

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.479 OF 2019

Mr.Siddheshwar Mogalappa Kamurthi)
Age - 59 years, Occ. Business,)
Residing at 316, Gauripada, Bhiwandi,)
District-Thane- 421 302) .. Petitioner

Vs

1. The State of Maharashtra)
through the Secretary,)
Urban Development Department,)
Government of Maharashtra,)
Mantralaya, Mumbai - 400 032)
)
2. The Commissioner,)
Bhiwandi Nizampur City Municipal)
Corporation, Bhiwandi,)
District-Thane, PIN - 421 302) .. Respondents

WITH
WRIT PETITION NO.475 OF 2019

Mr.Rahul Chagan Khatke)
Age-28 years, Occ.Business,)
Residing at Flat No.101/102, B-3 Building)
Mansarovar, Bhiwandi,)
District-Thane 421 302) .. Petitioner

Vs

1. The State of Maharashtra)
through the Secretary,)
Urban Development Department,)
Government of Maharashtra,)
Mantralaya, Mumbai - 400 032)
)
2. The Commissioner,)
Bhiwandi Nizampur City Municipal)
Corporation, Bhiwandi,)
District-Thane, PIN - 421 302) .. Respondents

WITH
WRIT PETITION NO.478 OF 2019

Mr.Mohammad Sajid Ashfaq Khan)
Age-44 years, Occ.Business,)
Residing at House No.1294, Noor Palace,)
Opp.Al-Raji Hospital, Nashik Road,)
V.P.Naka, Bhiwandi,)
District-Thane- 421 302) .. Petitioner

Vs

1. The State of Maharashtra)
through the Secretary,)
Urban Development Department,)
Government of Maharashtra,)
Mantralaya, Mumbai - 400 032)
2. The Commissioner,)
Bhiwandi Nizampur City Municipal)
Corporation, Bhiwandi,)
District-Thane, PIN - 421 302) .. Respondents

WITH
WRIT PETITION NO.480 OF 2019

Mr.Devanand Rupchand Thale)
Age-44 years, Occ. Business,)
Residing at Flat No.405, Chamunda)
Palace, Anjur Phata, Bhiwandi,)
District-Thane-421 302) .. Petitioner

Vs

1. The State of Maharashtra)
through the Secretary,)
Urban Development Department,)
Government of Maharashtra,)
Mantralaya, Mumbai - 400 032)
2. The Commissioner,)
Bhiwandi Nizampur City Municipal)
Corporation, Bhiwandi,)
District-Thane, PIN - 421 302) .. Respondents

Dr.Ramdas P. Sabban a/w Mr.Subhash Gutte and Mr.Pravin Sabban for the Petitioners.

Mrs.Kirti Kulkarni, AGP for State-Respondent No.1.

Mr.N.R.Bubna for Respondent No.2.

**CORAM :- S. C. DHARMADHIKARI &
B.P.COLABAWALLA, JJ.**

DATE :- APRIL 16, 2019

ORAL JUDGMENT :- (Per S.C.Dharmadhikari, J.)

1. By these petitions under Article 226 of the Constitution of India, the petitioners are challenging the order dated 27th November, 2018 suspending them as nominated Councillors of Bhiwandi Nizampur City Municipal Corporation .

2. The facts and circumstances in each of these petitions being common and equally the legal issue, we take the facts in Writ Petition No.479 of 2019 and dispose of all these petitions by this common judgment and order.

3. We issue Rule in each of these petitions. Respondents waive service. By consent, Rule is made returnable forthwith.

4. The petitioner says that a resolution was passed by the Municipal Corporation bearing number 76 dated 12th July, 2018

appointing the petitioner and four others as nominated Councillors. The nominated Councillors are the petitioner, in the present petition, Mr.Rahul Khatke, Mohammad Sajid Ashfaq Khan, Mr.Devanand R. Thale and advocate Harshad Pramod Patil.

5. The petitioner says that he is duly qualified to be nominated and particularly, fulfills the requirement of Rule 4 of the Rules in relation to nomination.

6. One Mr.Shyam Mansukhrai Agarwal filed writ petition in this Court being Writ Petition No.8541 of 2018. This writ petition was placed before this Court, but no orders were passed and in the meanwhile, acting on his complaint which alleges that the nomination contravenes Rule 4 of the Maharashtra Municipal Corporation (Qualification and Appointment of Nominated Councillors) Rules 2012, the intervention of the Government was sought.

7. The Government intervened by the impugned order and the order recites the backdrop in which the matter was taken up by the Government. The Government firstly referred to the requirements of the Rules and then, came to the allegations. The Government, after referring to the Rules, came to the conclusion that the nominations of the petitioner in this petition and others

namely, Mohammad Sajid Ashfaq Khan, Rahul Chagan Khatke and Devanand Rupchand Thale are contrary to Rule 4 of the Rules as also a Government Circular dated 6th July, 2010. It is stated that once these Councillors have been nominated contrary to the Rules, then, Section 451 of the Maharashtra Municipal Corporations Act, 1949 (hereinafter referred to as “the MMC Act”) empowers the Government to take the appropriate steps, including to suspend the resolution. It is in these circumstances, the impugned order recites that the Municipal Corporation Resolution dated 12th July, 2018 stands suspended. It stands suspended only to the extent of the Councillors referred above.

8. We have, with the assistance of Mr.Sabban appearing for the petitioners and learned advocate appearing for the Municipal Corporation Mr.Bubna as also the learned AGP perused the MMC Act.

9. The MMC Act is an Act to provide for the establishment of Municipal Corporations for all larger urban areas except that of Brihan Mumbai in the State of Maharashtra. Chapter I contains the preliminary provisions and Section 2 contains the definitions. In that, the definition of the term “Councillor” is relevant. Section 2 Clause 11 defines the term “Councillor” to mean a person duly elected as a member of the Corporation and includes a nominated

Councillor, who shall not have the right to vote in meeting of the Corporation and the Committees of the Corporation and to get elected as a Mayor of the Corporation or a Chairperson of any of the Committees of the Corporation.

10. As far as the constitution and duration of the Municipal Corporation is concerned, it is evident from the provisions of the Act that by Section 5, the law permits establishment of a Municipal Corporation. The minimum number of elected Councillors is also specified together with the nominated Councillors. They have to be nominated, provided they have special knowledge and experience in municipal administration. They are to be nominated by the Corporation in such manner as may be prescribed. The word “prescribed” is defined to mean “prescribed by rules”. It is very clear from a perusal of Sections 11 and 12 that they deal with “disabilities from continuing as Councillor” and “questions as to disqualification to be determined by the Judge”. The preceding provision enumerates as to how the qualifications are incurred. Section 10 enumerates the same. By Section 16, a remedy of Election Petition is provided and our attention is invited by Mr.Sabban to a Full Bench judgment of this Court in case of *Anil Vidhyarthi Chanderlal Ailani and Anr. Vs State of Maharashtra*¹. This decision of the Full Bench specifically

¹ 2016(3) Bom.C.R.481

decides the point or issue as to whether remedy under Section 16 of the MMC Act or under Section 21 of the Municipal Council Act is available to a voter entitled to vote in General Ward Election. The remedy of election dispute is available to a voter. The argument in that case and which was duly considered by the Bench revolved around the interpretation of these very provisions. The Section has been reproduced and thereafter this Court found that a narrow or restricted view of the provision cannot be taken.

11. Now, a complaint has been made in relation to the nominations by an elected Councillor. According to the State, such elected Councillor, who has made a complaint, has approached the State Government on the basis that he has no remedy, save and except to seek the intervention of the State Government. It is that precise issue which was dealt with by this Court.

12. The complaint of the nominated Councillors, copy of which is at page 27 of the paper-book, alleges that the Thane Municipal Corporation has appointed all the five nominated Councillors exclusively from Social Welfare work qualification category under Clause (g) of Rule 4. The present nominated Councillors belong to Congress opposition party and the allegation in the complaint shows that this Councillor was in fact and in substance referring

to their qualifications. Our attention is also invited to various provisions and it is stated that the provisions enable filing of an election petition by any person, whose name is included in the Municipal Election Roll. The Full Bench decided the issue as to whether such a power, as is conferred by Section 16, can be invoked where the dispute is about nomination of candidates.

While dealing with such an issue, the Full Bench held as under:-

“59) We are, in this reference, concerned with only the meaning to be assigned to the term “Election Petition” and whether it can be presented to challenge the nomination of Councillors. If the section provides the remedy to question the election, then, to make a distinction as is sought between “election” and “nomination” would run counter to the object and purpose of the Act. The Act envisages a Municipal Corporation comprising of both, the elected and the nominated Councillors. If that is how the Corporation is understood as a body or a legal entity, then, to hold that only such of the Councillors as are elected at a general election would have to face a challenge to their elections but the nominated Councillors are out of the purview of section 16 would mean plural remedies created for challenging an identical process.

60) The word “election” is not defined in the Act and the Rules. The words such as these would therefore have to be given their ordinary and plain meaning. The words “election” and “nomination” have been understood as “to choose, to pick out, to select from a number or to make a choice of”. It also means to cast vote for the purpose of selecting members of any legislative, municipal or other authority of whatever character. Thus, it would have to be construed in the context and the circumstances in which the process is required to be undertaken. It is well settled rule of interpretation that a word not defined in a statute its meaning has to be gathered from the context in which it has been used [see **AIR 1995 SC 1620** (*Regnl. Executive Kerala F. W. F. Board vs. M/s. Fancy Food*, para 8 at page 1623)]

61) It is in this sense that this word is employed and reliance therefore is rightly placed on the judgment of Hon’ble Supreme Court of India in the case of *Dinesh Prasad Yadav vs.*

State of Bihar and Others reported in **1995 (Supp) 1 SCC 340**. In the context of a similar challenge but with a marginal difference, in that, the State Government had a right to nominate on the managing committee not more than two persons, one of whom shall be a Government servant, the Hon'ble Supreme Court considered the argument that the term of office of this managing committee would have to be counted from the beginning of the co-operative year, in which election by ballot is held or it is to be counted from when the nominations are made by the State Government. The Hon'ble Supreme Court, in paras 7, 8 and 9 of this decision, held as under:-

“7. The provision of the Act and the Rules, quoted above, clearly indicate that the scheme of the Act gives wide powers to the State Government to control those societies in which it has considerably contributed towards the share capital. The State Government can nominate even up to two-third of the total members of the Managing Committee including the Chairman. It would, therefore, be in tune with the scheme of the Act to hold that the Managing Committee cannot assume office till the time the nominations are made by the State Government. Proviso to Rule 22(2) of the Rules rightly provides that the Managing Committee shall not be treated as complete unless the members thereof have been duly elected and/or nominated by the authority empowered to do so under the Act, Rules and Bye-laws of the society.

8. The expression 'election' has not been defined under the Act. In the absence of any definition by the legislature we have to follow the ordinary meaning given to the said expression. Collins English Dictionary defines 'election' as under:

“The selection by vote of a person or persons from among candidates for a position, esp. a political office. The act or an instance of choosing.”

Webster's Comprehensive Dictionary, International Edn., gives the following meaning to the expression 'election'.

“The selection of a person or persons for office as by ballot. A choice, as between alternatives, choice in general.”

9. The expression 'election', therefore, means selection of a person by vote or even otherwise. When a person is nominated by way of selection on the basis of a given criteria from amongst several persons, then in the broader sense he is elected to the office. We are of the view that the expression 'elections', in the first proviso to Section 14(1) of the Act, has been used in the broader sense. It includes election by ballot as well as the choice by nomination. This interpretation would make Rule 22(2) of the Rules workable. Section 14(2) of the Act vests the management of a registered society in a Managing Committee constituted in accordance with the Rules. Section 14(4) further provides that even up to two-third members of the Managing Committee can be nominated. Sub-section (8) of Section 14 further imposes bar on the members of the Managing Committee for re-election after they have held two consecutive terms. Rule 22(2) read with Section 14(2) of the Act makes it abundantly clear that constitution the Managing Committee is to be treated complete only when the elections by ballot as well as the nominations are finalised. Even otherwise, to fulfill the avowed object of the Act and to encourage and promote the cooperative movement in the State, it is necessary that the Managing Committee as constituted under Rule 22(2) of the Rules should be given its full tenure of three cooperative years. Having provided for three years' term in office to the Managing Committee of a society, it could not be the intention of the legislature to leave it to the State Government to reduce the same to as short a period as three weeks, which would be a mockery. We, therefore, hold that in the first proviso to Section 14(1) the expression "the cooperative year in which elections are held" means not only the elections by way of ballot, but also the nominations under the Act. The net result in that the term of the Managing Committee under the Act and the Rule is to commence from the beginning of the cooperative year in which the nominations by the State Government are completed and the Managing Committee is constituted in terms of Rule 22(2) of the Rules."

62) It is therefore clear that when the scheme of the Act and Rules is understood as denoting that the Corporation shall consist of Councillors elected directly at Ward election

and nominated by it, then, it would not be proper to divide the exercise and then hold whether it is “election” or “nomination”. As urged by the learned Senior Counsel Mr. Gorwadkar, an election means voting as set out in section 8A of the MMC Act. That manner of voting would decide whether it is a election else the process cannot be termed as such would be really missing the point. The act of electing can be held to be performed after the vote is caste. It may be by ballot meaning inserting a paper marking one's choice in the box or by pressing the button against a name in the electronic machine.

63) The word “nomination” also is assigned the same meaning, namely, “to select the candidate to be voted for a public office or a member of legislative or representative assembly, to name or to recommend for confirmation”. One nominates a person in order to propose him or appoint him to an office and that could be as understood in the Law Lexioan by appointment or it could be to propose a person for election or appointment.

64) Once we understand that it is the Corporation as a whole which considers the recommendations of the Commissioner and then takes a decision on nominations of the candidates, then, the process can be equated with an election. Albeit the mode may be by voting in the manner understood above.

65) That such a decision of the Corporation is also capable of being challenged by an Election Petition is therefore evident. One cannot construe section 16(1) in the backdrop of the locus of a person challenging the elections. Advisedly, the words employed in section 16 are that if the qualification of any person declared to be elected a Councillor is disputed or if the validity of the election is questioned for the reasons indicated in sub-section (1), then, any person enrolled in the municipal election roll can submit an application to the Judge for determination of dispute or question. Thus, the dispute is about the qualification of any person declared to be elected as a Councillor, whereas the question is with regard to the validity of any election. On both counts, the application can be presented by the person enrolled in the municipal election roll. Equally, by sub-section (2), a discretion is given to the State Election Commissioner to make an application within the meaning of that sub-section. The locus of the person entitled to make the application is not decisive or conclusive and that cannot control the interpretation and construction of sub-section (1). If the Election Petition can be presented by any person enrolled in

the municipal election roll, then, the elected Councillors fulfill that criteria. To be elected as Councillors, they have to fill a nomination form. That can be filled in only by those whose name appear in the municipal election roll. Sub-section (1) of section 9 sets out this condition. Even a voter or a person whose name appears in the municipal election roll as such can submit that application to the Judge. Such a person may not be an elected Councillor. Equally, a elected Councillor can also submit above referred application. Both can be equally interested in raising the dispute or in questioning the validity of election. If a person who has not been nominated despite being recommended by the Commissioner desires to question the validity of the nomination process or the qualification of any person nominated, he can also submit the application within the meaning of sub-section (1) of section 16 of the MMC Act, provided his name is enrolled in the municipal election roll. The argument that a person qualified for nomination or eligible for being nominated need not be one whose name is reflected in the municipal roll and therefore, he may as well question the process and therefore, an addition is being made in sub-section (1) of section 16, particularly on the issue of locus to submit an application, is without any merit. This person may be falling in the category of a candidate at an election, but if he is not enrolled in the municipal election roll, he will not be able to submit that application. That does not mean that the locus or the eligibility to submit the application would govern the construction or interpretation of the provision. It is one thing to say that the locus of a person to maintain or bring an action would not be a decisive or conclusive factor in determining the availability of or right to avail of a remedy and quite another to grant locus or right to avail of that remedy when it is expressly not in the statute. The latter one would not be a permissible exercise. The former is only a issue of construction of the statutory provision conferring a right to avail of a remedy and hence permissible. It is aimed at giving meaning to the words and expressions already existing in the statute.”

13. Now all that remains for our consideration is whether the State Government could at all have intervened and to suspend the nominated Councillors. Chapter XXVIII of the MMC Act is titled as “Control”. Section 448 empowers the State Government to require performance of duties in default of any municipal

authority. The expenses of measures enforced under Section 448 are to be recovered in terms of Section 449 by the procedure set out in Section 449. Section 450 empowers the State Government to call for extracts from proceedings etc. and Section 450A empowers the State Government to issue instructions or directions. Then comes Section 451 and it reads as under :-

“451. (1) If the State Government is of opinion that the execution of any resolution or order of the Corporation or any other authority or that the doing of any act which is about to be done or is being done by or on behalf of the Corporation of such authority is in contravention of or in excess of the powers conferred by or under this Act or any other law for the time being in force, or is likely to lead to a breach of the peace or to cause injury or annoyance to the public or any class or body of persons, or is likely to lead to abuse or misuse of or to cause waste of municipal funds against the interest of the public or is likely to be against the financial interest of the Corporation or against larger public interest the State Government may, by order in writing, suspend the execution of such resolution or order or prohibit the doing of any such act, for such period or periods as it may specify therein. A copy of such order shall be sent forthwith by the State Government to the Corporation and to the Commissioner or the Transport Manager.

(2) On receipt of a copy of the order as aforesaid, the Corporation or Commissioner or Transport Manager may, if it or he thinks fit, make a representation to the State Government against the said order.

(3) The State Government may, after considering any representation received from the Corporation or Commissioner or Transport Manager and where no such representation is received within a period of thirty days, either cancel, modify or confirm the order by it under sub-section (1) or take such other action in respect of the matter as may in its opinion be just or expedient, having regard to all the circumstances of the case. Where any order made under sub-section (1) is confirmed the State Government may direct that the resolution or order of the Corporation or its authority in respect of which suspension order was made under sub-section (1) shall be deemed to be rescinded.

(4) Where any order is made by the State Government under sub-section (3), it shall be the duty of every Councillor and the Corporation and any other authority or officer concerned to comply with such order.”

14. A bare perusal of sub-section (1) of Section 451 shows that if the State Government has to form an opinion that the execution of any resolution or order of the Corporation or any other authority or that the doing of any act which is about to be done or is being done by or on behalf of the Corporation of such authority is in contravention of or in excess of the powers conferred by or under this Act or any other law for the time being in force, or is likely to lead to a breach of the peace or to cause injury or annoyance to the public or any class or body of persons, or is likely to lead to abuse or misuse of or to cause waste of municipal funds against the interest of the public or is likely to be against the financial interest of the Corporation or against larger public interest, the State Government may, by order in writing, suspend the execution of such resolution or order or prohibit the doing of any such act.

15. The impugned order proceeds to state that the nomination of the municipal Councillors is suspended, but the State Government has not recorded any specific reason. It has only stated in the impugned order that the circumstances brought on

record by the Municipal Corporation denote that the Rules enabling the nomination have not been followed. By itself, this is not enough to interfere with the resolution of the Municipal Corporation. Pertinently, all nominations are not suspended or the resolution dated 12th July, 2018 has not been suspended in its entirety. If the suspension of resolution dated 12th July, 2018 is directed by the impugned order dated 27th November, 2018, then, it should have also been recorded as to why these nominated Councillors were allowed to continue till the date the State Government passed the impugned order. In other words, such order of suspension is required to be made even after five months of the nomination should also have been indicated with clarity. Thus, on the point of delay and on merits as well the impugned order does not accord with the Section. To our mind, therefore, neither the order subscribes to Section 451(1) of the MMC Act nor in the facts and circumstances peculiar to this case, the State Government could have entertained the complaint and obliged the elected Councillor, who is a member of the Bhartiya Janata Party.

16. It is evident that the Bhartiya Janata Party, together with Shivsena party, its ally are the parties in power in the State. The State Government has exercised the powers under Section 451(1) at the instance of a person, who is a elected Councillor belonging

to the Bhartiya Janata Party. It is not as if he is remedyless nor the impugned order proceeds on the footing that he has no other remedy. If he is aggrieved by the nominations, then, in terms of the law, he could have availed of all the legal remedies and, particularly, those referred by us. There was no occasion for the State Government to have intervened in a pure political dispute. The intervention by the State Government not only contravenes the mandate of Section 451, but also interferes with a democratic process. That process had run its course. There was no occasion for the State Government to intervene in such a process after it has run its course completely and only to oblige a political opponent of these nominated Councillors. In such circumstances, we are of the firm opinion that the impugned order is *ex-facie* illegal, arbitrary and deserves to be set aside. It is vitiated by a colourable exercise of power.

17. Each of these writ petitions, therefore, succeed. Rule in each of these petitions is made absolute in terms of prayer clause (a).

18. We, however, clarify that this Court has not expressed any opinion on the merits of the controversy. Our order shall not prevent the complainant from taking recourse to law. In the event, he takes recourse to any of the legal remedies, then, such

proceedings be decided on their own merits and in accordance with law uninfluenced by the present order. All contentions, in relation to the qualifications of the nominated Councilors, of either side are kept open.

19. Mr.Sabban submits that this is a fit case for imposition of costs. We do not think that we should impose costs for what we have observed ought to serve as a warning to the State Government and it should refrain from exercising its power of control in the matters of present nature. It is only because of the persuasion of the learned AGP, we do not impose the costs. There will be no order as to costs.

(B.P.COLABAWALLA, J.)

(S.C.DHARMADHIKARI, J.)