

IN THE HIGH COURT OF BOMBAY AT GOA.

WRIT PETITION NO.1087 OF 2019.

SUNIL JAGGANATH SHET
AND 2 ORS

... PETITIONERS.

Versus

PALLAVI GAJANAND BHOSLE
AND 6 ORS.

... RESPONDENTS.

Shri C. Padgaonkar, Advocate for the Petitioners.

Shri S. M. Walwaikar, Advocate for the respondents.

Coram:- DAMA SESHADRI NAIDU, J.

Date:- 12th December 2019.

ORAL ORDER:

Introduction:

A Society wants to hold elections to choose its office-bearers. The notification issued, Elections Officers are appointed. Many enter the fray, but a few are disqualified. They challenge their disqualification. When the Society wants a happy ending to the election disputes, the Election Officers come in the way. They insist, it seems, the Committees should comprise office-bearers not as the successful candidates desire, but as they dictate. This insistence leads to and prolongs litigation. They even oppose the very Society's intervention in the litigation; they object to its being a party to the suit. Is the Election Officers' conduct justified?

Facts:

2. The respondent-Society had to have its election; for that it notified elections. In response to the notification, many members responded and filed their nominations. But a few nominations were rejected. Aggrieved six persons, whose nominations were rejected, filed Regular Civil Suit No.151/2018/B before the Civil Judge, Senior Division, Mapusa. Curiously, the very Society was not a party to that suit.

3. In the suit, only the three Election officers are the defendants. Though an interlocutory application, the plaintiffs applied for a direction that the authorities permit them to participate in the election proceedings—that participation being subject to the suit outcome. Pending that application, the plaintiffs and the defendants compromised and filed the consent terms.

4. As per those consent terms, the plaintiffs could participate in the election, and that was subject to the outcome of the interlocutory application to be decided. That is, even if the plaintiffs got elected, if the interlocutory application were to be dismissed, that would result in their deemed vacation of the office. The elections were held, and all the plaintiffs were elected. As the respondents' counsel represents, 18 persons were elected to the Executive Committee.

5. To be explicit, as two panels contested, 16 were elected from one panel and 2 from the other, which was the outgoing committee.

Those elected persons, it seems, met and chose the office-bearers—that is, the Managing Committee. But the Election Officers did not recognize the Managing Committee; instead, on 13.06.2018, they convened the meeting of the Executive Committee for electing the office-bearers. Again out of 18 Executive Committee members, 17 asserted that the office-bearers they had earlier elected should remain undisturbed.

6. In this background, unrelenting, the Election Officers applied to the trial Court for having a commissioner appointed. They wanted that court-appointed commissioner to hold the election for the Managing Committee. Before the trial Court could allow that application, the Society represented by its President, who was elected by those 18 members of the Executive Committee, applied for intervention. Pending the intervention application, on 21.06.2019 the trial Court allowed the interlocutory application the Election Officers filed: it appointed a commissioner.

7. At any rate, the Society, which is yet to come on record, challenged the trial Court's order, dated 21.6.2019, before this Court in Writ Petition No.663 of 2019. This Court disposed of the Writ Petition on 31.7.2019. I see no challenge on the record to the Society's standing in filing the writ petition. Instead, the Election Officers reported to the Court that they intended to withdraw their application for having a commissioner appointed.

8. In that backdrop, this Court set aside the trial Court's order appointing the commissioner and permitted the Election Officers to withdraw their application before the trial Court. It seems they did that. At any rate, this Court directed the trial Court to decide the interlocutory application expeditiously—the application the plaintiffs filed to participate in the election.

9. Now, pending the Society's intervention application, the trial Court decided the interlocutory application. The trial Court dismissed it. That means, the six plaintiffs, who were elected pending the interlocutory application, deemed to have vacated their office. Aggrieved, the plaintiffs have filed Miscellaneous Appeal before the District Court, North Goa, Panaji. The plaintiffs, as the appellants, have shown the Society as a respondent, though. The Election Officers, as the other respondents, opposed the plaintiffs' showing the Society as the respondent in the appeal.

10. Eventually, the District Court has, in my view, rightly observed that as the Society has not yet been brought on record before the trial Court, it should not have been a party-respondent in the appeal. But the District Court, in its wisdom, has felt that the Society is a proper party and allowed it to remain on record. The District Court allowed the Society to be a respondent in the appeal, it seems, because the Society again filed an intervention application before the District Court, as it did before the trial Court. All the three Election Officers

have filed this writ Petition, challenging Appellate Court's order, dated 4.12.2019.

11. Heard Shri C. Padgagonkar, the learned counsel for the petitioners, and Shri S. M. Walwaikar, the learned counsel for respondent Nos. 1 to 6.

Discussion:

12. "In a democracy, someone who fails to get elected to office can always console himself with the thought that there was something not quite fair about it." So observes Thucydides in *History of the Peloponnesian War*. Knocked out, the losing party need not sit idle. He may knock the doors of the court. That is what the plaintiffs did. Plainly put, in an election arena, either contestant may have a grievance. But how does the referee have a grievance? A referee ought not to fight.

13. Here, the Election Officers were appointed for a limited purpose and were expected to be neutral; they just had to carry on with their duty of overseeing the elections. I reckon once the Executive Committee has been elected, the Election Officers' role must have ceased. Electing the office-bearers is the Society's internal affair. In fact, those 18 candidates, who have been elected, chose from among themselves the office-bearers—the Managing Committee. But the Election Officers would have none of it.

14. The Elections Officers insisted that the election to the

Managing Committee, too, should be held in their presence. So they convened a meeting on 13.6.2018. Out of 18 members of the Executive Committee, 17 stuck to their original decision and reiterated that the office-bearers they chose should remain. Then the Election Officers applied to the trial Court to have a commissioner appointed; they succeeded in that effort. The Society, which wanted to come on record, was kept at bay. Then, that Society filed a Writ Petition before this Court assailing the trial Court's order appointing the commissioner. The Election Officers, perhaps, saw the writing on the wall. They agreed to withdraw their application before the trial Court, despite their success in that application.

15. The plaintiffs suffered an adverse order in their interlocutory application to participate in the election. Because of the adverse order, their *lis pendens* election stood vacated. So they filed an appeal. They erroneously showed the Society as one of the respondents, though the Society's application before the trial Court for impleadment has still been pending.

16. When the Election Officers objected that the Society was not a party in the original proceedings before the trial Court, the Society, it seems, has filed a fresh application before the appellate Court for coming on record—to intervene in the appeal proceedings. The appellate Court has allowed that application.

17. While allowing the application, the appellate Court has also

observed that its allowing the Society to come on record will also bind the trial Court when it decides the Society's intervention application.

Para 13 of the impugned order reads:

“13. During course of arguments, another point which came up for discussion is whether the order passed by this Court would be binding on the application for intervention filed by the same party before the trial Court. The answer would be affirmative because the orders of the Appellate Court are binding on trial Court. Secondly, I have dealt with the issue whether the Samaj is a proper and necessary party. To keep the record straight, the learned trial Judge can make an endorsement on the application for third party filed before the trial Court that the same is decided by virtue of the order passed by this Court on 4.12.2019 in Misc. Civil Appeal No. 87/2019.”

(a) Is the Society a Necessary Party?

18. First, I wonder how the plaintiffs have filed this suit without having the Society as a party, for the Society is a juristic person holding elections for choosing its office-bearers. Kept out of reckoning, the Society itself wanted to cure the defect. So, through its newly elected President, it has applied to come on record. The trial Court, in my view, ought to have ruled on that application before it decided other applications. When the plaintiff took the trial Court's interlocutory order to the appellate Court, it showed the Society as a respondent. That approach is wrong. An appeal, being in continuation of the original proceedings, cannot have new parties—unless the appellate Court permits. So the plaintiffs' showing the Society as a party was wrong.

19. Erroneously shown as a party in the appeal, the Society

wanted to legitimize its standing in the appeal. So it applied for intervention in the appeal, as it did before the trial Court. The appellate Court, I hold, has rightly allowed the Society to continue as the respondent.

20. The Election Officers have insisted before this Court, as they must have done before the appellate Court, that it was the President that wanted to come on record. They have also argued that the office-bearers were elected *lis pendens*, based on the consent terms. Until the suit proceedings conclude, those office-bearers would have no legitimacy to elect the Managing Committee. I am afraid that plea is specious, if not fallacious.

21. I reckon it is not the President that wanted to come on record; it is the Society that did. And the Society must be represented by a human agent. Here, that human agent happens to be the President. He is not a party to the litigation per se.

22. Thus, the appellate Court has rightly allowed the Society to come or to remain on the record because it is a necessary party. Besides, the appellate Court's decision to keep the Society on record in the appeal will also bind the trial Court. The appellate Court has reasoned that its decision does bind the trial Court. Truly so—even in the same case.

(b) Does the Appellate Court's decision obviate adjudication before the Trial Court on the same issue—Impleadment?

23. In any common law jurisdiction, appellate orders bind the lower, or even the coordinate, adjudicatory fora. That binding is four ways: (a) as precedent if the appellate forum is a Court of Record; (b) as *res judicata* if the case has already been decided; (c) as law of the case; and (d) as law of the trial.

24. The first two—precedent and *res judicata*—need no elaboration. Let us briefly visit the legal concepts of law of the case and law of the trial. The doctrine of the Law of the Case, according to the Black's Law Dictionary¹, makes a decision rendered in a former appeal of a case binding in a later appeal [of the same case.] It is different from law of the trial, *res judicata*, or *stare decisis*. On the other hand, "Law of the Trial" is a legal theory or court ruling that is not objected to and is used or relied on in a trial.

25. Garner's Dictionary of Legal Usage² elaborates on the doctrine of the law of the case: If a case is appealed a second time [say, on remand] to a panel of Court of Appeals, and a panel with a different makeup from the first panel hears the case the second time, the second panel will generally hold itself bound by the writings of the first panel whether or not its members agree with those earlier writings.

1
Black's Law Dictionary (9th Ed.)

2
Bryan A. Garner, *Garner's Dictionary of Legal Usage* (New York : Oxford UP, 2011) 522

26. In *Messenger v. Anderson*³, Justice Holmes, as quoted by Garner, observes that absent statute, the phrase, "law of the case," as applied to "the effect of previous orders on the later action of the court rendering them in the same case," merely expresses the practice of courts generally refusing to reopen what has been decided. It is not a limit on their power, though.

27. In a recent commentary on stare decisis—*The Law of Judicial Precedent*⁴—Bryan A. Garner, et al., have elaborately treated this principle. The law-of-the-case doctrine is said to come in at least two forms. One form, also called the mandate rule, forestalls "relitigation in the trial court of matters that were explicitly or implicitly decided by an early appellate decision in the same case. Once an appellate court decides an issue, then it is settled in further proceedings in the trial court and controls the case. The other form generally binds a court to its own earlier ruling in the same case- in the absence of an intervening ruling by a higher court on the same issues. This doctrine wants the courts to "display disciplined self-consistency" throughout the case. It distinguishes itself from *res judicata* and 'issue estoppel', both of which are much more rigid and offer not much leverage.

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225 U.S. 436, 444 (1912)

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The Law of Judicial Precedent, Bryan A. Garner et al., Thomson Reuters (2016), p.442

28. In fact, this doctrine, not an iron-clad one, has three exceptions: to address new evidence, to deal with a change in controlling legal authority, and to prevent a miscarriage of justice.⁶ Under the caption 'miscarriage of justice,' Garner et al., emphasise the rule's discretionary nature. If applying the doctrine would lead to, they postulate, a clearly erroneous result and if uncorrected, would work a serious injustice, the policy justifications of the doctrine yield to interests of justice, and courts decline to apply the former decision⁵. Finally comes the cautionary caveat: despite this roster of three exceptions to the law-of-the-case doctrine, it bears repeating that the doctrine is a prudential one. These rules and exceptions are meant to be a "guide to discretion," and not "a set of categorical rules, mechanically applied."⁶

29. Thus, in the same proceedings, under identical circumstances, the appellate Court having felt that the Society is a necessary party to the proceedings, that issue becomes *fait accompli*, and the trial Court will only go through the ritual of considering the Society's impleadment or intervention—and allow it.

(c) Is the Election Officers' Interference Justified?

30. Under these circumstances, I hold that the Election Officers have been hyper-vigilant in a manner unwarranted. They are, ironically,

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Id, p.442

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Id.pp.485-86

obstructing or even disrupting the democratic process, in aid of which they have been appointed. I reckon their applying to the trial Court for having a commissioner appointed for electing the office Managing Committee, which already had been appointed, amounts to an abuse of process. So does their challenging the impleadment of the Society—not to mention their withdrawing the application for having a commissioner appointed only when the trial Court's order in their favour was challenged before this Court.

31. Again and again, the petitioners' counsel has insisted that the president has no locus. I am afraid it is not the president, as I have already noted, that wanted to come on record; it is the Society. The Society and its President are as different as oil and vinegar.

Under these circumstances, I dismiss this writ petition with exemplary costs of Rs.10,000/- to be paid by the petitioners in favour of Goa State Legal Service Authority in four weeks after this Order is uploaded.

DAMA SESHADRI NAIDU, J.