

DSS

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO. 8157 OF 2021
WITH
WRIT PETITION NO. 8158 OF 2021
WITH
WRIT PETITION NO. 8251 OF 2021
WITH
WRIT PETITION NO. 8249 OF 2021**

Hasmukh M. Ghelot
V/s.
Divisional Commissioner
Konkan Division and ors.

...Petitioner

...Respondents

Mr. Mayur Khandeparkar i/b Mr. Chaitanya Nikte a/w. Ms Sneha Bhange and Mr. Tarun Sharma for Petitioner in WP8158/21.
Mr. Chaitanya Nikte a/w. Ms Sneha Bhange and Mr. Tarun Sharma for Petitioner in WP8157/21, 8251/21 and 8249/21.
Mrs. V.S. Nimbalkar, AGP for the Respondent / State..
Mr. D.H. Shukla for the Respondent No.2 in WP8157 and 8158/21.
Mr. D.K.Pandey for the Respondent No.2 in WP8249/21.
Mr. Parshuram P. Mhatre, Respondent No.2 in WP8251/21 present in person.

**CORAM : G. S. KULKARNI, J.
DATE : DECEMBER 09, 2021.**

PC :

1] The challenge in these petitions is to an order dated 29.10.2021 passed by the Divisional Commissioner, Konkan Division whereby the applications as filed by the petitioner under the Maharashtra Local Authority Members' Disqualification Act, 1986 (for short "the Act") praying for disqualification of respondent No.2 in these petitions, for having dishonored "the whip" issued by the petitioner who is the Gat Neta of the Bharatiya Janata Party (BJP), in the elections to the post of Mayor and

Deputy Mayor of the Mira-Bhayandar Municipal Corporation, have been dismissed.

2] Mrs. V.S. Nimbalkar, learned AGP for the respondent - State, at the outset, raised an objection to the maintainability of these petitions, as also supported by learned counsel for respondent No.2, on the ground that an alternate remedy of an appeal is available to the petitioner under Section 7(3) of the Act, which provides thus:

“ 7. Decision on question as to disqualification on ground of defection. -

(1)

(2)

(3) Any person aggrieved by the decision of the Commissioner or Collector may, prefer an appeal before the State Government within a period of thirty days from the date of such order.”

3] Learned counsel for the petitioner referring to the specific averments as made in the memo of these petitions would contend that although an alternate remedy of an appeal is available to the petitioner, however, the same is not an efficacious remedy for several reasons. For illustration, the averments in this regard as made in Writ Petition No. 8158 of 2021 needs to be reproduced, which reads thus :

“37. The Petitioner states that there is an alternative remedy as per the Maharashtra Local Authority Member’s Disqualification Act which provides an Appeal before the State Government. However, the same is not the efficacious remedy for the following reasons:

i. The Appeal so provided is provided to the State Government. The present State Government consists of Congress and Shivsena alongwith other parties and the BJP is in opposition. In fact the Respondent No.2 has voted in favour and for benefit of Shivsena and Congress which is the ruling party in the state government.

ii. Apart from the same the membership of the Respondent No.2 is valid for only for 7-8 months and thereafter fresh elections are likely to be held. The Petitioner believes that the state Government will not decide this issue in the time bound manner.

iii. The said appreciations on the basis of the fact that as per the rules every petition has to be decided within the period of 6 months however in the present matter was lagged and derailed, somehow malafiedly for a period of almost 1 ½ years.

iv. Only after the intervention from this Hon'ble High Court the first effective hearing took place in the complaint/petition filed by the Petitioner.

v. In spite of the directions from this Hon'ble High Court further extension was sought from the office of Respondent No.1 which only reflects that constantly the matter was delayed with ulterior motives.

vi. Apart from the same aforesaid matters for disqualification was filed against 4 members simultaneously who have against the whip in the matter of Election of post of Mayor and Deputy Mayor which included a member namely Mrs. Geeta Jain. Ms Jain apart from being a Municipal Councillor has also thereafter contested elections of MLA and presently is a Member of the Legislative Assembly and has openly supported the ruling party consisting of Shivsena and Congress. Thus, the Petitioner believes that the proceedings before the State Government will be highly influenced, unnecessarily delayed with an ulterior motive and therefore, the Appeal would not be an efficacious remedy.

vii. Similarly, the impugned order was not even forthwith communicated with the Petitioner as per the mandate of the act and the Petitioner had to follow up with the Respondent No.1's office and had to avail copies of the same."

4] Learned counsel for the petitioner has also drawn my attention to the decision of the Division Bench of this Court in **Writ Petition (St) No. 98279 of 2020** (Ajit B. Patil v/s. State of Maharashtra and ors. decided on 5.2.2021) to contend that considering the controversy which was before the Court, arising from an order passed by the Hon'ble Minister for Urban Development and Public Works Department, who was arrayed as respondent No.3 in such petition, it is impossible to conceive that the Hon'ble Minister who would now be the appellate authority, can decide the petitioner's appeal without a political bias as he belongs to the Shiv Sena. This for the reason that in the facts of the present case, respondent No.2 disobeyed the whip of BJP and voted in favour of one candidate belonging to Shiv Sena and/ or a candidate belonging to Congress party, except that

respondent No.2 in Writ Petition No. 8249 of 2021 had abstained from voting, which according to the petitioner was also against the whip issued by him. Thus, it is the case of the petitioner that there is a strong likelihood and apprehension of bias which would dissuade the petitioner to avail of the alternate remedy, and it is for such reason the petitioner has invoked the jurisdiction of this Court under article 226 of the Constitution, by filing the present petitions.

5] On the other hand , learned counsel for respondent No.2 in all these petitions as also learned AGP would contend that in view of clear legislative intent providing an alternate remedy of an appeal, an argument of likelihood of bias ought not to be entertained and needs to be rejected, so as to direct the petitioner to avail of the alternate remedy.

6] Having considered the case of the petitioner as to why the petitioner has chosen not to take recourse to the alternate remedy of an appeal as provided under sub-section (3) of Section 7 of the Act, in my opinion, it would be premature for the petitioner to presume any bias of the appellate authority, even before taking recourse to the appellate remedy. This is for more than one reason. It is the legislature which has made the law by following the democratic process and by bringing an amendment to Section 7 of the Act, by amending Act No. I of 2018 to incorporate sub-section (3) so as to provide for a remedy of an appeal to the “State Government”, against the decision of the Commissioner or Collector. Once the legislature by law has provided of an appellate remedy such provision cannot be rendered nugatory on the ground of an apprehension of bias, even if the Presiding Officer who would decide the appeal belongs to a particular political affiliation and hence, he would not pass any order which would be

prejudicial to the political interest of his party.

7] It cannot be overlooked that when the Hon'ble Minister presides as an appellate authority, he wears two hats. The first hat would be the adjudicatory hat conferring power, authority and jurisdiction to discharge functions as an appellate authority. The second hat, to be kept dormant, would be as a member of a particular political affiliation. The Hon'ble Minister would necessarily be required to remove the second hat when he wears the official hat of an appellate authority. The responsibility and rigor of wearing the first hat are quite onerous. In wearing the first hat, the Hon'ble Minister is acting as the State Government and not a person belonging to a particular political affiliation. When the Hon'ble Minister wields the power of an appellate authority so as to discharge the functions of the State Government as the provisions under sub-section (3) of Section 7 of the Act would provide, the law mandates that the Hon'ble Minister shuns all biases which may be either personal or official and that he assumes a neutral position so as to discharge his authority and functions with objectivity in deciding the appeal before him in accordance with law. There can be no other expectation in the appellate authority to exercise jurisdiction in such manner.

8] This apart, there is still a more higher and solemn role of the appellate authority when it comes to discharge of duties and functions, when the complexion of the dispute pertains to rival political interest. Such role would require a high degree of consciousness of the responsibility attached to the office, impartiality and objectivity coupled with maintaining the highest values of rectitude, to be adhered in discharging the adjudicatory functions. The recognition of these solemn attributes is implicit

in the provisions of sub-section (3) of Section 7 of the Act conferring adjudicatory powers on the appellate authority even in matters of defection. For such reasons, there is no scope for any argument, at this stage, that the Hon'ble Minister would possess a bias against the petitioner in discharging duties of the State Government under sub-section (3) of Section 7 of the Act. It is too early for the petitioner to presume that the appellate authority/ Hon'ble Minister would not function as the law would mandate. Merely because the Hon'ble Minister belongs to a particular political affiliation, there is no scope for any apprehension that the appellate remedy in these circumstances is hallow and meaningless. Certainly, the law mandates that the appellate authority would take into consideration the solemn position of its adjudicatory role and decides the petitioner's appeal in accordance with law.

9] In this context, a useful reference can be made to the decision of the Supreme Court in **Kihoto Hollohan Versus Zachillhu & Ors.**¹. The question for consideration before the Supreme Court was whether investiture of the determinative jurisdiction in the Speaker would by itself stand vitiated as denying the idea of an independent Adjudicatory Authority which would render the provision in the Tenth Schedule of the Constitution of India (provisions as to disqualification on the ground of defection) unconstitutional. The Supreme Court held that such criticism that the provision incurs the vice of unconstitutionality was in ignorance of the importance of the high office of the Speaker in a Parliamentary democracy. It was held that the office of the Speaker is held in the highest respect and esteem in the Parliamentary tradition and that the evaluation of the institution of the parliamentary democracy has as its pivot the institution of

¹ 1992 SCC Supl. (2) 651.

the Speaker. The Speaker is said to be the very embodiment of propriety and impartiality as he performs wide ranging functions including the performance of important functions of judicial character. It was held that it was inappropriate to express distrust in the high office of the Speaker merely because some of the Speakers are alleged or even found to have discharged their functions not in keeping with the great traditions of that high office. The Court observed that the robes of the Speaker do change and elevate the man inside. It was held that the contention that the vesting of adjudicatory functions in the Speakers/Chairman would by itself vitiate the provisions on the ground of political bias was unsound. In my opinion, these observations and the principles as laid down by the Supreme Court would certainly apply in the case of Hon'ble Minister discharging appellate functions on defection issues.

10] In these circumstances, all these petitions are disposed of by permitting the petitioner to avail of the statutory remedy. All contentions of the parties on merits of the proposed proceedings are expressly kept open. The appellate authority is directed to decide the appeals as expeditiously as possible and preferably within a period of two months from the date of filing of the appeals, as the proceedings involve a short issue.

11] Needless to observe that as the petitioner was bonafide pursuing the present proceedings, the appellate authority shall decide the appeals to be filed by the petitioner without any objection on limitation. The petitioner shall file the appeals within one week from today.

12] Disposed of in the above terms. No cost.

(G. S. KULKARNI, J.)