

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.4254 OF 2020

Shripad s/o Shankar Chindam,
Age : 36 years, Occu. Business,
R/o Delhi Gate, Taluka and
District Ahmednagar

PETITIONER

VERSUS

1. The State of Maharashtra,
Department of Urban Development,
Mantralaya, Mumbai
2. Municipal Corporation,
Ahmednagar

RESPONDENTS

Mr. P.R. Katneshwarkar, Advocate holding for Mr. Abhishek Kulkarni,
Advocate for the petitioner
Mr. D.R. Kale, Govt. Pleader for respondent No.1/State
Mr. V.D. Hon, Senior Advocate, instructed by Mr. A.V. Hon,
Advocate for respondent No.2

CORAM : MANGESH S. PATIL, J.

DATE : 06.01.2021

ORAL JUDGMENT :

Heard.

2. Rule. The Rule is made returnable forthwith. Mr. D.R. Kale, learned Government Pleader and Mr. V.D. Hon, learned Senior Advocate waive service for respondent Nos.1 and 2 respectively. With the consent

of both the sides, the matter is heard finally at the stage of admission.

3. By this petition under Article 227 of the Constitution of India, the petitioner is impugning the order dated 27.02.2020, passed under Section 13 (3) of the Maharashtra Municipal Corporations Act, 1949 (hereinafter referred to as “the Act”), whereby he has been removed from the post of a councillor, on a recommendation made by respondent No.2 Corporation for alleged misconduct as contemplated under Section 13 (1)(a) of the Act.

4. At the outset, it is necessary to mention that since the matter is being heard finally at the stage of admission, the learned Advocates of both the sides have made comprehensive arguments touching all the aspects, factual as well as legal. However, since a preliminary objection was raised on behalf of the respondents regarding maintainability of the petition in view of the remedy of reference available under Section 13(4) read with Section 405 of the Act and since, for the reasons to follow, I have come to the conclusion that the petition is not maintainable in view of availability of such an alternate and efficacious remedy, I will not be indulging into any other aspect touching the disputed facts and law.

5. Mr. D.R. Kale, the learned Government Pleader for respondent No.1/State and Mr. V.D. Hon, learned Senior Advocate for respondent No.2 submit that since the petitioner is seeking to dispute his disqualification by

the State Government on a recommendation of respondent No.2 Corporation, as contemplated under sub-section (3) of Section 13 of the Act, he should have raised such a dispute by making a reference to the Judge as contemplated under sub-section (4) of Section 13. They would also point out that Section 405 of the Act also lays down the matters in which a reference is to be made to the Judge, which inter alia includes the orders passed under Section 13 regarding removal and disqualification. They would, therefore, submit that since such an alternate and efficacious remedy is available to the petitioner to dispute his disqualification recommended by respondent No.2 Corporation and accepted by the State Government by the impugned order, the Writ Petition is not maintainable.

6. Per contra, Mr. PR. Katneshwarkar, learned Advocate for the petitioner would submit that the stage for invoking the remedy of making a reference to the Judge under Section 13(4) of the Act is already over. On a recommendation by respondent No.2 Corporation, the State Government has already disqualified the petitioner. The reference contemplated under this provision is not in the nature of an appeal against the order of the State Government passed under Section 13(3) and the remedy of a reference cannot be said to be an alternate and efficacious remedy available to the petitioner to challenge his disqualification.

7. It is necessary to reproduce the relevant provisions of the Act:

10. Disqualification for being a councillor. - (1) Subject to the provisions of sections 13 and 404, a person shall be disqualified for being elected and for being a councillor, if such person -

[(ai) to 2(a) to (d)

11. Disabilities from continuing as councillor. - A councillor shall cease to hold office as such if at any time during his term of office he, -

(a) to (d)

12. Questions as to disqualification to be determined by the Judge. - (1) If any doubt or dispute arises whether a councillor has ceased to hold office as such under section 11, such councillor or any other councillor may, and at the request of the Corporation, the Commissioner, shall refer the question to the Judge.

(2) On a reference being made to the Judge under sub-section (1), such councillor shall not be deemed to be disqualified until the Judge after holding an inquiry in the manner provided by or under this Act determines that he has ceased to hold office.

13. Liability of councillor to removal from office. - (1) (a) The State Government may, on its own motion or on the recommendation of the Corporation, remove any Councillor from office, if such Councillor has been guilty of any misconduct in the discharge of his duties, or of any disgraceful conduct during his current term of office or immediately preceding term of office as a Councillor.

(b) The State Government may, on the recommendation of the Corporation supported by the vote of not less than three-fourths of the whole number of Councillors, remove any councillor from office, if such Councillor has, in the opinion of the State Government, become incapable of performing his duties as a Councillor.

(2) No resolution recommending the removal of a Councillor for the purposes of sub-section (1) shall be passed by a Corporation and no order shall be made by the State Government, unless the Councillor to whom it relates has been given a reasonable opportunity of showing cause why such recommendation or order as the case may be, should not be made:

Provided that, no order of removal of councillor shall be made by the State Government on its own motion, unless the Corporation is given one month's time for taking necessary action in the matter.

(3) In every case in which the State Government makes an order under subsection (2), the Councillor shall be disqualified for being a Councillor, or from becoming a Councillor, or a Councillor or member of any other local authority, for a period of five years from such date as may be specified in such order, unless the State Government relieves him of the disqualification by an order which it is hereby empowered to make.

(4) If any doubt or dispute arises as to the removal and disqualification of a councillor under this section, such Councillor may, and at the request of the Corporation, the Commissioner may, make reference to the Judge.

405. References to the Judge. - In the following cases a reference shall be made to the Judge :-

(1) whether a councillor has ceased to hold office under section 12;

[(1A) regarding removal and disqualification of a Councillor under section 13;]

(2) whether a person has ceased to be a member of the Transport Committee under section 26;

(3) whether the Commissioner may be directed to remove a shaft or pipe on the application of the owner of a building or but under section 175;

(4) regarding the amount of the price for the land required for setting forward a building under section 216;

(5) regarding the amount or payment of expenses for any work executed or any measure taken or things done under the orders of the Commissioner or any municipal officer under section 439;

(6) regarding the amount or payment of expenses or compensation and the apportionment thereof falling under any of the provisions of this Act or any rule or bye-law thereunder not otherwise specifically provided for.

. As can be gathered from the scheme of these provisions, Section 10 lays down various grounds on which a councillor can be disqualified.

Section 11 then provides for few additional grounds for disqualification. Section 12 provides for mechanism for getting decided any doubt or dispute as to if a councillor has incurred any disqualification and further requires a reference to be made to the Judge either by the councillor or on a request of the Corporation by the Commissioner to determine if he has ceased to hold the office of councillor. Section 13 then provides for removal of a councillor from the office on the ground of misconduct or his incapability of performing the duties as a councillor. As can be seen, it is on a recommendation of the Corporation that the State Government is expected to pass an order regarding removal of a councillor. Section 13(4) is similar to Section 12(1) and provides that a councillor or on a request of the Corporation, the Commissioner to make a reference to the Judge, if any doubt or dispute arises as to the removal of the councillor under that Section.

8. In turn, Section 405 of the Act lays down as to in which matters a reference would lie before a Judge and as can be seen, the questions as to whether the councillor has ceased to hold an office under Section 12 and regarding removal and disqualification of a councillor under Section 13, etc. are some such circumstances/cases where a reference has to be made to the Judge. Conspicuously, the opening sentence of Section 405 uses the word 'shall', which is suggestive of a mandatory nature of the provision.

9. Though not in respect of the provision of Section 13 of the Act, this Court has interpreted Section 12 and has observed that the remedy in

that case would be available in the form of a reference under Section 405 of the Act. One can gainfully refer to the observations of this Court in the case of *Sajeda Nihal Ahmed vs. Malegaon Municipal Corporation, Malegaon and others; 2005(1) Mh.L.J. 87*, particularly the following observations from paragraph Nos.10 and 11 :

10. Sub-section (1) of Section 12 clearly provides that if any doubt or dispute arises whether a Councillor has ceased to hold office as such, the Commissioner shall, refer the question to the Judge. In that sense, it is the "Judge" who has been specified as the Authority to decide the question of disqualification. The Act also provides for the procedure to be adopted in such adjudicatory process. Section 405 of the Act makes provision for reference, of such kind to be made to the Judge. It provides that the reference as provided in the said provision shall be made to the "Judge". Sub-section (1) refers to the question whether a Councillor has ceased to hold Office under Section 12 as one of the matters, which could be and ought to be referred to the "Judge". Section 434 of the Act provides the procedure to be followed by the concerned authorities in the course of the proceedings. Sub-section (1) of Section 434 pertains to appeals to be heard by the Judge from the orders of the Commissioner and orders of the District Court. Sub-section (2) provides for matters of all other types for which no specific provision has been made under the Act to be governed by Rules to be specified by the State Government from time to time in consultation with the High Court. In other words, reference under Section 12 of the Act will have to be decided in the manner provided for under the Rules which are specified by the State Government in consultation with the High Court, if any. Section 435 provides for limitation in respect of proceedings to be adopted under the provisions of this Act, which reads thus :

"435. (1) In computing the period of limitation prescribed for an appeal or application referred to in this Chapter, the provisions of Sections 5, 12 and 14 of the Indian Limitation Act, 1908 shall, so far as may be, apply.

(2) When no time is prescribed by this Act for the presentation of an appeal, application or reference, such appeal or application shall be presented or reference shall

be made within thirty days from the date of the order in respect of or against which the appeal, application or reference is presented or made."

Sub-section (2) of Section 435 is applicable to reference such as the present reference under Section 12 of the Act. In other words, the Act of 1949 provides for a complete mechanism for adjudicating the issue or question as to whether concerned member or Councillor has incurred disqualification. If it is so, the issue of disqualification can be considered only by that Authority and none else, and only in the manner specified by the Act and the Rules made thereunder. In substance, this view is already taken by our High Court in two decisions of Division Bench of this Court. The one which is pressed into service on behalf of the petitioner is in the case of Martin Nirmal Moresh (supra). There is also another recent case reported in 2004(3) Mh.L.J. 435 = 2004(2) All M.R. 1 [Smt. Noorjahan M. Aslam Ansari v. State of Maharashtra and Ors.](#), which has taken the view that where any doubt or dispute has arisen as to whether the Councillor has ceased to hold the Office as such under [Section 11](#), then Councillor or any other Councillor may, and at the request of the Corporation, the Commissioner shall refer the question to the Judge.. It is further observed that [Section 12](#) of the Act does not give the Municipal Commissioner the power to decide the controversy himself. As mentioned earlier, in the recent unreported decision in the case of Madhukar Deoman Patil, etc. (Supra), I had occasion to consider this question and I have taken the view following the principle stated in the decision in the case of Martin Nirmal Moresh (Supra), that the Municipal Commissioner has no authority or jurisdiction to consider or adjudicate upon question as to whether any Councillor of the Corporation has become subject to any of the disqualifications provided by the Act.

11. To get over this position, it was contended on behalf of the respondents that such reference would be necessary only when there is any doubt or dispute. This argument does not commend to me. If this argument was to be accepted, it will not only whittle down the mandate provided for in [Section 12](#) of the Act, but also impinge upon the Constitutional scheme as spelt out from [Article 243V\(2\)](#) of the Constitution. The expression "doubt" or "dispute" will have to be understood to mean that whenever concerned Councillor contests the position that he has incurred any disqualification, then in such a case, it

is not open for the Municipal Commissioner to himself examine whether the stand taken by the Councillor is appropriate or otherwise. But, the only course open to the Municipal Commissioner will be to make reference to the "Judge" as defined under [Section 2\(29\)](#) of the Act. Any other view will result in rewriting the Law made by the Legislature. It will be useful to mention that in other cognate enactments of the State of Maharashtra, to wit- The Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 ([sections 44 and 45](#)) as well as Bombay Village Panchayat Act [[Section 16\(2\)](#)], such issue can be examined by the Collector. There is express provision to that effect. Unlike in the present enactment, the Commissioner has no option but to make reference to the Judge, in view of the express provision in [Section 12](#) of the Act."

10. As can be seen, even the argument of the learned Advocate for the petitioner that the decision regarding removal has already reached finality and there remains no doubt or dispute about it and consequently, the petitioner cannot resort to the remedy of a reference under Section 13(4), can be squarely met by the observations in paragraph No.11 (supra).

11. Consequently, the submission of the learned Advocate for the petitioner that since the State Government has already adjudicated and decided the issue regarding removal of a councillor under Section 13(3) of the Act and there being no other remedy in the nature of appeal available to the petitioner, and since the Act does not provide for any appeal against the order of the State Government under Section 13(3), is also not legally tenable. To my mind, though the ultimate decision regarding removal is expected to be taken by the State Government on a recommendation of the Corporation, it is an administrative power which is vested in it and not a

judicial or quasi-judicial power which it exercises while passing an order under that provision. It is after such removal if a councillor wants to raise a dispute that a remedy of a reference is made available under Section 13(4). Merely because the State Government before passing an order under Section 13(3) is required to give an opportunity of being heard to a councillor like the petitioner, the enquiry into his removal before passing an order under Section 13(3) would not partake a judicial or quasi-judicial proceeding. It is trite that even in administrative matters, an Authority exercising the powers has to follow the principles of natural justice. That would not *ipso facto* be sufficient to term such administrative enquiry as a quasi-judicial one.

12. The mechanism provided under Section 12(1) and 13(4) of the Act clearly indicates that even a councillor may raise a dispute. Obviously, in the case of Section 13, he would have an opportunity and contingency to raise such a dispute only if and when the State Government takes a decision regarding his removal on a recommendation of the Corporation. Had it been the case that the Legislature had contemplated a reference to be made by the Corporation alone, these provisions would not have provided specifically that even a councillor could make a reference. The act of removal would occasion only after the State Government takes a decision under Section 13(3). Till then, there is no occasion or a reason for a councillor to make any reference. It is in view of such a legal position and the view taken by this Court in the matter of Section 12, discussed hereinabove, the petitioner in the matter in

hand has an alternate and efficacious remedy in the form of a reference to be made under Section 13(4) read with Section 405 of the Act.

13. Resultantly, the Writ Petition is liable to be dismissed and is accordingly dismissed. The Rule is discharged.

[MANGESH S. PATIL]
JUDGE

npj/WP4254-2020

