

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

Sanjay Babanrao Mali and another. ..Petitioners
-Versus-
 State of Maharashtra and others. ..Respondents

Aparna Anil Magare @ Mali. ..Petitioner
-versus-
State of Maharashtra and others. ..Respondents

CORAM: RAVINDRA V. GHUGE, J.
DATE :- 05th March, 2015

1 I have heard Mr.P.M.Shah, learned Senior Counsel appearing
for the Petitioners in Writ Petition No.2620/2015, Mr.Brahme, learned
Advocate appearing for the Petitioner in Writ Petition No.2625/2015,
learned AGPs appearing on behalf of Respondent Nos.1 and 2 in the
respective petitions, Mr.Sapkal, learned Advocate appearing for the

Respondent No.3 in both petitions and Mr.Magre, learned Advocate appearing for the Respondent No.4/ Municipal Council in both petitions.

2 I have heard the submissions of the learned Advocates for quite sometime.

3 The State has declared the elections for the position of President of the Taloda Municipal Council (Respondent No.4 herein) in the backdrop of the earlier President Sau.Yojna Bharat Mali having been disqualified under Section 55A r/w 55B of the Maharashtra Nagar Parishads, Nagar Panchayats and Industrial Townships Act, 1965 (for short, "the said Act, 1965").

4 The said Sau.Yojna Bharat Mali had questioned her disqualification by an order dated 26.11.2014 before this Court in Writ Petition No.10961/2014. By order dated 22.12.2014, this Court had dismissed the said petition. It is now informed that the Special Leave Petition (Civil) No.2490/2015 has been dismissed by the Honourable Supreme Court by it's order dated 02.02.2015.

5 These three Petitioners were disqualified by an order dated 28.01.2014 passed by the District Collector, Nandurbar in the dispute

applications filed by Respondent No.3 under Section 44(1) of the said Act, 1965.

6 The decision of the District Collector was called in question by these three Petitioners by preferring a common Appeal under Section 44(4) of the said Act, 1965 before Respondent No.1. An application for interim protection and stay to the judgment dated 28.01.2014 was also preferred.

7 It is not in dispute that by an ad-interim order dated 30.04.2014, Respondent No.1 had granted an interim stay to the execution and operation of the order of the District Collector dated 28.01.2014. It is also not in dispute that the interim order has continued till the passing of the impugned order on 02.03.2015 by which the earlier protection (temporary stay) granted to the Petitioners on 30.04.2014 has been stayed.

8 Mr.Shah, learned Senior Counsel submits that when the interim protection was granted and the main Appeal was pending, the impugned order dated 02.03.2015 could not have been passed. The grievance is that the said order dated 02.03.2015 has been passed ex-parte, without hearing the Petitioners despite the fact that there was a

full-fledged hearing on the Appeal preferred by the Petitioners and that the said Appeal was pending judgment.

9 As such, he submits that there was no propriety on the part of the State in passing the impugned order dated 02.03.2015. The principles of natural justice have been blatantly violated while passing the impugned order as the main Appeal was pending judgment and there was no occasion to pass the impugned order instead of delivering a judgment, notwithstanding the fact that the Honourable ex-Chief Minister had heard the Appeal finally.

10 Mr.Shah places reliance upon the judgment of the Division Bench of this Court delivered on 07.03.2014 in Writ Petition No.1236/2011 in the matter of *Shastri Nagar Rahiwasi SRA CHS Limited v/s State of Maharashtra and others*. He specifically draws my attention to the concluding part of the judgment in paragraphs 18 and 19 by which the Division Bench of this Court has concluded that a hearing being conducted by one Authority and a judgment/ order being delivered by the successor authority without hearing the parties, would amount to violation of the principles of natural justice.

11 It is apposite to reproduce paragraphs 18 and 19 of the said

judgment as under:-

18. *A personal hearing ought to be granted by Respondent no.2. In the case Automatic Tyre Manufacturers Association V/s. Designated Authority & Ors. [(2011) 2 SCC 258], the Apex Court observed that a personal hearing enables the authority to observe demeanor of the parties and clear doubts during the course of hearing. If one person hears and another decides, a personal hearing becomes an empty formality. The Court further observed that even written arguments are no substitute for oral hearing. Giving a personal hearing before a final order is passed is essential for ensuring compliance with basic principle of Audi alteram partem.*
19. *In the present case, one Minister heard the application and his successor passed the order. Such an order does not comply with the principles of natural justice and, therefore, liable to be set aside. As far as the developer i.e. Petitioner No.2 in Petition no.1236 is concerned it is not in dispute that he has been allowed to construct the building after following due process and obtaining necessary permissions. For the reasons aforesaid, the impugned dated 2nd May, 2011 in Writ Petition No.1236 of 2011 is, therefore, liable to be quashed and set aside. Rule is made absolute in terms of prayer clause (b) in Writ Petition No.1236 of 2011. No case is made out for interference in Writ Petition No.2370 of 2012 and the same is dismissed. There will be no Order as to costs.”*

12 Mr.Shah, therefore, submits that with the change in the leadership of the State and a new Chief Minister taking over, the Appeal filed by the Petitioners was, therefore, required to be heard afresh. He, therefore, submits that in the event the impugned order dated 02.03.2015

was to be passed, same principles in law as are laid down in the Shastri Nagar Judgment (supra), would apply even to an order being passed by the successor Authority without hearing the Petitioners. He explains that the litigating sides were heard on the Appeal and the successor Authority passed the impugned order, which would render the impugned order unsustainable in the light of the observations of the Division Bench in Shastri Nagar Rahiwasi (supra).

13 Mr.Shah then submits that the election to the position of President of the Taloda Municipal Council is scheduled tomorrow i.e. 06.03.2015. The impugned order has been timed in a manner so as to ensure that the Petitioners stand disqualified as Members of the said Municipal Council by virtue of the judgment of the District Collector dated 28.01.2014 since the effect of the said judgment is brought into force by the impugned order dated 02.03.2015.

14 Mr.Shah submits that though the Petitioners may appear to stand disqualified as on date, the intention is to deprive them of their right to vote in the elections scheduled tomorrow. He, therefore, prays that these two Writ Petitions be allowed, the impugned order dated 02.03.2015 be set aside, Respondent No.1 be directed to hear the Petitioners on their Appeal and decide the same within a particular time

frame and therefore, consequentially permit the Petitioners to vote in the elections scheduled tomorrow.

15 The learned AGPs appearing on behalf of the Respondent Nos.1 and 2/ State, submit that the Petitioners stand disqualified as on date in view of the impugned order staying the earlier interim order dated 30.04.2014. They, therefore, submit that the judgment of the District Collector dated 28.01.2014 stands restored, which was in operation from 28.01.2014 till 30.04.2014.

16 It is further submitted that merely because the judgment dated 28.01.2014 was earlier stayed, would not mean that the disqualification of the Petitioners is wiped out or rendered a nullity. The order dated 30.04.2014 was purely an interim order passed in the interregnum pending the hearing and final disposal of the Appeal. Though Respondent No.1 may hear the Appeal and decide it within a particular time frame, the Petitioners having been disqualified by the judgment dated 28.01.2014 and hence, ought not to be allowed to vote in the elections scheduled tomorrow.

17 Mr.Sapkal, learned Advocate appearing for Respondent No.3, has filed a detailed affidavit in reply on behalf of Respondent No.3. A host

of reasons and factors have been set out in the affidavit in reply, which is accompanied with several documents, for opposing these petitions.

18 Mr.Sapkal submits that the earlier President Sau.Yojna Bharat Mali was disqualified by following the due procedure of law and the said issue has attained finality in the light of the dismissal of the Special Leave Petition by the Honourable Supreme Court on 02.02.2015.

19 Mr.Sapkal, therefore, submits that two out of the three Petitioners, namely, Sanjay Babanrao Mali and Bharat Babanrao Mali are two Councillors who have been the cause and effect of the disqualification of Sau.Yojna Bharat Mali. Bharat Babanrao Mali is the husband of Sau.Yojna Mali and Sanjay Banbanrao Mali is her brother-in-law. The acts of leasing out the property of the Taloda Municipal Council in violation of Section 92 of the said Act for the period of 99 years to the husband and brother-in-law of Sau.Yojna Mali along with her mother-in-law, had resulted in the proceedings against these Petitioners under Section 44 of the said Act. Their disqualification has occurred earlier in point of time vis-a-vis Sau.Yojna Mali.

20 Mr.Sapkal further submits that the reasons which caused the disqualification of Sau.Yojna Mali are, therefore, necessarily the basis of

the disqualification of the Petitioners. Since Sau.Yojna Mali was the President of the Municipal Council, Sections 55A and 55B of the said Act were made applicable to her. Mr.Sapkal, therefore, submits that though different provisions of law were pressed into service as against Sau.Yojna Mali and the present Petitioners, the grounds were practically the same and therefore, the consequence of disqualification was “fait accompli”.

21 Mr.Sapkal has pointed out an order passed by this Court on 03.12.2014 in the case of Sau.Yojna Mali in Writ Petition No.10961/2014 which was an interim order during the pendency of the said writ petition. He submits that as an ad-interim measure, the position of Sau.Yojna Mali as the President of the Municipal Council was protected pending hearing of her petition, but she was prevented from exercising a right to vote in any meeting. She was similarly restrained from taking any policy decisions and especially such decisions which were likely to have financial implications. She was also prevented from drawing any allowance as the President of the Municipal Council.

22 Mr.Sapkal further submits that he has no objection as regards the hearing of the main Appeal preferred by the Petitioners within any time frame. He states that no adjournments would be sought on his behalf. He, however, submits that since the Petitioners stand disqualified

as on date, they ought not to be permitted to vote in the elections scheduled tomorrow notwithstanding the issuance of a direction to Respondent No.1 to decide the Appeal. He further submits that if the Appeal could be decided in a period of four or eight weeks, the impugned order dated 02.03.2015 could very well be maintained and continued.

23 Mr.Magre, learned Advocate appearing for the Respondent No.4/ Municipal Council, submits that as the petitions are served on the Municipal Council just yesterday, having been filed yesterday itself, he is unable to make any statement on the merits of the petitions. He, however, submits that this Court may pass an appropriate order.

24 Having considered the submissions of the learned Advocates appearing for the respective sides, the whole issue, in my view, turns upon the judgment dated 28.01.2014 passed by the District Collector. Ex-facie, the District Collector had considered the claims of the rival sides and had delivered his judgment thereby, disqualifying the Petitioners under Section 44 of the said Act. By the order dated 30.04.2014, the judgment dated 28.01.2014 was temporarily stayed.

25 It cannot be in dispute that had the said judgment dated 28.01.2014 not been stayed even temporarily, the positions of Councillors

occupied by the Petitioners would have automatically fallen vacant and further process of conducting elections to the said positions would have naturally followed. Had the same occurred, new persons would have got elected in the places of the Petitioners. Pursuant thereto, if the Appeal of the Petitioners was allowed and the judgment dated 28.01.2014 was set aside, then the fresh elections to the positions of Councillors would have fallen into jeopardy. The Petitioners would then have been reinstated as Councillors. Naturally to avoid the said complex situation, the judgment dated 28.01.2014 was temporarily stayed.

26 Insofar as the validity of the impugned order is concerned, it clearly appears that the Petitioners were not heard before the order dated 30.04.2014 granting interim protection to them was stayed. The impugned order dated 02.03.2015 is non speaking, no reasons have been assigned nor is there any justification set out for passing the impugned order. In this situation, the impugned order deserves to be quashed and set aside.

27 With the quashing and setting aside of the impugned order dated 02.03.2015, the Petitioners are, therefore, placed in an identical position in which Sau.Yojna Mali was placed into when her Writ Petition No.10961/2014 was pending hearing before this Court. Before delivering

the final order dated 22.12.2014 by which her writ petition was dismissed, this Court had conditionally protected the position of Sau.Yojna Mali by passing an order on 03.12.2014.

28 Paragraph 4 of the order passed on 03.12.2014 reads as under:-

“4. Since this matter is being heard and is likely to take sometime, I intend to pass the following order, purely as an ad-interim order so as to facilitate a fair hearing of the matter:-

(A) The petitioner, who claims to be occupying the position of President of Municipal Council, Taloda shall continue as such until further orders. However, she shall have no right to vote in any meeting, shall be taking no policy decision and such decisions which are likely to involve financial implications and she shall not draw any allowances as a President of the Municipal Council. Needless to state, this order shall not create any equity in the petitioner.”

29 Since the Appeal of the present Petitioners is pending before Respondent No.1 which will have to be decided and for which I would be issuing certain directions in this order, I intend to pass a similar order as was passed by this Court in the case of Sau.Yojna Mali in similar circumstances. I am passing a similar order for the reason that the Appeal is pending before Respondent No.1. If no protection is granted to the Petitioners, their positions as Councillors would fall vacant and there is a

likelihood that bye-elections would be conducted for filling in the said positions. This would create a complex situation if their appeal is allowed.

30 It is informed that the term of the Councillors of the Municipal Council is upto 2017. The election of the President of the Municipal Council is scheduled tomorrow. It is in this backdrop that I am permitting the Petitioners to cast their votes in the elections scheduled tomorrow under certain conditions.

31 In the light of their disqualification by the judgment dated 28.01.2014 and which is pending scrutiny in the Appeal before Respondent No.1, I find it appropriate to direct the Respondent No.2/ Collector to provide a separate ballot box/ envelope in which the votes of these three Petitioners would be cast. The Respondent No.2/ Collector shall then seal the said ballot box/ envelope and preserve the same till the decision on Appeal by Respondent No.1.

32 On account of the disqualification of Sau.Yojna Mali as the President of the Municipal Council, the said post has fallen vacant ever since the dismissal of the Special Leave Petition by the Honourable Supreme Court on 02.02.2015. I, therefore, do not find it appropriate to issue any direction for withholding the result of the elections scheduled

tomorrow. The said result would be declared by Respondent No.2 without taking into account the votes cast by the Petitioners. Needless to state, the result of the elections for the position of President of the Municipal Council, Taloda shall be subject to the result of the Appeal to be decided by Respondent No.1.

33 In the event, the said Appeal is dismissed, efficacy of this direction of making the result of the elections subject to the result of the Appeal shall, therefore, come to an end.

34 However, in the event, the Appeal of the Petitioners is allowed, the District Collector shall, thereafter, resort to the procedure laid down in law for opening the ballot box/ envelope and for including the votes cast by the Petitioners, which would have an impact on the result of the election of the President of the Municipal Council scheduled tomorrow. Needless to state, no equities, therefore, would be created in the newly elected President of the Taloda Municipal Council.

35 By way of clarification, in the event the result of the election of the President scheduled tomorrow, results in returning a candidate as President with a vote margin of more than three votes, then the votes cast by these three Petitioners would be rendered inconsequential and would

therefore, have no impact on the result of the said election.

36 In the above circumstances, I pass the following order:-

- (a) Both Writ Petitions are partly allowed. No order as to costs.
- (b) The impugned order dated 02.03.2015 passed by the Respondent No.1 is quashed and set aside.
- (c) The Respondent No.1 shall hear the pending Appeal No.MUN-4414/160/PK.26/Navi-15 of these three Petitioners as expeditiously as possible and preferably on or before 12.06.2015.
- (d) The Petitioners and other litigating sides shall appear before the Respondent No.1 on 20.03.2015 at 03:00 pm.
- (e) The litigating sides shall abide by the dates on which the Respondent No.1 shall post the Appeal for hearing and they shall not seek adjournments on frivolous and unreasonable grounds.
- (f) The disqualification of these three Petitioners ordered by the judgment dated 28.01.2014 shall not have its operation till the decision of the Respondent No.1 in the Appeal.

- (g) In the light of this order, the Respondent No.1 need not decide the application for stay filed by the Petitioners and shall decide the main Appeal itself.
- (h) These three Petitioners shall cast their votes in a separate ballot box/envelop which shall be provided for by the Respondent No.2/ Collector in the elections to the position of the President of Taloda Municipal Council to be held tomorrow i.e. 06.03.2015.
- (i) The Respondent No.2/ Collector, after votes have been cast by the Petitioners, shall seal and preserve the said ballot box/envelop in his own custody.
- (j) The Respondent No.2 will be at liberty to declare the result of the election of the President of the Taloda Municipal Council in accordance with the procedure prescribed by law, after the voting on 06.03.2015.
- (k) The result of the election of the President of the Taloda Municipal Council to be held tomorrow, shall be subject to the result of the Appeal pending before the Respondent No.1 and no equities shall be created in favour of the newly elected President in the light of the pending litigation of the Petitioners in connection with their disqualification dated 28.01.2014.

- (l) Till the decision of the Respondent No.1 on the Appeal filed by the Petitioners, the Petitioners may participate in the meetings of the Taloda Municipal Council, but shall not be a party to any voting in such meetings and therefore, shall not be a party to any policy decision taken by the said Municipal Council.
- (m) The Petitioners shall not draw any allowances as Councillors of the Taloda Municipal Council till the decision in Appeal pending before the Respondent No.1.
- (n) Since this order is dictated in open court, the learned AGP shall convey this order to the Respondent No.2 Collector and Mr.Magre, learned Advocate for the Respondent No.4/Municipal Council, shall convey this order to the Chief Officer of Taloda Municipal Council.
- (o) Since the elections are scheduled tomorrow, all the concerned parties shall act on an authenticated copy of the operative part of this order.

(RAVINDRA V. GHUGE, J.)