

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

WRIT PETITION NO.9645 OF 2017

Pratiksha Pravin Raut & Anr.

...Petitioners

V/s.

Divisional Commissioner,
Kokan Division, Navi Mumbai & Ors.

...Respondents

Mr.C.G. Gavnekar i/b Mr.Suhas Deokar for the Petitioners.

Mr.S.D. Rayrikar, AGP for Respondent Nos.1 & 3.

Mr.Pradeep Gharat i/b Mr.Rahul More and Mr.Prashant Vartak for
Respondent No.2.

CORAM : M. S. SONAK, J.

DATE : 04th SEPTEMBER 2017

ORAL JUDGMENT :

1. Heard Mr.Gavnekar for the petitioners, Mr.S.D. Rayrikar, AGP for respondent Nos.1 and 3. and Mr.Pradeep Gharat for respondent No.2.

2. The challenge in this petition is to the orders dated 17-07-2017 and 14-08-2017 made by the Divisional Commissioner and the State Government ordering/approving the removal of the petitioners as Sarpanch/Members of the Gram Panchayat in terms of Section 39 of the Maharashtra Village Panchayat Act, 1959 (said Act).

3. Mr.Gavneker, the learned counsel for the petitioner submits that the Chief Executive Officer of Zilla Parishad, in this case, has submitted a report dated 04-02-2017, in which, the CEO, did not return any finding that the petitioners had indulged into any misconduct as contemplated by Section 39 of the said Act. Mr.Gavnekar submits that all that the CEO has recorded is that there was some violation of the procedural rules, in the matter of passage of Resolution No.456/2012 dated 29-04-2015 (said resolution) by which the tax assessment in respect of house constructed by the petitioner No.2 was reduced from Rs.5/- per sq.ft. to Rs.2.50/- per sq. ft. Mr. Gavnekar points out that the CEO's report also records that the previous resolution by which the assessment was determined at Rs.5/- per sq.ft. was also vitiated by non-compliance with the rules and other procedural requirements.

4. Mr.Gavnekar submits that on the basis of such a report of the CEO, the Divisional Commissioner, was not at all entitled to or in any case, justified in exercising the powers under Section 39 of the said Act and ordering removal of elected representatives, like the petitioners. Mr.Gavnekar has placed reliance upon the decision of Division Bench of the Allahabad High Court in the case of

Surinder Prakash Goel V/s. The State of Uttar Pradesh & Ors.¹, in support of the proposition that the provisions relating to removal of elected representatives should be resorted only in clear case of flagrant and gross misconduct and not for some slight or technical misconduct.

5. Mr.Gavnekar submits that if passage of the resolution, on the ground that the same was contrary to the rules or prescribed procedure is to be regarded as misconduct, then, all the 17 members of the Panchayat may have to be removed on the grounds of such interpretation of the expression '*misconduct*'. Mr.Gavnekar points out that the report of the CEO clearly records that the resolution in question was never opposed by any of the members of the Panchayat, including the respondent No.3, who now, seeks the removal of the petitioners under Section 39 of the said Act. Mr.Gavnekar submits that the CEO, in his report, has not made any observations/comments as regards any intentional breach on the part of the petitioners or attributed any malafide to the petitioners. In the absence of such observations/findings, the Divisional Commissioner, was neither entitled nor justified invoking the provisions of Section 39 of the said Act.

1 AIR 1993 Allahabad 50

6. Mr.Pradeep Gharat, the learned counsel for respondent No.2 supports the impugned orders by contending that this is a clear case of misconduct on the part of the petitioners. He points out that the resolution squarely concerns the rate of tax assessment in respect of the house of the petitioner No.2. He points out that the petitioner No.1 is wife of the petitioner No.2 and therefore, she was very much interested in reducing the assessment so as to benefit herself and her husband. He points out that the CEO has recorded that there was breach of rules and procedures in the passage of the resolution. He relies upon the decision of this Court in the case of ***Sau.Shubhangi Sharad Gondhali V/s. Smt.Sonali Santosh More***² for interpretation of the expression '*misconduct*' for the purposes of Section 39 of the said Act. He submits that the elections for the vacancies occasioned by the removal of the petitioners is scheduled on 06th September 2017 and at this advanced stage, this Court, may not interfere with the electoral process. For these reasons, Mr.Gharat submits that this petition may be dismissed.

7. Mr.S.D. Rayrikar, the learned AGP for respondent Nos.1 and 3 submits that there is no error of jurisdiction in making of the impugned orders. The impugned orders were made after the due

2 Writ Petition No.3174 of 2016 decided on 16th March 2016

This judgment is corrected in pursuance to the speaking to minutes order dated 14/09/2017

compliance with principles of natural justice and fairly play. This is a case where misconduct has been established and therefore, this Court, may not, in the exercise of extraordinary jurisdiction of Article 227 of the Constitution of India interfere with the impugned orders.

8. The rival contentions now fall for determination.

9. In this case, the facts are not in dispute. Petitioner No.1 is the Sarpanch of the Panchayat. Petitioner No.2, is her husband and also one of the Members (Panch) of the same Panchayat. Petitioner No.2 has constructed a new house, which was in terms of the earlier resolution of the Panchayat assessed to tax at the rate of Rs.5/- per sq.ft. Petitioner No.2, aggrieved by such assessment even took out certain proceedings to question such assessment.

10. Even while such proceedings to question assessment of talks were pending, the political equations in Panchayat changed. Respondent No.2, upon whose complaint, action has been taken against the petitioners under Section 39 of the said Act, was removed as Sarpanch by the competent authority exercising powers

under Section 33 of the said Act. In place of respondent No.2, petitioner No.1, who, as noted earlier, is the wife of petitioner No.2, was elected as Sarpanch of Panchayat.

11. The petitioners, were parties to passage of resolution dated 29-4-2015, in terms of which, the earlier tax assessment relating to new house of petitioner No.2, was reduced from Rs.5/- per sq. ft. to Rs.2.50/- per sq. ft. the Chief Executive Officer (CEO) of the Zilla Parishad, who has made a report in terms of Section 39 of the said Act has recorded a categorical finding that the said resolution dated 29-4-2015 was passed in-disregard of the prescribed rules and procedure in matters of revision of tax assessment. This finding of fact recorded by the CEO of the Zilla Parishad was not even questioned by Mr. Gavnekar, learned counsel for the petitioners.

12. Mr. Gavnekar, however, contended that passage of said resolution dated 29-4-2015, even though, such passage may have been contrary to statutory rules or procedure does not constitute “*misconduct*” so as to invite drastic action of removal under Section 39 of said Act. Mr. Gavnekar also contended that if passage of said

resolution dated 29-04-2015 is to be construed as misconduct on the part of the petitioners, then, by same yardstick, it will have to be held that all the Members of Panchayat or at least such Members of Panchayat, who participated in the meeting in which this motion was passed are also liable to be held guilty of committing a misconduct warranting action under Section 39 of the said Act. Mr. Gavnekar was at pains to point out that said resolution dated 29-04-2015 was not opposed by any Members of Panchayat including respondent No.2 and this fact has also been noted and recorded by the CEO in his report dated 04-02-2017.

13. Section 39 of the said Act, *inter alia*, provides that the Commissioner may remove from office any Member or any Sarpanch or Upa-Sarpanch who has been guilty of misconduct in the discharge of his duties, or of any disgraceful conduct, or of neglect of or incapacity to perform his duty, or is persistently remiss in the discharge thereof. The various expressions like '*misconduct in the discharge of duties*' or '*any disgraceful conduct*' etc. have not been specifically defined under the said Act.

14. In *Sau Shubhangi S. Gondhali (supra)*, this Court,

relying upon earlier in cases of *Ramdas Bhimkaji Darade V/s. Hon'ble Minster of State, Ministry of Urban Development, Mumbai and others*³ *Umesh Dattatray Naik V/s. The Hon'ble Minster of State, Ministry of Urban Development & Others*⁴ and *Ramesh Gangadhar Korde V/s. State of Maharashtra and Ors.*⁵ has held that the expression '*misconduct*' in Section 39 of the said Act, includes improper behaviour, mismanagement, improper conduct, bad behaviour, action involving wrongful intention but would not include mere error judgment.

15. In *Sureshkumar s/o. Kanhaiyalal Jethlia vs. State of Maharashtra and ors.*⁶, the Division Bench of this Court in the context of provisions contained in Section 55A of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965, which also provided for the removal of President or Vice-President of a Municipal Council for “*misconduct in the discharge of duties*” has made reference to Concise Oxford dictionary meaning of the expression “*misconduct*” to mean improper, unprofessional behaviour, bad management or mismanagement. The expression

3 2009 (4)-Mh.LJ-436

4 2008 (3)-Mh.LJ-747

5 2006 (2)-Bom. C.R.-157

6 2001(1)Mh.L.J. 901

“neglect” has been held to mean failure to care for or to do, overlook or forget the need to do a thing, not to pay attention to, lack of caring etc..

16. The Division Bench in *Sureshkumar (supra)* has made reference to decision of Nagpur High Court (as it then was) in ***Shaikh Mohammad Vs. G.G. In Council***⁷, which has again interpreted the term “misconduct” to literally mean wrong or improper conduct, i.e., conduct in violation of a definite rule of action and it ordinarily means failure to do what is required of a person to be done. Omission to do what is required of a person to do may therefore, constitute misconduct even though a person may not have acted willfully or maliciously.

17. In ***Baldev Singh Gandhi vs. State of Punjab and ors.***⁸, the Hon'ble Supreme Court in the context of provisions contained in Section 16 of the Punjab Municipal Act, 1911 has held that the expression “misconduct” though not defined under the Act is antithesis of the word “conduct”. Thus, ordinarily the expression “misconduct” means wrong or improper conduct, unlawful behaviour, misfeasance, wrong conduct, misdemeanour etc.. There

7 AIR 1954 Nag.337

8 (2002) 3 SCC 667

being different meaning of the expression “*misconduct*”, the same has to be construed with reference to subject and context wherein the said expression occurs, regard being had to the aims and objection of the statute. The aim and object of the Act is to make better provisions for administration of municipalities. The municipality is a democratic institution of self-governance consisting of local people, for the local people and by the local people. The prime object of the local body is to serve the local people and to provide amenities and service to the people residing within the municipality.

18. In case of *Baldev Gandhi (supra)* elected Municipal Councillor was removed from Membership by the executive, because he criticised house tax assessment list and asked the tax payers to come to him for sorting out the grievances. The Hon'ble Supreme Court, after holding that mere criticism of the house tax assessment list, unaccompanied by any incitement to defy the tax law, did not amount to misconduct and struck down the order of removal of the Member. However, that was on the facts of the matter. The Hon'ble Supreme Court after adverting to various shades of the expression “*misconduct*” has clearly held that the expression will have to be

construed with reference to subject and the context where the said expression occurs, regard being had to the aim and object of the statute.

19. In *Anishbhai Ishabhai Patel V/s. State of Gujrat and Others*⁹, the Gujarat High Court whilst construing similar provision has held that misconduct would result where an elected Member, being conversant with the consequences does some act which is wrong, bad, illegal or causes loss or damages, then, such conduct will be covered under the expression “*misconduct*”.

20. The conduct of the petitioners, in the present case, cannot be styled as some error of judgment or some act involving innocent breach of rules and procedures in the matter of passage of resolution dated 29-04-2015. The said resolution dated 29-04-2015 directly concerns the assessment of tax of petitioner No.2's new house. The resolution confers direct pecuniary benefit to both the petitioners and results in pecuniary loss to the Panchayat whose interest, both the petitioners, were duty bound to protect or at least not sacrifice. The petitioners, had already taken out proceedings

⁹ AIR-1995-Gujrat-118

against the previous assessment of house tax at the rate of Rs.5/- per sq.ft. in respect of their own house. In such circumstances, the petitioners, have certainly committed a misconduct by piloting or in any case ensuring passage of or in any case participating in the passage of said resolution dated 29-04-2015, reducing their own house tax liability by almost 50%.

21. The material on record, which has been taken note of CEO of the Zilla Parishad, indicates that even the preceding rate determined by Panchayat in respect of comparable instances was Rs.4/- per sq. ft. However, by the said resolution dated 29-04-2015, the house tax assessment has been reduced to Rs.2.50/- per sq. ft. in respect of petitioners' own house and that too in disregard of the rules and prescribed procedures.

22. This is really a case of conflict between interest and duty. The petitioners, as Sarpanch and Member of the Panchayat owed a fiduciary duty to the Panchayat. The discharge of such duty would contemplate that the petitioners take action, which is in the best interest of the Panchayat. Further, in order to maintain the purity of decision making process as well as in the interest of

democratic functioning of the Panchayat, the petitioners, ought not to have participated into decision making process where the petitioners had direct pecuniary interest in the subject matter. Rather, the petitioners, in breach of prescribed rules and prescribed procedures went ahead with resolution for reduction of tax assessment in respect of their own house from Rs.5/- per sq.ft to Rs.2.50/- per sq.ft. If in such circumstances, two authorities have concurrently held that the petitioners were guilty of misconduct inviting action under Section 39 of the said Act, it cannot be said that the decision is in excess of jurisdiction or vitiated by any unreasonability or perversity of approach.

23. In *Sureshkumar (supra)* the Division Bench of this Court was concerned with Charge against the President of Municipal Council that he chaired meeting of the Standing Committee which passed resolution No.30 dated 30th December 1997 in which it was decided to charge octroi on machinery imported by M/s.Gajanan Cotton Pressing Factory at the rate of 1% instead of 3%. As per the resolution, the factory paid an amount of Rs.23,490/- though, even in terms of resolution, the octroi amount came to Rs.25,900/-, since, the import price of the machinery was Rs.25.99 lakhs. At the rate of

3%, octroi duty would have come to Rs.77,970/-. M/s. Shri Gajanan Cotton Pressing Factory belonged to the family of the petitioner. On this basis, the petitioner, was charged with misconduct and ordered to be removed. In fact, there were two other charges levelled against the petitioner as well. The Division Bench of this Court, however, ruled that there charges could not have formed basis for action under Section 55A. The Division Bench after noting that resolution No.30 was in breach of provisions of the Act and the Rules, further made following significant observation at paragraph 16:

“the resolution passed is a premediated design of the Petitioner to grant financial gains to the establishment of his nephew and that too by causing loss to the council. This is certainly an act of misconduct by the petitioner. We, therefore, hold that charge No.2 has been duly proved against the petitioner.”

24. The Division Bench, at paragraphs 17 - 18 went on to observe as under:

*“17-18. We agree with Mr. Shah, the learned counsel for the Petitioner, that when it comes to the removal of a municipal council there must be a case of persistent defaults but the same principle does not apply to the President of the council. **What matters is the seriousness of the act of misconduct which is proved against the incumbent in office.** Such defaults are not necessarily required to be persistent or repeated or committed on more than one occasions. **For the persons who hold the public office the normal benchmark of***

*this character and behaviour in the common man's language is "Caesar's wife must be above suspicion". We, therefore, agree with the contentions of the learned counsel for the respondents that even if one charge out of the three charges is proved against the petitioner, the impugned order does not call for any interference and it is not necessary that all the three charges must be proved against him. The ratio in the case of Surinder Prakash (supra) as relied upon by Shri Shah, the learned counsel for the petitioner, is not applicable in the facts of this case as well as the provisions of sections 55A and 55B of the Maharashtra Municipalities Act. **The seriousness of the charge proved against the petitioner does not permit us to allow him to continue in the office of the President of Partur Municipal Council and he must vacate the same office forthwith.**"*

(emphasis supplied)

25. The decision in *Sureshkumar (supra)* is a clear answer to the contentions raised by Mr. Gavnekar in support of the present petition. This is not a case of mere deviation from the statutory rules of the statutory procedure in the matter of passage of resolution dated 29-04-2015. Rather, this is a case where the petitioners have been instrumental in the passage of resolution dated 29-04-2015 in breach of statutory rules and statutory procedures only for the purpose of benefiting themselves pecuniarily and consequently, causing loss to the coffers of the Panchayat. The contention that the earlier resolution determining assessment at the rate of Rs.5/- per sq.ft in respect of the petitioners newly constructed house also being

in breach of the statutory rules and statutory procedures, is of no avail to the petitioners. It is trite that two wrongs do not make a right. If the earlier resolution was wrong, then nothing prevented the petitioners from pursuing legal remedies already undertaken by them in regard to such earlier resolutions. The petitioners, could have or rather ought to have recused themselves when the later resolution dated 29-04-2015 came up for consideration before the Panchayat, since, such resolution, was intended to directly confer pecuniary benefits to the petitioners against all members of the Panchayat. Applying principle in *Sureshkumar (supra)* as also other decisions, which have discussed scope and import of the expression “*misconduct*” in provisions relating to removal of elected functionaries, it is not possible to accept Mr.Gavnekar's contention that in the facts and circumstances of the present case, action under Section 39 of the said Act was not warranted against the petitioners.

26. Mr. Gavnekar's contention that action under Section 39 of the said Act may be warranted, if the interpretation in the impugned orders is to be accepted, also deserves no acceptance in the facts and circumstances of the present case. Admittedly, the gravamen of the charge is in the fact that the petitioners were

directly and pecunarily interested in the passage of resolution dated 29-04-2015, because, the resolution involved the reduction of the tax assessment from Rs.5/- per sq.ft to Rs.2.50/- per sq.ft in respect of the petitioners newly constructed house. The remaining members of the Panchayat cannot be said to have had any direct or pecuniary interest in the passage of resolution dated 29-04-2015. Accordingly, there is a distinction between the role played by the remaining Members of the Panchayat and the petitioners. As noted earlier, petitioner No.1 held a post of Sarpanch of the Panchayat and in that capacity it is reasonable to proceed on that basis that petitioner N.1 in fact presided over the meeting in which resolution dated 29-04-2015 came to be passed. Petitioner No.2 is the husband of petitioner No1 and also a Member of the Panchayat, who took part in the passage of resolution dated 29-04-2015, by which, the tax assessment in respect of his newly constructed house was reduced from Rs.5/- per sq.ft to Rs.2.50/- per sq.ft. There is accordingly, no comparison between the complicity of the petitioners in the passage of resolution dated 29-04-2015 and the involvement of the rest of the Members of the Panchayat, who may have taken part in meeting in which the resolution dated 29-04-2015 came to be passed.

27. In *Zelia M. Xavier Fernandes E. Gonsalves vs. Joana Rodrigues and ors.*¹⁰, the Hon'ble Supreme Court, upheld the disqualification of Panchayat Member under Section 10(f) of the Goa Panchayat Raj Act, 1994 on the ground that she had a direct or indirect monetary interest in a contract awarded by the Panchayat to her husband. The Hon'ble Supreme Court observed that the purpose and object of providing several disqualifications is to ensure the purity of the administration of the Municipal Committees and in that sense the different clauses of disqualifications should not receive unduly narrow or restricted construction.

28. In *Manohar Joshi Vs. State of Maharashtra and ors.*¹¹, the Hon'ble Supreme Court observed that the expectations from the political executive are that it must be above board, and must act in accordance with the law and not in furtherance of the interest of a relative. That was a case where strictures passed by this Court against the Chief Minister of the State were approved by the Hon'ble Supreme Court after affirming this Court's finding that deletion of reservation and grant of development permissions were wholly illegal, unjustified and were issued only to benefit near

¹⁰ (2012) 3 SCC 188

¹¹ (2012) 3 SCC 619

relative of the Chief Minister. At paragraphs 205 to 207, the Hon'ble Supreme Court had observed thus:

“205. Same are the expectations from the political executive viz. that it must be above board, and must act in accordance with the law and not in furtherance of the interest of a relative. However, as the time has passed, these expectations are belied. That is why in Shivajirao Nilangekar (Shivajirao Nilangekar Patil v. Mahesh Madhav Gosavi, (1987) 1 SCC 227) this Court had to lament in para 51 of the judgment as follows: (SCC p.253)

“51. This Court cannot be oblivious that there has been a steady decline of public standards or public morals and public morale. It is necessary to cleanse public life in this country along with or even before cleaning the physical atmosphere. The pollution in our values and standards in (sic is) an equally grave menace as the pollution of the environment. Where such situations cry out the courts should not and cannot remain mute and dumb”

206. People of a State look up to the Chief Minister and those who occupy the high positions in the Government and the administration for redressal of their grievances. Citizens are facing so many problems and it is expected of those in such positions to resolve them. Children are particularly facing serious problems concerning facilities for their education and sports, quality of teaching, their health and nutrition. It is the duty of those in high positions to ensure that their conduct should not let down the people of the country, and particularly the younger generation. The Ministers, Corporators and the administrators must zealously guard the spaces reserved for public amenities from the preying hands of the builders. What will happen, if the protectors themselves become poachers? Their decisions and conduct must be above board. Institutional trust is of utmost importance.

207. In Bangalore Medical Trust (Bangalore Medical Trust v. B.S. Muddappa, (1991) 4 SCC 54) this

Court observed in para 45 of its judgment that: (SCC p.85)

“45. The direction of the Chief Minister, the apex public functionary of the State, was in breach of public trust, more like a person dealing with his private property than discharging his obligation as head of the State administration in accordance with law and rules.”

Same is the case in the present matter where Shri Manohar Joshi, the then Chief Minister and Shri. Ravindra Mane, the Minister of State have failed in this test, and in discharge of their duties. Nay, they have let down the people of the city and the State, and the children.”

29. For all the aforesaid reasons, there is no case made out to interfere with the impugned orders. This petition is dismissed. There shall however be no order as to costs.

30. At this stage, Mr.Gavnekar, the learned counsel for the petitioners, requests that the election scheduled on 06-09-2017 be stayed for a period of at least 15 days as to enable the petitioners to seek redressal before the Hon'ble Supreme Court. Since the election process have already commenced and the elections are scheduled to take place after two days, it is not possible to accede the request made by the learned counsel for the petitioners.

(M. S. SONAK, J.)