

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 6966 OF 2022

Ladkya Rupa Kharpade	... Petitioner
Vs.	
Laxman Jethya Dombre & Ors.	... Respondents

Mr. Pratik Balasaheb Rahade for the Petitioner.
Mr. Atul Vanarase, AGP for State-Respondent.
Mr. Deelip Patil Bankar, Chief Standing Counsel, SCEA, for
Respondent No.2.

CORAM : ABHAY AHUJA, J.
DATE : 14TH JULY 2022

ORAL ORDER:

1. By this Petition, Petitioner challenges the order dated 21st December, 2021 passed by the Divisional Joint Registrar, Cooperative Society, Kokan Division, Navi Mumbai in director disqualification application no. 11 of 2021, whereby the Divisional Joint Registrar has rejected the claim of Petitioner for declaring him as an elected candidate, after Respondent No. 1 Petitioner was disqualified.

2. It is the case of Petitioner that Petitioner and Respondent No. 1 had contested the election of Respondent No. 4-Bank, from A Class Talasari Taluka Prathamik Krushi Patpurotha Vivid Karya Kari Sahakari Seva Constituency. The Petitioner and Respondent No. 1 were the only candidates to contest the election from the said constituency. Elections were conducted on 30th March, 2021 and the Respondent No. 1 came to be elected from the said constituency. The Petitioner lost the election and was a losing candidate.

3. Thereafter, by an application dated 19th April, 2021 to the Respondent No. 3-Divisional Joint Registrar, the Petitioner complained to the Respondent No. 3 that the Respondent No. 1 had incurred disqualification under Section 73 CA (7) as Respondent No. 1 as he had more than two children after the datum line of 2002 and prayed that the Respondent No. 1 be disqualified from the post of director of the Respondent no. 4-Bank. He further prayed that since the Petitioner was the only candidate who had contested against the Respondent No.1, in the event of disqualification of Respondent No.1, Petitioner be declared as elected and be appointed as director in place of Respondent No. 1. The Respondent No. 3 - Divisional Joint Registrar of Cooperative Societies, Kokan Bhavan,

after hearing and scrutinizing the evidence on record, passed an order dated 21st December, 2021 disqualifying Respondent No.1 under Section 73CA of the Act.

4. Mr. Rahade, learned counsel for the Petitioner points out that by the said order Petitioner's request for being appointed in place of disqualified Respondent No. 1 was also rejected and therefore, Petitioner is aggrieved and has filed this Petition on 17th January, 2022 before this Court.

5. During the course of hearing, Mr. Rahade, fairly brings to the notice of this Court order dated 21st June, 2022 (after the filing of the Petition) passed by this Court (Coram: Nitin W. Sambre, J) in Writ Petition No. 488 of 2022, filed by the Respondent No.1 challenging the very same order dated 21st December, 2021 by the Divisional Joint Registrar, Co-operative Societies which has been considered by this Court and the said Petition has been dismissed upholding the order of the Divisional Joint Registrar. This Court after having considered in detail the provisions of Section 73CA(1) (f)(vii) of the Maharashtra Co-operative Societies Act, 1960, (whereby an elected candidate suffers disqualification on the

ground of having more than two children) as well as arguments made on behalf of Petitioners, the arguments of Respondent No. 1 as well as various decisions this Court has observed in paragraph 16 that the impugned order (viz. Order dated 21st December, 2021) of disqualification of the Petitioner is justified. Mr. Rahade however submits that since the challenge in the said Petition was only to the disqualification by Respondent No.1 and was not with respect to the rejection of this Petitioner's prayer to be declared as elected candidate after the Respondent No. 1 was disqualified, this Petition requires consideration.

6. Mr. Patil Bankar, learned Chief Standing Counsel, State Co-operative Election Authority (SCEA) on behalf of Respondent No.2- District Co-operative election Officer, submits that there is no provision under the Maharashtra Co-operative Societies Act for declaring a lost candidate as elected in the event of disqualification of a successful candidate. He draws the attention of this Court to Section 73CA(2) to submit that a member who has incurred any disqualification under sub-section (1), shall cease to be a member of the committee and his seat shall thereupon be deemed to be vacant. Mr. Patil Bankar, also draws the attention of this Court to Rule 74 of

the Maharashtra Co-operative Societies (Election to Committee) Rules, 2014 (the “Election to Committee Rules, 2014”), in respect of filing up of Casual Vacancies and submits that the only manner in which such vacancies are to be filled up are under Rule 74(1) whereby after the communication of a vacancy *inter alia* on account of disqualification of a member, such vacancy shall be filled up as per convenience according to the provisions of the Maharashtra Co-operative Societies Act and the person so elected or co-opted, nominated to hold office as committee member only till the period in whose place such member has been appointed as if such a vacancy had not occurred.

7. After the matter is heard for some time, Mr. Pratik Rahade, learned counsel for Petitioner submits that Petitioner may be permitted to explore the avenues available to him under the Co-operative Societies Act and the Rules as submitted by Mr. Patil Bankar.

8. I have heard Mr. Pratik Balasaheb Rahade for the Petitioner. Mr. Atul Vanarase, AGP for State-Respondent. Mr. Deelip Patil Bankar, Chief Standing Counsel, SCEA, for Respondent No.2. and

given my thoughtful consideration to the matter.

9. This Court (Coram:- Nitin W. Sambre, J.) in **Laxman Jethya Dombare Vs. Ladkya Rupa Kharpade and Ors. (supra)** has considered challenge to the very same order dated 21st December 2021, disqualifying Respondent **Laxman Jethya Dombare Vs. Ladkya Rupa Kharpade and Ors. (supra)**No. 1 where Petitioner being Respondent No. 1 was also heard. Paragraphs No. 7 to 13 of the said decision are relevant and are quoted as under:-

7. No doubt, the respondent No.1 at the time of election has raised an objection to the candidature of the petitioner seeking rejection of his nomination form on the ground of having three children. As the objection was turned down by the Returning Officer at the relevant time and rightly so pointed out by the counsel for the petitioner, said issue was not taken to its logical end during the process of election.

8. The respondent No.1 has taken out present proceedings after the elections are over under Section 73CA(1)(f) seeking declaration on the similar ground i.e. the petitioner is having third children and as such has incurred disqualification to hold the post of director.

9. Such claim was contested by the petitioner on merits, as the claim put forth by the respondent is substantiated by the documentary evidence.

10. In the aforesaid background, what can be noticed that even if claim was raised by the respondent for rejection of nomination form during the process of election, such plea was restricted only to the extent of election process whereas under Section 73CA(1)(f) it is open for the respondent No.1 to seek declaration as regards disqualification of the petitioner. As such, both these remedies are available at different stages viz. before and after the election.

11. *Merely because respondent No.1 has raised an objection to the nomination form of the petitioner or has sought declaration in the proceeding under Section 73CA that he be declared as elected cannot be given colour of an election dispute. In any case, prayer of the petitioner for grant of declaration that he is elected is not allowed vide impugned order.*

12. *In the aforesaid background, reliance placed by the petitioner on the division bench judgment of this Court in the matter of Pandurang Laxman Kadam (cited supra) is wholly misplaced. The issue in the said judgment considered by the division bench was in relation to the deletion of members from the final voters list and of remedy under Article 227 of the Constitution of India in extraordinary jurisdiction of this Court. In the case in hand, respondent No.1 has already taken recourse to a remedy provided by statute viz. under Section 73CA and the authority, in my opinion, was justified in exercising powers conferred in it by virtue of such provision.*

13. *Once it is noticed that Section 73CA of the Act confers jurisdiction on the authority to pass an order impugned, the contention of the petitioner that the order impugned is without jurisdiction also needs to be rejected."*

10. There is therefore no doubt about the first Respondent's disqualification. The above quoted order confirms this. But I quite see and appreciate the point which learned Counsel for Petitioner seeks to canvass when he submits that the challenge in the case of **Laxman Jethya Dombare Vs. Ladkya Rupa Kharpade and Ors. (supra)** was with respect to the disqualification of Respondent No.1 and not with respect to Petitioner's prayer for being declared elected. Therefore, the question to be considered here is whether

upon disqualification of an elected candidate, can the losing candidate be declared as elected to the said office. That was not the question considered in the said Petition. The answer to this question in my view on first principles, would be a big no. How can a losing candidate possibly be declared elected to an office which is vacated upon disqualification of an elected candidate. This completely militates against the basic philosophy on which elections are conducted, unless of course the statute governing, provides otherwise, which, as will be seen, is evidently absent.

11. This then brings us to the provisions of Section 73CA(2) of the Maharashtra Co-operative Societies Act, 1960 which is quoted as under:-

“A member who has incurred any disqualification under sub-section (1), shall cease to be a member of the committee and his seat shall thereupon be deemed to be vacant.”

In nuce, upon disqualification the member ceases to be a member of the Committee and his seat is thereupon deemed to be vacant. There is also no doubt that Respondent No. 1 pursuant to Section 73CA(2) has vacated the office and his seat has become vacant.

12. Let us also consider sub-Sections 3 and 4 of Section 73CA of the Maharashtra Co-operative Societies Act, 1960, which are quoted as under:-

“(3) A member of a committee who has ceased to be a member thereof, on account of having incurred disqualification under sub section (A1) and clauses (i) to (ix) of sub-section (1) shall not be eligible to be re-elected, re-co-opted or re-nominated as a member of the committee till the expiry of the period of next term of five years of the committee from the date on which he has so ceased to be a member of the committee.

(4) A member of a committee who has ceased to be a member thereof, on account of having incurred any disqualification other than disqualifications, referred to in sub-section (3) shall, unless otherwise specifically provided in this Act, be eligible to be re-nominated or re-co-opted or re-elected as a member of the committee as soon as such disqualification ceases to exist.”

13. The disqualification in the present case pertains to Section 73CA(1)(f)(vii) of the Co-operative Societies Act and, therefore, any member who is disqualified under this provision shall not be eligible to be re-elected, re-co-opted or re-nominated as a member of the committee till the expiry of the period of next term of five years of the committee from the date on which he has so ceased to be a member of the committee.

14. Further, as can be seen under Section 73CA (4) of the Act, such a member can become eligible to be re-nominated or re-co-opted or re-elected as a member of the committee as soon as such disqualification ceases to exist.

15. All the aforesaid provisions are concerned with a disqualified member's period of disqualification and his eligibility in future to be re-nominated, re-co-opted or elected as member of the committee. There is no provision setting out whether or how a losing candidate can stake his claim to be declared elected in the eventuality of disqualification of a winning candidate.

16. Rule 74 of the Election to Committee Rules, 2014, as cited by Mr. Deelip Bankar Patil, is also usefully quoted as under:-

*“ 74. Casual vacancies how to be filled in.-
In the event of vacancy occurring on account of death, resignation, disqualification or removal of the member of a society or through such a member becoming incapable of acting prior to the expiry of his turn of office or otherwise, the Chief Executive officer of the Society shall forthwith communicate the occurrence of such vacancies to the SCEA and the vacancy shall be filled as soon as conveniently, according to the provisions of the Act. The person so elected or co-opted or, as the case may be, nominated shall hold office so long only as the member of the committee in whose place he is elected, is co-opted or as the case may be, nominated would have held it, if the vacancy had not occurred.”*

17. From a plain reading of this Rule, it is quite clear that a vacancy arising on account of death, resignation, disqualification or removal of a member of a society, upon the Chief Executive Officer's communication of the occurrence of such vacancy to the SCEA, shall be filled up as soon as conveniently in accordance with the provisions of the Maharashtra Co-operative Societies Act, 1960.

18. At this stage it would also be apposite to remind ourselves of the provisions enshrined in the Constitution of India in this regard.

Article 243(ZJ) is relevant and is quoted as under:

“243ZJ. Number and term of members of board and its office bearers.—

(1) The board shall consist of such number of directors as may be provided by the Legislature of a State, by law:

Provided that the maximum number of directors of a co-operative society shall not exceed twenty-one:

Provided further that the Legislature of a State shall, by law, provide for the reservation of one seat for the Scheduled Castes or the Scheduled Tribes and two seats for women on board of every co-operative society consisting of individuals as members and having members from such class or category of persons.

(2) The term of office of elected members of the board and its office bearers shall be five years from the date of election and the term of office bearers shall be conterminous with the term of the board:

Provided that the board may fill a casual vacancy on the board by nomination out of the same class of members in respect of which the casual vacancy has arisen, if the term of office of the board is less than half of its original term.

(3) The Legislature of a State shall, by law, make provisions for co-option of persons to be members of the board having experience in the field of banking, management, finance or specialisation in any other field relating to the objects and

activities undertaken by the co-operative society, as members of the board of such society:

Provided that the number of such co-opted members shall not exceed two in addition to twenty-one directors specified in the first proviso to clause (1):

Provided further that such co-opted members shall not have the right to vote in any election of the co-operative society in their capacity as such member or to be eligible to be elected as office bearers of the board:

Provided also that the functional directors of a co-operative society shall also be the members of the board and such members shall be excluded for the purpose of counting the total number of directors specified in the first proviso to clause (1)."

(emphasis supplied)

As can be seen, the Constitution of India also gives guidance as to the filling up of a casual vacancy by nomination out of the same class of members in respect of which the casual vacancy has arisen.

19. Accordingly, Section 73AAA of the Maharashtra Co-operative Societies Act with respect to the Constitution of Committees contains the aforesaid constitutional direction and is usefully quoted as under:

"73AAA(4) Any casual vacancy in the committee may be filled in from amongst the members belonging to the same category of persons in respect of which a casual vacancy has arisen."

20. It is quite clear that upon the disqualification of Respondent No. 1, a casual vacancy has arisen in the Managing Committee of the Respondent No. 4, Thane District Central Co-operative Bank,

Thane and accordingly such a vacancy in my view would need to be filled up in accordance with the Maharashtra Co-operative Societies Act and the Maharashtra Co-operative Societies (Election to Committee) Rules, 2014, keeping in mind the constitutional mandate referred to above.

21. Having also perused the gamut of the provisions pertaining to the Management of the Societies under the Maharashtra Co-operative Societies Act and the Election to Committee Rules, 2014 there does not appear to be any provision which permits a losing candidate to be declared elected in place of a disqualified winning candidate except by applying for a casual vacancy under Rule 74 of the Election to Committee Rules, 2014 keeping in mind Section 73AAA(4) of the Act, nor has any such provision of law other than stated above been brought to my notice.

22. The Petition must therefore fail and is hereby dismissed. No costs.

23. It is, however, clarified that Petitioner would always have the liberty of availing of the avenues under the provisions of the Maharashtra Co-operative Societies Act, 1960 and the Maharashtra Co-operative Societies (Election to Committee Rules), 2014.

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(ABHAY AHUJA, J.)