

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.5128 OF 2017
(Rekha Deepak Lohbande Vs. The State of Maharashtra and others)

Mr.H.V.Patil, learned counsel for the petitioner.
Mr.A.S.Bayas, learned counsel for respondent No.5.
Mr.S.R.Yadav, AGP for respondent/State.

(CORAM : M.S.Sanklecha, J.)

DATE : 19/04/2017

PER COURT :

1. This petition under Article 226 and 227 of the Constitution of India takes an exception to the order dated 05/04/2017 passed by the Minister of State for Urban Development u/s 51-A of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 (Act). By the impugned order, the appeal of respondent No.5, raising a dispute/challenge to the election of the petitioner as Vice President to the Municipal Council, Mukhed, Dist.Nanded at its meeting held on 22/02/2017 Act, was allowed.

2. Briefly, the controversy leading to this petition is as under :-

[a] On 18/02/2017, general elections took place for the Municipal Council, Mukhed. At this election, the petitioner as well as respondent No.5 herein were elected as Councillors. Respondent No.4 herein was elected directly by the

Constituents as a President of the Municipal Council.

[b] On 18/02/2017, respondent No.4 i.e. the President of the Council issued notices of the special meeting to its Councillors of a meeting scheduled on 21/02/2017 to elect the Vice President of the Municipal Council.

[c] On 21/02/2017, respondent No.5 herein tendered an application to the District Collector raising an objection to the convening of the meeting on 22/02/2017 to elect the Vice President of the Municipal Council. This on the ground that the statutory notice as required under the Act for the election of the Vice President i.e. the meeting should be ordinary (general) meeting and not a special meeting. Further seven clear days notice for holding a general meeting was not given.

[d] In the above view, the respondent No.5 did not attend the meeting held on 22/02/2017 for the election of the Vice President of the Municipal Council. However, at that meeting on 22/02/2015 of the Municipal Council, the petitioner was elected as its Vice President. This is evidenced by the resolution passed in the special meeting held on 22/02/2017.

[e] Being aggrieved by the election of the petitioner, as the Vice President of the Municipal Council on 22/02/2017, the respondent No.5 preferred an appeal on 27/02/2017 to the State Government. This appeal was preferred under Section 51-A(5) of the Act.

[h] The State Government, i.e. the Minister of State for Urban Development, after hearing the petitioner as well as the respondents, passed the impugned order dated 05/04/2017 allowing the Dispute/Appeal filed by respondent No.5. The impugned order held that in terms of Section 81 of the Act, 7 clear days notice of a general meeting should be given to the Councillors and 3 days clear notice should be given of the special meeting. In this case, the impugned order holds that the notice of the meeting was given on 18/02/2017 and therefore did not satisfy the statutory requirements of 7 days notice to hold a general body meeting for election of the Vice President. The 7 days notice was necessary for election of a Vice President has to be at its general meeting as provided u/s 51-A (1) of the Act. Thus the election of the petitioner as the Vice President of the Municipal Council was set aside.

3. Mr.Patil, learned counsel appearing for the petitioner submits that the impugned order passed by the Minister is unsustainable. This for the reason that in terms of specific rules made under the Act namely Maharashtra Municipal Councils (Conduction of election of Vice President) Rules (Election Rules), only 3 days notice is required to be given to the Councillor for election of Vice President. The Election Rules in terms of proviso to Rule 3 of the Election Rules provide for giving at least 3 clear days notice of the holding of the meeting to elect the Vice-President. In the above view, it is submitted

that the specific provision in Election Rules, same would prevail over Section 81 of the Act on the principle of special provision would prevail over the general provision (*Generalia specialibus non derogant*). It is further submitted that other Municipal Councils in Nanded District have called for special meetings to elect their Vice President by giving 3 days notice and the same remains undisturbed. In support, reliance was placed upon notices issued to the Councillors of Degloor Municipal Council and Kandhar Municipal Council. It is also submitted that the entire proceedings against the petitioner arises in view of political rivalry/vendetta as the petitioner does not belong to the party in power in the Council and in the State.

4. As against the above, Mr. Bayas, learned counsel for respondent No.5 states that an order passed by the Minister calls for no interference. The impugned order he submits is in accordance with Section 81 of the Act which requires for general body meeting to be called after giving 7 days notice as the election of Vice President has to be done at a general meeting in terms of Section 51-A(1) of the Act. It is further submitted that the Election Rules, on which the petitioner places reliance, is a piece of sub-ordinate legislation made under Section 321 of the Act. Therefore, the Election Rules cannot be inconsistent to the provisions of the Act. In support, he relied

upon the decision of the Full Bench of this Court in Dattatraya Narhar Pitale Vs. Vibhakar Dinkar Gokhale and another [1975 Mh.L.J. 701].

5. Section 51-A of the Act provides for an election of a Vice President and it specifically states that the Vice President of the council would be elected at the general meeting of the Council. Section 81(4) of the Act specifically provides that a general meeting would be preceded by 7 clear days notice to the members of the Council, while a special meeting should be preceded over by 3 days clear notice. Further Section 81(19) of the Act provides that the State Government may make Rules in respect of the matters relating to conduct of the meeting not provided for in the Section. Thus under Section 51-A(1) of the Act, the Vice President has to be elected at a general meeting and such a general meeting should in terms of Section 81 of the Act require 7 days clear notice for the conduct of business at a general meeting.

6. The Election Rules have been framed u/s 321 of the Act and they generally empower the State Government to make Rules consistent with the Act for the purpose of carrying out the purposes of the Act. Rule 3 of the Election Rules also specifically states that

the Vice President of the Council would be elected at its general meeting. However, the proviso thereto provides that such meeting shall be called by giving the Councillors 3 clear days notice prior to the meeting. The aforesaid provision of giving 3 days clear notice prior to the general meeting to elect the Vice President is inconsistent with and contrary to Section 81(4) of the Act which provides for 7 clear days notice for a general meeting. Therefore, as held by the Full Bench of this Court in Dattatraya Narhar case (supra), the provisions of Section 51-A r/w Section 81 of the Act providing for 7 days notice for a general meeting to elect the Vice President, would prevail over the 3 days notice provided in the election rules for conducting a general meeting to elect the Vice- President. Thus the Election Rules providing for a shorter period of notice to the Councillors to elect its Vice President then that provided under the Act is clearly ultra-vires to the provisions of the Act and cannot be sustained. The Maxim *Generalia Specialibus non derogant* and *Generalibus speciatia derogant* would have no application in the facts of this case, as the special provision made in the Election Rules is a piece of delegated/ sub-ordinate legislation and cannot prevail over the Act. The above maxims are applicable when both the general as well as the special provision are found in legislations of equal status. It can have no applicable to enable a subordinate legislation to override the Act.

7. Mr.Patil, thereafter in re-joinder submitted that in any view of the matter in terms of Section 321(4) of the Act, the Rules which are being made by the State Government, are required to be placed before each house of the State Legislature. Consequently, the Rules would have the same status as the Act, as it is subject to the scrutiny of the Legislature. Therefore it is submitted that no occasion to ignore the Election Rules being ultra-vires the Act, can arise. The aforesaid submission overlooks the fact that the Rule being a delegated legislation cannot be in excess of the powers conferred on the delegate to frame Rules by the Parent Act. This issue is no longer *res-integra* in view of the decision of the Apex Court in Lohia Machines Ltd., and another Vs. Union of India and others [(1985) 2 SCC 197] wherein reference was made to an earlier decision of the Apex Court in Kerala State Electricity Board Vs. Indian Aluminium Co. [AIR 1976 SC 1031] and observed as under :-

“It is also well-settled that even if the rules have been laid, before Parliament and there is a resolution of Parliament approving the rules, the validity of the rules has to be declared by the court and the court can declare any rule placed before Parliament and approved by Parliament to be ultra vires the Act and invalid. In the case of Kerala State Electricity Board v. Indian Aluminium Co. Ltd., this court held at p.576 (SCC pp.486-87 : para 25)

In India many statutes both of Parliament and of State Legislatures provide for subordinate legislation made under the provisions of those statutes to be placed on the table of either the Parliament or the State Legislature and to be subject to such modification, amendment or annulment, as the case may be, as may be made by the Parliament or the State Legislature. Even so, we do not think that where an executive authority is given power to frame subordinate legislation within stated limits, rules made by such authority if outside the scope of the rule-making power should be deemed to be valid merely because such rules have been placed before the Legislature and are subject to such modification, amendment or annulment, as the case may be, as the Legislature may think fit. The process of such amendment, modification or annulment is not the same as the process of legislation and in particular it lacks the assent either of the President or the Governor of the State, as the case may be. We are, therefore, of opinion that the correct view is that notwithstanding the subordinate legislation being laid on the table of the House of Parliament or the State Legislatures and being subject to such modification, annulment or amendment as they may make, the subordinate legislation cannot be said to be valid unless it is within the scope of the rule-making power provided in the statute.

(emphasis supplied)

8. As pointed out above, in the present case, the Election Rules providing for 3 days of prior notice for a general meeting is outside the scope of Rule making power granted to the State Government under Section 321 of the Act.

9. In any event, the aforesaid exercise is academic in the present facts, as it is undisputed that the notice issued on 18/02/2017 calls a special meeting to elect the Vice President. This notice is in breach of the Rule 3 of the Election Rules which require to calling of a general meeting in accordance with Section 51-A of the Act to elect the Vice President. Therefore, the notice dated 18/02/2017 is bad in law being contrary not only to the Act but also to the Election Rules on which the petitioner places reliance.

10. The other submissions made by Mr.Patil, learned counsel for the petitioner, that other Councils within the District of Nanded had called for election of Vice President by giving 3 days notice is of no avail. This for two reasons, firstly, the general understanding does not necessarily reflect the correct position in Law but only the understanding of the Councillors and the President of the Councils within the Nanded District of what the law is assumed to be and what the Law is, as provided under the Act and the Rules and

secondly, in this case admittedly the meeting called for is a special meeting and not a general meeting. Particularly so when both the Act and the Election rules provide the election of the Vice President at a general meeting. The submission that the entire exercise of removing the petitioner as a Vice President is on account of political vendetta is without any particulars. Therefore, the above submission of malice in fact without supporting material being pleaded in the petition cannot be basis of holding a quasi judicial decision to be bad in law.

11. It was lastly submitted by Mr.Patil for the petitioner that a person, who has abstained from the meeting cannot challenge the result of the meeting. This submission is without any merit as according to respondent No.5, the meeting called on 22/02/2017 to elect the Vice President was illegal and without any jurisdiction as the necessary 7 days clear notice was not given. Therefore, no fault can be found with not attending the meeting. Moreover, if respondent No.5 had attended the meeting, then the submission would have been that she has waived her right to challenge that proper notice was not served upon her.

12. In view of the above reasons, no occasion to entertain this

petition can arise. Accordingly, the petition is dismissed with no order as to costs. Parties to act upon copy of this order duly authenticated by the Registrar of this court.

(M.S.Sanklecha, J.)