

sas

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.9213 OF 2013

Prakash Kalu Gaikwad

..Petitioner.

V/s.

Sachin Dattatraya Pote & Ors.

..Respondents.

None. for the petitioner.

Ms.Neha Prashant with Ms.Manish Mane and Cherl Fernandes i/b.
ALMT Legal for the respondent Nos.1 & 2.

Mr.Prashant Kamble i/b. Mr.A.S.Rao for the respondent No.3.

**CORAM : A.S.OKA AND
A.K. MENON, JJ.****DATED : 9TH MARCH, 2015****P.C. :-**

1. None appears for the petitioner. Though none appeared for the petitioner, the learned counsel for the first and second respondent has argued the matter on merits. We have also heard the learned counsel appearing on behalf of the third and fourth respondents. The main issue in this writ petition is, whether the first respondent who is an elected councillor of the third respondent -Municipal Corporation stands disqualified under section 10 (1D) of the Maharashtra Municipal Corporations Act, 1949 (for short 'the said Act of 1949'). Clause (1D) of section 10 reads thus :-

“10(1D) A Councillor shall be disqualified for being a Councillor, if such Councillor has constructed or constructs by himself, his spouse or is dependent, any illegal or

unauthorised structure violating the provisions of this Act or the Maharashtra Regional and Town Planning Act, 1966 or the rules by 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. Such disqualification shall be for the remainder of his term as a Councillor from the date of the declaration of such structure to be illegal or unauthorised by the concerned authority under the provisions of the said Acts or, as the case may be, from the date of commission of the act of interference or obstruction by the Councillor against the Competent Authority. “

2. There is an affidavit in reply filed by Mr.Arun Rajaram Wankhede, Ward Officer, D-Ward, Kalyan-Dombivli Municipal Corporation on behalf of third and fourth respondents. It is stated by him that on the basis of a complaint made by M/s. Bhagyashree Co-operative Housing Society, Kalyan, a notice under section 260 of the said Act of 1949 was issued to the first respondent on 22nd November, 2010. A copy of the notice has been annexed. A copy of the order dated 7th March, 2011 passed on the basis of the said notice is also annexed to the reply which records that a reply was submitted by the first respondent on 26th November, 2011. It is recorded in the said order that the first respondent did not remain

present at the time of personal hearing. The said order holds that the first respondent has carried out illegal construction as alleged in the notice under section 260 of the said Act of 1949. The reply of Mr. Wankhede discloses that the notice under section 260 has been received either by the first respondent or his authorized representative on 23rd November, 2010. The notice records that the first respondent has carried out illegal construction.

3. The learned counsel appearing for the first and second respondents relies upon the affidavit-in-reply of the first respondent. Her submission is that the order of demolition has been passed in breach of principles of natural justice. Her submission is that the notice was not served upon the first respondent. Her submission is that the alleged construction of the mobile tower is not carried out by the first and second respondents. Her submission is that as regards the other illegal constructions, there is a building permission granted in the year 2001 which shows that the structure was in existence. The further submission is that the petitioner has no locus as he is not an elected councillor of the said Municipal Corporation. Reliance is placed on section 12 of the said Act of 1949. The submission of the learned counsel appearing for the first and second respondents is that in any event, a disqualification will not be incurred on the basis of an order by the Municipal Corporation which is completely illegal.

4. The affidavit of Mr. Arun Rajaram Wankhede is filed on

19th August, 2014. The affidavit has an endorsement which shows that a copy of the said affidavit has been served on the Advocate for the first and second respondents on 20th August, 2014. Assuming that what is contended by the learned counsel for the first and second respondents is correct, even as of today, the first and the second respondents have not challenged the order of demolition dated 7th March, 2011 which holds that the first respondent has carried out illegal construction. The first respondent has not even challenged the said order as of today. The submission on the merits of the said order cannot be considered in this petition. We must also note that the order dated 7th March, 2011 has been annexed to the writ petition itself. Though the first and second respondents have filed a reply on 15th January, 2014 the said respondents have not challenged the said order by filing appropriate proceedings.

5. The relief prayed in prayer clause (a) is for a direction to forthwith demolish the unauthorised and illegal construction carried out by the first respondent. The second prayer (b) is for directing the fourth respondent to set the criminal law in motion. The prayer clause (c) is for a declaration that the first and second respondents have incurred disqualification under section 10(D) of the said Act of 1949.

6. There is prayer in the alternative seeking a direction to the third and the fourth respondents to take necessary steps under

section 12 of the said Act of 1949 by making a reference to the Court.

7. As of today, the order passed by the third and fourth respondents holding that the first respondent has carried out illegal construction continues to operate. The only question is, whether the illegal construction was carried out after the first respondent was elected as a councillor. The Municipal Commissioner may have to consider this aspect. If the Municipal Commissioner finds that the first respondent has incurred disqualification, he shall obviously pass a formal order to that effect. If he has a doubt whether the first respondent ceases to hold office due to disqualification, it is obligatory on his part to take steps to make a reference to the State Government in accordance with section 12 of the said Act, 1949.

8. Though the petitioner sought action even against the respondent No.2, going by the affidavit of the third and fourth respondents, there is no finding recorded that the second respondent has carried out any illegal construction.

9. As far as the first prayer is concerned, if the order dated 7th March, 2011 continues to operate, the third and the fourth respondents will have to take immediate steps for the demolition of the illegal structure.

10. According, we pass the following order :-

- (i) If the order dated 7th March, 2011 (Exhibit-B to the petition) continues to operate as of today, we direct the third and fourth respondents to take steps for demolition of the illegal structures within a period of three months from today;
- (ii) We direct the Commissioner of the Kalyan Dombivli Municipal Corporation to consider whether the first respondent has incurred a disqualification under clause (1D) of section 10 of the Maharashtra Municipal Corporations Act, 1949;
- (iii) If the Commissioner comes to the conclusion that the first respondent has incurred a disqualification, he shall pass a formal order in that respect within a period of two months from today;
- (iv) If the Municipal Commissioner has any doubt as to whether the first respondent has ceased to occupy the office as a result of disqualification, he shall take steps in accordance with section 12 of the Maharashtra Municipal Corporations Act, 1949;
- (v) The writ petition is partly allowed in the above terms with no order as to costs;
- (vi) All concerned to act upon an authenticated copy of this order;
- (vii) Civil Application No.1890 of 2014 does not survive and hence disposed of.

(A.K.MENON, J.)

(A.S.OKA, J.)