

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 11070 OF 2015

Mr. Shailesh Manohar Patil,

Age : years, Occ:

R/at, Near Kulswamini Mandir,

Diva Road, Bunder Lane, Diva Road, Thane Petitioner

vs

1 Thane Municipal Corporation,
 having office at -
 Mahanagarpalika Bhavan,
 Dr. Almeida Road,
 Chandan Wadi, Panchpakhai,
 Thane 400 602

2 The Commissioner,
 Thane Municipal Corporation,
 Mahanagarpalika Bhavan,
 Dr. Almeida Road,
 Chandan Wadi, Panchpakhai,
 Thane 400 602

3 Shri Ramakant Dashrath Madhavi,
 Age: – Occ: –
 Residing at Dativli Diva, Thane Respondents

ALONG WITH

WRIT PETITION NO. 11072 OF 2015

Mr. Ram Hari Egade,

Age : years, Occ:

R/at, 2/3 N. B. Wing,

Siddhivinayak Tower,
Runwal Nagar,
Thane (West)

.... Petitioner

vs

- 1 Thane Municipal Corporation,
having office at -
Mahanagarpalika Bhavan,
Dr. Almeida Road,
Chandan Wadi, Panchpakhai,
Thane 400 602
- 2 The Commissioner,
Thane Municipal Corporation,
Mahanagarpalika Bhavan,
Dr. Almeida Road,
Chandan Wadi, Panchpakhai,
Thane 400 602
- 3 Shri Sandeep Mhalgaonkar,
Age: – Occ: – Adult,
Residing at Merry Dsouza Chawl,
Gokuldaswadi, Khopat,
Pokharan Road No.1,
Thane 400 601

.... Respondents

AND ALONG WITH
WRIT PETITION NO. 11071 OF 2015

Mr. Manohar Rama Salvi,
Age : years, Occ:Business,
R/at Raturaj, Manisha Nagar,
Bombay Poona Road, Kalwa,
Thane - 400 604

.... Petitioner

vs

- 1 Thane Municipal Corporation,
having office at -
Mahanagarpalika Bhavan,
Dr. Almeida Road,
Chandan Wadi, Panchpakhai,
Thane 400 602
 - 2 The Commissioner,
Thane Municipal Corporation,
Mahanagarpalika Bhavan,
Dr. Almeida Road,
Chandan Wadi, Panchpakhai,
Thane 400 602
- Respondents

Mr. Y. S. Jahagirdar, Senior Advocate with Mr. P. K. Dhakephalkar, Senior Advocate, with Mr. G.s. Godbole with Mr. S.M. Oak, Mr. B. G. Tangsali and Mr. Sagar A. Joshi, Advocates for the Petitioners.

Mr. Shekhar Jagtap with Mr. Akshay Kapadia i/by J. Shekhar & Co for the Corporation.

**CORAM: ANOOP V. MOHTA AND
G. S. KULKARNI, JJ.**

CLOSED FOR JUDGMENT ON : February 12, 2016

PRONOUNCED ON : February 26, 2016

JUDGMENT (Per Anoop V. Mohta, J.):

Rule, returnable forthwith. Heard finally by consent of parties.

2 Since the issues involved in all these matters are common, the same are heard and therefore disposed of by this common judgment, accordingly.

3 The Petitioners have challenged separately, respective but similar order dated 3 November 2015, whereby they have been declared “deemed disqualified councillor” of Thane Municipal Corporation (The Corporation). The provisions of the Maharashtra Municipal Corporation Act, 1949 (for short, “MMC Act”) referring to Sections 10 (1D), 11, and 12 have been invoked.

4 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 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.

5 It is stated in first Writ Petition No. 11070/2015 that the Petitioner got elected on 6.3.2012 from Ward No.65A of the Corporation. On 11.09.2014, disputed the position of alleged disqualification of the Petitioner as show cause notice was issued by the Corporation. The Commissioner passed the order and put the subject of alleged disqualification of the Petitioner before the General Body for referring it to the Judge under Section 12 MMC Act. The Commissioner held that the Petitioner has carried out unauthorized construction. On 22.12.2014, Vide Resolution No. 182, the General Body of Corporation refused to refer the subject of alleged disqualification to the Judge. On 31.10.2015, the Deputy Commissioner issued a notice for hearing of the proceedings under Section 10 (1D) of MMC Act. On 3.11.2015, the Commissioner passed the impugned order and disqualified the Petitioner as a councillor for his remaining tenure w.e.f 3.11.2015. The impugned order records at one hand that the alleged construction is prior to 01.04.2010 and the other hand records that alleged construction has been carried out during the tenure as a councillor.

6 It is stated in second Writ Petition No. 11072 of 2015 that

the Petitioner got elected from Ward No. 24 on 6.3.2012. On 17.03.2012, Sandip Mahagaonkar, a rival candidate, complained about an alleged unauthorized construction by Petitioner's wife. On 15.05.2014, the Petitioner disputed that he has incurred such disqualification. On 27.05.2014, the Deputy Commissioner put the subject of alleged disqualification before the General body for referring it to the Judge under Section 12 of MMC Act. On 27.06.2014, Vide Resolution No. 12, General Body of Corporation refused to refer the subject of alleged disqualification of the Petitioner to the Judge. On 31.10.2015, the Deputy Commissioner issued a notice for hearing of the proceedings under Section 10(1D) of MMC Act. On 3.11.2015, the Commissioner passed the order and disqualified the Petitioner as a councillor for his remaining tenure w.e.f 3.11.2015. The impugned order is passed without any inquiry or any evidence.

7 It is stated in third Writ Petition No. 11071 of 2015 that the Petitioner got elected from Ward No. 43B on 6.3.2012. On 4-5-2012, one Ghanshyam Thorat (Retd Asst. Commissioner) submitted the report alleging that the Petitioner obstructed the officers of the

Corporation while they were taking actions against the unauthorized construction of third party. On 5.5.2012, a Show Cause Notice was issued to the Petitioner as to why action under Section 10(1D) of MMC Act should not be initiated against him. On 14.05.2012, the Petitioner disputed the position that he has incurred any disqualification. On 27.05.2014, the Commissioner put the subject of alleged disqualification before the General Body for referring it to the Judge under Section 12 of MMC Act. On 27.06.2014, Vide Resolution No. 14, the General Body of Corporation, refused to refer it to the Judge. On 3.10.2015, the Deputy Commissioner issued a notice for hearing of the proceedings under Section 10 (1D) of MMC Act. On 3.11.2015, the Commissioner passed the order and disqualified the Petitioner as a councillor for his remaining tenure w.e.f 3.11.2015. The impugned order records the obstruction without any inquiry or any evidence is the case.

8 Admittedly, the petitioners were elected as Councillors of the Corporation on 6 March 2012. They had been working as councillor till the date of impugned order. They filed these writ Petitions. This Court has granted protective order to the extent of not

to hold fresh elections of the respective post. Admittedly, the Respondent-Corporation never made reference under Section 12. However, by the impugned communication, by overlooking the provisions, declared the Petitioners as “deemed disqualified”.

9 The learned counsel appearing for the Respondent-Corporation opposed the prayers and relied on *Bhaskar Timappa Shetty v. State of Maharashtra*¹. The provisions so read and referred above are clear including the power of Commissioner. But it is always subject to the foundation of case/facts, being within the ambit of above provisions. The Corporation and the Commissioner are also under obligations to follow the provisions strictly, as it disqualify the sitting elected member. Such decision of “deemed disqualification” cannot be used and utilised abruptly, without complying with the mandate of the provisions, specially by misinterpreting it and/or by wrong application of law. All the judgments are based upon the respective facts, are distinguishable on facts itself.

10 The issue, therefore, is whether the Commissioner was

1 2007 (2) BCR 777

competent and had jurisdiction to pass an order disqualifying the Petitioners. The Commissioner has taken support of the facts as referred to in the respective proposals moved before the General Body to come to a conclusion that the Petitioners stand disqualified. It cannot be overlooked that the allegations as made against the Petitioner to say that they are disqualified under Section 10(1D) of the Act are denied / disputed by the Petitioners. The Commissioner in such situation was under an obligation to refer the issue to the Judge as Section 12 of the Act would mandate. However, the Commissioner chose to himself exercise jurisdiction which was actually vested with the Judge under Section 12 in passing an order disqualifying the Petitioners. The Commissioner has admittedly acted without jurisdiction in passing the impugned order to disqualify the Petitioners. The contention on behalf of the Respondent to justify the impugned order would render Section 12 and Section 405 of the Act nugatory. In so observing, we are supported by the decisions of the Division Bench this Court in the following cases:-

- (i) The Commissioner, Nanded Waghala Municipal Corporation Vs. Surjitsing s/o. Jeevansing Girniwale, [2007(5) ALL MR 683],

- (ii) Noorjahan M.Asalam Ansari Vs. State of Maharashtra & Ors., [2004(2) Bom.C.R. 468]

11 As regards the issue as to whether the Commissioner has rightly invoked Section 10(1D) of the Act to disqualify the Petitioners and whether the ingredients of the provision are satisfied to disqualify the Petitioners, are the issues which would fall for consideration of the Judge in exercising powers under Section 12 of the Act. Needless to observe that it would be within the jurisdiction of the Judge to consider whether the allegations as made against the Petitioners fall within the parameters of Section 10(1D) of the Act and whether the acts as alleged against the Petitioners are such acts done in the capacity as a Councillor.

12 The power of declaration even if any, cannot be utilised to disqualify the Petitioner by such declaration as issued by the Municipal Commissioner. The dis-qualification should take effect only after due and final decision by the Court/Judge. It is relevant to note that once the matter is referred to the Judge, there is no question of “deemed disqualification”. The

Councillor continue to act as elected member till the final decision by the Judge.

13 Therefore, the following order :

ORDER

- (1) All the writ petitions are allowed in terms of prayer (a).
- (2) The respective impugned order dated 3 November 2015 are quashed and set aside.
- (3) Rule in all the matters is made absolute accordingly.
- (4) There shall be no order as to costs.

14 At this stage, learned counsel appearing for Respondent/Corporation seeks stay of this order and contended that ad-interim order already granted to continue for eight weeks. Considering the reason so given while pronouncing the operative part, no case is made out for oral request of stay. Therefore, oral request for stay is accordingly rejected.

(G. S. KULKARNI, J.)

(ANOOP V. MOHTA, J.)