

CASE NO.:
Appeal (civil) 5290 of 2005

PETITIONER:
PUNDLIK

RESPONDENT:
STATE OF MAHARASHTRA & ORS.

DATE OF JUDGMENT: 25/08/2005

BENCH:
Y. K. Sabharwal & C.K. Thakker

JUDGMENT:
J U D G M E N T
(ARISING OUT OF S. L. P. (C) No. 14832 OF 2005)

Hon. C.K. Thakker, J.

Leave granted.

The present appeal arises out of an order dated July 13, 2005 passed by the High Court of Bombay in Writ Petition No.4291 of 2005. By the said order, the High Court was pleased to dismiss the petition filed by the appellant herein.

To appreciate the controversy raised in the present appeal, relevant facts in brief may be stated.

There is a specified Society, namely, Aurangabad Zilla Sahakari Doodh Utpadak Sangh Ltd., Aurangabad, respondent No. 6 herein ('Sangh' for short), registered under the Maharashtra Co-operative Societies Act, 1960 (hereinafter referred to as "the Act"). The Managing Committee of the Sangh consists of several members and the appellant as also respondent No. 7 are elected members of the Committee. On April 5, 2005, the process for election of respondent No.3 -Maharashtra Rajya Sahakari Doodh Maha Sangh Marvadi, Mumbai ("Maha Sangh" for short) started. The Maha Sangh directed the Sangh to send the name of its delegate on or before April 16, 2005. On April 7, 2005, the Sangh called a meeting of the Managing Committee by issuing an agenda. The meeting was scheduled to be held on April 15, 2005. The agenda contained only one subject regarding discussion of letter dated April 5, 2005 received from the Maha Sangh. In the said meeting a unanimous decision was taken to send the name of respondent No. 7 as the delegate of the Sangh. On May 19, 2005, the Maha Sangh sent a telegram to the Sangh directing it to send the name of its representative afresh in the light of amended bye-laws. The Sangh, therefore, convened a meeting on May 24, 2005 to discuss the matter. A decision was again taken to send the name of respondent No. 7 subject to the confirmation of the decision in the subsequent meeting. On May 30, 2005, the Collector published the programme of various stages upto finalization of the voters' list in accordance with the provisions of the Maharashtra Specified Co-operative Societies Election to Committee Rules, 1971 (hereinafter referred to as "the Rules"). As per that programme, any objection for inclusion of names in the voters' list must be taken before June 10, 2005. It was mentioned that if the Sangh wanted to change the name of its delegate, it could do so latest by June 10, 2005. Pursuant to the said communication received from the Collector, a meeting of the Managing Committee of the Sangh was convened on June

9, 2005 and it was decided to send the name of the appellant as the delegate of the Sangh for the election of Maha Sangh. A resolution to that effect was passed being Resolution No. 7 which inter alia stated that earlier the name of respondent No. 7 was sent, but thereafter it was decided to send the name of the appellant. Respondent No. 7 raised a dispute before the Co-operative Court, Aurangabad against the said decision which is pending. It is asserted by the appellant that the Divisional Deputy Registrar, Co-operative Societies (Dairy), Aurangabad vide his communication, dated June 18, 2005 to the Joint Registrar, Co-operative Societies (Dairy), Mumbai informed that Resolution No. 7 had been passed by the Sangh which was 'correct'. On June 20, 2005, the Collector finalized voters' list and on June 27, 2005 the list was published. By an order dated June 28, 2005, respondent No. 2 - Collector informed the appellant that in the list of subjects of the meeting, there was no subject for changing the name of the representative of the Sangh and, therefore, the change of the representative in the meeting dated June 9, 2005 was not proper. Being aggrieved by the order, the appellant filed a writ petition which, as stated above, was dismissed by the High Court. Against the decision of the High Court, the appellant has approached this Court by filing special leave to appeal on July 21, 2005. Notice was issued by this Court on July 25, 2005. Affidavit-in-reply is filed by respondent No. 7.

We have heard the learned counsel for the parties.

The learned counsel for the appellant contended that the order passed by the High Court suffers from illegality and infirmity. According to him, a right has been conferred on the Sangh to change its representative under the Rules and when the right has been exercised within the stipulated period by passing a resolution, it was incumbent on respondent No. 2 - Collector to effect change as per the resolution passed by the Sangh. The counsel submitted that the High Court had committed grave error in holding that the petition was not maintainable as the election process started. The High Court was also wrong in relying upon the decision of this Court in Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha & Another v. State of Maharashtra & Ors., (2001) 8 SCC 509. The said decision was clearly distinguishable and the ratio laid down therein did not apply. Since, the Sangh was exercising its statutory right, the action of respondent No. 2 -Collector was contrary to law and ought to have been interfered with by the High Court. It was, therefore, submitted that the appeal deserves to be allowed by directing respondent No. 2 \026 Collector to substitute the name of the appellant for the name of respondent No. 7 as the representative of the Sangh.

The learned counsel for the respondents, on the other hand, supported the order passed by the High Court. It was submitted by them, particularly on behalf of respondent No. 7, that there was suppression of material facts by the appellant and special leave to appeal may not be granted by this Court in exercise of discretionary power under Article 136 of the Constitution. It was stated that against an action taken by respondent No. 2 - Collector in not effecting the change, a substantive petition has been filed by seven Committee Members of the Sangh being Writ Petition No. 4580 of 2005 in the High Court of Bombay, Aurangabad Bench on July 6, 2005 and the said petition is pending. The appellant is aware of the said fact and yet that fact has been concealed from this Court. Even on merits, the appellant has no case. In several decisions, the High Court of Bombay has consistently taken the view that preparation of

election roll is an intermediate and integral process of election and it cannot be interfered with at that stage. It was stated that in the first meeting of the Sangh, unanimous decision was taken on April 15, 2005 to send the name of respondent No. 7 as the representative of the Sangh. The said decision was reiterated on May 19, 2005. It was only on June 9, 2005 that the so-called decision was taken to change the name of the representative of the Sangh and instead of respondent of 7, the name of appellant was sought to be substituted. The counsel contended that the change of representative of respondent Sangh was not on agenda and no resolution could have been passed. Further, the purported decision was contrary to the bye-laws of the Sangh and since the appellant had not obtained majority votes, his name could not have been sent as representative of the Sangh. The High Court was wholly right in relying upon Rule 81 of the Rules and in holding that if the appellant is aggrieved by the decision of respondent No. 2 \026 Collector, he could file election petition for declaring election to be void. He, therefore, submitted that the appeal deserves to be dismissed.

Having heard the learned counsel for the parties, in our opinion, the appeal deserves to be allowed. So far as the preliminary objection to the maintainability of proceeding before this Court is concerned, it is no doubt true, as submitted by the learned counsel for respondent No. 7 that the members of the Managing Committee of the Sangh have approached the High Court of Bombay, Aurangabad Bench by instituting a writ petition which is pending. But, it is equally true and is not disputed by respondent No. 7 that the appellant had filed a petition in the High Court of Bombay on June 30, 2005, i.e. prior to the petition filed by seven Members of the managing Committee before Aurangabad Bench. Moreover, the appellant is not a party to the said petition. So even if it is assumed that the appellant was aware of filing of the writ petition and pendency thereof, it was open to him to approach this Court against a decision of the High Court after his petition was dismissed. When the appellant approached this Court by filing special leave petition on July 21, 2005, the petition at Aurangabad Bench was pending and is still pending. It, however, cannot prevent the appellant in approaching this Court. In our considered opinion, non-disclosure of fact of filing a writ petition by members of Managing Committee of respondent Sangh in the Special Leave Petition in this Court cannot be said to be material or vital so as to deprive the appellant to the relief to which he is otherwise entitled. It cannot be said that the appellant has not come with clean hands. Since the name of representative of respondent \026 Sangh was not changed as per the resolution, dated June 9, 2005, the Members were aggrieved and accordingly, they had initiated proceedings in the High Court of Bombay, Aurangabad Bench. Similarly, the appellant was aggrieved since his name was not substituted for the name of respondent No. 7 which is a distinct, separate and independent cause of action. It was, therefore, open to him to take proceedings against such decision and accordingly, he had approached the High Court in June, 2005 and on dismissal of the petition, he is in this Court. The preliminary objection, therefore, is not well founded and the appeal cannot be dismissed on that count.

On merits, it is true that the High Court of Bombay has in several cases held that preparation of voters' list is an integral process of election and a court would not interfere at that stage. In this connection, our attention has been invited by the learned counsel to Dhondiba Parshuram Lakde & Others vs. Someshwar Sahkari Sakhar Karkhana Ltd. & Others, (1979) Mah LJ 311, Someshwar Sahkari Sakhar Karkhana Ltd. vs. Srinivas Patil,

Collector, (1992) 1 Mah LJ 883 and Shivnaryan Amarchand Paliwal vs. Vasantrao Vithalrao Gurjar, (1992) 2 Mah LJ 1052. Strong reliance was placed on Sant Sadguru Janardan Swami. It was contended by the respondents that preparation of electoral roll is an interim stage in the process of election of the specified society and the Court should not stay or interfere with the said election process.

We are unable to uphold the contention. In Sant Sadguru Janardan Swami, this Court had an occasion to consider the relevant provisions of the Act and the Rules. Referring to Section 144 X of the Act, the Court observed that preparation of list of voters is one of the stages of election. It is true that according to this Court, normally the High Court would not interfere in exercise of powers under Article 226 of the Constitution at the stage of preparation of list of voters but such action must be in accordance with law.

We have been taken through the relevant provisions of the Rules by the learned counsel for the parties. Rule 4 of the Rules provides for provisional list of voters. Rule 5 relates to particulars to be included in the provisional list of voters. Sub-rule (2) of the said rule is relevant and material for our purpose and it may be reproduced :

5. Particulars to be included in provisional list of voters \026

(1) \005 \005 \005 \005 \005 \005 \005 \005 \005

(2) Where a society is a member of a specified society, the specified society shall call for the name of the delegate duly authorized to vote at an election on behalf of the affiliated society, so as to reach it by the 2nd July. While communicating the name of its delegate to the specified society, the affiliated society shall enclose a copy of the resolution of the society or its committee under which the delegate is so authorized. The specified society shall include in the list of voters the names of all such delegates as have been communicated to it before the date fixed for publication of the provisional list. In addition to the names of all such delegates, the list shall contain the names of the affiliated societies, their registration numbers and addresses and the names of constituencies, if any, to which they belong. A society which has communicated the name of its delegate shall by like resolution be permitted to change the name of its delegate not later than seven days before the date appointed by the Collector under Rule 16 of the said Rules for making nominations." (emphasis supplied)

Rule 6 deals with claims and objections to provisional list of voters. Rule 7 requires a copy of final list of voters of every society to be displayed on the notice board of office of the Collector, the District Deputy Registrar and the Society. Rule 16 provides for appointment of dates for various stages of election.

The respondent No.2 - Collector passed an order on May 30, 2005, stating therein that in accordance with the provisions of the Rules, various dates for publication of list of voters had been settled as per Schedule I. It was mentioned in the Schedule that submission of any objection or claim could be raised by June 10, 2005 under Rule 6. The last date for publication of final voters' list was June 27, 2005. In the light of the above order, a

resolution was passed by the Sangh that instead of name of respondent No. 7, the name of the appellant will be sent as representative of the Sangh. The grievance of the appellant is that the meeting was held on 9th June, 2005 wherein Resolution No. 7 was passed and respondent No.2 was informed about the said decision and yet he had not changed the representative of the respondent Sangh. The said action was clearly contrary to and inconsistent with Rule 5 of the Rules. The said rule enabled the Sangh to change the name of its delegate not later than seven days before the date appointed by the Collector under Rule 16 for making nominations. As the action was in consonance with the Rules, it was obligatory on the Collector to change the name on the basis of the resolution passed by the Sangh. Non-implementation of the resolution and the refusal to change the name of the representative of the Sangh was unlawful and the High Court ought to have set aside the said decision by directing the Collector to effect the change and to treat the appellant as representative of respondent Sangh at the place of respondent No. 7.

We see considerable force in the contention of the learned counsel for the appellant. Bare reading of Rule 5(2) makes it abundantly clear that the society which has communicated the name of its delegate can change the name of such delegate within the period stipulated therein. It was, therefore, open to respondent Sangh to exercise the said power in accordance with Rule 5(2) which has been done. It was the case of respondent No.2 - Collector that in the list of subjects of the meeting convened on June 9, 2005, there was no subject for sending the name of representative for the election of the Maha Sangh and yet the representative was changed which was not proper. But the learned counsel for the appellant has rightly referred to the proceedings dated June 9, 2005, and in particular Resolution No. 7. It is further clear from agenda notice dated June 2, 2005, in which it was stated that the meeting of Board of Directors of respondent Sangh would be held on June 9, 2005 for discussing various subjects and subject No.7 related to the fax message received from the Collector, Mumbai, respondent No.2 in connection with the election of respondent No.3 Maha Sangh. Pursuant to the above agenda notice, a meeting was held, subject No. 7 was taken for consideration and Resolution No.7 was passed. By the said resolution, it was decided that instead of name of respondent No. 7, name of appellant will be sent as delegate and representative of respondent - Sangh and the said resolution was forwarded to respondent No.2 - Collector. He was, therefore, under obligation to effect change under Rule 5(2) of the Rules. By not acting on the resolution, the respondent No.2 \026 Collector has acted contrary to law and the appellant was wholly justified in making complaint before the High Court and praying for exercise of writ jurisdiction under Article 226 of the Constitution.

In our considered opinion, the ratio laid down in Sant Sadguru Janardhan Swami does not apply to the facts of the case. In that case, objections against publication of provisional electoral roll of the society were filed which were considered by the Collector and disposed of. Final electoral roll was published on July 2, 1999. Election programme was drawn by him on October 21, 1999. Thereafter, the petitioner filed a petition under Article 226 of the Constitution in the High Court. A prayer was made in the petition that the order passed by the Collector on October 21, 1999 was required to be set aside. Obviously, therefore, the election process was already in motion and prayer of the petitioner was for quashing of Schedule for holding election. In the light of the factual position before the court, the

petition was dismissed and it was held that the only remedy available to the aggrieved petitioner was to file election petition after the election is over in accordance with Rule 81 of the Rules.

The Court stated :

"In view of our finding that preparation of the electoral roll being an intermediate stage in the process of election of the Managing Committee of a specified society and the election process having been set in motion, it is well settled that the High Court should not stay the continuation of the election process even though there may be some alleged illegality or breach of rules while preparing the electoral roll. It is not disputed that the election in question has already been held and the result thereof has been stayed by an order of this Court, and once the result of the election is declared, it would be open to the appellants to challenge the election of the returned candidate, if aggrieved by means of an election petition before the Election Tribunal."

In the instant case, respondent Sangh had taken immediate action on receiving the fax message from respondent No.2 - Collector. As per the said communication by the Collector, an action could be taken for change of representative of respondent Sangh latest by June 10, 2005. A meeting was, therefore, convened by issuing an agenda to that effect by respondent Sangh on June 2, 2005. The meeting was accordingly convened on June 9, 2005 and a resolution was passed being Resolution No. 7 wherein it was decided that instead of respondent No. 7, the appellant would represent respondent Sangh in the election of Maha Sangh. Since the action was taken strictly in conformity with the provisions of Rule 5 of the Rules as also the communication of respondent No.2 - Collector dated May 30, 2005, respondent No.2 ought to have effected the change. The ground put forward for rejecting the resolution was not correct inasmuch as in the agenda notice issued by respondent - Sangh dated June 2, 2005, subject No.7 had clearly been mentioned and in pursuance of the said agenda notice, a meeting of the Managing Committee of respondent - Sangh was convened and a decision was taken. The grievance of the appellant, therefore, was justified that by not effecting the change and by ignoring the resolution passed by the Managing Committee of respondent \026 Sangh the Collector has acted contrary to law.

In our opinion, the learned counsel for the appellant is also right in submitted that if the order passed by respondent No.2 is upheld, the provisions of sub-rule (2) of Rule 5 will become nugatory and otiose. When the rule making authority conferred power on the Sangh to change the name of its representative/delegate by expressly permitting the change of representative/delegate and intimating the said fact to the Collector, such right cannot be taken away or interfered with. Since the last date as per the communication of the respondent No.2 - Collector was June 10, 2005, the action of respondent - Sangh was within the four corners of Rule 5(2). The High Court was, therefore, in error in not allowing the petition and granting the relief to the appellant.

We are also supported in taking this view by a recent three-Judge Bench decision in Ahmednagar Zilla S.D.V. & P. Sangh Ltd. & Another vs. State of Maharashtra & others, (2004) 1 SCC 133. In that case, election roll was prepared on the basis of bye laws which were held to be illegal. When the action was

challenged it was contended that the court could not interfere with the list of voters prepared in accordance with the provisions of the Rules and the only remedy available to the aggrieved party was to file election petition after the election was over. Reliance was placed on Sant Sadguru Janardan Swami. The Court, however, distinguished Sant Sadguru Janardan Swami and held that where the voters' list had been prepared on the basis of non-existent Rules, it would be illegal and the court could interfere under Article 226 of the Constitution.

In the case on hand, the respondent - Sangh was within its authority conferred under the Rules to take an appropriate decision for change of its representative/delegate within the stipulated period and such action had been taken by respondent \026 Sangh. The action of respondent No.2 - Collector in not effecting change was clearly in violation of Rule 5(2) and could be challenged by filing a petition under Article 226 of the Constitution. In our opinion, the respondent No.2 - Collector was duty bound to effect change of representative/delegate of respondent - Sangh.

It was then contended by the learned counsel for respondent No.7 that the appellant had no "majority" as contemplated by bye-law 18.13 of the bye laws. Bye-law 18.13 reads thus :

18.13 The decision in the meeting of Board of Directors will be taken by way of majority considering the number of Directors who are present in the meeting. In case of equal votes Chairman will have power to cast additional decision vote."

According to the counsel, there were 17 members of the Managing Committee of respondent Sangh. Three had no voting rights. Hence, for the purpose of majority of votes, relevant number would be 14. In the submission of the counsel, a member whose name could be sent as representative of Sangh must get at least eight votes. Only then it can be said that he had the requisite "majority". We are unable to uphold the argument. In our considered opinion, the word "majority" used in bye-law 18.13 does not mean 51 per cent or more votes. It only means that such a member must obtain majority votes. If the argument of respondent No. 7 is upheld, in given case a society may not be able to send its representative for the election of the specified society. For instance, if a Managing Committee consists of 14 members who have right to vote as in the instant case and there are three contestants who get 6, 5 and 3 votes respectively, none has got 51 per cent votes (majority) and hence the society will not be qualified to send its representative for the election of the apex society. That is not the intention of the Act, Rules or Bye-laws. Obviously, in such a situation the member, having maximum numbers of votes would be able to represent the society in the election of the apex society.

In the present case, fourteen members were present at the meeting convened on June 9, 2005, and twelve participated in the voting. Seven voted in favour of the appellant and five in favour of Shivajirao Pathrikar. Two, including respondent No. 7 did not vote. In these circumstances, it cannot be held that the appellant did not get majority as he got only seven and not eight votes. It was, therefore, clearly open to respondent - Sangh to send the name of the appellant for effecting change of its representative by substituting his name for the name of respondent No.7.

Finally, it was stated that the Election Notification was issued by respondent No.2 - Collector on July 28, 2005 and

hence, now, this Court may not interfere as the election process has already started. We would have considered the effect of issuance of Election Notification by respondent No.2 - Collector but we are not inclined to enter into larger question in the light of the subsequent development which has been brought to our notice. It was stated by the learned counsel for the appellant and not disputed by the learned counsel for the respondents that due to "heavy rains", the Government Order dated July 28, 2005 was modified by another notification dated July 29, 2005, and the election process which was to start as per the notification dated July 28, 2005 was adjourned for a period of one month and now it will start from August 28, 2005. The said date has so far not come and hence, relief in favour of the appellant can be granted.

For the foregoing reasons, in our opinion, the appeal deserves to be allowed and is accordingly allowed. The order passed by respondent No.2 - Collector dated June 28, 2005 is hereby quashed and set aside. The respondent No.2 - Collector is directed to effect the change as per Resolution No.7 dated June 9, 2005 passed by respondent - Sangh and by treating the appellant as the representative/delegate of respondent - Sangh instead of respondent No.7.

The appeal is, accordingly, allowed to the extent indicated above. There shall be no order as to costs.