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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.8194 OF 2016

Dr. Sayanna Sayanna Shengulwar PETITIONER
Age - 65 years, Occ - Agriculture
R/o Kundalwadi, Taluka - Biloli
District - Nanded

VERSUS

1. The State of Maharashtra RESPONDENTS
   Through Secretary,
   Department of Co-operation,
   Mantralaya, Mumbai

2. District Deputy Registrar,
   Co-operative Societies,
   Nanded

3. The Returning Officer,
   For the election of the
   Vividh Karyekari Seva Sahakari Sanstha Ltd.,
   Kundalwadi, Taluka - Biloli
   District - Nanded

4. The Vividh Karyekari Seva Sahakari Sanstha Ltd.,
   Kundalwadi, Taluka - Biloli
   District - Nanded
   Through its Secretary,

5. Vitthal Chinnanna Kundulwar,
   Age - Major, Occ - Agriculture
   R/o Kundalwadi, Taluka - Biloli
   District – Nanded

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Mr. V. D. Salunke, Advocate for the petitioner
Mr. A. P. Basarkar, AGP for respondent-State
Mr. S. K. Kadam, Advocate for respondent No.3
Mr. A. N. Nagargoje, Advocate for respondent No.4
Mr. S. S. Thombre, Advocate for respondent No.5

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[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 1st AUGUST, 2016

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard learned advocates for the appearing parties finally with consent.

2. The petitioner is before this court aggrieved by order dated 18th July, 2016 passed by returning officer in the elections to the managing committee of Vividh Karyekari Seva Sahakari Sanstha Ltd., Kundalwadi, under which his nomination has been rejected and the same has been maintained by the appellate authority - District Deputy Registrar, Co-operative Societies, Nanded - respondent No.2.

3. Mr. V. D. Salunke, learned advocate appearing for the petitioner contends that the petitioner has been a member of the VKSS Society, Kundalwadi in his individual and independent character, with reference to land bearing Gut No.248. Late Nagabai Sayanna Shengulwar was his mother. Under a scheme floated by the VKSS Society for irrigation of lands of its members, certain loan had been raised by the society from federal society and apportioned liability of repayment had been

fastened onto the members who were to benefit from the scheme, in proportion of their land holdings. Accordingly, said Nagabai had undertaken to repay her apportioned liability towards the loan. She had been member of the VKSS Society in relation to her land holding bearing No.302/1/B. She had not repaid loan during her lifetime. She died in 2008. Her aforesaid property had been encumbered with the liability undertaken by her.

4. Learned advocate contends that the petitioner, as a member in his independent and individual character, has applied for nomination to membership of managing committee of the VKSS Society, however, the same has been rejected by a very terse order by the returning officer, with reference to section 73CA (A1) of the Maharashtra Co-operative Societies Act, 1960 (The returning officer's order contains section 79 (CA) 1 (i) of the Act) based on a purported complaint by present respondent No. 5 alleging that the petitioner is a defaulter of the VKSS society, since he has failed to repay the loan undertaken to be repaid by deceased Nagabai. Learned advocate points out that respondent No.5 purports to allege that requisite demand notice could not be issued to the petitioner, for the petitioner had been the director of the VKSS Society and further that the Manager /

Secretary of respondent No.5 had been under his influence, as such, requisite legal compliance of issuing demand notice could not be possible.

5. With reference to the objections, according to learned advocate, the petitioner had submitted his written resistance stating that even his mother Nagabai had not taken any loan from the VKSS society and as such, she could not be a defaulter. Moreover, the petitioner in his independent and individual capacity, has been member and his membership is not after death of his mother. It is being submitted that it is the VKSS Society, which is defaulter and not its members. It is only liability is agreed to be shared and therefore, a charge is allowed over the land towards security for repayment. It has further been stated that since no notice had been given in respect of alleged default, the petitioner would not incur any disability as a defaulter pursuant to section 73CA of the Act. Learned advocate further contends that it is in the capacity of a legal heir, property bearing gut No.302/1/B has been inherited by the petitioner as one of legal heirs. According to learned advocate, despite such reply being given, without applying any mind to the same, by a terse order, his nomination has been rejected by the returning officer. Learned advocate further goes on to submit

that the appeal therefrom also failed and as such, the petitioner is before this court.

6. Learned advocate submits that appellate authority as well has not been able to comprehend the situation, factual or legal, for the reason that the observations as are appearing, which have weighed with the appellate authority while dismissing the appeal are depiction of the same, as it has been observed that the petitioner has become member of the society after death of his mother Nagabai. It is further being submitted that during the course of election programme, a letter purportedly had been issued, which was during the course of arguments before the appellate authority was sought to be relied on. It cannot be said to be a demand notice in order to support rejection of his nomination. He submits that even otherwise, going by the date of the communication relied on, period of one month would not be over until date of nomination, as per the election programme.

7. Learned advocate purports to take aid of provision of section 26 of the Act as well as purports to make reference to section 73CA of the Act, to submit that since there cannot be said to be any demand notice in the eye of law for repayment of loan, it cannot be said that the petitioner is a defaulter and upon

that ground his nomination is not liable to be rejected.

8. Mr. Salunke, learned advocate, laying emphasis on the word "*him*" occurring in section 73CA (1) (b) submits that provision would hold good only in the case, it can be said that the loan is granted to a member. Here, in the present case, according to him, it is not the case that it can be said that the loan is granted to the petitioner, when it has been admittedly a liability incurred by mother and not him.

9. In support of his submissions, Mr. Salunke relies on a judgment in the case of *"Abdul Khalekh Mohd. Musa V/s Ramkrishna Maroti Bangar and Others"* reported in *1985 (2) Bom.C.R. 250* and particularly draws attention to paragraphs No.7 and 8 thereof, which have in its focus the procedure that would be said to have been observed while scrutiny of nominations takes place and further to buttress his submissions, that it is the nomination paper, which is the subject matter of the scrutiny which is not supposed to be general investigation into various objections.

10. Additionally, he submits that upon hearing advocates for the respondents that the controversy cannot be allowed to be deflected to other aspects being now argued beyond the scope of the complaint lodged before the returning officer, which

according to him is being done by the learned advocates for the respondents now trying to rely on such documents which were not relied on or were not before the returning officer or for that matter even production of the document dated 13th July, 2016 was beyond the scope of the complaint during pendency of the appeal.

11. Judgment in the case of *"Ravindra Bhaurao Patil Shishode V/s State of Maharashtra and Others"* reported in *2010 (5) Mh.L.J. 410* is being relied on for the purpose that disqualification could be incurred as a defaulter only if the same is incurred in a particular manner. In the present case, according to him, it emerges on record that there is no notice for repayment of any amount due to the VKSS Society as would be required to invalidate his nomination with reference to section 73CA of the Act. He further lays emphasis on an unreported order of division bench of this Court dated 22nd September, 2015 in writ petition No.9182 of 2015 which is with reference to section 26 of the Act, particularly second proviso to sub section (1) of section 26 of the Act, wherein it has been prescribed that society shall give a notice of demand to the members and give reasonable period to comply with, in case of increase in minimum contribution of member in share capital in order to enable the members to exercise right of membership.

He particularly lays emphasis on the observations of paragraph No.6 of said order.

12. Mr. S. S. Thombre, learned advocate appearing for respondent No.5 contends that the petitioner has been director of the VKSS Society at the relevant time and was as such, an influential person in the managing committee of the society. He submits that the petitioner had made himself liable to the responsibility of repayment after inheriting property and had executed a document in this respect. He has stepped into the shoes of his mother. Having undertaken such a liability and being a member and having not paid any amount, in discharge of the liability, it is indeed a default. When a member takes upon himself such a liability and does not discharge it, he is a defaulter, whether the liability is from mother or any other person. He submits that the liability has been undertaken voluntarily and by executing documents, as required under the provisions of the Maharashtra Co-operative Societies Act, particularly, sections 47 and 48. He submits that submission on behalf of the petitioner that no notice of demand had ever been served on him, is a runaway argument in order to suit petitioner's convenience, for, the provision of giving notice as is contained in section 73CA of the Act would not hold the case of

the petitioner. Liability that was undertaken to be discharged was a long term liability and the amount due under the same had not been discharged and the case would be covered by section 73CA (1) (b) rather than as is sought to be contended by learned advocate for the petitioner under section 73CA (1) (c) (ii) of the Act. He further submits that even pursuant to section 73CA (1) (c) (ii) of the Act, it was a liability to be discharged within thirty days from the date of taking loan, which the petitioner has palpably failed to discharge.

13. Mr. Thombre purports to rely on a few documents, which are appended along with affidavit in reply filed on behalf of respondent No.5, particularly, a communication which was purportedly issued in the name of Nagabai to state that as a matter of fact, even that deficiency cannot be said to be available for taking a cover. A demand notice cannot be said to have not issued at all. He further submits that, however, in the case falling under section 73CA (1) (b), such a demand notice is not envisaged under the provisions of law and the person becomes defaulter as soon as he fails to pay any of the installment. Mr. Thombre, purports to repel the argument in respect of word "*him*" occurring in section 73CA (1) (b) of the Act stating that when the petitioner has undertaken to repay the loan by

executing documents, he places himself into the shoes of the person who has undertaken to discharge the liability and as such, it is not open for the petitioner to veer around and contend that the loan is not availed by him. He submits that while the document is executed, it is the original person, who stands replaced by the person, who executes documents and as such, it is not open for petitioner now to contend that said clause under section 73CA of the Act would not hold him.

14. Mr. Thombre, further submits that the liability had been undertaken in 1997 and was supposed to be repaid by 2007, as yet, an amount of Rs. 2,69,293/- is outstanding against petitioner. He submits that, as such, since the amount has not been paid, a default is committed, it is continuing default. He for said purpose, purports to rely on a supreme court judgment in the case of *"Pundalik V/s District Deputy Registrar, Co-operative Societies, Chandrapur and Others"* reported in *(1991) 2 SCC 423* and lays emphasis on paragraphs No.10, 11 and 12 thereof contending that as in said case, it has to be considered that the petitioner has been in arrears in respect of discharge of the liability. He submits that the day an installment falls due and on the due date, failure to pay results in default and the default continues from day to day until it is repaid. He submits that the

observations impeccably apply to present position. He, therefore, submits that it is a tenuous argument that land being charged with the loan being taken by mother, the petitioner is not liable. He submits that once he steps into the shoes of his mother, the argument shall fail, for, he replaces the person wholly and it would not be for him to take only benefits and deny liability.

15. Mr. Nagargoje, learned advocate for respondent No.4 society states that in fact and in law, it would be the petitioner who would require to discharge the liability undertaken by his mother, since he replaces her, undertaking said liability by executing documents. He submits that the notice for repayment of the loan issued in 2008 may have been issued in the name of deceased Nagabai, since the society being unaware about her death then.

16. Mr. S. K. Kadam, learned advocate for respondent No.3 contends that the inquiry undertaken at the time of scrutiny of nominations is of summary nature and the authorities have relied on the documents as have been submitted at the time of the scrutiny. He submits that even if it is assumed that loan has been availed by VKSS Society, the liability for repayment has been incurred by the members by the acts of their volition and

the loan availed by the society had been defaulted along with the society by the members. He, therefore, submits that with reference to the complaint and the record as had been submitted before the authorities, proper decisions have been taken and the same do not require any disturbance.

17. Having heard the arguments advanced as aforesaid, factual position appears to be that Nagabai, mother of the petitioner had undertaken to discharge the liability of an apportioned portion and had kept charge over her property. The petitioner, who had already been a member in the society in his individual capacity, had inherited the property upon which charge had been kept for discharge of the liability. He had executed certain documents with reference to said liability. It thus appears that he has undertaken to discharge said liability. The liability incurred by deceased Nagabai has not been disputed nor execution of document and taking over the liability. Once having taken the liability being a member, it ostensibly appears that it was the liability to be discharged by such member and it is not the case of the petitioner that he has discharged the liability before filing of the nomination. Section 73CA of the Act disables a person who is defaulter of any society from contesting elections of the managing committee of the society. Here, in the

present case, the petitioner appears to have executed certain documents taking upon himself the responsibility of repayment and has not discharged the liability. It appears at least, at this stage that the petitioner may not be said to have ably demonstrated that in spite of factual position adverted to above, he would yet be able to be considered eligible. This being a question which will be required to be considered in an inquiry which would not be of a summary nature, as such, I do not consider that the returning officer or for that matter the appellate authority has committed such a grave error so as to set aside said orders.

18. In view of emerging disputed position, the writ petition is not being entertained and is dismissed leaving it open for the petitioner to resort to such proceedings as would be advised and as would be available in facts and circumstances and in law. Rule stands discharged.

[SUNIL P. DESHMUKH, J.]

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