilal Tarachand Bothara is neither as per the rules nor justifiable, hence, it be rejected.

Considering above all points, though Shri Shantilal Tarachand Bothra is surety and his property is mortgaged to the Society for the loan of Shri. Shamkant Raghunath Chaudhari and Shri. Ishwar Sukdeo Patil, it would not be proper to consider Shri Bothra as the borrower as the entire loan amount is credited in the account of main borrowers.

The petitioner has challenged the order dated 28.02.2023 passed by the respondent no.1 in the present Writ Petition.

5] The learned counsel for the petitioner submits that the respondent no.3 is a co-borrower of the loan taken by Shri Shamkant Raghunath Chaudhari of Rs.25 lakhs and Shri Ishwar Sukhdeo Patil of Rs.25 lakh and both loans have defaulted.

6] The learned counsel for the petitioner further submits that the respondent no.3 being co-borrower of the loan is disqualified from contesting the elections of the Mahavir Nagari Sahakari Patsanstha Maryadit Chopda in view of bar under Section 73 (CA) of the Maharashtra Co-operative Societies Act, 1960 and the bye-laws of the society. The learned counsel for the petitioner relies upon the judgment in the case of Shetkari Sahakari Sangh Ltd. Vs. Shahuwadi Taluka Shetkari Sahakari Kharedi Vikri Sangh & others reported in 1999 (1) Bom.C.R. 143, in the case of R. Arun Vs. M/s. Indsind Bank Limited in O.S.A.No.347 of 2017 and C.M.P.No.22497 and 22498 of 2017, decided on 09.02.2018 and also in the case of Sambha Gangaram Pikale Vs. State of Maharashtra & others reported in 1996 (2) Mh.L.J. 182.

7] Per contra, the learned counsel for the respondent no. 3 submits that the loan is taken by Shri Shamkant Raghunath Chaudhari of Rs.25 lakhs and Shri Ishwar Sukhdeo Patil of Rs.25 lakh and the respondent no. 3 is only a guarantor to the said loan and the property of the respondent no.3 is mortgaged to the said purpose. The amount of loan disbursed is entirely to the aforesaid two persons and merely because the respondent no.3 is a guarantor, he is termed as a co-borrower. In fact, there is no application for seeking loan by the respondent no.3 from the respondent no. 2 society. The respondent no.2 has thus correctly held that the respondent no. 3 in fact is a guarantor and accordingly has held that the guarantor is not liable under Rule 58 of the Maharashtra Co-operative Societies Rules, 1961. The learned counsel relies upon the judgment of the Bombay High Court in the case of Utrane Vividh Karyakari Seva Sahakari (V) Socy. Ltd. & others Vs. Laxman Dalpat Patil & others reported in 1990 (1) Bom.C.R. 217 and also in the case of Pravin Indarchand Jain Vs. State of Maharashtra & others in Writ Petition No.11348 of 2021, decided on 14.10.2022 and also relies upon the judgment in the case of Ramesh Rajaram Patil Vs. The Additional Commissioner reported in AIR 1995 Bom 91.

8] Having considered the rival submissions. It is necessary to note relevant provisions of the Maharashtra Co-operative Societies Act and the bye laws of Mahavir Nagari Sahakari Patsanstha Maryadit Chopda. The relevant provisions of the Section 73CA of the Maharashtra Co-operative Societies Act, 1960 reads as

under:-

[73.CA]. Disqualification of committee and its members]

[(A1) In the case of a society, which gives loans to members for purchasing machinery, implements, equipment, commodities or other goods, or which deals in such goods, no member, who or whose member of the family is a dealer in such goods or is a director of a company or a partner in a firm carrying on business in such goods, in the area of operation of the society shall be eligible for being elected or nominated as a member of the committee of such society;

Explanation. - For the purposes of this sub-section, the expression "family" shall have the same meaning as explained in the Explanation 1, to sub-section (2) of section 75.

(1) Without prejudice to the other provisions of this Act or the rules made thereunder in relation to the disqualification of being member of a committee, no person shall be eligible for being appointed, nominated, elected, co-opted or, for being a member of a committee, if he -

(i) is a defaulter of any society;

Explanation. - For the purposes of this clause, the term "defaulter" includes -

(d) in the case of non-agricultural credit societies, a member who defaults the payment of any installment of the loan granted;

9] The relevant provisions of the bye laws no.4 (17) and 44 (9) of the society, which reads as under:

4. Definition :

(17) 'Defaulter' means any borrower whose loan is in default for more than 90 days; also a person who is a guarantor to such a loan.

44. Disqualification for the post of Directorship :

An active member of the society shall be disqualified to be elected as a Director or become a member – Director of the society, if such a member -

(9) Has become defaulter under the provisions of bye laws.

10] From the contentions of the parties it would be easily ascertained that the respondent no. 3 is mentioned as 'co-borrower' of the aforesaid loan. However, even if the contention of the respondent no.3 is accepted, then he is a guarantor to the loan which is defaulted and he would still be disqualified from contesting the elections to the Managing Committee of the respondent no. 2 – society for the reasons mentioned in his judgment.

11] The bye-laws no.4 (17) of the society clearly mentions that defaulter means any borrower whose loan is in default for more than 90 days; also a person who is a guarantor to such a loan is the defaulter. Thus, the respondent no. 3 could

be a defaulter even if he is a borrower or a guarantor to the said loan. Bye law No. 44 of the society specifically provides that a member of the society shall be disqualified to be elected as a Director or become a member – Director of the society, if such a member has become defaulter under the provisions of bye laws of the society. Thus, in the instant case, the respondent no.3 is a defaulter of the Mahavir Nagari Sahakari Patsanstha Maryadit, Chopda, Taluka Chopda, District Jalgaon even if he is a guarantor to a loan which is defaulted in terms of bye-law no. 4 (17). While considering similar situation, while examining similar bye laws of a co- operative society this Court has held that even a guarantor is barred from contesting elections to the Managing Committee. This Court in the case of Vaibhav Manohar Bhokare Vs. State Co-operative Election Authority, through its Secretary & others in Writ Petition No.254 of 2023, decided on 17.01.2023 has held at para 15 as under :

15. Coming to the facts of the instant case, the respondent no. 3 in both the petitions are clearly barred from contesting the election to the managing committee of the society in view of the bye law nos. 4 (17) and 44 (9) of the Yogeshwar Nagari Credit Co-operative Society, Dhule.....

12] Reliance placed by the learned counsel for the respondent no.3 in the case of Utrane Vividh Karyakari Seva Sahakari (V) Socy. Ltd. & others Vs. Laxman Dalpat Patil & others reported in 1990 (1) Bom.C.R. 217 has held at paras 9 & 10 as under :

9. The respondents had also challenged the election of respondent No.4 who is the original petitioner No. 5 on the ground that he was disqualified from contesting the election because he was a surety for a borrower who had defaulted in repayment of his loan.

10. Rule 58 (1) (a) of the Maharashtra Co-operative Societies Rules, 1961 prior to its amendment on 16-10-1987, was as follows :-

"58 (1) No person shall be eligible for appointment or election as a member of the committee of a society, if – (a) he is in default to any society in respect of any dues from him, either as a borrower or as a surety for such period as is specified in this behalf in the bye-laws of the concerned society, or for a period exceeding three months, whichever is less"

Petitioner No.4 falls within this disqualification because both at the time of the scrutiny of the nomination papers as also at the time of election the unamended rule was in force. The said petitioner was a surety for a defaulting member. Hence he was disqualified. The Rule has been amended on 16th October, 1987, as a result of which a surety for a defaulting borrower is now no longer disqualified. But the benefit of this amendment was not available to petitioner No. 4 at the material time. It was on account of this unamended rule 58 that both the lower courts have considered petitioner No.4 as disqualified from contesting the election in question.

In the instant case, the respondent no.3 is disqualified under the bye laws of the respondent no.2 society and there can be additional qualification prescribed for being a managing committee member in the bye laws of the society. Although, the bye laws cannot dilute the requirement of qualifications as prescribed in the Maharashtra Co-operative Societies Act, 1960 for contesting elections, the bye laws of the society can prescribe additional qualifications as held in the case of Sambha s/o. Gangaram Pikale Vs. State of Maharashtra & others reported in 1996 [2] Mh.L.J. 182. In the instant case, bye laws nos.4 (17) and 44 ((9) of the Mahavir Nagari Sahakari Patsanstha Maryadit, Chopda prescribes additional qualification for being elected member of the Co-operative society. The respondent no. 3 being a defaulter in view of the bye-laws of the society, is barred from contesting the elections of the respondent no. 2 - Mahavir Nagari Sahakari Patsanstha Maryadit, Chopda.

13] The reliance placed by the learned counsel for the respondent no. 3 on the judgment of this Court in the case of Pravin Indarchand Jain Vs. State of Maharashtra & others in Writ Petition No.11348 of 2021, decided on 14.10.2022. The learned counsel for the respondent no.3 also placed reliance on the judgment in the case of Ramesh Rajaram Patil Vs. The Additional Commissioner reported in AIR 1995 Bom 91 and submits that in the similar facts, the respondent no. 6 Sharmila Sudhir Jain therein was treated as co-borrower as she had offered security to the credit facilities and the facts in the case of Ramesh Rajaram Patil [supra] are very similar to the facts of the respondent no.3 in the instant case. However, final order passed by this Court in above judgment of Ramesh Rajaram Patil [supra] there is no specific finding as regards applicability of the Rule 58 of the MCS Rules, 1961 with respect to the respondent no.6 as being not disqualified for being co-borrower or a guarantor of a loan which is defaulted. The order therein was set aside for having being passed without issuance of the notice to the respondents and as such the judgment does not lay down proposition of law that guarantor cannot be a defaulter in view of the amendment of Rule 58 of the MCS Rules, 1961.

14] This Court in the case of Vaibhav Manohar Bhokare Vs. State Co-operative Election Authority, through its Secretary & others in Writ Petition No.254 of 2023, decided on 17.01.2023, while considering similar case, has examined the scope of interference in the election matters and has held in para nos.12, 13 and 14 as under :

12] It is also to be noted that in the case of Dattatray Genaba Lole and others Vs. Divisional Joint Registrar, Co-operative Societies and others reported in 2022 (1) Bom.C.R. 471 at paras 8.3 and 8.4 this Court has held as under certain circumstances alone, this Court can interfere with the election process. Para 8.3 and 8.4 of the said judgment, reads as under :

8.3 The legal principles that emerge from the various judgments noted and discussed in detail below is that as a matter of principle, Courts have been reluctant to interfere at an intermediate stage of an election process. It has been

held that every allegation of illegality or irregularity and every assertion of rights by persons being excluded from the voters list are not entertained by Courts under Article 226 of the Constitution of India at the intermediate stage of the election process. There is a strong public policy reason behind Courts being circumspect in entertaining challenges at this stage under Article 226 of the Constitution of India. This is because there is a vital public interest in the elections being completed after which various matters can be gone into. A liberal approach to interference at the intermediate stage would frequently result in election processes being halted or becoming uncertain, which by itself undermines the sanctity of such elections and the democratic object that they seek to achieve.

8.4 The only circumstance in which the Courts would be inclined to interfere in a challenge to an election process at an intermediate stage would be when the order or action under challenge is patently and demonstrably illegal, such as, for example, by applying a non-existent rule or provision to the election process or failing to adhere to a mandatory provision. The intervention in such cases has been explained as enabling or assisting the process of the election rather than thwarting or stalling it. Also, one of the important aspects to consider is the precise stage of the election process and the delay, if any, in the filing of the petition.

13] Thus, there is no absolute bar for exercise of the writ jurisdiction of this Court in interfering with elections to the co-operative society. However, the same has to be exercised only in case of patent illegality coupled with other factors such as stage of election and the effect the interference will cause on the on going elections. While examining similar facts situation, the Division Bench of this Court in the case of Dalsing Shamsing Rajput Vs. State of Maharashtra & ors. reported in 2006 (5) Bom.C.R. 691 in para 6 has held as under:

6. If at all respondent No. 5 is not eligible to contest the elections to the Managing Committee of the Society, and if we can prevent him from so contesting without disturbing the election programme, we feel that the same will serve the interest of justice. Election petition cannot be termed as equally efficacious remedy in the present fact situation. It will be absurd and ridiculous to the democratic process of election that a person not eligible to contest is allowed to contest any election and then efforts are started to dislodge him. We are, therefore, not inclined to feel obstructed by the availability of alternate remedy. In fact, we are of the considered opinion that the alternate remedy suggested by learned Advocate Shri V.B. Patil is certainly not equally efficacious remedy in the present matter.

14] This Court in the case of Dalsing Shamsing Rajpur (supra) in a very similar situation has held that when the member is not eligible to contest the election to the Managing Committee of the society, this Court can prevent him from so contesting without disturbing the election programme and the same will serve the interest of justice. This Court has further held that election petition cannot be

termed as equally efficacious remedy in the fact situation. That it would be absurd and ridiculous to the democratic process of election that a person not eligible to contest is allowed to contest election and then efforts are started to dislodge him. Thus, this Court exercised its writ jurisdiction and prohibited ineligible candidate from contesting the election.

15] Coming to the facts of the instant case, the respondent no.3 is clearly barred from contesting the election to the managing committee of the Mahavir Nagari Sahakari Patsanstha Maryadit Chopda in view of the bye law nos. 4 (17) and 44 (9) of the Mahavir Nagari Sahakari Patsanstha Maryadit Chopda. The order passed by the respondent no. 1 – Returning Officer is patently illegal. In view of the law laid down in the case of Dattatraya Genaba Lole Vs. Divisional Joint Registrar, Co-operative Societies reported in [2022] 1 Bom.C.R. 471 in para 8.3 and 8.4, this Court can interfere in the election process under the circumstances mentioned therein and in the case of Dalsing Shaming Rajput Vs. State of Maharashtra reported in [2006] 5 Bom.C.R. 691, this Court has interfered in the illegal acceptance of the nomination without disturbing the election process.

16] Thus, I hereby quash and set aside the order passed by the respondent no.1 – Returning Officer, Mahavir Nagari Sahakari Patsanstha Maryadit, Chopda, Taluka Chopda, District Jalgaon, accepting nomination of the respondent no.3. The respondent no. 3 is barred from contesting the elections to the Mahavir Nagari Sahakari Patsanstha Maryadit, Chopda. The respondent no. 1 - Returning Officer, Mahavir Nagari Sahakari Patsanstha Maryadit, Chopda, Taluka Chopda, District Jalgaon to make necessary correction in the final list of nominated candidates after the last date of withdrawal of nomination. The election to the Managing Committee of the Mahavir Nagari Sahakari Patsanstha Maryadit Chopda can proceed further without change of the election programme.

17] In view of the same, Rule is made absolute in above terms.

18] The Writ Petition is allowed accordingly.

[ARUN R. PEDNEKER]

JUDGE

. Mr.S.K.Kadam, learned counsel appearing for the respondent no.1 – election authority, at the time of pronouncement of the judgment, submits that the election to the managing committee of the respondent no.2 – society was unopposed and as such results are declared on 15.03.2023 after 3.00 p.m. and the same is communicated to him today.

Since this Writ Petition was already argued extensively Yesterday i.e. on 15.03.2023 from 10.30 a.m. to 12 Noon and reserved for judgment, the judgment is pronounced.

In view of this judgment, all legal consequences to follow.