

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****WRIT PETITION NO. 3707 OF 2016**

Shri Mallesh Shivan Shetty
Age 48 years, Occ.-Corporator,
R/at. House No. 1827, Netivali Naka,
Haji Malang Road, Kalyan (East),
District Thane.

....Petitioner.

Vs.

- 1 The Commissioner,
Kalyan Dombivali Municipal
Corporation Kalyan.
Having office at Shivaji Chowk,
Kalyan (W), Dist. Thane.
- 2 State of Maharashtra,
Through Urban Development
Department, Mantralaya, Mumbai,
Served through the Govt. Pleader
(Writ Cell) Appellate Side,
High Court, Mumbai.
- 3 Shri Narendra Krishnanath Gupte,
Age ____ years, Occ.-Corporator,
R/at Rajnigandha, B-3/116,
Netivalli, Kalyan (E), Dist. Thane.
- 4 Shri Prakash Kalu Gaikwad,
Age 50 years, Occ. Business
R/at Prakash Kalu Gaikwad Chawl,
Behind Gorakshanath Temple,
Tisgaon Naka, Kalyan (East),
Taluka-Kalyan, Dist. Thane

5 Shri Santosh Ganpat Shelar,
Age 40 years, Occ.-Business,
R/at 102/1, Anil Apartment,
Near Saket Bungalow, Chinchpada
Road, Katemanivali, Kalyan (East),
Taluka-Kalyan, Dist. Thane

....Respondents.

Mr. P.K. Dhakephalkar, Senior Advocate a/w Mr. S.M. Oak, Mr. Saga Joshi and B.G. Tangsali for the Petitioner.

Mr. D.J. Khambata, Senior Advocate a/w Mr. Pheroze Mehta and Mr. A.S. Rao and Mr. Prashant Kamble for Respondent No.1.

Mr. V.N. Sagare for the Respondent-State.

Mr. A.Y. Sakhare, Senior Advocate a/w Mr. Raju D. Suryawanshi for Respondent No.3.

**CORAM : ANOOP V. MOHTA AND
A.A. SAYED, JJ.
DATE : 6 APRIL 2016.**

ORAL JUDGMENT (PER ANOOP V. MOHTA, J.):-

As the regular Bench could not take this matter and in view of urgency expressed, circulated before this Bench. Heard finally, by consent of the parties.

2 Rule. Rule is made returnable forthwith.

3 Though this Writ Petition was served upon Respondent Nos. 4 and 5, none appeared for them. Affidavit of service to that

effect is filed by the Petitioner. The same is taken on record. All other main contesting parties are heard.

4 The Petitioner, who is elected as Councillor from Ward No. 42 of Kalyan Dombivali Municipal Corporation in October/November 2015, has filed the present Writ Petition thereby, challenged the order passed by the Commissioner, Kalyan Dombivali Municipal Corporation-Respondent No.1 dated 23 March 2006, which reads as under:-

ORDER

- 1) *Shri. Mallesh Shivan Shetty, has incurred disqualification as the councillor from Ward No. 42 of Kalyan Dombivli Municipal Corporation u/s. 10(1D) of the Maharashtra Municipal Corporation Act.*
- 2) *The representation of Shri. Narendra Krushnanath Gupte is finally disposed off in above terms.*
- 3) *Copy of this order be given to Shri. Mallesh Shivan Shetty, Shri. Narendra Krushnanath Gupte and The Municipal Secretary, Kalyan Dombivli Municipal Corporation."*

5 Admittedly, the Petitioner got elected in Ward No.68 of Kalyan Dombivali Municipal Corporation for the year 2010-2015. Based upon a complaint against the Petitioner that he has carried out

an unauthorized construction and is required to be disqualified as the Councillor, the proceedings in question had been initiated. Prior to this, during his earlier tenure, a show cause notice was issued under the Maharashtra Municipal Corporation Act, (For short, “MMC Act”) thereby, calling upon the Petitioner to give reply as to why the alleged illegal construction described in the notice, should not be demolished. The Petitioner resisted the show cause notice by filing reply. Ultimately, on 4 March 2014, the Corporation has passed an order holding that the alleged construction carried out by the Petitioner is illegal.

6 Respondent No.1, thereafter, issued another show cause notice seeking explanation as to why he should not be disqualified as a Councillor for his remaining period as per the provisions of Section 10(1D) of the MMC Act. The statement is made that no further steps were taken by the Respondents, except the show cause notice. The Suit was filed by the Petitioner challenging order dated 4 March 2014, in the Court of Civil Judge, Junior Division, Kalyan. The Suit is pending. There was no declaration and/or order passed of disqualifying the Petitioner in his tenure which ended on 11

November 2015.

7 A fresh election was declared and the Petitioner has participated in the election by filing nomination on 25 October 2015. The Petitioner got elected on 2 November 2015, for the term 2015-2020. As noted above, though show cause notice was issued, no further steps were taken against the Petitioner of disqualification, during the earlier tenure. However, Respondent No.3 made a complaint to Respondent No.1 pertaining to the same unauthorized construction by the Petitioner, with prayer to declare that the Petitioner has incurred disqualification and Respondent No.1 to pass formal order accordingly, which is impugned in the present Petition.

8 The learned Senior Counsel appearing for the Petitioner, has cited following Judgments and orders in support of his submission to set aside the impugned order, being bad in law and unsustainable.

a) *Madhukar Devram Patil Vs. State of Maharashtra*¹

b) *Sajida Nihal Ahmed, Malegaon Vs. Malegaon Municipal Corporation*²

1 AIR 2004 Bom 473 = 2004(6) BCR 659

2 AIR 2005 Bom 81 = 2005(1) BCR 142

- c) *Surjitsing J. Girniwale & Ors. Vs. Commissioner, Nanded Waghala Municipal Corporation & Anr.*³
- d) *Martin Moresch Vs. State of Maharashtra*⁴
- e) *Noorjahan M. Aslamansani Vs. State of Maharashtra*⁵
- f) *Vithal Son of Nityanand Mohite Vs. State of Maharashtra*⁶
- g) *Mr. Nitin Baburao Pote Vs. Kalyan Dombivli Municipal Corporation & Ors.*⁷
- h) *Prakash Kalu Gaikwad Vs. Sachin Dattatraya Pote & Ors.*⁸

9 The learned Senior Counsel appearing for Respondent No.1 and learned Senior Counsel appearing for Respondent No.3 have supported the order with reasons. The learned Senior Counsel have read and referred the provisions of Sections 10(1D), 11 and 12 of the MMC Act. Sections 10(1D), 11 and 12 of the MMC Act read thus:-

“10 Disqualification for being a councillor,

(1) Subject to the provisions of Sections 13 and 404, a person shall be disqualified for being elected and for being a

3 2007(2) Bom. C.R. 617

4 2001(4) BCR 635 = 2001 (4) MhLJ 643

5 2004(2) BCR 468 = 2004 (3) MhLJ 435

6 2007(6) BCR 571

7 WP NO. 5069 of 2015 dated 14 July 2015 (A.S. Oka & Revati Mohite Dere, JJ.)

8 WP NO. 9213 of 2013 dated 9 March 2015 (A.S. Oka & A.K. Menon, JJ.)

councillor, if such person -

.....

(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 or bye-laws framed under the said Acts; or has directly or indirectly been responsible for, a 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.

(emphasis added)

11 Disabilities from continuing as councillor

A councillor shall cease to hold office as such if at any time during his term of office he, -

(a) becomes disqualified for being a councillor by reason of the provisions of Section 10;

(b) -----

(c) -----

(d) -----

12 Questions as to disqualification to be determined by the Judge.

(1) If any doubt or dispute arises whether a councillor has ceased to hold office as such under Section 11, such councillor or any other councillor may, and at the request of the Corporation, the Commissioner, shall refer the question to the Judge.

(2) On a reference being made to the Judge under subsection (1), such councillor, shall not be deemed to be disqualified until the Judge after holding an inquiry in the manner provided by or under this Act determines that he has ceased to hold office.”

10 The Commissioner, in our view, wrongly held that the Petitioner has carried out unauthorized construction, considering the Scheme of Sections 10(1D), 11 and 12 of the MMC Act. It is necessary for the Commissioner to come to the conclusion that as to whether the Petitioner, being the Councillor, has carried out unauthorized construction during his present tenure. Admittedly, there is no such case that such construction is carried out during his present tenure. No such action was taken in the Petitioner's earlier tenure. The conclusion so arrived at by the Commissioner is without any discussion on the interpretation of Section 10(1D) and whether such construction activities were carried out during the Petitioner's earlier tenure cannot be countenanced and cannot be the foundation to dislodge a sitting Councillor. The Commissioner has no authority and jurisdiction even to take such decision, without deciding the

issues/disputes for want of specific provisions, is another factor. The drastic action of disqualification, based upon such unauthorized construction, which is not during the present tenure, is therefore, bad in law. Respondent No.1 cannot be permitted to add more reasons through an affidavit in reply, in the Writ Petition, in this regard.

11 The fact that the construction is still in existence, in our view, cannot be the reason to dislodge the elected Councillor without following due procedure of law and by not referring the matter/proposal to the General Body of the Corporation for making a reference to the Judge. Issue of illegal construction was prejudged and is subject matter of pending Suit.

12 Admittedly, it is on Respondent No.3's representation/complaint, the hearing was fixed by the Commissioner and not by invoking any other specific provisions before taking such action. The Corporation has wrongly interpreted even the Judgment cited, by holding that the Judgment passed by this Court (Coram:- Anoop V. Mohta and G.S. Kulkarni, JJ.) in *Mr. Shailesh Manohar Patil Vs. Thane*

*Municipal Corporation & Ors.*⁹ has not attained finality, as the Supreme Court has issued notice. The effect and operation of that Judgment was not stayed by the Supreme Court. In the result, the order of setting aside the disqualification order of the Commissioner, in those matters are in force. The Commissioner, ought not to have taken the decision in view of above reasons to hold that the Petitioner-Councillor has incurred disqualification, based upon the show cause notice issued during the earlier tenure of the Petitioner-Councillor.

13 The issue of limitation about the Suit, no way sufficient to deny the defence of the Petitioner referring to the stated and/or such unauthorized construction. The submission is made by the learned Senior counsel appearing for Respondent No.1 that having once declared and/or found that the Petitioner has constructed unauthorized building, that itself is sufficient to declare him disqualified, is unacceptable, in the present case. The requirement of reference and/or putting the matter to the Corporation's General Body for the reference to the Judge, as contemplated under Section 12 of the MMC Act, have not been complied with by the Commissioner.

9 WP No. 11070 of 2015 dated 26 February 2016

14 One thing which is clear even from the discussion and the submission so made by the learned Senior Counsel appearing for Respondent No.1, that there is no provision and/or procedure pointed out whereby, the Commissioner is empowered to pass such order formally and/or otherwise. The power given to the Commissioner to pass such impugned order, in absence of any specific power, in our view, affects the rights of the elected Councillor. In the present case, there is no finding given that the unauthorized construction is made by the elected Councillor- Petitioner during running tenure, after being elected as Councillor.

15 The Petitioner has participated and got elected in the election, inspite of the background of earlier notice about the unauthorized structure. Having once permitted the Petitioner to participate in the election, the submission revolving around these Sections that he ought not to have been permitted and/or has already incurred disqualification even on the date of his participation in the election, is also unacceptable, as admittedly, the Respondents never took effective steps during the concerned tenure at earliest.

Therefore, invocation of these provisions after the new election is unjust, impermissible and bad in law, in the facts of the case.

16 Admittedly, as recorded above, no show cause notice of any kind given to the Petitioner after he got elected in view of the fresh election. The reasons so given for disqualifying the Petitioner are admittedly based upon the allegations in the show cause notice given during his earlier tenure, so referred above. There is no finding given by the Commissioner before passing such drastic action/order against the Petitioner that the Petitioner has made such unauthorized construction being a Councillor during his current tenure. In absence of this specific finding also, in our view, there is no question to take action and/or pass such impugned order.

17 The scheme of Section 12 of the MMC Act, so referred above, itself provides that in case of doubt and/or dispute, it is necessary for the Councillor and/or the other person and/or by the Commissioner to refer the matter to the Corporation's General Body/ Corporation, so that the appropriate decision can be taken as to whether to take/refer this issue to the Judge under Section 12 of

MMC Act. Admittedly, there is no such procedure followed in this matter. In absence of any specific power, as recorded above, without making reference and/or seeking approval from the General Body, the impugned order has been passed by the Commissioner. We cannot overlook the mandate of Section 12, which provides that in case of doubt and/or disputes, it is necessary to refer the issue to the Judge so that appropriate order and/or decision can be taken on all aspects, revolving around, whether the structure is unauthorized and/or whether the construction was constructed during the tenure and/or whether the Petitioner has incurred disqualification, as referred above. All these provisions, in our view, are necessary to be followed prior to the person who is elected in such election, incurs disqualification. Such drastic action/order, in our view, just cannot be passed without giving full opportunity to the sitting Councillor, at every stage. As noted, there are various lacunas before passing the impugned order in question. The initiation of such steps, therefore, in our view, is impermissible, contrary to law and unsustainable.

18 Another factor is that Section 12 itself contemplates that once the matter is referred, there shall not be any deemed

disqualification, to such Councillor. The effect is, even if the Commissioner declare or pass such order, but issue and/or doubt if raised and referred to the learned Judge, that itself automatically protects the interest of the Councillor, as the impugned declaration cannot be given effect, unless the learned Judge takes decision finally. The scheme of this provisions therefore, need to be accepted in the interest of all, including the public at large who have elected the Councillor.

19 Therefore, taking over all view of the matter and considering the scheme of the Act and the Judgments so cited, in our view, the order passed by the Commissioner is unsustainable and required to be interfered with.

20 In the result, the following order:-

ORDER

a) Writ Petition is allowed in terms of prayer clause

(a), which reads thus-

(a) *this Hon'ble Court may pleased to issue a Writ of Certiorari or any other appropriate Writ in the nature of Certiorari, order or direction directing*

to call for recording proceeding pursuant to which Order no. KDMC/ D Ward / UCR / 123 datd 23/3/2016 passed by Respondent no.1 (Exh. 'G' to the petition) thereby declaring the Petitioner has incurred disqualification as the Councillor from Ward No.42 of Kalyan- Dombivli Municipal Corporation under Section 10(1D) of Maharashtra Municipal Corporation Act and after examining legality, validity and propriety of the impugned order; the same may be pleased to quash and set aside.”

- b) Rule is made absolute, accordingly.
- c) There shall be no order as to costs.

21 The learned counsel appearing for Respondent No.1, seeks stay of this judgment and order passed in open Court. Considering the issue so involved and the reasons so recorded above, no case is made out for such stay. The oral request for stay is accordingly rejected.

(A.A. SAYED, J.)

(ANOOP V. MOHTA, J.)