

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

NAGPUR BENCH : NAGPUR

WRIT PETITION NO.5472 OF 2006

Vijay s/o Kamalkishor Agrawal,
aged adult, occupation : Social Worker,
r/o Lala Lajpatrai Society, Akola,
Taluq and District Akola.

... Petitioner

- Versus -

- 1) The State of Maharashtra, through
its Secretary, Urban Development
Department, Mantralaya, Mumbai-32.
- 2) The Commissioner, Akola Municipal
Corporation, Akola, Taluq and
District Akola.
- 3) Surendrakumar K. Shah,
r/o Vidarbha Xerox Corner,
near Panchayat Samiti, Akola.
- 4) Sumantai Shriram Gawanade,
Ex-Mayor, r/o Pramod Nagar,
Kaulkheda, Akola.

... Respondents

Shri R.L. Khapre, Senior Advocate, assisted by Adv. A.P. Tathod and
Adv. Rohan Malviya, for petitioner.

Shri A.S. Fulzele, Additional Government Pleader for respondent
no.1.

CORAM : SUNIL B. SHUKRE AND
ANIL L. PANSARE, JJ.

DATED : JANUARY 4, 2022

ORAL JUDGMENT (PER SUNIL B. SHUKRE, J.) :

Heard Shri Khapre, learned Senior Advocate, assisted by Adv. Tathod, for the petitioner and Shri Fulzele, learned Additional Government Pleader for the respondent no.1. Nobody appears for the respondent nos.2 to 4.

2) The petitioner was a member nominated to Akola Municipal Corporation and was not a member, who was elected, in the year 2002. Although the petitioner was a nominated member and not an elected one, the then Mayor of the Municipal Corporation recommended his name for being appointed as a Leader of the House. This recommendation was made by the then Mayor in view of her power under Section 19-1A of the Bombay Provincial Municipal Corporations Act, 1949 – now re-named as the Maharashtra Municipal Corporations Act, 1949 (hereinafter referred as “the Act of 1949”).

3) Respondent no.3 Surendra Kumar Shah, noticing that the petitioner not being an elected member and only being a nominated member was appointed by the then Municipal Commissioner as a Leader of the House, on the basis of the recommendation made by the then Mayor under Section 19-1A of the Act of 1949, made a

complaint to the respondent no.1 for recovery of the expenses incurred on account of such appointment and working of the petitioner.

4) It appears that some enquiry was made in the matter and by the communication dated 24/7/2006, the petitioner was informed that his appointment as a Leader of the House was invalid and illegal and the petitioner was called upon to reimburse to the Corporation an amount of Rs.4,48,039/-. By another communication dated 4/8/2006, the petitioner was informed of his failure to reimburse to the Corporation the said amount and was warned of further necessary action in the matter. Being aggrieved by these communications, the petitioner has filed the present petition.

5) Shri Khapre, the learned Senior Advocate for the petitioner, submits that there is no provision made or available in the Act of 1949, which empowers the respondent Authorities to recover the expenditure incurred on account of such appointment and working of the petitioner in pursuance of the appointment so made. He further submits that in the recommendation made by the then Mayor and also in the appointment made by the then Municipal Commissioner, the petitioner had no role to play and, therefore, no

blame could be put upon the petitioner so as to compel him to reimburse the expenditure to the Corporation.

6) Shri Fulzele, the learned Additional Government Pleader for the respondent no.1, submits that the impugned communications are correctly issued as the petitioner was not eligible, being a nominated Councillor, to be appointed as a Leader of the House and that his appointment as such was void ab initio.

7) It is not in dispute that the petitioner was not an elected member, but a nominated one. It is also not in dispute that it is only an elected member, who is eligible to be appointed as a Leader of the House. The provision made in this regard in Section 19-IA of the Act of 1949 is very clear. It would then mean that the Mayor ought not to have recommended the petitioner as a Leader of the House and even if he was so recommended by the Mayor, he ought not to have been appointed by the then Municipal Commissioner, but both these events occurred. There was recommendation of the petitioner for his appointment as a Leader of the House and there was also appointment of the petitioner as a Leader of the House - all done in the name of the enabling provision of Section 19-IA of the Act of 1949. Since nominated member cannot be appointed as a Leader of the House under Section 19-IA of the Act of 1949, the appointment

of the petitioner as a Leader of the House was illegal, rather void ab initio as rightly submitted by the learned Additional Government Pleader. But, the question would arise - even if the appointment of the petitioner was void ab initio, would it confer any right upon the respondent Authorities to order recovery of the expenditure incurred on account of such appointment and also working by the petitioner in pursuance of the appointment in the absence of any provision being made or available in the Act of 1949 and this is all the more so when the petitioner is not to be found at fault in the whole episode ?

8) To our mind, the answer to the question would lie in the provisions made in the Act of 1949 and also the extent and nature of involvement of the petitioner in the whole episode. As rightly submitted by the learned Senior Advocate for the petitioner, there is no provision whatsoever made in the Act of 1949, which would enable the respondent Authorities to effect recovery of the expenditure from the Leader of the House erroneously or illegally appointed. The learned Additional Government Pleader for the respondent no.1 also could not show to us any such provision being available in the Act of 1949. When there is no power conferred upon the respondent Authorities, we do not think that the respondent Authorities could resort to such a step as ordering recovery of the

expenditure from the petitioner. We would have understood presence of such power with the respondent Authorities, if there were present some special circumstances justifying such action on their part. This special circumstance could be such as the petitioner himself being involved in or responsible for making of recommendation of his name by the Mayor as a Leader of the House and his appointment being made by the then Municipal Commissioner. But such is not a case here. The other special circumstance could have been in the nature of playing a fraud or suppression of material facts by the petitioner. That is also not the case here. Therefore, this is a case where there is no justification whatsoever available for the decision of the respondent Authorities to recover expenditure from the petitioner on account of his illegal appointment as a Leader of the House.

9) There is another angle involved in the matter. If some fault is to be found with the petitioner in the entire episode, the fault would be equally with the then Mayor, who made the recommendation of the name of the petitioner and also with the then Municipal Commissioner, who made appointment of the petitioner as a Leader of the House. When the recommendation was made by the then Mayor, the fact that the petitioner was a nominated member and not an elected one, was as clear as sunlight to everybody including

Mayor. It was also very clear to the then Municipal Commissioner, who made the appointment of the petitioner. The then Mayor as well as the then Municipal Commissioner being holders of responsible Offices could not be presumed to be not aware of the provisions contained in Section 19-IA of the Act of 1949. Even then, the then Mayor made recommendation of the name of the petitioner and the then Municipal Commissioner appointed the petitioner as a Leader of the House. This was done by both these Authorities being fully conscious of the provisions of law and also factual conditions. In such circumstances, if the petitioner is to be held responsible, equal responsibility would also have to be placed upon the shoulders of the then Mayor and the then Municipal Commissioner, but the impugned communications have been issued to the petitioner selectively ignoring the equal responsibility of the then Mayor as well as the then Municipal Commissioner. The rule of equality does not operate in a negative manner in the sense that if action for violation of some provisions of law is not taken against some and is taken only against others, the others cannot say that they should also be let off the hook. But, the respondent Authorities being “State” within the meaning of Article 12 of the Constitution of India are expected to act reasonably and fairly and not capriciously. The respondent Authorities cannot choose to discriminate between

similarly situated persons. If State wishes to impose penalty upon one person for some fault, the other persons, who are also responsible for the same fault, must also be made to suffer for the same in an equal and proportionate manner. If no recovery is proposed against the other two holders of public office, the recovery sought to be made from the petitioner, could not be more than the extent of his fault in the matter. In fact, in this case there is no enquiry made to determine who, from out of three holders of public office, were responsible for making of illegal appointment and what is the proportion of the share of the persons found responsible in making of such an appointment. There is also no proposal made by the respondent nos.1 and 2 to order recovery against the then Mayor and the then Municipal Commissioner and the entire responsibility has been placed on the head of the petitioner without making any enquiry to find out as to who was at fault in reality. Therefore, we are of the opinion that the action as well as inaction on the part of the respondent Authorities to this extent is arbitrary and such an action as well as inaction cannot be upheld by us.

10) There is one more reason why we find that the orders of recovery of amount are illegal. The reason is to be found in the de facto doctrine, as submitted by Shri Khapre, learned Senior Advocate for the petitioner. This doctrine has been explained lucidly

by the Apex Court in the case of **Gokaraju Rangaraju vs. State of A.P.** (AIR 1981 SC 1473). The Apex Court has quoted with approval a paragraph from Black Dictionary and it reads thus :

“In Black on judgments it is said,

“A person may be entitled to his designation although he is not a true and rightful incumbent of the office, yet he is no mere usurper but holds it under colour of lawful authority. And there can be no question that judgments rendered and other acts performed by such a person who is ineligible to a judgeship but who has nevertheless been duly appointed and who exercises the power and duties of the office is a de facto judge and his acts are valid until he is properly removed.”

The Supreme Court has further held that the de facto doctrine has been recognised by the Indian Courts and such recognition was done as a matter of policy and necessity to protect the interest of the public and individuals involved in the official acts of persons exercising duties of an Officer without actually being one in strict point of law. It held that although these Officers are not Officers de jure, they are by virtue of the particular circumstances, Officers, in fact, whose acts, public policy requires should be considered valid. The principle so laid down is squarely applicable to this case and would require us to protect the interest of the petitioner. The petitioner has, without any dispute, functioned as de facto Leader of

the House in good faith and so would be entitled to the same treatment as de jure Leader of the House till the period he held the Office and we do accord it to the petitioner.

11) In the result, we allow the petition. The impugned orders/ communications are hereby quashed and set aside. Rule is made absolute accordingly. No costs.

JUDGE

JUDGE

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