

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

Writ Petition No.4925 of 2015

Rajendra s/o Mahadu Patil.

.. Petitioner.

Versus

The State of Maharashtra
And Others.

.. Respondents.

Shri. S.B. Talekar and Shri. U.R. Awate, Advocates, for
petitioner.

Shri. S.R. Yadav, Assistant Government Pleader, for
respondent Nos.1 to 4.

Shri. N.B. Khandare, Advocate, for respondent No.5.

Shri. M.S. Deshmukh, Advocate, for respondent No.6.

CORAM: T.V. NALAWADE, J.

DATE : 24 OCTOBER 2016

ORDER:

1) The proceeding is filed to challenge the order made on 25-4-2015 by the Returning Officer (Sub Divisional Officer, Pachora) by which the objection filed to the nomination of respondent No.6 for the post of President of the Bhadgaon Municipal Council is rejected.

2) Ordinarily, in view of the provision of section 51(4) of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 (hereinafter referred to as "the Act") appeal needs to be filed before the authority created under the Act. Learned counsel for the petitioner submits that in view of the exceptional circumstance like one petition, being Writ Petition No.4878/2015, is already filed with regard to the previous disqualification and as that circumstance needs to be used in the subsequent proceeding, present Writ Petition No.4925/2015 needs to be entertained even when appeal remedy is available. In view of these peculiar circumstances, this Court is deciding this writ petition also on merits. Other side counsels are heard.

3) It is the case of the petitioner that respondent No.6 was disqualified as councillor of Municipal Council Bhadgaon by order dated 26-7-2013 made by the learned Collector and this order was confirmed in appeal by the State Government on 24-4-2015. It is the case of the petitioner that the ground of illegal and unauthorized construction within the limits of the said local body was

proved against respondent No.6 in the past and as the said construction was not yet removed, respondent No.6 was not entitled to contest the election for the term 2015-2020. It is the case of the petitioner that the previous term of 5 years was up to 14-3-2015 and it was not possible for the respondent No.6 to contest the election which took place on 19-1-2015. Here only it needs to be observed that there was stay to the order of disqualification made by the Collector and the appeal before the Hon'ble Minister came to be decided subsequently i.e. on 24-4-2015. Respondent No.7 had also filed nomination for the post of the President and so he is made party to the present petition. The petitioner was also one of the candidates.

4) Notification in the official gazette about the elected Councillors was published on 20-1-2015. Copy of notice of the first meeting of the general body for the period 2015-2020 was issued on 23-4-2015 and the meeting was called on 30-4-2015. In this meeting there was programme of election to the post of the President and subsequently the election to the post of Vice President was also to be held.

5) The period for filing nominations for the post of the President was from 24-4-2015 to 25-4-2015. Scrutiny was to be done on 25-4-2015 after 2.00 p.m. and after 2 p.m. list of eligible candidates was to be published on 25-4-2015. In view of the provisions of the Act there was remedy of appeal against the order of the Returning Officer. The date 28-4-2015 was fixed for publishing the list of eligible candidates and time to withdraw the candidature was upto 29-4-2015. Election was to take place on 30-4-2015 at 11.05 a.m.

6) The present petitioner took objection before the Returning Officer which was of the aforesaid nature. It is already observed that the appeal filed before the Hon'ble Minister in the previous disqualification proceeding was dismissed on 24-4-2015 and till that date there was stay to the order of disqualification. In any case, the previous term was to come to an end on 29-4-2015 and so the defence was taken by the respondent No.6 that he was entitled to contest the election to the post of Councillor for the next term and he was also entitled to contest the election to the post of the President in next term. The

Returning Officer held that the disqualification was for the previous term 2010-2015 and said disqualification cannot operate to the new term, 2015-2020.

7) In view of nature of the grievance, relevant provisions of the Act need to be seen. For the present purpose relevant provisions are Sections 40, 41, 41-A and 44(1)(e), (3) & (4) of the Act. In view of the rival contentions and the nature of dispute it is necessary to consider the provision of section 44(1)(e), (3) & (4) and that portion of section 44 runs 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)

(c)

(d)

(e) 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 (Mah. XXXVII of 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 :

(2)

(3) In every case the authority to decide whether a vacancy has arisen shall be the Collector. The Collector may give his decision on receipt of the report of the Chief Officer under sub-section (2), or on his own motion or on an application made to him by a voter and such decision shall be communicated to the Councillor concerned, the Chief Officer and the applicant, if any. Until the Collector decides that a vacancy has arisen and such decision is communicated as provided above, the Councillor shall not be deemed to have ceased to hold office.

(4) Any person aggrieved by the decision of the Collector may within a period of fifteen days from the date of receipt of the decision of the Collector by him, appeal to the State Government and the orders passed by the State Government shall be final:

Provided that, no order shall be passed under sub-section (3) by the Collector or under sub-section (4) by the State Government in appeal, against any Councillor without giving him a reasonable opportunity of being heard.

Explanation.-- If any elected or nominated Councillor were subject to any disqualification specified in Section 16, at the time of his election, or nomination and continues to be so disqualified, the disqualification shall, for the purposes of this section, be deemed to have been incurred during the term for which he is elected or nominated."

Provisions of Sections 40, 41 and 41-A of the Act run as under :

"40. Duration of Council.-- (1) Every Council, unless sooner dissolved, shall continue for a period of five years from the date appointed for its first meeting and no longer.

(2) A Council constituted upon the dissolution of a Council before the expiration of its duration shall continue only for the remainder of the period for which the dissolved Council would have continued under sub-section (1), had it not been so dissolved."

"41. Term of office of Councillors.-- (1) The term of office of the Councillors shall be co-terminus with the duration of the Council.

(2) A Councillor may resign his office unconditionally at any time by notice in writing in his hand addressed to the Collector and delivered in person and signed before the Collector and then only such resignation shall be effective."

"41-A. Election to constitute Council.-- An election to constitute a Council shall be completed,--

(a) before the expiry of its duration specified in sub-section (1) of Section 40; or

(b) before the expiration of a period of six months from the date of its dissolution:

Provided that where the remainder of the period for which the dissolved Council would have continued is less than six months, it shall not be necessary to hold any election under this section for constituting the Council for such period."

The aforesaid provisions show that the Collector has the power to declare that disqualification and vacancy has arisen under the aforesaid ground. However, the disqualification will be limited to the period mentioned in section 44 i.e. the same term and it cannot be extended for the period after the expiry of the said term.

8) The aforesaid provisions need to be considered together. They show that the term of the office is co-terminus with the duration of the Council. The term is 5 years and it commenced from the date appointed for its first meeting. So, in the previous matter, previous term expired on completion of 5 years starting from 30-3-2010. The first meeting of the next term was scheduled on 30-4-2015. There is nothing in the aforesaid provisions to show that the person who is disqualified in the previous proceeding for the previous term, can be prevented from being elected for the new term. Such further bar can be seen in section 55-B of the Act but not in the aforesaid provisions. When there is no such bar created, it was not possible to reject the nomination of respondent No.6 filed for the post of the President. Whether due to continuation

of previous illegal and unauthorized construction he can be disqualified for further period and whether separate action can be taken under section 44 or 55-A, 55-B of the Act is a different matter. Further it needs to be kept in mind that in view of the provision of section 44(3) of the Act, till the Collector decides that vacancy has arisen, respondent No.6 was entitled to hold the office and exercise all the rights including the right to contest the election to the post of the President. Thus, there was no force in the contention made against the respondent No.6 that he was not entitled to contest the election to the post of Councillor and also to the post of the President. In view of these circumstance, this Court holds that it is not possible to interfere in the order made by the returning officer of acceptance of the nomination form of respondent No.6. In the result, the petition stands dismissed.

Sd/-
(T.V. NALAWADE, J.)