

Gujarat High Court

The Jodiya Kheralu Dudh Utpadak ... vs State Of Gujarat on 31 December, 2020

Bench: Sonia Gokani

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 16464 of 2020

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS. JUSTICE SONIA GOKANI

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
- 2 To be referred to the Reporter or not ?
- 3 Whether their Lordships wish to see the fair copy of the judgment ?
- 4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?

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THE JODIYA KHERALU DUDH UTPADAK SAHAKARI MANDLI LIMITED  
Versus  
STATE OF GUJARAT

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Appearance:

MR MIHIR JOSHI, SR. ADV. with MR DIPEN DESAI(2481) and DR VENUGOPAL PATEL(7411) for the Petitioner(s) No. 1  
MR KAMAL TRIVEDI, ADVOCATE GENERAL with MS MANISHA LAVKUMAR SHAH, GOVERNMENT PLEADER with MR. UTKARSH SHARMA, AGP for the Respondent(s) No. 1,2,3,4,5

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CORAM:HONOURABLE MS. JUSTICE SONIA GOKANI

Date : 31/12/2020

ORAL JUDGMENT

1 This petition is preferred under Article 226 of the Constitution of India by the petitioner, which is a Cooperative Society registered under the Gujarat Cooperative Societies Act, 1961 ("the Act" for short) Its members and office bearers are nationals and citizens of India and are, therefore, claiming protection of fundamental rights enshrined under the Constitution of India. It has approached this Court seeking a declaration that the audit classification that may be awarded by respondent No.4

Auditor (Grade-I) to the petitioner Society for the year 2019-20 may not be considered, as the accounts of the petitioner Society have not been audited till date. It also seeks direction upon respondent No.5 to permit the delegate of the petitioner Society to contest the election. It also seeks direction upon respondent No.5 Mehsana District Cooperative Milk Producers Union ("the Milk Union" for short) to permit the delegate of the petitioner Society to contest the election of Mehsana District Cooperative Milk Producers Union.

FACTUAL MATRIX 2 Following are the facts, which are averred in the petition:-

2.1 The petitioner Society was registered on 17.03.2001.

It is a Milk Producing Society and its Members are milk producers, who deposit the milk produced with the Society everyday, which in turn deposits the same in the Mehsana District Milk Producers' Union Limited.

2.2 Under section 84 of the Act, the The Registrar shall audit or cause to be audited by a person possessing prescribed classification, the account of every society at least once in each year and such person shall be an auditor for the purposes of the Gujarat Cooperative Societies Act. Section 84 of the said Act provides for the audit of the accounts of the Society.

2.3 Rule 38 of the Gujarat Cooperative Societies Rules, 1965 provides for classification of the auditors and Rule 38A provides of scale of audit fees payable by the societies to the auditor. Rule 38B(1) provides for award of audit classification by the Auditor for which guidelines are to be prepared by the Registry and Rule 38B(2) provides for determining and awarding audit classification by the Auditor to each society in accordance with the guidelines prescribed by the Registrar.

2.4 It is the say of the petitioner that the Registrar has prescribed the guidelines for conducting audit of the milk producers' society and marking system is prescribed to give marking to each society keeping in mind the efficiency of the management, financial position and such other factor of each society.

2.5 It is further averred that the petitioner Society is having Audit Class A, since its registration, which is indicative that it is functioning in the best possible manner. It is a Member of Mehsana district Milk Producers' Union. The Union is specified society within the meaning of section 74C and, therefore, the elections have to be held in consonance with chapter XI of the Gujarat Cooperative Societies Act read with Gujarat Specified Cooperative Societies (Election to Committee) Rules, 1982.

2.6 The Election Officer and the Deputy Collector published the Election Programme for the purpose of preparation of Voters' List and published the Voters' List for election of the Member of the managing committee of the union, wherein the petitioner society is included in the Voters' List of Kheralu constituency. It is further averred that the bye-laws No.48(2)(h) of the Union provides that delegates of those Member Societies can contest in the election of Members of Managing

Committee of the Union, which has Audit Class A or B and thereby the Societies which have Audit Class-C and D are disqualified from contesting the elections for Board of Directors of the Union.

2.7 The delegate of the petitioner Society is Mr. Vipul Chaudhary and it is averred that the present dispensation at the State Government is against the said Mr. Chaudhary, which desires that he does not contest elections. Various proceedings have been initiated against him by passing the order under section 76B(1) of the Act. A show cause notice for disqualification under section 76B(2) of the Act is issued and against such order and show cause notice, he has approached this Court by Special Civil Application No.11977 of 2020 and this Court has protected him and the hearing of the petition has been concluded and the judgement is reserved.

2.8 The petitioner society has been issued the show cause notice by the District Registrar on 01.12.2020 under section 23 of the Act to remove the said Mr. Chaudhary as a Primary Member of the Society.

Against the said show cause notice, he has approached this Court by way of Special Civil Application No.15880 of 2020 and the Court vide its order dated 09.12.2020 has issued the notice and also granted stay to the further proceedings of the show cause notice.

2.9 It is averred that in the said show cause notice of 1.12.2020 it has been stated that the audit of the society has been completed. However, the Auditor has not even checked the record of the Society and the Society's audit has not been completed at all.

The Auditor had also issued the Society notice on 28.09.2020 and 19.11.2020 for conducting audit, but because the Secretary of the Society was not keeping well, since the last two months, he could not produce the accounts of the Society for audit and, therefore, sought time from the Auditor for production of record and, therefore, the audit has not been completed at all. It is further submitted that whenever the audit of any Society is completed, Auditor would put an endorsement that the audit has been completed and all the records of the Society have been verified. It is also submitted that in the past whenever such audit has been completed, the Auditor would give an endorsement that the audit has been completed, whereas in the present case, the record and accounts of the Society have not been verified and checked. The petitioner has placed relevant account books of the earlier year and of the present year to show that audit for the year ending 03.03.2020 has not been completed at all and even no endorsement has been made by the Auditor that the audit has been completed. It is further the say of the petitioner Society that with a view to see that the delegate of the petitioner Society does not contest intentionally and with oblique motive and in colourable exercise of powers, the Audit Class of the petitioner Society is apprehended to be changed to Audit Class-"C" or Audit Class-"D"

and the said Audit Class is not being informed to the petitioner. The petitioner requested the Auditor that the accounts of the Society have not been audited at all in spite of which it has written in the show cause notice that the audit is completed. It is further averred that there is an increase in the profit compared to last year and yet, it has apprehended that the audit classification of the petitioner would be reduced to Class-"C" from Class-"A". It is with a oblique purpose that the

delegate of the petitioner Society does not remain eligible for the election of the Union.

2.10 It is also the say of the petitioner that Rule 38B provides that the Auditor shall determine an award an Audit Class keeping in mind the efficiency of the management and financial position of the Society.

However, the Auditor has no discretion to award the classification as he chose, as there is a specific marking system, whereby guidelines are prescribed as to how the marking is to be give to each Society for the purpose of Audit Class. The Society which receives more than 60 marks is given Audit Class-"A", the Society which receives 50 to 59 marks is given Class-"B", the Society which receives 40 to 49 marks is given Class-"C" and the Society on being given less than 40 marks is given Class-"D"

and hence, it is not the choice of the Auditor or the power of the Auditor to give the marks as per his free will and the same shall have to be as per the marking system provided by the Registry. It is , thus, emphasized that awarding of Class-"C" or Class-"D" has direct adverse consequence inasmuch as the same disqualifies the Society from contesting or from voting and, thus, this action would take away the right of voting or contesting and, therefore, principles of natural justice shall need to be applied as otherwise, the provision of Rule 38B would be rendered invalid and it would also be in violation of Article 14 of the Constitution of India. The petitioner Society has Audit Class-"A" since more than 20 years and at the last moment after elections of Union are declared, the Society if is placed in Audit Class- "C" or Class-"D" with a mala fide intent when the audit is not completed, and it will seriously jeopardize the right of the petitioner. The petitioner has also got its account audited from the independent Chartered Accountant to satisfy the conscience of the Court and according to the petitioner, the said CA has certified that considering the guidelines of the Registrar of Audit of Milk Society, the Audit Class of the petitioner would be Class-"A" for the year 2020. It is alleged that the action of the Auditor is mala fide and is in colourable exercise of powers.

2.11 According to the petitioner, there is no remedy of statutory appeal or revision provided under the Gujarat Cooperative Societies Act under section 153 or section 155 under the Gujarat Cooperative Societies Act under section 153 or section 155 and in case of Mehsana Gam Ni Seva Sahakari Mandali Limited, the Society had challenged the awarding of Audit Class-"D" by preferring appeal/ revision under section 153 or section 155 of the Act. However, the said appeal/ revision was rejected by Additional Registrar vide order dated 15.07.2017 by holding that against awarding of Classification by the Auditor, no appeal or revision would lie.

2.12 The petitioner, therefore, urges that on one hand, there is non compliance of principles of natural justice before giving an audit class, which would have adverse effect on the Society's right and on the other hand, there is no statutory appeal or revision provided against such award of audit class.

2.13 It is further averred that Mehsana Gam Ni Seva Sahakari Mandali Limited approached thereafter Joint Registrar, Cooperative Societies, Gujarat State objecting to awarding of Audit Class by Auditor.

However, the same was not in the form of statutory appeal or revision, but, a kind of objection to the Audit Class given by the Auditor and, therefore, the same cannot be compared with the right of appeal or revision as provided under the Act. It is further the say of the petitioner that elections of the Union would be declared by the Union Officer in the near future and election is to be held very soon and, therefore, only with a view to prevent the delegate of the petitioner Society from contesting the election, when the impugned action is taken, the same is to be construed as illegal and arbitrary deserving quashment. The petitioner, therefore, has requested for following prayers:-

"The petitioner, therefore, prays that: (A) The Hon'ble Court be pleased to issue a writ of mandamus or in the nature of mandamus or any other appropriate writ, direction or order, declaring that he audi tot of the petitioner society for the year 2019-20 has not been conducted by the respondent no.4-Auditor and any certification or audit classification given by the auditor for the year 2019-20 shall not be operative and binding tot he petitioner society.

(B) The Hon'ble Court be pleased to issue a writ of prohibition or in the nature of prohibition or any other appropriate writ, direction or roder, prohibiting the respondent no.5 from considering any audit classification giben by the respondent no.4-auditor in respect of the petitioner society fro the year 2019-20 and be pleased to direct the respondent no.5 Electioni Officer to consider the delegate of the petitioner society as eligible to contest the election of Mehsana District Cooperative Milk Producers' Union in respect of audit classification.

(C) Pending final hearing and disposal of the petition, the Hon'ble Court be pleased to stay the operation and implementation of any audit classification given by the respondent no.4- auditor of the petitioner society for the year 2019-

20. (D) Pending final hearing and disposal of the petition, the Hon'ble Court be pleased to permit the delegate of the petitioner society to contest the elections of Mehsana District Cooperative Milk Producers' Union Limited.

(E) Such other prayer as may be deemed just and proper may be granted in the facts of present case."

REPLY OF RESPONDENTS 3 Affidavit-in-reply is filed by one Mr. Hitesh Patel working as District Registrar, Mehsana, inter alia contending that each and every averments, statements or allegation is denied. It is also contended that unless specifically admitted, they are denied in toto, as if they are all specifically and individually dealt with. It is contended further that the present petition filed on behalf of the petitioner society is not intended for protecting any of its rights and interest inasmuch as the voters in the forthcoming election of the Mehsana District Cooperative Milk Producers Union Limited ("the Milk Union" for short) is scheduled on 05.01.2021. It is not at all affected by any of its audit classification under Clause C inasmuch as in view of the proviso to sub-section(3) of section 27 of the Gujarat Cooperative Societies Act, 1961 ("the Act" for short), the member society of the Milk Union can qualify to exercise its right to vote at an election of a Member of a Committee only if it has got its last accounts audited, in clause A,B or C, which the petitioner society is even otherwise fulfilling. It is further contended that once a primary Cooperative Society like the petitioner Society

authorises its Member/Nominee to represent and vote on behalf of the petitioner Society as well as to contest the election for being a Member of the Managing Committee of the Milk Union, it would be the decision of the said Member Nominee to contest or not to contest the election, while representing his primary Cooperative Society and the said Society cannot insist upon the Member to contest the election or to become proposer or Secunder to anybody in the election.

4 Thus, according to the respondent, it goes to show that if a Member or Nominee exercises discretion, primary Cooperative Society does not exercise any control thereon. It is, therefore, urged that the petitioner Society under the guise of present petitioner, cannot seek to represent against the so-

called third party Member/ Nominee like Shri Gul Chaudhary, who is not before the Court and hence, the petition deserves no entertainment.

5 It is also the say of the respondent that even the proxy litigation for and on behalf of the third party must not be entertained for the purpose of protecting his so-called statutory right of nomination to contest the election as the Member of the Managing Committee of the Milk Union, under Article 226 of the Constitution of India programme on 12.12.2.2020. In view of this, it is contended that the only remedy available for such a proxy litigation is the election petition to be filed by the aggrieved party and affected person and not by the petitioner society. Such Election Petition needs to be before the Election Tribunal as per the provision of section 145U of the Act read with rule 82 of the Specified Committee Rules of 1982, more particularly, against the litigation in any of the nomination. The legal position, according to this respondent, is well settled by catena of decisions.

6 It is further the say that exercise of undertaking the audit of account of the Cooperative Society followed by award of audit classification is nothing but administrative exercise and not quasi judicial exercise. Therefore, there arises no question of putting the society to notice before doing the same.

Even though, it happens to end its supremacy due to down gradation of its classification as compared to earlier years, no question arises of putting the Society to notice before carrying out the administrative exercise. It is further the say of the respondent that at the end of exercise of every period, audit of accounts of the Cooperative Society under sub-section(4) of section 84 of the Act, audit classification award to a Society is a natural course, to happen in a short automatic fashion, as per the guidelines formulated as per Rule 38B of the Rules of 1965 depending upon the total marks obtained by the Society as a result of the said exercise of the audit.

7 It further is contended that there is no question of hearing the Society on administrative audit of its accounts or awarding the audit classification and even with reference to the re-audit under sub-

section (5) of section 84 and special audit under sub-section (5A) of section 84 as per the various decisions of the Court. Moreover, the provisions contained under Section 84 as well as under Rule 38B, which empowers the Auditors to award audit classification, do not provide either expressly or impliedly a grant of any sort of hearing before awarding the audit classification as the same is based

upon the fixed parameters laid down under the guidelines prepared.

8 It is emphasized that the petitioner Society has efficacious alternative remedy under section 155 of the Act for the purpose of challenging the audit classification in question on the ground that it has been down-graded from Class A to Class C. It has sought to rely upon the case of Adhumik Patel Pak Cooperative Housing Society Limited vs. State of Gujarat reported in 2010(3) GULR 2303, where the Court has held that section 155 of the Act confers power upon the State Government and the Registrar to call for the proceedings of subordinate officers and to pass orders thereon. Therefore, any order of subordinate officer being that of District Registrar under section 20 of the Act is subject to these powers and an aggrieved person can certainly approach the State Government for redressal of grievances. According to the respondent, the writ petition is preemptive and premature in nature and filed at the behest of third party and deserves to be dismissed in limine without the grant of any relief.

9 It also has denied various allegations and averments of the petitioner Society regarding the exercise of powers mala fide, in bad faith, due to political rivalry and strategies, with ulterior motive and in exercise of colourable exercise of powers, non-

transparency etc, making the outcome of the whole exercise as fate accomplie as alleged.

10 The petitioner Society has relied upon the order dated 01.10.2020 passed by this Court in Special Civil Application No.11977 of 2020 to allege that certain officers in the State Government were after Mr. Vipul Chaudhary for his removal under section 76B (1) of the Act for which he had to move this court, wherein the order of removal has been stayed on statement and the matter has been reserved for judgment. While so doing, the petitioner Society has deliberately overlooked a categorical admission of Shri Vipul Chaudhary in the said case that he was, in fact, disqualified to hold or to contest election for any office in any Society vide order dated 16.12.2015 of the Registrar under section 76B(2) of the said Act. Before the learned Single Judge, in the said case, the contention of the authority was to the effect that he was already removed prior to his resignation coming into effect. It is admitted that the judgement of this Court is awarded, but it is not permissible for the petitioner Society to allege that there were any mala fide acts in the matter for harassing Mr. Vipul Chaudhary. It is further contended that so is the position with reference to another petition sought on behalf of the petitioner Society by referring to interim order dated 09.12.2020 in Special Civil Application No.15880 of 2020 relating to the very petitioner Society i.e. Jodiya Kheralu Dudha Utpadak Sahakari Mandali Limited, wherein also he had become the Member of the Managing Committee of the said Society on the ground of he being a resident of area within the jurisdiction of the Society. The contention advanced on behalf of the authority was logical as to how can he be an ordinary resident of areas with reference to two different Cooperative Societies and, more particularly, when he actually resides in Gandhinagar.

It is contended that when the petitioner Society alleged strategy and non-transparency on the part of the authorities, it overlooks in contesting litigation at the behest of Mr. Vipul Chaudhary, as to how there were causes of illegality or impropriety on his part against which the authorities have been acting in accordance with law.

11 It is further contended that the affidavit has been filed by Shri B.G. Patel, Auditor (Grade-I), respondent No.4, who has given a vivid description of the whole matter, which clearly establishes that the theory sought to be propounded by the petitioner Society of there being no audit or audit classification of the petitioner Society for the period from 01.10.2019 to 31.03.2020 is unbelievable and afterthought with a view to save Mr. Vipul Chaudhary from the consequences. It is emphatically urged that there has been no secrecy maintained by the authorities concerned as sought to be alleged, but the same is very ingenious method formulated by the petitioner Society at the behest of Mr. Chaudhary, which befits a popular saying that the pot calling the cattle black. Therefore, it is urged that the writ petition deserves to be dismissed in limine without the grant of any relief.

12 Affidavit in reply for and on behalf of respondent No.4 is filed by Mr. B.G. Patel working as Auditor (Grade-I) states inter alia that for limited purpose of putting on record, the factum of exercise of audit of accounts of the petitioner society for the period from 01.10.2019 to 31.03.2020 this affidavit is being filed, which according to him, has been initiated, continued and completed with the knowledge of office bearers of the petitioner society, at its own office and also for the purpose of putting categorically denial on record with reference to the theory of the petitioner that no audit of any nature is made and consequentially audit classification for the year 2019-20 is not applicable.

13 He has denied all averments and allegations, unless they are admitted specifically and has contended further that the development, which took place with reference to the audit and audit classification of the petitioner society for the period from 01.10.2019 to 31.03.2020 have been set out in chronological order. It would be apt to reproduce the same in his own words.

"4. In order to appreciate the developments which took place with reference to the audit and audit classification of the accounts of the Petitioner Society for the period from 01.10.2019 to 31.03.2020, I set out hereunder the important events in chronological order:

1. 28.09.2020 A notice came to be issued by the Respondent No.3 herein i.e. Special Auditor (Milk), Milk Audit Office, Mehsana, to the Petitioner Society, inter alia, informing about the audit of the accounts of the Society for the period from 01.10.2019 to 31.03.2020 would commence from 12.10.2020 (Pls. See pg.131). For ready reference a copy of the said notice dated 28.9.2020 is annexed hereto and marked as Annexure-R.

Note: In terms of the Guidelines, as contained in the Circular dated 6./7.2007, issued by Supervision and Audit Committee, Co- operative Dept. Under Section 95 of the Act, appointed for the supervision and audit of milk co-operative societies and union, all milk societies having a turnover of 10 lacs to 25 lacs, would have their accounts audited every 6 months.

2. 07.10.2020 I personally made a phone call to the Secretary of the Petitioner Society and informed him that audit work would start on 14.10.2020 instead of 12.10.2020 and hence, all the records should be kept ready on that day in the office of the Petitioner Society. The same was also agreed to.

3. 14.10.2020 I visited the office of the Petitioner Society and started the audit work right from 7.30 a.m. to 5.00 p.m. in the presence of the Secretary and other officers of the Society, on the basis of all the requisite records produced by them.

4. 14.10.2020 In the later part of the day, the Secretary of the petitioner Society appears to have addressed a communication to my superior i.e. Special Auditor (milk), Milk Audit Office, Mehsana, to defer the audit work for a period of one month in view of he being indisposed. For ready reference a copy of the said communication dated 14.10.2020 of the Secretary of the Society is annexed herewith and marked Annexure-R2.

5. On coming to know about the aforesaid request in the late evening of 14.10.2020, I with the permission of the Respondent No.3 herein decided to defer the incomplete audit work to 18.11.2020 under prior information thereof to the Secretary of the Petitioner Society.

6. 18.11.2020 In view of the above development, audit work to was resumed by me on 18.11.2020, when I 20.11.2020 realized that some of the record was missing and appeared to have been deliberately shifted from the office of the Petitioner Society. As a result of this, I had to revert to the details of the said record provided by the Petitioner Society in prescribed Statement-"A" for the sale and purchase of milk, Statement-"B" for stock, milk and ghee, and Statement-"C" relating to bank transaction and for this purpose, required information by way of verification was retrived from the concerned Bank of the Petitioner Society as well as Mehsana District Cooperative Milk Producers Union Ltd. ("The Milk Union" for short) of which, the Petitioner Society is a member and ultimately completed the audit work.

7. 20.11.2020 As a result of the aforesaid development, in the late evening of 20.11.2020, I issued an Audit Memo to the Secretary of the Petitioner Society in person and also received his signature on the copy of the said Audit Memo in the acknowledgement thereof, on the say day, which is annexed hereto and marked as Annexure-R3. The audit remarks based on the functioning of the society were thus well within the knowledge of the Society since the said date.

8. 20.11.2020 Thereafter, I prepared Audit Classification Report by relying upon necessary guidelines issued by the Department in that behalf and produced by the Petitioner at Pgs.20 to 22 and submitted the copy of the aforesaid Audit Memo along with Audit Classification arrived at by me in the office of Respondent No.3- Special Auditor (Milk) for his approval.

9. 14.12.2020 On basis of my aforesaid Audit Report/Memo along with Audit Classification, Respondent No.3 carried out thorough examination and approved the same. For ready reference a copy of the said Audit Classification signed by me on 20.11.2020 and approved by the Respondent No.3 on 14.12.2020, is annexed herewith and marked as Annexure-R4, wherein the Petitioner Society came to be classified as belonging to Class-"C", as it has received 47 marks as per the guidelines prescribed in that behalf, according to which a Society receiving 60 marks is to be given Audit Class-"A", a Society receiving 50 to 59 marks is to be given Class-"B", whereas a Society which receives 40 to 49 marks is given Class-"C" and the Society which receives less than 40 marks is given Class-"D".

10. 14.12.2020 Pertinently, the above referred Audit Classification Certificate was dispatched under outward No.AFHN/01/4/713/5973/2020, dated 14.12.2020."

14 It is also his say that it is absolutely clear that there is an afterthought theory sought to be made out by the petitioner society to the effect that there was neither any audit nor any audit classification ever done with reference to the accounts of the petitioner society from the period from 01.10.2019 to 31.03.2020. It is also his say that main relief prayed for by the Society, therefore, deserves to be rejected.

Interim relief also become non-existent and should stand rejected.

REJOINDER AFFIDAVIT 15 Affidavit-in-rejoinder is filed by Secretary of the petitioner Society Mr. Madhubhai Revabhai Chaudhary, who after going through the affidavit-in-

reply of respondent No.2 and respondent No.4 has denied all the averments made in the affidavit-in-

rely. He has submitted that the contention raised by Auditor that audit of the society has been completed on 20.11.2020 is completely false. According to him, by way of letter dated 28.09.2020, the Auditor informed the petitioner society that the auditor would remain present on 12.10.2020 for conducting the audit of the petitioner society. However, on 12.10.2020, the Auditor did not visit the office of the society, instead he came to the office on 14.10.2020.

Thus, the proceedings had started on that day.

However, it was soon realized that various records of the society were incomplete because of ill-health of Secretary himself and, therefore, vide letter dated 14.10.2020, the Secretary of the Society informed the Auditor to postpone the audit for the period of one months so that the record can be completed after recovering from ill-health.

16 It is further his say that vide letter dated 19.11.2020 the Auditor informed that the Auditor would remain present for auditing the accounts on 18.11.2020 (surprisingly the day prior to the date of letter). It is, therefore, submitted that letter dated 19.11.2020 was received by the post office of Kheralu on 21.11.2020, which is the postal seal of the communication and the same was received by the society on 22.11.2020. The petitioner society, therefore, on 23.11.2020 informed the Auditor that health of the Secretary is not still well and doctor advised complete rest and, therefore, it would not be possible for the Secretary to get the accounts audits.

The said letter was received by the Auditor and no reply has been given by him, which shows that the contents of the letter are completely correct. It is further its say that from what the Auditor has been saying, if the audit work had already been completed on 20.11.2020, then the Auditor would not be silenced on the said letter of the petitioner society not to conduct the audit and to grant further time. This silence itself is reflective that no such audit, as contended by the Auditor, is conducted from 18.11.2020 to 20.11.2020. It is further the say of the Secretary that on 07.12.2020,

the petitioner society categorically informed the District Registrar that in the show cause notice dated 01.12.2020, it is recorded that the audit has been completed, however, the said recording is completely incorrect and hence, explanation was sought as to on what basis the statement is made that audit has been completed and necessary information was required to be supplied. However, till date, the District Registrar also has not submitted the reply to the said letter, which shows that the contention raised by the petitioner is true. It is further the say of the Secretary to the petitioner society that the audit has not been completed and the same gets support from the fact that the bill file of Mehsana District Cooperative Milk Producers' Union Limited is not tallied with Rojmel and voucher file is not tallied with Rojmel and such fact also gets support from the fact that in the Rojmel, there is no endorsement that the audit is completed. It is emphasized that whenever the audit is completed all these aspects would have been seen and the Auditor would have tick marked the bill files, the voucher files etc. Therefore, it is said that the current Rojmel has not been checked and no endorsement is shown and no endorsement is done in the current stock register also. In the past years, whenever the audit is completed, such endorsement would be done and for the year in question, no such endorsement having been done, it should be held and construed that the audit has not been completed.

17 It is also the say of the Secretary that marking given is also erroneous. Some of the examples, he has shown as to how the marking is incorrect and not reliable. According to him, no marking is given head wise and the audit classification is head wise. The Durasti patra was not seen and, therefore, the same would have adverse impact on marking Item No.6.

The lower marks are given purposely to achieve specific object. It is also the say of his that Item No.9(2) is without verification and contrary to the present asset of the society. For Item No.10, original record is required to be seen, which is not seen and verified and it is duly maintained by the petitioner society, but the same has not been verified by the Auditor. It is further his say that for Item No.11, there is no question of deduction, since there is adaption of computers and slips are duly given to the Members, which are not verified. So far as marks in Item No.13 are concerned, they are given without verification. According to him, so far as Item No.14 is concerned, the stock register is not collected by the Auditor nor is verified, which adversely affect the marking. Hence, it is urged that there is undue haste in preparing the audit, which shows the mala fide intention of the authority. It is, therefore, urged that classification given on the basis of such faulty marking and audit is clearly invalid and without any supportive documents or basis and is deliberately done with a oblique purpose. Hence, the classification cannot be relied upon.

18 It is further his say that it is not a correct contention that there is an endorsement of the Secretary of the Society on completion of the audit.

A part of audit since was done, the endorsement had been taken on 14.10.2020. It is emphatically denied that audit was completed. He also sought a support from the letter of Auditor dated 19.11.2020 that he would be visiting on 18.11.2020. Had it been a case of completed audit, there was no action for him to once again visit the office for this very purpose. The certificate dated 20.11.2020 does not inspire confidence as there is a clear over writing on the said letter. Interpolation and discrepancies in the report made it clear that the documents are unreliable. It also showed that the

certificate appeared to have been dated 20.10.2020, which has been subsequently corrected to 20.11.2020. The over writing on the certificate becomes clear from the certificate produced by Objector Shri Sardarbhai Shyamalbai Chaudhary, who along with his objection had produced this certificate. The said certificate produced by the Auditor along with the affidavit-in-reply and the certificate produced by Shri Sardarbhai Chaudhary, if are compared closely, these are two different certificates bearing the same date. There are apparent tempering with regard to the date and there is a difference in hand writing in both the certificates. It is further contended that the audit memo received by the petitioner is absolutely incorrect and false. The endorsement on page 178 "Rubaru Nakal Mali Che"

is not of the Secretary of the petitioner. He states on oath further that the audit memo is never received by the Secretary and the hand writings appear to be of the Auditor himself. Timings of issuance of certificate also, according to this Secretary reflects the mala fide intention and ill-motive on behalf of the authorities. Assuming that the certificate is dated 20.11.2020, the same is sent on 14.12.2020, after the period 24 days from the Auditor preparing the certificate. On 01.12.2020, the preliminary Voters' List for the election of the union was published and on 12.12.2020, the election programme was published and thereafter, on 14.12.2020 the audit certificate is sent to the petitioner society. Till date, the said certificate is not received by the petitioner and along with the affidavit-in-reply also it is not produced nor has it been conveyed as to how the same has been sent to the petitioner and why, though the period of one week has lapsed from the purported dispatch of the audit certificate, the same is not received by the petitioner society. The respondent had not produced the postal receipt of dispatch intentionally as is alleged by this person. According to him, the audit certificate is intentionally kept as a secret weapon to be used only at the time of scrutiny of objection and not to be given to the petitioner society, though it would adversely affect the rights of the petitioner and its delegate. He has alleged that the intention on the part of the authorities and oblique purpose of the audit classification are quite apparent from this conduct. It is also urged to this Court that let the proof be produced with regard to the posting of the letter dated 14.12.2020. The marking which is produced is incomplete and it is improper. It is further the say of the Secretary that the Auditor has clearly with mala fide intention given less marks with regard to Clauses 10 to 16 of the marksheet.

Even by following the conservative formula, the society would get at least 7 to 10 marks more in the said Clause being Clauses No.10 to 16 to make the total marks of the society to about 55 and thereby the society would get the audit Class-"B". The certificate by an independent Chartered Accountant shows that the petitioner would get "A"

Classification, according to the guidelines of the Registrar himself. The petitioner society is agreeable to get the accounts and record re-audited by the independent Chartered Accountant as may be directed by the Court and the same may be produced before this Court to satisfy the conscience of the Court as to what would be the audit classification of the petitioner society. It is further the say of the petitioner society that according to the respondents, there is a remedy available under section 153 or section 155 of the Act against the audit classification. However, it is a stand which is contrary since when the petitioner is stating that the awarding of audit classification has adverse civil consequences, the principles of natural justice shall have to be read into this. The

authorities would say that the audit is simple administrative action and, therefore, no rights of the petitioner are being affected and no hearing is to be given and when the petitioner contended that giving of audit classification is not an order or decision as contemplated under section 153 or section 155 of the Act and it cannot be said to be a proceeding of an office of subordinate officer as contemplated under section 155 of the Act the appeal or revision would not lie and the petitioner is supported by the order of the appellate authority of the State, where the Additional Registrar had dismissed the similar appeal preferred by another society against the audit classification. To that contention, the respondent authority has stated that appeal or revision would lie against awarding of audit classification, which would mean that awarding of audit classification can be termed as an order or decision or proceeding of the subordinate officer and, therefore, the authorities are raising contrary stand.

19 Yet another contention raised by the authorities is that the only remedy for the petitioner is to approach the Tribunal by way of Election Petition under section 145U of the Act which is misconceived, according to the petitioner. The Election Tribunal hearing the Election Petition has no authority to go into the validity of the audit classification and it would not have power to decide the validity of any audit classification. Therefore, it would be incorrect to contend that the Election Petition has to be preferred against awarding classification. Hence, even the said remedy is not available to the petitioner, therefore, the only remedy which is available is to prefer the present petition by way of writ.

20 The petitioner society has emphatically urged that the respondents are bent upon rejection of nomination forms of the delegate of the petitioner.

He was also taken in police custody by way of First Information Report by the CID (Crime) with a view to ensure that delegate of the petitioner society cannot contest the election. The investigating authority was not allowing the delegate of the petitioner society to contest the election and, therefore, it intended to file an application before the Sessions Court, Ahmedabad for grant of permission to contest the election and the Court vide its order dated 08.12.2020 passed in Criminal Miscellaneous Application No. 7640 of 2020 allowed the application and permitted to fill-up and sign the nomination form. The investigating authorities opposed the said application tooth and nail and contended that the delegate of the petitioner society should not be permitted to file form and should not be permitted to contest, which is reflective as to how the authorities are bent upon restraining the delegate of the petitioner society from contesting the election any how.

21 It is urged that till date, the audit class certificate has not been supplied to the petitioner and the awarding of Class-"C" to the petitioner society was with an oblique purpose and in colourable exercise of powers. It is further the say of the society that the society is aggrieved party inasmuch as the audit classification is given to the society and not to its delegate. Therefore, any consequential effect would also not determine which is a party which is affected. Hence, the said contention is completely misplaced and, therefore, it is urged that on none of the counts the action of the respondent is sustainable and, therefore, the petition, in the interest of justice to be allowed.

ISSUE OF MAINTAINABILITY 22 Taking firstly the question of maintainability of this petition, it is urged by learned senior counsel Mr. Mihir Joshi that the challenge in the present petition is essentially to the classification of society by the auditor on completion of audit for the year 2019-20. The petitioner society challenges the very action of the respondent in declaring the certificate that the audit is completed for the year and audit classification is 'C' on following the guidelines to be prepared in this regard. He also has further urged that Section 84 of the Gujarat Co-operative Societies Act makes it incumbent upon the Registrar to audit, or cause to be audited by a person possessing prescribed qualifications and authorised by the Registrar by general or special order in writing in this behalf, the accounts of every society at least once in each year. The Gujarat Co-operative Societies Rules, 1965, according to him are meant for clarification of auditors, audit fees, guidelines prepared by the Registrar for determining and awarding the audit classification. It is the say that the petitioner is a member of Mehsana District Co-

operative Milk Producers' Union Limited within the meaning of Section 74(C) of the Gujarat Co-

operative Societies Act, 1961 and therefore, the election of the member of the managing committee shall need to be in consonance with Chapter XI-A of the Gujarat Cooperative Societies Act read with Gujarat Co-operative Specified Societies' Elections to Committees Rules, 1982. He has urged that the bye-

laws of the specified societies provides that delegates of only those member society can contest elections which has audit class 'A' or 'B' and therefore, those societies which have audit class 'C' and 'D' are itself classified for not contesting election for election of union. Again, the delegate of the petitioner society is one Mr. Vipul Chaudhary and the State Government is against his contesting the election. Deliberately, therefore, the auditor has given classification 'C' to the society so that its delegate cannot contest. According to him, serious consequences will be meted out to the society at the end of the audit for the year 2019-20 as the election program has already been published on 01.12.2020.

He therefore has urged that there is no efficacious or effective remedy which can take care of the grievance raised before this Court.

23 Per contra, learned Advocate General Mr.Kamal Trivedi appearing with learned Government Pleader, Ms. Manisha Lavkumar and Learned AGP Mr.Sharma for the State, has emphatically urged that classification of 'A', 'B' or 'C' would not bar the society for voting,however, his candidature would be barred if the class given to the society is 'C' or 'D'.

According to him, every year the audit takes place and the classification is done following the guidelines. The automatic result of performance is to be given and there is alternative efficacious remedy under Section 155 of the Gujarat Co-

operative Societies Act. According to learned Advocate General, the down grading of the society due to audit is an administrative act and therefore, there will be no requirement for hearing the parties and the remedy of the petitioner would lie under Section 155 of the Act. He has emphasized that this

petition is not maintainable as the society can approach only if its right is in jeopardy, otherwise, a proxy litigation is impermissible. The society is litigating third party's right which is not permissible.

Under Section 155 of the Act, the aggrieved party can always move to the Government and for not permitting the candidate of the petitioner to contest the election, since the election process is already set-in, no petition under Article 226 of the Constitution would lie and Election Petition shall need to be preferred before the Election Tribunal. He further has stated that there are highly disputed questions of facts which are needed to be addressed under Section 155 of the Act. In no manner, the Court, in a writ jurisdiction, can entertain those issues.

24 Learned Advocates General has relied on the following decisions to substantiate his contentions:

(a) PRABHADEVI HIMGIRI CO.OP.HSG.SOC.LTD.

THROUGH SECRETARY vs. STATE OF MAHARASHTRA AND OTHERS [CIVIL WRIT PETITION NO. 8142/2018] DATED 11.12.2019;

(b) MEHSANA DISTRICT COOPERATIVE MILK PRODUCERS UNION LIMITED vs. STATE OF GUJARAT and ANOTHER [LETTERS PATENT APPEAL NO. 555 of 2017] dated 23.08.2018;

(c)	THE	VISNAGAR	TALUKA	CO-OPERATIVE	
PURCHASE		AND	SELLS	UNION	LTD
PRATIK		UPADHYAY,	DISTRICT	REGISTRA	vs.
					AND

OTHERS [SPECIAL CIVIL APPLICATION NO. 7321 OF 2020] dated 05.08.2020;

(d) UNION OF INDIA AND OTHERS v. INDIAN JUTE MILLS ASSOCIATION AND OTHERS [2005(10) SCC 69];

(e) DAHEDA GROUP SEVA SAHAKARI MANDLI LIMITED vs. R.D.ROHIT, AUTHORISED OFFICER AND COOPERATIVE OFFICER (MARKETING) [2006 (1) GCD 211];

(f) VITTHODAR VIVIDH KARYAKARI SEVA SAHAKARI MANDALI LIMITED vs. STATE OF GUJARAT [2016 JX(Guj) 1699];

(g) N.P. PONNUSWAMI vs RETURNING OFFICER [AIR 1952 SC 64]

(h) SHRI SANT SADGURU JANARDAN SWAMI (MOINGIRI MAHARAJ) SAHAKARI DUGDHA UTPADAK SANSTHA AND OTHERS vs. STATE OF MAHARASHTRA AND OTHERS [(2001) 8 SCC 509];

(i) SIYANAGAR DUDHUTPADAKL SAHAKARI MANDLI LIMITED AND OTHERS vs. ELECTION OFFICER AND DIRECTOR AND OTHERS [SPECIAL CIVIL APPLICATION NO. 12731 OF 2018] DATED 12.09.2018;

25 Section 155 of the Gujarat Co-operative Societies Act would deserve reproduction at the outset: -

"155. Power of State Government and Registrar to call for proceedings of subordinate officers and to pass orders thereon: - The State Government and the Registrar may call for and examine the record of any inquiry or the proceedings of any other matter of any officer subordinate to them, except those referred to in sub-section (9) of section 150, for the purpose of satisfying themselves as to the legality or propriety of any decision or order passed, and as to the regularity of the proceedings of such officer. If in any case, it appears to the State Government, or the Registrar, that any decision or order or proceedings so called for should be modified, annulled or reversed, the State Government or the Registrar, as the case may be may after giving persons affected thereby an opportunity of being heard pass such order thereon as it or he may deem just."

25.1 Taking firstly the decision in case of CHIMANBHAI DEDUBHAI DESAI VS. CHHOTUBHAI PATEL, DISTRICT REGISTRAR COOPERATIVE SOCIETIES', (1970) 1 GLR 31, there was an inquiry instituted into the working, constitution and financial affairs of Charotar Gramoddhar Sahkari Mandal Limited which was the petitioner before this Court. The petitioner there was aggrieved by the order of inquiry, preferred revision application to the Registrar, Co-operative Society under Section 155 of the Act which was rejected by the Joint Registrar, Administration and Appeals, Co-operative Societies and the reasons which weighed with the Joint Registrar in rejecting the revision application were questioned. The Court was of the view that the Joint Registrar, Administration and Appeals was in error in taking the view that no revision application would lie against an order made by the District Registrar directing an inquiry under Section 86 sub-section (1) and he wrongly refused to exercise jurisdiction which was vested in him by Section 155. By exercising jurisdiction, the Court issued writ of certiorari quashing and setting aside the order passed by the Joint Registrar and directed him to decide it after complying with the principles of natural justice. On the issue whether the opportunity of hearing needs to be given to the society, the Division Bench held that the order directing the inquiry under Section 86 of the Act is a serious matter for a Cooperative Society and the same involves serious consequences and hence, the principles of natural justice requires to be complied with.

25.2 This authority does speak of powers of revision and of availing audience when serious consequences arise.

25.3 Yet another decision relied on of this Court rendered in case of MEHSANA DISTRICT COOPERATIVE MILK PRODUCERS UNION LIMITED vs. STATE OF GUJARAT and ANOTHER [LETTERS PATENT APPEAL NO. 555 of 2017] dated 23.08.2018; where the Court referred to the provisions of audit under Section 84, inquiry by Registrar under Section 86 and held that the respondent - State has passed the order for carrying out special audit under Section 84(5A) of the Act and therefore, no opportunity of hearing is required to be given to the petitioner union before passing such an order. The said decision would not be applicable in the given set of facts of the case.

25.4 In case of STATE OF MADHYA PRADESH AND OTHERS VS. SANJAY NAGAYACH AND OTHERS [(2013) 7 SCC 25]; the Court held that Statutory functionaries like Registrar/Joint Registrar of Cooperative Societies functioning under the respective Act must be above suspicion and

function independently without external pressure. The Registrar / Joint Registrar, while exercising powers of supersession has to form an opinion and that opinion must be based on some objective criteria, which has nexus with the final decision. A statutory authority shall not act with pre-conceived notion and shall not speak his masters' voice, because the formation of opinion must be his own, not somebody else in power to achieve some ulterior motive. There may be situations where the Registrar/ Joint Registrar are expected to act in the best interest of the society and its members, but in such situation, they have to act bona fide and within the four corners of the Statute. Apt would be to reproduce some of the findings and observations:

Registrar/Joint Registrar and external influence "36. Statutory functionaries like Registrar/Joint Registrar of Co-operative Societies functioning under the respective Cooperative Act must be above suspicion and function independently without external pressure. When an authority invested with the power purports to act on its own but in substance the power is exercised by external guidance or pressure, it would amount to nonexercise of power, statutorily vested. Large number of cases are coming up before this Court" and the High Courts in the country challenging the orders of supersession and many of them are being passed by the statutory functionaries due to external influence ignoring the fact that they are ousting a democratically elected Board, the consequence of which is also grave because the members of the Board of Directors would also stand disqualified in standing for the succeeding election as well.

37. The Registrar/Joint Registrar, while exercising powers of supersession has to form an opinion and that opinion must be based on some objective criteria, which has nexus with the final decision. A statutory authority shall not act with pre-conceived notion and shall not speak his masters' voice, because the formation of opinion must be his own, not somebody else in power, to achieve some ulterior motive. There may be situations where the Registrar/Joint Registrar are expected to act in the best interest of the society and its members, but in such situations, they have to act bona fide and within the four corners of the Statute. In our view, the impugned order will not fall in that category."

Such objectivity in the approach is always desirable in all cases and in the matter on hands also, that shall need to be examined while reverting to the facts.

26 In case of THE VISNAGAR TALUKA CO-OPERATIVE PURCHASE AND SELLS UNION LTD vs. PRATIK UPADHYAY, DISTRICT REGISTRAR AND OTHERS [SPECIAL CIVIL APPLICATION NO. 7321 OF 2020] dated 05.08.2020; the petitions were filed by Visnagar Taluka Cooperative Purchase and Sale Union Limited seeking to quash and set aside the order passed under the provision of Sec.84(5) of the Cooperative Societies Act, 1961 by the Joint Registrar and the order passed under Section 155 of the Act in exercise of powers under Revision by the respondent No.2 confirming the order passed under Section 84(5) of the Cooperative Societies Act. In the matter before this Court, the application was made to the Joint Registrar by some of the members of the Cooperative Society who are the primary member of the petitioner society. Several irregularities existed in audit memos for the period of financial years 2015-16 to 2018-19. Despite irregularities in the audit memo, no actions were taken therefore, the request was made that the petitioner society's account needed to be re audited. 13 serious irregularities were enlisted in their application made to the Joint Registrar.

The Registrar called upon the respondent to remain present. The Joint Registrar passed an order under Section 84 (5A) of the Act allowing the application made by the respondent Nos.6 to 13 for re-audit of the accounts of the petitioner society for 4 years from 2015-16 to 2018-

19. He appointed one Shri K.D. Turi, as the auditor to carry out the said audit. This had aggrieved the petitioner society which had approached the State by way of Revision Application. Simultaneously, writ petition was preferred before this Court and since the petitioner society had already challenged it in Revision, the petition was not entertained.

Thereafter, the Revisional Authority passed the order dismissing the revision and which was challenged before this Court. It was after the re-

audit was completed, that the petition was preferred challenging the order under Section 83(1) OF THE Act. The petitioner society has been re-audited and classified as "Audit Class C".

27 On the issue whether the petitioner ought to have been given the opportunity of hearing before passing an order of seizure, it was argued by the State that Section 83(1) of the Act did not contemplate any such hearing. The Court held thus: -

"26. With greatest respect, the State Government tried to play smart taking advantage of the situation of lockdown when judicial notice can be taken of the fact that the litigants were having some difficulty in circulation of matters due to restricted functioning of courts and the Registry. It has come on record that the learned advocate for the petitioner has requested the Government Pleader's office that the crisis may not be precipitated as the petition was already filed on 21.5.2020 i.e. SCA No.7461/2020 challenging the original order u/s.84(5) by which the revision was dismissed. The State Government did not stay its hands. Just a day prior to filing of the petition on 19.5.2020, the respondent No.4 again sought to take over the records within four days and within two days thereafter on 22.5.2020, the respondent No.4 for unseemingly, unknown reasons comes to the conclusion that the petitioner will tamper or destroy the records. For 3 months or for over 4 months from 29.1.2020 to 14.5.2020 no such apprehension seems to have existed because had that been so, the Government would not have agreed on 20.2.2020 before this Court that they will not carry out the procedure of the re-audit. Of-course, the Government can counter this by saying that, that statement was only made to see that re-audit is not carried out. But if that was a statement made in a faith that the parties would not precipitate a crisis, that was not actually so.

27. What also seemingly seems a decision taken in hot haste so as to present a fait accompli to this order, the order of 22.5.2020 was passed on Friday. Purely coincident it may sound that it was followed by three holidays i.e. Saturday, Sunday and Monday being a Eid Holiday. On Tuesday, the Police was authorized to enter the premises of the petitioner and the records were taken over on 26.5.2020 night.

28. On 8.6.2020, when the petition challenging these orders was moved, a statement was made by Government Pleader that for the records which were seized the re-audit was complete and the matter has become infructuous.

29. Please note that without delving into the legality of the order passed in exercise of powers u/S.84 of the Act, this Court is at pains to deprecate the conduct of the State in the manner in which the order u/s. 83(1) of the Act was passed.

30. From the unfolding events and dates which have been referred to extensively in detail, the powers u/s. 83(1) of the Act the authority to exercise such powers by the Officers concerned and the ingredients which authorized the authorities to exercise such powers are not in doubt. This Court has not examined whether the order in context of it's prerogative to pass such orders u/s. 83(1) but in the context of whether in the facts and circumstances of the case was in the present set of facts it could have been passed.

31. Submissions and counter submissions have been made that the exercise of powers of the respondent was de hors the provisions of Sec.83(1), that it was passed without following the principles of natural justice and the section that was reproduced was not in existence. To this submission made by Mr.P.K. Jani, learned senior advocate, I do not agree. Reading of the judgment in Amreli Cooperative Sale and Purchase Union Ltd. (Supra) , it becomes clear that what was struck down by this Court was different propositions of unreasonably refusing to give records or likely suppression. The power to take over and seize the records if the authorities had an apprehension that it is to be tampered with or destroyed can be exercised in given circumstances and the facts of the case. Even the proposition that the petitioner or a party needs to be heard while exercising powers u/s. 83(1) is a submission that is misconceived. I agree with the submission of the learned Advocate General that when there are contingencies provided under the Act which present the case where the State apprehends that the records will be tampered with or destroyed, these are exceptional circumstances and if the hearing is given as contended by the learned advocate for the petitioner, it would frustrate the object of such a provision. Sec. 83(1) therefore does not contemplate any sort of hearing to be given prior to applying before the Executive Magistrate for seizing possession of the records. Therefore, while agreeing with the submission of the State that powers can be exercised in given set of facts and circumstances u/s. 83(1) of the Act for taking possession of the records, in the facts of the present case, the powers were clearly exercised in an arbitrary, capricious manner and the Court will not be wrong in saying that they were surreptitiously exercised undermining the process of the Court. This the Court is pained to say in view of the fact that the legal remedies that exist, the petitioner had a right to invoke. The petitioner did invoke, the stay may not have been granted while revision was filed on 12.2.2020 but the order of 20.2.2020 passed in SCA No.4764/2020 changed the rules of the game. The State was expected to act fairly having made a statement that they will not proceed with the procedure of re-audit. Albeit, the State would join an issue by contending that what was assured before the Court was that they will not proceed with the re-audit. It did not prevent them seizing the record, however, what followed subsequently when the revisional orders were stayed till 6.5.2020, the State ought to have acted fairly. That it did not is apparent from the undue haste in exercising powers u/s. 83(1) of the Act by the State in the manner that it did.

32. Therefore, as far as SCA No.7321/2020 is concerned, the same is allowed with cost of Rs.1,00,000/-.Rule is made absolute in SCA No.7321/2020 with costs of Rs.1,00,000/- to be paid to the petitioner by the State accordingly."

Here of course, the first resort was to the revision to challenge the order of re-audit and since that was pending, the court chose not to entertain the petition at the first go. The conduct that followed of the State came under a scanner of the court while it accepted wide powers of the court to seize records.

28 Reference is made here of the decision rendered in case of K. NAGRAJ AND OTHERS v. STATE OF ANDHRA PRADESH [1985(1) SCC 523]; it would be apt to reproduce the findings and observations of the Apex Court: -

"22. As held in the case of N. Nagaraj (supra), merely because decision is taken on haste would not make it bad. So also held by the Supreme Court in the case of S.P.Gururaja (supra). Relevant para 13 of the said judgment i.e. N.Nagaraj and paras 34 & 35 in S.P. Gururaja, respectively read as under: "13. As regards Shri Venugopal's argument at

(b) above, the fact that the decision to reduce the age of retirement from 58 to 55 was taken by the State Government within one month of the assumption of office by it, cannot justify the conclusion that the decision is arbitrary because it is unscientific in the sense that it is not backed by due investigation or by compilation of relevant data on the subject.

Were this so, every decision taken by a new Government soon after assumption of office shall have to be regarded as arbitrary. The reasonableness of a decision, in any jurisdiction, does not depend upon the time which it takes. A delayed decision of the executive can also be bad as offending against the provisions of the Constitution and it can be no defence to the charge of unconstitutionality that the decision was taken after the lapse of a long time. Conversely, decisions which are taken promptly cannot be assumed to be bad because they are taken promptly. Every decision has to be examined on its own merits in order to determine whether it is arbitrary or unreasonable. Besides, we have to consider the validity of a law regulating the age of retirement. It is untenable to contend that a law is bad because it is passed immediately on the assumption of office by a new Government. It must also be borne in mind that the question as to what should be the proper age of retirement is not a novel or unprecedented question which the State Legislature had to consider. There is a wealth of material on that subject and many a Pay Commission has dealt with it comprehensively. The State Government had the relevant facts as also the reports of the various Central and State Pay Commissions before it, on the basis of which it had to take a reasonable decision. The aid and assistance of a well-trained bureaucracy which, notoriously, plays an important part not only in the implementation of policies but in their making, was also available to the Government. Therefore, the speed with which the decision was taken cannot, without more, invalidate it on the ground of arbitrariness."

"34. Undue haste also is a matter which by itself would not have been a ground for exercise of the power of judicial review unless it is held to be mala fide. What is necessary in such matters is not the time taken for allotment but the manner in which the action had been taken. The Court, it is trite, is not concerned with the merit of the decision but the decision-making process. In the absence of any finding that any legal malice was committed, the impugned allotment of land could not have been interfered with. What was only necessary to be seen was as to whether there had been fair play in

action.

35. The question as to whether any undue haste has been shown in taking an administrative decision is essentially a question of fact. The State had developed a policy of single-window system with a view to get rid of red tapism generally prevailing in the bureaucracy. A decision which has been taken after due deliberations and upon due application of mind cannot be held to be suffering from malice in law on the ground that there had been undue haste on the part of the State and the Board."

29 The court was more concerned with the process of decision making and not the decision itself and as held in this decision, unless the actions are malafide of the official, undue haste per se is no ground of interference. This court shall be scrutinizing the very process of audit and not the final outcome alone on merit.

30 In the case of UNION OF INDIA AND OTHERS v.

INDIAN JUTE MILLS ASSOCIATION AND OTHERS [ 2005(10) SCC 69]; the Court held thus: -

"23. Subject matter of the appeal in this Court today is not regarding the validity of the notifications dated 16.4.2004 and 01.07.2004 the duration of which has already lapsed due to efflux of time. The question of law which is being raised is as to whether the High Court contrary to the provisions of the Act and the observations made by this Court in Dalmia Cement (Bharat) Ltd. (supra) could direct the Standing Advisory Committee to afford a hearing to the representatives of the growers and the workers engaged in the production of raw jute and jute packaging material. The challenge to the constitution of Standing Advisory Committee consisting of only the Secretaries representing various departments without associating the jute industry or its representative being void was rejected by this Court in Dalmia Cement (Bharat) Ltd. (supra). The Court did not accept the plea of the appellant that the representatives of the jute industries should either be nominated to the Standing Advisory Committee or that they should be heard by the Standing Advisory Committee before making its recommendations to the Central Government for the purpose of Section 3(1) of the Act. While rejecting the contention this Court further did observe that, "It would be desirable that the industry or industries through recognised office-bearers of the associations may be nominated or given notice before the Advisory Committee meets to place their views and material in support thereof to evaluate the need for regulation and extent of regulation thereof. The persons representing the particular industry would assist the Committee to properly advise the Government before issuing directions/orders under Section

3."

24. It would be seen that this Court was careful not to give a positive direction to the Central Government either to nominate a representative of the industry on the Advisory Board or of affording an opportunity by the Standing Advisory Committee to hear them before making its recommendation to the Central Government. The only desire expressed by the Court was that the Standing Advisory Committee should give a notice to the jute industry to enable it to place its point of view before the Advisory Committee for its evaluation before making the recommendations to the

Central Government. It is not disputed before us that the observations made by the Court are being carried out meticulously. There is no provision in the Act requiring the Standing Advisory Committee to afford a hearing to any person associated with either the production of the raw jute or engaged in the production of the jute packaging material before making its recommendations to the Central Government. The directions issued by the Division Bench run counter to the provisions of the Act as well as the observations made by this Court in *Dalmia Cement (Bharat) Ltd. (supra)*. The same deserves to be set aside and are hereby set aside."

31 In case of *DAHEDA GROUP SEVA SAHAKARI MANDLI LIMITED vs. R.D.ROHIT, AUTHORISED OFFICER AND COOPERATIVE OFFICER (MARKETING)* [2006 (1) GCD 211]; where group of Special Civil Applications were preferred where it was urged to include the names of the petitioners in the final voters' list. The petitioners have also prayed for direction to respondent No. 1 to permit the petitioners in the ensuing elections of the Kambhat Agricultural Produce Market Committee. It was contended that the reasons best known to the Election Officer acting at the behest of someone else, on extraneous grounds, the names of the authorised representatives of the Agricultural Cooperative Societies were deleted who were disbursing agricultural loans to the members. The Court raised the following issues: -

"4. In view of the conflicting judgments of the Division Benches of this Court wherein some of the Division Benches had taken a view that the inclusion or non-inclusion of the names in the voters' list cannot be made a ground in an election petition, while the other view is that preparation of the voters' list which includes deletion of the names in the voters' list being integral, the questions can be raised in an election petition under rule 28, the Division Bench felt that the matters need hearing by a larger Bench to settle all the disputes once and for all. Hence this group of petitions has been referred to us to answer the following questions:

I. Whether a person whose name is not included in the voters' list can avail provisions of rule 28 of the rules by filing election petition ?

II. Whether the remedy under rule 28 can be termed to be efficacious remedy ?

III. Whether a petition under Article 226 of the Constitution of India is maintainable in an election process challenging an order issued by the Election Officers i.e. inclusion or deletion of the names of the voters in the voters' list ?" The Court held and observed thus: -

"12. Thus the market committee envisaged by these provisions are consisting of elected representatives of the first three constituencies and members nominated by the local authority and the State Government. Under section 59, the State Government may, by notification in the official Gazette, make rules, either generally or specially for any market area or market areas for the purpose of carrying out the provisions of this Act, such rules may provide for or regulate -

(i) preparation and revision of list of voters for the purpose of any election under section 11,

(ii) determination of disputes arising in such election and (iii) payment of expenditure in connection with or incidental to such election; In exercise of power conferred under section 59 of the Act, Government of Gujarat has framed rules called Gujarat Agricultural Produce Markets Rules, 1965. Part III of the said rules entitles "Election of Market Committee". Rule 4 empowers the Director to fix the date of election for general election of the market committee or by-election under section 15 of the Act. Under rule 5, three different lists of voters are to be prepared for the purpose of section 11 of the Act. These lists comprise -

(i) list of members of the Managing Committee of the cooperative societies dispensing agricultural credit in the market area;

(ii) list of traders holding general licences in the market area;

(iii) list of members of managing committees of Cooperative Marketing Societies situated in the market area.

According to rule 6, a person whose name is entered in the voters' list shall be qualified to vote at an election to which the list of voters relates, unless he has ceased to hold the capacity in which his name was entered in such list. Rules 7 and 8 provide for the preparation of list of voters for general election which reads as under:

(7) (i) every Cooperative Society dispensing agricultural credit in the market area shall communicate the full names of the members of its managing committee together with the place of residence of each member;

(ii) the market committee shall communicate the full names of the traders holding general licences in the market area together with the place of residence of each such trader; and

(iii) every Cooperative Marketing Society shall communicate the full names of the members of its managing committee together with the place of residence of each such member, to the authorised officer before such date as the Director may be by order fix in that behalf. Provided that the date to be so fixed shall not be later than sixty days before the date of the general election.

(2) The Authorised Officer shall within seven days from the date fixed under sub-rule (1) cause to be prepared the lists of voters as required by rule 5 on the basis of the information received under sub-rule (1) and, if necessary, after making such inquiry as he may deem fit.

(3) Every list of voters shall show the full name, place of residence and the serial number of each voter.

Rule 8. Provisional and final publication of lists of voters - (1) As soon as the list of voters is prepared under rule 5, it shall be published by the Authorised Officer by affixing copy thereof at the office of the market committee and at some conspicuous place in the principal market yard in the market area along with a notice stating that any person whose name is not entered in the list of

voters and who claims that his name should be entered therein or any person who thinks that his name or the name of some other person has been wrongly entered therein or has not been correctly entered, may within fourteen days from the date of the publication of the notice, apply to the authorised officer for an amendment of the list of voters.

(2) If any application is received under sub-rule (1), the Authorised Officer shall decide the same and shall cause to be prepared and published the final list of voters, after making such amendments therein as may be, necessary in pursuance of the decision given by him on the application. The final list shall be prepared at least thirty days before the date fixed for the nomination of candidates for the election.

(3) Copies of the final list of voters prepared under this rule shall be kept open for public inspection at the office of the Authorised Officer and at the office of the market committee. Rule 28, which is relevant for our purpose, provides for Determination of validity of election whereby a person qualified to vote or to be elected at the election, may approach a Director or the State Government as the case may be within seven days after the date of the declaration of the result of the election to challenge the validity of the election.

13. Rule 28 has been interpreted by this court on many a times. It came up for consideration by way of Letters Patent Appeal before the Division Bench consisting of Hon'ble M/s. Justices B K Mehta and R J Shah, JJ in the case of Patan Proper Fal and Shak Bhaji Kharid Vechan Sahakari Mandli Ltd. Patan v. Pali Shak Bhaji and Fal Adi Ugarnaraoni Kharid Vechan Shahkari Mandli Ltd.

Mehsana (1986 GLH 430). It was a case wherein the names of the members of the Managing Committee of the petitioners' society were not included in the voters' list and, therefore, the petitioners' society moved the court for appropriate writ, orders or direction for enjoining the authorised officers to include names of the members of the Managing Committee in the voters' list as required under section 11(1)(iii) of the Act. The matter came up before the learned Single Judge, who disposed of the petition on merits with the consent of the parties. In para 6 of their judgment, the Division Bench has observed as under:

"6. The learned Single Judge was of the opinion that on the true interpretation of the relevant rules, inter alia, Rules 7 and 8 of the Rules, the qualifying date for purposes of determining the eligibility of a person to be enrolled as a voter should be considered the date on which the final voters' list is published under the Rules and, therefore, the petitioner society was well within bounds and entitled to enrolment of its members of the Managing Committee as voters in the voters' list for purposes of the elections to the Market Committee. He ruled out the objection raised on behalf of the appellant-society that the petitioner society can have recourse to the election petition as provided in Rule 28 and the court should not arrest or interfere with the programme of election at that stage since in his opinion it cannot be said as a rule of law and it is more in the nature of rule of discretion which the court should observe since the election is a costly process and should be allowed to have its own operation uninterrupted by any outside agency. He, therefore, allowed the petition and directed the Authorised Officer to include the names of the members of the petitioner's Managing Committee as voters and made the Rule absolute."

Against the said order, LPA was preferred as aforesaid. The LPA Bench formulated two questions to be decided namely;

1. "Whether this court has jurisdiction and/or can interfere in exercise of such jurisdiction under Article 226 of the Constitution of India and consecutively arrest the programme of election which has been declared in connection with election of the market committee in question since the special right of being voters conferred on the eligible person under the said Act can be enforced by the special remedy of Election Petition under Rule 28 of the Rules.
2. Whether the original petitioners are entitled to be enrolled as voter?.

The Division Bench, after considering the entire scheme and the relevant provisions of the Act as well as the rules, was of the view that when special remedy has been provided, the Court should not exercise the jurisdiction in the matter since there is a provisional finality in the matters pertaining to various stages of elections and therefore, having regard to the principle in the matter of public importance that election should be concluded as early as possible according to the time schedule and all controversial matters as well as disputes arising out of the election including the right to vote or stand as a candidate should be postponed till after the elections are over so as to avoid impediment or hindrance in the election process, does not arise. In that view of the matter, the Division Bench was of the opinion that this court should not exercise the jurisdiction under Article 226 of the Constitution of India by interfering at this stage with the election process. In that view of the matter, the Division Bench did not feel it necessary to go into the second question of each of those appeals.

14. In para 29 of the judgment, it was further observed that if the court, on principle and authority, should not exercise the jurisdiction in such matters pertaining to elections, it is proper not to express any opinion on the construction of a rule since the question as to whether a particular person is a voter or not, or continues to be a voter, or is entitled to object to inclusion of the names of some persons who, according to the objector, are ineligible for being included, are questions which are pre-eminently fit to be decided by the competent election authorities.

15. In the case of Mehsana District Cooperative Sales and Purchase Union Ltd. (supra) (1988 (2) GLR 1060) the Division Bench consisting of Hon'ble M/s. Justices Ahmadi and D H Shukla, JJ. were posed with the question as to whether the High Court, in exercise of jurisdiction under Article 226 of the Constitution would be justified in arresting the election programme which has been set in motion by the issuance of an order under Rule 4 and 10 of the rules on the plea of omission of certain names from the lists of voters finalised by the Authorised Officer under rule 8 in view of the special forum and remedy provided by Rule 28 of the Rules? The Division Bench, after considering various decisions including the decision rendered in the case of Patan Proper Fal and Shak Bhaji Kharid Vechan Sahakari Mandli Ltd. Patan (supra) (1986 GLH 430) held that according to Rule 28, if the validity is questioned after the declaration of the result, it has to be decided by the special forum created by the said Rules. That forum has the power to confirm or amend the declared result or set aside the election. Prima facie, therefore, the preparation of the lists of voters is a step in the direction of holding of elections so far as the scheme of the Rules is concerned.

16. The Division Bench answered the question posed before it in negative and consequently refused to arrest the election programme which was already set in motion by observing that it must be remembered that the right to be included in the voters' list is conferred by statute and must, therefore, be exercised under the statute and not de hors the said statute since the petitioners have no right in equity or at common law. The right being a statutory right must be exercised within the frame work of the statute and if the statute provides for an efficacious remedy for the enforcement of the right, the High Court would be justified in refusing to exercise jurisdiction under Article 226 of the Constitution.

17. The Division Bench in para 11 of its judgment observed that in extraordinary and exceptional cases the Court would be justified in invoking the jurisdiction under Article 226 of the Constitution. However, the case on hand was not to be one such case for invoking the extraordinary jurisdiction of this Court.

19. The Division Bench, after considering the above judgment of the learned Single Judge, held that the view taken by the learned Single Judge was not correct. Courts are not expected to supply words to the Statute so as to give a different meaning. If the interpretation of a section leads to an apparent conflict with other provisions, the court can adopt an interpretation so as to avoid conflict. The court can iron out the creases, but cannot alter the material. Moreover, the definition of words "qualified to vote" as given in rule 6 is to be applied. When any of the provisions of the statute is interpreted and when the Legislature gives a dictionary for the statute, the words given in the statute can only be interpreted in accordance with the meaning given in such a dictionary. Any other view taken by the court cannot be accepted as a proper interpretation. The Court observed that "going by the provisions of rule 28(1) read with rule 6, it is doubtful, whether an application could be maintained by a person whose name is not entered in the electoral roll".

20. Finally in the case of Kanubhai Chhaganbhai Patel v. Director of Agricultural Marketing & Rural Finance, Gandhinagar and Ors. (2004(3) GLR 2718), again the interpretation of rule 6 and rule 28 came up for consideration before another Division Bench consisting of Hon'ble M/s. Justices R K Abichandani & D H Waghela, JJ. The Division Bench, after considering all the aforesaid three decisions, held that in view of the efficacious machinery provided in Rule 28 of the rules and since the election process is at a very advanced stage, at both the places, interference with the election processes by entertaining any of these petitions at this stage is not warranted. While holding the decision held in the case of Kanjibhai Babaldas Patel v. Election Officer of APMC, Visnagar, as per incuriam. It was observed that -

"The stage of scrutiny of nomination and withdrawal of candidature are strictly time bound under the statutory rules. If the High Court interferes, the outcome of the scrutiny of the nomination, it will have direct effect of disturbing the time schedule statutorily contemplated as aforesaid. For example, when nomination paper is wrongly rejected, or accepted and the High Court directs otherwise, which may directly disturb the date on which such list is required to be statutorily affixed not less than seven days before the date fixed for the election. As soon as the court enters into the controversy of the validity of the nomination paper, by the very nature of time schedule, having been already announced under the statutory rules, there would be every likelihood of interfering with the

process of election. Therefore, in the matter of rejection of nomination, it is eminently clear that entertaining of a petition at such late stage would in no way smoothen the progress of election proceeding.

If pick and choose policy is adopted for examining some cases of rejection or such acceptance of nomination papers and not others, in face of proximity of voting dates, it would amount to circumventing the settled legal position that if an election (the term elected being widely interpreted so as to include all steps and entire proceedings commencing from the date of notification of election till the date of declaration of result) is to be called in question and which questioning may have an effect of interrupting, obstructing or protracting the election in any manner, the invoking judicial remedy has to be postponed till after the completion of proceeding in elections." In substance, the Division Bench in their decision virtually approved the earlier two decisions rendered in 1988 (2) GLR 1060 (supra) and 1986 GLH 430 (supra).

21. In view of the conflicting decisions rendered by the different Division Benches of this Court, we have to consider the rival contentions advanced before us by the learned Counsel for the respective parties.

On a plain reading of rule 28 which provides remedy to "any person qualified" either to be elected or to vote at the election to determine the validity of the election of the members of APMC. Since the expression "any person qualified" is not defined under the Act and the Rules, guidance is to be derived from rule 6 of the rules, dealing with "persons qualified to vote" - where the qualification criteria is to be taken into account which should be the capacity i.e. the post and not the factum of inclusion and exclusion of the names from the voters' list. We agree with the submissions of the learned Addl. Advocate General that with a view to give full effect to the provisions providing for remedy in the matter of resolution of election disputes as contained in the aforesaid Rule 28, the said provisions along with the provisions of Rule 6 should be given purposive interpretation in the widest amplitude so as to make the same more meaningful and effective. He has placed reliance of the decision in the case of D. Saibaba v. Bar Council of India and anr.(2003) 6 SCC 186. While interpreting the Section 48- AA of the Advocates Act, 1961, the Hon'ble Supreme Court held as under:

"So far as the commencement of the period of limitation for filing the review petition is concerned, we are clearly of the opinion that the expression 'the date of that order' as occurring in section 48-AA has to be construed as meaning the date of communication or knowledge of the order to the review petition. Where the law provides a remedy to a person, the provision has to be so construed in case of ambiguity as to make the availing of the remedy practical and the exercise of power conferred on the authority meaningful and effective. A construction which would render the provision nugatory ought to be avoided. True, the process of interpretation cannot be utilized for implanting a heart into a dead provision; however, the power to construe a provision of law can always be so exercised as to give throb to a sinking heart."

In view of the above, referring back to the present controversy, a person may be qualified to vote in any election, by virtue of his being a member of the Managing Committee of the particular

Cooperative Society as per section 11(1) of the Act and not by virtue of the inclusion or deletion of his name from the voters' list. Inclusion or deletion of a name is only consequence of holding a capacity because if a person holds the post, his name should be included and if he ceases to hold the post on the date of election programme, then his name should be deleted, meaning thereby it is the holding of the capacity which is the relevant criterion and not the appearance of name in the voters' list which is only a consequence. Thus, even though a person's name is found entered into voters' list that alone would not qualify him to be a voter because it can be shown that he had ceased to hold the capacity in which his name was entered into the list, even though he had voted on the basis of inclusion of his name in the final voters' list but proof of his capacity having been ceased, the election could be set aside on the ground of improper reception of voters of an ineligible person. The context in which Rule 6 is framed by the Legislature cannot be read in isolation. While interpreting the same, it has to be kept in view that it also talks about cessation of the capacity in which name of a person was entered into the list. Therefore, it would be improper to construe Rule 6 as controlling the eligibility of a person entitled to file an election petition under Rule

28.

22. Provisions of rule 28 of the rules are otherwise independent of the provisions of rule 6 and are not in any manner, controlled by rule 6 and provide for remedy for resolution of all kind of election disputes. If the provisions of rule 6 and rule 28 are not interpreted in the wider spectrum and in light of the intent of the legislature as discussed hereinabove, the same would create two classes i.e. (1) one which can challenge the wrong inclusion only by way of election petition, and (ii) the other which can challenge the non-inclusion i.e. exclusion by way of writ petition only. This could never have been intended by the legislation. When remedy of election petition is deemed fit and is provided as a statutory remedy then every election dispute should be raised before the forum competent to decide the same.

24. As observed earlier, the Division Bench, in the case of Patan Proper Fal and Shak Bhaji Kharid Vechan Sahakari Mandli Ltd. Patan v. Pali Shak Bhaji and Fal Adi Ugarnaraoni Kharid Vechan Shahkari Mandli Ltd.

Mehsana (1986 GLH 430) (supra) and in the case of Mehsana District Coop. Sales and Purchase Union Ltd. and Anr. v. State of Gujarat (1988 (2) GLR 1060 (supra), have clearly laid down that rule 28 is a provision of widest amplitude where the validity of election can be challenged on any ground and further since the question as to whether a particular person is a voter or not, or continues to be a voter, or is entitled to be included in the voters' list, or entitled to object to the inclusion of the names of some persons, who according to the objector, are ineligible for being included, are questions which are pre-eminently fit to be decided by the competent election authorities and further if the voters' list is prepared on extraneous considerations and not consistent with the requirements of the relevant rules, the forum created under Rule 28 of the rules would have jurisdiction and would be justified in looking into the same. We accordingly hold that the question that whether the voters' list is to be modified at the instance of some persons claiming to be voters or at the instance of persons objecting to the inclusion of the names of some persons in the voters' list is a matter relating to election. It is a right conferred under the Act for which remedy has been

provided and therefore, this Court should not exercise its discretion in the matter. In our opinion, inclusion or exclusion of the names in the voters' list and all controversial matters as well as disputes arising out of the election including the right to vote or stand as a candidate should be postponed till after the elections are over so as to avoid impediment or hindrance in the election process. The Division Bench of this Court in the the case of Mehsana Dist.Coop.Purchase & Sales Union Ltd. v. Dhadhusan Beej Utpadak Rupantar and Vechan Karnari Sahkari Mandali Ltd. (1998 (1) GLH 170 (supra) could have referred the matter to the larger Bench especially in view of the earlier two decisions of two different Division Benches of this Court as stated above instead of taking a contrary view in the matter.

27. We accordingly do not approve the law laid down by the Division Bench of this Court in the case of Mehsana Dist.Coop.Purchase & Sales Union Ltd. (supra) (1998 (1)GLH 170. In light of what is stated above, we approve the decisions rendered by the respective Division Benches in the following cases by holding that the same are good law:-

i. 1986 GLH 430 - Patan Proper Fal and Shak Bhaji Kharid Vechan Sahakari Mandli Ltd. Patan v. Pali Sahak Bhaji and Fal Ful Adi Ugarnaraoni Kharid Vechan Shahkari Mandli Ltd. and Ors.

ii. 1988 (2) GLH 1060 - Mehsana Dist.Cooperative Sales and Purchase Union LTd. and Anr. v. State of Gujarat and Ors.

iii. 2004 (3) GLR 2718 - Kanubhai Chhaganbhai Patel v. Director of Agricultural Marketing & Rural Finance, Gandhiniagar and Ors.

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 bye-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."

32 In case of VITTHODAR VIVIDH KARYAKARI SEVA SAHAKARI MANDALI LIMITED vs. STATE OF GUJARAT [2016 JX(Guj) 1699; the Court referred to the decision rendered in case of Daheda Group Seva Sahakari Mandli Limited (supra) to hold that even though petition under Article 226 of the Constitution is maintainable even when alternative remedy is available, the powers are to be exercised in extraordinary or special circumstances such as where the order is ultra-virus 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 the 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.

32.1 It is necessary to make a mention at this stage that the petitioner in the above referred matter had approached to set aside the order passed by the Election Officer whereby the name of Vitthodar Vividh Karyakari Seva Sahakari Mandali Limited as well as name of another cooperative society namely, the Kuchavada Vividh Karyakari Seva Sahkari Mandli, were deleted from the list of voters although their names were included in the preliminary list of voters during the process of election. The Court held thus: -

"5. Though submission on part of learned advocate for the petitioner was attractive at the first lush, having regard to the higher principle and discipline of jurisdiction, when the election process is underway, petitioner cannot maintain the prayer at this stage in this proceeding for inclusion of name of the petitioner society in the list of voters. Therefore, none of the contention raised by both the sides are required to be gone into and are not gone into.

5.1 It is trite that writ court would not interfere once the election process is underway. This dictum, well-settled by caravan of decisions of the Supreme Court as well as by this Court, is true whether it is elections to local body or elections of any democratic domestic body such as cooperative society. It is also well-settled that all election disputes relating to alleged irregularities or illegalities in course of the election have to be postponed for their solution, to be tried and settled after the elections are over in accordance with the machinery provided for resolution of such disputes. 5.2 The well-settled proposition that the Court should not interfere with the election process and the remedy could be availed only after the elections are over, has been holding the field right from the decision in N.P. Ponnuswami Vs Returning Officer [AIR 1952 SC 64] and caravan of other decisions, of which a more recent decision in Shaji K. Joseph Vs V. Viswanath [(2016) 4 SCC 429] may be referred to, which reiterated the principle in the following words.

"... as per the settled law, the High Court should not have interfered with the election after the process of election had commenced. The judgments referred to hereinabove clearly show the settled position of law to the effect whenever the process of election starts, normally courts should not interfere with he process of election for the simple reason that if the process of election is interfered with by the courts, possibly no election would be completed without the court's order. Very often, for frivolous reasons, candidates or others approach the courts and by virtue of interim orders passed by courts, the election is delayed or cancelled and in such a case the basic purpose of having election having election and getting an elected body to run the administration is frustrated. For the aforesaid reasons, this court has taken a view that all disputes with regard to election should be dealt with only after completion of the election. ... .." (Para 15) 5.3 In Rajeshbhai Vaghjibhai Chaudhari Vs State of Gujarat being Special Civil Application No.8041 of 2016 decided by this Court reiterating the principle came to be confirmed in Letters Patent Appeal No.538 of 2016 in which, after discussing the powers of the Court, the Division Bench observed to state as under. "Keeping in mind the aforesaid legal position with regard to exercising powers under Article 226 of the

Constitution of India in the election matters, if the facts of the present case are considered, it is revealed that the Authorized Officer has rejected the objections raised by the petitioners about inclusion of the names of petitioner Nos. 6 to 101 in the voters list. In the facts of the present case when a new market committee is constituted in September 2014 and thereafter the licences were issued to the concerned traders, we are prima facie of the opinion that Authorized Officer has not committed any jurisdictional error or order of the Authorized Officer cannot be said to be ultra vires or nullity nor the same can be termed as arbitrary. Thus, in the facts of the present case, the learned Single Judge is right in not exercising the jurisdiction under Article 226 of the Constitution and by observing that the petitioners can file an Election Petition under Rule 28 of the rules. We are in agreement with the reasoning given by the learned Single Judge and therefore the present appeal is devoid of any merits and accordingly it is dismissed." (Para 15) "However, we leave it open to the appellants that if the appellants petitioners are aggrieved by the result of election, they 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 prima facie findings recorded by this Court in this appeal." (para 16) 5.4 In a recent decision in Bhesavahi Group Vividh Karyakari Seva Sahakari Mandli Limited Vs State of Gujarat being Letters Patent Appeal No.569 of 2016 decided on 01st July, 2016, wherein reference of Daheda Group Seva Sahakari Mandli Limited (supra) was also made, the Division Bench reiterated the principle of non-interference in the election process in exercise of powers under Article 226 of the Constitution.

5.5 The proposition that Court would not interfere or interpose itself once the election process is started is stated and reiterated in several decisions of this Court including the decision of Full Bench of this Court in case of Daheda Group Seva Sahakari Mandli Limited Vs R.D. Doshit [2006(1) GCD 211], wherein the Court even while holding that only in exceptional circumstances the Court may be inclined to interfere with the election process, in terms held that inclusion or exclusion from the list of voters are not exceptional circumstance which would justify interference of the Court in the midst of the election.

5.6 The conclusion drawn by Full Bench of this Court in Daheda Group Seva Sahakari Mandli Limited (supra) are 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 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."''

33 Interference with the election process, more particularly, when it comes to inclusion and/or exclusion of the named from the voters' list in case of N.P. PONNUSWAMI vs RETURNING OFFICER [AIR 1952 SC 64] the Court held that word "election" is used to embrace the whole procedure of election and is not confined to final result. The rejection of acceptance of nomination paper is also included in the term. The Court held and observed thus: -

"8. The next important question to be considered is what is meant by the words "no election shall be called in ques- tion". A reference to any treatise on elections in England will show that an election proceeding in that country is liable to be assailed on very limited grounds, one of them being the improper rejection of a nomination paper. The law with which we are concerned is not materially different, and we find that in section 100 of the Representation of the People Act, 1951, one of the grounds for declaring an elec- tion to be void is the improper rejection of a nomination paper.

9. The question now arises whether the law of elections in this country contemplates that there should be two attacks on matters connected with election proceedings, one while they are going on by invoking the extraordinary jurisdiction of the High Court under article 226 of the Constitution (the ordinary jurisdiction of the courts having been expressly excluded), and another after they have been completed by means of an election petition. In my opinion, to affirm such a position would be contrary to the scheme of Part XV of the Constitution and the Representation of the People Act, which, as I shall point out later, seems to be that any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropri- ate manner before a special tribunal and should not be brought up at an intermediate stage before any court. It seems to me that under the election law, the only signifi- cance which the rejection of a nomination paper has consists in the fact that it can be used as a ground to call the election in question. Arti- cle 329(b) was apparently enacted to prescribe the manner in which and the stage at which this ground, and other grounds which may be raised under the law to call the election in question could be urged. I think it follows by necessary implication from the language of this provision that those grounds cannot be urged in any other manner, at any other stage and before any other court. If the grounds on which an election can be called in question could be raised at an earlier stage and errors, if any, are rectified, there will be no meaning in enacting a provision like article 329(b) and in setting up a special tribunal. Any other meaning ascribed to the words used in the article would lead to anomalies, which the Constitution could not have contemplat- ed, one of them being that conflicting views may be ex- pressed by the High Court at the pre-polling stage and by the election tribunal, which is to be an independent body, at the stage when the matter is brought up before it.

12. It is now well-recognized that where a right or liability is created by a statute which gives a special remedy for en- forcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes J. in Wolverhampton New Water Works Co. v. Hawkes- ford(1) in the following passage :-

"There are three classes of cases in which a liability may be established founded upon statute. One is, where there was a liability existing at common law and that li- ability is affirmed by a statute

which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it..... The remedy provided by the statute must be followed, and it is not (1) 6 C.B. (N.S.) 336, 356.

competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."

The rule laid down in this passage was approved by the House of Lords in *Neville v. London Express Newspaper Limited*(1) and has been reaffirmed by the Privy Council in *Attorney-General of Trinidad and Tobago v. Gordon Grant & Co.*(2) and *Secretary of State v. Mask & Co.*(a); and it has also been held to be equally applicable to enforcement of rights: see *Hurdutrai v. Official Assignee of Calcutta*(4). That being so, I think it will be a fair inference from the provisions of the Representation of the People Act to state that the Act provides for only one remedy, that remedy being by an election petition to be presented after the election is over, and there is no remedy provided at any intermediate stage.

16. The conclusions which I have arrived at may be summed up briefly as follows :-- (1) Having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognized to be a matter of first importance that elections should be concluded as early as possible according to time schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted.

(2) In conformity with this principle, the scheme the election law in this country as well as in England is that no significance should be attached to anything which does not affect the "election"; and if any irregularities are committed while it is in progress and they belong to the category or class which, under the law by which elections are governed, would have the effect of vitiating the 'election' and enable the person affected to call it in question, they should be brought up before a special tribunal by means of an election petition and not be made the subject of a dispute before any court while the election is in progress."

34 In case of *SHRI SANT SADGURU JANARDAN SWAMI (MOINGIRI MAHARAJ) SAHAKARI DUGDHA UTPADAK SANSTHA AND OTHERS vs. STATE OF MAHARASHTRA AND OTHERS* [(2001) 8 SCC 509];

the dispute was regarding preparation of electoral roll where the Court held that breach of or non-compliance with mandatory provisions of Rules during preparation of electoral roll can be challenged in an election petition under Section 144-T of Maharashtra Cooperative Societies Act

after declaration of result. The Court held that where election process is already commenced, the High Court rightly declined to entertain the writ petition seeking to set aside the election. The Court held and observed thus: -

"10. In the case of Bar Council of India & Ors. vs. Surjeet Singh & Ors. (supra), Untwalia, J. speaking for the Court observed thus:"There is no substance in the last submission made on behalf of the appellants. The manner of resolving disputes as to the validity of election is provided for in Rule 34 of Delhi Council election Rules. This is not an appropriate and adequate alternative remedy to defeat the writ petitioner on that account. Firstly, no clause of Rule 34 covers challenging of the election on the ground it has been done in this case. Secondly, the Election Tribunal will not be competent to declare any provision of the election Rule ultra vires and invalid."

11. In the aforesaid case, this Court held that a writ petition under Article 226 of the Constitution should not be rejected on account of an alternative remedy by way of election petition where, firstly, the challenge is not a ground under the Act or Rules for filing an election petition and, secondly, where the validity of a rule is challenged being ultra vires and invalid. It is true that a tribunal being a creature of an Act or the Rules has a limited jurisdiction and it is not open to a tribunal to decide the validity of the Act and the Rules. But, that is not the case here and, therefore, the decision in the case of Bar Council of India & Ors. vs. Surjeet Singh & Ors. (supra) is of no help to the case of the appellant. In the case of Ramchandra Ganpat Shinde & Anr vs. State of Maharashtra & Ors. (supra), the parties to a writ petition obtained a collusive order by applying fraud on the court and such an order was made basis of the election. In that context, it was held that so long as the order of the High Court continues, the tribunal would be bound by that order of the High and, therefore, the writ petition was maintainable and the same cannot be thrown out on the ground of an alternative remedy. Again, that is not the case of the appellant and, therefore, the same is distinguishable. In Shri Shreewant Kumar Choudhary vs. Shri Baidyanath Panjiar (supra), it was held that it was not open to the tribunal to go behind the entry in an electoral roll. This was in the context of the provisions of Representation of People Act, 1950 and 1951. It may be borne in mind that there is a distinction between the scheme of the provisions of the Representation of People Act, 1950 and the Representation of People Act, 1951. The Representation of People Act, 1950 provides for the delimitation of constituencies and allocation of seats for purposes of election to, the House of the People and the Legislatures of States and preparation of the electoral roll, whereas, Representation of People Act, 1951 provides for conduct of election. Under Section 100 of the Representation of People Act, 1951 one of the grounds amongst other is an election can be challenged where there is non-compliance of the provisions of the Constitution or of the said Act and the rules or orders made thereunder - meaning thereby that breach of the Representation of People Act, 1950 cannot be called in question in an election petition filed under 1951 Act. In that view of the matter, the decision relied upon by the appellant is distinguishable.

12. In view of our finding that preparation of the electoral roll is 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 appellant to challenge the election of returned candidate, if aggrieved, by means of an election petition before the election tribunal. "

35 In case of SIYANAGAR DUDHUTPADAKL SAHAKARI MANDLI LIMITED AND OTHERS vs. ELECTION OFFICER AND DIRECTOR AND OTHERS [SPECIAL CIVIL APPLICATION NO. 12731 OF 2018] DATED 12.09.2018; 13 petitioners had initially filed a petition challenging the order passed by the respondent and sought direction against the respondent no.1 to include the names of the petitioner nos. 1 to 9 in the voters' list and permit the petitioner nos. 1 to 12 to participate in the election of Managing Committee of the Botad Cooperative Milk Producers Union Limited, popularly known as 'the Botad Dairy'. The report of respondent no.3 was of giving audit classification 'D' to the petitioner nos. 1 to 9 and audit classification 'C' to the petitioner nos. 10 to

12. The petitioners were the milk producers' societies and were affiliated to the Botad Dairy which is a specified society as per the provisions contained in Section 74(C) of the Gujarat Cooperative Societies Act, 1961. The Election Officer had issued a press note inviting claims and objections against the publication of the provisional voters' list prepared by the Botad Dairy in respect of the election of the Managing Committee of the Botad Dairy, so as to reach such claims and objections to him. The Court held and observed thus: -

"10. As per Section 74(C) of the said Act, the election of the members of the Committees and of the officers by the committee of the Specified Societies would be subject to the provisions contained in Chapter XI-A of the said Act. The said Rules of 1982 have been framed in exercise of powers conferred by section 168 read with Section 145-G (2), section 145-U(4) and Section 145-Y contained in Chapter XI-A of the said Act. Rule-3A of the said Rules pertains to Delimitation of constituencies for the purpose of election. Sub Rule 9 of Rule 3-A thereof being relevant is reproduced as under:

"3A. Delimitation of constituencies for purpose of election:-

(1) xxx xxx xxx to (8) xxx xxx xxx (9) Notwithstanding anything contained in these rules and the bye-laws of the society, where the elections to the members of any Committee are scheduled to be held before the ending of the according year of the society, the delimitation of the constituencies shall be made by the Collector prior to the publication of the list of voters."

11. Rule 4 of the said Rules pertains to the preparation of the provisional list of voters by the specified society and the display thereof by the Collector. Rule 5 pertains to the particulars to be included in the provisional list of voters, and Rule 6 pertains to the claims and objections to the provisional list of voters. Sub Rule (4) of Rule 6, reads as under:

"6. Claims and objections to provisional list of voters:-

(1) xxx xxx xxx to (3) xxx xxx xxx (4) The Collector shall, after considering each claim or objection give his decision thereon in writing to the person concerned within ten days from the date of receipt

of the claim or objection under sub-rule (2) and take steps to correct the provisional list wherever necessary. The list as finalised by the Collector after deciding all claims and objections shall be final list of voters."

12. In the instant case, it appears that the Collector having not constituted the constituencies as contemplated in Rule 3-A(9) of the said Rules, the learned AGP had made statement in Special Civil Application No.10995 of 2018 and Special Civil Application No.9062 of 2018 to the effect that the Collector shall consider the objections raised by the objectors as regards the eligibility of the members shown in the provisional list of voters and that the Collector shall constitute constituencies before publication of the list of voters as per Rule 3-A(9) of the said Rules. Accordingly, the respondent no.1 while preparing the list of voters appears to have taken into consideration the eligibility of the voters and deleted the names of those societies including the petitioners nos.1 to 9, who were classified in Class "D"

by the respondent no.3. Under the circumstances, the petitioners having not qualified themselves as the voters, in view of the proviso to Section 27(3) of the said Act, their names were deleted by the respondent no.1 from the final voters' list.

13. Though, learned Advocate Mr.B.S.Patel has vehemently submitted that the petitioners have been wrongly classified in Class "D" with a view to eliminate them from the final voters' list, the said submission cannot be accepted. As per the guidelines for audit classification issued by the Government, the auditor is required to give head subhead wise marks, and the society which obtains marks below 40 would be covered under Class "D" and the society which obtains marks between 40 and 49, would be covered under Class "C". In the instant case, the audit notes of the petitioner no.1 have been placed on record, from which it transpires that the petitioner no.1 has been allotted 39 marks by the respondent no.3 and accordingly, it has been placed in Class "D" as per the certificate issued on 09.11.2017/ 02.07.2018 for the year ending on 31.03.2017 and as per the certificate issued on 02.07.2018 for the year ending on 31.03.2018. It is pertinent to note that petitioners have not produced the audit notes or other materials in respect of the other petitions. Whether the petitioners have been allotted proper marks under different heads as per the said guidelines or not, and whether the petitioners have been given proper class or not, though are highly disputed questions of facts, the Court had ventured to go into the same at the request of Mr.Patel, however, Mr.Patel had failed to point out as to how the petitioners were given wrong audit classification.

14. Though, the Court finds some substance in the submission made by

learned Advocate Mr.Patel for the petitioners that the petitioners should have been given an opportunity of hearing by the respondent no.1 before deleting their names from the final voters' list, the said submissions pales into insignificance in view of the fact that the petitioner nos.1 to 9 had failed to get their last accounts audited in Class "A", "B" or "C" as required under the proviso to Section 27(3) of the said Act. As rightly submitted by learned AGP Mr.Pandya, the respondent no.1 could not go into the issue as to whether the audit classification was proper or not. It is not disputed that petitioner nos.10 to 12 have been given audit class "C" and therefore their names have been included in the voters' list. It is also not disputed that only those societies who have got their last

accounts audited in Class "A" or "B" could contest the election for the Managing Committee of the specified society Botad Dairy. The Court therefore does not find any error or illegality in the list of voters published by the respondent no.1."

36 In case of SHANKERBHAI JESANGBHAI CHAUDHARI vs. STATE OF GUJARAT [2016 (2) GLR 1371]; the challenge in the petition under Article 226 of the Constitution of India was to the action of respondent - Election Officer of rejecting the nomination papers of the petitioner for election of the Managing Committee of Mehsana District Coop. Milk Producers' Union Limited. The rejection of the nomination papers of the petitioner was on the ground that the member society which the petitioner represented i.e. Vaghasar Milk Producers' Cooperative Society Ltd., Taluka Saraswati is audited in Class-C in the last audit for the year 2014- 2015 and as per bye-law 48 (2)(A)(h) of the bye-law of the Union, Audit Class-C is considered to be the disqualification to be elected as Member of the Board of Directors. The question that arose before the Court was that what meaning is to be ascribed to the words "last audit" used in bye law No. 48 (2) (A)(h), the Court held thus: -

"15. However, the question needs to be considered is what meaning is to be ascribed to the words "last audit" used in bye law No. 48 (2) (A)(h). As per the provisions made in this bye law, member society placed in audit Class C or D at the time of last audit shall not be qualified to be elected as member of the Managing Committee (Board of Directors). The voters list was finalised on 21.10.2015. Therefore, for the purpose of election, if last audit is considered for the year from 1.4.2014 to 31.3.2015, the petitioner may be said to have incurred disqualification. However, the last audit of the earlier year is considered, the petitioner is not be considered to have incurred disqualification. Rule 4 of the Rules provides for provisional list of voters in the society for the year in which the general election is due to be held. Persons who are members as on the date of drawing up the accounts of the year immediately preceding the year in which such election is due shall be included in the provisional list. If different constituencies are provided in the bye laws, the names of voters shall be arranged constituency wise as laid down in the bye laws. As per rule 3 of the Rules, the District Registrar shall every year within ninety days before drawing up the accounts report to the Collector the names and addresses of the societies in his District in which the elections are to be held and there are other steps provided for finalisation of the voters list. Reading the above said provisions of the Rules with section 27 of the Act which provides for right to vote, it could be said that the right to contest the election is relatable to finalisation of the voters list though right to vote and right to contest the election are two different things. Thus, for the purpose of deciding the disqualification, it has to be relatable to the time of finalisation of voters list especially for the member society. When as per the proviso to sub section (3) of section 27 of the Act, no member society shall exercise their right to vote at election of member of a committee unless such society has its last accounts audited in Class A,B and C, the right to contest could be relatable only to the classification given when voters list is finalized. In that context, audit report of the society is to be considered. Therefore, class of audit given in the last audit done for the year for which the voters list is finalised is to be considered. Undisputably, in the present case, the voters list finalised was for the year ended with 31.3.2014 and the year ending with this date is the relevant year for considering the last audit for the purpose of deciding the question of disqualification. When the voters list was finalised i.e. on 21.10.2015, the society of the petitioner was not rendered disqualified since it was already having Audit Class A and B and thereafter, election program was issued, therefore,

classification of audit held by the society of the petitioner as on 31.3.2014 was the relevant audit classification for the purpose of deciding on the aspect of disqualification under bye law No. 48 (2)(A)(h) of the Union. The petitioner, therefore, cannot be said to have incurred any disqualification to contest the election of the managing committee of the union. The election officer would assume power, authority or jurisdiction under rule 23 only when there is a disqualification but if there is no disqualification and there are no other grounds for rejection of the nomination, then, he can be said to have no jurisdiction to reject the nomination of the petitioner. Rejection of nomination of the petitioner by the Election Officer by order dated 9.11.2015 is therefore, invalid and bad in law and is required to be quashed and set aside.

16. This Court vide order dated 11.11.2015 directed that subject to further orders which may be passed in the petition and without prejudice to the rights and contentions of the parties in the present petition, name of the petitioner shall be included in the list of contesting candidate.

17. Now when the order impugned is being set aside, the nomination of the petitioner shall be considered to be valid in the eye of law."

37 It is needed to be reiterated that in SCA 12731 of 2018, this Court while considering the submissions of the petitioner that it ought to have been given an opportunity of hearing before deleting the names from the final voters' list, the Court held that the said submission pales into insignificance in view of the fact that the petitioners failed to get their last accounts audited in Class "A", "B" or "C" as required under the proviso to Section 27(3) of the said Act. It was not for the respondent - Election Commissioner to go into the issue as to whether the audit classification was proper or not. The Court held that, it is not disputed that the petitioners have not been given audit class "C" and therefore, their names have been included in the voters' list. It is also not disputed that only those societies who have got class "A" or "B" to contest the election for the Managing Committee of the specified society Botad Dairy.

38 This Court in case of AADHUMIK PATEL PARK CO-

OPERATIVE HOUSING SOCIETY LIMITED AND ANOTHER vs. STATE OF GUJARAT AND OTHERS [2010 (3) GLR 2303]; held that upon cancellation of registration, society ceases to be a corporate body, however, a person aggrieved by order cancelling registration may be an office bearer or member, can always resort to legal proceedings to challenge such an order. The Court applied the principle 'whether there is a right and/or injury, there has to be a remedy.' "10.6. A Society registered under the Act acquires a statutory status under the Act. The Society does not become a living being but a corporate body and performs its statutory functions through its Managing Committee and office bearers in accordance with law. Therefore, when a Society ceases to be a corporate body upon passing of an order under Section 20(1) of the Act, whether such Society, who is no more a corporate body, and/or its office bearer or member can challenge such order is to be considered in the present petition while exercising powers under Articles 226 and 227 of the Constitution of India.

10.7 It may be true that, upon passing of an order under sub-section (1) and on publication of such order under sub-section (2) of Section 20 of the Act, the Society ceases to be a corporate body from the date of such order of cancellation of registration, but a person aggrieved by such order may be an office bearer or member, can always challenge such order by invoking jurisdiction of the Court under Article 226 of the Constitution of India in case if the remedy available under the Statute is exhausted and the grievance remains unsolved.

10.8 Section 155 of the Act confers power upon the State Government and the Registrar to call for proceeding of sub-ordinate officers and to pass orders thereon. Therefore, any order of the sub-ordinate officer being that of the District Registrar under Section 20 of the Act is subject to above power and an aggrieved person can certainly approach the State Government for redressal of grievance. Existence of the Society as a corporate body whether ceases is relevant for the purpose of the Act and the Rules and is not a condition precedent or a pre-requisite to adjudicate legality and validity of the order of the District Registrar under Section 20 of the Act and, on that ground, an aggrieved person cannot be rendered remedyless. The preliminary contention raised by the learned counsel for the respondents, if accepted, will run counter to the well-known principle 'ubi-jus-ibi-remedium' - wherever there is a right and/or an injury - there has to be a remedy. Therefore, the preliminary contention raised by the learned counsel for the respondents will not detain this Court any further. However, this Court has decided to deal with all the contentions raised on law as well as on facts on their own merit and considering the scope of such examination under Articles 226 and 227 of the Constitution of India as per the decisions relied upon by the counsel appearing for the parties hereinabove.

Re: Contention as to locus of respondent Nos. 4 to 26 herein to file revision against the order of the Appellate Authority.

13. This issue is no longer res-integra. As held by the Apex Court in the case of C.D. Desai vs. C.P. Patel, AIR 1971 Gujarat 156, it is also not essential to attract revisional jurisdiction under Section 155 of the Act that the decision or order sought to be revised must be one affecting rights or liabilities of parties. In paragraph 4, it is held by the Apex Court as under:

"It is a power of a residuary nature empowering the State Government and the Registrar to revise decisions or orders which are not otherwise appealable to the Cooperative Tribunal under Section 150 and this is a necessary power for it is eminently desirable that against orders or decisions which may be passed by the subordinate officers in respect of various matters which are entrusted to them under the Act, there must be a revising authority which can rectify errors arising from bona fide mistake, incompetence, inefficiency or even fraud or corruption or else the object of entrustment of such functions might be frustrated." 13.1 Considering the above, it is held that under Section 155 of the Act any aggrieved person can challenge the order."

39 In case of VELABHAI HARDASBHAI PATEL vs. HIRABHAI HARDASBHAI PATEL AND OTHERS [2006 (3) GLH 613]; it was a case of removal of officer, the Court held that power of Registrar to order removal would extend only against officer of the society and not against any other person or an employee. The Court held thus:-

"19. I am however not convinced that the proceedings should be quashed only on the ground of want of locus standi of the respondent nos. 1 and 2 herein. It is true that respondent nos. 1 and 2 were only members of the society and would, therefore, not be in a position to hold a stand different from the society, that by itself would not be fatal to the impugned orders passed by the District Registrar as well as the State Government. Under section 76-B of the said Act the District Registrar enjoys suo motu powers to initiate proceedings. Similarly u/s 155 of the said Act the Government also enjoys suo motu powers to call for the record and examine legality of an order passed by the Additional Registrar. Therefore, even if the proceedings were instituted at the instance of respondent nos. 1 and 2, the same could still have been maintained independently in exercise of suo motu powers by the said authorities. Respondent nos. 1 and 2 had approached this Court and this Court had also permitted them to present their case before the District Registrar before taking final decision. In that view of the matter the complaint of these respondents could not have been rejected for want of locus standi."

40 In case of HARGOVANBHAI J. PATEL vs. LANVA DUDH UTPADAK CO-OPERATIVE SOCIETY LIMITED [1981 GLR 787]; the Court held thus: -

"3. Mr. Shah for the petitioner then alternatively urged that the powers of the Government and the powers of the Registrar under Section 155 of the Act are co-extensive and once the powers are exercised by the Registrar or the Joint Registrar the State Government cannot exercise such powers. The language of Section 135 of the Act does not support this reasoning. It gives power of revision to the Registrar as well as to the Government. The Registrar exercises powers of revision against the orders of his subordinates and the Government is invested with the powers of revision against the order of its subordinates. The Jt. Registrar is obviously an officer subordinate to the Government and so there is nothing in Section 155 of the Act itself to show that the Government cannot exercise powers under S. 155 of the Act against the Jt, Registrar's orders after the powers are exercised by the Jt. Registrar. Mr. Tackwani in this connection had invited my attention to the judgment of this High Court in the case of Maganlal Lalbhai Patel v. State of Gujarat, reported in 19 Guj LR 1141 : (AIR 1979 Guj 43). It is the case arising under the provisions of the Gujarat Panchayats Act but the principle laid down in that case squarely applies to the present case. What the learned Judge says about Section 294(5) of the Gujarat Panchayats Act, in my view, should apply to a provision which is in pari materia with that provision. The learned single Judge in this connection observes as follows (at p. 45 of AIR): "Once the State Government authorises a particular officer, the power conferred under sub-section (5) of Section 294 belongs to that officer. When such an officer exercises power under sub-section (5) of Section 294, it is within the competence of the State Government to revise his order under sub-section (5)."

4. Mr. Shah for the petitioner urged that the mala fides attributed to the Minister-in-Charge of Co-operation at the relevant time have stood undenied. Mr. Tackwani in this connection submitted that as Shri Rasiklal Acharya is no longer there in office, it is difficult for the Government to affirm or deny the allegations but he has made available for my perusal the original file and I find, that there was an elaborate order passed by the then Minister-in-Charge of Co-operation Shri Rasiklal Acharya and it appeared ex facie from the order, set out in detail on the file, that the Minister-in-Charge had interpreted the legal provisions and passed the order. Mr. Shah had in this

connection urged that Section 71 of the Act prohibits the Society from investing its funds in a manner other than provided in that section, But the then Minister's order on the Government file showed that the Government had treated this as a case, not of investment but of spending for the purchase of the property for the purposes of the Society. Ex facie the order of the Government appears to be right because Section 71, from its very nature of the text, is confined to investment of the surplus funds of the Society so that cash does not remain on hand with the chances of its being channelled to other unlawful sources."

41 In case of RAMESH S/O CHUDAMAN BADGUJAR vs. STATE OF MAHARASHTRA AND OTHERS [2014 SCC Online Bom 1215]; the petitioner challenged recovery certificate under Section 101 of the Maharashtra Co-operative Societies Act without resorting to the statutory remedy under Section 154 and Section 154(2-A) of the said Act. The Court referred to the decision of Syed Yakoob vs. K.S.

Radhakrishnan [AIR 1964 SC 477] on the aspect of limitation of jurisdiction of High Court in issuing writ of certiorari under Article 226 of the Constitution of India.

42 In case of SHEELA DEVI vs. JASPAL SINGH [1999 (1) SCC 209]; on the ground of maintainability of the petition under Article 226 of the Constitution of India, the Apex Court held that the High Court wrongly exercised its writ jurisdiction on the question of fact when alternative statutory remedy of revision was available. The respondent was free to avail the alternative remedy. It was a matter under Rent Control and Eviction.

Findings:

43 The issue, therefore, which requires redressal, is as to whether the present petition under Article 226 of the Constitution is maintainable or in view of the existing alternative remedy which is pleaded to be efficacious, the petition deserves rejection in limine.

44 From the discussion of law above, it is quite clear that ordinarily, when there is an appropriate and adequate alternative remedy, the writ petition under Article 226 of the Constitution need not be invoked and at the same time, a writ petition under Article 226 of the Constitution should not be rejected only on account of alternative remedy and that too, by way of Election Petition or revision. This Court is conscious that ordinarily once the election process starts, no interference is needed. For any infraction of right on statutory law, the solution provided by the statute shall have to be resorted to and extraordinary jurisdiction the court is not to be exercised. And yet it is also conscious that the extraordinary and exceptional circumstances would require extraordinary exercise of powers. This Court ordinarily would not like to exercise its power under Article 226 of the Constitution when the process of election is in motion unless the action under challenge is mala fide and arbitrary or there exists exceptional grounds to so do it.

44.1 This Court needs to inquire whether this is a case where if the Court intervenes in a pending proceeding, there is likely to be a delay in termination of proceedings or is it a case where if it does not intervene, the error of moment may earn immunity from the correction or is it a case where the

non-action would result in a gross failure of justice or grave injustice may occasion.

44.2 This Court noticed from the provisions that it is a right of the State Government or the Registrar to call for and examine the record of any inquiry or the proceedings of any other matter of any officer subordinate to them, except those referred to in sub-section (9) of section 150, for the purpose of satisfying themselves as to the legality or propriety of any decision or order passed, and as to the regularity of the proceedings of such officer. It is his power to modify the decision or order or proceedings after giving due opportunities to the party concerned. Such right of revision is with the State or Registrar, the revisional powers by its very nature are restricted and that cannot be termed as an efficacious alternative remedy, particularly when the facts pleaded are gross and against the very officials.

44.3 In view of the challenge which has been raised before this Court by way of the present petition, on behalf of the petitioner society which intends to protect its right and interest as its status as a voter as also as a society which has fielded its representative in the election of Managing Committee of the Mehsana District Co-operative Milk Producers' Union Limited (the 'Milk Union' for short) which is scheduled on 05.01.2021, this petition is preferred. It is not affected by the audit classification under class 'C' in view of the proviso to sub-section (3) of Section 27 of the Gujarat Co-

operative Societies Act. It is a member society of the Milk Union which can qualify to exercise its right to vote at an election of a Member of Committee provided its last accounts are audited in class 'A' and 'B' or 'C' which of course the petitioner society is fulfilling. The society has authorised its nominee to represent and vote on behalf of the petitioner society as well as to contest the election for being a member of the Managing Committee of the Milk Union.

44.4 It is correct to say on the part of the respondent that the decision of the said member to contest or not to contest the election while representing his primary co-operative society is upon him and the said society cannot insist upon the member to contest the election or to become a proposer or seconder to anybody in the election. However, it is incorrect to say that member/nominee exercising the discretion and the primary co-operative society has no control thereon. Since the member/representative/nominee has no independent right other than being a member of the society and therefore, even if the nominee/representative is aggrieved by the class given to the society, it cannot challenge such classification as the classification is given to the society and not to the member. It is an unacceptable proposition put-forth by the State that the petitioner Society under the guise of the present petition seeks to represent the so-called interest of the third party/member/nominee/representative officer, who is not before the Court. If the representative independent of the society would have chosen to approach this Court questioning and challenging the classification given to the society, the same could not have been sustained, if there would have been no challenge by the co-operative society itself.

44.5 It is also unsustainable to argue that this is a proxy litigation for the purpose of protecting so-called statutory right of nominee of contesting election as a Member of Managing Committee of third party under Article 226 of the Constitution of India. The Election Commission is since not permitted to go into the question whether the classification given to the society was correctly given

or not as also held by this Court in Special Civil Application No. 12731 of 2020, the society also cannot be relegated to the Election Tribunal, even if the process is said to have begun. In fact, as would be discussed above, no disqualification can be said to have suffered by the petitioner society.

44.6 The Court would not endorse to the statement of the respondent that the only remedy available is the Election Petition to be filed by the aggrieved and affected person before the Election Tribunal as per the provisions of Section 145(U) of the Act read with Rule 82 of the Specified Committee Rules, 1982 against the rejection. The Court cannot be oblivious of the fact that the exercise of undertaking audit of the account of co-operative society followed by award of audit classification, is emphasized on the part of the respondent to be an administrative exercise and not the quasi-judicial one. Although, it has been emphasized that against this classification, the society can always approach the Registrar/ Joint Registrar and also can approach Revisional Authority under Section 155 of the Act, such remedy is not efficacious and certainly not in the given circumstances. The Court is not concerned with the merit of the decision but surely with the decision making process. Whether there is a fair play in action or not, needs to be surely seen and if the answer is negative, indulgence would be inevitable. And, hence maintainability part of petition is held in favour of the petitioner.

45 Petitioner society is audit Class-"A". Since its registration and in the election programme for the purpose of Voters' List published for election of members of managing committee of Milk Union, it is included in the Voters List of Kheralu Constituency.

It has also filled nomination of its candidate being Class-"A" society so far as the by laws and rules permit contest to the representative of society which is classified as Class- "A" or "B". The elections are announced of the Committee members of the Milk Union on 01.12.2020. All along the allegations on the part of the petitioner society is that to scuttle the candidature of the ex-Chairman of the Union, attempts are made by the respondent-State, by different means, on an apprehension that the society would be given class below Class-"C" and Class-"D" in the audit, which is to be carried out by the Registrar at least once in year under section 84 of the Cooperative Societies Act, this petition is preferred questioning the very modus of audit. This apprehension was on the basis that the communication, which had been addressed on 01.12.2020 in SCN which had shown that the audit of petitioner for 2019-20 had already taken place.

There is a marking formula and a circular which prescribes A,B,C,D as classification and the marks to be given for awarding any of these classes as per guidelines prescribed. Presently, the Milk Union is being looked after by a custodian and the election programme is already published on 01.12.2020 by the Election Officer. Nominee or the representatives of the petitioner is one Mr. Vipul Chaudhary and the election programme indicates that date of scrutiny was 21.12.2020 of the nomination form. After the last date of filling-up of the form, this Court notices that the proceedings had been initiated against the candidate of the society under section 76 of the Cooperative Societies Act to disqualify him from contesting election. Special Civil Application No. 11977 of 2020 is preferred against the said action and this Court (Coram: B.D. Karia, J.) has been given by this Court and after hearing the entire material, it has been reserved for judgement. There was yet another notice issued to remove him from the primary membership of the society on various grounds under section 23(1) of the

Cooperative Societies Act. The grounds raised are of his not being resident of Kheralu Jodia and his being a resident of Gandhinagar etc. This action was challenged by him. The person concerned by way of Special Civil Application No. 15880 of 2020 where again, this Court has protected the representative and nominee of the society.

46 It is to be noted that a notice issued on 01.12.2020 which is challenged in Special Civil Application No. 15880 of 2020, wherein it is mentioned that the task of audit had been undertaken and the same has been accomplished. This appears to be a cause of concern as awarding if Class-"C" to the society, the society would have an entitlement to vote but the representative would be disqualified to contest the election. It is to be noted that from 2001 onwards the society is given Class-"A".

47 This Court notices that in Special Civil Application No. 15880 of 2020 in the averments of the petition, it is a specific stand taken by the petitioner that audit work has not been completed before this Court. Also at paragraph No.2.10, in the present petition, it is emphasized by the petitioner society that though the notice dated 01.12.2020 states that the audit of the society has been completed, the task the Auditor had not even checked the record of the society and it has not been completed at all. It is admitted that the Auditor had issued notice to the society on 28.09.2020 and on 19.11.2020 for conducting audit. However, as the Secretary of the society was not keeping well for the past two months, the accounts of the society for audit could not be produced and time was sought for production of the record and, therefore, it is incorrect to say that audit has been completed.

48 Attention has been drawn to the effect that in earlier years wherever the audit of the society had taken place, there has been specific endorsement on the part of the Auditor of having checked and examined the documents and materials and books of accounts like rojmel etc. It can be seen that in the audit which is alleged to have been completed of the year 2019-20, no such endorsement of any of the papers and material is found.

49 It is also not out of place to mention that on 07.12.2020 the District Registrar, Cooperative Societies had been addressed a communication saying that in a notice dated 01.12.2020, it had been conveyed that the audit of the society is over.

However, there is no endorsement and the accounts have also not been examined and, therefore, on what basis the Registrar was claiming that the audit has been over and this needed to be examined by the District Registrar. No response has been given till date of the said communication. It is not out of place to make a mention that there had been serious objection to the account having been examined and the date having been completed.

There is yet another aspect, which is a matter of serious concern as to why at classification is given to the society has not been communicated till the filing of the matter. In fact, at the time of hearing on 21.12.2020 when the scrutiny of nomination was taking place, a simple mail, which is said to have been sent of classification reached the society.

50 This prima facie shows that there is lack of transparency. A pertinent query was raised by this Court as to how the communication has been made of the classification given to the society and the answer that had been received from learned Advocate General on instruction for State officials was that by a simple mail. There is nothing to indicate in the statute the mode in which the communication needs to be effected and knowing fully well that the process of election has already begun and any classification given to the society is going to have far reaching consequences, the society has not even been communicated the classification till the date of scrutiny as something as important as the ouster of its delegate of the society to contest the election in a democratic society. In this present age of communication, the communication is sent by a simple post! And, there is no proof till date of this having been posted and assuming that there is a posting of the same, for something which has been decided in the month of November, 2020, how could there be a communication by a simple post leaving the person remediless, more particularly, in wake of declaration of the election programme. This will give reinforcement to the submission of the petitioner that the audit is being used as a weapon since the bye-laws of the specified society 48(2)(h), particularly provides that the society, which is given the Classification "C" or "D" will not be entitled to contest the election through its delegate.

51 Apt would be also to refer to the fact that the society has been given Grade-"A" for the past twenty years and before this Court also, through an independent Chartered Accountant, using the very parameters, the classification has been placed to urge that all the modes and parameters of the society would have Grade-"A" only, had all accounts been examined judiciously and audit, in fact, had taken place as required under the law.

52 This is not the only question of inclusion or exclu-

sion of society and of candidate and of audit report culminating into Classification-"C" to the society and thereby debarring the candidate of the society consequentially from contesting the election. Had it been that simple a case, directions for alternative remedy also could have been contemplated. It is from the mode and manner of the State officials conducting themselves and undue haste expressed in conducting the audit and thereby suddenly the slowness that had crept in, in conducting the out- come, the Court is of the prima facie opinion that unless checked, these tendencies in the officials may claim to be larger than the law itself and that conduct is wholly and simply impermissible. If the events of the audit of the society is once again re- capitulated, they would be as under:

52.1 A notice given for audit on 28.09.2020 to visit the society by the Registrar.

52.2 Instead of visit on 12.10.2020, respondent No.4 vis-

ited on 14.10.2020, at the office of the petitioner society and started work of audit.

52.3 While this work was continuing, request of time was made to the respondent No.3, the superior officer by the Secretary of the petitioner society and, ac-

cordingly, such a request was acceded to and work of audit was postponed.

52.4 Letter was communicated to visit for completing the work of audit on 18.11.2020, which, in fact, is dated 19.11.2020 and is stamped at the post office on 20.11.2020. This had reached the office of the peti-

tioner society on 22.11.2020 subsequent to the dates having been gone.

52.5 The affidavit of Registrar, respondent NO.4, says that he realised that on 18.10.2020, some record of the society had been shifted from the office of the petitioner society and, hence, he collected the date from the bank. He does not deny that there was no calling of any record, nor of this being completed at the society's office by following the required proced-

ure.

52.6 Memo issued by respondent No.4 and averred to be signed by the Secretary is denied emphatically on oath. What has been signed is a part of audit, which had been completed on 14.10.2020. It is alleged to be the handwriting of the respondent no.3 and this is a serious allegation necessitating examination of requisite record scientifically.

52.7 There is an over writing of dates on various docu-

ments and a communication of office of Registrar including the certification of audit classification. Although, it is sought to be explained only as a simple and pure mistake, this change from October to November appears more than that as truth has a tendency of emerging by paving its own way. Nothing was happening on 20.10.2020 nor on 20.11.2020.

52.8 Certificate of audit classification purportedly issued and dispatched to the petitioner society is different from the one supplied to the 3rd party objector and thus, it is intriguing.

52.9 Registrar, respondent No.4, tendered the document classifying the society to Class-"C" for approval of his superior officer, respondent No.3, Special Aud-

itor(Milk) who too has chosen not to have acted promptly being fully conscious that the said result would have a bearing on the ensuing election. Even if he was unaware, the communication from the pe-

tioner society to him in wake of the show cause no-

tice issued on 01.12.2020 to the delegate on 07.12.2020 would have made him aware of the ob-

jection to the declaration of completion of audit at the end of respondent No.4. Least he would have done was to look into the grievances and while so doing, respond to the said communication and to

do the needful.

52.10 Approval and signing of the said certificate is after the process of election had begun on 14.12.2020, possibly to oust the jurisdiction of the Court and to facilitate the parties to contend that no interference is permitted, once the process of election has star-

ted.

53 From these unfolding events, as narrated chronolo-

gically and referred to hereinabove, it appears prima facie that the exercise of powers by the Registrar and Special Registrar are surreptitious and arbitrary in nature.

54 This task of audit does not generate any confidence.

It is impossible to comprehend that the unfinished task would start on 18/11/2020 without any notice to the party. 18 /11/2020 is the date of restarting the audit work and letter addressed to the petitioner society is of 19/11/ 2020 by the respondent no.4 and it is sent to the postal department on 20 th November 2020 and the same is received by the pe-

titioner on 22nd November, 2020.

55 Secretary of the petitioner society stated on oath that he was unwell and it is not denied that no work is carried out in the second half at the office premises of society.

56 Over writings of dates in each document of the office of the registrar, respondent no.4 leaves much to be desired. The haste in carrying out audit and manner of marking and sudden halt in the examination by the respondent no.3 of the record and certification of audit and its date of issuance as also mode of dis-

patch would surely deserve closer examination of entire material and therefore, before this court enters into that detail, it may not happen that irre-

versible process sets in, jeopardising the right of the society to field its candidates.

57 It would be apt to digress a little to mention that the voters' list as declared in the notice of election on 1.12.2020 by the election officer is 31.03.2020. And thus, it is the position as on 31.03.2020 of the members who are included in the voters' list shall govern the list, and thus, for the purpose of elec-

tion, the last audit can be considered of the earlier year where the petitioner society already was given class A. What meaning that needs to be given to the words used in by-laws 48 (2)(A) (h) read with section 27(3) of the act which provides for the right to vote for the member to incur if there is no dis-

qualification, the election officer cannot be said to have jurisdiction under rule 23 as held by this court in case of Shankar Bhai Jai Singh Bhai Chaud-

hari versus State of Gujarat 2016 2GLR 1371.

The court was categorical that the petitioner cannot be said to have incurred any disqualification to con-

test the election of the managing committee of the union as classification of audited society of the peti-

tioner in the preceding year would be the relevant audit classification for the purpose of deciding the aspect of disqualification under bye laws number 48 (2)(A)(h) of the by laws.

58 There are apt and far serious legal issues raised by the society before this Court and firstly whether the voters' list can be drawn in the year in which the election is scheduled or whether it can be based on the list prepared on complete audit in the year preceding the year in which the election to the committee is scheduled. Secondly, could a classification lower than what has been there in the last five years be made without putting to the notice of the society and without giving an opportunity of hearing to the society, since serious consequences of eliminating the society from contesting the election happens on account of classification at "C"

and "D" and it also consequently seriously jeopardize the right of the society. Corollary to this is the third issue as to whether voters' list could be prepared on the basis of two different accounting years as has happened here where 31.03.2020 is though taken as a base, attempt is made to draw audit of 1/3rd(4 & odd) number of societies (out of nearly 1200).

59 Apt would be to refer to Rule 3-A of the Gujarat Specified Cooperative Societies Election to Committee Rues, 1982 as under:-

"3-A Delimitation of constituencies for purpose of election. -

(1) In every society where there are more than one constituencies, the Secretary or where there is no post of Secretary, the Chief Executive Officer of every such society shall, in the year preceding the year in which election to the Committee is scheduled to be held, prepare a provisional list of the constituencies.

(2) Such list shall describe the limits of each constituency. A copy of the provisional list shall be displayed with a notice to be signed by the Secretary or where there is no post of Secretary, the Chief Executive Officer of the society on the notice board of every office or sub-office of the society. A copy of such provisional list along with the notice shall also be sent to the Registrar and to the Collector.

(3) A copy of such list along with notice shall also be sent to every member of the society by registered post.

(4) The notice referred to in sub-rules (2) and (3) shall clearly lay down that any objections or suggestions in respect of the provisional list may be sent by any person to the Secretary or where there is no post of Secretary to the Chief Executive Officer of the society within a period of 15 days from the date on which the provisional list is displayed on the notice board of the office of the society. (5) Any member of the society may bring to the notice of the society any omission or error in respect of the name or address or other particulars shown in the provisional list.

(6) Any person raising any objection or making a suggestion shall send such objection or suggestion with grounds therefore in writing within 15 days from the date on which the provisional list is displayed on the notice board of the office of the society.

(7) The society shall after considering every objection, suggestion or any error in the provisional list indicated by any member under sub-rule (5), prepare the final list. The final list shall be displayed on the notice board of the office or sub-office of the society and a copy of such final list shall be sent to the Registrar and also to the Collector.

(8) Where the area of operation of a society is in more than one village, the number of constituencies shall be equal to the total number of seats excluding two seats reserved under sub-section (1) of Section 74-B.

(9) Notwithstanding anything contained in these rules and the bye-laws of the society, where the elections to the members of any committee are scheduled to be held before the ending of the accounting year of the society, the delimitation of the constituencies shall be made by the Collector prior to the publication of the list of voters."

60 Rule-4 This speaks of the provisional list to be delayed with a notice to be signed by the Secretary for each constituency. Rule 4, inter alia, provides that a provisional list of voters shall be prepared by every society for the year in which general election is due to be held. It states that the provisional list of voters shall be prepared in Gujarati by every society for the year in which general election is due to be held. The person, who are members as on date of drawing up the accounts of the year in which such election is due shall be included in the provisional list. Sub rule (r) of Rule 4 provides that if any soci-

ety fails to send copies of provisional list of voters to the Collector, through the District Registrar within 15 days from the date of drawing up of the ac-

counts, the Collector shall himself or through any person authorized by him prepare a provisional list of voters and the expenditure incurred shall be re-

covered from the society as arrears of land revenue.

61 Rule 36 of the Gujarat Cooperative Societies Rules, 1965 states that the date of drawing up of accounts for the Cooperative Societies shall be 31 st day of March of every year. Proviso to this provides that in case of Cooperative Society whose date for drawing up of accounts is any date after

31st March, 1999, the period for which the the accounts will be drawn up will be deemed to be extended upto 31 st March, 2000.

62 Profitable would be to refer to section 84 of the Co-

operative Societies Act, which speaks of audit of ac-

counts of the society as under:-

"84. (1) The Registrar shall audit, or cause to be audited by a person possessing prescribed qualifications and authorized by the Registrar by general or special order in writing in this behalf, the accounts of every society at least once in each year. The person so authorized shall be auditor for the purposes of this Act: 44a[Provided that the audit of the Central Co-operative Banks and the State Co-operative Bank shall be conducted only by the Chartered Accountants from the panel approved by the National Bank]. (2) The audit under the foregoing sub-section include an examination of overdue debts, if any the verification of the cash balance and securities, and a valuation of the assets and liabilities of the society. (3) The Registrar of the auditor shall, for the purpose of audit, at all times have access to all the books, accounts, documents, papers, securities, cash and other properties belonging to, or in the custody of, the society, and may summon any person in possession or responsible for Registrar's power to seize records, etc. Auditor. [1962: Guj. X Gujarat Co-operative Societies Act, 1961 the custody of any such books, accounts, documents, papers, securities, cash or other properties, to be produce the same at any place at the head-quarters of the society or any branch thereof. (4) Every person who is, or has at any time been, an officer or employee of the society, and every member and past member of the society shall furnish such information in regard to the transactions and working of the society as the Registrar, or the auditor may require. (5) The auditor shall have the right to receive all notices, and every communications relating to the annual general meeting of the society and to attend such meeting and to be heard thereat, in respect of any part of the business with which he is concerned as auditor. (6) If it appears to the Registrar, on an application by a society or otherwise, that it is necessary or ex-

pedient to re-audit any account of the society, the Registrar may by order provide for such re-audit and the provision of this Act applicable to audit of accounts of the society shall apply to such re-audit. 44b[(6A) The Registrar shall, by an order provide for a special audit of the co-operative credit structure on the basis of the recommendation of the Reserve Bank of India or, as the case may be, the National Bank. A copy of the report of such special audit shall be submitted to the Reserve Bank of India or, as the case may be, the National Bank within the period specified by the Reserve Bank of India or, as the case may be, the National Bank, The provisions relating to audit of accounts of the society made under this section shall also apply to such special audit.] 45[(7) For auditing the accounts of a society under this section, every society shall be liable to pay to the Registrar, or, as the case may be, to the auditor, audit fee,-- (i) in relation any period beginning from the date of the commencement of this Act and ending on the day immediately before the date of general or, as the case may be, special order made under clause (ii), at the existing rates ; (ii) in relation to any other period at such rates or scales as the State Government may, from time to time, by general

or special order, determine. 1962: Guj. X] Gujarat Co-operative Societies Act, 1961 (8) The State Government may, if it considers it necessary to do so in public interest, exempt, by notification in Official Gazette, and for reasons to be specified therein, any society or class of societies wholly or partially from payment of audit fees. (9) The amount of audit fees payable by any society for any period, whether before or after the commencement of this Act, shall be deemed to be a sum due to the Government for the purpose of section 157. 45a[(10) The Registrar shall, in consultation with the National Bank prescribe Prudential Norms including Capital to Risk Weighted Assets Ratio for Primary Agricultural Credit Co-operative Societies. (11) The Registrar shall, by an order, provide for the periodical in-

pection by the officers subordinate to the Registrar or by federal society or by financing bank, for a class of society under section 87 or, section 88."

63 This authorizes the Registrar to audit the accounts of every society at least once in each year. The Registrar

himself possesses qualification and should authorize by general or special order any person, to act as an Auditor for the purposes of the Act.

64 Section 27(1) of the Cooperative Societies Act states that no person shall exercise the right of a Member of the Society unless, he has made such payment to the society in respect of the membership or acquired such interest in the society as may be prescribed by rules or by-laws of such society. This speaks of right to vote and sub-section (3) of section 27 says that no person shall exercise the right to vote at an elec-

tion of a member of the committee in a financial year unless he is a member of the society for the whole financial year preceding the financial year in which the election is being held provided that no member society of federal society shall exercise the right to vote at an election of a member of the committee

and unless such society has its last accounts audited in Class "A", "B" or "C". An attempt is made to urge before this Court that the society has already been audited and is given the classification "C" which has entitled it to right to vote at an elec-

tion of a member of a committee and unless its last accounts are audited in Class "A", "B" or "C", it could not have been entitled to even vote. If this is accepted, answer, which has been given to this Court is that out of 1200 societies in the year 2019-

2020, accounts are audited, however, for the cur-

rent year, only 400 and odd societies have been audited. The rest, due to Covid-19 virus have not been audited. If the Court accepts the interpretation that the right to vote, as provided under sub-sec-

tion(3) of section 27 would be based on the audit which has been last performed of a society, this year, all those 800 societies in whose case the audit has not been completed will be left without exer-

cising their respective right to vote and anomaly which will also arise is that if those societies, which have been audited this year and in whichever class they fall into, they shall be entitled to vote, whereas, others, which have been already audited in the pre-

ceding year, their cases will be governed by the clas-

sification allocated to them in the preceding year.

This, surely, will leave everything in an entirely chaotic state. This uncertainty and confusion can never have been the wisdom of the legislature. If all these provisions, which includes Rule 3-A and 4 of the Specified Cooperative Societies Election to Com-

mittee Rules read with rule 36 of the Gujarat Co-

operative Societies Rules read with section 27(3) and section 84 of the Act prima facie, it can be inter-

preted that the drawing of the accounts of the year would need to be of the year preceding such election and this being the election due in November, 2020, the voters' list since is drawn as on 31.03.2020 as also declared in the election programme. Accord-

ingly, the audit classification shall need to be re-

garded for the purpose of election for all concerned having an identical base, to lend certainty.

65 If the interpretation advanced by the State is accep-

ted, it would amount to endorsing the promise that where those who wield the powers may decide the fate of election making a dent in the democratic process. If the voters' list is not finalized on the basis of the audit carried out in the preceding year on 31 st March, there would be incomprehensible confusion and that would also permit inclusion and exclusion of societies and their delegates with so much of uncertainty. The Registrar and some of the officers also can have decisive role, which would be completely undesirable as what is needed in democratic set up is a strong system and not individual driven systems. When the bye-laws of Union had been framed, it surely was to further the end of democratic values and not to weaken, in any manner, the very process. Hence, if the bye-laws needed representative of strong and well performing societies to represent in a federal society's managing committee, it is a laudable objective, but its implementation could not be of such a nature, whereby process of audit classification could be either hurriedly rushed or slowed down as none of these provisions/rules/by laws could be permitted to be used

as weapons in the hands of officials. Again, no event in period of post declaration of election should guide the process of election and there shall need to be interpretation of provisions/rules which is rational, comprehensible and promoting the wisdom of legislature.

66 It is reiteratively emphasized that the date of making up of the accounts or the date of drawing up of the account of the cooperative societies shall need to be read as the preceding year in which the election to the committee is scheduled inasmuch as there has to be finality of the voters' list. It is not simply giving of classification to the society, but it also amounts of ousting the person in a democratic set up. It being a serious jeopardizing of a right of a person by means of classification and this since also causes ir-

retrievable prejudice to the society or to its nom-

inee to interpret it otherwise would amount to dilut-

ing the very democratic process of election.

67 As can be noticed in the instant case, there is a seri-

ous dispute raised by the society as to whether its audit has been, in fact, completed or not. The chronology of events as have been narrated before this Court and as seriously contended by the State and by the petitioner, once again in rejoinder, what culls out is that though the work of audit had started on 14.10.2020, so far as the petitioner society is concerned, the subsequent events and the communications so also the challenge before this Court in other petitions and in the present petitions, leave serious question mark as to whether at all the task had been completed. The giving of classification "C" to the society, which consistently had received unfailingly Class-"A" also would require some closer examination of the material. To dismiss the petition on this count will not only permanently jeopardise the right of the society to vote, but also oust its delegate to contest the election in a democratic set up. There-

fore, the challenge is larger than the classification and the petitioner having raised the serious questions and also having established the prima facie case the Court is of the opinion that while admitting the matter on certain vital questions raised in this petition, it needs to be protected by way of interim relief in terms of paragraph 6(C).

68 Resultantly, the following order:

Rule. Pending final hearing and disposal of this petition, interim relief in terms of paragraph No.6(C) shall operate with its consequential effect.

(MS. SONIA GOKANI, J.) MISHRA AMIT V./sudhir