

pmw

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO.105 OF 2017
IN
PUBLIC INTEREST LITIGATION NO.41 OF 2006

Nashik Municipal Corporation and Anr. ... Applicants

In the matter between

Nashik Nagarik Kruti Samiti ... Petitioner

Vs.

The State of Maharashtra and Ors. ... Respondents

Mr. Tejesh Dande a/w Mr. Bharat Gadhavi I/by Tejesh Dande and Associates for Petitioner in PIL and for Applicant in CAI/35/2017.

Mr. Kevic Setalwad, Sr. Adv. A/w Mr. Rakesh L. Singh, and Mr. S.D. Shetty I/by M.V. Kini & Co. For R. No. 6.

Mr. Murlidhar L. Patil for R. No. 2 & 3 and for Applicant in CAI/105/2017.

Mr. Manish M. Pabale, A.G.P for Respondent Nos.1,5,7 & 8 in PIL and for applicant in CAI/5/2018.

Mrs. S.V. Bharucha and Mr. N.D. Sharma and Mr. A.A. Ansari for R. No. 4.

Mr. Ashok T. Gade for Applicant in CAI/1/2015.

Ms. Komal Kalawapudi, Technical Assistant, NEERI.

**CORAM : A.S. OKA &
RIYAZ I. CHAGLA, JJ.**

DATE : 20th MARCH, 2018

PC.

1 This application is taken out by the Nashik Municipal Corporation containing the following prayer :-

“(a) The Hon'ble Court may therefore permit the Tree Authority to function as per the provisions of the Acts

and the Rules and the aforesaid petition be disposed of accordingly.”

2 The reason for filing this application is the order dated 2nd May, 2014 passed in the main PIL while admitting the PIL. Clauses (v), (vi) and (vii) of paragraph 16 of the said order read thus :-

- (v) We direct the Municipal Corporation of City of Nashik and its Tree Authority to abide by the directions given by this Court to the Pune Municipal Corporation in terms of the paragraph Nos. 17, 19, 20 and 21 to 23 of the Judgment and Order dated 20th September, 2013 in PIL No.93 of 2009 (Deepak Balkrishna Vahikar and another versus The State of Maharashtra and others).
- (vi) At present, the Tree Authority constituted by the Nashik Municipal Corporation consists of only six members. The Nashik Municipal Corporation will have to consider of increasing the strength of the Committee within the limits permissible in law in terms of what is stated in paragraph 20 of the Judgment and Order in PIL No.93 of 2009;
- (vii) Till compliance is made by the Nashik Municipal Corporation with the directions contained in the order dated 20th September, 2013 in PIL No.93 of 2009, we restrain the Tree Authority from granting permissions for felling/ pulling down trees without permission of this Court. Only in case of extreme emergency, the Tree Authority shall be entitled to permit trimming of trees or felling of Trees. In such a case, report in writing

shall be filed in this Court within fifteen days from the date of grant of permission with copies to the parties;

3 By this Civil Application, the applicant – Nashik Municipal Corporation has claimed that now the Tree Authority has been lawfully constituted. There is an order passed by the Division Bench of this Court on 25th January, 2018 where directions were given to file additional affidavit. There is an additional affidavit filed accordingly.

4 Under the Maharashtra (Urban Areas) Protection and Preservation of Trees Act, 1975 (for short “the said Act of 1975”), Tree Authority is required to be constituted in accordance with Section 3. Sub-Sections (1) to (3) of Section 3 read thus :-

"3. Establishment and Procedure of Tree Authority :

- (1) As soon as may be after this Act is brought into force in any urban area the urban local authority concerned shall constitute a Tree Authority, consisting of [the Chairman and other] not less than five and not more than fifteen persons from amongst its members, appointed in such manner and for such period as that authority may determine :

Provided that, where an administrator by whatever name called is appointed for any municipal corporation or municipal council, he shall during the period of his appointment, act as the Tree Authority and exercise all the powers and perform all the duties of the Tree Authority.

- (2) In the case of an urban local authority specified in column (1) of the table below the Chairman of its Tree Authority shall be the person specified against it in column (2) thereof.

	Name of the urban local authority	Chairman of its Tree Authority
	1	2
1	A Municipal Corporation	[The Commissioner] of the Corporation.

2	A Municipal Council	The President of the Council.
3	A Special Planning Authority constituted under section 40(1)(a) of the Maharashtra Regional and Town Planning Act, 1966.	[The Chief Executive Officer] of the Special Planning Authority.
4	A New Town Development Authority constituted under section 113(2) of the Maharashtra Regional and Town Planning Act, 1966.	[The Chief Executive Officer] of the New Town Development Authority.
5	A New Town Development Authority declared under section 113(3A) of the Maharashtra Regional and Town Planning Act, 1966 or a Special Planning Authority appointed under section 40(1)(b) of that Act.	The Managing Director of the Corporation or company declared to be the New Town Development Authority.

- (3) Every Tree Authority may nominate representatives of non-official organizations, who have special knowledge or practical experience in the field of planting and preservation of trees, as members of the Tree Authority, but the number of such nominated members shall not exceed the number of members appointed under sub-section (1). These members shall be nominated in such manner and for such period as may be prescribed."

(underline supplied)

5 As provided in Sub-Section (1), the Tree Authority consists of the Chairman and not less than five and not more than fifteen other persons. Sub-Section (1) contemplates that Local Authority shall appoint the said members from amongst its members. In the present case, the Local Authority is the first applicant – Municipal Corporation. The Municipal Commissioner is an ex officio Chairman of the Tree Authority. Sub-Section (3) empowers the Tree Authority to nominate the representatives of non-official organisations who have special knowledge or practical experience in the field of planting and preservation of trees, as members of the Tree Authority. Sub-Section (3) provides that the number of such nominated members shall not exceed

the number of members appointed under Sub-Section (1) of Section 3. This Civil Application contains various averments regarding constitution of the Tree Authority by the first applicant. It is stated that by a Resolution dated 26th May, 2017, the General Body of the first applicant granted approval for the steps to be taken for constitution of the Tree Authority.

6 According to the case made out in the application, a Screening Committee was constituted for making appointments for constituting the Tree Authority. Accordingly, a docket was submitted for placing the same before the General Body of the Municipal Corporation. It is the case of the applicant – Municipal Corporation that even the process of nominating the members as per Sub-Section (3) of Section 3 was completed by the Tree Authority by passing a Resolution dated 11th September, 2017. It is the contention that the applications were invited by publishing advertisements in various newspapers the copies of which have been annexed at page 28 of the application. It is stated that as per the said Resolution of the Tree Authority passed on 11th September, 2017, Shri Sandip Bhavar, Shri Manoj Ghodke, Shri Pundlik Gite, Shri Yogesh Nisal, Shri Shekher Gaikwad and Shri Pramod Gaikwad were nominated as the members in accordance with Sub-Section (3) of Section 3. There is also a Committee of expert constituted vide

Resolution No.27 passed by the Tree Authority. In the rejoinder, the applicants have relied upon the Maharashtra (Urban Areas) Protection and Preservation of Trees Rules, 2009 (for short “the said Rules of 2009”). The said Rules of 2009 have been framed in exercise of rule making power under Sub-Section (1) of Section 22 of the said Act of 1975. Rule 3 of the said Rules of 2009 reads thus :-

“3. For being nominated as a representative of non-official organisation on the Tree Authority, the person shall be an active member of a non-official organization registered with the Social Forestry Department of the Government; shall have an interest in tree plantation, tree conservation, tree protection, etc. and shall possess a rich experience of at least ten years in the field.”

7 Before we deal with the submissions, it will be necessary to advert to the directions issued by a Division Bench of this Court by an order dated 20th September, 2013 in PIL No.93 of 2009. In fact there is a direction issued in the present PIL to constitute the Tree Authority in accordance with the said directions. Paragraph 20 of the said judgment and order in PIL No.93 of 2009 reads thus :-

“20. That leaves the Court with two aspects to be considered namely (i) the Constitution of the Tree Authority; and (ii) the procedure to be followed. As regards the constitution of the Tree Authority, under Section 3(2), only the members of the urban local authority [as defined in Section 2(g)] can constitute the Tree Authority. For the constitution of the Tree Authority, the minimum required strength is five members while the maximum permissible is fifteen. PMC has stated that the total number of members should be fixed at seven and that those corporators who are Science Graduates would

be preferred. A membership of seven non-official members is, in our view, fair and proper having regard to the need of making the functioning of the Tree Authority of manageable proportion. Under Section 3(3), the total number of nominated members cannot exceed the number of corporators, who constitute the Tree Authority. Hence, the nominated members would also be restricted to seven. The nominated members should belong to independent NGOs and PMC has stated that not more than one person shall be appointed from the same NGO. As regards the nominated members, wider representation needs to be given to diverse cross sections of NGOs with a special knowledge or expertise in plantation and preservation of trees with a minimum experience of at least five years. Care shall be taken to obviate a situation which had occurred in the past whereby all the nominated members belonged to the same NGO. While nominating the non-official members, preference shall be given to qualified persons with a degree or diploma in agriculture/forestry/horticulture with an expertise of five years in plantation/preservation/transplantation of trees and/or in environment protection. PMC has stated that preference would be given to those NGOs who have a national presence.”

(underline supplied)

8 Thus, in addition to qualifications provided in Sub-Section (3) of Section 3 of the said Act of 1975 the Division Bench observed that nominated members should belong to independent NGOs. It was observed that members belonging to only one NGO should not be appointed. It is also observed that while nominating the non-official members, preference shall be given to qualified persons with a degree or diploma in agriculture/ forestry/horticulture with an expertise of five years in plantation/ preservation/transplantation of trees and/or in

environment protection. In fact, under the order dated 2nd May, 2014 this Court directed that the first applicant – Corporation and the Tree Authority will abide by the directions given in the said judgment and order dated 20th September, 2013 and in particular paragraph 20 thereof.

9 Therefore, the question which arises for consideration in this Civil Application is whether the Tree Authority of the first applicant has been constituted in accordance with the provisions of the said Act of 1975 and the directions issued in paragraph 20 of the aforesaid decision. We have already referred to Sub-Section (3) of Section 3 which mandates that :-

- A] The nominated member should be a representative of non-official organization and ;
- B] The nominated member should have special knowledge or practical experience in the field of planting and preservation of trees.

10 In this context, we have perused the copy of advertisement dated 30th June, 2017 published by the Chairman of the Tree Authority for inviting applications for being nominated as members in terms of Sub-Section (3) of Section 3. The qualifications mentioned therein are :-

- (a) the applicant should be a member of NGO;

- (b) the applicant should have interest and experience in planting/ preservation/ re-planting of trees. It is stated that the member should have five year experience in the field and preference will be given to those applicants holding degree or diploma in agriculture, forestry or horticulture;
- (c) The NGO should be registered with Social Forestry Department of the State Government.”

11 As stated earlier, under Sub-Section (3) of Section 3, the essential qualification for appointing nominated member is that the person should have a special knowledge or practical experience in the field of planting and preservation of trees. The words “special knowledge” as well as “practical experience” are missing in the advertisement. It only talks about experience and interest in the field of plantation, preservation and re-plantation of trees. The learned counsel appearing for the applicants tried to rely upon Rule 3 of the said Rules of 2009. Obviously, a Rule framed under the said Act of 1975 cannot be inconsistent or contrary to Sub-Section (3) of Section 3. If Rule 3 is read to mean that it dilutes the qualifications incorporated under Sub-Section 3, it will suffer from the vice of being *ultra virus*. Sub-Section (3) of Section 3 provides that the nominated member must be a representative of non-official organization. Rule 3 provides that such person should be an active member of a non-official organization and

that the non-official organization must be registered with Social Forestry Department. Thus, this is an additional qualification provided by Rule 3. It also lays down that the applicant shall possess rich experience in the field of tree plantation, tree preservation and tree conversation, etc. for a period of 10 years. This is also an additional qualification provided in Rule 3. The decision of this Court dated 20th September, 2013 provides that persons having minimum experience of five years should be selected. Rule 3 provides for further stringent condition of the candidate having rich experience in the field of at least 10 years. Thus, at highest, what is laid down in Rule 3 will have to be construed as additional qualifications for the post of nominated members under Sub-Section (3) of Section 3. Notwithstanding Rule 3 of the said Rules of 2009, the advertisement dated 30th June, 2017 provides for requirement of only five years experience. Thus, the advertisement dated 30th June, 2017 does not specify qualifications consistent with Sub-Section (3) of Section 3 and Rule 3 of the said Rules of 2009. The process of nominating members commenced on the basis of such flawed advertisement is itself illegal.

12 However, the matter does not rest here. On 1st August, 2017 a docket was prepared by the Additional Municipal Commissioner – 1 and the Garden Superintendent of the first applicant – Municipal

Corporation for placing before the Tree Authority. The docket contains a chart of qualifications of 15 applicants. The third column in the chart is of special knowledge and practical experience. The fourth column is of details of the non-official organization to which the candidate belongs. The fifth column provides whether such non-official organization is registered with Social Forestry Department and the last column records whether the candidate has five years experience. On the basis of the said docket that a detailed resolution dated 11th September, 2017 was passed by the Tree Authority nominating the aforesaid six members. The chart containing six columns which is the part of the docket has been reproduced in the said resolution. Out of 15 candidates which are listed, the candidates at Sr. No.2, Sr. No.11, Sr. No.12, Sr. No.13 and Sr. No.14 were appointed as the nominated members. In addition, one Mr. Pramod Gaikwad, whose name does not figure in the chart in the resolution as well as in the docket dated 1st August, 2017, has been appointed. It appears that subsequently on 7th September, 2017 the name of said Pramod Gaikwad was forwarded to the Tree Authority.

13 As far as candidate at Sr.No.14 Shekhar Gaikwad is concerned, in the column of special knowledge and practical experience, it is mentioned that he holds a diploma in Mechanical Engineering. Therefore, going by the chart which is incorporated in the

resolution dated 11th September, 2017 the said Shekhar Gaikwad was not at all possessing the qualifications in terms of Sub-Section (3) of Section 3. It is claimed that he was a member of a particular NGO mentioned in column 4. However, the said NGO is not registered with the Social Forestry Department of the State Government as required by Rule 3. As far as Shri Manoj Ghodake is concerned, in column 4, it is mentioned that he is member of NGO known as Hindu Khatik Yuva Samaj Sanstha which apparently from its name appears to be an organisation of butchers. There is nothing placed on record to show that this organization is concerned in the field of planting and preservation of trees. Moreover, experience column against name of Shri Ghodke is kept blank. As regards his special knowledge or practical experience, it is merely mentioned that a newspaper cutting showing tree plantation function is produced. As far as Shri Pundlik Gite is concerned in the column “special knowledge and practical experience”, it is noted that he holds a degree of Botany. That it itself does not mean that he has special knowledge and practical experience in the field of planting and preservation of trees. His experience in terms of the number of years is not mentioned in the last column. It is merely mentioned that he has experience. Moreover, he is shown to be member of one Navnirman Sevabhavi Sanstha. Neither in the docket nor in the resolution it is recorded that the said NGO is concerned in any manner with the field

of planting and preservation of trees. As far as Shri Yogesh Nisal is concerned, it is stated that he is a member of NGO Maratha Seva Sangh. However, it is not mentioned that this organization has any connection with the planting and preservation of trees. It is not specifically stated that his experience exceeds five years. In a separate docket mentioning the name of Shri Pramod Gaikwad it is mentioned that he holds degrees of B.Sc. (Physics), M.A. (Economics) and MBA (Finance). It is not mentioned that he has special knowledge and practical experience for five years. We are referring to the aforesaid factual aspects only to show that there is complete non-application of mind by the Tree Authority and no effort is made to satisfy itself that the candidates possess the qualifications laid down in Sub-Section (3) of Section 3 read with Rule 3 of the Rules of 2009. Illegality in the decision making process starts right from the text of the advertisement by which the applications were invited to nominate the members as per Sub-Section (3) of Section 3. In fact, as a result of the failure to incorporate correct qualifications as provided in law in the said advertisement, the entire process initiated on the basis of the said advertisement is vitiated. This is apart from non-application of mind as reflected from the impugned resolution. No effort has been made by the Tree Authority to satisfy itself that the persons selected satisfy the criteria prescribed by the Act and Rules.

14 Therefore, it is impossible to hold that the Tree Authority has been lawfully constituted in accordance with the provisions of the said Act of 1975 and the Rules of 2009. Moreover, the directions issued in paragraph 20 of the judgment and order dated 20th September, 2013 have not been complied with. In the circumstances, there is no merit in the application and the same is rejected. We must clarify here that in view of the findings recorded above, the directions in order dated 2nd May, 2014 will continue to operate with full force and especially clause (vii) of paragraph 16 thereof.

15 Accordingly, we pass the following order :-

ORDER

- (i) Application is rejected;
- (ii) We make it clear that notwithstanding the pendency of the PIL it will be always open for the concerned respondents to reconstitute Tree Authority in accordance with law and to make a fresh application for the same relief which is set out in this application.

(RIYAZ I. CHAGLA, J)

(A.S. OKA, J)