

(2010) 01 BOM CK 0068
In the Bombay High Court
Case No : Writ Petition No. 6273 of 2009

Trimbak Patil Madge

APPELLANT

Vs

The Additional Divisional Commissioner, Aurangabad Division
and Others

RESPONDENT

Date of Decision : 13-01-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 15
Maharashtra Co-operative Societies Act, 1960 — Section 144(1), 144(2), 144(3),
144(4), 144(5)
Maharashtra Specified Co-operative Societies (Elections to Committees) Rules, 1971 —
Rule 74, 74(1), 74(2), 76

Citation : (2010) 2 BomCR 681

Hon'ble Judges : S.B. Deshmukh, J

Bench : Single Bench

Advocate : S.S. Thombre, holding for M.S. Karad, for the Appellant; V.B. Ghatge, AGP for R-1, Mahesh V. Ghatge, for R-3 and V.D. Sapkal, for R-5, for the Respondent

Final Decision : Dismissed

Judgement

S.B. Deshmukh, J.—Heard learned Counsel Mr. Thombre for petitioner, learned AGP Mr. Ghatge for respondent Nos. 1 and 2, learned Advocates Mr. M.V. Ghatge for respondent No. 3 and Mr. V.D. Sapkal for respondent No. 5.

2. Rule. Rule made returnable forthwith. Heard finally by consent of the parties.

3. This petition takes an exception to the judgment and order passed by the learned Additional Divisional Commissioner, Aurangabad, dated September 3, 2009 in case No. Coop./Eln./Ptn./45/2008.

4. Few events which are admitted by the parties are listed herein below for disposal of this writ petition:

i) The respondent No. 3 Aurangabad District Central Cooperative Bank Limited, Aurangabad (hereinafter referred to as ?ADCC? Bank for short) is a specified Co-

operative society within the meaning of Section 73G(1) of the Maharashtra Cooperative Societies Act, 1960 (hereinafter referred to as 'said act' for short). The election of the Managing committee of respondent No. 3 ADCC Bank are governed by the provisions of Maharashtra Specific Societies Committees Rule 1971 (herein after referred to as Rule of 1971).

ii). Petitioner, respondent No. 4 and 5 had contested the election of Member of Managing committee of respondent No. 3-ADCC Bank from economically weaker section category.

iii) Petitioner was declared elected as member of ADCC Bank on 28.12.2007. In other words present petitioner is elected candidate from the weaker section constituency from respondent No. 3 ADCC Bank.

iv) Declaration as elected candidate in favour of the petitioner was challenged by filing election petition by the respondent No. 5 before the Additional Divisional Commissioner, Aurangabad. This was registered as case No. Co.op/Ele./Pet./45/2008.

v) This petition was heard finally by the learned Additional Divisional Commissioner, Aurangabad holding that deficiencies or defects pointed out by the present petitioner in election petition filed by the respondent No. 5 are curable defects. Two issues were framed by the Additional Divisional Commissioner that 1) "Whether provisions of Section 144V(2) are directory or mandatory? and 2) Does every schedule/annexure requires verification and signature of the petitioner?". Accordingly it was answered in favour of the respondent No. 5.

5. The learned Counsel Mr. Thombre appearing for the petitioner points out Annexure "C" of the compilation for deciding the application for maintainability of the election petition. In this application, it has been stated that Section 144V is material. Said section has been quoted in this application. In paragraph No. 4 of the application it has been stated that the petitioner (respondent No. 5) in this writ petition has not complied with the provisions of Maharashtra Cooperative Societies Act. The petitioner has not verified the annexures which are annexed with election petition and has not filed his affidavit in support of annexures and therefore, the election petition is not maintainable as per the provisions of law and issue of maintainability has to be decided and therefore election petition filed by the petitioner may kindly be dismissed. This application was filed on June 25, 2009. There is no affidavit in support of the petition filed by the respondent No. 5 before learned Additional Divisional Commissioner. He also submits that annexures have not been verified as required under law. In support of his submission, he has relied on the judgment of learned Division Bench of this Court in the matter of Shrikrushna Sadashiv Dhamankar Vs. The Nasik Merchants Co-operative Bank Ltd. and Others, . Mr. Thombre, learned Counsel emphasized paragraph No. 19 and 20 of this reported judgment. He submits that, the ratio is squarely applicable to the case at hand. He therefore seeks quashment of the order impugned in this writ petition.

6. Learned Counsel Mr. Sapkal who appears on behalf of respondent No. 5 submits that learned Additional Divisional Commissioner has considered the provisions laid down u/s 144V and Rule 74. It is a discretion vested with the learned specified officer i.e. learned Additional Divisional Commissioner. This discretion has been justifiably exercised. He has also pointed out Section 144(I) of the said Act and Rule 74 of Rules 1971. He relied on paragraph No. 9 and 16 of the Judgment relied upon by the learned Counsel Mr. Thombre in the matter of Shrikrishna Dhamankar (supra). Mr. Sapkal, the learned Counsel also relied on the judgment of Division Bench of this Court in the matter of Sitaram Hirachand Birla v. Yograjsing Shankarsing Parihar and Ors. reported in 1953 BCI (O) 35. This judgment relied by Mr. Sapkal is in connection with his submission that word "may" is construed as "shall" and expression "shall" as "may" under Sub-rule 1 and 2 of Rule 74. He ultimately submits that petition is devoid of substance and therefore be dismissed.

7. The election of the Managing Committee or Board of Directors of the Specified Society is the matter governed by Chapter XI-A of the said Act. In chronology Section 144I defines the expression "Corrupt practices" which reads as follow:

144. Corrupt Practices : The following shall be deemed to be corrupt practices for the purposes of this Chapter:

(1) "Bribery", that is to say-

(A) any gift offer or promise by a candidate or his agent or by any other person with the consent of a candidate or his election agent of any gratification, to any person whomsoever, with the object, directly or indirectly of including-

(a) a person to stand or not to stand as, or to withdraw or not to withdraw from being a candidate at an election : or

(b) an elector to vote or refrain from voting at an election, or as a reward to-

(i) a person for having so stood or not stood, or for having withdrawn or not having withdrawn his candidature; or

(ii) an elector for having voted or refrained from voting:

(B) the receipt of, or agreement to receive, any gratification, whether as a motive or reward-

(a) by a person for standing or not standing as, or for withstanding or not withdrawing from being, a candidate:

or

(b) by any person whomsoever for himself or any other person for voting or refraining from voting, or inducing or attempting to induce any elector to vote or refrain from voting, or any candidate to withdraw or not to withdraw his candidature. For the purposes of this clause, the term "gratification" is not restricted to pecuniary gratifications or gratifications but estimable in money and

it includes all forms of entertainment and all forms of employment for reward, but it does not include the payment of any expenses bonafide incurred at, or for the purpose of, any election and duly entered in the account of election expenses referred to in Section 144F.

(2) Undue influence, that is to say, any direct or indirect interference or attempt to interfere on the part of the candidate or his agent, with the free exercise of any electoral right:

Provided that:

(a) Without prejudice to the generality of the provisions of this clause, any such person as is referred to therein who-

(i) threatens any candidate or any elector, or an elector to believe that he, or any person in whom he is interested with injury of any kind including social ostracism and ex-communication or expulsion from any case or community, or

(ii) induces or attempts to induce a candidate or an elector to believe that he, or any person in whom he is interested, will become or will be rendered an object of divine displeasure or spiritual censure, shall be deemed to interfere with the free exercise of the electoral right of such candidate or elector within the meaning of this clause;

(b) a declaration of public policy, or a promise of public auction, or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this clause.

(3) The hiring or procuring, whether on payment of otherwise, of any vehicle or vessel by a candidate or his agent or by any other person with the consent of a candidate or his election agent, or the use of such vehicle or vessel for the free conveyance of any elector (other than the candidate himself, the members of his family or his agent) to or from any polling station Provided that, the hiring of a vehicle or vessel by an elector or by several electors at their electors at their joint costs for the purpose of conveying him or them to and from any polling station shall not be deemed to be corrupt practice under this clause:

Provided further that, the use of any public transport vehicle or vessel or railway carriage by any elector at his own cost for the purpose of going to or coming from any polling station shall not be deemed to be a corrupt practice. Explanation ? In the clause and in the next succeeding clause, the expression "vehicle" means any vehicle used or capable of being used for the purpose of road transport, whether propelled by mechanical power or otherwise and whether used for drawing after vehicles or otherwise.

(4) The use of vehicles belonging to a specified society for the purposes of any election.

(5) The incurring or authorizing of expenditure in contravention of Section 144F.

(6) 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 date of declaration of the result thereof.

8. A cursory look to this Section 144-I reveals that Section 144-I(i) defines expression "bribery". This Bribery has been further detailed in sub Clauses (A) and (B). There are further minute details given in this section i.e. Section 144(1). Section 144I Sub-section (2) defines expression "undue influence". I have considered this entire Sub-section (2) relating to "undue influence". Section 144(2) Sub-section (3) clarifies "hiring" or "procuring vehicles whether on payment or otherwise" either by candidate himself, his agent or any other person with the consent of the candidate or his election agent. It is important that hiring or procuring of such vehicle or vessel must be of free conveyance of any elector (other than the candidate himself, the members of his family or his agent). Explanation is also appended to Section 144-I after second proviso. Sub-section (4) of Section 144 makes reference to use of vehicles belonging to a specified society for the purposes of any election. Sub-section 5 is a ground pertaining to expenses or expenditure incurred or authorized in contravention of Section 144F. Sub-section 6 of Section 144-I makes a reference to 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 date of declaration of the result thereof.

9. The controversy amongst the petitioner and respondent No. 5 revolves around the nature of election petition or grounds raised in election petition filed by respondent No. 5 before the Specified Officer i.e. learned Additional Divisional Commissioner. According to the counsel appearing for petitioner in this writ petition that ground refers to alleged corrupt practices committed by the present petitioner. In contrast to the submission, counsel appearing for the respondent No. 5/original petitioner who approached to the Specified Officer, ground raised is not the corrupt practice. Precisely it is submitted on behalf of respondent No. 5 that petitioner candidate does not belong to a weaker section. Certificate obtained by him showing his income below Rs. 15,000/- is in collusion with revenue authorities is false and fabricated and authorities concerned are facing criminal prosecution.

10. In the light of the submission of the counsel for respondent No. 5 and with the assistance of the counsel appearing for petitioner and respondent No. 5, I have perused the copy of the election petition on record. Paragraph No. 2 of this election petition filed by the respondent No. 5 before specified Officer reads that respondent No. 3 (present writ petitioner) at the time of submission of nomination submitted the certificate of Weaker Section dated 21.11.2007. It is further stated in paragraph No. 2 of the election petition that the respondent No. 3 in collusion with the revenue authorities got the certificate showing only land gat No. 267 situated at village Apatgaon, Tq. & Dist. Aurangabad to the extent of 10 R and income from the said land is shown at Rs. 11,000/-. In same paragraph

No. 2 names of family members were given by the present writ petitioner according to respondent No. 5 have been listed. These are five names mentioned in paragraph No. 2 of the election petition. In paragraph No. 3 of the election petition apart from the land gat No. 267 information regarding other lands of family members of the respondent is given. Counsel for the respondent pointed out that land to the tune of 3H 93R is shown as the total holding of the persons whose names have been mentioned in the tabular information. Apart from this agricultural land shown in paragraph No. 4, it has been alleged by the respondent No. 5 that present petitioner owns flat No. A-7 in Kasliwal Classic, Shahanoormiya Dargah at Aurangabad. According to respondent No. 5, present petitioner owns other flats in the said building but at present the record is not traceable by the respondent No. 5. In paragraph No. 5 of the Election petition, it has been pleaded that income from the land in favour of the present petitioner is in lacs of rupees. Further allegation is leveled that present writ petitioner is fetching income from the rent of the flats. Statement is also made that Tahsildar and other revenue officer appears to have been issued false and bogus certificate by preparing the false record in respect of income of the present writ petitioner. With this, counsel appearing for respondent No. 5 points out grounds raised in the election petition before Specified Officer. Ground No. 1 -Allegations that present writ petitioner is holding around 3H 93R land and also having flats and getting income from the same in lacs of rupees. II Allegations of playing fraud and mischief by the present petitioner with the concerned revenue authorities and obtaining false certificate of weaker section. This sentence is improper which I would like to reproduce herein below:

Respondent No. 3 played fraud and mischief with the concerned revenue authorities and got the false certificate of weaker section and as such committed the corrupt practices. The corrupt practices committed by the respondent No. 3 on 07.09.2007 at the time of submission of application for issue of Weaker Section Certificate on 17.09.2007, while obtaining the recommendation from the Circle Inspector Shri A.P. Ghodke.

11. Ground No. IV pointed out by the counsel appearing for respondent No. 5 raises a grievance as Tahsildar concerned prior to issue of certificates in favour of present petitioner did not hold any inquiry in respect of the income of the present petitioner. I have also considered other grounds in this petition. In my view, ground No. II and contents thereof, which I have quoted in foregoing paragraph of the order, is of prime importance to resolve the controversy amongst the parties.

12. With this, now I would like to consider the provisions laid down under Rule No. 74 and Rule 76. Rule 74 pertains to presentation of election petition. Sub-rule (1) of Rule 74 provides two months time from the date of declaration of the result of the election. In other words this Sub-rule lays down limitation for filing election petition. In the case on hand there is no controversy pertaining to filing of election petition beyond period of limitation. Sub-rule 2 of Rule 74 provides

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

13. Sub-rule 1 of Rule 76 provides that, every election petition shall be tried by the Commissioner. This proviso to this Sub-rule which confers discretion on the specified officer i.e. Commissioner to refuse, for reasons to be recorded in writing, to examine any witness or witnesses, if he is of the opinion that evidence of such witness or witnesses is not material for the decision of the petition. Sub-rule 2 of Rule 76 says that the Commissioner may dismiss an election petition which does not comply with the provisions of Rule 74.

14. The substantive challenge for the election of the members of Managing Committee/Board of Directors of the society is u/s 144V. This section speaks about the contents of the petition. Section 144V(1) is the provision around which submission of the counsel for petitioner and respondent No. 5 are revolving. Said provision is reproduced herein below:

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.

15. The ground made available to the person challenging the elections of the elected candidate and manner of pleading the contents of such petition, in my view, are governed by Section 144V(1)(b) to mean, "putting forth 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". The expression any corrupt practice that petitioner alleges is significant and most important.

16. After reading the entire petition copy of which is on record, I am of the view

that it is not a petition based on corrupt practice as defined u/s 144-I of the said Act. Section 144V Sub-sections (1)(c) provides about the signing of the petition by the petitioner and verification thereof in the manner laid down in the Code of Civil Procedure, 1908, for the verification of pleadings. Proviso is also important appended to Section 144(V)(1) which lays down that when the petitioner alleges any corrupt practice the petition shall be accompanied by an affidavit in support of the allegation of such corrupt practice and the particulars thereof.

17. I have recorded my opinion that petition filed by respondent No. 5 is not based on the expression 'Corrupt practices' defined u/s 144-I. Obviously, therefore, this case cannot be said to be covered by Section 144V(1)(b). Proviso talks about filing of the affidavit but then it is prefixed by the words that where the petitioner alleges any 'Corrupt practices'. Since I have held that petition filed herein is not based on alleged 'Corrupt practices' defined u/s 144-I, there is no question of compliance of proviso of Section 144V(1) and more specifically proviso thereof. Since petition is not maintainable on the ground that there is a 'Corrupt practice', simple affidavit filed on record, as pointed out by the counsel appearing for respondent No. 5, (page 16) in my view, suffice the purpose. While parting with the Section 144V(1) it is to be noticed that verification contemplated by Section 144V(1)(c) is like the verification of pleadings. Order VI Rule 15 of the CPC provides verification of the pleadings. I have considered Sub-section (2) of Section 144V which provides that schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition.

18. Turning to the reported judgment of the Division Bench on which reliance is placed by Mr. Thombre, learned Counsel for the petitioner and also by learned Counsel for respondent No. 5, I may state that facts of the reported judgment, provisions of law considered by the court and conclusions drawn are important while finding out whether judgment cited has got applicability. In the matter of Shrikrishna Dhamankar (supra) learned Division Bench has discussed the facts in paragraph Nos. 1 to 5. Paragraph No. 9 of the judgment is rather important, wherein the learned Division Bench has observed that Additional Commissioner has held that 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. This part of paragraph No. 9 is most important and distinguishable on facts in the case at hand. In the case at hand I have recorded finding that grounds raised in the petition are not corrupt practices as defined u/s 144-I of the said Act. Paragraph No. 16 of the judgment makes clear the legislative intent to take trial of the election petition, which alleges 'Corrupt practices' on the part of respondents, seriously. This paragraph also talks about ground raised in the election petition as involving 'Corrupt practices' obviously u/s 144-I of the said Act. After reading these two paragraphs conjointly i.e. paragraph No. 16 and 9 of the reported judgment, I reached the conclusion that facts therein were altogether different. It can be said that there is a sea-change difference in the facts of the reported

judgment and the case on hand.

19. The counsel for the petitioner emphasizes paragraph Nos. 19 and 20 of the judgment. Paragraph No. 19 deals with Rule 74 Sub-rule (i) which provides limitation. I have already stated in earlier part that in the case on hand, issue of limitation is neither raised by any of the parties. Paragraph No. 20 of the Judgment and more specifically portion which emphasized by counsel Mr. Thombre reads thus:

The Commissioner has no power to condone the deficiencies of an election petition in complying with the requirements provided for in Section 144V of the Act. A petition which is not in strict compliance with the requirements of Section 144V of the Act is not a petition at all and Rule 74 will not apply to the same.

In my view these observations of the Division Bench are based on observations of paragraph No. 9, there, in that case, 'Corrupt practices' was the ground raised and accepted by the Division Bench. This paragraph also does not help to the present petitioner.

20. The counsel for respondent No. 5 in relation to his submission, has relied on judgment of Division Bench in the matter of Sitaram Birla (supra). He has pointed out paragraph No. 4, which, with great caution, I have considered. Independently I have given my consideration to Rules 74 and 76 of Rules of 1971. In my view, discretion as exercised by the learned Specified Officer i.e. Additional Divisional Commissioner in the facts on hand, firstly; is vested with him and secondly; has been exercised on sound judicial principles.

21. Counsel for the petitioner relied on one more judgment of Division Bench of this Court in the matter of Ashok Tapiram Patil " A.T. Nana Patil Vs. Gurumukh Mehrumal Jagwani and Others, It is under the provisions of Representation of the Peoples Act (1950), Section 83. Since I am dealing with the provision laid down u/s 144V of the said Act and Rules 74 and 76, in my view, this judgment cannot be considered in support of petitioner especially on the ground of differential facts. Same is the case with another judgment cited by the learned Counsel for the petitioner in the matter of Ram Sukh Vs. Dinesh Aggarwal, . In this case Honourable Supreme Court held that since material facts and full particulars were not given there is non compliance of the Peoples Act, 1951. For the same reason, in my view, this judgment also does not help the present petitioner since respondent No. 5 is raising his ground based on different facts.

22. Writ Petition stands dismissed without any order as to costs. Rule stands discharged. At this stage, learned Counsel Mr. Thombre appearing for petitioner, seeks suspension of this order for a period of four weeks. Counsel appearing for respondent No. 5 opposes the prayer. Ad-interim relief was granted by this Court on September 23, 2009. In this view of the matter, I am inclined to grant four weeks suspension to this order. This order shall stand suspended for a period of four weeks.