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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.384 OF 2018
IN
PUBLIC INTEREST LITIGATION NO.46 OF 2015

Mr. Zoru Darayus Bhathena	... Applicant
<u>In the matter between</u>	
Mr. Zoru Darayus Bhathena	... Petitioner
Vs.	
Tree Authority, Municipal Corporation of Greater Mumbai and Ors.	... Respondents

Ms. Sonal a/w Mr. Manoj Shirsat and Ms. Irani i/b. Ms. Pushpa Thapa for the Applicant.

Mr. A.Y. Sakhare, Senior Counsel a/w Mr. Joel Carloz, Mr. Rohan Mirpury and Mr. Sagar Patil for the Respondent Nos.1 and 2.

Ms. Geeta Shastri, Addl. G.P. and Mr. Amit Shastri, AGP for the Respondent Nos.3 and 6.

Mr. G.W. Mattos for the Respondent No.7.

Ms. Jaya J. Bagwe for the Respondent No.4.

Ms. Mahafrin Mehta i/b. M/s. Mulla & Mulla & Craigie Blunt & Caroe for the Respondent No.9.

Mr. Chetan C. Agrawal for the Respondent No.12.

Mr. Kunal Birwadkar, Respondent No.14 in person.

CORAM : A.S.OKA AND M.S. SONAK, JJ.

DATE : 24th OCTOBER 2018.

P.C. :

1 The submissions on the Notice of Motion were fully heard on 22nd October 2018. The main PIL and Notice of Motion pertain to the assignment of a Bench headed by the Hon'ble Shri Justice S.S. Kemkar. The said Bench declined to take up this matter. As per the general

standing order which was operative till 22nd October 2018, the matters which could not be heard by the said Bench were required to be heard by this Bench and that is how, this Bench heard the Notice of Motion. In the main PIL which has been admitted for final hearing, the issues raised are concerning the Tree Authority under the provisions of the Maharashtra (Urban Areas) Protection and Preservation of Trees Act, 1975 (for short “the Trees Act”). In the present case, the “Urban Area” as defined in clause (f) of section 2 of the Trees Act falls within the jurisdiction of the Mumbai Municipal Corporation (for short “the said Corporation”). The contention is that the Tree Authority for Mumbai has not been constituted in accordance with section 3 of the Trees Act inasmuch as the expert members as contemplated by sub-section (3) of section 3 have not been nominated.

2 Before we refer to the submissions made across the bar, it will be necessary to quote the relevant provisions of the Trees Act. Sections 3, 4 and 7 of the Trees Act are relevant for our consideration which 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 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 (1)	Chairman of its Tree Authority (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.

- (4) Any vacancy in the Tree Authority shall be filled as soon as may be by the authority competent to appoint the member in whose place fresh appointment is to be made.

Notwithstanding anything contained in sub-Sections (1) and (2) where, in respect of the area of a Municipal Corporation or, as the case may be, a Municipal Council, the Tree Authority is not constituted or is not able to function for any reason whatsoever, the Municipal Commissioner of such Municipal Corporation or, the Chief Officer of such Municipal Council, shall act as the Tree Authority and shall exercise all the powers and discharge all the duties of a Tree Authority in such area, till such Authority is duly constituted or is able to function :

Provided that, every decision taken by the Municipal Commissioner or the Chief Officer under this Section, shall be placed before the general body of such Municipal Corporation or as the case may be, the Municipal Council, in its immediately next meeting held after such decision.”

- “4. Meetings of Tree Authority.
- (1) The Tree Authority shall meet at least once every month at such place and time as the Chairman may decide but, forty-five days shall not intervene between its two consecutive meetings.
- (2) The quorum to constitute a meeting of the Tree Authority shall be one-third of the total number of its members including the nominated members, if any.
- (3) The nominated member shall have the right to vote at a meeting of the Tree Authority.
- (4) Save as otherwise provided by or under this Act, the rules of procedure for the meeting of the urban authority

shall mutatis mutandis apply to the meetings of the Tree Authority.

7. Duties of Tree Authority

Notwithstanding anything contained in the relevant Act or in any other law for the time being in force, and subject to any special or general directions given by the State Government, the Tree Authority shall be responsible for—

- (a) protection and preservation of all trees in all lands within its jurisdiction;
- (b) carrying out a census of the existing trees in all lands within its jurisdiction, once before December 1996 and thereafter once in every five years;
- (c) prescribing standards specifying the number and types of trees which each plot of land shall have and which shall be planted therein;
- (d) development and maintenance of nurseries for the supply of seeds, sapplings and trees to persons who desire to plant new trees or to replace trees which have been felled with the previous permission of the Tree Officer or involuntarily uprooted;
- (e) transplanting of trees necessitated by construction of new roads or widening of existing roads or for safeguarding danger to life or property;
- (f) organisation of flower, fruit, vegetable, tree or plant shows at least once a year and assisting private and public institutions in organising such shows, and creation of consciousness of importance of trees and vegetation to the human welfare;
- (g) grant of advice and technical assistance to any person seeking such advice or assistance in any matter connected with planting, protection and preservation of trees;
- (h) planting and maintaining such number of trees as it considers necessary, according to the prescribed standards, along the roads, in public parks and gardens and on banks of rivers or lakes or sea shores, on hills, open spaces or public places;

- (i) undertaking any other schemes or measures for achieving the objects of this Act.”
(underlines supplied)

3 As far as the important role assigned to the Tree Authorities constituted under the Trees Act is concerned, we must make a reference to the order dated 23rd April 2018 passed in the very PIL and in particular paragraphs 26 to 31 of the said order which read thus :-

- “26. We have given careful consideration to the submissions. It will be necessary to make a reference to the statements of objects and reasons of the Trees Act, the relevant part of which reads thus:-
“Greenary in the cities is rapidly giving way to jungles of cement and concrete blocks. With the growing pace of urbanisation and industrialisation, there has been indiscriminate felling of large number of trees in the urban areas of the State of Maharashtra. This has resulted in disturbing the ecological balance with disastrous effect of environment particularly the climate in the cities and their surrounding areas. It has thus become necessary to provide for protection for the existing trees and for encouragement to planting more trees in the urban areas. This Bill accordingly seeks to make better provision for the preservation of trees in urban areas in the State, by regulating felling of trees and providing for planting of adequate number of new trees in those areas and to provide for matters connected therewith. The following paragraphs indicate in brief the important provisions made in the Bill.....”
27. The statement of objects and reasons specifically notes the factual position that indiscriminate felling of large number of trees due to urbanisation and industrialisation in the urban areas in the State of Maharashtra has resulted in disturbing ecological balance with disastrous effect on the environment and particularly the climate in the cities and surrounding

areas. The object of the Trees Act is to provide protection to the existing trees and to encourage planting more trees in the urban areas. It is emphasized that the Trees Act seeks to make better provisions for preservation of trees in urban areas in the State, by regulating felling of trees and providing for planting of adequate number of new trees in those areas. Thus, essentially the Trees Act has been enacted after taking a note of disturbance of ecological balance due to indiscriminate felling of trees in the urban areas of the State. The entire object seems to protect the existing trees and to encourage planting of more and more trees in urban areas. Only with the object of preservation of trees that the Trees Act seeks to regulate felling of trees. The object is not to allow felling of large number of trees.

28. Before we advert to the provisions of Sections 3, 4 and 8, it will be also necessary to make a reference to the other relevant provisions of the Trees Act. Under sub-Section (1) of Section 9, there is a power conferred on the Tree Officer to direct the owner or occupier of the land requiring him to plant such tree or trees at such places in the land as may be specified in the order. Sub-Section (1) of Section 12 provides for adoption of trees. Section 11 provides that when an order under Section 8 is made, it will be the duty of the owner or occupier of the land who is directed to plant trees to see that the trees grow properly and are well preserved. He is expected to submit a report to the Tree Officer once in six months about the condition of the trees. Moreover, it imposes a duty upon such owner or occupier to preserve all other trees existing on the land on the date of coming into force of the Trees Act in the urban areas in which the land is situated. Sub-Section (1) of Section 12 provides for grant of permission by the Tree Authority to an individual or a body to adopt any tree for the period specified therein. Section 19 is a salutary provision which starts with a non-obstante clause. The section, thus, overrides the other laws in force. It

provides that any officer or any authority of the Urban Local Authority, who is empowered to give any permission for development of a land, shall not give such permission, except with the approval of and subject to the conditions, if any, imposed by the Tree Officer in regard to the preservation or plantation of trees on such land. Therefore, even if cutting or trimming of trees for making development on a land is not required, a development permission cannot be granted by the Planning Authority except with the approval of and subject to conditions imposed by the Tree Officer with the object of preservation or plantation of trees on such lands. This provision overrides the provisions of the Municipal Laws such as the Maharashtra Municipal Corporations Act, 1949, the Mumbai Municipal Corporation Act, 1888 and the Maharashtra Regional and Town Planning Act, 1966. Section 20A confers a power on any Tree Officer or any Police Officer to use such force as may be reasonably necessary to prevent the felling or destruction of any tree or for the protection of any tree. Thus, apart from the objects set out in the objects and reasons, the extensive provisions referred above clearly show that **the object of the Trees Act is to provide protection to existing trees and for encouraging planting of additional trees. Granting permission for cutting the trees or transplanting the trees is only a small part of the function of the Tree Authority. In fact, if Section 7 is perused, it holds the Tree Authority responsible for protection and preservation of all trees in all lands within its jurisdiction. The Tree Authority is also under an obligation to carry out census of the existing trees in all lands within its jurisdiction once before December, 1996 and thereafter once in every five years. It is not clear whether this important function has been discharged by the Tree Authorities of both the Municipal Corporations. One of its functions is to organize flower, fruit, vegetable, tree or plant shows. Its another function is**

grant of advice and technical assistance to any person seeking such advice or assistance in any matter connected with planting, protection and preservation of trees. Its duty is also to undertake the schemes or measures to achieve the objects of this Act. On conjoint reading of the provisions of the Trees Act with its objects and reasons, it is very clear that power under Section 8 conferred on various authorities is to ensure that there are restrictions/ regulations on felling of trees so as to improve green cover of the urban areas. We have already made an extensive reference to the decision of the Division Bench of this Court dated 20th September 2013, which essentially deals with the City of Pune which notes that due to expansion of the said City by leaps and bounds during last two decades, there is a fast depletion of green cover. We must take a judicial notice of the fact that the said observation will equally apply to the cities of Mumbai and Thane as well as several other Metropolitan cities in the State. Perhaps, it is in the light of the provisions of the Trees Act and objects and reasons that the Division Bench in paragraph 26 of the decision held thus:-

“26. We now direct that the PMC shall take necessary steps to effectuate this order to ensure that the census of trees adopting modern technology in a digitized frame work with geo-tagging is duly completed. All steps shall be taken to ensure that the constitution of the Tree Authority is carried out in terms as indicated to the Court. **Above all, we would seek to emphasize that the Tree Authority is not an authority for the destruction of trees but for the preservation of trees and the enhancement of the fast depleting green cover in the urban areas of the State.**”

29. **It is only in the light of this legal position that the provisions of the Trees Act will have to be interpreted.** Now, we turn to the provisions of Section 3 of the Trees Act. As far as the qualifications of nominated members under sub-Section (3) of Section 3

are concerned, the same can be found at three places. The first is the statute itself [sub-Section (3) of Section 3] which provides that the Tree Authority can nominate representatives of non-official organizations, who have special knowledge or practical experience in the field of planting and preservation of trees, as the members of the Tree Authority. The number of such nominated members shall not exceed the number of members appointed under sub-Section (1) of Section 3 who are councillors of the Municipal Corporation. We have already reproduced the provisions of Rule 3 of the said Rules of 2009 which provide for additional qualifications in addition to what is provided in sub-Section (3) of Section 3. It provides that nominated member shall be an active member of a Non Government Organization (NGO) registered with Social Forestry Department of the State Government. It imposes condition of a minimum experience of 10 years in that field. The decision dated 20th September 2013 which is referred earlier provides for experience of five years which does not take the note of Rule 3. However, said decision categorically lays down that all nominated members should not be from the same non-official organization. The fact that Rule 3 provides that a non-official organization must be registered with Social Forestry Department indicates that the NGO must have some connection with the activity of tree plantation or tree conservation or tree protection etc. **Thus, the object of sub-Section (3) of Section 3 and Rule 3 seems to be that the Tree Authority should have an assistance of the persons who are having not only mere experience in the field but those who have special knowledge or practical experience in the field of plantation or preservation of trees who are representatives and members of NGO which is registered with Social Forestry Department.** Thus, the object of the qualifications laid down is to ensure that a Tree Authority must have expert members in the field of tree planting and conservation and protection of trees.

As stated earlier, grant of permissions for cutting the trees appears to be a very small part of the larger duties and functions entrusted to the Tree Authority generally under Section 7 and particularly under various other Sections of trees Act.

30. **Thus, it goes without saying that if the provisions of sub-Section (3) of Section 3 and/or Rule 3 and/or aforesaid binding directions of this Court are not implemented in its true letter and spirit, the very object of appointing nominated members will be completely frustrated.** We have already noted the statement of objects and reasons in which the State has accepted that there has been indiscriminate felling of large number of trees in the urban areas in the State of Maharashtra which has resulted in disturbing ecological balance with disastrous effect on environment particularly the climate in the cities and surrounding areas. It is not the stand taken by the State Government that between 1975 and 2018, there is any improvement in the situation. Any action which affects ecological balance and which has disastrous effect on the environment including the climate amounts to violation of fundamental rights of the citizens under Article 21 of the Constitution of India. The said right is to live in a pollution free atmosphere. Article 48A which is a part of the directive principals of such policy are also relevant which reads thus:-

“48A. Protection and improvement of environment and safeguarding of forests and wild life. – The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.”

(emphasis supplied)

4 The learned counsel appearing for the petitioner invited our attention to the prayer made in the Notice of Motion. The prayer is for

restraining the Tree Authority of Mumbai from functioning and discharging the duties assigned to it under the Trees Act. The main contention raised by the learned counsel appearing for the applicant/ PIL petitioner is based on the judgment and order dated 20th September 2013 in PIL No.93 of 2009 by a Division Bench of the Hon'ble Shri Justice D.Y. Chandrachud (as he then was) and one of us (M.S. Sonak, J.). The submission of the learned counsel appearing for the applicant is that admittedly the Tree Authority does not consist of expert members which are required to be nominated under sub-section (3) of section 3 and today, the Tree Authority consists of only 13 elected councilors who are not experts in the field of horticulture. Her submission is the the very object of providing for establishing a Tree Authority is defeated as a result of failure of the said Corporation to nominate the expert members under sub-section (3) of section 3 who have special knowledge and practical experience in planting and preservation of trees. Her submission is that as per the scheme of the Trees Act, such nominated members have right of voting on par with elected councilors who are appointed under sub-section (1) of section 3. Her submission is that the word "may" used in sub-section (3) of section 3 will have to be read as "shall". Her submission is that if expert members as contemplated under sub-section (3) of section 3 are not appointed, the very object of enacting the Trees Act will be defeated. Her submission is that both the Tree Authority and the Municipal Corporation have public duty to discharge and therefore, provision of sub-section (3) of section 3 will have to be read as mandatory. Her submission is that as admittedly not a single member has been nominated under sub-section (3) of section 3, interim order which is made by this Court by a

common order dated 23rd April 2018 passed in this PIL as well as PIL No.119 of 2017 in relation to Tree Authority of Thane be passed.

5 The learned senior counsel appearing for the Municipal Corporation accepted that not a single member in terms of sub-section (3) of section 3 has been nominated. The learned senior counsel relied upon sub-section (1) of section 3 and submitted that the moment the urban local authority constitutes Tree Authority by appointing not less than 5 and not more than 15 persons as provided under sub-section (1) of section 3, the Tree Authority stands constituted and it is not mandatory to appoint nominated members as provided in sub-section (3) of section 3. He pointed out that sub-section (3) uses the word “may”. He pointed out that the words “if any” used in sub-section (2) of section 4 indicate that it is not mandatory to appoint expert members as provided in sub-section (3) of section 3. The learned senior counsel relied upon two decisions of the Apex Court in the case of *May George Vs. Special Tahsildar and Ors.*¹ and *Bachahan Devi and Anr. Vs. Nagar Nigam, Gorakhpur and Anr.*². He also invited our attention to the contents of the reply filed by the Municipal Corporation. He pointed out that an effort was made by the Municipal Corporation to nominate members in accordance with sub-section (3) of section 3 but the Municipal Corporation could not get any one. He pointed out that though the affidavit does not set out the qualifications of the 13 elected councilors who are a part of the Tree Authority, in the affidavit, list of the employees of the Garden Department of the Municipal Corporation has been annexed which shows that there are large number

1 (2010) 13 SCC 98

2 (2008) 12 SCC 372

of staff members available with the Municipal Corporation who have special knowledge in Agriculture/Botany/ Horticulture and therefore, the existing members of Tree Authority who may not be experts can always discharge their duties properly with the assistance of large number of qualified officers. The learned senior counsel submitted that drastic interim relief as prayed cannot be granted preventing the Tree Authority from functioning. He also invited our attention to the observations made by this Court in paragraph 29 of the order dated 23rd April 2018 passed by the Division Bench of this Court in the very PIL.

6 We have given careful consideration to the submissions. In the case of Deepak Balkrishna Vahikar and another Vs. State of Maharashtra and others (PIL No.93 of 2009) (supra), the Division Bench was dealing with the PIL concerning the Tree Authority at Pune wherein the issue of proper constitution of Tree Authority under section 3 squarely arose. In paragraph 10 of the said judgment, the Division Bench held thus :-

10. The Tree Authority is not an authority that has been constituted for the destruction of trees. The primary object of the Tree Authority is to ensure the preservation and protection of the trees, the plantation of trees and the enhancement of the tree cover. Evidently, however, this purpose has been defeated. The object of the Act has been defeated by the failure of the PMC to co-opt members of civil society on the Tree Authority. The object underlying the provisions of Section 3(3) is that civil society organizations with special knowledge or practical expertise in the preservation of trees, should be co-opted as nonofficial representatives. It is an unfortunate reflection on the state of affairs in the PMC that not a single non-official

organization has been co-opted in the Tree Authority at present. In consequence, the entire work of the Tree Authority is manned by municipal corporators. The applications are not disposed of within the statutory period of sixty days with the result that a developer goes scot-free and can destroy trees virtually at will. Such a state of affairs needs urgent remedial attention by the Court. Article 21 of the Constitution which recognizes the right to live, it is well settled, includes the right to a clean and healthy environment. The protection of the environment is a fundamental duty under Article 51(A) (d) of the Constitution. Our jurisprudence has now been expanded to incorporate the principles of sustainable development. Sustainable development seeks to draw a balance between the needs of development in the present with the need to preserve and protect the environment in the interests of future generations. The doctrine of public trust recognizes that the environment should be protected for future generations. Legislation, such as the Trees Act, must, therefore, be interpreted by the Court consistent with the need to ensure sustainable development so that the green cover in urban agglomerations of the State, is not destroyed by rapacious development motivated by human greed.”

(underline supplied)

7 Thus, considering the object of the Trees Act, the Division Bench came to the conclusion that the failure of the Pune Municipal Corporation to co-opt/ nominate the members of the civil society as per sub-section (3) of section 3 defeats the very object of the Trees Act. The Division Bench specifically disapproved the working of the Tree Authority of the Pune Municipal Corporation which was manned only by the Municipal Councilors. Ultimately, the Division Bench held that the legislations such as Trees Act must be interpreted by the Court consistent with a need to ensure the sustainable development so that green cover in

urban agglomerations of the States is not destroyed by rapacious development motivated by human greed.

8 A very detailed finding has been recorded in paragraph 20 about the manner in which the Tree Authority should be constituted. Paragraph 20 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 nonofficial 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.”

9 Ultimately, a direction was issued by the Division Bench in paragraph 26 to the Pune Municipal Corporation to constitute the Tree Authority in terms of the said decision. What is material is the last observation made by the Division Bench in paragraph 26 which read thus :-

“26. Above all, we would seek to emphasize that the Tree Authority is not an authority for the destruction of trees but for the preservation of trees and the enhancement of the fast depleting green cover in the urban areas of the State.”

10 The learned counsel appearing for the applicant relied upon the orders passed in PIL/119 of 2017 which was heard along with the present PIL which concerns the Tree Authority of the Thane Municipal Corporation. Reliance was placed on the order dated 2nd May 2014 in PIL No.41 of 2006 (Nashik Nagrik Kruti Samiti Vs. The State of Maharashtra and others) which deals with the issues concerning the Tree Authority of the Nashik Municipal Corporation. The Division Bench noticed that the Tree Authority was not constituted in terms of the aforesaid decision in the case of Deepak Balkrishna Vahikar (supra) and therefore, the orders were passed to comply with the directions issued in the case of Deepak Balkrishna Vahikar (supra) including the directions in paragraph 20 thereof. An interim order was passed restraining the Tree Authority of the

Nashik Municipal Corporation from granting permissions for felling of trees without permission of this Court so long as the directions contained in the case of Deepak Vahikar were not complied with. There is a further order dated 20th March 2018 passed in the PIL No.41 of 2006 which takes note of the action of Nashik Municipal Corporation of appointing expert members under sub-section (3) of section 3. After holding that the members so appointed were not qualified, the prayer made by the Nashik Municipal Corporation for vacating the earlier restraint put on the functioning of the Tree Authority was rejected. Even while passing the order dated 23rd April 2018 in PIL No.119 of 2017 in relation to the Tree Authority of Thane Municipal Corporation, a finding was recorded that constitution of the Tree Authority stands vitiated considering the entire procedure followed for nominating members under sub-section (3) of section 3 stands vitiated. Therefore, a restraint was imposed on the functioning of the Tree Authority of the Thane Municipal Corporation subject to the directions issued for taking care of the emergent situations. In the case of Thane Tree Authority, after holding that the appointment of the nominated members under sub-section (3) of section 3 stands vitiated, it was held that the Tree Authority cannot function only with the elected councilors as members. Hence, there is no difference between the situation in the case of Thane Tree Authority and the Tree Authority of Mumbai. Hence, reasons recorded in the order dated 2nd April 2018 will squarely apply.

11 Now, we turn to the decision of the Apex Court in the case of May George (supra). Paragraphs 19 and 25 of the said decision are material which read thus :-

“19. In *Sharif-ud-Din v. Abdul Gani Lone* this Court held that the difference between a mandatory and directory rule is that the former requires strict observance while in the case of latter, substantial compliance with the rule may be enough and where the statute provides that failure to make observance of a particular rule would lead to a specific consequence, the provision has to be construed as mandatory.”

“25. The law on this issue can be summarised to the effect that in order to declare a provision mandatory, the test to be applied is as to whether non-compliance with the provision could render the entire proceedings invalid or not. Whether the provision is mandatory or directory, depends upon the intent of the legislature and not upon the language for which the intent is clothed. The issue is to be examined having regard to the context, subject-matter and object of the statutory provisions in question. The Court may find out as to what would be the consequence which would flow from construing it in one way or the other and as to whether the statute provides for a contingency of the non-compliance with the provisions and as to whether the non-compliance is visited by small penalty or serious consequence would flow therefrom and as to whether a particular interpretation would defeat or frustrate the legislation and if the provision is mandatory, the act done in breach thereof will be invalid.”

(underline supplied)

12 In the case of *Bachahan Devi and Anr.*, the Apex Court considered the effect of use of words “may” and “shall”. A portion of paragraph 13 was relied upon by the learned senior counsel appearing for the petitioner wherein the Apex Court dealt with the situation where both the expressions “shall” and “may” were used in the same provision. In the said paragraph, the Apex Court considered the various decisions and other

material on record and ultimately, in paragraphs 18 to 20, it was held thus:-

- “18. It is well-settled that the use of word ‘may’ in a statutory provision would not by itself show that the provision is directory in nature. In some cases, the legislature may use the word “may” as a matter of pure conventional courtesy and yet intend a mandatory force. In order, therefore, to interpret the legal import of the word “may”, the court has to consider various factors, namely, the object and the scheme of the Act, the context and the background against which the words have been used, the purpose and the advantages sought to be achieved by the use of this word, and the like. It is equally well settled that where the word “may” involves a discretion coupled with an obligation or where it confers a positive benefit to a general class of subjects in a utility Act, or where the court advances a remedy and suppresses the mischief, or where giving the words directory significance would defeat the very object of the Act, the word “may” should be interpreted to convey a mandatory force. As a general rule, the word “may” is permissive and operative to confer discretion and especially so, where it is used in juxtaposition to the word “shall”, which ordinarily is imperative as it imposes a duty. Cases however, are not wanting where the words “may”, “shall”, and “must” are used interchangeably. In order to find out whether these words are being used in a directory or in a mandatory sense, the intent of the legislature should be looked into along with the pertinent circumstances.
19. The distinction of mandatory compliance or directory effect of the language depends upon the language couched in the statute under consideration and its object, purpose and effect. The distinction reflected in the use of the word “shall” or “may” depends on conferment of power. Depending upon the context, “may” does not always mean may. May is a must for enabling compliance of provision but there are cases in

which, for various reasons, as soon as a person who is within the statute is entrusted with the power, it becomes his duty to exercise that power. Where the language of statute creates a duty, the special remedy is prescribed for non-performance of the duty.

20. If it appears to be the settled intention of the legislature to convey the sense of compulsion, as where an obligation is created, the use of the word “may” will not prevent the court from giving it the effect of compulsion or obligation where the statute was passed purely in public interest and that rights of private citizens have been considerably modified and curtailed in the interests of the general development of an area or in the interests or removal of slums and unsanitary areas. Though the power is conferred upon the statutory body by the use of the word “may” that power must be construed as a statutory duty. Conversely, the use of the term “shall” may indicate the use in optional or permissive sense. Although in general sense “may” is enabling or discretionary and “shall” is obligatory, the connotation is not inelastic and inviolate." Where to interpret the word “may” as directory would render the very object of the Act as nugatory, the word “may” must mean “shall”.

(underline supplied)

13 The learned counsel appearing for the applicant had relied upon the decision of the Apex Court in the case of *Deewan Singh and Ors. Vs. Rajendra Pd. Ardevi and Ors.*³. Paragraph 32 of the said decision reads thus :-

- “32. Even if the expression “shall” is read as “may” although there does not exist any reason therefor, the statute provides for a power coupled with a duty. It is a well-settled principle of interpretation of statutes that where

3 (2007) 10 SCC 528

power is conferred upon a public authority coupled with discretion, the word “may” which denotes discretion, should be construed to mean a command.”

(underline supplied)

14 The legal position which emerges on the basis of the aforesaid decisions is that mere use of words “may” in a statutory provision is by itself not sufficient to hold that the provision is directory in nature. In some cases, the legislature may use the word “may” as a matter of pure conventional courtesy and yet intend a mandatory force. One of the factors to be considered is the object and scheme of the Act, the context and the background against which the word “may” has been used and the purpose and the advantages sought to be achieved by the use of this word. Where the word “may” involves a discretion coupled with an obligation or where it confers a positive benefit to a general class of subjects in a utility Act, the word “may” should be used to convey the statutory force. Where an obligation is created, the use of word “may” will not prevent the Court from giving it the effect of compulsion or obligation where the statute was passed purely in public interest.

15 Ultimately, the issue is to be examined having regard to the context, subject matter and object of the statutory provision. The Court will have to consider whether a particular interpretation will defeat or frustrate the object of the legislation. As far as this Court is concerned, it is already held that the failure to appoint nominated members under sub-section (3) of section 3 defeats the very object of the Trees Act. Apart from what is held in the decision of the Deepak Vahikar or what is

mentioned in the preamble of the Trees Act, it is clear that the object of the Act is to make a better provision for protection and preservation of trees in urban areas. We have already referred to the important role assigned to the Tree Authority. Indiscriminate felling of trees in the cities directly affects the fundamental rights of the citizens under Article 21 of the Constitution of India to live with dignity, to lead a meaningful life and to live in a pollution free atmosphere. The Tree Authority constituted under the Trees Act has an important public duty to perform in larger public interest in the light of the mandate of the Directive Principles of State Policy which enjoins the State to protect the environment. As the Tree Authority performs important public duty, even the urban local authority (in the present case, the said Municipal Corporation) which is vested with the duty of constituting the Tree Authority also performs important public function and public duty. As held earlier, one of the important public duties of the Tree Authority is to protect and preserve trees in the city. As per section 7, there are diverse statutory duties vested in the Tree Authority including prescribing the standards specifying the number and types of trees which each plot of land shall have and which shall be planted therein. Under clause (g) of section 7, it is the duty of the Tree Authority to grant advise and technical assistance to any person seeking such advice in the matter connected with planting, protection and preservation of trees. Thus, apart from what is held in the case of Deepak Vahikar, at least some members of the Tree Authority require expert knowledge in the field of plantation, preservation of trees as well as horticulture. It is not open to contend that though the Tree Authority will not consist of anyone who is an expert in the field, for discharging its

mandatory duties, the Tree Authority will seek assistance of someone else who is not a member. In the circumstances, *prima facie*, we are of the view that the use of the word “may” in sub-section (3) of section 3 does not suggest that the provision is directory. Sub-section (2) of section 4 specifically provides that even nominated members have a right of voting. Merely because the words “if any” are used in sub-section (2) of section 4, the same does not dilute the provisions of sub-section (3) of section 3. It is true that sub-section (1) of section 3 provides that the Tree Authority can be constituted by urban local authority by appointing its own members as specified therein. It is only after the Tree Authority is constituted that sub-section (3) of section 3 comes into action which mandates the Tree Authority to nominate the representatives of non-official organisations having special knowledge or practical experience in the field of planting and preservation of trees. Though technically, the Tree Authority can be said to have been constituted after the appointment of members as contemplated under sub-section (3) of section 3, the constitution of the Tree Authority cannot be complete unless nominated members required by sub-section (3) of section 3 are appointed. The words “if any” used in sub-section (2) of section 4 appear to have been used mainly because there may be a small time gap between the constitution of a Tree Authority as per sub-section (1) of section 3 and the appointment of nominated members under sub-section (3) of section 3.

16 It is argued by the learned counsel for the Municipal Corporation that efforts were made by the Corporation to get qualified members, but the Corporation could not get any one. The said contention

deserves to be rejected as it is not the case of the Corporation that applications were invited by publishing a public notice. The Corporation ought to have invited applications by giving adequate publicity.

17 Apart from the prima facie view taken by us that sub-section (3) of section 3 is mandatory, even otherwise, in view of the law laid down in the case of Deepak Vahikar, we have to conclude that the failure to appoint nominated members under sub-section (3) of section 3 completely defeats the very object of enacting the Trees Act. Therefore, in our considered view, the directions which are issued under the order dated 23rd April 2018 in PIL No.119 of 2017 in relation to the Tree Authority of Thane Municipal Corporation will have to be issued in the present case. Accordingly, we dispose of this Notice of Motion by passing the following order :-

ORDER

- (i) Till the final disposal of the PIL, the existing Tree Authority of the Mumbai Municipal Corporation shall not take any decision on the applications which may be made under sub-section (2) of section 8 of the Trees Act;
- (ii) We, however, make it clear that in view of the aforesaid direction, the Municipal Commissioner shall be entitled to exercise powers conferred upon him by sub-section (4) of section 3 of the Trees Act. However, the powers shall be exercised in accordance with what is observed in paragraphs 47 and 48 of the common order dated 23rd April 2018 passed in PIL No.119 of 2017 and PIL No.46

of 2015. Consequently, whenever power is exercised by the Commissioner of the Municipal Corporation under sub-section (4) of section 3, the direction issued under the said order in terms of clauses (x) to (xiii) will apply;

- (iii) We also make it clear that this order will not prevent the Municipal Corporation from appointing the appropriate number of nominated members as per sub-section (3) of section 3 of the Trees Act and as soon as such appointments are made, it will be always open for the Municipal Corporation to apply for modification/ vacating this order;
- (iv) Notice of Motion is disposed of on above terms;
- (v) We make it clear that notwithstanding the disposal of the Notice of Motion, it will be open for the applicant to take out fresh Notice of Motion for prayers made in terms of prayer clauses (b) and (d). At this stage, the learned senior counsel appearing for the Municipal Corporation seeks stay of this order. This order takes care of all emergent situations and permits the Municipal Commissioner to exercise powers of sub-section (4) of section 3 of the Trees Act. Hence, prayer for stay is rejected.

(M.S. SONAK, J.)

(A.S.OKA, J.)