

kps

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

CIVIL APPLICATION NO. 4419 OF 2015
IN
RAST/11226/2015

WITH
REVIEW APPLICATION (STAMP) NO.11226 OF 2015
IN
WRIT PETITION NO.2827 OF 2015

MAKARAND SHURSEN RAJENIMBALKAR
VERSUS
STATE OF MAHARASHTRA AND OTHERS

...
Advocate for Applicants : Mr.Kulkarni Mukul S.

Advocate for Respondent No.5 : Mr.Pravin S. Dighe h/f Mr.VR.Dhorde.

AGP for Respondent Nos.1 & 4 : Mr.P.P.More.

...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 15th April, 2015

Per Court:

(a) Civil Application No.4419/2015:-

1 Delay of 04 days is caused in filing the Review Application. I, therefore, indicated to the learned Advocates that since the delay is being condoned, they may address the Court on the Review Application.

2 For the reasons set out in the Civil Application, the same is

allowed. The delay of 04 days is condoned.

(b) Review Application (stamp) No.11226/2015:-

3 I have heard Mr.Kulkarni, learned Advocate appearing for the Review Applicant (Applicant in short) and Mr.Dighe, learned Advocate appearing for the Respondent No.5/ original Petitioner in Writ Petition No.2827/2015, at length. I have also heard the learned AGP appearing on behalf of the Respondent Nos.1 and 4.

4 Writ Petition No.2827/2015 was filed by the Respondent No.5 herein. The prayers set out in paragraph 12-A to 12-E in the said Writ Petition are as follows:-

- “(A) Call for record and proceeding of the case;
- (B) Hold and declare that, the decision of the respondent No.3 Presiding Officer accepting the nomination of the respondent No.4 is illegal, arbitrary and violative of Article 14 of the Constitution of India and in contravention of the provisions of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 and hence the decision dated 09.03.2015 is itself liable to be quashed and set aside;
- (C) Pending hearing and final disposal of this Writ Petition, restrain the respondent No.4 from contesting election of the President scheduled on 11.03.2015 of Osmanabad Municipal Council and for that purpose issue necessary orders;
- (D) Pending hearing and final disposal of this Writ Petition, grant stay to the further process of the meeting dated 11.03.2015 scheduled for holding the

elections of President of Osmanabad Municipal Council and for that purpose issue necessary orders;
(E) *Grand and ad-interim relief in terms of prayer clause “C” & “D”;*

5 In the light of the election that was scheduled on 11.03.2015 for the position of the President, Osmanabad Municipal Council, the said Writ Petition was circulated by the original Petitioner on 10.03.2015. Grave urgency was expressed by Mr.R.N.Dhorde, learned Senior Advocate appearing for the Petitioner therein at 01:30 pm. The matter was, therefore, taken on the Production Board.

6 In the Writ Petition, after hearing the learned Senior Advocate appearing for the Petitioner and the learned AGP, this Court had recorded the submissions of the Petitioner in paragraphs 4 and 5, which read as under:-

- “4. 4. Shri R.N. Dhorde, learned Sr. Advocate has set out certain dates and events which are as under :-
- a) By communication dated 03-02-2011, the Town planning department of Osmanabad intimated the District Collector, Osmanabad (Respondent No. 5) as regards instances of encroachment and construction beyond the permission granted on the part of respondent No. 4.
 - b) By communication dated 04-02-2011, the Chief Officer, Municipal Council, Osmanabad-respondent No. 2 herein intimated the District Collector, respondent No. 5 about the illegal construction / encroachment at the hands of the father of respondent No. 4.

c) By communication dated 17-02-2011, respondent No.5 Collector informed respondent No. 2 that the latter shall submit a report as regards the illegal construction and the action initiated against such illegal construction.

d) By communication dated 26-06-2012, a show-cause notice has been issued to the 4th respondent calling upon him to explain as to why action should not be initiated against him under section 55-B of the The Maharashtra Municipal Councils Nagar Panchayats & Industrial Townships Act, 1965 Act, (said Act) .

e) The Division Bench of this Court by order dated 01-10-2012 in Writ Petition No. 8028 of 2012 preferred by the 4th respondent, permitted him to file his reply to the notice and with the said observation, disposed off the petition.

f) Notice of hearing dated 08-07-2013 was issued to the 4th respondent.

g) On 02-03-2015, the election programme for filling in the position of President of Osmanabad Municipal Council was declared in the light of the resignation of the incumbent President Shri Sunil H. Kakade.

h) The petitioner and respondent No. 4 are the contesting candidates.

i) Elections are scheduled on 11-03-2015 at 11.00 am.

5. Shri Dhorde, therefore, submits that the 4th respondent is subjected to proceedings under section 55-B of the said Act which are likely to result in his disqualification. There is every likelihood that by incurring disqualification, he would not be in a position to continue either as a member or as a President of the Municipal Council, Osmanabad. However, the 4th respondent has been successfully delaying the proceedings under Section 55-B. The State, therefore, deserves to be directed to complete the said proceedings as expeditiously as possible and preferably within a period of four weeks from today.”

7 By order dated 10.03.2015, the Writ Petition was disposed of with certain directions, squarely based only on the statement of the learned AGP recorded in paragraphs 6, 7 and 9, which read as under:-

- “6. The learned AGP appearing on behalf of respondent Nos.1, 3 and 5 submits that the proceedings pending before the appropriate authorities have been progressing. Nevertheless, the said proceedings could be conducted within a particular time frame. However, the State assembly is presently in session and as such, time of at least twelve (12) weeks need to be granted since all the litigating sides are to be heard by giving them a reasonable opportunity.
7. In the light of the statement made above, I am disposing off this petition without formally issuing notices to the respondents. The respondent No. 1 State can conduct the proceedings against the 4th respondent under Section 55-B of the said Act by giving the litigating sides reasonable opportunity of hearing.
8.
9. In the light of the above, this petition is disposed off by taking into account the statement of the learned AGP. As such, respondent No. 1 shall issue notice of hearing to respondent No.4 and all the litigating sides in the pending proceedings under Section 55-B of the Act.”

8 It was only upon recording the statement of the learned AGP in respect of the pending proceedings under Section 55B of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Township Act, 1965 (hereinafter referred to as “the said Act, 1965”), that

this Court issued the directions to the State Government which are evident from paragraphs 6 and 10 of the order under review. Paragraph 6 is reproduced herein above and paragraph 10 reads as under:-

“10. The first respondent shall therefore, conduct the said proceedings as expeditiously as possible and preferably within a period of fourteen (14) weeks from today, if not already decided.”

9 The Applicant then approached the Honourable Supreme Court by filing Special Leave Petition (C) No.9504/2014. The Honourable Supreme Court while disposing of the SLP, has observed as under:-

“Premptory directions have been issued, according to the petitioner without notice to him. If so, it is a valid ground for him to file an appropriate application for review before the High Court.

The petitioner is hence permitted to file an application for review before the High Court.

Subject to the above, the special leave petition is disposed of.”

10 Mr.Kulkarni, learned Advocate appearing for the Applicant, has pointed out that the Government was directed by this Court to decide the proceedings against the Applicant under Section 55B of the said Act, 1965. He submits that no such proceedings were pending. Some proceedings under Section 44 of the said Act, 1965 had commenced and as such, two proceedings, one by the District Collector under Section 44 and another by the State Government under Section 55B, cannot be

conducted concurrently.

11 Mr.Kulkarni further submits that the original Petitioner in Writ Petition was set up by a political rival, namely, Mr.Udaysinh Nimbalkar, who was not party to the Writ Petition. At his behest the original Petitioner moved the Writ Petition. Mr.Kulkarni submits that a stranger has filed the said Writ Petition and the proceedings purportedly pending before the Government against the Applicant under Section 55B of the said Act, 1965 have been directed to be decided in a particular time frame. No such directions could have been given by this Court in a petition filed by a stranger.

12 Mr.Kulkarni has further pointed out ground No.VI set out in the Review Application, which reads as under:-

“VI. *It may be appreciated that in Writ Petition No.2827 of 2015, the present Respondent No.5 has challenged the list of valid candidates for the post of President of the Osmanabad Municipal Council on 09.03.2015. Thus there was no order under challenge before this Hon'ble Court and hence the Writ Petition before the Hon'ble Single Judge was not tenable. The list of valid candidates could have been challenged only before the Hon'ble Division Bench as per the High Court Appellate Side Rules. This Hon'ble Court was, as a matter of fact, mislead by stating in the prayer clause that the decision of the Returning Officer accepting the nomination is challenged. As can be seen from the record, neither there is such order passed by the*

Returning Officer nor any such order is annexed to the Writ Petition. In this view of the matter, the Writ Petition No.2827 of 2015 was not at all tenable and hence ought to have been dismissed on this ground alone.”

13 In the light of the above ground, he submits that this Court could not have entertained the said Writ Petition either under Article 227 and/or Article 226 of the Constitution of India since there was no order passed by the Election Officer (Respondent No.3 in the Writ Petition). By entertaining the petition, this Court has passed such orders which could only have been passed by the Division Bench of this Court under the Bombay High Court (Appellate Side) Rules, 1960.

14 Mr.Kulkarni further points out that, earlier this Court had considered Writ Petition No.3953/2011 filed by the Applicant as regards transfer of the proceedings from the Collector, Osmanabad to any other Collector under the said Act, 1965. This Court had made certain observations in paragraph 5 of it's order dated 01.08.2011 and had, thereafter, issued directions, which read as under:-

“5. *No doubt, the proceedings for disqualification have to be determined expeditiously. It is submitted by Shri Kulkarni, the learned counsel for the petitioner that, the petitioner has moved the State Government for transfer of the proceedings and the record and proceedings has been called by the State Government.*

6. *According to the petitioner the witnesses who are not named in the list of witnesses are required to be examined because of stand taken in the affidavit which is not in tune with the original complaint. The procedural law is always directory in nature. The same cannot be applied in rigid manner. Taking into account the principles of natural justice, the petitioner can be allowed to examine the witnesses not named in the list of witnesses. The petitioner can be directed to submit the list of witnesses in this regard. However, the record and proceedings is not with the Collector, Osmanabad, where the proceedings are pending and the same is with the State Government. Therefore, I pass the following order.*

O R D E R

- A. The impugned order dated 03.06.2011 passed by the Collector Osmanabad is set aside.*
- B. The authority before whom the proceedings would be pending as per the orders passed by the State Government shall decide the proceedings expeditiously.*
- C. The petitioner shall file list of witnesses within a period of one week from the date the State Government passes the order on transfer petition before the authority to whom the proceeding would be allocated.*
- D. The Rule is made absolute in above observations and directions. No costs.”*

15 Mr.Kulkarni, therefore, contends that the order passed by this Court dated 01.08.2011 leads to the presumption that the proceedings under Section 44 of the said Act, 1965 alone can be proceeded with and the proceedings under Section 55B, if at all have been initiated, will have to be kept in suspended animation.

16 Mr.Kulkarni has then referred to the report of the District Collector, Osmanabad dated 27.06.2011 wherein the District Collector has opined that the proceedings against the Applicant cannot be conducted under Section 55A or 55B of the said Act, 1965 since the Applicant was not elected as a President of the Municipal Council, Osmanabad. In connection with the alleged acts committed by him, the proceedings under Section 44 of the said Act, 1965 alone could be initiated against him.

17 Mr.Kulkarni has, therefore, submitted that the issues raised by the Applicant as are mentioned herein above, are indicators of the error apparent on the face of the order so as to entertain this Review Petition and review the order passed by this Court dated 10.03.2015.

18 On the other hand, Mr.Dighe, learned Advocate appearing for the Respondent No.5/ Original Writ Petitioner, submits that the basic objection of the Applicant that this Court has entertained Writ Petition No.2827/2015, is misconceived. This Court in fact has disposed the said Writ Petition without granting any relief to the original Petitioner. The interest of the Applicant stood protected by the order passed by this Court, which is evident from paragraph 11 of the order under review, which is as under:-

“11. *Since the election programme has been declared and*

the election is scheduled on 11.03.2015, I am not inclined to cause any interference either with regard to the respondent No.4 contesting the elections or with regard to the holding of elections on 11.03.2015.”

19 Mr.Dighe, therefore, submits that this Court declined to cause any interference with the election programme as declared and the election scheduled on 11.03.2015, inasmuch as the Respondent No.4 in Writ Petition, who is the Review Applicant herein, was permitted to contest the election scheduled on 11.03.2015.

20 Mr.Dighe has then pointed out an order passed by the Division Bench of this Court dated 01.10.2012 in Writ Petition No.8028/2012 filed by the Applicant herein. The said order is self explanatory and clearly indicates that the Applicant has left no stone unturned in preventing the progress of the proceedings under Section 55B of the said Act, 1965.

21 Mr.Dighe submits that when the show cause notice under Section 55B was issued to the Review Applicant herein, he had challenged the same in Writ Petition No.8028/2012 raising all grounds. By order dated 01.10.2012, the said Writ Petition was disposed of by observing that the Review Applicant herein shall be entitled to file his reply to the said

show cause notice.

22 Mr.Dighe, therefore, submits that the right of the Applicant to contest the proceedings under Section 55B has neither been taken away nor has it been curtailed.

23 Mr.Dighe has then pointed out that a notice was issued to the Applicant dated 02.07.2013 informing him that the proceedings under Section 55B of the said Act, 1965 before the Honourable Chief Minister were posted for hearing on 04.07.2013 and he should participate in the same along with such material as he may find appropriate. Pursuant to the said notice, the Applicant participated in the hearing before the Honourable Chief Minister by remaining personally present and by being assisted by his Advocate. He was given time of 08 days to produce all such documents on which, he desired to place reliance upon.

24 Mr.Dighe, therefore, submits that it is too late in the day for the Applicant either to make grievance about conducting of the proceedings by an appropriate authority under Section 55B or to urge that the proceedings under Section 55B cannot be continued since the proceedings under Section 44 are pending. Mr.Dighe, therefore, prays for rejection of the Review Petition.

25 The learned AGP appearing on behalf of the State and the District Collector, Osmanabad, points out that this Court had only recorded the statement of the learned AGP as regards the pending proceedings under Section 55B against the Applicant. When the learned AGP indicated that after the State Assembly Session is over, all the litigating sides would be given a reasonable opportunity of being heard and the proceedings would be conducted within 12 weeks, that this Court passed the order by recording the statement in paragraphs 6 and 9 of the order under review.

26 The learned AGP further submits that this Court has only observed that the pending proceedings under Section 55B of the said Act, 1965 should be decided in a time frame as per the statement made by the AGP and therefore, this Court cannot be said to have entertained the Writ Petition. The learned AGP, therefore, submits that the Review Petition is devoid of merit.

27 I have considered the submissions of the learned Advocates which are recorded herein above. The contention of the Review Applicant that the proceedings under Section 44 of the said Act, 1965 will automatically halt the proceedings under Section 55B of the said Act,

1965, cannot be entertained as a ground for reviewing the order dated 10.03.2015. Similarly, the contention of the Applicant that Section 55B proceedings cannot proceed as the relevant papers are with the District Collector in connection with Section 44 proceedings, as well cannot be a ground for review. It is left to the appropriate authorities to deal with this contention of the Applicant in the concerned proceedings before them.

28 It needs to be noted that the Applicant has in fact denied the existence of the proceedings under Section 55B. I find that the said statement is not made innocently or by inadvertence. There appears to be an oblique motive behind the Applicant making such a statement. Apparently, the said statement is false since the first notice issued to the Applicant is dated 22.02.2011 whereby, it was indicated to him that the proceedings under Section 55B are contemplated.

29 Similarly, the Applicant had approached the Division Bench of this Court for challenging the show cause notice issued under Section 55B by filing Writ Petition No.8028/2012. The said Writ Petition was disposed of by order dated 01.10.2012 permitting the Applicant to file his reply to the show cause notice and participate in the said proceedings. It is also evident that the Applicant has participated in the said proceedings under Section 55B by being assisted by an Advocate.

30 The contention of the Applicant that this Court has entertained the Writ Petition filed by the original Petitioner, in which the order under Review has been passed, does not appear to be correct for reasons more than one. Firstly, the grievance put forth by the original Petitioner (Respondent No.5 herein) was not entertained and the Writ Petition was disposed of without causing any interference in the impugned order. Secondly, the election scheduled on 11.03.2015, so also the right of the Applicant to contest the said election, was not interfered with.

31 Moreover, the learned AGP had made a statement that the proceedings under Section 55B against the Applicant would be conducted, if not already decided, within a particular time frame. It was only by recording the said statement of the learned AGP that this Court made its observations and disposed of the said Writ Petition. It was, therefore, left to the State Government to conduct the said proceedings which apparently are in progress from 26.06.2012 when the State Government issued a show cause notice under Section 55B to the Applicant and challenge to which, in Writ Petition No.8028/2012 filed by the Applicant herein, was turned down by the order of the Division Bench of this Court dated 01.10.2012.

32 At this stage, Mr.Kulkarni has submitted that this Court, by it's order dated 02.07.2012 passed in Writ Petition No.8116/2011 filed by Mr.Udaysinh Nimbalkar, political opponent of the Applicant, had directed the transfer of record and proceedings to the Collector. He submits that it amounts to precluding the State Government from conducting the proceedings under Section 55B against the Applicant.

33 The order passed by this Court dated 02.07.2012 was on the grievance made out by the Petitioner that the Collector against whom the transfer of proceedings were sought, had already been transferred and a new Collector had taken charge. The Petitioner was, therefore, permitted to withdraw his petition for transfer and pray to the State Government for return of record and proceedings to the Collector, Osmanabad. I do not find that this order in any way precludes the State Government from conducting the pending proceedings under Section 55B of the said Act, 1965.

34 In the light of the above, I do not find that the Applicant has pointed out any error in the order under review so as to entertain this Review Petition. The Review Petition sans merit and is, therefore, rejected.

35 The Applicant, at this juncture, prays for staying the order

passed today.

36 Mr.Dighe opposes the said request on the ground that this Court had only recorded the statement of the learned AGP and allowed the State Government to decide the proceedings under Section 55B by giving reasonable opportunity of hearing to all the sides. All the contentions that the Applicant may desire to canvass, are neither restricted nor is he restrained. Therefore, the Applicant may participate in the said proceedings by raising all grounds as he may find appropriate. Mr.Dighe, therefore, submits that the process of law be permitted to take it's own course.

37 The order under review was purely based on the statement made by the learned AGP and hence, no such directions were issued by this Court so as to presume that it had invoked it's jurisdiction under Article 226 of the Constitution of India. The Applicant can participate in the said proceedings and in the event he desires to seek some extension of time, he may, accordingly, address the State Government on the said count. As such, the request for staying this order is rejected.

(RAVINDRA V. GHUGE, J.)