

---

**(2007) 07 BOM CK 0124**

**In the Bombay High Court**

**Case No :** Letters Patent Appeal No. 74 of 2007 in Writ Petition No. 2773 of 2006

Commissioner

APPELLANT

Vs

Surjitsing Jeevansing Girniwale

RESPONDENT

---

**Date of Decision :** 11-07-2007

**Acts Referred:**

Bombay Provincial Municipal Corporations Act, 1949 — Section 10, 10(1B), 10(1C), 10(1D), 10(4)

Constitution of India, 1950 — Article 243, 243V, 243ZG

**Citation :** (2007) 5 ALLMR 683 : (2008) 1 BomCR 867

**Hon'ble Judges :** Kakade P.V., J; Borde R.M., J

**Bench :** Division Bench

**Advocate :** S.V. Kurundkar, for the Appellant;

**Final Decision :** Dismissed

---

## **Judgement**

Borde R.M., J.—The appellant, in this appeal, is calling in question the judgment and order dated 15.02.2007, passed by the learned Single Judge in Writ Petition No. 2773/2006, whereby the petition filed by present respondent came to be allowed and the order impugned therein dated 29.03.2006, passed by the appellant herein i.e. Commissioner, Nanded Waghala Municipal Corporation, Nanded, disqualifying the present respondent to act as Councillor of the said Corporation, in exercise of powers u/s 10(1D) of the Bombay Provincial Municipal Corporations Act, 1949 (for short the BPMC Act), is quashed and set aside. The learned Single Judge further held that if any of the parties, including the petitioner and respondent, desires to refer the issue as regards disqualification u/s 12 of the BPMC Act, the observations made in the judgment shall not be construed to be the observations touching merits of the matter.

2. Respondent herein is an elected Councillor of the Municipal Corporation. He was served with a show cause notice on 28.12.2005 calling upon him to show cause regarding his act of obstruction in the work of removal of encroachment in respect of community centre and he was further directed to show cause as to

why action of removal shall not be taken against him in exercise of powers u/s 10(1D) of the BPMC Act. The contention of the elected representative/respondent herein was that he demanded copies of certain documents which were not supplied to him. He submitted a reply to the show cause notice on 3rd January 2006 and denied the allegations made against him. It was urged by the contesting respondent that the Commissioner has no jurisdiction to decide the issue. However, it appears that the Commissioner passed an order on 29.03.2006 declaring the respondent herein to be disqualified to work as Corporater. Hence the respondent approached this Court by filing Writ Petition No. 2773/2006.

3. After considering rival contentions of the parties, the learned Single Judge, while deciding Writ Petition No. 2773/2006 along with other petitions of similarly situated councillors, allowed the petitions holding that the Commissioner had no jurisdiction to take action u/s 10(1D) of the BPMC Act.

4. We have heard Mr. S.V. Kurundkar, learned Counsel for the appellant.

5. According to learned Counsel for the appellant, disqualification, as provided u/s 10(1D) of the BPMC Act, is automatic and according to the learned Counsel, it is the Commissioner, who is the Competent Authority to deal with the question of disqualification in respect of the acts enumerated in Sub-section (1D) of Section 10 of the BPMC Act. The learned Counsel for the appellant tried to draw an analogy in respect of the provisions contained in Sub-sections (1B) and (1C) of Section 10 of the BPMC Act. It would be appropriate to quote provisions of Section 10(1-D) of the BPMC Act, which reads as follows:

10(1-D). A Councillor shall be disqualified for being a Councillor, if such Councillor has constructed or constructs by himself, his spouse or his dependent, any illegal or unauthorised structure violating the provisions of this Act or the Maharashtra Regional and Town Planning Act, 1966 or the Rules or Bye-laws framed under the said Acts; or his directly or indirectly been responsible for, or helped in his capacity as such Councillor in, carrying out such illegal or unauthorised construction or has by written communication or physically obstructed or tried to obstruct, any Competent Authority from discharging its official duty in demolishing any illegal or unauthorised structure. Such disqualification shall be for the remainder of his term as a Councillor from the date of the declaration of such structure to be illegal or unauthorised by the concerned authority under the provisions of the said Acts or, as the case may be, from the date of commission of the act of interference or obstruction by the Councillor against the Competent Authority.

6. Provisions of Section 10(1B) and 10(1C) are in respect of disqualification attached to a Councillor contesting an election for being elected as a Councillor, if such a person claims the seat which is earmarked for the category of candidates belonging to Scheduled Castes, Scheduled Tribes or backward classes of citizens. It is to be noted at this stage that the provisions of Sub-sections (1B) and (1C)

of Section 10 of the Act are deleted by Maharashtra Act No. 35 of 2006. It is also to be noted that amendment has been introduced Act by incorporating Section 5-B, which reads as under:

5-B. Every person desirous of contesting election to a seat reserved for the Scheduled Castes, Scheduled Tribes, or as the case may be, Backward Class of Citizens, shall be required to submit, along with the nomination paper, Caste Certificate issued by the Competent Authority and the Validity Certificate issued by the Scrutiny Committee in accordance with the provisions of the Maharashtra Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimuka Jatis), Nomadic Tribes, Other Backward Classes and Special Backward Category (Regulation of Issuance and Verification of) Caste Certificate Act, 2000.

It is to be noted that by Maharashtra Act No. XLIX of 2006, following proviso is added to Section 5-B of the BPMC Act.

Provided that a person who has applied to the Scrutiny Committee for the verification of his Caste Certificate before the date of filing the nomination paper but who has not received the validity certificate on the date of filing of the nomination paper shall submit, alongwith the nomination paper.

(i) a true copy of the application preferred by him to the Scrutiny Committee for issuance of the validity certificate or any other proof of having made such application to the Scrutiny Committee; and

(ii) an undertaking that he shall submit, within a period of three months from the date of his selection, the validity certificate issued by the Scrutiny Committee:

Provided further that, if the person fails to produce the validity certificate within a period of three months from the date of his election, his election shall be deemed to have been terminated retrospectively and he shall be is qualified for being a Councillor.

7. It must be noted at this stage that the amended provisions were unfortunately not brought to the notice of the learned Single Judge and the arguments were advanced on the footing that the provisions of Sub-section (1B) and (1C) of Section 10 of the BPMC Act are retained on the statute book. The aspect relating to deletion of provisions of Sub-section (1B) and (1C) of Section 10 was not brought to the notice of the learned Single Judge while the arguments were advanced. In view of deletion of provisions of Sub-sections (1B) and (1C) of Section 10 of BPMC Act, the arguments based on the interpretation of said provisions and comparison of exercise of powers under the said provisions with that of provisions of Sub-section (1D) of Section 10 falls to the ground. Even otherwise, the question of disqualification arising out of invalidation of the status claim of a councillor cannot be compared with the other modes of disqualification prescribed by Section 10 of the BPMC Act.

8. The learned Counsel for the appellant has drawn our attention to a reported judgment of Division Bench of this Court in the case of Dattatraya Ramrao Thorat

v. State of Maharashtra and Ors. 2003 (Supp.) Bom. C.R. 110 : 2003(5) Mh.L.J. 539; and two judgments of the Full Bench of this Court in the case of Sujit Vasant Patil Vs. State of Maharashtra and Others, ; and in the case of Ramesh Suresh Kamble Vs. State of Maharashtra and Others, . The learned Counsel also places reliance on the judgment of the learned Single Judge of this Court in the case of Edwin Francis Britto Vs. Municipal Corporation of Greater Mumbai and Prakash Pandurang Bobadi, .

9. That so far as the argument advanced by the learned Counsel for the appellant that "disqualification" envisaged by Sub-section (1D) of Section 10 of the BMC Act is automatic and the Commissioner would be an appropriate authority to declare disqualification is concerned, the learned Counsel has drawn an analogy on the basis of a disqualification comparable to a case attaching disqualification on the ground of invalidation of status claim of an elected councillor. As stated earlier, provisions contained in Sub-sections (1B) and (1C) of Section 10 have been deleted by Maharashtra Act No. 35 of 2006. The argument based on the comparison of provisions, which have been deleted from the statute book, needs no consideration. Even otherwise, the learned Single Judge has considered the issue in detail and we find no reason to express dissent with the well reasoned view based on the appropriate analogy of the related provisions.

10. It would be appropriate to refer to the observations made by the Division Bench of this Court in the case of Dattatraya Ramrao Thorat (supra). The issue before the Division Bench was touching validity of the provisions of Maharashtra Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Other Backward Classes and Special Backward Category (Regulation of Issuance and Verification of) Caste Certificate) Act, 2000 (for short "Act No. XXIII of 2001"). The challenge was primarily to the provisions of Section 10(4), which, according to the arguments advanced in the said matter, run concurrent to the provisions of Section 12 or 16(2-A) of the BMC Act.

11. The view expressed in the judgment delivered by the Division Bench in the case of Dattatraya (supra) is confirmed by the Full Bench of this Court in the case of Sujit Vasant Patil (cited supra). While examining the issue, the Full Bench, in Paragraphs 12-A to 12-C, observed as below:

12A. Thus, the scheme of the various Local Self-Government Act in relation to the filing of the nomination papers and their scrutiny and the scheme of the Maharashtra Act No. XXIII of 2001 appears to be that in case a person desires to contest an election to a reserved seat, it is obligatory on his part to get a caste certificate from the Competent Authority and then immediately apply to the Scrutiny Committee to get a validity certificate. Therefore, normally as the candidate is required to make an application to the Scrutiny Committee as soon as he receives a caste certificate from the Competent Authority, with the result that in many cases his application before the Scrutiny Committee for validity certificate would be pending when his nomination paper is accepted on the basis of the caste certificate. If his nomination paper is accepted on the basis of the

caste certificate issued by the Competent Authority and as the caste certificate itself is valid subject to the grant of validity certificate, obviously acceptance of his nomination paper as valid will also be subject to the grant of validity certificate by the Scrutiny Committee. Therefore, once the Scrutiny Committee refuses to issue a validity certificate the nomination cannot survive and if the nomination cannot survive, election cannot survive. Therefore, cancellation of the election of such a candidate is a natural consequence of his caste certificate being found invalid.

12B. Thus the scheme is that a person who obtains a caste certificate has to himself apply to the Scrutiny Committee for scrutiny of his caste certificate, so that he can secure a valid certificate from the Scrutiny Committee, and it is only after the Scrutiny Committee issuing a valid certificate that the caste certificate issued in favour of the person by the Competent Authority becomes final. In our opinion, the scheme of Sub-section (2) of Section 6 is that any candidate who desires to avail of any benefit available to backward class has to get a caste certificate as also the validity certificate before he makes a claim for the benefits. But if a candidate chooses to make claim to the benefits on the basis of a tentative certificate namely a certificate issued by the Competent Authority, he takes the risk of his losing the benefits that he has claimed and obtained and also being visited with penal consequences on the refusal of the Scrutiny Committee to validate his caste claim. The Act contemplates conscious decision being made by a person at the time of claiming benefits. The Legislature expects a person to claim the benefits only after obtaining the validity certificate, but the Legislature also permits a person to claim the benefits on the basis of a tentative certificate issued by the Competent Authority, if he is willing to take the risk mentioned above. In our opinion, therefore, the validity certificate is one of the essential ingredient of the candidate being qualified to contest for the reserved seat. It may be pointed out here that nobody can doubt the necessity of power being vested in an authority for issuance of caste certificate. If it is necessary to vest the power in an authority to issue a caste certificate, then in view of various types of claims being made, it is equally necessary to provide for scrutiny of those certificates. The determination of a caste is a job for the expert. Therefore, definitely there is a need of appointing an authority which is competent to issue caste certificates, which can be accepted by the returning officer at their face value. In our opinion, therefore, in the face of the provisions of the Act, the nomination papers which have been accepted on the basis of certificate issued by the Competent Authority gets rejected on the refusal by the Scrutiny Committee to issue validity certificate and therefore the candidate loses his title to the seat against which he has been elected. There is no question of the election of that candidate being set aside by the Scrutiny Committee. The job of the Scrutiny Committee is of either issuing the final caste certificate or refusing to do so. If the Scrutiny Committee refuses to issue a final caste certificate, then the caste certificate issued by the Competent Authority ceases to exist. With the result, there is no caste certificate filed at scrutiny of the nomination papers and

therefore the nomination papers itself becomes infirm and incomplete, and therefore, the returned candidate loses qualification to contest the seat and therefore he has to vacate his seat. In our opinion, in view of this scheme of the Act, even in the absence of Sub-section (4) of Section 10, the consequences in law of the Scrutiny Committee refusing to issue valid caste certificate would be vacation of seat by the elected candidate.

12C. In our opinion, therefore, reference to provisions of Article 243-ZG, which lays down that no election to any Municipality shall be called in question except by election petition presented to such authority and in such manner as is provided by or under the law made by the State Legislature is not relevant. In the proceedings before the Scrutiny Committee, the election of the candidate is not in question, what is done by the Scrutiny Committee is that it scrutinises the caste certificate on the basis of which the candidate has contested the election. Nobody calls the election in question before the Scrutiny Committee. The candidate himself files an application to get a validity certificate. In our opinion, the scheme of the Act is that the election of a person from a reserved seat who has contested on the basis of tentative certificate issued by the Competent Authority is itself provisional. Nomination papers and the election become final on the issuance of validity certificate and it gets cancelled on the refusal to issue a validity certificate. In our opinion, therefore, there is no question of there being any conflict with the provisions of Article 243-ZG. So far as the competence of the State Legislature to make such provisions is concerned, in our opinion, the State Legislature gets competence to make such provisions because it has the competence to make reservation of the seats.

12. This decision rendered by the Full Bench was also considered in the later Full Bench decision rendered in the case of Ramesh Suresh Kamble (cited supra). In the matter of Ramesh, the Full Bench has put a seal of approval to the earlier decision of the Full Bench. The Full Bench, in Paragraphs 25 and 26, observed as below:

We find ourselves in full agreement with the observations made by the Full Bench in the case of Sujit Vasant Patil that the caste validity certificate is one of the essential ingredients of the candidate being qualified to contest for the reserved seat and the other observations made in Paragraphs 12A and 12B of the judgment which we have reproduced above and we need not repeat the same. It is true that Section 6(1C)(a) of the M.M.C. Act is not specifically noticed by the Full Bench in its judgment in the case of Sujit Vasant Patil, but from the reading of the entire judgment, it cannot be said that the Full Bench was alive to the provisions contained in various Local Self-Government Acts. As a matter of fact, Paragraph 12A of the judgment in Sujit Vasant Patil begins with the scheme of various Local Self-Government Acts and the scheme of Maharashtra Act No. XXIII of 2001. What has been said by the Full Bench in Sujit Vasant Patil's case, applies on all fours to the case u/s 16(1C)(a) of the M.M.C. Act.

A candidate who sets up a claim as belonging to a particular caste by making an

application to the competent Authority and obtains the Caste Certificate based on such claim and information and contests the election of the Councillor from the reserved seat and gets elected and if, ultimately, the Scrutiny Committee upon inquiring into the correctness of such certificate declares such certificate invalid and cancels the same, it is obvious that such Caste Certificate has been obtained by that person on the basis of the declaration or information or claim which was not correct or true and upon invalidation and cancellation of the Caste Certificate by the Scrutiny Committee, such person incurs disqualification automatically. There is no escape from it.

13. The learned Single Judge, in the instant matter, on making analysis of the reported judgments observed that the instances of disqualification on the ground of invalidation of status claim are not comparable with the disqualification attached under Sub-section (1D) of Section 10 of the BPMC Act. The reason for arriving at such a conclusion is that before arriving at a declaration in respect of validation of the status claim of an individual, a complete procedure, as prescribed under Act No. XXIII of 2001, is required to be followed. Not only that but the Appellate Authority and the Scrutiny Committee is empowered with all the powers of the Civil Court while determining the issue. It is only after observance of the procedure prescribed under Act No. XXIII of 2001 and after holding due inquiry, caste claim of a person can be invalidated and upon such invalidation, disqualification is invited. The net effect of deletion of provisions of Sub-sections (1B) and (1C) of Section 10 of the BPMC Act is that one has to fall back on the amended provisions of Section 5-B of the BPMC Act and the consequences as provided are attracted.

14. It would be appropriate to consider impact of introduction of provisions to Section 5-B of the BPMC Act by Amendment Act No. 35 of 2006. The Section mandates that every person desirous of contesting election to a seat reserved for the Scheduled Castes, Scheduled Tribes, or, as the case may be, Backward Class of Citizens, shall be required to submit, along with the nomination paper, Caste Certificate issued by the Competent Authority and the Validity Certificate issued by the Scrutiny Committee in accordance with the provisions of the Maharashtra Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Other Backward Classes and Special Backward Category (Regulation of Issuance and Verification of) Caste Certificate Act, 2000. The provisions further extends a concession in favour of a candidate desirous of contesting election to produce the validity certificate within specified time. In the event of failure of a candidate or an elected representative to produce the validity certificate within prescribed period, or in the event of invalidation of the caste certificate, net result would be that his election shall be deemed to have been terminated retrospectively and he shall be disqualified for being a Councillor i.e. the Councillor vacates the office and the very act of tendering the nomination paper itself is rendered invalid. The consequence of failure to tender a valid certificate, as provided under the provisions of Section 5-B is that the very filing of nomination paper by the elected representative is itself vitiated. In view of this

amended provision, the argument advanced by the learned Counsel for the appellant, based on the analogy of provisions relating to the consequences meted out by a candidate contesting the election to a seat reserved for the Scheduled Castes, Scheduled Tribes, or, as the case may be, Backward Class of Citizens, is not comparable with that of the cases covered by disqualification as envisaged by the provisions of Section 10(1D) of the BPMC Act.

15. On perusal of Section 267 of the BPMC Act, it would be revealed that the Commissioner is empowered to arrive at a conclusion in respect of execution of any work to be unlawful or being carried out in unlawful manner. The Commissioner is authorised under the said provisions to require a person to stop the unauthorised construction forthwith. The provisions of Section 10(1D) holds the person liable for disqualification if he is directly or indirectly responsible for carrying out unauthorised construction so also helping the same in his capacity as councillor. Not only this, but the disqualification is also invited when a councillor is found to be obstructing in demolition of any illegal or unauthorised structure. The Commissioner is not authorised to issue such a declaration. The power conferred on the Commissioner u/s 267 of the BPMC Act is in respect of satisfying himself regarding unlawful construction or the issue in respect of demolition of the same.

16. The learned Single Judge has rightly drawn a conclusion that in view of Sub-clause (2) of Article 243 of the Constitution, the Legislature is not only required to designate an authority to decide the question but is also required to prescribe the manner in which it is to be done. On perusal of the provisions of PMC Act, the argument advanced by the learned Counsel for the appellant that the Commissioner is the authority, so empowered, cannot be accepted.

17. It would be now appropriate to refer to the provisions of Article 243-V of the Constitution, which reads as under:

243-V. Disqualifications for membership-

(1) A person shall be disqualified for being chosen as, and for being, a member of a Municipality.

(a) If he is so disqualified by or under any law for the time being in force for the purposes of elections to the Legislature of the State concerned;

Provided that; no person shall be disqualified on the ground that he is less than twenty-five years of age, if he has attained the age of twenty-one years;

(b) If he is so disqualified by or under any law made by the Legislature of the State.

(2) If any question arises as to whether a member of a Municipality has become subject to any of the disqualifications mentioned in Clause (1), the question shall be referred for the decision of such authority and in such manner as the Legislature of a State may, by law, provide.

18. It is a Constitutional mandate that if any question arises as to whether a member of municipality has become subject to any disqualifications mentioned in Clause (1), the question shall have to be decided by such authority and in such manner, as provided by the Legislature of the State. In the instant case, provisions of Section 12 of the BPMC Act prescribes that if any doubt or dispute arises whether a councillor has ceased to hold office as such u/s 11, such councillor or any other councillor may, and at the request of the Corporation, the Commissioner shall, refer the question to the Judge. Sub-section (2) of Section 12 further provides that 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 the Act determines that he has ceased to hold office.

19. Provisions of Section 12 of the BPMC Act are in tune with the Constitutional scheme as provided under Article 243-V.

20. For the reasons set out above, we are of the considered view that the application of provisions of Sub-section (1D) of Section 10 are not automatic and the Municipal Commissioner is not Competent Authority to rule on disqualification of a councillor and such a declaration ought to be made having regard to the provisions of Section 12 of the BPMC Act. We are in agreement with the view set out by the learned Single Judge. The argument of the learned Counsel for the appellant, based on the analogy of provisions of Section 10(1B) and (1C), does not sound reasonable in view of deletion of the said provisions from the statute book and introduction of provisions of Section 5-B of the BPMC Act. There is no merit in the appeal and the same deserves to be dismissed.

21. In the result, appeal stands dismissed accordingly. No costs.