

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/LETTERS PATENT APPEAL NO. 765 of 2022****In R/SPECIAL CIVIL APPLICATION NO. 7772 of 2022****With****CIVIL APPLICATION (FOR STAY) NO. 1 of 2022
In R/LETTERS PATENT APPEAL NO. 765 of 2022****With****R/LETTERS PATENT APPEAL NO. 766 of 2022****In****SPECIAL CIVIL APPLICATION NO. 7776 of 2022****With****CIVIL APPLICATION (FOR STAY) NO. 1 of 2022
In R/LETTERS PATENT APPEAL NO. 766 of 2022****In****SPECIAL CIVIL APPLICATION NO. 7776 of 2022**=====

JITENDRABHAI ARJANBHAI ROY**Versus****THE DIRECTOR OF AGRICULTURAL MARKETING AND RURAL FINANCE**
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Appearance:

MR KP CHAMPANERI(5643) for the Appellant(s) No. 1
for the Respondent(s) No. 1,2,3,4,5
=====**CORAM: HONOURABLE MR. JUSTICE BIREN VAISHNAV**

and

HONOURABLE MR. JUSTICE SANDEEP N. BHATT**Date : 16/05/2022****COMMON ORAL ORDER****(PER : HONOURABLE MR. JUSTICE BIREN VAISHNAV)**

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ORDER IN LETTERS PATENT APPEALS :-

1. Heard Mr.K.P.Champaneri, learned advocate for the appellant.

2. By the orders of the learned single judge under challenge dated 05.05.2022, in both these appeals, the facts indicate that as far as the

Letters Patent Appeal No.765 of 2022 is concerned before the learned single judge, the order that was challenged by the appellant-petitioner was rejection of his objections by which the appellant's name was deleted from the voters' list and in the Letters Patent Appeal No.766 of 2022, his objection to get the name of certain voters from the list was also rejected.

3. Considering Rule 28 of the Rules, the learned single judge has not interfered with both these orders. The position of law has been discussed by the learned single judge, which reads as under.

"Position of Law :-

8. The law as regards judicial review in the matters pertaining to election is well settled. (a) The Full Bench of this Court in the case of Daheda Group Seva Sahakari Mandli Limited vs. R. D. Rohit, Authorised Officer and Cooperative Officer (Marketing), reported in 2006 (1) GCD 211 held that the inclusion or exclusion of name in the voters' list cannot be termed as extraordinary circumstances warranting interference by this Court under Article 226 of the Constitution of India. Paragraphs 31, 32 and 33 reads thus :-

"31. On the question of maintainability of petition under Article 226 of the Constitution of India, in our opinion, the law is well settled. Mr Patel, invited our attention to the decision reported in 1988 GLH 430. There the Division Bench, after quoting the judgment of a Full Bench in the case of Ahmedabad

Cotton Mfg. Ltd. v. Union of India and Ors. (18 GLR 714) where the principles have been clearly enumerated and held that extraordinary jurisdiction of the High Court under Articles 226 and 227 of the Constitution of India is very wide, the Court should be slow in exercising the said jurisdiction where alternative efficacious remedy under the Act is available but however, if the impugned order is an ultra vires order or is nullity as being ex-facie without jurisdiction. the question of exhausting alternative remedy would hardly arise.

31.1. In the case of Mehsana Dist. Coop. Sales and Purchase Union v. State of Gujarat (1988 (2) GLR 1060), after following the decision rendered by the Apex Court in the case reported in the case of Gujarat University v. N U Rajguru, (1988 (1) GLR 308), the Court have noted the observations made by the Hon'ble Apex Court as under:-

"there may be cases where exceptional or extraordinary circumstances may exist to justify by-passing alternative remedies".

In the case of Manda Jaganath v. K S Rathnam, reported in AIR 2004 SC 3600, the Apex Court has held after considering the provisions of Article 329(B) of the Constitution of India that "there are special situations wherein writ jurisdiction can be exercised but, special situation means error having the effect of interfering in the free flow of the scheduled election or hinder the progress of the election which is the paramount consideration."

In the case of Election Commission of India v. Ashok Kumar, reported in 2000(8) SCC page 216, the Apex Court held that the order issued by the Election

Commission is open to judicial review on the ground of malafide or arbitrary exercise of powers.

32. We have gone through the aforesaid decisions closely. There cannot be any dispute with regard to the principles laid down therein. The sum and substance of those decisions apply to a situation where this Court would like to entertain a petition on the foundation that the order is ultra vires and/or without jurisdiction and/or is violating principles of natural justice. Thus, in an exceptional case, this Court can exercise the power of judicial review, which is a basic structure of the situation in such cases more particularly, in the election process. One thing is clear that this Court ordinarily would not like to exercise its power under Article 226 of the Constitution when the process of election has been set in motion even though there may be some alleged illegality or breach of rules while preparing the electoral roll.

32.1. The Supreme Court, in the case of Shri Sant Sadguru Janardan Swamy (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha and Ors. v. State of Maharashtra and Ors (2001) 8 SCC 509, while dealing with the Maharashtra Cooperative Societies Act, held that in the process of election of the Managing Committee of a specified society where the election process having been set in motion, 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 was held that the proper remedy is by way of election petition before the Election Tribunal.

33. In view of the above discussion, we answer the Reference as under:

- i. A person whose name is not included in the voters' list can avail benefit of provisions of Rule 28 of the Rules by filing Election Petition.
- ii. As the authority under Rule 28 has wide power to cancel, confirm and amend the election and to direct to hold fresh election in case the election is set aside, remedy under Rule 28 is an efficacious remedy.
- iii. Even though a petition under Article 226 of the Constitution of India is maintainable though alternative remedy is available, the powers are to be exercised in case of extraordinary or special circumstances such as where the order is ultra vires or nullity and/or ex facie without jurisdiction. The exclusion or inclusion of names in the voters' list cannot be termed as extraordinary circumstances warranting interference by this Court under Article 226 of the Constitution of India and such questions are to be decided in an Election Petition under Rule 28 of the Rules."

(b) The ratio laid down by the Division Bench of this Court in the case of Bhesavahi Group Vividh Karyakari Seva Sahakari Mandali Ltd., vs. State of Gujarat and Others, reported in 2017(2) GLR 902, paragraphs 13 to 16 read thus :-

"13. It is also pleaded by learned Senior Advocate Mr. Mihir Joshi that remedy under Rule 28 of the Rules is only before Director, and the order impugned in the Special Civil Application is passed by the authorised officer of the Director who is performing functions as election officer, as such, the same is not an effective alternative remedy. Merely because the impugned order is passed by the authorised

officer, that by itself is no ground to hold that remedy before the Director is not an effective alternative remedy. When a dispute is raised by placing material on record, it is always open for the Director to pass appropriate orders either by confirming or by amending the results of election or setting aside the election. In view of such powers which are expressly conferred under Rule 28 of the Rules, even such submission that under the Rules the Director is working under the government and the impugned order passed by the authorised officer of the Director also cannot be a ground to accept the contention that remedy under Rule 28 of the Rules is not effective alternative remedy.

14. It is also pleaded by learned Sr. Advocate Mr. Mihir Joshi that the learned single Judge has also recorded a finding that the appellant is not primary agricultural credit cooperative society, but it was not a ground for exclusion of the names of the members of the managing committee of the appellant society and the learned single Judge thereby dismissed the Special Civil Application. It is clear from Section 11(1)(i) of the Act that members of the managing committee of only primary agricultural credit cooperative societies doing credit business in the market area alone are eligible to vote. The learned single Judge has recorded such finding. But from the reasons stated in the order impugned in the Special Civil Application as we are of the view that the order impugned in the Special Civil Application itself can be the subject-matter of election petition, such finding of the leaned single Judge will have no consequence at all. 14A. For the

aforesaid reasons, we are of the view that this appeal is devoid of merits and the same is accordingly dismissed.

15. However, we leave it open to the appellant that if the appellant-petitioner is aggrieved by the result of election, it can approach the competent authority by raising an election dispute as contemplated under Rule 28 of the Rules. If such petition is filed, it shall be considered by the competent authority independently and uninfluenced by the findings recorded either by the learned single Judge or by this Court in this appeal. 16. Since the main appeal is dismissed, the Civil Application does not survive and the same stands disposed of."

9. In view of the ratio as laid down by the Full Bench of this Court the writ-applicant can avail statutory remedy of filing a Election Petition after the election is concluded under Rule 28 of the Rules, 1965. Rule 28 of the Rules 1965 reads thus :-

"28. Determination of validity of election .- (1) If the validity of any election of a member of the Market Committee is brought in question by any person qualified either to be elected or to vote at the election to which such question refers such person may, within seven days after the date of the declaration of the result of the election, apply in writing-

(a) to the Director, if the election has been conducted by a person authorised by the Director, to perform the function of an Election Officer, and

(b) to the State Government if the election has been conducted by the Director as an Election Officer and

(2) On receipt of an application under sub-rule (1), the Director, or the State Government, as the case may be, shall, after giving an opportunity to the applicant to be heard and after making such inquiry as he or it as the case may be, deems fit, pass an order confirming or amending the declared result of election or setting the election aside and such order shall be final. If the Director or the State Government as the case may be sets aside the election, a date shall be forthwith fixed, and the necessary steps be taken for holding a fresh election for filling up the vacancy of such member."

10. The writ-applicant herein is aggrieved by the impugned order dated 9.4.2022 passed by the respondent No.3. The respondent No.3 by the impugned order dated 9.4.2022 allowed the objections filed by the respondent No.5 by passing the order deleting the name of the writ-applicant from the preliminary voters' list after issuance of notice and hearing both the parties. The Authorised Officer by the impugned order held that the writ-applicant was not in possession of the unified license for the financial year 2020-21. It appears that the respondent No.3 relied on Clause 11(1)(2) of the Act while deciding the said application and deleted the name of the writapplicant from the preliminary voters' list.

11. The election programme came to be published on 5.3.2022. It can be said that the election is set to be in motion. In view of the ratio as referred to above once the process of election has been set in

motion this Court under Article 226 of the Constitution of India would not interfere in the election process. Accordingly this Court is not inclined to interfere with the impugned order passed by the respondent No.3 and relegate the writ-applicant to avail statutory remedy by filing election petition under Rule 28. The rejection of the writ-applicant's name from the voters' list results in exclusion of name of the writ-applicant from the voters' list. In view of the ratio as laid down by the Full Bench of this Court, the writ-applicant can avail the benefit of provisions of Rule 28 of the Rules by filing the election petition. The authority under Rule 28 has wide power to cancel and, confirm and amend the election and also to direct to hold fresh election in case the election is set aside and the remedy under Rule 28 is an efficacious remedy.

12. In view of above, this Court is not inclined to exercise its extraordinary jurisdiction under Article 226 of the Constitution of India and in view of this Court no extraordinary circumstances warrant interference by this Court.

13. It is clarified that this Court has not opined on the merits of the matter, since this Court has relegated the writ-applicant to avail statutory alternative remedy."

4. Mr.K.P.Champaneri, learned advocate for the appellant would rely on the decision of the Hon'ble High Court in the case of Joshi Hashmukhbhai Parshottambhai Vs. State of Gujarat.

5. In view of the above, we don't consider taking a view different than one taken by the learned single judge. Accordingly, both the appeals stand dismissed.

ORDER IN CIVIL APPLICATIONS :-

In view of the orders passed in the Letters Patent Appeals, the present Civil Applications don't survive. Hence, the same are disposed of.

(BIREN VAISHNAV, J)

(SANDEEP N. BHATT, J)

MOHMMEDSHAHID

