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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.6221 OF 2014

Mr. Sheetal s/o Ramesh Patil
Age – 38 years, Occ – Business,
R/o Raver, District – Jalgaon

PETITIONER

VERSUS

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| 1. State of Maharashtra
Through its Urban Development Department,
Mantralaya, Mumbai | RESPONDENTS |
| 2. Collector, Jalgaon
District – Jalgaon | |
| 3. Raver Municipal Council,
Through its Chief Officer,
Raver, District – Jalgaon | |
| 4. Mr. Nilesh Dinkar Tayade,
Age – Major, Occ – Nil | |
| 5. Mr. Pravi Ashok Ghete,
Age – Major, Occ – Nil | |

Respondents No.4 and 5
R/o Bharatratna Dr. Babasaheb
Ambedkar Nagar, Raver,
Taluka -Raver, District – Jalgaon

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Mr. V. J. Dixit, Senior Advocate i/b Mr. V. R. Patil, Advocate for
the petitioner

Mr. B. A. Shinde, AGP for respondents – State

Mr. S. P. Shah h/f Mr. D. R. Jethliya, Advocate for respondents
No. 4 and 5

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[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 28th JULY, 2016

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard learned advocates for the appearing parties finally with consent.

2. Petitioner invokes Articles 226 and 227 of the Constitution of India by way of present writ petition questioning validity, legality and propriety of order dated 16th July, 2014 passed by respondent No.1 in appeal bearing No. MUN 4413/31/PRA KRA-127/NAVI – 15 Urban Development Department, Mantralaya, Mumbai, confirming order dated 25th November, 2013 passed by respondent No. 2 – Collector, Jalgaon in disqualification petition bearing No.6 of 2013.

3. Elections to Municipal Council, Raver had taken place in December, 2011. The petitioner was declared elected as a councillor from ward No.4 as a candidate of "*Janakranti Aghadi, Jalgaon*". Since then the petitioner is a councillor, of Nagar Parishad, Raver.

4. Disqualification petition No.6 of 2013 came to be moved by present respondents No.4 and 5 contending that plot bearing

No.2278-A/2 is the property owned and possessed by Mr. Ramesh Natthu Patil – father of the petitioner and the petitioner and his father constitute a joint hindu family and are residing together in aforesaid property.

5. It is alleged that the petitioner has got sanctioned a plan for construction of shopping complex and residence over aforesaid property from Raver Municipal Council, however, the petitioner and his father, in collusion, have caused excess construction by misusing petitioner's position as a councillor of the Municipal Council, constructed residence, dispensary / hospital and a shop, named "*Sumangal*". The petitioner and his father built more rooms than the sanctioned plan and for the extra / additional rooms, they have not sought permission from the municipal council. The construction carried out has not been according to the sanctioned plan and is in excess.

6. It is contended by respondents No.4 and 5 that from information received under the Right to Information Act, 2005 in response to their application dated 3rd April, 2012 it glaringly surfaces that the petitioner and his father have not carried out construction as per the sanctioned plan and in respect of the same, the Raver Municipal Council had issued a notice to them

directing demolition of unauthorized construction, however, the petitioner and his father have neither responded to the notice nor have demolished the construction. Even the municipal council has not issued completion certificate to the petitioner in respect of the construction.

7. It is further referred to in the disqualification petition that the Municipal Council, Raver had issued a notice dated 11th February, 2005 asking the petitioner to demolish the unauthorized / excess construction within thirty days, however, the petitioner had not demolished the unauthorized / excess construction. The Municipal Council, Raver had again issued a notice dated 20th September, 2012 to Ramesh Natthu Patil asking him to demolish the unauthorized construction. However, the petitioner and his father have not demolished the excess construction and the same is still existing.

8. It is alleged in the disqualification petition that the petitioner is holding post of a councillor of the municipal council and is a public representative and by misusing his said position, by not causing construction according to the sanctioned plan and causing excess construction, has breached the trust and as such, there is sufficient cause and reason for disqualifying the

petitioner under section 44 of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965. (Hereinafter referred to as "Municipal Councils Act) It is further contended that as a matter of fact, upon noticing illegal action of the petitioner, Chief Officer, Municipal Council, Raver ought to have filed a report complaining about aforesaid, however, the Chief Officer has faltered in the same. As such, it was requested that the petitioner be disqualified and re-elections in respect of the vacant seat be directed.

9. The petitioner, in response to notice, had submitted his reply to the allegations made in the disqualification petition. The petitioner has denied allegations contending that the disqualification petition has been moved in order to vex and harass him and has been moved under political pressure, with a view to achieve unlawful gains. There is no cause of action for disqualification petition and the same is devoid of any honest intention.

10. It is contended that the petitioners in the disqualification petition are not residents of ward No.4 from where the petitioner has been elected and as such, they do not have any right or authority to lodge the disqualification petition.

11. The petitioner has been elected from ward No.4, which had been reserved for backward class category. He has not caused any construction over CTS No.2278-A/2 nor had obtained permission for the same. Said property is not owned or possessed by the petitioner. The property is of his father and him and his father are independent of each other in residence, business and occupation. By making use of father's property, it is attempted under the disqualification petition to keep away the petitioner from the post of councillor. The petitioner has neither carried out any illegal construction nor has caused any encroachment. The petitioner has no concern with respect to the construction. The disqualification petition is politically vindictive.

12. The petitioner has further referred in the reply to that while he had been councillor, during 2008-2011, a similar disqualification application had been moved by one Mustafakhan Gulabkhan and the same came to be dismissed under order dated 17th November, 2008 by the Collector. Said order has become final. In view of aforesaid, the petitioner would not be disqualified for the alleged illegal / unauthorized construction.

13. It has been specifically denied that his father Dr. Ramesh Natthu Patil and him are joint in family. He has asserted that

they have been separate.

14. It is contended that the construction has been carried out in 1982-83 and raising a dispute in respect of the same now is highly improper and illegal. No illegal or unauthorized construction or encroachment has been caused during the period of the petitioner being councillor. Since the petitioner represents reserved ward, his said right and opportunity is sought to be taken away under the ill-motivated action by filing disqualification petition. Claiming that construction is of 1982-83 and relying on a citation in the case of “*Ganesh Arun Chavan V/s State of Maharashtra and Others*” reported in 2013 (5) Bom.C.R. 297, it has been contended that for any illegal or unauthorized act by a relative would not entail disqualification of a councillor. Ratio in said judgment is applicable in present case and illegal or unauthorized construction cannot be imputed to the petitioner. The construction has not taken place during the period of him being a councillor. The disqualification petition cannot be maintained against him and the same is unlawful and untenable and deserves to be dismissed.

15. The respondents submitted written submissions contending that the petitioner, along with his father are joint in

family and the same can be borne out from the provisional voter's list, which shows same address for them. Petitioner runs hotel "Sai Palace" in the disputed property and has obtained certificate in respect of the same from Executive Magistrate, which shows same address for running business of hotel. Additionally, his father's consent letter has also been submitted and accordingly permission had been granted for running hotel business. It is further referred to that initially, the Municipal Council had issued no objection certificate, however, the same came to be cancelled under order dated 6th November, 2010, since the construction over the property had not received completion certificate. Although permission had been sought for construction of shopping complex and residence, the construction has been carried out in excess, encroaching over more area and three permanent rooms have been constructed in excess along with shed cover of plastic sheets. As such, the petitioner or his father have caused construction in excess of permission granted. The construction has not been carried out in accordance with sanctioned plan. Information solicited under the Right to Information Act under communication dated 3rd July, 2013 reveals aforesaid.

16. It is also contended that Dr. Ramesh Nathu Patil had been

issued notice dated 20th September, 2012 by the Municipal Council for removing unauthorized construction. However, taking disadvantage of position of the petitioner neither the petitioner nor his father have demolished the unauthorized construction.

17. It has further been referred to that under application dated 3rd April, 2012, the petitioners in disqualification petition had sought information under the Right to Information Act and they had been supplied with information and documents, which contain notice dated 11th February, 2005 for removal of unauthorized construction, no objection certificate issued for carrying the hotel business dated 16th February, 2010 and the application made by the petitioner seeking permission for running hotel business. According to the respondents, said information and documents do establish that construction has not been carried out in accordance with sanctioned plan and despite notice by the Municipal Council, the same has not been removed by the petitioner or his father. Due to non removal of unauthorized construction, neither the petitioner nor his father have received completion certificate. The unauthorized construction has been carried out by taking disadvantage of the position of the petitioner as a councillor. Since pursuant to notice

dated 11th February, 2005 unauthorized construction had not been removed, once again on 20th September, 2012, another notice had been issued to Dr. Ramesh Nathu Patil, however, neither the petitioner nor his father have demolished said structure. Since the petitioner is holding post of a councillor, taking disadvantage of the same being people's representative, unauthorized construction has been carried and as such, pursuant to section 44 of the Municipal Councils Act he has incurred disqualification for being a councillor. Despite pointing out this to the Collector, he has not made any report in respect of the same as required and as such, the petitioner be disqualified and re-election, in the place of the petitioner be directed.

18. Respondent No.1 allowed the disqualification petition considering that pursuant to section 44 (1) (e) of the Municipal Councils Act, if a councillor has constructed or constructs by himself, his spouse or his dependent, any illegal or unauthorized structure violating the provisions of said Act, or the Maharashtra Regional and Town Planning Act, 1966 or the rules or bye-laws framed under said Act; or has directly or indirectly been responsible for, or helped in his capacity as such councillor carrying out such illegal or unauthorized 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 unauthorized structure, then he would incur disqualification from being a councillor. It has further been referred to that from the area of ownership of 1139.3 square meters, petitioner's father had been permitted to cause construction over an area of 108.86 square meters in 1982 and further in 2000 he had been permitted construction over an area of 150.18 square meters for commercial purposes and had been allowed to carry out minor alterations in the same in 2010. However, during tax survey in 2013-14, it occurred that on the first floor of CTS No.2278/A/2+6, three rooms aggregating to 540 square feet were found to be newly built and accordingly, its noting had been taken in tax register. Since no permission had been taken for said purpose, then Chief Officer had issued a notice on 3rd July, 2013 for removal of unauthorized construction. However, while the spot inspection had been taken on 14th November, 2013 by the construction supervisor, unauthorized construction was found to be as it is. Thus from this the Collector purported to deduce that petitioner's father had caused unauthorized construction without permission. The Collector purported to distinguish the citation relied on, referred

to herein above, relied upon on behalf of the petitioner finding that the same is a decision in respect of a member of Village Panchayat, whereas the matter before him is under the provisions of the Municipal Councils Act and since it appeared to him that father of the petitioner has caused illegal construction, the decision may not be able to hold the situation, as provisions of Bombay Village Panchayat Act are different. He further considered that earlier disqualification petitioner during 2008 had been dismissed since it could not be proved that there had been any unauthorized construction. However, in the present matter, during tax survey it appeared that there has been unauthorized construction of about 540 square feet and there is no permission in respect of the same, which would be evident from notice dated 3rd July, 2015 and the notice having not been subjected to any litigation, it would tantamount to acceptance of the allegations in the same and since it appears that during period of the petitioner being councillor the unauthorized construction has taken place, he considered that the petitioner has incurred disqualification.

19. Matter was taken in appeal by the petitioner and the appellate authority had under interim order dated 18th November, 2014, on interim relief application, stayed the order

disqualifying the petitioner. Subsequently, however, under the order dated 16th July, 2015, the appeal came to be dismissed under the orders of the appellate authority.

20. The appellate authority though has referred to contentions on either side, while it came to take decision in the matter, it has simply relied on the observations by the Collector in his order dated 25th September, 2013 and the report by the Chief Officer of the Municipal Council from there it purported to cull out that the impugned construction is of the year 2013 and as such, the petitioner incurs disqualification, the construction being during his tenure as a councillor.

21. Learned Senior advocate Mr. V. J. Dixit for the petitioner has relied on a decision in the case of “*Jagdishchandra narayanrao Karemore V/s District Collector and Others*” reported in 2009 BCI 34 : 2009 (2) ALL MR 685 : 2009 (2) Mh.L.J. 553. He further refers to and relies on a decision in the case of “*Ganesh Arun Chavan V/s State of Maharashtra and Others*” reported in 2013 (5) Bom.C.R. 297. According to learned senior advocate Mr. Dixit, for the petitioner none of the conditions of section 44 (1) (e) of the Municipal Councils Act can be said to have been satisfied. His father is not dependent as is required under the statutory provisions nor his father can be

said to be a spouse and the construction cannot be attributed to the petitioner at all, for, there is nothing on record to show that it is the petitioner who has carried out the alleged unauthorized or illegal construction. Nor it can be said that it is the petitioner who has helped him carrying out alleged unauthorized or illegal construction. He submits that it is not conclusively proved that construction is during his tenure as councillor. He, therefore, submits that section 44 (1) (e) of the Municipal Councils Act is not applicable to the petitioner's case and thus, he could not have been disqualified. He further refers to a decision in the case of "*Javed Shaikh Mustaque Patel V/s State of Maharashtra and Others*" reported in 2009 (3) Bom. C. R. 719 : 2009 (3) ALL M. R. 40 : 2009 (2) Mh.L.J. 925, wherein the division bench has held thus -

"27. In view of the above, we have no hesitation to hold that in order to attract disqualification under section 44 (1) (e) of the Act, illegal or unauthorized construction violating the provisions of the Act, or the Maharashtra Regional and Town Planning Act, 1966 or the Rules or Bye-laws framed under the said Acts, must have been carried out by a Councillor, either by himself, his spouse or his dependent during the term of his office and consequently any construction undertaken prior to his tenure can not be a ground to disqualify the Councillor. We answer the reference accordingly."

Learned advocate for the petitioner refers to that aforesaid observations apply on all fours to the present situation. He reiterates, it has not come on record that the construction

can be said to have been carried out during the petitioner being councillor.

22. Learned advocate for the respondent – Mr. S. P. Shah, however, opposes the submission that when it has emerged that a notice had been issued for demolition, which had been issued during tenure of petitioner being councillor and there is no removal of the unauthorized / illegal construction and further tax survey had also taken during regime of petitioner being councillor, as such, the orders of the two authorities being based on position emerging from record, the same are not liable to be disturbed.

23. He purports to take support from a decision in the case of *“Devidas Matiramji Surwade V/s Additional Commissioner, Amravati and Others”* reported in 2012 BCI (0) 944. The judgment is delivered on factual background that though it was sought to be contended that it was father, who can be said to have encroached upon and encroachment was prior to election of the appellant, and in such a case, the appellant would not be able to extricate himself of occupying the encroached portion and as such, is an encroacher, during regime. In the circumstances, said citation would hardly carry forward case for the respondents. He also refers to a decision in the case of *“Sheela Dilip Daberao V/s State of Maharashtra*

and Others” reported in 2015 (3) *Mh.L.J.* 231, wherein also the situation was similar that the member had been residing on an encroached portion of the plot.

24. It transpires that notices had been issued for removal of illegal / unauthorized construction even before the petitioner had been elected in 2011. While the tax survey had been carried out in 2013 for the purpose of levy of tax, entry of three rooms admeasuring 540 square feet had been taken. Unauthorized construction notices had been issued in 2005 or for that matter in 2012. Entry of excess construction in tax register was in respect of the construction after the notices had been issued. In the circumstances can it be said that construction which has been shown in tax register can be said to be a construction after 2011. The appellate authority appears to have been overwhelmed by consideration that since tax survey had taken in 2013 and notice had also been issued in 2013, the construction is of the year 2013. Room for such assumption does not appear to be borne out clearly, having regard to the background as has been referred to hereinabove.

25. Facts, as those occur, which are not seriously disputed as can be gathered, are the petitioner had been elected in 2011. It

is contended on behalf of respondents No.4 and 5 that notices had earlier on been issued in 2005 for demolition of unauthorized / illegal construction to father of the petitioner / petitioner. Subsequently, a notice had also been issued in the year 2012 for removal of unauthorized / illegal construction to father of the petitioner. The construction had been permitted to be carried out over an area of 108.86 square meters in 1982-83 and further in 2000, construction had been permitted over an area of 150.18 square meters for commercial purposes. In 2010, owner – father of the petitioner had been allowed to carry out minor alterations in the same. It further transpires that no objection certificate had been issued in favour of the petitioner to run hotel business over said premises. However, subsequently, the same had been revoked, since completion certificate had not come forth. Around September, 2012, there had been a notice for removal / demolition of unauthorized / illegal construction to father of the petitioner and then it is stated that the tax survey had been carried out in the year 2013, when it came to be recorded that there had been an excess construction of three rooms admeasuring about 540 square feet, which had further been endorsed in inspection in the same year and accordingly notice had been issued under the Maharashtra Regional and

Town Planning Act for action.

26. In the circumstances, it does not clearly come out as to whether construction found in tax survey is subsequent to the election of the petitioner, as there are lot of intervening events occurring, about notices having been given, no objection certificate having been revoked and as such, a fact finding will have to take place bringing out the period during which the excess construction has been carried out. It will have also to be considered whether the notices issued for demolition pertain to some other construction than the construction which had been recorded under the tax survey.

27. The situation calls for a fact finding. The fact finding would be necessary in order to throw light on the accusations / grounds now being sought to be urged for removal of the petitioner.

28. Further, if it transpires that the construction is during the tenure of the petitioner as a councillor, whether the conditions for disqualification can be said to be satisfied.

29. It would be worthwhile to refer to section 44 (1) (e) of the Municipal Councils Act, which reads thus -

“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 unauthorized 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 unauthorized 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 unauthorized structure”

30. Thus, it will have to be considered that whether the alleged illegal / unauthorized construction can be said to be carried out by the petitioner himself for his spouse or by his dependent or for that matter he has helped in his capacity as councillor in carrying out such illegal or unauthorized construction or by written communication or physically obstructed or tried to obstruct any competent authority from discharging its duty in demolishing the illegal or unauthorized structure or as to whether father of the petitioner can be said to be dependant on the petitioner. These appear to be requirements under section 44 (1) (e) of the Municipal Councils Act. Decisions so rendered by the Collector or for that matter appellate authority do not

depict that these aspects have weighed and have received due consideration.

31. In the circumstances, unless and until it is borne out on facts that the circumstances and conditions are available for disqualification of the petitioner, it would be difficult to consider that a proper decision is being reached, on proper verification of facts and record. The matter deserves to be remanded to the collector for re-adjudication giving opportunity to the parties. Parties accordingly are to appear before the Collector on 27th September, 2016 obviating notice from him to pursue proceedings.

32. Writ petition stands allowed. Rule is made absolute in following terms.

33. The impugned orders are set aside, the matter is remitted to the Collector, to give finding as to whether, the alleged unauthorized construction had been carried out during the petitioner's tenure as Councillor and further, as to whether, if so carried out, he had been directly or indirectly responsible for or has helped in his capacity as such, in carrying out illegal and unauthorized construction.

34. The Collector to go on with the matter by giving opportunity to the parties concerned and decide the same expeditiously preferably within a period of one month from the date of receipt of this order.

[SUNIL P. DESHMUKH, J.]

drp/wp6221-14