

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

**SECOND APPEAL NO. 90 OF 2018
WITH
CIVIL APPLICATION NO. 201 OF 2018**

Vaibhai Sanjay Jarag	...	Appellant
V/s.		
Geeta Shripati Gurav & Ors.	...	Respondents

- Mr.Mahindra Deshmukh for the Appellant.
- Mr.Rahul Walvekar for Respondent No.1.
- Mr.Abhijit Adagule for Respondent Nos.6 and 7.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 3rd JULY, 2018.

P.C. :

1] Heard learned counsel for the Appellant and learned counsel for the Respondents.

2] This Second Appeal takes an exception to the judgment and decree dated 05/12/2017 passed by the District Judge-6, Kolhapur, thereby setting aside the judgment and decree dated 22/03/2017 passed by the 8th Jt. Civil Judge, Junior Division, Kolhapur, in Regular Civil Suit No.1130 of 2015.

3] The said suit was filed by the present Appellant for declaration that Respondent No.1 is disqualified to act as a Councillor for Ward No.78 of Kolhapur Municipal Corporation and for perpetual injunction restraining Respondent No.1 from acting as elected Councillor from the said Ward and taking part as such in the business of Kolhapur Municipal Corporation.

4] As per the Appellant, Respondent No.1 was elected from Ward No.78 in the Election of Kolhapur Municipal Corporation held in the year 2015. Subsequent to her election, it was discovered by the Appellant that, Respondent No.1 has made the construction by making encroachment on some portion of 100 ft. D.P. Road and therefore, as per Section 10(1-D) of Maharashtra Provincial Municipal Corporation Act, she has incurred the disqualification and hence, she is not entitled to continue as a Councillor.

5] This suit was resisted by Respondent No.1 denying the alleged encroachment and also challenging the maintainability of the suit and the jurisdiction of the trial Court to entertain such suit.

6] The trial Court however held that the suit is maintainable and it has jurisdiction to entertain the same. The trial Court also found that Respondent No.1 has incurred the disqualification on account of

the encroachment made by her on D.P. Road. The trial Court accordingly decreed the suit in toto.

7] When Respondent No.1 challenged this finding of the trial Court before the First Appellate Court, it was held by the Appellate Court that the requisite procedure, which is laid down under Section 12(2) of the Maharashtra Provincial Municipal Corporation Act was not at all followed in this case for entertaining such grievance. The Appellate Court in this respect relied upon the judgment of this Court in the case of *Hasan Ali s/o.Mohammad Ali & Anr. Vs. Collector, Nagpur and others*¹ and came to the conclusion that, only on the reference being made by the Competent Authority concerned, viz., the Commissioner of the Municipal Corporation, the Court can have the jurisdiction to decide the alleged disqualification. Secondly, it was also held that, as per Section 2 of Sub-Clause (29) of the Act, the word “*the Judge*” means in the City of Pune the judge of the Small Causes, and in the other City, the Civil Judge (Senior Division) having jurisdiction the city. Here, in the case, the suit was decided by the Court of Civil Judge, Junior Division and that too without any reference being made by the Commissioner. Hence, it was held by the Appellate Court that the suit was not maintainable. The Appellate Court also came to the

¹ 1997 (20) Mh.L.J. 588

conclusion that the Appellant has failed to prove that Respondent No.1 has made construction by making encroachment over the sanctioned D.P. Road. Accordingly, the Appellate Court allowed the appeal and dismissed the suit on all the grounds.

8] While challenging this judgment of the Appellate Court, the submission of learned counsel for the Appellant is that the Appellate Court was not right in placing reliance on the judgment of this Court in the case of *Hasan Ali s/o.Mohammad Ali (supra)* as it pertains to the provisions of *the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Township Act, 1965*; whereas, the present case pertains to the provisions under *Maharashtra Provincial Municipal Corporation Act* and therefore, the ratio laid down therein cannot be made applicable to the facts of the present case.

9] Secondly, it is submitted that, the Appellant admits that the Court of Civil Judge, Senior Division can have the jurisdiction to try but in order to go to that Court, the finding of the Appellate Court that the Appellant has failed to prove that Respondent No.1 has committed the encroachment on the D.P. Road will come in the way of the Appellant. Hence, according to learned counsel for the Appellant, the impugned judgment and decree of the trial Court needs to be set-aside.

10] However, it has to be observed that the Appellate Court has firstly considered the provisions of Section 10 of the Maharashtra Provincial Municipal Corporation Act, as the very case of the Appellant is based on the alleged disqualification incurred by Respondent No.1 under Sub-Section (1-D) of Section 10 of the Act.

11] Section 10 of the Maharashtra Provincial Municipal Corporation Act reads as follows:-

(10) Disqualification for being a councillor -

(1) Subject to the provisions of Section 13 and 404, a person shall be disqualified for being elected and for being a councillor, if such person,

(1A).....

(1B)

(1C)

(1D) A Councillor shall be disqualified for being a Councillor, if such Councillor has constructed or constructs by himself, his spouse or his 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 the rules or bye-laws framed under the said Acts; or has directly or indirectly been responsible for, 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.”

12] The relevant provisions are then Section 11 and Section 12 of the Maharashtra Provincial Municipal Corporation Act, which read as follows:-

“Section 11 : Disabilities from continuing as Councillor : *A councillor shall cease to hold office as such if at any time during this term of office he, -*

- (a) becomes disqualified for being a Councillor by reason of the provisions of Section 10;*
- (b) absents himself during three successive months from the meetings of the corporation, except from temporary illness or other cause to be approved by the Corporation;*
- (c) absents himself from, or is unable to attend the meetings of the Corporation during six successive months from any cause whatever, whether approved by the Corporation or not, or*

(d) acts as a Councillor or as a member of any Committee of the corporation by voting on, or taking part in the discussion of, or asking any question concerning any matter in which he has directly or indirectly by himself or his partner any such share or interest as is described in clause (b) or such-section (20) of Section 10 or in which he is professionally interested on behalf of a client, principal or other person.

“Section 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 sub-section (1) such Councillor shall not be deemed to be disqualified until the Judge after holding an inquiry in the matter provided by or under this Act determines that he has ceased to hold office.”

(emphasis supplied)

13] Thus, Sub-Section 12(2) of the Act makes it clear that, it is for the Commissioner to make a reference to “the Judge” as defined

under Sub-Clause (29) of Section (2) of the Act, as to, whether the elected Councillor has incurred any disqualification. Thereafter, it is for “the Judge” to make inquiry in the manner provided by or under the said Act and to determine whether such disqualification is incurred or not. Therefore, it is clear that no one can approach the Court directly to challenge the election of the Councillor under this section. The power is conferred only on the Commissioner to take that action and on this reference only 'the Judge' can get the jurisdiction to decide the question.

14] Here, in the case, admittedly, the Appellant has not followed this requisite procedure. The Appellant has directly filed a suit in the trial Court i.e. Civil Judge (Junior Division), which is not at all contemplated under the provisions of the Act. It is for the Commissioner, the Municipal Corporation to make a reference and thereafter for a judge to make inquiry to decide, whether such disqualification is incurred and if that procedure is not followed, the very maintainability of the suit is rightly challenged and the said challenge is rightly upheld by the Appellate Court, as the Appellant had no *locus-standi* at all to move the Court on this ground.

15] Moreover, the definition of “the Judge” as given in Sub-Clause 29 of Section 2 of the Act makes it clear that in respect of any

other city except the city of Pune, 'the Judge' means the Civil Judge (Senior Division) having jurisdiction in the city.

16] Here, in the case, admittedly, the trial Court which has decided the suit is not the Court of Civil Judge (Senior Division) but the Court of Civil Judge (Junior Division), which has no jurisdiction to entertain the suit.

17] Moreover, as held in the case of *Hasan Ali s/o.Mohammad Ali (supra)* as the suit filed by the Appellant in this case in substance, challenges the election of the Respondent as 'Councillor', the suit is clearly barred in view of Section 21 of the Act and it is also prohibited under the provisions of Section 243 (zg) of the Constitution of India and therefore, was not at all maintainable.

18] Considering this legal position, it has to be held that, the Appellate Court has rightly appreciated the same and allowed the appeal.

19] No substantial question of law is raised in this Second Appeal to entertain the same and therefore, the Second Appeal stands dismissed.

20] In view of dismissal of the Second Appeal, nothing survives in the Civil Application and therefore, it also stands disposed of.

[DR.SHALINI PHANSALKAR-JOSHI, J.]