

Ishwar & Ors vs. State Of Maharashtra [2020 SCC Online Bom 402] – The Right Aim Hit with the Wrong Arrow

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Abstract

Recently, the Bombay High Court bench at Aurangabad, Maharashtra, struck down two State Government orders which postponed elections of a large section of co-operative societies in Maharashtra. The Court while doing so has solely relied upon the provisions of the 97th Constitutional Amendment Act, 2011 as against relying upon the principle of 'disciplined non-extendibility of co-operative society office tenures' as enshrined in the parent statute. The judgement was advanced oblivious to the fact that the Gujarat High Court had, in the case of *Rajendra Shah v. Union of India*, struck down the very same Constitutional Amendment. In this case review, the author shall comment upon the principle of effective operation of a High Court judgement beyond the territories of the State and the effect of striking down of the 97th Constitutional Amendment on the State-based statutory provisions amended in pursuance of that amendment. Given the principle that the Court should ordinarily address only those issues that arise for determination, it was not necessary for the Court to rely on the 97th Constitutional amendment, as it could have comfortably relied on the provisions of the Maharashtra Co-operative Societies Act, 1960 and held that the impugned orders were ultra vires the parent legislation as against ultra vires the Constitution.

KEYWORDS - 97th Constitutional Amendment, elections, unconstitutional, Kusum Ingots, Rajendra Shah, Co-operative Societies Act.

I. Introduction

On 11th March, 2020, the Hon'ble Bombay High Court ruled on the constitutional validity of two State Government Orders, which inter alia, postponed the general elections of a large section of co-operative societies in Maharashtra. The reason cited was the requirement of the staff members of the co-operative societies in Maharashtra for administrative and allied work in facilitating a 'loan waiver scheme' which was implemented by the Government. These orders sprung up in the alleged exercise of powers conferred under Section 73-CC of the Maharashtra Co-operative Societies Act, 1960. As egregious as the Government Orders could be, they had an unusually grave effect on the co-operative principles so far as the term and fixed durability of the managing committee of the co-operative society is concerned. The said orders were challenged across all benches of the Bombay High Court by way of writ petitions. The High Court Bench at Aurangabad, Maharashtra was the first amongst all to finally decide these petitions. It declared the Government Orders postponing elections of co-operative societies to be unconstitutional, relying on the 97th Constitutional Amendment, 2011.²

The decision raises a conundrum about the validity of the impugned orders. Herein, two fundamental points of law will have to be considered. Firstly, that the reliance on the Constitution (97th Amendment) Act is misplaced as the Gujarat High Court has held it to be

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² The Constitution (97th Amendment) Act, 2011.

unconstitutional and secondly, the impugned orders could have been struck down by holding them to be extra-constitutional to the parent legislation.

II. The Maharashtra Co-Operative Societies Act, 1960 And Substantive Co-Operative Principles:

The legislating power on the subject matter of "Co-operative Societies" has been consciously bestowed upon the States by way of Item 32 in the State List. Thus, every State in India has its independent law dealing with Co-operative Societies and their management. It was the 97th Constitutional Amendment which invigorated the States to introduce suitable provisions in their laws. Pursuant to this, amendments were carried out to the Co-operative Societies legislation in the State of Maharashtra. Section 73-AAA³ states that the term of the office of the elected members of the committee and its office bearers shall be five years from the date of election and the term of office bearers shall be co-terminus with the term of the committee. The said provision, interestingly, bears identical language as postulated by clause (2) of Article 243-ZJ⁴ of the Constitution. Furthermore Section 73-CB⁵ was added, which constitutes the State Co-operative Election Authority (for short, SCEA) for conduction of seamless Co-operative Society elections. Clause 10 of the said provision postulates that notwithstanding anything contained in any other law for the time being in force, the SCEA shall ensure that elections to the society are held before the expiry of the term of the outgoing committee. The above provision bears identical language with that employed in clause (1) and (2) of Article 243-ZK.⁶ Another addition was that of Section 73-I⁷ which provides for appointment of an Administrator in case elections could not be held for a particular society and the existing committee ceases to enjoy the term of their office. The above provision seems to have derived its source from clauses (2) and (3) of Article 243- ZL.⁸

Irrespective of any reference to the 97th Amendment, the above Maharashtra State Amendments are self-eloquent about their derivation from the 97th Constitutional Amendment. The said amendment is unpretentious in ensuring certainty and uniformity in the functioning of co-operative societies under the auspices of a managing committee, which enjoyed the confidence of the electorate. It was largely observed that managing committees of several co-operative societies and banks hitched themselves for perpetuity on the seats irrespective of the termination of its tenure and these circumstances went to the extent of the previous committee dauntlessly continuing to run the affairs of the society irrespective of losing the confidence of the electorate. This frustrated the co-operative principles, and hence the 97th constitutional amendment sought to mandate a fixed tenure with a fixed termination of the outgoing committee. The fundamental cooperative principle that office of the society shall not remain in abeyance or unparented, was crystallised by a legislative mandate that the elections for the subsequent committee shall be held even before the outgoing committee ceases to hold office by termination of tenure. This was to

³ The Maharashtra Co-operative Societies Act, 1960, S. 73-AAA,

⁴ India Const., art. 243-ZJ (2).

⁵ The Maharashtra Co-operative Societies Act, 1960, S.73-CB.

⁶ India Const., art. 243-ZK.

⁷ S. 73-I, The Maharashtra Co-operative Societies Act, (1960)

⁸ India Const., art. 243-ZL.

ensure that the incoming committee immediately assumes office once vacancy is occasioned. The provisions as regards appointment of an administrator in absence of an elected committee as also the ones dealing with filling of vacancies by the existing members from a specified class, speak volumes about the anxiety of the legislators to ensure compliance with the principle that; “No seat shall remain in abeyance by reason of being unoccupied”.⁹

III. Faltered Fulcrum Of The Judgement Qua Judicial Misventuring On Non-Existing Grounds:

The bone of contention in numerous petitions filed before the Court was that the impugned postponement orders fall foul on the face of Section 73-CC. The said provision which was inserted by way of an amendment in 2015¹⁰ exudes that the general elections can be postponed for a period of six months from the due date and for such further period not exceeding one year from the said date. However, this can be done only in cases of conditions like drought, scarcity, flood, fire, any natural calamity, rainy season, conflicting dates with election programme of State or Parliament or a Local Authority. It was argued that no such factor as enumerated in Section 73-CC had occasioned in the State of Maharashtra. Moreover, it was also contended that the impugned orders were in direct conflict with numerous provisions of the Act as also the 97th Constitutional Amendment, as narrated above.

The fallacy is that the Court proceeds to deliver the judgement by plainly referring to and relying upon the provisions of the 97th Constitutional Amendment. While doing so, it does not notice the fact that the existence of the 97th Constitutional Amendment is itself in jeopardy by reason of it being declared unconstitutional by the Gujarat High Court in the case of *Rajendra Shah v. State of Gujarat*¹¹ (hereinafter “*Rajendra Shah*”). Thus, the fulcrum on which the Hon’ble Court ventures to declare the impugned law as unconstitutional, is lost by reason of *Rajendra Shah*. It is beyond doubt that having demonstrated the impugned orders to be in direct conflict with the settled co-operative principles, as enshrined in the statutory provisions, no court could have ever allowed an executive fiat as arbitrary as this, to sustain. In this case, the Court does not consider the conflict of the Government orders with the statutory provisions but relies solely on the 97th Constitutional Amendment, thus also ignoring the consideration of a settled principle in co-operative law that the society is to be heard before an exemption/exclusion from the statutory rights/privileges/duties is imposed¹². An argument could also have been advanced that Section 73-CC cannot be given effect to as it is contrary to the other provisions of the Act. This would have automatically affected into the striking down of the impugned government orders. However, lamentably, this aspect was not argued.

IV. Misplaced Reliance on The Constitution (97th Amendment) Act, 2011

There cannot be any doubt that the court has ultimately reached the right conclusion and struck down the orders concerned. But unfortunately, it has done so by relying, not on the statutory provisions contained in the Maharashtra Co-operative Societies Act, 1960 as amended up to the

⁹The Maharashtra Co-operative Societies Act, 1960, S. 73-I, 77-A; India Const. art. 243-ZL (2) & (3).

¹⁰The Maharashtra Co-operative Societies (Amendment) Act, 2015, S.2.

¹¹ *Rajendra Shah v. State of Gujarat*, 2013 SCC Online Guj 2242.

¹² The Maharashtra Co-operative Societies Act, 1960, S. 157.

year 2015, but on the Constitution (97th Amendment) Act, 2011, being oblivious of the fact that the Gujarat High Court, in the case of *Rajendra N. Shah v. Union of India*,¹³ had struck down the 97th Constitutional amendment on the ground that the procedure laid down in clause (2) of Article 368 ought to have been followed while passing this amendment and that such procedure not having been followed, the 97th amendment was liable to be struck down.

In light of the decision of the Supreme Court in *Kusum Ingots & Alloys Ltd. v. Union of India*,¹⁴ the judgement of the Gujarat High Court operates throughout India. In *Kusum Ingots*, the Apex Court, while addressing issues regarding “cause of action” under Article 226(2), had made the following observations in this regard;

“An order passed on a Writ Petition questioning the constitutionality of a parliamentary Act, whether interim or final, keeping in view the provisions contained in clause (2) of Article 226 of the Constitution of India, will have effect throughout the territory of India subject of course to the applicability of the Act.”¹⁵

Following the Apex Court, the Madras High Court, in the matter of *Union of India v. Textile Technical Tradesmen Association*¹⁶, was considering the issue of enforceability of an award made by the Special Industrial Tribunal under the provisions of the Industrial Disputes Act, 1947 and the notifications issued therein. During the course of hearing, it noticed a judgement of the Andhra Pradesh High Court, which had declared S. 17A (1), (2) and (3) of the Industrial Disputes Act, 1947 to be *ultra vires* the Constitution of India. It was contended that the judgement of the Andhra Pradesh High Court would not have any operation in the Union Territory of Puducherry (the Madras High Court also exercises jurisdiction over the Union territory of Puducherry, in addition to the State of Tamil Nadu). However, the Court held that in view of the judgement of the Apex Court in *Kusum Ingots*, the said provision was unconstitutional throughout India and hence it found the concerned award to be unenforceable.

Furthermore, in the case of *Anil Naik Gaunekar vs. State of Goa*,¹⁷ the Bombay High Court bench at Goa was hearing a challenge to an order of the Registrar of Co-operative Societies. The Petitioners had also challenged the Constitutional validity of S. 67-A of the Goa Co-operative Societies Act, 2001. The Court found the order concerned to be illegal, *ultra vires* and in breach of the provisions of S. 67-A and hence set it aside. It did not find it necessary, having set aside the order concerned, to go into the question of challenge to the Constitutional validity of the provision concerned. It has, however, taken due note of the judgement of the Gujarat High Court in the case of *Rajendra Shah*¹⁸ and also the judgement of the Apex Court in *Kusum Ingots* but found it unnecessary to venture into the entire controversy. Interestingly, the 97th Constitutional amendment is also the subject matter of challenge before the Bombay High Court in the case of *Sudhakar Gopal Patil vs. Union of India*.¹⁹ When the matter was heard by the Court, it was

¹³ *Rajendra N. Shah v. UOI*, 2013 SCC Online Guj 2242.

¹⁴ *Kusum Ingots & Alloys Ltd. v. UOI*, (2004) 6 SCC 254.

¹⁵ *Id.*, 22.

¹⁶ *UOI v. Textile Technical Tradesmen Association*, 2014 SCC Online Mad 7158.

¹⁷ *Anil Naik Gaunekar v. State of Goa*, 2018 SCC Online Bom 1991.

¹⁸ *Rajendra N. Shah v. UOI*, 2013 SCC Online Guj 2242.

¹⁹ *Sudhakar Gopal Patil v. UOI*, 2015 SCC Online Bom 785.

brought to the notice of the Court that the Gujarat High Court in Rajendra Shah's case had struck down the said constitutional amendment and that an SLP is pending against the said judgement before the Apex Court. Having been confronted with the judgement in Rajendra Shah and the law laid down in Kusum Ingots, the Court thought it fit to adjourn the matter sine die.

In these circumstances, the Bombay High Court bench at Aurangabad could not have relied upon the 97th Constitutional Amendment in order to strike down the impugned notification in question. In view of the fact that the entire ratio of the judgement of the Bombay High Court is based on the 97th Constitutional Amendment, and in view of the fact that the Court did not notice the order of the Principal Bench of the Bombay High Court adjourning²⁰ the hearing of a Petition challenging the very same constitutional amendment, the basis of the judgement of the Bombay High Court bench at Aurangabad is lost. There are several petitions pending at the Principal seat of the Bombay High Court as well as the Bench at Nagpur, which deal with the same subject matter and therefore, in a given case, it would be necessary to consider the entire issue afresh. While so considering, the Bombay High Court may easily bypass the judgement of the Gujarat High Court and simply rely on the existing provisions of the Maharashtra Co-operative Societies Act, 1960, which are unaffected by the judgement of the Gujarat High Court, and ultimately reach the same conclusion.

V. The Possible Rectification–Statutory Laws Continue Holding The Field irrespective of Rajendra Shah:

A three-judge bench of the Allahabad High Court presided by Dr. Chandrachud CJ (as his Lordship then was), in the case of Committee of Management of Sahkari Ganna Vikas Samiti v. State of U.P.,²¹ was answering a reference of a question whether the High Court could issue a writ in order to extend the term of a managing committee of a co-operative society even though it has come to an end in accordance with Section 29 of The U.P. Co-operative Societies Act. Several provisions of the said Act were amended in 2013, pursuant to the 97th Constitutional amendment. The Court noticed the judgement of the Gujarat High Court but held that the amendments to the Co-operative Societies Act still held the field. It said no more about the 97th amendment being declared ultra vires. As seen earlier, post the enactment of the 97th Constitutional amendment Act, 2011, several States amended their respective co-operative societies legislations in order to make them compliant with the concerned constitutional amendment. It is necessary to state that the though the statutes were amended post the 97th Constitutional amendment, the same being struck down would have no effect whatsoever on such statutory amendments.

VI. Conclusion:

The striking down of the 97th Constitutional Amendment Act, 2011 does not consequently render unconstitutional, the amendments to the various Co-operative Societies legislations which fundamentally stand on the principle of 'non-extendibility of office tenures'. Hence, the Court could have comfortably placed reliance on the provisions contained in the Maharashtra Co-operative Societies Act, 1960 and struck down the impugned orders as being ultra vires the

²⁰ Id.

²¹ Committee of Management of Sahkari Ganna Vikas Samiti v. State of U.P., 2014 SCC Online All 15710.

parent statute, as against *ultra vires* the Constitution. Lastly, amidst the nation-wide lockdown in light of the COVID-19 pandemic, the State Co-operative Election Body cannot be held contemptuously liable for not being able to conduct elections within the statutory timelines, pursuant to Ishwar. Interestingly, an application by the said Election Body praying for the above declaratory relief was allowed by the same bench as that in Ishwar.²²

²² State Co-operative Election Authority v. Ishwar, 2020 SCC Online Bom 449.