

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 14210 OF 2018

Shri. Afjal Kutubaddin Pirjade

...Petitioner

Versus

The Divisional Commissioner,
Pune Division, Pune, and others

...Respondents

....

Mr. Tanaji Mhatugade, Advocate for the Petitioner.

Mr. Y.D. Patil, A.G.P., for Respondent No.1-State.

Mr. Sagar Mane, Advocate for Respondent No.2.

Mr. Sugandh B. Deshmukh, Advocate for Respondent No.3.

....

CORAM : R. G. KETKAR, J.

RESERVED ON : 17th DECEMBER, 2018

PRONOUNCED ON : 22nd DECEMBER, 2018

ORDER :

1. Heard Mr. Tanaji Mhatugade, learned Counsel for the petitioner, Mr. Y.D. Patil, learned A.G.P. for respondent No.1-State, Mr. Sagar Mane, learned Counsel for respondent No.2 and Mr. Sugandh B. Deshmukh, learned Counsel for respondent No.3, at length.

2. By this Petition under Articles 226 and 227 of the Constitution of India, the petitioner has challenged the order dated 7.12.2018 passed by the first respondent, the Divisional Commissioner, Pune Division, Pune (for short, 'Commissioner') in Disqualification

Application No.1/2018. By that order, the Commissioner has partly allowed the application made by the third respondent herein and declared the petitioner herein, who was opponent No.1 before the Commissioner, as disqualified for continuing as a Corporator of respondent No.2 Municipal Corporation of City of Kolhapur (for short, 'Corporation') for the remainder of the tenure i.e. till November, 2020 or till the dissolution of the Corporation, whichever is later. The facts and circumstances, giving rise to filing of the present petition, briefly stated, are as under.

3. The General Elections of the second respondent Corporation were held for the period 2015 to 2020. The elections were held on 1.11.2015. The results were declared on 2.11.2015. There are total 74 Corporators in the Corporation. Out of 74 Corporators, 15 Corporators including the petitioner and the third respondent were elected on the tickets of Nationalist Congress Party (for short, 'N.C.P.'). The fifteen elected Corporators of N.C.P. formed their Aghadi in the meeting convened on 6.11.2015 and formed 'the Kolhapur Municipal Corporation Nationalist Congress Party, Kolhapur'. These Corporators also framed Constitution of the Kolhapur Municipal Corporation Nationalist Congress Party, Kolhapur. By resolution No.1 passed on 6.11.2015, respondent No.3 was elected as the Group Leader of the Vikas Aghadi and was

authorized to issue whips. Respondent No.1 was pleased to inform the second respondent Corporation to register said Aghadi by name, the Kolhapur Municipal Corporation Nationalist Congress Party, Kolhapur under the provisions of the Maharashtra Local Authority Members' Disqualification Act, 1986 (for short, 'Act') read with the Maharashtra Local Authority Members' Disqualification Rules, 1987 (for short, 'Rules').

4. Respondent No.2 issued agenda notice on 2.2.2018 to all the members of the Standing Committee informing them that election will be held for the post of Chairman of the Standing Committee on 12.2.2018. On 12.2.2018, the petitioner had cast his vote in the election. It is the case of the third respondent that the *whip* was served upon the petitioner on 9.2.2018 directing the Corporators of N.C.P. to cast their votes in favour of Smt. Megha Ashish Patil as she was fielded as a candidate by the Vikas Aghadi for contesting the election for the post of Chairman of the Standing Committee. Respondent No.3 came with the case that the petitioner did not cast his vote to Smt. Megha Ashish Patil and had cast vote in favour of Mr.Ashish Manohar Dhavale and thus acted contrary to the whip dated 9.2.2018.

5. Respondent No.3, therefore, filed application No.1/2018 before the Commissioner under Section 3 of the Act on 20.2.2018 to

declare that the petitioner has incurred disqualification to continue as a Corporator of the second respondent Corporation.

6. After service of the proceedings, the petitioner filed reply dated 3.4.2018 resisting the application. Respondent No.3 filed application on 5.12.2018 before the Commissioner to withdraw the application filed by him under Section 3 of the Act. By order dated 7.12.2018, the Commissioner partly allowed the application disqualifying the petitioner for the remainder of the tenure i.e. till November, 2020 or till the dissolution of the Corporation whichever is later. It is against this order, the petitioner has instituted the present petition.

7. In support of this Petition, Mr. Mhatugade strenuously contended that respondent No.3 was not elected / appointed as a Leader of Vikas Aghadi. Respondent No.3 had no authority to issue whip. In any case the whip was not served on the petitioner.

8. Mr. Mhatugade submitted that the provisions of Rule 3(5) and Rule 7 of the Rules are mandatory. He submitted that Rule 3(5) lays down that where a Councillor in relation to municipal party votes or abstains from voting in any of the meetings of the Municipal Corporation contrary to any direction issued by such party or by any person or authority authorized by it in this behalf without obtaining in either case

the prior permission of such party, person or authority, the leader of such Municipal party has to as soon as may be thereafter and in any case within thirty days from the date of such voting or abstention, inform the Commissioner in Form II whether such voting or abstention has or has not been condoned by such party. In the present case, respondent No.3 did not submit information in Form II within a period of 30 days from the date of voting on 12.2.2018 before the Commissioner. He further submitted that Rule 7(7) of the Rules lays down that the Commissioner has to dispose of the petition within 90 days from the date of receipt of the petition. As the disqualification petition is not disposed of within 90 days, the impugned order is vitiated and as such liable to be set aside.

9. Mr. Mhatugade relied upon following decisions :

- (i) **Kiran Narhari Wattamwar & Anr. Vs. Collector & Ors., 2012(5) Bom.C.R. 292** and in particular paragraphs-16, 18 and 26 thereof to contend that respondent No.3 was not elected/appointed as a Leader of Vikas Aghadi. He has no authority to issue whip and that the alleged whip was not served on the petitioner.
- (ii) **Balaji Ganeshrao Bacchewar Vs. Laxman Ganeshrao Tahkharwar & Ors., 2012(Supp.) Bom.C.R. 150** to contend that the proof regarding due service of the whip and due authority of person to issue whip is required to be proved if question about the alleged disqualification falls

within Clause (b) of Section 3(1) of the Act.

- (iii) **Sharda Gopal Kalore and others Vs. Collector and others, 2017(1) Bom.C.R. 834** to contend that the provisions of Rule 3(5) and Rule 7 are mandatory. If the provisions are not followed the impugned order is not sustainable and is, therefore, liable to be set aside.

10. On the other hand, Mr. Patil has supported the impugned order. He has produced the original record for my perusal. Mr. Patil submitted that on 7.11.2015, respondent No.3 as a leader of the Vikas Aghadi submitted following information/documents to respondent No.1 Divisional Commissioner:

- (i) information in Form I as required by Rule 3(1)(a) of the Rules,
- (ii) resolution appointing him as a leader of Vikas Aghadi as also authorizing him to issue whips,
- (iii) resolution framing Rules and Constitution of the Vikas Aghadi,
- (iv) declarations of 15 Corporators in form III under Rule 4(1) and
- (v) the Rules, Regulations and Constitution of the Vikas Aghadi.

11. Mr. Patil submitted that the agenda notice was issued on 2.2.2018 to all the members of the Standing Committee informing them that there will be election for the post of Chairman of the Standing Committee on 12.2.2018. On 9.2.2018, respondent No.3 issued whip to all the Corporators of N.C.P. including the petitioner herein. The petitioner received said whip and put his signature acknowledging

receipt of the whip.

12. Mr. Patil submitted that the petitioner never disputed that respondent No.3 was elected / appointed as Leader of Vikas Aghadi and that he had authority to issue whip. He has taken me through the reply dated 3.4.2018 filed by the petitioner resisting the application No.1/2018 filed by the third respondent. He submitted that even the said contentions were not advanced before the Commissioner. In other words the petitioner cannot agitate these contentions for the first time in this Petition. He submitted that the matter was closed for passing order on 5.12.2018. Respondent No.3 thereafter filed application for withdrawal on 5.12.2018 which even otherwise was legally impermissible. He, therefore, submitted that no case is made out for interfering with the impugned order.

13. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record as also the original record produced by the learned A.G.P. As mentioned earlier, respondent No.3 had filed application on 20.2.2018 under Section 3 of the Act for disqualifying the petitioner as a Corporator of the second respondent Corporation. The petitioner had filed reply dated 3.4.2018 resisting said application. A careful perusal of this reply does not even remotely indicate that the petitioner disputed

the claim of the third respondent that he was elected / appointed as a Leader of the Vikas Aghadi. The petitioner also did not dispute the authority of the third respondent to issue whip. In fact a perusal of paragraph-5 shows that petitioner asserted that respondent No.3 who was applicant before the Commissioner did not issue any whip. In paragraph-10, the petitioner contended that the whips issued by the third respondent in the past were obeyed by the petitioner. Mr. Mhatugade submitted that though this point was neither specifically pleaded nor argued before the Commissioner, since these points are pure question of law the same can be agitated for the first time in this Court. It is not possible to accept this submission for more than one reason. In the first place, the petitioner did not plead that respondent No.3 was not elected / appointed as a Leader of the Vikas Aghadi. Secondly, he did not specifically plead that respondent No.3 was not authorized to issue whip. Thirdly, in paragraph-10 the petitioner specifically asserted that the whips issued by the third respondent in the past were obeyed by the petitioner. All that the petitioner contended in his reply is that the whip was not served on him. Thus, the petitioner not only accepted that third respondent was appointed / elected as Leader of the Vikas Aghadi but also accepted that he had authority to issue whip. Fourthly, the contention of Mr. Mhatugade that this being a pure

question of law can be agitated for the first time in Writ Petition cannot be accepted. In paragraph-9 of **Balaji Bacchewar's** case (supra), the learned Single Judge of this Court referred to the decision of **Jagjit Singh Vs. State of Haryana and others, (2006) 11 S.C.C. 1.** Paragraph-9 reads thus:

“9. In "Jagjit Singh V. State of Haryana and others [(2006) 11 SCC 1] the Apex Court observed:

"48. Relying upon Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayak Gosavi it was sought to be contended on behalf of the petitioners that the admissions allegedly made before the media could be explained and shown as erroneous and not binding on them and, therefore, opportunity ought to have been granted to them to prove so and the failure to grant opportunity vitiates the impugned orders. The petitioners had failed to plead how the admissions/statements made by them were erroneous. Had they done so, then the question of its proof would have arisen. Instead of so doing, the petitioners only took shelter under the general vague denial pleading that they wish to adduce evidence. It is also to be remembered, as observed by the Supreme Court in the aforesaid case, that admission is the best evidence that can be relied upon, and though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous. The petitioners have failed to satisfy the latter part."

(emphasis supplied)

In my opinion, the contention of Mr. Mhatugade does not raise a pure question of law but it raises a mixed question of law and fact.

14. A perusal of the reply dated 3.4.2018 shows that the petitioner contended that the whip was not served on him and, therefore, the Commissioner was not justified in disqualifying the petitioner.

15. I have perused the original record. The original record shows that by resolution No.3 passed in the meeting of Vikas Aghadi on 6.11.2015 respondent No.3 was elected as a Leader of Aghadi. He was also authorized by the authority to issue whips. A perusal of the whip dated 9.2.2018 addressed to the petitioner by the 3rd respondent shows that the same was received by the petitioner and to that effect he had put his signature. A comparison of the admitted signatures of the petitioner on his reply, on vakalatnama and on the whip dated 9.2.2018 leaves no room for doubt that the signature is that of the petitioner.

16. Mr. Mhatugade submitted that the petitioner's signature is forged and fabricated. I do not find any merit in this submission. In the impugned order, the Commissioner observed that the petitioner had signed the nomination papers of Smt. Megha Ashish Patil as a Proposer.

The petitioner never raised dispute about the service of the whip as also signature acknowledging receipt of the claim. The Commissioner further observed that if at all his signature was forged and fabricated, the petitioner ought to have lodged complaint before the Competent Authority at the earliest available opportunity. However, the petitioner did not lodge complaint. The Commissioner, therefore, did not find any merit in that submission. I, therefore, do not find any merit in the submission of Mr. Mhatugude that petitioner's signature is forged and fabricated on the whip dated 9.2.2018.

17. This brings me to the contention of the petitioner that provisions of Rule 3(5) and Rule 7(7) of the Rules are mandatory and failure to comply these provisions vitiates the impugned order. Rule 3(5) lays down that where a Councillor in relation to municipal party votes or abstains from voting in any of the meetings of the Municipal Corporation contrary to any direction issued by such party or by any person or authority authorized by it in this behalf without obtaining in either case the prior permission of such party, person or authority, the leader of such Municipal party has to as soon as may be thereafter and in any case within thirty days from the date of such voting or abstention, inform the Commissioner in Form II whether such voting or abstention has or has not been condoned by such party. In the present case, the whip was

issued on 9.2.2018. The voting took place on 12.2.2018 for electing the Chairman of the Standing Committee. On 20.2.2018, respondent No.3 filed application. Thus, within thirty days from 12.2.2018 being the date of voting respondent No.3 filed the disqualification petition. Hence, there is substantial compliance of Rule 3(5) of the Rules.

18. Insofar as the contention that as the Commissioner did not decide the disqualification application within 90 days the proceeding is vitiated is concerned, equally I do not find any merit. It is settled principle of law that time is never mandatory unless the consequences on account of failure to abide by the time-frame are provided by the Statute. A perusal of Rule 7(7) of the Rules does not indicate that failure to decide the proceedings within 90 days, any consequences are provided.

19. In view thereof, the reliance placed on the decision of **Sharda Kalore** (supra) does not advance the case of the petitioner.

20. Lastly, Mr. Mhatugude submitted that respondent No.3 had filed application on 5.12.2018 for withdrawal of the disqualification application. Mr. Patil submitted that after the arguments were concluded the matter was closed for orders on 5.12.2018.

21. Section 3(1)(b) reads thus:

“3. Disqualification on ground of defection .

- (1) Subject to the provisions of section 5, a councillor or a member belonging to any political party or aghadi or front shall be disqualified for being a councillor or a member -
 - (a) xxxxxxxx
 - (b) if he votes or abstains from voting in any meeting of a Municipal Corporation, Municipal Council, Zilla Parishad or, as the case may be, Panchayat Samiti contrary to any direction issued by the political party or aghadi or front to which he belongs or by any person or authority authorised by any of them in this behalf, without obtaining, in either case, the prior permission of such political party or aghadi or front, person or authority **and such voting or abstention has not been condoned by such political party or aghadi or front, person or authority within fifteen days from the date of such voting or abstention :**

Provided that, such voting or abstention without prior permission from such party or aghadi or front, at election of any office, authority or committee under any relevant municipal law or the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961 shall not be condoned under this clause;”

(emphasis supplied)

22. A perusal of the above extracted portion shows that the condonation has to be made by person or authority within 15 days from the date of such voting or abstention. Admittedly in the present case the action of the petitioner in casting vote contrary to whip is not condoned within 15 days from 12.2.2018 being the date of voting. In view thereof, I do not find any merit in the submission of Mr. Mhatugude that the Commissioner failed to take into account withdrawal application dated

5.12.2018 submitted by the third respondent.

23. In the light of the aforesaid discussion, no case is made out for interfering with the impugned order. Hence, the Petition fails and the same is dismissed. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)