

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

WRIT PETITION NO. 11795 OF 2015

Makarand @ Nandu Shursen Raje Nimbalkar ..PETITIONER

VERSUS

State of Maharashtra and Others ..RESPONDENTS

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Mr. R.S. Deshmukh, Advocate for petitioner.

Mr. A.P. Basarkar, A.G.P. for Respondent Nos. 1 to 3.

Mr. V.B. Deshmukh, Advocate for Respondent No.4.

Mr. N.B. Khandare, Advocate for Respondent No.5.

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CORAM : T.V. NALAWADE, J.

DATED : 19th OCTOBER, 2016

ORDER :

1. The petition is filed to challenge the order made by the Hon'ble Minister for Urban Development under Section 55-B of the Maharashtra Municipal Council, Nagar Panchayats and Industrial Townships Act, 1965 (hereinafter referred to as 'the Act') by which the present petitioner is disqualified from the post of both Vice-president and Municipal Councilor of Municipal Council, Osmanabad. By the same order, the petitioner is debarred from contesting the election to the said council for the period of next six years from the date of the order. Both sides are heard.

2. The petitioner was elected as Councilor in the aforesaid municipal council in the year 2006 for the term 2006-11. Respondent No.5 who had started proceeding for disqualification had contested the election from the rival political party. On 16th June, 2006 the petitioner was elected to the post of Vice-president of the council.

3. Respondent No.5 filed proceeding before the Collector, Osmanabad under Sections 44, 55A and 55B of the Act and he contended that by misusing his post as Councilor and Vice-president, the present petitioner had made illegal construction of his house bearing House No. 22/63 situated within the local limits of the Municipal Council, Osmanabad. The application was given on 07th January, 2011 and notice came to be issued on 22nd February, 2011 against the present petitioner. Prior to issuing show cause notice, the Collector collected the report from Town Planning Authority of Osmanabad and Chief Officer of Municipal Council, Osmanabad in respect of the allegations. The report was to the effect that construction was made over more area than the permission granted and the construction was made in the space which is required to be kept as set back as per the Town Planning, Development Rules. Copies of these reports were supplied to the present petitioner by the Collector and it was informed specifically that there was excess construction of 298.93 sq. meters and that was of

aforesaid nature. Thus there was breach of the rules made for development, there was construction by using more F.S.I. than permissible and construction was made on the space which was required to be kept vacant as set back. The petitioner was asked to appear before the Collector for showing cause as to why action against him as provided under Section 44(1) (d) should not be taken. It needs to be mentioned that the provision of Section 44(1)(c) is applicable when there is misconduct of aforesaid nature from Councilor. In any case, the specific allegation against him and circumstances were informed in the show cause notice by the Collector.

4. The petitioner filed reply to the aforesaid show cause notice. He contended that the construction permission was granted by the local body on 05th February, 2009 to his father – Shursenraje Nimbalkar and he admitted that he was holding the post of Vice-president of the Municipal Council, Osmanabad at the relevant time. But he denied that construction was made of more than permissible F.S.I. and it was made in set back space. He contended that occupancy certificate was also given in respect of the said construction. He denied that he misused the post and due to his influence, political influence, the authority had given construction permission and the occupancy certificate and the authority was not taking action to pull down the construction.

5. The present petitioner contended in the reply that his father was not depending on him and he had other sources of income. He also contended that for about one year prior to his death his father was living separate from him. He contended that the construction was made by his father and he had no concern with the said construction.

6. After filing the reply of aforesaid nature, the present petitioner rushed to the Hon'ble Minister for Urban Development and filed application on 21st May, 2011. He prayed for transfer of the matter pending before the Collector, Osmanabad to other District Collector and he prayed for relief of stay to the proceeding which was pending before the Collector, Osmanabad. In the year 2011, the political party to which the petitioner belongs was in power in the State.

7. By letter dated 10th June, 2011, the Secretary directed the Collector, Osmanabad to send the record to the Hon'ble Minister and it was informed that as the proceeding was against the Vice-president of the Municipal Council, in view of the provisions of Section 55A and 55B of the Act, it was necessary to decide the matter at government level. The Collector was also asked to send his own report with regard to the allegations made against the present petitioner. The Collector gave report on 27th June, 2011

and informed that he was acting on the basis of report given by Town Planning Authority and Chief Officer of Municipal Council, Osmanabad but he had not given decision in view of the order made by Aurangabad Bench of High Court in Writ Petition No. 3953 of 2011. He sent the entire record of enquiry to the Hon'ble Minister.

8. Writ Petition No. 3953 of 2011 was filed by the present petitioner to challenge one order made by the Collector, Osmanabad in aforesaid enquiry by which the Collector had rejected the request of present petitioner to grant permission to examine the witnesses who were not mentioned in the witness list. The witnesses mentioned in the list were already examined and the matter was ready for decision. The other Hon'ble Judge of this Court made order on 01st August, 2011 and set aside the order of the Collector. The record was already called by the Hon'ble Minister in view of the provisions of Sections 55A and 55B of the Act. Direction was given to decide the proceeding expeditiously in Writ Petition No. 3953 of 2011. Direction was given to the present petitioner to give list of the witnesses who were to be examined for him within one week.

9. Show cause notice came to be issued by the government on 26th June, 2012 against the present petitioner in respect of aforesaid allegations made against him and it was informed to him that in breach of the provision

of law and rules, he had made the construction and it was protected due to the post he was holding and so he was expected to show as to why the provisions of the Act should not be used against him to disqualify him for the remaining period of the term and also for further period as provided in law. The documents like the reports of the Chief Officer of the Municipal Council, Osmanabad, the Town Planning Authority and the Collector and the documents like construction commencement certificate of the local body dated 05th February, 2009 and copy of occupancy certificate dated 14th July, 2010 were supplied alongwith this show cause notice. This show cause notice was also challenged by the present petitioner by filing Writ Petition No. 8028 of 2012 in this Court. This Court refused to entertain the proceeding and give relief and observed that it was open to the petitioner to file his reply before the Hon'ble Minister. This order came to be made on 01st October, 2012. It can be said that by filing writ petition, the petitioner obtained sometime and the decision of the proceeding before the Hon'ble Minister was protracted.

10. After disposal of the aforesaid writ petition, written intimation was given by government to the petitioner on 01st July, 2013 and he was asked to remain present with his counsel before the Hon'ble Minister on 04th July, 2013 for hearing. On 08th July, 2013, another written intimation was

given to him to ask him to produce copies of order if any made by this Court in writ petitions in his favour and in this intimation it was mentioned that the petitioner had appeared before the Hon'ble Minister on 04th July, 2013 and he had expressed that he wanted to produce the orders. On 07th August, 2013, he informed that he was not able to get the order made in L.P.A. No. 172 of 2012 filed by the Uday Nimbalkar – original complainant but he had produced the copies of the orders made in the proceedings filed by him.

11. Writ Petition No. 2827 of 2015 was filed against the present petitioner to prevent him from contesting the election to the post of President, Municipal Council, Osmanabad which was scheduled on 11th March, 2015. It was contended in the petition that the proceeding was kept pending which was to be considered under Section 55-B of the Act by the Hon'ble Minister and the present petitioner was misusing that circumstance though he was disqualified automatically in view of the provisions of the Act. Statement was made for the government in that proceeding that at the government level the proceeding will be expedited within 14 days from the date of order i.e. 13th February, 2015. This Court refused to interfere in the election which was scheduled on 11th March, 2015. Thus, the petitioner was allowed to contest the election to the post of President but the petitioner challenged this order by filing Special Leave to Appeal No. 9504 of 2015 in

Supreme Court. The proceeding was then withdrawn by making statement that the petitioner wanted to file review application. Review application was filed with application for condonation of delay and it was given no. 4419 of 2015.

12. In the review application, many surprising contentions were made. Objection was raised to the direction given in Writ Petition No. 2827 of 2015 to expedite the matter, within 14 days from the date of the order. Submission was made that petitioner wanted to show to the Court in the previous proceeding that the proceeding ought to have been decided by the Collector and the proceeding was not tenable before the Hon'ble Minister. Such submissions were made even when in the proceeding pending before the Hon'ble Minister the petitioner had participated for many years. The locus standy of the lady who had sought expeditious disposal was also challenged. These submissions were made in the year 2015 when the political party of the present petitioner, Congress(I) was not in the power in State and other party had come in power. In the past, when in the year 2011, direction was given to the authority to expedite the matter though at that time the matter was pending before the Collector, record was already called by the Hon'ble Minister and the proceeding was to be conducted under Section 55-A and 55-B of the Act. Thus there was already direction to

expedite the matter in the year 2011 but at that time the political party of the petitioner, Congress(I) was in power and it can be said that no progress was made in the proceeding which was pending before the Hon'ble Minister till the year 2015. Only when the complainant and others tried to see that the proceeding is expedited, all tactics were played by the present petitioner to see that the decision of the matter is protracted. It can be said that to some extent, this Court was also misled by the petitioner and the orders made by this Court were misused. All the matters filed by petitioner were clear cases of misuse of process of law.

13. The review application filed by the present petitioner was dismissed by this Court on 15th April, 2015 and this order was also challenged by filing petition for special leave nos. 13986 – 13987 of 2015 in Supreme Court. Though proceedings were withdrawn in the month of August, 2015, this circumstance again shows that tactics were played to see that the Hon'ble Minister does not give the decision. It is unfortunate that authority including the Hon'ble Minister do not touch the matters involving serious questions like present one when the proceedings are filed in the High Court or Supreme Court even when there is no stay granted by this Court. Such approach is misused by the persons like petitioner by filing many proceedings in this Court and Hon'ble Supreme Court.

14. After disposal of the Writ Petition No. 2827 of 2015, notices were given to the petitioner of hearing by the State Government on 16th April, 2015 and subsequent to that date. In April, the notice was given, but the petitioner requested for time by submitting that he wanted to challenge the order made by this Court and he had filed review application. The petitioner then filed another application before the Hon'ble Minister and prayed for giving particulars as to the date of his misconduct. He then filed another application before the Hon'ble Minister in May, 2015 and contended that the proceeding ought to have been kept before the Collector in view of the provisions of Section 44(1)(e) of the Act and he again sought time to file reply to show cause notice. He also requested to drop the proceeding in view of the aforesaid contentions. He filed application in June, 2015 and requested Hon'ble Minister for permission to lead oral evidence and fix the date for that. He filed one more application in June, 2015 and requested to give copies of the documents of entire file of enquiry which was pending before the Hon'ble Minister. In the application dated 26th June, 2015, however he admitted that he had appeared before the Hon'ble Minister and hearing was started on 06th May, 2015. On 17th August, 2015, the Hon'ble Minister decided the matter after considering the oral arguments of defence Counsel. The order was made after considering the record which includes reports of two authorities including the Collector. The petitioner was

disqualified by using provision of Section 55-B of the Act. This decision was challenged by filing Writ Petition No. 8760 of 2015 in this Court by the petitioner. Fortunately, the matter was disposed of immediately on 27th August, 2015 but this Court set aside the order of the Hon'ble Minister and remanded the matter back to the Hon'ble Minister. Direction was given to supply copies of documents alongwith show cause notice and petitioner was allowed to file reply. Liberty was given to the petitioner to file application for getting copies within seven days from the date of the order and direction was given to the Hon'ble Minister to dispose of the matter within eight weeks from 10th September, 2015. It can be said that alongwith show cause notice, documents mentioned in the notice were already supplied but the petitioner succeeded in getting the order of aforesaid nature from this Court. He had advanced argument before the Hon'ble Minister which can be seen from the first order made by the Hon'ble Minister on 17th August, 2015. He had avoided to file reply and he had sought many adjournments as already quoted.

15. Even when there was direction to expedite the matter and writ petition was decided on 27th August, 2015, the petitioner continued to play tactics and he applied before the Hon'ble Minister on 10th September, 2015 for supplying certified copies of the documents like copy of roznama,

evidence of witnesses if any recorded before the Collector, say alongwith documents filed by the petitioner before the Collector, complaint filed against the petitioner before the Collector and report submitted by the Collector to the Hon'ble Minister. The documents described above show that these documents were already with the petitioner and alongwith show cause notice, report of Collector was also supplied to him. He wanted to protract the decision and it can be said that only with that view, he filed such application on 10th September, 2015. On 14th September, 2015 with letter sent under Registered Post with Acknowledgment Due, the State Government again sent the record like show cause notice, copy of report of the Chief Officer of Municipal Council, copy of certificate of permission granted for construction dated 05th February, 2009, copy of occupancy certificate dated 14th July, 2010, copy of report given by the Town Planning authority dated 03rd February, 2011, other letters of Chief Officer of Municipal Council dated 07th March, 2011 and 27th June, 2011. Thus documents were supplied which were mentioned in the show cause notice to the petitioner and other documents were also supplied.

16. The petitioner then filed reply. The reply dated 24th September, 2015 is similar to reply filed before the Collector though he mentions some other circumstances like there was litigation between his father and uncle in

respect of suit property, the circumstance that his father had filed income tax returns separately for year 2008-09 and he was filing separate returns. He contended that his father was not depending on him for his livelihood and he started living separately from his father one year prior to the death of his father. On 24th September, 2015, he again requested to give copies of documents like copy of report of Collector on the basis of record which was before the Hon'ble Minister. On 23rd October, 2015, he filed one more application to get copy of the order of Collector by which adjournment was refused when petitioner had sought adjournment by contending that he was seeking transfer of the matter from the said Collector. That application was given on 23rd May, 2011. He also requested to supply the copies of the application given for issuing witness summons by him before the Collector and copy of roznama written in the file which was pending before the Collector in 2011. These circumstances again show that the petitioner was asking to supply the material which was not at all relevant with the matter which was pending before the Hon'ble Minister but he was trying to misuse the order made by this Court of aforesaid nature. He then requested for permission to lead oral evidence. On 28th October, 2015, he again requested to supply the documents which were on the file of the Collector which are quoted above. On that date he again requested for permission to lead oral evidence.

17. By letter dated 31st October, 2015, State Government informed to the petitioner that hearing of the matter was kept before the Hon'ble Minister on 05th November, 2015 at 11.15 a.m. in the office of the Hon'ble Minister at Mumbai. He gave application on 09th November, 2015 in the proceeding and submitted that he wanted to examine Smt. Prema Patil who had filed petition in the year 2015 which is already quoted to seek order of this Court of expeditious disposal of the present matter which was pending before the Hon'ble Minister. This circumstance shows that the petitioner had crossed all the limits and he was trying to protract the decision by making any contention. This was done even when he was represented by his Counsel before the Minister.

18. The Hon'ble Minister decided that matter on 02nd December, 2015 and the petitioner is disqualified not only in respect of the remaining period of present term but for further six years from the date of the order. The order shows that the decision was given on the basis of the argument advanced by the Counsel of the petitioner and of the aforesaid record. The Hon'ble Minister has specifically mentioned that every attempt was made by the petitioner to protract the decision.

19. In the present matter, learned Counsel for the petitioner argued following points:

(i) Reasonable opportunity was not given to the petitioner to have his say by the Hon'ble Minister. He was not allowed to give oral evidence and examine witnesses.

(ii) The proceeding itself was not tenable before the Hon'ble Minister.

(iii) In view of the nature of material, the disqualification is not possible and the matter indicates that if at all illegal and unauthorised construction was made, it was made by father of the petitioner and the petitioner has nothing to do with the said construction.

(iv) There is no material to draw inference against the petitioner that he misused the post whether as Councilor or as President or Vice President of the Municipal Council.

(v) In view of the nature of allegations and the material, the Minister ought not to have used the provisions of Section 55-B and at the most Section 55-A of the Act could have been used.

20. On merits it can be said that there is more than sufficient material against the petitioner to show that he and his father were living together in the same house which is constructed illegally when there was no permission to make the construction. Though, learned Counsel for the petitioner submitted that due to the decision given by the Civil Court, it needs to be presumed that the property was self acquired property of the father of the petitioner, record is otherwise. The property card of the record is there and it shows that in the year 1977, the property was standing in the name of grand-father of the petitioner. The name of Shursenraje Nimbalkar – father of the petitioner was entered in the property card first time in the year 2003. After the death of father of the petitioner, names of all the successors of Shursenraje Nimbalkar came to be entered in the property card on 02nd June, 2011 and mutation shows that name of present petitioner was also entered as owner in the property card. Thus there is sufficient material to infer that present petitioner was also the owner of the said house. The petitioner has contended that one year prior to death of his father, he was living separate from his father. He is trying to use only one income tax returns to show that separate returns were filed by them for the assessment year 2009-10. It can be said that separate returns were filed but the returns show that both were residents of the same address – Anand Nagar, Osmanabad. No record was at all produced by the petitioner to show that he

was living separate from his father. His father had shown income of Rs.2,10,000/- and the petitioner had shown income of Rs.1,88,000/-. Both had not paid income tax by showing some exemptions. No record of separate business was filed. This circumstance cannot be ignored while considering the allegations against the present petitioner.

21. The learned Counsel for petitioner submitted that document of relinquishment of right was executed infavour of brother of the petitioner – Chitrasen by present petitioner and his other brothers and sisters and that circumstance is sufficient to infer that the petitioner had no concern with the said property. Copy of the so called relinquishment document dated 12th July, 2011 is on record. It is already observed that in the property card, after the death of father of the petitioner, names of all his issues were entered as successors and the property was shown as ancestral property of the father of the petitioner. It is also observed that there is other record to infer that present petitioner was living with his father and they made illegal and unauthorised construction. So the document of relinquishment deed cannot help much to the present petitioner. Further, the reply filed by present petitioner to show cause notice indicates that he had knowledge of everything including date of application, date of permission, nature of construction made, etc. It was up to the petitioner to show that he was

living separate and he was not responsible for continuation which was illegal and unauthorised. On the contrary, there is record to show that even after noticing illegal construction, no action at all was taken for removal of the illegal and unauthorised construction. Present petitioner had become vice-president and then for sometime he was in-charge President also. This circumstance cannot be ignored.

22. The record of illegal and unauthorised construction shows that it was prepared by independent agency like Town Planning Authority and Chief Executive Officer of Municipal Council. The petitioner had become Councilor on 20th November, 2006 and the permission of construction was given on 05th February, 2009. The petitioner became vice-president on 21st June, 2009 but the occupancy certificate was given on 14th July, 2010 when the petitioner was vice-president. As per the record prepared by independent officers, the construction of four stored building was as under:

- (i) Construction of bottom floor was found to be made of 288 sq. meters as against 155.54 sq. meters permitted.
- (ii) Construction of second floor from bottom was found to be made of 302.40 sq. meters as against 178.73 sq. meters. permitted.

(iii) Construction of third floor from bottom was found to be made of 302.40 sq. meters as against permission of 155.54 sq. meters

(iv) Construction of forth floor from bottom was found to be made of 302 .40 sq. meters as against 155.54 sq. meters permitted.

Thus construction of around 300 sq. meters more than permission granted was made.

23. There was one more serious thing like no set back area was kept even towards the main road – public road and construction was made in the set back space also. Thus there was no scope of regularisation of such construction. This record and circumstances are sufficient to show that only when petitioner became Councilor, construction was started. During his tenure the construction was made and during his tenure as vice-president occupancy certificate was obtained and no action was taken like pulling down the illegal and unauthorised construction as the petitioner was holding the post of vice-president. Before granting occupancy certificate inspection of the construction needs to be made by officers of the local body.

24. The learned Counsel for respondent submitted that the finding is based on material. He submitted that there is sufficient material to infer that

the illegal construction could be made and protected due to the post the petitioner was holding and the occupancy certificate which could be obtained due to the post which the petitioner was holding viz. Vice-president. There is force in these submissions. The circumstance that occupancy certificate was granted even when there are aforesaid circumstances, is sufficient to infer that post was misused. Due to the circumstances already quoted it can not be said that only the father was owner. The petitioner was co-owner and he was living there and so he was responsible for the construction.

25. In respect of contention that reasonable opportunity was not given to the petitioner, relevant circumstances are already quoted by this Court. The petitioner did everything to see that authority was not able to give the decision of the matter. What amounts to reasonable opportunity depends on the facts of that case. The State Government is expected to give reasonable opportunity to the person against whom the action is to be taken. In the present matter, necessary record was supplied to the petitioner as already observed and there was no room to dispute that the construction of the aforesaid nature was made on the property of which the petitioner was co-owner and where he was living. If a person avoids the proceeding, it does not remain open to him to say that reasonable opportunity was not given to

him. The aforesaid material was more than sufficient to draw inference against the petitioner.

26. Submission made by learned Counsel for petitioner that proceeding was not tenable before the Hon'ble Minister is not acceptable. The show cause notice issued by the Government itself was challenged in the writ petition and that point is already considered by this Court. Further the aforesaid material and circumstances show that during the tenure of the present petitioner as vice-president, illegal and unauthorised construction was made and even occupancy certificate was given to the petitioner though it was in the name of his father. Provision of Section 55A and 55B of the Act are made only to take action against President/ Vice-president and so it cannot be said that proceeding was not tenable before the Hon'ble Minister. One more submission was made by learned Counsel for petitioner that show cause notice ought to have been signed by the Minister. This submission can never be accepted. In the provisions the authority mentioned is State Government and the Secretary of Government needs to execute the orders of the government and the Minister is never expected to sign the show cause notice. The Secretary is expected to act as per the directions of the Ministers who are discharging quasi judicial functions and so such contention cannot be accepted.

27. The learned Counsel for petitioner submitted that in show cause notice both the Section 55A and 55B were mentioned and even if best possible case against the petitioner is accepted, the penalty could not have been given as provided by Section 55B of the Act.

28. To ascertain as to whether there is force in the aforesaid contention made by the learned Counsel for petitioner, this Court has carefully gone through the scheme of the Act and particularly the provisions of Section 42, 44, 55A and 55B of the Act. The provision of Section 42 shows that State Government has power to take action against the Councilor on its own motion also if the Councilor has been guilty of any misconduct in discharge of his duties or he is guilty of any disgraceful conduct during his current tenure of office or even during his immediately preceding term of office as Councilor. In this Section also it is mentioned that reasonable opportunity of showing cause needs to be given to the Councilor before passing order under this Section. The period of disqualification mentioned in this Section is five years from the date of the order.

29. The provisions of Sections 55A and 55B of the Act are in respect of misconduct and disgraceful conduct of the person who was holding the

post of vice-president or President. The difference between the two provisions is that under Section 55A of the Act, the President or Vice-president will be removed from the post of President or Vice-president and he will not be eligible for reelection or reappointment as President or Vice-president as the case may be during the remaining term of the Councilor. Thus the person who was Councilor will not lose his post of Councilor even after such order. Under the provisions of Section 55B of the Act, such person will lose the post of Councilor also for the remainder of his term of the office and he will be also disqualified for being elected as Councilor till the period of six years has elapsed from the date of order of disqualification.

30. The provision of Section 55B, the first part of the Section reads as under:

Section 55B: Disqualification for continuing as Councillor or becoming Councillor on removal as President or Vice-president.

Notwithstanding anything contained in section 55A, if a Councillor or a person is found to be guilty of misconduct in the discharge of his official duties or being guilty of any disgraceful conduct while holding or while he was holding the office of the President or Vice-president, as the case may be, the State Government may,-

(a) disqualify such Councillor to continue as a Councillor for the remainder of his term of office as a

Councillor and also for being elected as a Councillor, till the period of six years has elapsed from the order of such disqualification;

(b) disqualify such person for being elected as a Councillor till the period of six years has elapsed from the order of such disqualification.

31. The aforesaid provision shows that discretion is given to the State Government to make order under Section 55B of the Act which is more harsh than the order mentioned under Section 55A of the Act. However, in both the cases, the State Government is taking the decision on the two grounds like misconduct in discharge of official duties or disgraceful conduct when the person was holding the office of President or Vice-president. Standard of proof however will be the same for provisions of Section 42, 55A and 55B of the Act as mentioned already.

32. It can be said that in view of the facts and circumstances of a peculiar case, the State Government may use the provision of Section 55B of the Act. It is always advisable for the government to start proceeding against both Section viz. 55A and 55B of the Act and the decision as to which provision needs to be used can be taken only at the time of passing of the order in the matter. In the present matter, the show cause notice was issued under both these provisions. This Court is avoiding to consider hypothetical

situations to classify the matters which can be fall under Sections 55A and 55B of the Act. However in the present matter it can be said that it is fit case where Section 55B of the Act can be used. The petitioner made illegal and unauthorised construction, he saw to it that occupancy certificate is issued even when the construction was illegal and unauthorised and it was causing nuisance as it was made without keeping the set back space. He did not admit the fault, misconduct and he went on to challenge the authorities. He filed proceeding for transfer of matter by making allegations against the Collector when his party was in power. The matter did not make progress when it was pending before the Hon'ble Minister when his party was in power. He did everything to see that the decision is not given by the Minister when his party was not in power. He enjoyed his post of office of President / Vice-president by keeping the matters pending. The matter came to be decided when the petitioner was not holding the post of President or Vice-president. Due to these circumstances no fault can be found with the order of the Hon'ble Minister by which the petitioner is prevented from being elected as Councilor till the period of six years has elapsed from the order of disqualification.

33. In view of the facts and circumstances of the present matter, it needs to be observed that Hon'ble Ministers are expected at least to apply

mind as they are exercising quasi judicial powers. Urgency needs to be shown in such matters by the Hon'ble Ministers, irrespective of the fact that the party loosing post belongs to the party of the Minister. Unless such steps are taken, the society will not believe that government is working for all of them and is not working to favour their party-men.

34. Learned Counsel for petitioner cited many reported and unreported cases before this Court. In the case reported as **2009(3) BCR 695 (Bombay High Court) (Ramdas Vs. Hon'ble Minister of the State Government)** this Court held that the misconduct was not proved as the unauthorised construction was 25 years old and there was allegation that President did not pull down the said construction. Thus the facts were totally different. In the case reported as **AIR 2012 SC 1339 (Ravi Vs. District Collector, Raigad)** the meaning of the term disgraceful conduct is given. There is no need to discuss disgraceful conduct in the present matter. The term misconduct is also discussed by the Apex Court and it is observed that when there is transgression of some established and definite rule of action or unlawful behaviour which is willful in character, it can be called misconduct. But the negligence or carelessness can also become misconduct in view of peculiar facts and circumstances of that case. Thus there can not be a straight jacket formula in this regard. In the present matter, there is

specific ground like the ground given in Section 44(1)(e) and so it is not necessary to discuss the term of misconduct. The ground is as under:-

Section 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 construct 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, 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:

35. In the present matter, the construction was in breach of provisions of Maharashtra Regional and Town Planning Act, 1966 (M.R.T.P.) and it was also against the rules and by-laws of the local body with regard to the construction permission and so there is not much scope to the petitioner to say that his conduct does not amount to misconduct. In Writ Petition No.

1436 of 2009 (Dattatraya Vs. State of Maharashtra and Others) decided by this Court the procedure which needs to be followed during such enquiry is discussed. It is observed that reasons needs to be recorded for passing order of disqualification and if reasons are not recorded, it amounts to violation of principles of natural justice. There can not be dispute over the proposition. Necessary material in this regard is already discussed. In Writ Petition No. 5030 of 2007 (Umesh Naik Vs. Hon'ble Minister for Urban Development), decided at Principal Seat of this Court, the provisions of Sections 55A and 55B are discussed and in that case also illegal and unauthorised construction was involved. This Court has observed that order can be made of disqualification if the Councilor has directly or indirectly being responsible for, or held in his capacity as such Councilor in carrying out such illegal or unauthorised construction thus, the order can be made against him. There cannot be dispute over this proposition. Relevant provision is already quoted. Reliance was placed on case reported as **2013(5) Bom.C.R. 297** of this Court at Principal Seat (***Ganesh Chavan Vs. State of Maharashtra and Others***). It was the matter of encroachment and the provision of Village Panchayats Act for disqualification of member of village panchayat is considered. The provisions of Mumbai Municipal Corporation Act are also considered. In view of the facts of that case it was held that encroachment was made by father and so the disqualification was not possible due to the

act of the father. The facts of the present case are altogether different and they are already quoted.

36. The copy of order made by this Court in Writ Petition No. 3836 of 2011 (Sangita Kadam Vs. State of Maharashtra) was produced. In view of the facts of that case, this Court observed that the order was not legal. The order was made by the Secretary under Section 55B of the Act when Government, Minister is expected to make the order. In the present matter, the order is made by Hon'ble Minister and so this case is of no use. It is already observed that learned Counsel has argued that even show cause notice ought to have been signed by the Hon'ble Minister and this Court has observed that this proposition cannot be accepted. It needs to be presumed that Secretary had sent the show cause notice to execute the order made by Hon'ble Minister.

37. Reliance was placed on case reported as ***AIR 1996 Bombay 227 (Baburao Vs. State of Maharashtra and Others)***. Facts of this reported case were altogether different and allegation was of 'neglect'. When there is allegation of neglect, the facts making out negligence need to be made out and they need to be informed to the person against whom proceeding is started. The observations made in that case are of no help in view of

relevant facts of this case which are already quoted. Thus, there is no room to interfere in the decision given by the Hon'ble Minister. In the result, petition stands dismissed.

(T.V. NALAWADE, J.)

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