

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.10704/2015

Faruk Shah Anwar Shah,
Age: 40 years, occu: business,
R/o House No.6, Gafur Nagar,
Gajanan colony,
At Post Tq. Dist. Dhule

Petitioner

Versus

- 1 The State of Maharashtra
through Secretary,
Urban Development Department,
Mantralaya, Mumbai 32
- 2 The Commissioner,
Dhule Municipal Corporation,
Dhule
- 3 Halimabi Gulab Shah,
age: major, occu: household,
R/o Near 80 feet Road Crossing
Wadjai Road
At post, tq. Dist. Dhule.

Respondents

Mr. Pawan B. Pawar advocate for the petitioner
Mr. S.R. Yadav, Lonikar, Assistant Govt. Pleader for Respondent No.1
Mr. P.B. Patil & Mr. M.S. Kulkarni advocates for respondent No.2

CORAM : S.B. SHUKRE, J

(Date : 7TH February, 2017.)

ORAL JUDGMENT

- 1 Heard.

2 Rule. Rule made returnable forth with and heard finally by consent of the learned counsel for the parties.

3 The petitioner has challenged the legality and correctness of the order dated 19.10.2015 passed by the Commissioner, Dhule Municipal Corporation declaring that, the petitioner has incurred disqualification for continuation to be a councilor in terms of section 10-1-D of the Bombay Provincial Municipal Corporations Act, 1949 (BPMC Act).

4 It is the contention of learned counsel for the petitioner that, the Commissioner has no power to make such declaration under section 12 of the said Act and it is the '*Judge*' contemplated there-under, who has jurisdiction to adjudicate upon the issue. He placed reliance upon the view taken by learned single Judge of this Court in case of **Surjitsing s/o Jeevansing Girniwale versus Commissioner, Nanded Waghala Municipal Corporation** (2007(3) Mh.L.J.488) which has become the settled law after the Division Bench of this Court upheld the view so taken by the learned single Judge in case of **Commissioner versus Surjitsing Jeevansing Girniwale** (2008(1) Bom.C.R. 867).

5 Learned AGP for respondent No.1 as well as learned counsel

for respondent No.2 submit that the issue is no more *res integra* after the Division Bench of this Court has confirmed the view taken by learned single Judge in the case of **Surjitsing Jeevansing Girniwale**. However, learned counsel for respondent No.3 has different opinion. According to him, the issue may no longer be *res integra*, yet there is no need for this Court to cause interference in the order passed by the learned Commissioner on the ground that the order is otherwise correct and whenever correct orders are passed, this Court, in exercise of writ jurisdiction could not make any interference in such orders despite the fact that the order is without jurisdiction. He relied upon the view taken by the learned single Judge of this Court in the case of **Swarupchand S/o Tarachand Lunawat and another v/s. Additional Collector, Nagpur and others** (2006(2) Mh. L.J. 636).

6 So far as the law in this regard is concerned, it has been settled by the Division Bench of this Court in case of **Commissioner Versus Surjitsing Jeevansing** (supra), when it held that the authority contemplated under section 12 of the BMC Act, 1949 is the '*Judge*' as defined under section 2(29) of the Act of 1949. Surely, Municipal Commissioner is not covered by this definition. Therefore, there is great substance in the argument of learned counsel appearing for the petitioner that the

impugned order could not have been passed by the learned Commissioner and since he has passed it, it will have to be held as an order passed without jurisdiction and as such will have to be quashed and set aside.

7 About the contention that when the order is correct, it need not be interfered with, I am of the view that this contention would be valid only when the order impugned has been passed within jurisdiction; but when the impugned order has been passed without jurisdiction, the challenge goes to the root of the power of authority to pass the order and such an order will have to be considered as patently illegal, passed in violation of statutory rules. Such an order, therefore, can never be sustained in the eye of law and this Court, in exercise of its writ jurisdiction would be under a duty to correct such patently illegal and invalid order.

8 Even in the case of **Swarupchand** (supra), learned single Judge has only held that a decree need not be interfered with only on the ground that it contains some technical defects or deficiencies and has not held that a decree passed without jurisdiction, if otherwise correct, should not be set aside. I must say, absence of jurisdiction is certainly not a technical defect or some such deficiency which can be ignored by the writ Court.

9 In this view of the matter, I find that the impugned order cannot be upheld and it deserves to be quashed and set aside.

10 Accordingly the writ petition is allowed with costs. The impugned order is set aside. Liberty is given to the Corporation to proceed in the matter in accordance with law.

11 Rule is made absolute in the above terms.

(S.B. SHUKRE, J)