

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.541 OF 2017

WITH

STAMP NUMBER (APPLN.) NO.4238 OF 2017.

Anil N. Naik Gaunekar,
75 years of age, son of Narso Naik
Gaunekar, Director, Goa Urban
Co-operative Bank Ltd.,
Resident of Ashirwad Building,
Near Civil and Criminal Courts,
Ponda, Goa.

..... Petitioner.

Versus.

1. State of Goa,
through its Secretary (Co-operation),
Secretariat, Porvorim, Goa.
2. The Registrar of Cooperative Societies,
Sahakar Sankul, Patto Plaza,
Panaji, Goa.
3. Goa Urban Co-op. Bank Ltd.,
A Co-operative Society, having its
Registered Office at
Dr. A.B. Road, Panaji, Goa,
represented by its:
Managing Director, Office at
Dr. A.B. Road, Panaji, Goa
4. Smt. Sonia Sidharth Kunkolienkar,
major of age, Sharda Bldg.,
Boca de Vaca, Panaji, Goa.

5. Prabhu Dulo Gaude,
major of age, H.No.250,
Padribhat, Mandur,
Neura, Tiswadi, Goa.

6. Govind Ghanashyam Kamat,
s/o. Late Ghanashyam Kamat,
major in age, Doctor, married,
r/o. S-26, A1, Jairam Complex,
Mala, Panaji, Goa.

7. Ashish Prabhu Verlekar,
s/o. V. Verlekar, major in age,
C.A. Married, having office at 201,
Govinda Building,
M.G. Road, Panaji, Goa.

8. Audhut Narsinha Chimulkar,
s/o. Late Narsinha Chimulkar,
major in age, married,
r/o. Flat No.A/1, Ganesh Prasad,
Rua Calicut, Altinho, Panaji.

9. Smt. Shubhalaxmi Ulhas Pai Raikar,
w/o. Adv. Ulhas Pai Raikar,
major in age, Advocate, married,
having office at
Skylark Building, Panaji.

10. Venkatesh V. Naik,
68 years of age, s/o. V. Naik,
Director, Goa Urban Co-operative
Bank Ltd., r/o. H.No.393,
Comba, Margao, Goa.

11. Shivaji Bhavnath Sinai Bhangi,
61 years of age,
s/o. Bhavnath Sinai Bhangi,
Director, Goa Urban Co-operative
Bank Ltd.

12. Narayan Vishwanath Sinai Talaulikar,
62 years of age, H.No.223,
Talauli Post, Durbhat, Ponda.

13. Sandeep R. Khandeparkar,
51 years of age, H.No.115,
Post Khandepar, Ponda, Goa.

..... Respondents.

Mr. A. F. Diniz, with Mr. Ashwin D. Bhobe and Ms. S. Bhobe,
Advocates for the Petitioner.

Mr. D. Lawande, Advocate General with Mr. Pravin N. Faldessai,
Addl. Government Advocate for Respondent Nos.1 & 2.

Mr. D. Pangam, with Mr. Parikshit Sawant, Advocate for
Respondent No.5.

Mr. S. D. Padiyar, with Mr. P. Shirodkar, and Mr. S. Bhangui,
Advocate for Respondent Nos.10 to 13.

Mr. S. S. Kantak, Senior Advocate with Mr. A. Kakodkar, and Mr.
Abhijeet Kamat, Advocate for Respondents No.6 to 9.

***Coram : N.M. Jamdar &
Prithviraj K. Chavan, JJ.***

Reserved on : 23 July 2018.

Pronounced on : 1 August 2018.

JUDGMENT: (Per N.M. Jamdar, J.)

The Goa Urban Co-operative Bank is one of the largest co-operative banks in Goa. The term of the Board of Directors of the Bank had come to an end in December 2016. The existing Board continued. The elections were held on 9 May 2017. Nine directors were elected. Out of nine directors, six were from the general category, one each from the category of Chartered Accountant and the category of person with banking experience, and one from the women category. Two posts remained vacant i.e. one from women category and one reserved, as no nominations were filed.

2. On 29 May 2017, the Registrar of Co-operative Societies, Goa, exercising power under Section 67A of the Goa Co-operative Societies Act, 2001 appointed two directors to the Board for the two vacancies. Those were, Ms. Sonia Sidharth Kunkolienkar, the Respondent No.4 from women category. The second was Mr. Prabha Dulo Gawde, the Respondent No.5 from SC/ST category. Registrar noted in the order that two members are required to be appointed to fill in the vacancies as it is necessary to have a full-fledged board. He noted that no application was received from the

officer of the Bank for the appointment to any of these vacancies, which showed a lack of interest. He noted that a writ petition was filed by one of the members to hold the first meeting of the Bank, which was due on 5 June 2017. He decided to exercise the power to appoint a member *suo motu* and decided that the notice of the proposed order is not necessary, dispensed with it and proceeded to pass an order on 29 May 2017 appointing the Respondents No.4 and 5 on the Board of Directors.

3. The Petitioner, one of the elected directors, has challenged the order passed on 29 May 2017 by way of this Petition.

4. The Petitioner, by amending the Petition, has also challenged the constitutional validity of Section 67A of the Act on the ground that it is inconsistent with the principles of autonomous functioning and democratic member control of the co-operatives, and it is inconsistent with Article 243ZI of the Constitution of India.

5. The Goa Urban Co-operative Bank is a scheduled Bank. It is governed by the provisions of the Goa Co-operative Societies Act, 2001. The Bank was established in the year 1964. The financial position of the Bank is sound. The deposits as on 31 March 2017 are ₹ 92230.44 lacs. The advances are ₹ 52711.13 lacs, and net profit is

₹ 101.46 lacs. The Bank has sixteen branches in Goa. The State Government has no shareholding or any funding in the Bank. The total number of members as of 31 March 2018 is 107652. There are 22715 women members.

6. Admittedly, there are two groups amongst the nine elected Directors. Five Directors, the Petitioner and the Respondents No.10 to 13 belong to the one group. The Respondents No.6 to 9 belong to the second group. The second group supports the appointment of Respondents No. 4 and 5. It is thus quite evident that the appointment of respondents No.4 and 5, as directors will substantially alter the control dynamics in the Bank.

7. The assertions of the Petitioner about the political background of the appointed directors, Respondents no.4 and 5 have not been controverted. These are that the Respondent No.4 is the wife of the sitting Member of Legislative Assembly for Panaji and that the Respondent No.5 is affiliated to the ruling party in the State.

8. Further, it is also an admitted position that both, the Respondent No.4 and the Respondent No.5 are not qualified to hold the posts of the Director.

9. The Petitioner seeks two reliefs. First, that the impugned order be quashed and set aside, and second, the Section 67A of the Act be declared as unconstitutional.

10. Generally, unless it is necessary, the Court may not adjudicate on questions of law which may have broader ramifications. Decisions on the constitutional validity of the enactments are to be eschewed if the case can be decided on lesser points. Further, if a provision is challenged as unconstitutional, an attempt should be made to read it down to be in consonance with the constitutional principles. Keeping these positions in mind, we will proceed to consider the controversy.

11. On 24 June 2017, Division Bench (*Reis & Sardesai, JJ*) issued Rule in this Petition and a detailed interim order was passed. The Division Bench observed that *prima facie* there was substance in the contentions raised by the Petitioner. The impugned order was stayed until further orders. As an interim arrangement Justice A.P. Lavande, a former Judge of this Court was appointed as an *ex-officio* Chairman of the Board of Directors.

12. The learned Counsel for the parties made a joint

request for taking up the writ petition for hearing at the earliest, as the learned Judge had expressed his inability to continue beyond 1 August 2018. We have, accordingly, taken up the petition for disposal on a priority basis as a solution needs to be found.

13. The arguments on behalf of the Petitioner were made by Mr. Diniz and Mr. Padiyar for the supporting Respondents. Mr. D. Lawande, the learned Advocate General, addressed us on behalf of the State. Mr. Kantak learned Senior Advocate for the four Directors of the second group, i.e. Respondents No. 6 to 9. Mr. Pangam appearing on behalf of Respondent No.5, the appointed Director has adopted Mr.Kantak's arguments.

14. Though in the affidavit-in-reply, the Respondents have taken up the ground of availability of alternate remedy, this contention was not advanced before us during the arguments. In fact, what was contended by the learned Advocate General, albeit in a different context, that looking at the magnitude of the Bank there is a public law element involved in the functioning of the Bank. Also that there was an urgency to decide the dispute. Rule has already been issued.

15. The contesting respondents argued that the Petitioner

has no locus to seek a writ of certiorari and at the most, those candidates who were desirous of being appointed and were not appointed, can challenge the order of the Registrar. The submission cannot be accepted. The Petitioner is on the Board of Directors of the Bank and is directly interested in the functioning of the Bank. It is his grievance that by an illegal order, under a colourable exercise of power, wrong persons are being appointed on the Board with whom the Petitioner will have to participate in the daily affairs and also for the election for a chairman. This being the grievance, it cannot be said that the Petitioner is unconcerned with the impugned order. Therefore, on the ground of locus alone, we cannot reject the petition.

16. The exercise of power by the State functionary in respect of the functioning of a co-operative is questioned before us. While deciding this aspect, it is necessary to keep in mind certain basic premises underlying the governance of the co-operatives. These principles are to be found in the Constitution of India and the policies of the government. One of the basic premises is that a co-operative is founded on the principle of democratic governance. It should be encouraged to function democratically.

17. The Constitution of India makes a reference to the co-

operatives at various places. Article 19(1)(c) recognizes that a citizen has a fundamental right to form associations or unions. Article 43B, as a Directive Principle of State Policy, expects that the state shall endeavor to promote voluntary formation, autonomous functioning, democratic control and professional management of the co-operative societies. Article 243ZI provides that the Legislature may by law make provisions regarding incorporation, regulation of co-operative societies based on the principles of voluntary formation, democratic member-control, member-economic participation and autonomous functioning.

18. An International Co-operative Alliance Statement on the Cooperative Identity was adopted in a conference in Manchester, the United Kingdom on 23 September 1995. The co-operative was declared as an autonomous association of persons and a democratically controlled enterprise. The co-operatives are founded on values of the self-help, democracy, equality, equity, and solidarity. The democratic organisation of the co-operatives is to enable the members to pursue their policies and have freedom in decision making. In India, National Policy on Co-operation was announced by the Department of Agriculture and Co-operation, Government of India in March 2002. The Supreme Court has taken a review of these events in the case of *Vipulbhai M. Chaudhary vs. Gujarat Co-*

*operative Milk Marketing Federation Limited and Ors.*¹

19. The statement of objects and reasons to the 97 Constitutional Amendment bringing in Part IXB on Co-operatives, reiterates the National Policy. It is stressed that a co-operative should run on the well-established principle that its elections are held in a free and fair manner. The statement recognizes a strong need to keep the co-operatives free from unnecessary outside interference and to ensure autonomous organization. The commitment of the Central Government to ensure that a co-operative should function on the principles of democratic member control, independent functioning and professional management, was reiterated. Though there was a debate at the Bar on the continuation of Part IXB in the Constitution, which we will advert later, the Statement of Object appended to the Amendment coupled with the Fundamental Rights, the Directive Principles and the National Co-operation Policy can guide the State and the Courts in decision making concerning the co-operatives.

20. In the State of Goa, a need was felt to consolidate the law regarding co-operative societies to provide for the orderly development of co-operative societies, based on self-help and mutual

¹ AIR 2015 SC 1960

aid in accordance with co-operative principles. The Goa Co-operative Societies Act, 2001, the Act, was passed on 29 March 2001 and notification was published on 24 May 2001. Various amendments have been introduced from time to time. The Section 2 in Chapter I, deals with the Definitions. Chapter II deals with registration of the co-operative societies. Rights, liabilities of members are provided under Chapter III. Incorporation, duties, and privileges of the Society are dealt with under Chapter IV. The State aid to societies and property in the funds of the society are dealt with under Chapters V and VI. Chapter VII deals with the management of the Societies. Chapter VIII refers to accounts, audit, inquiry, and inspection. Disputes and arbitration are provided under Chapter IX. The other aspects such as liquidation, special provisions, appeals, offences are laid down from Chapters X to Chapter XIV.

21. Chapter VII of the Act is relevant for the controversy. Section 58 of the Act lays down that the final authority in every society vests into the general body. The subjects to be dealt with by the general body have been specified under Chapter VII. Section 58A, which was brought into force by Amendment Act of 2009, deals with the special general meeting. Section 59, as amended by the amending Act of 2014, deals with Board of Directors and its composition and conduct. Section 59A provides for motion of no

confidence against an officer who holds the office by virtue of his election. Section 60 provides for various disqualifications for being a director. Section 61 lays down disqualifications for all the directors. Powers and functions of the directors have been provided under Section 62. Chief Executive and his powers are circumscribed under Sections 63 and 64. Election to the Board of Directors is provided in Section 66. The contingency of vacancies on the Board of Directors is specified under Section 67A. Section 67A was brought into effect by amending the Act of 2009, which deals with the appointment of directors, a new board of directors or administrator. Section 68 deals with Government's power to give directions and other directions and powers are contained in rest of the provisions.

22. The Bank has framed its own Bye-laws. The bye-laws provide for Chief Executive, who has been entrusted with the work of management of the Bank, and the Board of Directors is a governing body. A director is a member of the Board of Directors. The objects of the Society are stated as primarily to accept deposits from the public, repayable on demand, borrow and raise money, provide safe deposits and various forms as a banking Society, as per the provisions of the relevant enactment. Bye-laws provide for different classes of nominal members, joint shareholders, and contingencies of transfer of shares, nomination, death, and resignation of members. The

General Body is invested with the final authority under the bye-laws. The bye-laws also deal with the procedure for holding meetings.

23. Bye-law No.29 deals with the Board of Directors and states that the Board shall consist of eleven duly elected directors among Class A and Class B shareholders. They have been specified as category One, category Two and so on. Six directors are to be elected from the general category; one director from the category of Chartered Accountant; one director from the category of suitable banking experience; one director from the category of the scheduled caste or scheduled tribe; two directors from the women category. Each member can cast 11 votes. Bye-law No.31 deals with the election of Chairman and Vice-Chairman of the Board. Election of the office bearers is to be conducted within 30 days from the declaration of result of the election to the Board. Bye-law Nos.32 and 33 deal with the vacation of the office in the Board of Directors. Bye-law No.35 deals with quorum as half the number of the total strength of the Board of Directors.

24. We will now examine the scheme of Section 67A of the Act, under which the impugned order is passed. Section 67A reads thus :

“67A. Appointment of Directors, New Board of

Directors or Administrator.—

(1) Where the Registrar is satisfied that,—

(a) at the first constitution of the Board of Directors of any society there is a failure to elect all or any of the members of the Board of Directors;

(b) the term of the Board of Directors of any society or of any of its members has expired or for any other reason election is held and there is a failure to elect all or any of the Directors required to fill the vacancies;

(c) any Director is prevented from entering upon his office;

(d) new Directors have failed to enter upon office on the date on which the term of office of the existing Board of Directors expired; or

(e) a new Board of Directors cannot, for any reason, be constituted before the expiry of the term of Office of the existing Board of Directors, he may, either suo motu or on an application of any officer of the society, by order, appoint,—

(i) any member or members of the society to be the member or members of the Board of Directors to fill the vacancy/vacancies; or

(ii) a committee, consisting of not more than three members of the society, or one or more administrators, other than the member/s of the society, to manage the affairs of the society till the new Board of Directors enters upon office:

(f) any member of board attracts disqualification under the Act;

[(g) majority of the members of the board resigns:]

Provided that before making such order, the Registrar shall publish a notice on the notice board at the head office of the society, inviting objections and suggestions with respect to the proposed order within a period specified in the notice and consider all objections and suggestions received by him within that period:

Provided further that it shall not be necessary to publish such notice in case where the Registrar is satisfied that immediate action is required to be taken or that it is not reasonably practicable to publish such notice.

(2) The Board of Directors or administrator so appointed shall be subject to the control of the Registrar and obey such instructions as the Registrar may, from time to time give, and shall have power to discharge all or any of the functions of the Board of Directors or of a director, as the case may be, and take all such actions as may be required to be taken in the interest of the society.

(3) The Board of Directors or administrator so appointed shall make necessary arrangements to constitute a new Board of Directors for enabling the new Board of Directors to enter upon office or to fill the vacancy/vacancies of the Directors, as the case may be, within such period or extended period as the Registrar may specify].”

Section 67A was inserted by Goa Co-operative Societies (Amendment) Act 2009, published on 16 March 2009. This provision has undergone further amendment by the Amending Act of

2014. Section 67A is part of Chapter VII which deals with Management of Societies. It is inserted between pre-existing Section 67 which deals with the vacancies on the Board of Directors and Section 68 with the Government's power to issue necessary directions.

25. Section 67A empowers the Registrar to appoint Directors, new Board of Director or Administrator. Section 67A(1) lays down the parameters for the satisfaction of the Registrar as regards certain contingencies. Clause (a) speaks of the failure to elect all or any of the members of the Board of Directors at the first constitution of the Board of Directors. Clause (b) deals with the situation where the term of the Board of Directors has expired and there is a failure to elect all or any of the Directors required to fill in vacancies of all or any of the Directors. Clause (c) deals with the contingency if a Director is prevented from entering his office. The contingency of new Directors having failed to enter upon office on the date on which the term of office of the existing Board of Directors expired is dealt with. Clause (e) deals with the situation of a new Board of Directors cannot, for any reason, be constituted before the expiry of the term of office. Clauses (f) and (g), introduced subsequently, deal with any member of the Board attracts disqualification and majority of the members of the Board resign. If

the Registrar is satisfied with the contingencies listed out in Clauses (a) to (g), he may either, *suo motu* or on an application of any officer of the Society, appoint any member or members of the Society on the Board. The first proviso to Section 67A(1) mandates the Registrar to publish a notice inviting objections and suggestions in respect of the proposed order within the period specified. The second proviso states that it is not necessary to publish such a notice where the Registrar is satisfied that immediate action is required or it is not reasonably practicable to publish such notice. Sub-sections (2) and (3) deal with the further procedure after such appointment. The Counsel have pointed out that the placement of amended clauses (f) (g) in the section is wrong.

26. Turning now to the challenges raised by the Petitioner to the impugned order. These challenges broadly are as follows. First, filling up the vacancies up to 1/3 is the prerogative of the Board of Directors. Second, even assuming that the Registrar has the power to make appointments, he has no power to make appointments of those members who are disqualified to be directors. Third, the notice of the proposed order is mandatory and no exceptional circumstances existed to dispense with it. Fourth, the appointments made by the Registrar by the impugned order are not for better functioning of the Bank, but with a political move to appoint directors who have a clear

political affiliation, making the Bank susceptible to outside influences. Fifth, the order passed is against democratic principles governing the functioning of a co-operative society. Sixth, the constitutional validity of Section 67A is challenged on the ground that the provision confers unguided power and surrenders control of the co-operative society to the State Government which is against the constitutional principle enshrined in Part IXB of the Constitution of India.

27. The Petitioner's first contention is that Section 67 empowers the Board of Directors to fill in vacancies less than 1/3rd of the total number of directors by co-option from the eligible persons and if the vacancies exceed 1/3rd, the remaining directors can call upon the Registrar to hold elections to fill in the vacancies. According to the Petitioner, only if there is a failure in respect of these vacancies, that the power under Section 67A of appointment of directors can be exercised. The contesting respondents contend that the Board of Directors will not come into existence unless there is an election of the office bearers of the Board and the contingencies as specified in Section 67(1) can arise after the Board is constituted. What we notice is that the proviso to Section 59(2) refers to a casual vacancy which arises on the Board. Therefore, there is a distinction between Casual Vacancy and the Vacancies specified in Section 67(1). However, we

do not find it necessary to rule on this legal position finally, in this Petition. The Petitioner's group, five in number, have stated that as a *via media* and in the spirit of democratic functioning of the cooperatives, they will prefer that an election to these vacant posts is held and if it so held there is no need to exercise the power of co-option. Further as we would point out later that is the best course of action in the circumstances.

28. One more debate should not detain us further, which is the mention of the different sub-clauses of Section 67A(1) in the impugned order and in the affidavit filed by the State. This is because it is an established position in law that mere reference to an incorrect provision will not *ipso facto* lead to setting aside an order if the power to pass such an order is vested in the Authority.

29. The power conferred on the Registrar under Section 67A is not for gaining control of the co-operatives, but to take such steps as may be necessary in the larger interest of the co-operatives and the members. Upon examination of Section 67A of the Act, it cannot be said that it confers unchecked and unguided arbitrary power on the Registrar. The scheme of Section 67A shows that there are various inbuilt safeguards on the exercise of the power, so that it does not result into an arbitrary exercise. Section 67A(1) opens with

the words "*where the Registrar is satisfied*". The satisfaction of the Registrar has to be well informed, rational, transparent and fair. If the Registrar is satisfied that the new Board cannot be constituted he may *suo motu* or on an application appoint any member or members. However, the Registrar, cannot straight away proceed to appoint any person of his choice from the membership of the society. He has to publish a notice inviting objections and suggestions to the proposed order and consider all the objections and suggestions. This helps him to arrive at an informed decision. In the process, the Registrar also gives an opportunity to all the members of the Society to be part of the decision making. This is the most crucial aspect of the power under Section 67A. This safety valve ensures that the exercise is transparent, prudent and in the interest of the co-operatives. The Legislature has however visualized a contingency where there is a need for speed in taking immediate corrective measures. There could be situations where it is not reasonably practicable to publish such a notice and the second proviso permits dispensation of notice. However, dispensing with notice has to be an exception, not a rule. The requirement of issuance of notice before issuance of an order is a crucial component of the scheme of Section 67A. Merely because the Legislature has provided for a rare eventuality, where safeguard can be departed from, does not mean

that the safeguard can be dispensed with at will. Cogent reasons must exist for doing so.

30. In the case of *Ghatageppa Parreppa Muger and ors. vs. M.R. Naik and ors.*² the Division Bench of this Court had an occasion to consider an identical provision i.e. Section 77A of the Maharashtra Co-operative Societies Act, 1960 in the context of appointment of an administrator. The Division Bench observed that the provision regarding invitation of objections and suggestions to the proposed order is an essential requirement. The Division Bench stressed that the power to dispense with the statutory requirement could not be exercised as a matter of course and the Registrar is bound to put on record the circumstances which justify the non-compliance. The contesting Respondents relied upon the decision in the case of *Chandralok Sahakari Gruha Nirman Sanstha Ltd. Shegaon vs. Assistant Registrar, Cooperative Societies, Shegaon*³ of the Division Bench of the Nagpur Bench of this Court wherein, the Court approved the dispensation of notice. The Division Bench noted the reasons for the dispensation of the publication. In that case, the Registrar had found that there were series of irregularities in the Society. There were hunger strikes held before the Office of the

² 1983 BCI 115

³ [1992 Mh LJ 1118]

Registrar for three weeks complaining about mismanagement of the society. The Chairman of the Society was mis-utilizing the funds, and there was an apprehension that he would tamper with the records of the Society. The Division Bench observed that it is the subjective satisfaction of the Registrar and as long as the reasons are not perverse, Court may not interfere. In the facts before the Division Bench, the reasons were not perverse. There was a possibility of manipulation of the record and siphoning of funds, and there were protests, including hunger strikes. In that context, the Registrar appointed the administrator without any notice, which the Division Bench in its writ jurisdiction did not interfere. Therefore, the position will depend on the facts of the case.

31. Thus, there are safeguards in Section 67A of the Act of 2001 to ensure that it does not empower the Registrar with unguided, arbitrary or draconic powers. It is mandatory to call for objections and suggestions in respect of the proposed order, except where there is an immediate action required or that it is not reasonably practicable to issue such a notice. Keeping in mind the principles of democratic governance of the co-operatives, the proviso relating to dispensation of notice will have to be strictly construed. The grounds mentioned in the second proviso must genuinely exist and cannot be a mere *ipsi dixit* of the authority or that the grounds

are artificially created. The order under section 67A must be a speaking order, so that there is transparency and good governance in the exercise of powers by the Registrar.

32. It is settled position of law, right from the decision of the Constitution Bench rendered in the year 1978 in the case of *Mohinder Singh Gill and anr., vs. The Chief Election Commissioner, New Delhi an ors.*⁴ that existence of reasons must be seen in the impugned order itself and cannot be supplemented by a subsequent affidavit. This is particularly so in respect of the kind of order with which we are concerned. Therefore, we will now turn to the recitals and the reasons given in the impugned order.

33. Heading of the impugned order passed by the Registrar states that it is passed under section 67A(1)(e) of the Act. The Registrar observes that the election to the Bank was held in terms of Section 66(5) of the Act. He states that as per bye-laws, 11 Directors are to be elected, one woman member was elected on 26 July 2017 as unopposed and in the elections declared on 9 May 2017, six Directors were elected from the general category, one from the second category, and one from the third category. The Respondent Bank has failed to elect one member each in the fourth and fifth categories. He

⁴ (1978) 1 SCC 405

then states that to have a full-fledged Board, two members are required. It is then noted that the applications have been received from the officers of the Bank which indicates a lack of interest. Then he refers to a writ petition praying for directions to the Registrar to call the first meeting and that the writ petition was adjourned to 5 June. He states that since the results were declared on 9 May and since the election has to be conducted within 30 days, and immediate action is required to be taken and time requirement is not adequate for the reasons mentioned, he dispensed with the notice and proceeded to pass the order.

34. Vacancies on the Board of Directors were not filled up. We will proceed on the basis that the Registrar could appoint directors in those vacancies. The issue would then be whether the impugned order is a bonafide and lawful exercise of the power.

35. The analysis of the reasons given in the impugned order is as follows.

36. Firstly, the Registrar says that if the two members are not appointed, a full-fledged Board is not constituted. He, however, does not refer to the fact that there was a quorum to continue with the functioning of the Board. Nine members were elected, out of eleven

and that formed a quorum to continue. The bye-laws framed by the Bank, deal with the aspect of the quorum. Bye-law 35 deals with quorum which states that half the number of the total strength of the Board of Directors shall form a quorum. It was argued that whether it would be the total number of the Directors or the strength of the Board of Directors. The Board consists of 11 Directors, and at present, there are 9 Directors. For either of these interpretations, there was a quorum.

37. Secondly, the Registrar states that applications were not received to fill in the vacancies and it indicates a lack of interest. This is also not correct. There were some applications by some members showing a willingness to be appointed. Whether these members should have been appointed or not, is not the issue. For a *sou motu* exercise, there were some applications before him, and he did not even refer to them. Just because no application was received, does not mean that there was lack of interest.

38. Thirdly, the Registrar refers to a writ petition filed in this Court and the next date granted in it. How that constituted a grave urgency is not explained. The petition was simply adjourned. There was no direction from this Court to dispense with any of the procedure under Section 67A.

39. Fourth ground is that the election of office bearers is required to be conducted within 30 days. That may be so, but was that enough to dispense with the most crucial provision of Section 67A. It was not that the functioning of the Bank had come to a standstill. Nine elected directors could continue. That the directors belonged to different groups does not mean that the Bank had stopped functioning. That the election to the office bearers will have to be held within 30 days from the general election was known right from the beginning. Elections were held on 9 May 2017, and the impugned order was passed on 29 May 2017. If the Registrar chose to exercise the power towards the end of this period, then an excuse cannot be put forward that there was no time left for the issuance of the notice. For a co-operative society, it should not take a number of days to complete the process of inviting objections and suggestions. Contesting Respondents argued that if the Registrar had appointed the directors earlier, same Petitioner would have assailed the order on the ground that it was passed in a hurry. Such submission is stated to be rejected. The impugned order will have to be examined from the manner in which it was passed and who was appointed.

40. The learned Advocate General relied upon a decision of the Supreme Court in the case of *Deepak Pahwa and ors. vs. Lt.*

*Governor of Delhi & ors.*⁵ to contend that the urgency on that day has to be considered. The decision in the case of *Deepak Pahwa* was rendered entirely in a different factual conspectus. The case was of an inquiry under Section 5-A of the Land Acquisition Act. Notifications under Sections 4 and 17 and the declaration under Section 6 of the Land Acquisition Act were published for acquisition of certain lands for a transmitting station. Notification under Section 17(4) was issued invoking urgency clause. It was argued that eight years were spent on inter-departmental discussion, which showed no urgency for invocation of the urgency clause. It is in this context; the Apex Court observed that the urgency had to be seen on the date when the urgency clause was invoked. This decision of the Apex Court, therefore, cannot be directly applied to the facts of the present case.

41. Thus, we find that the reasons given in the order, taken as they are, cannot justify dispensing with the most important safeguard of the issuance of notice. None of the grounds stated in the impugned order, even *prima facie*, entitled the Registrar to dispense with the notice. The urgency was artificial and created one, and was designed only with an object to bypass the mandate of the first proviso.

⁵ (1984) 4 SCC 308

42. As this is not enough, the two directors who were appointed by the impugned order were disqualified to be appointed for not having attended the requisite number of meetings.

43. Petitioner argued that those directors who are not eligible or are disqualified as per Section 60 of the Act of 2001, cannot be appointed under section 67A by the Registrar. The learned Advocate General submitted that Section 67A speaks of *any member*, which phrase is a conscious choice and, therefore, the Registrar can appoint even that member who is disqualified, however, due care must be taken that the person so appointed is from the same category. He contended that otherwise, the provision for reservation for the backward class and women would be meaningless. The contesting Respondents-Directors submitted that *any member* could mean any members from other categories as well. The learned Advocate General, however, clarified that the State is not taking such an absolute stand and a member must be from the same category on which appointment is to be made.

44. Section 60 which deals with disqualifications uses the words *being chosen*. Choice is an act of choosing between two or more possibilities. A choice presents an opportunity of choosing. There are different paths to exercise a choice. Various phrases have

been used under the Chapter VII regarding filling up of the vacancies. The phrases used are *co-option*, *appointment*, *election*, *nomination*, etc. The *co-option*, *appointment*, *election*, *nomination* are ways to exercise a choice to decide as to who, out of many, should be allowed entry to the Board of Directors. The phrase *to be chosen* in Section 60 would encompass all these methodologies through which a choice can be exercised.

45. It also has to be noted that Section 60 deals with various types of disqualifications which have different degrees of seriousness. The presence of the members with disqualifications, such as incurring a penalty under the Act, a default in payment, or carrying on the same business, on the Board would be detrimental to the interest of the Society. If the absolute proposition advanced by the Respondents is to be accepted, that would mean that the Registrar can even appoint a person whose presence is entirely detrimental to the functioning of the Society. Such interpretation would lead to an absurdity. There could exist myriad situations. If there are no qualified candidates available at all, and the functioning of the society comes to a standstill, the Act provides for remedies for such a situation. If the qualified candidates in a particular category are not available and if it does not affect the functioning of the society, it may not be necessary to appoint a person who is disqualified, if the

quorum is complete. If all the members with Banking experience are carrying out the business same as the society, it cannot be argued that even though their presence is detrimental, one of them must be appointed. We, however, refrain from laying down any wider proposition than necessary to adjudicate upon questions of law arising from the factual situation at hand.

46. Argument of the contesting Respondents that the Legislature has consciously used the phrase *any member* in Section 67A meant even those who are disqualified, will not be in consonance with the scheme of the Act and its objectives. The Legislature has placed Section 67A by Amendment after Section 60 where disqualification is provided for. The placement of a provision in the scheme of the enactment can give a clue to the legislative intent. The Legislature was aware that there are disqualifications to enter on to the Board and, therefore, the Legislature, when it meant *any member* it can only be a member who has passed the stage of Section 60. If the Legislature wanted to confer power on the Registrar to make a disqualified member qualified to enter on to the Board, the Legislature would have suffixed the words *any member* with the words *even though disqualified under Section 60 of the Act*. Therefore, this contention of the Respondents cannot be accepted.

47. The Division Bench of this Court in the case of *Manohar S. Prabhu vs. Union of India & ors.*⁶ was considering the constitutional validity of Section 4 of the Constitution (Fourteenth Amendment) Act, 1962 and Section 3(3) of the Union Territories Act, 1963. The challenge arose because of the nomination of three respondents as Members of the Legislative Assembly. One of the arguments was qualification and disqualification for the persons chosen to fill the seat in the Legislative Assembly do not apply to nominations. The Division Bench repelled this argument holding that the narrow interpretation of the word *chosen* occurring in the provisions of the enactment in question will not conform with the Act itself. The Division Bench observed that the word *chosen* in its meaning is wide enough to take within the selection made by any mode or process and if this interpretation is not accepted, it would destroy the basic structure and affect the democratic form of Government. The Division Bench observed that even to be nominated, the person must be qualified.

48. Even assuming that there could exist a grave situation where there is no option except to appoint a person who is disqualified, even then there has to be an application of mind and elimination of all possible alternatives as to what would be the

⁶ 1987 (1) BomCR 130

consequences of such appointment. The impugned order is bereft of any application of mind to the fact of two directors being disqualified and the necessity to appoint the disqualified members.

49. In the additional affidavit filed by the State, it stated the total number of members in the Bank as 107652, of which 22715 are woman members. As regards the members belonging to scheduled caste/scheduled tribe, despite specific queries, the information is not placed before us by the parties or by the State on the ground that specific data is not available. It is however stated that there are members belonging to these categories.

50. The Registrar thus appointed one woman member, who is disqualified, out of 22715 woman members. She is the wife of the sitting MLA of Panaji, and one group of directors strongly defends her appointment. Similar is the position for the other appointee directors. The Registrar has not exercised power on the ground that all members of the Bank from the said category are disqualified. The impugned order does not state so. The impugned order does not state that there are no SC/ST members available in the Bank at all or that all others are disqualified. These are not innocuous omissions. The scrutiny and procedure is bypassed with a clear intent to somehow appoint the Respondents No.4 and 5 only

and none else. This is not to say that the Registrar cannot appoint any member with political affiliation at all, but the exercise of power in the present case will have to be examined in the totality of the circumstances.

51. The learned Advocate General contended that the impugned order achieves the purpose of giving reservation to the weaker section and if the impugned order is set aside, the purpose will be defeated. He relied upon the decision in the case of *State of U.P. and anr. vs C.O.D. Chheoki Employees' Cooperative Society Ltd., and anr.*⁷ The challenge before the Supreme Court arose from the validity of an Act and Rules providing for reservation or nomination of the weaker sections in the Co-operative Societies. The Supreme Court repelled the challenge holding that even though the management of the society can be considered as democratic, the State is within its right to enact legislation for the nomination of members belonging to weaker section. In the matter at hand, even though the disqualified member who is appointed belongs to the weaker section, does not mean he alone could have been appointed and further why others were deprived of their right to put forth suggestions and objections, is not justified.

⁷ (1997) 3 SCC 681

52. The methodology adopted by the Registrar is opposed to the principles of transparency and fairness and is against the principles of democratic governance of the co-operatives. The order passed by the Registrar is not a bonafide exercise of power. All the factors taken cumulatively lead to the conclusion that the exercise of power by the Registrar is not for the benefit of the Bank to help it overcome a difficult situation, but it is for the purpose of changing the power dynamics and with the sole object of affecting the democratic functioning. The Legislature has not conferred the power on the Registrar to achieve such an end. The impugned order thus is illegal, ultra vires, a colourable exercise of power and in breach of the mandatory provisions of Section 67A of the Act of 2001 and will have to be set aside.

53. Once we reach this conclusion, it is not necessary for us to enter into the larger question regarding the constitutional validity of Section 67A of the Act. Since there was a substantial debate at the Bar as to whether the provision is unconstitutional based on Part IXB of the Constitution of India, we refer to it. The Division Bench of Gujarat High Court in the case of *Rajendra N. Shah vs. Union of India & anr.*⁸ has declared the Constitutional 97th Amendment Act of 2011, inserting Part IXB as ultra vires the Constitution. The

⁸ WP (PIL) No.166 of 2012

Petitioner has relied upon a decision of the Rajasthan High Court in the case of *Bhanwar Lal s/o Gopram vs. State of Rajasthan through the Secretary (Law Legislative) and ors.*⁹, wherein the Rajasthan High Court has held that Rajasthan State Legislature in fact has acted upon Part IXB of the Constitution of India and distinguished the Judgment of the Gujarat High Court. However, the Respondents have relied upon the decision of the Apex Court in *Kusum Ingots & Alloys Ltd. vs. Union of India and anr.*¹⁰ to contend that once an order is passed concerning Parliamentary enactment by a High Court, effect of the said order applies throughout India. The Petitioner countered this by submitting that in the case of *Kusum Ingots* there is no reference to a *declaration*, but what is meant is an *order*. The decision in *Vipulbhai* was also relied upon by the Petitioner wherein it is pointed out that even after the decision of the Gujarat High Court, the Apex Court has given effect to the 97th Constitutional Amendment. Once we have found that the impugned order is not sustainable within the language of the section itself, it would not be prudent to dwell upon the issue of constitutional validity.

54. This now brings us to the relief to be considered in this

⁹ Civil WP No.13859/2016

¹⁰ (2004) 6 SCC 254

Petition. We have concluded that the impugned order will have to be quashed and set aside. The question, therefore, would be about the two seats of Director which would fall vacant upon the impugned order

55. In the facts of the present case, the best possible method which will advance the democratic functioning would be a free and fair election where all eligible members can participate and elect the directors of their choice. The Petitioner has also not pressed the arguments of co-option if the elections are held. No prejudice would be caused if the elections are held for these two posts. There are assertions and counter-assertions regarding the availability of eligible candidates; however, the impugned order is not passed on the basis that there are no candidates available at all. Till the elections are held and the Directors are appointed, the interim arrangement will have to continue. Since we propose to issue time-bound direction, we request the learned Judge to continue as a chairman till the elections are held. However, if the learned Judge, for personal reasons, is not able to continue as a Chairman during the extended period, it is open to the parties to apply to this Court for substitution.

56. Accordingly, Writ Petition is allowed. The impugned order passed by the Respondent No.2-Registrar dated 29 May 2017

is quashed and set aside. The Respondent No.2 is directed to initiate the process of elections to the two posts of the directors in question, within two weeks from today and the election process be completed as per the schedule specified under the Act, Rules, and the Bye-laws. Till the election process is completed, the interim arrangement operating in this Petition will continue. Liberty to apply for substitution of the *ex-officio* Chairman in case such eventuality arises.

57. Rule is made absolute in the above terms. No order as to costs.

58. In view of the disposal of the writ petition, the Application does not survive. Disposed of.

Prithviraj K. Chavan, J.

N.M. Jamdar, J.