

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

Amk

WRIT PETITION NO. 7961 OF 2016

Mohammed Ishak Kasim Ali Shaikh	]	
Son of Kasim Ali Shaikh	]	
Age 37 years, Occ.- Business,	]	
Add.-Room No.100, Gaibanshah Nagar,	]	
Near Home Guard, Ghatkopar (W),	]	
Mumbai-400 086	]	.. Petitioner

Vs.

- | | | | |
|----|-------------------------------------|---|----------------|
| 1. | Municipal Corporation of Gr. Mumbai |] | |
| | through its Municipal Commissioner |] | |
| | MCGM Head Office, Mahapalika Marg, |] | |
| | Mumbai CST, Mumbai-400 001. |] | |
| 2. | The State Election Commission, |] | |
| | New Administrative Building, |] | |
| | Opp. Mantralaya, Mumbai. |] | |
| 3. | Harish Krishna Bhandirge |] | |
| | Age-adult, Occ.-Not known, |] | |
| | Room No.12, Shakti Co-op. Housing |] | |
| | Society, Kajupada, Kurla (W), |] | |
| | Mumbai-400 072. |] | .. Respondents |

Mr. A. V. Anturkar, Sr. Advocate i/b Yusuf Khan for the Petitioner.
 Mr. A. Y. Sakhare, Sr. Advocate a/w. Mr. Vinod Mahadik for the Respondent-BMC.
 Mr. S. B. Shetye for Respondent No.2.
 Mr. R. K. Mendadkar for Respondent No.3.

CORAM : RANJIT MORE AND
DR. SHALINI PHANSALKAR-JOSHI, JJ.

Judgment reserved on : 20th SEPTEMBER, 2016.

Judgment pronounced on: 6th OCTOBER, 2016.

JUDGMENT

1. By this petition, filed under Article 226 of the Constitution of India, the petitioner is taking an exception to the Judgment and Order dated 08.07.2016, passed by the Additional Chief Judge of Small Causes Court, Mumbai in Municipal Election Petition No.87 of 2012. By the said Judgment and Order, the election of the petitioner, dated 17.02.2012 from Ward No.156 of the Mumbai Municipal Corporation was declared as null and void. At the same time, respondent No.3 herein was declared as elected from the said ward under the provisions of Section 33(2) of the Mumbai Municipal Corporation Act, 1882 (hereinafter referred to as the 'MMC Act').

2. Certain facts are not in dispute. The petitioner herein has contested the election for the post of councillor from Ward No.156 of the Mumbai Municipal Corporation, from a constituency reserved for Other Backward Class Community (hereinafter referred to as the 'OBC'). The result of the election was declared on 17.02.2012. The petitioner was declared as elected having secured highest number of votes. Respondent No.3 herein has also contested the said election from the same ward and he has secured second highest number of votes.

3. Being aggrieved, respondent No.3 had filed Municipal Election Petition No. 87 of 2012 before the Trial Court on the count that the

petitioner does not belong to the 'Mansuri' caste which is recognized as OBC and hence his election from the said ward be declared as null and void and in consequence, respondent No.3 be declared as elected from the said ward having secured second highest number of votes after the petitioner. The said election petition was filed on 02.03.2012.

4. Meanwhile, the caste certificate of the petitioner was sent for verification to the Caste Scrutiny Committee and the Scrutiny Committee by its order dated 20.12.2012 validated the caste certificate of the petitioner. However, the legality of the said order was challenged by respondent No.3 by preferring Writ Petition No. 398 of 2013. By its detailed Judgment and Order dated 28.08.2015, this Court was pleased to allow the said Writ Petition thereby invalidating the caste certificate of the petitioner. As a result thereof, by order dated 07.09.2015, Additional Municipal Commissioner disqualified the petitioner for the post of councillor retrospectively with effect from 17.02.2012. The said order has not been challenged by the petitioner and, therefore, it has become final having not been set aside by any other competent Court.

5. In view of this legal position, the learned Trial Court vide, its impugned order, allowed Election Petition No. 87 of 2012, filed by respondent No.3, declaring the election of the petitioner from Ward No.156, as null and void and at the same time declaring respondent No.3

herein as elected from the said ward under the provisions of Section 33(2) of the MMC Act.

6. While challenging this impugned order of the Trial Court, the main contention advanced by the learned Senior Counsel for the petitioner is that once the petitioner was declared to be disqualified for contesting the election itself, that too retrospectively with effect from 17.02.2012 by the order dated 07.09.2015, petitioner has ceased to be elected councillor and as such he also ceased to continue as 'respondent' in the Election Petition filed before the Trial Court under the provisions of Section 33 of the MMC Act. It is urged that, under Section 33 of the MMC Act, the Election Petition can be filed only against the existing elected councillor for challenging or disputing his election and, therefore, once the petitioner was held as disqualified to be the councillor, he ceased to continue as 'respondent' in the Election Petition. As a result thereof, the Election Petition has become redundant, infructuous, meaningless and was liable to be disposed of as such by the Trial Court.

7. Learned Senior Counsel for the petitioner has, in this respect, placed reliance on Section 9 of the MMC Act to advance his submission that once the petitioner was held to be disqualified to be a councillor, there has to be a deemed 'casual vacancy' in the office and such vacancy has to be filled in by holding the fresh election in the manner provided in Section

34 of the MMC Act. It is urged that in view of the Proviso to Section 9 of the MMC Act, no fresh election can be held as this vacancy has occurred within six months preceding the date on which the term of the office of councillor expires under Section 6A of the MMC Act. By further relying on Section 10(4) of the Maharashtra Scheduled Caste, Scheduled Tribes, Denotified Tribes (Vimukta Jatis), Nomadic Tribes, Other Backward Classes and Special Backward Category (Regulation of Issuance and Verification of) Caste Certificate Act, 2000 (hereinafter referred to as the "Caste Certificate Act"), it is urged that whenever an elected member incurs the disqualification for being a member of such statutory body like Municipal Corporation on account of his caste certificate being declared invalid, then the election of such person shall be deemed to have been terminated retrospectively. Thus, it is urged that in view of this deeming provision also, it has to be held that on 07.09.2015 itself, when the petitioner was held to be disqualified as councillor with retrospective effect, it has the automatic impact of terminating his election. In such situation, the only option was for the Election Commission to declare the casual vacancy under Section 9 of the MMC Act. It was not possible in the instant case as the vacancy has occurred within six months, preceding the date on which the term of office of the councillor expires under Section 6A of the MMC Act. Hence, according to learned counsel for the petitioner, the Trial Court has committed a grave error in proceeding with the hearing of the election petition, even after the order dated 07.09.2015 was brought to the notice

of the Trial Court, according to which, the petitioner was disqualified as councillor by respondent No.1-Corporation. In such situation, there was no occasion for the Trial Court to proceed further with hearing of petition filed under Section 33 of the MMC Act and declare respondent No.3 as elected from the said constituency having secured second highest number of votes. It is the submission of learned Senior Counsel for the petitioner that on this very ground itself, the impugned Judgment and Order of the Trial Court is liable to be quashed and set aside especially, considering that the Trial Court has no jurisdiction in itself to proceed further with the hearing of the elected petition.

8. *Per contra*, learned counsel for respondent No.3 has fully supported the impugned Judgment and Order of the Trial Court by placing reliance on the decision of the Division Bench of this Court in **Geeta Kisan Gore Vs. State of Maharashtra, 2003(4) Mh.L.J. 287** for submitting that the provisions of Sections 9 and 33 of the MMC Act must be read harmoniously. It is urged that, where returned candidate is declared disqualified and the election petition is pending, the Trial Court is enjoined to declare candidate obtaining next highest number of valid votes as elected. Here in this case, it is submitted that the petitioner is not challenging the fact that his election was declared as null and void and hence, there was a casual vacancy which was required to be filled up and Section 33(2) of the MMC Act authorized the Trial Court to do so. The

Trial Court has, therefore, rightly exercised the discretion and the jurisdiction vested in it by law, especially, considering undisputed position that respondent No.3 has obtained next highest number of valid votes in the said election.

9. In our considered opinion, in order to effectively decide the controversy involved in this petition, it would be useful to reproduce Section 9 of the MMC Act which lays down as to how casual vacancy should be filled up. It reads as under:

"9. Casual vacancies how to be filled up.- *"In the event of non-acceptance of office by a person elected to be a Councillor, or of the death, resignation or disqualification of a Councillor, or of his becoming incapable of acting during the term of his office there shall be deemed to be a casual vacancy in the office and such vacancy shall be filled up, as soon as it conveniently may be, by the election of a person thereto, who shall hold office so long only as the Councillor in whose place he is elected would have been entitled to hold it if the vacancy had not occurred.*

The casual vacancy in the office of an elected Councillor shall be filled up in the manner provided in section 34:

Provided that no election shall be held to fill up such vacancy if it occurs within six months preceding the date on which the term of office of the Councillor expires under section 6A."

10. Section 33 of the MMC Act, on the other hand, provides for hearing of election petitions and an order to be passed by the Chief Judge of the Small Causes Court. Sub-section (2) of the said Section is material

for our purpose and it may be quoted in extenso as follows:

"If the said Chief Judge, after making such inquiry as he deems necessary, finds that the election was valid election and that the person whose election is objected to is not disqualified he shall confirm the declared result of the election. If he finds that the person whose election is objected to is disqualified for being a Councillor he shall declare such person's election null and void. If he finds that the election is not a valid election he shall set it aside. In either case he shall direct that the candidate, if any, in whose favour the next highest number of valid votes is recorded after the said person and against whose election no cause of objection is found, shall be deemed to have been elected."

11. Thus, the conjoint reading of Sections 9 and 33(2) of the MMC Act makes it clear that whenever after making necessary enquiry in the Election Petition the returned candidate is declared disqualified and the Chief Judge finds that his election is required to be declared as null and void and accordingly declare it to be so, then Sub-section (2) of Section 33 makes it incumbent on the Chief Judge to declare the candidate who has obtained next highest number of valid votes, as elected.

12. As to the provisions of Section 10(4) of the Caste Certificate Act, they provide as follows:

"(4) Notwithstanding anything contained in any law for the time being in force, a person shall be disqualified for being a member of any statutory body if he has contested the election

for local authority, Co-operative Society or any statutory body on the seat reserved for any of Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Other Backward Classes or Special Backward Category by procuring a false Caste Certificate as belonging to such Caste, Tribe or Class on such false Caste Certificate being cancelled by the Scrutiny Committee, and any benefits obtained by such person shall be recoverable as arrears of land revenue and the election of such person shall be deemed to have been terminated retrospectively."

13. The entire emphasis of learned Senior Counsel for the petitioner is on this *non-obstante* clause in Section 10(4) of the Caste Certificate Act to advance his submission that once the caste certificate is cancelled by the Scrutiny Committee, then the election of such person shall be deemed to have been terminated retrospectively. It is urged that, in view of this deeming provision, there was a casual vacancy and in view of Section 9 of the MMC Act such casual vacancy has to be filled by holding the election. There was no occasion thereafter for the Trial Judge to proceed further with the hearing of the election petition and to declare respondent No.3 as elected from the said constituency.

14. We are, however, not inclined to accept this submission as in our opinion the legal controversy raised in this petition is no more *res integra* and is already set at rest in the above said decision of **Geeta Kisan Gore** (supra), relied upon by learned counsel for respondent No.3.

The facts of the said decision are identical even to the extent of being replica of the facts of the present petition. In that case also, at the time when the caste validity certificate of the petitioner therein was held invalid and cancelled, the election petition filed by respondent No.4 therein was pending before the Small Causes Court. In the said election petition, the election of the petitioner was declared as null and void in view of the decision of the Caste Scrutiny Committee, which was confirmed by the High Court also in that case and thereafter relying on the provisions of Sections 9 and 33(2) of the MMC Act, the learned Additional Chief Judge of the Small Causes Court has declared next candidate, namely, respondent No.4 therein as elected having secured next highest number of valid votes. The said decision of the Additional Chief Judge was challenged on the similar ground as raised in this petition that once the caste certificate was invalidated and the petitioner was held disqualified, then in view of the provisions of Section 9 of the MMC Act, there was casual vacancy which had to be filled up by the election and not in the Election Petition by the Court.

15. While rejecting this submission, the Division Bench of this Court, after considering, in detail, the provisions of Sections 9 and 33(2) of the MMC Act held that, Sections 9 and 33 must be read harmoniously, keeping in view the legislative intent and considering the special provision in sub-section (2) of Section 33 of the MMC Act. In paragraphs 9 and 10

of the Judgment it was observed as follows:

"9. In the event of contingency as contemplated by section 9, the authorities are required to take action treating vacancies as "Casual Vacancies". It is, no doubt, true that once the eventualities and consequences relates to disqualification of the Councillor then it has to be dealt with by issuing a notification for holding and election treating it as casual vacancy provided the proceedings under section 33 have not been initiated by filing an election petition. Hence, where a returned candidate has been declared disqualified and no election petition is pending in which an order can be passed under sub-section (2) of section 33, the procedure laid down under section 9 of the Act has to be followed. But where the returned candidate is declared disqualified under section 9 of the Act and an election petition is pending, the Judge is enjoined to declare the candidate who has obtained next highest number of valid votes as elected under sub-section (2) of the section 33 of the Act. (Emphasis supplied)

(10) Language sub-section (2) of section 33 is explicitly clear and unequivocal. It states that if the Chief Judge finds that the Councillor is held disqualified and his election is declared null and void, the Chief Judge shall direct that "the candidate in whose favour the next highest number of valid votes is recorded shall be deemed to have been elected."

16. While taking the above view of the matter, it was held by the Division Bench that as the petitioner in that case was held disqualified and as at that time election petition filed by respondent No.4 was pending, no illegality has been committed by the Additional Chief Judge of the Small

Causes Court in exercising the powers under sub-section (2) of Section 33 of the MMC Act and declaring respondent No.4 therein as elected candidate. It was held that the impugned order of the Additional Chief Judge required no interference in such situation by this Court.

17. In the facts of the present case also, as stated above, admittedly when the petitioner was declared as disqualified on account of invalidation of his caste certificate, at that time the Election Petition No. 87 of 2012 filed by respondent No.3 against the petitioner was pending before the Additional Chief Judge. Hence, there was nothing wrong or illegal on the part of the Additional Chief Judge in proceeding with the hearing of the said Election Petition and by exercising its powers and jurisdiction vested in him under Section 33(2) of the MMC Act declaring respondent No.3 to be elected from the said constituency.

18. In our view, the provisions of Section 10(4) of the Caste Certificate Act also cannot make any difference to the legal position, as laid down in the above said authority. Once, it is held that the provisions under Sections 9 and 33(2) of the MMC Act are to be read conjointly and harmoniously and when language of Section 2 of Section 33 is explicitly clear and unequivocal, then allowing the provisions of Section 10(4) of the Caste Certificate Act to prevail over this provision to make Section 33(2) of the MMC Act redundant, cannot be the way of interpreting or reading the

legislative provisions. The Court has to construe all the provisions of the statute harmoniously with each other and not allow any of the provision to become redundant.

19. In this view of the matter, we do not find that the Trial Court has committed any error, much less illegality, in passing the impugned order of declaring respondent No.3 as elected from the said constituency.

20. The petition, therefore, holds no substance or merits and hence stands dismissed.

21. In the facts and circumstances of the case however, there shall be no order as to costs.

[DR. SHALINI PHANSALKAR-JOSHI, J.]

[RANJIT MORE, J.]