

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.695 OF 2017
(Atul Bapu Japkar and others Vs. The State of Maharashtra
and others)
WITH
CIVIL APPLICATION NO.5178 OF 2018
WITH
CIVIL APPLICATION NO.9470 OF 2018

Mr.N.V.Gaware, Advocate for the petitioners.
Mr.B.A.Shinde, AGP for respondent No.1.
Mr.S.K.Kadam, Advocate for respondent Nos. 2 and 3.
Mr.A.S.More, Advocate for respondent No.4.
Mr.H.D.Deshmukh h/f Mr.S.R.Zambre, Advocate for respondent
No.5.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 26/07/2018

PER COURT :

1. The petitioners are aggrieved by the order dated 04/01/2017 passed by respondent No.3 District Co-operative Election Officer and District Deputy Registrar, Co-operative Societies, Ahmednagar, by which the objection application filed by respondent No.4 was allowed and 57 persons were deleted from the voters' list of the concerned Co-operative Society.

2. This matter was heard by this Court (Coram : S.B.Shukre, J.) on 17/01/2017 and the competent authority was directed not to

publish the election programme. Consequentially, the programme that was declared on 25/11/2016 with regard to the finalization of the voters' list, remained inconsequential and as such, there were no elections held.

3. I have considered the strenuous submissions of the learned Advocates for the petitioners and the respondents.

4. The contentions of the petitioners can be summarized in brief as follows :-

[a] These petitioners claim to have submitted their applications for being inducted as members of the Co-operative Society on 31/03/2011.

[b] They were issued with receipts indicating payment of the admission fees and shares fees.

[c] The meeting allegedly convened on 31/03/2011 was to consider the induction of these petitioners as members.

[d] The proceeding book, in which the minutes of the meeting are recorded, is blank so far as the meeting on 31/03/2011 is concerned,

[e] The concerned Secretary Mr.Holkar has deliberately kept the proceeding book blank as these petitioners did not belong to the Ruling Party.

[f] The rules of the society mandate that a member of the society cannot vote in the elections for a period of 2 years from

the date of being inducted as a Member.

[g] Section 23(1A) of the MCS Act provides for deemed membership if no decision is taken by the Society for a period of 60 days from the date of receipt of such application.

[h] The respondent No.3 has acted highhandedly and has exercised jurisdiction beyond the scope of Rule 8 of the M.C.S. (Election to Committee) Rules, 2014.

[i] The objection raised by respondent No.4 is vague and ambiguous and does not indicate as to what are the objections.

[j] The objection application must contain details about the objections raised under Rule 8(2).

[k] Respondent No.3 has resorted to a roving inquiry and that cannot be permitted in the light of the following judgments :-

i) Ahmednagar Zilla S.D.V. and P.Sangh Ltd., and another Vs. State of Maharashtra and others [2004(1) SCC 133],

ii) Pundlik Vs. State of Maharashtra [2005(7) SCC 181 = 2005 AIR (SCW) 4371,

iii) Election Commission of India Vs. Ashok Kumar [2000(8) SCC 216 = 2000 AIR (SCW) 3274],

iv) Kawadu Undruji Kundawar Vs. Additional Collector and others [2007(3) Bom.C.R. 157],

v) Dhondiba Parshuram Lakade and others Vs. Someshwar Sahakari Sakhar Karkhana Ltd., and others [1979 Mh.L.J. 311],

vi) Suresh s/o Ambadasrao Varpudkar Vs. District Co-op.Election Officer and others, WP No.3454/2015 dated

27/03/2015.

vii] *Dattatraya Kachru Chine and others Vs. State of Maharashtra and others* [2005(4) Mh.L.J.243 = 2005(4) All M.R. 597],

viii] *Chandrakant Mahadev Patole and others Vs. State of Maharashtra and others* [2010 (Supp) All.M.R. 457].

5. Mr.Kadam, learned Advocate appearing on behalf of respondent Nos.2 and 3 submits as under :-

[a] It is a matter of great suspicion that though the meeting agenda for 31/03/2011 indicates the subject of membership of these petitioners, there is no record to indicate that the said subject was taken up and these petitioners were granted the membership.

[b] In so far as the deeming provision is concerned, the audit reports of the society for the financial year 2010-2011 or 2011-2012 do not account for the membership fees of these petitioners, disproving that any membership fee was deposited.

[c] It is under the rules that each of such Co-operative Societies is supplied with receipt books by the statutory authority under the Co-operative Societies Act and no other receipt book is to be used for issuing receipts indicating payment of membership and shares fees.

[d] The receipt book said to be used for issuing receipts to these 57 petitioners, is not the book, which has been issued by statutory authorities.

[e] The share certificates are also not placed on record and there is no accounting for the receipt of the payments towards

purchasing of such shares.

[f] He relies upon the judgment of the Hon'ble Apex Court in the matter of Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha and another Vs. State of Maharashtra and others [AIR 2001 SC 3982], wherein the law has been settled that finalization of the list of voters under the earlier rules, is an intermediary stage of an election.

[h] Respondent No.3 has not overstepped his jurisdiction and his authority since it was the learned Division Bench of this Court which directed the said authority by order dated 22/12/2016 in WP No.12662/2016 to hear all these petitioners and after making necessary inquiries, decide the objections raised by respondent No.4.

[i] All these petitioners exhaustively canvassed their contentions before respondent No.3 pursuant to the above directions of this Court and since he was directed to consider all contentions, he has passed a reasoned order concluding that these 57 petitioners did not appear to have been inducted as members of the Society.

[j] Whether they are entitled to deemed membership u/s 23(1A), is a mixed question of facts and law as these petitioners will have to prove that they had applied for such membership and after conclusively proving that they had so applied and the applications were pending a decision of the society, that Section 23(1A) could be invoked.

6. Mr.Deshmukh, learned Advocate appearing on behalf of respondent No.5 / Society submits that the earlier Secretary had

acted malafide only to prevent these petitioners from becoming the members of the society. As a newly inducted member does not get the right to vote for 2 years from the date of his membership, these petitioners were not included in the final voters' list in connection with the 2011 Elections. In fact, the competent authority under the M.C.S.Act should initiate strict action against the earlier Secretary Mr.Holkar for his mis-deeds which are on account of his oblique motives.

7. Considering the contentions of the learned Advocates recorded as above, it is quite obvious that several disputed questions have been raised in these proceedings. The learned AGP rightly submits that this Court, while exercising supervisory jurisdiction, should not deal with disputed questions. These petitioners are not remediless and they can resort to a remedy for challenging the results of the elections, if they are aggrieved. In the alternative, he submits that as the said society is without elections for more than 18 months, respondent No.3 has rightly declared the election programme after the ad-interim relief was not continued from 03/07/2018 and these 57 voters may cast their votes, which can be preserved in separate ballot box. After declaration of the results, if they are aggrieved, they may take out appropriate proceedings and if they are held to be

valid members of the Society, the said ballot box could be opened and the results can then be reconsidered by the Court.

8. The Hon'ble Apex Court in Sant Sadguru (supra), has observed in paragraph Nos. 8 to 12 as under :-

“8. It was then urged that the tribunal constituted under the Act has no power to go behind the preparation of the electoral roll and, therefore, the writ petition is maintainable. Learned counsel also strongly relied upon the decisions in the case of Bar Council of India and Ors. vs. Surjeet Singh and Ors. - and Ramchandra Ganpat Shinde and Anr. vs. State of Maharashtra and Ors. - . Learned counsel also referred to Section 100 of Representation of Peoples Act and a decision in the case of Shri Shreewant Kumar Choudhary vs. Shri Baidyanath Panjiar - . In sum and substance, the argument is that since the breach of rule in preparation of the electoral roll cannot be questioned in an election petition before the election tribunal, therefore, the writ petition challenging the preparation of the electoral roll could not have been dismissed on the ground that the appellant had an alternative remedy of filing an election petition. In this regard, it is relevant to notice Rule 81 of the Rules which provides for grounds for declaring election to be void. The relevant portion of the Rule runs as under:

"81. Grounds for declaring election to be void.-

(d)(iv) - by any non-compliance with the provisions of the Act or any rules made thereunder, the Commissioner shall declare the election of the returned candidate to be void."

9. If the contention of the appellant is that there was a breach of rule or certain mandatory provisions of the rules were not complied with while preparing of the electoral roll, the same could be challenged under Rule 81 (d)(iv) of the Rules by means of an election petition. In view that, the preparation of electoral roll in part of the election process and if there is any breach of the rules in preparing the electoral roll, the same can be called in question after the declaration of the result of the election by means of an election petition before the tribunal.

10. In the case of Bar Council of India & Ors. vs. Surjeet Singh & Ors. (AIR 1980 SC 1612), Untwalia, J. speaking for the Court observed thus:

"There is no substance in the last submission made on behalf of the appellants. The manner of resolving disputes as to the validity of election is provided for in Rule 34 of Delhi Council election Rules. This is not an appropriate and adequate alternative remedy to defeat the writ petitioner on that account. Firstly, no clause of Rule 34 covers challenging of the election

on the ground it has been done in this case. Secondly, the Election Tribunal will not be competent to declare any provision of the election Rule ultra vires and invalid."

11. In the aforesaid case, this Court held that a writ petition under Article 226 of the Constitution should not be rejected on account of an alternative remedy by way of election petition where, firstly, the challenge is not a ground under the Act or Rules for filing an election petition and, secondly, where the validity of a rule is challenged being ultra vires and invalid. It is true that a tribunal being a creature of an Act or the Rules has a limited jurisdiction and it is not open to a tribunal to decide the validity of the Act and the Rules. But, that is not the case here and, therefore, the decision in the case of Bar Council of India & Ors. vs. Surjeet Singh & Ors. (supra) is of no help to the case of the appellant. In the case of Ramchandra Ganpat Shinde & Anr vs. State of Maharashtra & Ors. (supra), the parties to a writ petition obtained a collusive order by applying fraud on the court and such an order was made basis of the election. In that context, it was held that so long as the order of the High Court continues, the tribunal would be bound by that order of the High and, therefore, the writ petition was maintainable and the same cannot be thrown out on the ground of an alternative remedy. Again, that is not the case of the appellant and, therefore, the same is

distinguishable. In Shri Shreewant Kumar Choudhary vs. Shri Baidyanath Panjiar (supra), it was held that it was not open to the tribunal to go behind the entry in an electoral roll. This was in the context of the provisions of Representation of People Act, 1950 and 1951. It may be borne in mind that there is a distinction between the scheme of the provisions of the Representation of People Act, 1950 and the Representation of People Act, 1951. The Representation of People Act, 1950 provides for the delimitation of constituencies and allocation of seats for purposes of election to, the House of the People and the Legislatures of States and preparation of the electoral roll, whereas, Representation of People Act, 1951 provides for conduct of election. Under Section 100 of the Representation of People Act, 1951 one of the grounds amongst other is an election can be challenged where there is non-compliance of the provisions of the Constitution or of the said Act and the rules or orders made thereunder - meaning thereby that breach of the Representation of People Act, 1950 cannot be called in question in an election petition filed under 1951 Act. In that view of the matter, the decision replied upon by the appellant is distinguishable.

12. In view of our finding that preparation of the electoral roll is being an intermediate stage in the process of election of the managing committee of a specified society and the election process having been

set in motion, it is well settled that the High Court should not stay the continuation of the election process even though there may be some alleged illegality or breach of rules while preparing the electoral roll. It is not disputed that the election in question has already been held and the result thereof has been stayed by an order of this Court, and once the result of the election is declared, it would be open to the appellant to challenge the election of returned candidate, if aggrieved, by means of an election petition before the election tribunal."

9. The view taken by the Hon'ble Apex Court in Shri Sant Sadguru (Supra) has been consistently followed. The decision of the Hon'ble Apex Court in the Ahmednagar Zilla Case (supra) does not in any way deviate from the view taken by the Hon'ble Apex Court in Shri Sant Sadguru (supra).

10. The petitioners have placed reliance upon the judgments delivered in Kawadu's case (supra), Dhondiba Lakade's case (supra), and in Suresh (supra). The view taken by this Court in these matters is that Under Rule 6(1) of the erstwhile 1971 Rules, the Collector/Election Officer is restrained from entering into disputed questions while dealing with the provisional voters' list/objections to

nominations. Rule 6(1) of the 1971 Rules is quite similar to Rule 8 of the 2014 Rules.

11. In Dhondiba Lakade's case (supra), this Court concluded that the Election Officer cannot venture into resorting to a fact finding exercise. Minor mistakes can be corrected. However, it was these petitioners who had approached this Court in WP No.12662/2016 and had invited the order dated 22/12/2016, by which this Court directed the competent authority to grant an opportunity of hearing to these petitioners, consider their objections and pass a reasoned order strictly in view of the contentions of the rival sides. Respondent No.3 was also granted the liberty to take further steps for continuation of the process of election, after delivering a decision on the objections in accordance with the directives issued in the order dated 22/12/2016. I, therefore, find from the said order that respondent No.3 was subjected to strict terms by the learned Division Bench of this Court and he was directed to consider every contention of the rival sides and deliver an order strictly based on such contentions.

11. Considering the backdrop in which the impugned order was passed, I do not find that respondent No.3 has acted beyond his

powers in this particular case and in the peculiar facts of this case. He could not have disobeyed the directions of the learned Division Bench and hence it cannot be said that he has acted in excess of his powers.

12. In the light of the above fact situation, respondent No.3 has considered the record available before it and has passed a reasoned order. He has noticed that on the one hand, the cash receipt book is not an authentic receipt book and on the other hand, he has noticed that the *kird nond wahi* कीर्द नोंद वही (ledger book), does not contain the names of these petitioners which otherwise would have been reflected if they had been inducted as members. The factum of having tendered applications for seeking membership will have to be proved in appropriate proceeding. Names of these petitioners have been entered in Form I register. Whether an unauthorized cash book could be a valid record of acceptance of membership fees also needs to be adjudicated upon. Whether Mr.Holkar acted mischievously in his capacity being a Secretary at the relevant time also needs to be investigated and whether he deserves to be subjected to legal action, would also be a matter of adjudication. The said Secretary has filed an affidavit before respondent No.3 and has taken a stand that he had not issued the receipts from an

unauthorized receipt book to these petitioners.

13. Learned Advocate for respondent Nos. 2 and 3 also placed reliance upon the judgment in the matter of Gadhinglaj Taluka Sahakari Sakhar Karkhana Ltd., Vs. Collector of Kolhapur and another [2005(4) All MR 626]. Paragraph No.12 of the said judgment reads as under :-

“12. It is settled law that the entire process of an election is purely a creation of a statute and governed by the statute and rules framed thereunder. If a person is denied the right to vote because his name is not on the voters’ list, it must be taken to be the intention of the statute. It would indeed bring about uncertainty, in the certainty, of an election process if this Court interfered at the instance of persons who have been held to have no right to vote and have deleted from the voters’ list. Merely, on the ground that they have thereby been denied the right to contest the election. This contention on behalf of the petitioner certainly merits consideration but is not sufficient in my view to depart from the settled position in law that an election can only be challenged in accordance with the statute under which it is held and that this Court will not ordinarily interfere with the election process. Undoubtedly, if the challenge succeeds voters whose names have been wrongly deleted would be entitled to contest in the election held again.”

14. I am, therefore, of the view that these petitioners will have to

take recourse to such a proceeding, as may be permissible in law so as to cause a proper adjudication on the aspect of their membership and whether they have been illegally excluded from the final voters' list depriving them of a right to participate in the elections.

15. In view of the above, I do not find that this petition could be entertained so as to cause an adjudication over the impugned order passed by respondent No.3 which can always be subject to the result of an appropriate proceedings. The law laid down by the Hon'ble Apex Court in Shri Sant Sadguru (supra) mandates that such petitions cannot be entertained by this Court in election matters and for considering disputed questions. Hence, this petition, being devoid of merit, is therefore, dismissed.

16. At this stage, learned Advocate for the petitioners prays for the continuation of the order dated 17/01/2017. Learned Advocates for the respondents oppose. Since I find that the judgment of the Hon'ble Apex Court in Shri Sant Sadguru (supra) and Gadhinglaj Taluka (supra) were not cited before this Court (Coram : S.B.Shukre, J.) on 17/01/2017, when this Court practically stayed the election process, I do not think that the request of the petitioners could be accepted. Moreover, the petitioners are not remediless and the result of any

election, that may now be held, would be subject to the result of such proceedings that the petitioners may choose to initiate.

17. Pending civil applications, do not survive, hence stand disposed of.

(Ravindra V.Ghuge, J.)

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