

Bombay High Court

Shri Ramdas Bhikaji Darade vs The Hon'ble Minister Of State on 4 April, 2009

Bench: Anoop V.Mohta

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

WRIT PETITION NO.7599 OF 2008

Shri Ramdas Bhikaji Darade,
Aged 52 years,
President, Yeola Municipal Council,
Yeola, Dist. Nasik.

vs.

1. The Hon'ble Minister of State,
Ministry of Urban Development,
Mantralaya, Mumbai.
2. Deepak Chandrakant Patodkar,

R/o. Jagruti Mitra Vihar Colony,
Vinchur Road, Yeola, Dist.Nasik.

3. The Collector,
Dist. Nasik.
4. State of Maharashtra

Mr.P.K.Dhakephalkar, Sr.Advocate with Mr.Ajay S. Patil
for the petitioner.

Mr.S.N.Patil, AGP for respondents 1, 3 and 4.

Mr.S.C.Naidu with Mr.Sagar Talekar for respondent no.2.

CORAM : ANOOP V. MOHTA, J.

DATED : 4th April, 2009 ORAL JUDGMENT:

Heard finally by consent and in pursuance to an Order dated 15.12.2008 passed by the Hon'ble Supreme Court in Special Leave to Appeal (Civil) No.29235/2008, between the parties.

2. The petitioner being a member/Councillor of Yeola Municipal Council, has challenged the impugned Order passed by Respondent no.1 dated 10.10.2008 in Appeal under Section 55-(A) & (B) of the Maharashtra (Municipal Councils), (Nagar Panchayats) and Industrial Townships Act, 1965 (for short, "the Act"). The operative part of the Order reads as under:

"1. As it is becoming clear that Shri Ramdas Darade, President, Yewle Municipal Council, District Nasik carried out unauthorised construction without permission before he got elected and same was not removed at his own even after he got himself elected as the President and that it has been removed by the Municipal Council, I have come to the conclusion that said act of the Shri Darade is not matching to the post of the President, I am removing Shri Darade from the post of the President as per provisions of Section 55(A) of the Maharashtra Municipal Councils, Municipalities & Industrial Township Act 1965 from the date of this order.

2. As per provisions of Section 55(B) of the Maharashtra Municipal Councils, Municipalities and Industrial Township Act, 1965, Shri Ramdas Darwde, President, Yewle Municipal Council, District Nasik is being considered to be not eligible/disqualified to contest the election for the period of 6 years from the date of this order."

3. Based upon the due lease agreement & permissions granted by the Council some time in the year 1981 itself and later on extended in the year 1983, the petitioner had erected initially temporary structure and later on constructed the premises which he was using as hotel based upon various requisite licence and permissions.

Admittedly, on 16.12.2007 the said premises/structure was demolished.

4. The petitioner got elected as a Councillor of Yeola Municipal Council (for short, "the Council") in the year 2006. He was elected/appointed as a President of the Council. He was working as President till the date of impugned order since 2006.

5. Respondent no.2 had filed PIL
High Court, Bombay thereby, prayed

the above alleged unauthorised construct
land bearing C.T.S. No.3807 of the
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also prayed that the petitioner be disqualified from being President of the Council.

6. By an Order dated 12.03.2008 this Court has disposed of the said PIL in which the present petitioner was also respondent no.3. The relevant extract of the Order is as under:

"1. Grievance of the petitioner was two fold in the petition. One that certain construction had been made unauthorisedly and it should be demolished. This relief was granted by this Court and we are told at the bar that the constructions made unauthorisedly have already been demolished and removed. The second contention was that one of the construction was made by the Respondent No.3 who is the President of the Respondent No.1 Council. Therefore, he has incurred disqualification to be the President and therefore he should be removed as a President. This is an admitted fact that the respondent No.3 President had made constructions unauthorisedly and those constructions have already been demolished and removed. It is not disputed. The only dispute is whether respondent No.3 could be removed because admittedly the constructions he had made unauthorisedly were made by him before he was elected as a President.

2. We feel that this matter can be considered by the Government in terms of Section 55A of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965. Without going into the rival contentions of the parties, we dispose of this petition directing the Government to consider import of the fact that the Respondent No.3, the President of the Respondent No.1 Council had constructed a building without obtaining permission unauthorisedly, which has already been demolished and whether Respondent No.3 has incurred any disqualification on that count or not and if so pass appropriate orders after hearing their parties in accordance with the mandate of Section 55A of The Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965. The Government shall take decision within three weeks from today.

3. Writ petition stands disposed of accordingly."

7. Though the construction was demolished on 16.12.2007, even before the order of High Court, yet the concerned respondents, issued show cause notice dated 3rd June, 2008 by invoking Section 55A & B/(7)(A) read with Section 44(1)(a) of the Act, thereby alleging that the petitioner had carried out unauthorised construction without obtaining the permission and even after elected as a President of the Council not demolished the unauthorised construction voluntarily and as this amounts to a disgraceful act/misconduct and, therefore, disqualified to be the President of the Council, as contemplated under the Act.

8. The petitioner, replied to the show cause notice and resisted on all counts.

9. The extract of report of Collector, Nasik, in this regard is recorded as under:

"2.2. Unauthorised construction of the President is prior to the period when he got elected as the President. He had not removed unauthorised construction at his own even after getting elected as the President. Municipal ig Council has initiated the action in connection with the unauthorised construction which was provided by him when order was passed by Hon'ble High Court. When working on the post of the President of the Yewle Municipal Council, the act on the part of Shri Darad to keep his own unauthorised construction in existence is against the repotation to the post of the President as per provisions of Section 55(A) of the Maharashtra Municipal Councils, Municipalities and Industrial Township Act, 1955. For the reasons mentioned hereinabove, he can be disqualified as Member of the Municipal Council u/s 44 (1)(e) of the Maharashtra Municipal Council, Municipalities and Industrial Township Act, 1965."

10. After hearing both the parties, respondent no.1 has passed the impugned order dated 10.11.2008. Therefore, the writ petition.

11. The relevant provisions of the Act are as under:

"2(7) "Councillor" means a person duly elected as a member of the council,[the directly elected President] and includes the nominated Councillor, who shall not have the right, --

(i) to vote at any meeting of the Council and Committees of the Council; and

(ii) to get elected as a President of the Council or a chairperson of any of the Committees of the Council.

2(34). "Premises" includes messuages, buildings and lands of any tenure whether open or enclosed, whether built on or not and whether public or private.

2(36). "President" and "Vice-President" means the President and Vice-President of the Council.

15. "Qualification for becoming Councillor:

(1) Every person who is not less than twenty-one years of age on the last day of making nominations for every election or bye-election and whose name is included in the list of voters not under Section 11 and who is not for or shall not and being elected a Councillor under any other law for the time being in force or being qualified, and every person of twenty-one years of age as whose name is not included in the list of voters who is so disqualified for being a

shall not be qualified, to be elected as a Councillor at any election.

(2) Subject to the provisions of sub-section (1), the list of voters maintained under section 11 shall be conclusive evidence for the purpose of determining under this section whether a person is qualified or is not qualified to be elected, as the case may be, at any election.

16. Disqualifications for becoming Councillor.- (1) No person shall be qualified to become a Councillor whether by election, or nomination, who, --

(a-1) has been so disqualified by or under any law,-

(ba) the person has been found guilty of misconduct or being disqualified from holding office of the Council unless the person has been discharged of any office of the Council or the President of the Council

disqualification provided under Section 55B has lapsed.

(1A). A person who at any time during the term of his office is disqualified under section 55B or the Maharashtra Local Authority Members Disqualification Act, 1986, (Mah XX of 1987), for being a Councillor shall cease to hold office as such Councillor.

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12. At present, there is no specific disqualification clause to be a councillor/President of the Council, one who has constructed or constructs any structure unauthorisedly.

13. Section 17 of the Act provides for the rules regulating elections. Section 19 provides for declaration of results of elections. Section 21 contemplates "Disputes in respect of election, nomination of Councillors". Section 40 deals with "Duration of Council". Section 41 provides for "Term of Office of Councillors". Section 42 empowers to remove Councillor from office.

14. The relevant Section 44 deals with aspect of disqualification of Councillor during his term of office. The relevant portion of this sections is as under:

"44. Disqualification of Councillor during his term of office.- (1) A Councillor shall be disqualified to hold office as such, if at any time during his term of office, he

(a)

(b)

[(e) has constructed or construct by himself, his spouse or his dependent, any illegal or unauthorised structure violating the provisions of this Act, or the Maharashtra Regional and Town Planning Act, 1966 or the rules or bye-laws framed under the said Acts; or has directly or indirectly been responsible for, or helped in his capacity as such Councillor in, carrying out such illegal or unauthorised construction or has by written communication or physically obstructed or tried to obstruct, any Competent Authority from discharging its official duty in demolishing any illegal or unauthorised structure:] and he shall be disabled subject to the provisions of sub-section (3) from continuing to be a Councillor and his office shall become vacant."

15. Section 45 of the Act deals with the special provisions regarding disqualification of the Councillor including the President and Vice President for failure to pay taxes due to the Council. Section 51 of the Act deals with the election of President. Section 52 of the Act provides for term of office of President. Section 55 of the Act provides for procedure for removal of President by Councillors.

16. Section 55A of the Act provides for procedure for removal of President and Vide President by the Councillors. This is without prejudice to the provisions of Section 55-1A and 55. Section 55-A is reproduced as under:

"55 - A.

Removal

of

Pres

Vice-President by Government .
Government .
prejudice to the provisions
[55-1A] and 55, a resident or

may be removed from office
Government for misconduct in
his duties, or for neglect of,
to perform, his duties or for
any disgraceful conduct, and the

Vice-President so removed shall
eligible for re-election or
President or Vice-President as the

be, during the remainder of the term of office of the Councillors:

Provided that, no such President or Vice-President shall be removed from office, unless he has been given a reasonable opportunity to furnish an explanation.

17. Section 58 provides for functions of President which includes exercise, supervision and control over the acts and the proceedings of the Chief Officer of the Council in matters of executing administration and in matters concerning the accounts and record of the Council.

18. The relevant Articles of the Constitution of India are Articles 243(Q), 243(W) and 12th Schedule which deal with the Constitution of Municipalities and their powers and authority. This also provides the State Legislature to take steps to strengthen and ensure that Municipal Corporations, Municipal Councils and Nagar Panchayats work efficiently, fulfill the aim and object and for having strong local self-Government.

19. On the above foundation, after considering the developing unauthorised constructions and to control the same and further to ensure that persons involved in unauthorised constructions are not elected to the local bodies, amended the Act by Maharashtra 11 of 2002 which includes Section 44(1)(e) of the Act, as already reproduced above. The similar provisions have been made in other Municipal laws.

20. Admittedly, if the alleged unauthorised premises of the petitioner were in existence since 1980. The petitioner was doing hotel business in the premises by obtaining proper and due licences from the concerned Authorities & by paying regular rent and appropriate licence fees as charged by the Resolution of the Council. Some dispute about the construction was pending along with such other 53 unauthorised constructions, but there was no serious objection about the existence of the construction till 2007.

21. The petitioner along with others, being resident and eligible, contested the election of the Councillor some time in the year 2006. At the time of filing of his nomination form or at any such other time, there was no objection of this nature raised against the petitioner. His nomination form/paper was accepted.

There was no objection or election Petition filed against the petitioner even after the declaration of result as a Councillor. There is no restriction provided under Section 16 of the Act to disqualify such person for becoming the Councillor. The petitioner was qualified /eligible to become a Councillor as provided under Section 15 of the Act. Therefore, at the threshold and on the date of nomination form and/or at the time of election of the Councillor, there was no such objection and/or any disqualification as contemplated under if the Act debarring the petitioner from getting elected as a Councillor and thereafter even as a President of the Council.

22. The circumstances were never changed except the order of the High Court as referred above in the year 2008. Section 44 of the Act contemplates the disqualification of Councillor. If, during his term of office, "has constructed" or "constructs by himself, his spouse or his dependent, any illegal or unauthorised structure violating the provisions of this Act or the Maharashtra Regional and Town Planning Act, 1966 or the rules or bye-laws framed under the said Act or has directly or indirectly been responsible for, or helped in his capacity as such Councillor in, carrying out such illegal or unauthorised construction or has by written communication or physically obstructed or tried to obstruct, any Competent Authority from discharging its official duty in demolishing any illegal or unauthorised structure, such Councillor shall be disabled subject to the provisions of sub-section (3) from continuing to be a Councillor and his office shall become vacant. All these ingredients are absent in the present case.

23. The submissions in support of the impugned order are that; "the petitioner has constructed or construct by himself the illegal or unauthorised structure in question"; if the petitioner in spite of the order passed by the Division Bench, as referred above, not demolished the said premises voluntarily though he was party to the PIL, are not sufficient to maintain the order.

Admittedly, the petitioner has not constructed unauthorised structure at any time during his tenure as the Councillor or as the President of the Council.

24. The strong reliance is placed on the judgment of Edwin Francis Britto vs. Municipal Corporation of Gr.Mumbai, 2006(6) BCR 92, in support of his contention that the phrase "has constructed" is sufficient to include or disqualify the person like the petitioner who had erected unauthorised structure in the past even though he was not a Councillor. This judgement is based upon Section

16(1) (1D) of the Mumbai Municipal Corporation Act, 1888 (for short, "MMC Act"). Though, the phrase "has constructed" has been incorporated in the said Act and also under the Act in question by inserting identical provisions through Maharashtra Act of 2002 as referred above, yet, this isolated provision just cannot be read to accept the contention as well as, the order as passed in the present case. Section 16 of the MMC Act itself disqualifies for being elected and for being a councillor if such person or his relatives, "has constructed" or "constructs any unauthorised structure.". Such are not the provisions under the Act.

The	Scheme	of	Section	16(1) (1D)	
15/16	of	the	Act	is	different

of disqualification on the ground of unauthorised construction as referred above.

25. It is settled that the elections are governed by the Statutes, prescribed Rules and Regulations and, therefore also all the election process and the respective rights. The Apex Court in People's Union for Civil Liberties & anr. v. Union of India and anr., (2009) 3 SCC 200, has reiterated as under:

"The right to elect, to be elected and to dispute an election are neither fundamental rights nor common law rights but are simply statutory rights and therefore are subject to statutory limitations. Similarly, an election petition is not an action at common law, nor in equity but is a statutory proceeding to which only statutory rules apply."

We are concerned with the election and the election rules as prescribed under the Act. Therefore, the judgment (Edwin supra) is distinguishable on facts and as it is based upon the different Act. As recorded, in the present case, there is no such restriction available or provided under the Act that such person cannot contest the election. Having once permitted to contest the election and he got elected, now on the same ground to disqualify such person, in my view, is wrong. The structure in question constructed long back and was in existence for more than 25 years. At the relevant time, it was with due permission and sanction of the local Authorities. The local Authority never directed to remove the construction. It is only after the order passed by the Division Bench, as referred above, the issue was re-agitated against the elected Councillor/President. Therefore, in the facts and circumstances of the case itself, this judgement is not of any assistance to respondent no.2.-original complainant no.2 and also to respondent no.1.

26. A Division Bench of this Court in Keshav Shankar Ekbote v. State of Maharashtra & ors., 2006(3) Bom.C.R.404, has considered the issue of disqualification based upon Sections 44(3) and 55-A of the Act and refused to entertain such plea as in that case, the land was allotted prior to date of election as a President and further by observing that the case was not made out for disqualification even under section 16(1)(i) of the Act.

27. In *Umesh Dattatray Naik v. The Hon'ble Minister of State Ministry of Urban Development & ors.*, 2008(3) Mh.L.J. 747, considering the aspect of illegal construction, based upon the same provisions, this Court again refused to entertain such submissions by holding that the so-called notice itself demonstrate that the construction do not pertain to the petitioner's tenure as a President.

28. Section 55-A of the Act is invoked in the present read with Section 44 as referred above. The petitioner, when show cause notice was issued, holding the charge of the President of the Council. Section 44, as referred above, basically deals with the removal of the Councillor. Therefore, the provisions of Section 44, as invoked, for disqualification of the President and the whole action as initiated is void and impermissible as observed by this Court in *Mrs.Sunita Vilasrao Salukhe v.*

State of Maharashtra, 2005(4) ALL MR 970. This Court has observed that Section 44(1) does not provide for removal of the President by relying on *Dhananjaya Reddy v. State of Karnataka*, 2001 AIR SCR 1217, by observing as under:

"The rule adopted in *Taylor vs. Taylor* (1875) 1 Ch.D. 426 is well recognised and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted".

This rule applies to the present case also.

29. The strong reliance is also
Gangadhar
MR 774,
Korde
a
vs.
Division
State
Bench
of
judge

Section 55-A and Section "misconduct" and "disgraceful elaborated and discussed. The act/inaction on the part of falls within the meaning "disgraceful conduct" as inspite of the President, he did not demoli voluntarily and, therefore, this itself retain the impugned order. As

circumstances of this case are totally distinct and distinguishable.

30. There is no much agitation about the meaning and explanation given to the words "misconduct" and/or "disgraceful conduct" in following words in Ramesh Gangadhar Korde (Supra) :

"4..... On consideration of the Section of the Act and on a reading of the Section we have no hesitation to hold that the provisions of Section 16 can be read into Section 55-A, meaning thereby that if the President incurs any of the disqualifications as set out under Section 16 in the course of his term as a President he is liable for removal under Section 55-A. The expression misconduct has not been defined under the Act nor the expression disgraceful conduct. We may now consider the expression 'misconduct' as defined in Dictionaries and Law Lexicons as the expressions have not been defined under the Act. In the New International Webster's Comprehensive Dictionary, ig Encyclopedic Edition 'misconduct' is defined as to behave improperly, to mismanage, improper conduct, bad behaviour. In the New Oxford American Dictionary, 'misconduct' is declined to mean unacceptable or improper behaviour. In

the Law Lexicon, P. Ramanatha Aiyar, the term misconduct is described to imply a wrongful intention and not a mere error of judgment. In Black's Law Dictionary, Eighth Edition, official misconduct means a public officer's corrupt violation of assigned duties by malfeasance, misfeasance, or non-feasance. In so far as the expression 'disgraceful' is concerned, the New Oxford American Dictionary explains it to mean shockingly unacceptable. In the New International Webster's Comprehensive Dictionary 'disgraceful' is set out as characterized by or causing disgrace, shameful.

In P. Ramanatha Aiyar's Law Lexicon 'disgraceful conduct' is described as shameful behaviour. It further sets out that it need not be circumscribed to something done in the course of one's duty as member or office bearer. The term means any allegation which, because it is done by an elected member or office bearer is sufficiently apprehensible to be classified as disgraceful. It is in that context that we may consider the order passed against the petitioner and whether the material justified the passing of the order."

31. In the present facts and circumstances, in my view, the alleged inaction on the part of the petitioner cannot be said to be misconduct or disgraceful conduct.

The Division Bench has permitted to take appropriate action in accordance with law. There was no specific direction given against the petitioner to demolish the construction forthwith as it was not the only case of the petitioner. The direction was against the respondent-Council also. Admittedly, there were more than 50 such structures under consideration. All those constructions, were in existence since long. The petitioner's premises were demolished before the order of High Court in the PIL, even before the show cause notice.

32. The Division Bench in Keshav (supra) has considered the case of Ramesh G. Korde (supra), as that was a case where the President of the Council had opened a joint account with a partner of firm who was allotted a contract of construction on behalf of the Municipal Council.

33. Another Division Bench judgment in Sureshkumar K.

Jethlia vs. State of Maharashtra, 2001(1) Mh.L.J. 901, though based upon Section 55A of the Act is also of no assistance to the respondents. In that case the action was initiated as there were consistent defaults during the tenure of the office as a President. The facts in the present case are quite dissimilar. That was not a case of prior unauthorised construction or an effect of such unauthorised construction during the tenure of Councillor/President.

34. The reliance is also placed on Dr. Rameshchandra S.

Saboo v. State of Maharashtra, 2003(1) ALL MR 118, though Section 55-A of the Act is referred, as on facts itself situation was different. In that case, the charge was that the President unauthorisedly disposed of land reserved for development of Nagar Panchayat and he did not deposit the

development charges.

35. In Sayali Sanjay Malvankar vs. Chief Officer, Vengurla Municipal Council, 2004 Mh.L.J.(2) page 1013, the Councillor's wife carried out construction of a shed unauthorisedly during tenure of his office. Therefore, the order of disqualification is maintained. The position in the present case is different.

36. In this background, I am declined to accept the submission that as a President, the petitioner ought to have demolished unauthorised construction even without awaiting any order of his own after becoming Councillor and/or President of the Council. It was not the case of an individual's unauthorised construction. The matter was pending in the Court. Based upon the mass permissions and licences as granted and more than 50 such constructions were made which recently declared and confirmed by the Division Bench to be unauthorised.

Notably, the petitioner's construction was demolished admittedly in December, 2007; even prior to the show cause notice and the order of the High Court.

37. It is also necessary to consider that an elected President and/or a Councillor of any local body just cannot be thrown away unless the disqualification falls clearly within the ambit of the respective election enactments. Any removal from such an office is a serious matter. It curtails the statutory term of the holder of the office. It also affects one of the statutory right not only of the candidate, but also of the Constituency or the voters which he represents.

[Tarlochan Dev Sharma vs. State of Punjab & ors., 2001(6) SCC 260]

38. The petitioner admittedly has not constructed or erected any illegal construction, during his tenure of office as Councillor or the President of the Council.

The unauthorised structure was admittedly demolished prior to the so-called notice, during the tenure of his office as Councillor/President. The non-removal or demolition of unauthorised 25 years old structure by the President, in the facts and circumstances, cannot be said to be "misconduct" or "disgraceful conduct" as contemplated under the Act specially when the same was not in existence when the show cause notice was issued.

39. Resultantly, the show cause notice and the impugned order dated 10.11.2008 and consequential orders arising out of the same passed by respondent no.1 is quashed and set aside. The writ petition is allowed in terms of prayer (a). There shall be no order as to costs.

40. The learned counsel for respondent to stay the effect and operation Considering the reasoning given, I see

reason to grant any stay. The prayer is accordingly rejected.

[ANOOP V. MOHTA,J.]