

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

WRIT PETITION NO. 4280 OF 2022

SANTOSH
SUBHASH
KULKARNI

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SANTOSH SUBHASH
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Date: 2023.09.29
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Nitin Bhagwant Kolase
Age 54 years, Occu. Service
R/o. Tung, Tal. Miraj, Dist. Sangli

...Petitioner

Versus

- 1 State of Maharashtra
Through its Principle Secretary, Co-
operation, Marketing and Textile
Department, Mantralaya, Mumbai
- 2 The Maharashtra State Agricultural
Marketing Board, through its Executive
Director, Plot No.R-7, Market Yard,
Gultekadi, Pune -
- 3 The Directorate of Marketing
Maharashtra State, Pune, Through its
Director, 3rd floor, New Central
Building, Pune 411 001
- 4 The Sangli Agricultural Produce Market
Committee, Sangli, though its
Chairman
- 5 Mahesh Patangrao Chavan,
Age : Adult, Occu. Service
R/o. Daphalapur, Tal. Jath, Dist.
Sangli

...Respondents

Mr. Ashutosh Kulkarni, for the Petitioner.
Mr. P. P. Pujari, AGP for the State.
Mr. Vijay D. Patil, for Respondent No.2.
Mr. Surel Shah, i/b Abhay Jadhavar, for Respondent No.4.
Mr. Y. S. Jahagirdar, Senior Advocate, i/b Abhay Jadhavar, for
Respondent No.5.

CORAM: N. J. JAMADAR, J.

RESERVED ON: 22nd JUNE, 2023

PRONOUNCED ON: 29th SEPTEMBER, 2023

JUDGMENT:-

1. Rule. Rule made returnable forthwith and, with the consent of the learned Counsel for the parties, heard finally.

2. The petitioner takes exception to legality, propriety and correctness of an order dated 28th January, 2021, passed by the Minister (Cooperation and Marketing) in Appeal No.23 of 2020 under Section 52B of the Maharashtra Agricultural Produce Marketing (Development and Regulation) Act, 1963 (“the Act, 1963”), whereby the appeal preferred by respondent No.5 against an order dated 17th September, 2020 passed by the Director Marketing – respondent No.3, declining approval to the appointment of respondent No.5 as the Secretary of Sangli Agricultural Produce Market Committee (“the Market Committee”) came to be set aside and the resolution passed by the Sangli APMC – respondent No.4, dated 11th June, 2020 appointing respondent No.5 as the Secretary came to be approved.

3. The petition arises in the backdrop of the following facts:

(a) The petitioner joined the respondent No.4 - Market Committee on 7th February, 1988 as a Junior Clerk. The petitioner presently serves as a Supervisor with respondent No.4. Under Section 35 of the Act, 1963 the Market Committee

is empowered to employ a Secretary amongst other staff. However, under the second proviso to Sub-section (1) of Section 35, the Market Committee was enjoined to appoint a Secretary only from the list of persons prepared by the State Marketing Board - respondent No.2.

(b) In exercise of the said power, respondent No.2 issued a circular on 7th January, 2013 empaneling the employees who can be appointed as Secretary. Respondent No.5 was included in the said panel.

(c) In the meanwhile, respondent No.1 issued a resolution on 15th July, 2013 conferring the power of appointment of Secretary itself on the respondent No.2 instead of the Market Committee. The legality and validity of the said resolution was assailed in Writ Petition No.7720 of 2013. By an interim order dated 21st October, 2013 this Court restrained respondent Nos.1 and 2 from acting upon the circular dated 15th July, 2013. However, the appointments of 51 persons, who were already appointed as secretaries, were protected. Eventually, upon the respondent No.1 deciding to withdraw the said resolution dated 15th July, 2013, the writ petition came to be disposed by an order dated 6th December, 2019.

(d) In the year, 2016, respondent Nos.5 and others preferred a writ petition being WP/3824/2016 seeking, *inter alia*, directions against respondent Nos.1 and 2 to fill up all vacant posts of secretaries of all Market Committees in the State of Maharashtra from the panel prepared by respondent No.2 on 7th January, 2013 and quash and set aside the decision taken by respondent No.2 to prepare a new panel of secretaries. Eventually by an order dated 16th December, 2019 this Court dismissed the writ petition preferred by respondent Nos.5 and others, as the panel of secretaries prepared by respondent No.3 had ceased to exist after expiry of three years i.e. 6th January, 2016. No new panel of secretaries has thereafter been prepared by respondent Nos.2 – State Marketing Board.

(e) Despite the dismissal of the writ petition on 16th December, 2019, respondent No.5 submitted an application to APMC, Sangli - respondent No.4, to appoint him as a Secretary of respondent No.4. Vide a resolution purported to be passed in the meeting of the Market Committee held on 11th June, 2020, respondent No.4 appointed respondent No.5 as Secretary of the respondent No.4. The said action of respondent No.4 according to the petitioner is in gross violation of the principles which govern the promotion of the employees to the post of Secretary.

Respondent No.5 was appointed only on the ground that his name was included in the panel prepared on 7th January, 2013, which had lapsed long back.

(f) Respondent No.4 forwarded the proposal, for appointment of respondent No.5, to the respondent No.3. By an order dated 17th September, 2020, respondent No.3 declined to grant approval as the validity of the panel of secretaries had already lapsed on 6th January, 2016.

4. Being aggrieved, respondent No.1 preferred an appeal being Appeal No.23 of 2020 purportedly under Section 52B of the Act, 1963. By the impugned judgment and order dated 28th January, 2021 the Minister (Cooperation and Marketing) quashed and set aside the said order dated 17th September, 2020 and also granted approval to the appointment of respondent No.5 as Secretary of respondent No.4. Hence, being aggrieved, the petitioner has invoked the writ jurisdiction.

5. The thrust of the petition is that the list dated 7th January, 2013 containing names of the persons, who could be appointed as Secretary, had expired long back and respondent No.4 thus could not have appointed respondent No.5 as the Secretary for the mere reason that his name was included in the lapsed list. Secondly, respondent No.4 having already instituted Writ

Petition No.3824 of 2016 and suffered an adverse order could not have been appointed to the very same post, after the dismissal of the said writ petition. In the said petition, this Court clearly noted that the respondent No.5 and other petitioners had no right to be appointed on account of the fact that their names were included in the panel.

6. Respondent No.4 Market Committee has resisted the petition by filing an affidavit-in-reply. Respondent No.4 claims that respondent No.5 has been appointed as the Secretary of respondent No.4 Market Committee after considering his standing and the nature and experience of work performed by him and found him fit to be appointed as a Secretary of the Market Committee. It was contended that under Section 35(1) the Market Committee is vested with authority to appoint the staff including the Secretary. The locus of the petitioner to assail the appointment of respondent No.5 was also questioned on the ground that the petitioner has failed to satisfy as to how the petitioner could have been appointed to the said post and, is, thus, an aggrieved person.

7. Respondent No.5 also contested the petition by filing an affidavit-in-reply. It was contended that respondent No.5 had been working with respondent No.4 since last 19 years and after

considering his qualification and experience, respondent No.4 appointed him as the Secretary of the Market Committee. In contrast, according to respondent No.5, the petitioner is neither eligible nor the petitioner had applied for appointment to the post of Secretary. In fact, during the pendency of this petition, the petitioner had filed complaint being Complaint (ULP) No.14 of 2022 before the Industrial Court at Sangli seeking cancellation of promotion given to an employee to the post of Deputy Secretary on the establishment of respondent No.4. Thus, the petitioner had been resorting to litigation to wreak vengeance. It was categorically denied that respondent No.5 came to be appointed to the post of Secretary only because his name found mention in the panel prepared by respondent No.2.

8. In the wake of the aforesaid pleadings, I have heard Mr. Ashutosh Kulkarni, the learned Counsel for the petitioner, Mr. P. P. Pujari, the learned AGP for the State – respondent Nos.1 and 3, Mr. Vijay Patil, the learned Counsel for respondent No.2, Mr. Surel Shah, the learned Counsel for respondent No.4 – Market Committee and Mr. Jahagirdar, the learned Senior Advocate for respondent No.5. With the assistance of the learned Counsel for the parties, I have perused the material on record including the

orders passed by this Court in Writ Petition No.3824 of 2016 and Writ Petition No.7720 of 2013.

9. Mr. Kulkarni, the learned Counsel for the petitioner, would submit that the impugned order passed by the Minister (Cooperation and Marketing) suffers from the vice of clear non-application of mind. The Minister did not advert to the fact that in the absence of valid panel of secretaries, respondent No.4 Market Committee had no authority to appoint a Secretary as the power to appoint the Secretary was circumscribed by the second proviso to Section 35(1) which envisaged preparation of a panel for appointment. Since, indisputably, the panel prepared by respondent No.2 under the second proviso to Section 35(1) of the Act, 1963 had already lapsed by efflux of time, on 6th January, 2016, no appointment could have been made with reference to the entries in the said panel of secretaries. Director Marketing, respondent No.3, therefore, according to Mr. Kulkarni, was fully justified in declining to grant approval to the appointment of respondent No.5 as the Secretary and the said order was unjustifiably interfered with by the Minister (Cooperation and Marketing). Mr. Kulkarni laid emphasis on the fact that even the writ petition preferred by respondent No.5 and others for seeking appointment on the post of secretaries as

a number of posts were vacant across the State, on the basis of the panel prepared by respondent No.2, having been dismissed, it was not open to the authorities to appoint respondent No.5. This amounts to overreaching the orders of the Court.

10. In any event, in view of the second proviso to Section 35(1), which came to be inserted by Maharashtra Act No.48 of 2005 and subsequently substituted by Maharashtra Act No. 27 of 2022, a Secretary could have been appointed only in the manner ordained by Section 35(1) and the thing could not have been achieved in an indirect manner, which respondent No.5 was not entitled to do directly. To bolster up this submission Mr. Kulkarni placed a strong reliance on a judgment of the Supreme in the case of *Union of India and ors. vs. Mahendra Singh*¹.

11. Per contra, Mr. Jahagirdar, the learned Senior Counsel for respondent No.5, supported the impugned order. It was urged that the petitioner has misconstrued the import of the judgment of this Court in the case of *Maharashtra State Marketing Committees' Co-operative Federation Ltd. Pune vs. The State of Maharashtra and ors.*², to suit the petitioner's cause. According to Mr. Jahagirdar on a fair reading of the said judgment it

1 2022 SCC Online SC 909.

2 Writ Petition No.7720/2013 dtd.21/10/2013.

becomes evident that the power of the Market Committee to appoint a Secretary under Section 35(1) of the Act, 1963 has been specifically upheld. According to Mr. Jahagirdar, in the facts of the case, respondent No.4 has appointed respondent No.5 to the post of Secretary lawfully. As it is the case of the petitioner that the validity of the panel prepared by respondent No.2 had expired in the year 2016 itself, the petitioner cannot assail the impugned order on the ground that there is breach of second proviso to Sub-section (1) of Section 35.

12. Mr. Surel Shah, the learned Counsel for respondent No.4, while supplementing the submissions of Mr. Jahagirdar, would submit that the challenge at the instance of the petitioner does not deserve to be countenanced. The petitioner had, in fact, tendered resignation of his post. Subsequently, the petitioner had filed a complaint under Section 28 of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 alleging unfair labour practices in the promotion of the Shri Bhimanna Choudhary Ghomane to the post of Deputy Secretary of respondent No.4. The petitioner, thus, nowhere claimed that he was eligible to be appointed to the post of Secretary of respondent No.4. Therefore, the petition deserves to be dismissed in limine.

13. The learned AGP also supported the impugned order.

14. Under Section 2(j) of the Act, 1963, “Market Committee” means a committee constituted for a market area under Section 11 and includes the Bombay Agricultural Produce Market Committee established under Clause (a) sub-section (1A) and the Divisional or Regional Market Committee declared under clause (a) of sub-section (1B) of Section 13 and a committee or committees constituted as a result of amalgamation of a Market Committees or division of a Market Committee under Section 44. Under clause (r) of Section 2 ‘Secretary’ means a Secretary of a Market Committee and includes a Joint, Deputy or Assistant Secretary. Section 35 of the Act empowers a Market Committee to employ a Secretary and such other officers and servants as may be necessary for discharge of its functions under the Act, 1963. Section 35(1), alongwith the second proviso (as it stood then), read as under:

“35. Power of Market Committee to employ staff.

[(1) A Market Committee may employ a Secretary and such other officers and servants as may be necessary for the management of the market, for the collection, maintenance, dissemination and supply of information relating to crops statistics and marketing intelligence and for carrying out its duties under this Act; and shall pay such officers and servants such salaries and allowances, pension or gratuity and shall contribute to any provident fund and pension fund which may be established for the benefit of such employees:

Provided that, all posts other than that of a Secretary shall, subject to such general or special directions which the

Director may issue in this behalf, be created only with the prior approval of the Director.

[Provided further that, the State Marketing Board shall prepare a list of the persons to be appointed as the Secretaries on the Market Committees according to their qualification and experience and it shall be binding on the Market Committees to appoint a person as Secretary from the list of persons enrolled.]”

15. On a plain reading, under sub-section (1) of Section 35 the Market Committee is empowered to appoint a Secretary. The proviso, however, envisaged a restriction on the power to appoint a Secretary by making it obligatory for the Market Committee to appoint the Secretary only from the list of persons prepared by the State Marketing Board for being appointed as the Secretary. Power to appoint Secretary, however, vested with the Market Committee. The choice of a candidate to be appointed as the Secretary was however limited to the persons empanelled by the State Marketing Board.

16. It is in the aforesaid backdrop, the decision of this Court in the case of *Maharashtra State Marketing Committees’ Co-operative Federation Ltd.* (supra) deserves to be considered. By an order dated 15th July, 2013 purportedly issued under Section 59 of the Act the State Government professed to confer the power to make appointment to the post of Secretaries to various Market Committees out of the list prepared by it, on the State Marketing Board itself. The said decision was under challenge

in the said petition. Observing that the said order dated 15th July, 2013 conferring power on the State Marketing Board to appoint the Secretary was completely contrary to Section 59 of the Act, this Court granted interim relief. Eventually, the said order dated 15th July, 2013 was withdrawn by the Government on 24th April, 2017 and thus the said writ petition was disposed.

17. The aforesaid decision, if properly construed, emphasised the power of the Market Committee to appoint the Secretaries and restored the authority and primacy of the Market Committee in the matter of appointment of the Secretary, which was sought to be taken away by empowering the State Marketing Board to appoint the Secretaries under order dated 15th July, 2013.

18. Then came the decision of this Court in Writ Petition No.3824 of 2016 preferred by respondent No.5 and others. In the said petition, respondent No.5 and others *inter alia* sought a mandamus to the authorities to fill up all vacant posts of Secretaries of all Market Committee in the entire State within the stipulated time without invalidating the panel of candidates prepared by the State Marketing Board on 7th January, 2013. This Court held that the petitioners therein would not be entitled to any relief as the term of the list of the candidates

prepared by the State Marketing Board – respondent No.3 therein, had already come to an end on 6th January, 2016.

19. In the backdrop of the aforesaid decision, in Writ Petition No.3824 of 2016, Mr. Kulkarni strenuously submitted that to overreach the order passed by this Court, respondent No.5 approached respondent No.4 Market Committee directly and came to be appointed as the Secretary on the premise that his name was included in the panel which had already lapsed.

20. At the first blush, the submission appears attractive. In the resolution of respondent No.4 Committee dated 11th June 2020 in addition to the profile of respondent No.5, the nature of work performed by him and the experience to his credit, there is reference to the fact that respondent No.5 was included in the panel prepared by the State Market Board as an eligible person. In ordinary circumstances, the aforesaid factor would have rendered the decision of the Market Committee vulnerable. However, there are facets which warrant a deeper scrutiny.

21. Undoubtedly, there can be no duality of opinion that if a thing is required to be done in a particular manner, it must be done in that manner and no other. In the case of ***Mahendra Singh (supra)*** on which reliance was placed by Mr. Kulkarni, after adverting to the celebrated decision of the Privy Council in

the case of *Nazir Ahmad vs. King Emperor*³, wherein it was enunciated that 'where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all and other methods of performance are necessarily forbidden', it was reiterated that if a particular procedure in filling up the application form was prescribed, the application form should have been filled up following that procedure alone.

22. The crucial question that wrenches to the fore is, whether in the given circumstances, the Market Committee could have followed the mandate of law. It is pertinent to note that there was no embargo on the power of the Market Committee to employ a Secretary. The only restriction was that it should appoint a Secretary from the list of persons prepared by the State Marketing Board. Evidently, the list so prepared by the State Marketing Board had expired on 6th January, 2016. No list was thus in existence, out of which respondent No.4 Market Committee could have selected a person for being appointed as a Secretary. It is not the case that after the said list expired, the State Marketing Board had prepared a fresh list of candidates eligible to be appointed as Secretary. Non-availability of a list, in a situation of this nature, operated as an impediment in the appointment of the Secretary to the Market Committee. Thus,

3AIR 1936 PC 253.

indirectly, the Market Committee, which was otherwise statutorily empowered to appoint a Secretary, was denuded of the said power by omission on the part of the State Marketing Board to prepare and keep a valid list of candidates for being appointed as Secretary.

23. It is imperative to note that under the provisions of the Act, 1963 the Secretary of a Market Committee appears to be a key functionary. Sub-section (2) of Section 35 provides that the Secretary of the Market Committee should be the Chief Executive Officer and the custodian of the records and properties of the Market Committee and shall exercise such powers as are conferred and perform such duties as are imposed upon him by or under the said Act. The resultant position which the omission on the part of the State Marketing Board to have a list of candidates was that, the Market Committee was deprived of the services of the Chief Executive Officer thereby jeopardizing the efficient management of the Market Committee.

24. Had this been the only consequence, this Court might have been inclined to entertain the challenge. Legislative intervention, however, made the position rather irretrievable.

The second Proviso to Section 35(1) came to be substituted by Amendment Act No.27 of 2022. It now reads as under:

“35. Power of Market Committee to employ staff

.....

[Provided further that, Secretary and such other officers and servants shall be employed by the Market Committee, with the prior approval of the Director, on such terms and conditions and manner, as may be prescribed.]”

25. The situation which thus obtains is that with the substitution of the second proviso, there is no restriction to select a candidate from the list of candidates maintained by the State Marketing Board. The position thus stands restored to the stage as it obtained before the proviso came to be inserted by Maharashtra Act No.48/2005. The Market Committee is empowered to appoint a person as a Secretary whom it considered suitable. That leads to the question: should the appointment of respondent No.5 be interdicted at the instance of the petitioner and at this stage?

26. During the pendency of this petition, the petitioner had filed a complaint before the Industrial Court being Complaint (ULP) No.14 of 2022 seeking a declaration that the appointment of Bhimanna Choudhary, respondent No.2 therein, to the post of Deputy Secretary amounted to an unfair labour practice. The petitioner also sought a direction to the Market Committee

to appoint him to the post of Deputy Secretary. Evidently, the petitioner did not claim to be eligible for being appointed to the post of Secretary. The petitioner seems to have, however, withdrawn the said complaint on 19th June, 2013. At this stage, the Court may also not attach much importance to the fact that the petitioner tendered resignation of the post Supervisor which he was occupying with respondent No.4 and which he claimed to have later withdrawn. However, in view of the situation which emerges reflecting upon the eligibility of the petitioner to be appointed to the post of Secretary, a challenge at his instance to the appointment of respondent No.5 to the post of Secretary, where the Market Committee has found him otherwise suitable, may not be entertained in exercise of extraordinary writ jurisdiction. I, thus, find no substance in this petition.

27. Hence, the following order.

: O R D E R :

- (i)** The petition stands dismissed.
- (ii)** Rule discharged.
- (iii)** No order as to costs.

[N. J. JAMADAR, J.]