

(2007) 12 BOM CK 0026

In the Bombay High Court

Case No : Writ Petition No's. 3793/07, 4165/07, 5691/07 (with CA 2251/07) , 4250/07 (with CA 2257/07) , 4312/07 (with CA 2265/07) , 4313/07 (with CA 2258/07) , 4335/07 (with CA 2263/07) , 4336/07 (with CA 2264/07) , 4416/07, 4417/07, 4422/07, 4429/07, 5074/07, 514

Dadasaheb Arjun Gulve

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 20-12-2007

Acts Referred:

Bombay Village Panchayats Act, 1950 — Section 10(IA), 10A
Caste Certificates Validation Act, 2000 — Section 10, 10(4), 6, 6(4)
City of Nagpur Corporation Act, 1948 — Section 9AA
Maharashtra Municipal Councils Nagar Panchayats and Industrial Township Act, 1965 — Section 9A
Maharashtra Zilla Parishad and Panchayat Samitis Act, 1961 — Section 12A
Mumbai Municipal Corporation Act, 1888 — Section 5B

Citation : (2008) 2 BomCR 712

Hon'ble Judges : S.B. Mhase, J;D.G. Karnik, J

Bench : Division Bench

Advocate : Y.S. Jahagirdar and G.S. Godbole, for the petitioners in Writ Petition Nos. 5691/07, 4416/07, 4417/07, 4422/07, 4429/07, 5692/07, 5696/07, 5705/07, 5766/07, 5777/07, 5830/07, 6077/07 and 6768/08, R.K. Mendadkar, Writ Petition Nos. 3793/07, 5144/07, 5730/07, 6187/07, 6188/07, 6189/07, 6191/07 and 6192/07., L.M. Acharya, Writ Petition No. 4165/07 with C.A. No. 2251/07, Writ Petition No. 4250/07 with C.A. No. 2257/07, Writ Petition No. 4312/07 with C.A. No. 2265/07, Writ Petition No. 4313/07 with C.A. No. 2258/07, Writ Petition No. 4335/07 with C.A. No. 2263/07 and Writ Petition No. 4336/07 with C.A. No. 2264/07., Avinash Avhad for the petitioner in Writ Petition No. 5074/07., P.D. Dalvi, for the petitioner in Writ Petition No. 5529/07., Vijay Patil, for the petitioner in Writ Petition No. 5865/07., N.V. Walawalkar and Rahul Walvekar, for the petitioner in Writ Petition Nos. 5867/07, 5872/07, 5880/07 and 5950/07, H.S. Venegavkar, for the petitioner in Writ Petition Nos. 5874/07 and 5875/07, Pratap Patil, for the petitioner in Writ Petition No. 5878/07, S.S. Patwardhan, for the petitioner in Writ Petition Nos. 5882/07, 6587/07 and 6596/07, A.V. Anturkar, instructed by S.B. Deshmukh, for the petitioner in Writ Petition No. 6377/07, Harshad Bhadbhade, for the petitioner in Writ Petition No. 6568/07, A.A. Kumbhakoni, Associate A.G., C.R. Sonawane, A.G.P. for the State. Anjali Iyer, No. 4165/07.for Respondent No. 4, G.S. Godbole, for Respondent No.

3 in Writ Petition No. 4250/07 and C.A. No. 2257/07, A.J. Bhor, for respondent No. 3 Writ Petition No. 4313/07 and C.A. No. 2258/07, Kirit Hakani, for respondent No. 6 in Writ Petition Nos. 4335/07 and 4336/07, R.K. Mendadkar, for respondent No. 9 in Writ Petition No. 4416/07 and for respondent No. 3 in Writ Petition No. 6377/07, S.B. Shetye, for respondent No. 10 in Writ Petition No. 4416/07, for respondent No. 12 in Writ Petition No. 4417/07, for respondent No. 9 in Writ Petition Nos. 4422/07, 5730/07 and 5777/07, for respondent No. 11 in Writ Petition Nos. 4429/07 and 5766/07, for respondent No. 5 in Writ Petition Nos. 5144/07, 6187/07, 6188/07, 6189/07 and 6191/07, for respondent No. 4 in Writ Petition No. 5529/07, for respondent No. 6 in Writ Petition Nos. 5692/07, 5696/07 and 6077/07 and for respondent No. 3 in Writ Petition Nos. 5882/07 and 6587/07, R.G. Ketkar, for respondent No. 5 in Writ Petition Nos. 4417/07 and 4422/07, M.V. Bhutekar, for Respondent Nos. 9 to 11 in Writ Petition No. 4417/07 and for Respondents No. 9 and 10 in Writ Petition No. 4429/07, P.D. Dalvi, for Respondent No. 3 in Writ Petition No. 5144/07, S.S. Patwardhan, for Respondent No. 2 in Writ Petition No. 5529/07, Anilkumar Patil, for Respondent No. 1 in Writ Petition No. 5529/07. Amit Borkar, for Respondent No. 10 in Writ Petition No. 5830/07. J. Shekhar, for Respondent No. 3 in Writ Petition Nos. 5865/07 and 5878/07, M.S. Lagu, for Respondent No. 4 in Writ Petition No. 5872/07, V.D. Borwankar, for Respondent No. 6 in Writ Petition No. 6188/07, U.B. Nighot, for Respondent No. 6 in Writ Petition No. 6189/07, O.A. Siddiqui, for Respondent No. 6 in Writ Petition No. 6192/07 and A.M. Kulkarni, for Respondent No. 5 in Writ Petition No. 6587/07, for the appearing parties;

Judgement

D.G. Karnik, J.—In all these writ petitions, the petitioners have challenged the constitutional validity of Section 5-B of the Mumbai Municipal Corporation Act, 1888 (for short "MMC Act"), section 5-B of the Bombay Provincial Municipal Corporations Act, 1949 (for short "BPMC Act"), Section 9-A of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 (for short "Municipalities Act"), Section 12-A of the Maharashtra Zilla Parishads and Panchayat Samitis act, 1961 (for short "Zilla Parishads act") and Section 10-A in the Bombay Village Panchayats Act, 1950 (for short "the Village Panchayats Act"). In the alternative, counsel for the petitioners submitted that the time limit of four months prescribed for production of a caste/tribe validity certificate by the second proviso to each of the aforesaid sections should be held to be directory.

2. Since all the petitions raise common questions of law and challenge the constitutional validity on the same grounds and also put forward the same interpretation to the second proviso which are identical in each of the abovementioned sections of the Acts, we are passing this common order.

3. Article 243D of the Constitution of India provides that seats shall be reserved for the scheduled castes and scheduled tribes in every panchayat. The number of seats so reserved are required to bear, as nearly as may be, the same proportion to the total number of seats to be filled by direct election in that panchayat as the proportion of scheduled castes in that panchayat area or of the scheduled

tribes in that panchayat area bears to the total population of that area. Article 243T of the Constitution of India provides that seats shall be reserved for scheduled castes and scheduled tribes in every municipality (which under Article 243Q shall include a Nagar Panchayat, a Municipal Council and a Municipal Corporation). The number of seats so reserved are required to bear, as nearly as may be, the same proportion to the total number of seats to be filled by direct election in that municipality as the population of the scheduled castes in that municipal area or of the scheduled tribes in that municipal area bears to the total population of that area. In order to fulfil the constitutional mandate contained in Articles 243D and 243T of the Constitution of India, the Legislature of State of Maharashtra has made provisions for reservation of seats for persons belonging to scheduled castes, scheduled tribes and other backward classes of citizens in municipalities, village panchayats and zilla parishads.

4. In order to ensure that the benefits of reservation of seats in the municipalities, village panchayats and zilla parishads conferred on the persons belonging to the scheduled castes, scheduled tribes and other backward classes (hereinafter collectively referred to as "the backward classes") are not taken away and/or grabbed by ineligible persons not belonging to the backward classes but who falsely claim to so belong, the Legislature introduced section 5-B in the MMC Act, section 5-B in the BPMC Act, section 9-AA in the City of Nagpur Corporation Act, 1948 and Section 9-A in the Municipalities Act by enacting Maharashtra Municipal Corporations and Municipal Councillors (Amendment) Act, 2006 (Maharashtra Act No. XXXV of 2006). Similarly, the Legislature also introduced section 10(IA) in the Village Panchayats Act and section 12-A in the Zilla Parishads Act by enacting Bombay Village Panchayats and Maharashtra Zilla Parishads and Panchayat Samitis (Amendment) Act, 2006 (Maharashtra Act No. XXXVII of 2006). Section 5-B of the MMC Act, section 5-B of the BPMC Act and section 9-A of the Municipalities Act are identically worded and initially did not contain any proviso thereto. Section 10-IA of the Village Panchayats Act and section 12-A of the Zilla Parishads Act are also identically worded with section 5-B of the MMC Act and section 5-B of the BPMC Act save and except that each of them contain two provisos. The two provisos identical to those contained in section 10-A of the Village Panchayats Act and section 12-A of the Zilla Parishads Act were subsequently added to section 5-B of MMC Act and the BPMC Act and section 9-A of the Municipalities Act by Maharashtra Act No. XLIV of 2006. Thus, as on date of the petitions, section 5-B of the MMC Act section 5-B of the BPMC Act, section 9-A of the Municipalities Act, section 10(IA) of the Village Panchayats Act and section 12-A of the Zilla Parishads Act, with which we are concerned in these petitions, are all identically worded with identical provisos thereto. Since we are concerned with the identical provisions in the different statutes, it would be enough for us at this stage to refer to section 5-B of the MMC Act and whatever is said about section 5-B of the MMC Act would apply with equal force to the interpretation of other *pari materia* sections in the other Acts referred to above. Section 5-B of the MMC Act reads as under:

5B. Person contesting election for reserved seats to submit Caste Certificate and Validity Certificate.-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.

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, along with 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 for having made such application to the Scrutiny Committee; and

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

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

5. At the hearing of the petitions, learned Counsel appearing for the petitioners submitted that the period of four months prescribed for production of the caste validity certificate by elected councillor must be held to be directory. They submitted that a backward class person who gets elected as a corporator or a councillor of a municipal corporation or a municipality or as a member of a village panchayat or a zilla parishad (hereinafter referred to as "the councillor") on a seat reserved for backward classes, though having applied in time for the caste validity certificate, is often unable to obtain the caste validity certificate from a Caste Scrutiny Committee for no fault of his. Because of inaction of the Caste Scrutiny Committee in deciding his caste claim within statutory period of four months, he should not be disqualified from being a councillor merely by reason of his failure to obtain the caste validity certificate within the prescribed period of four months. If the period of 4 months prescribed by the proviso is held to be mandatory, the councillor whose caste certificate of belonging to a backward class is upheld by the Caste Scrutiny Committee, but after the expiry of the period of four months of the declaration of the election results would be disqualified to be a councillor and his election would be terminated retrospectively. This would not only be unjust but would be illegal and contrary to the constitutional mandate contained in Articles 243D and 243T of the Constitution of India. Therefore, the period of four months required for

production of the caste validity certificate must be held to be directory and if the councillor produces the caste validity certificate immediately after his caste claim is validated by the Caste Scrutiny Committee, he should not be held to be disqualified nor his councillorship be deemed to be terminated for non-production of the caste validity certificate before the expiry of the statutory period of four months. Counsel for the petitioners further submitted that if this interpretation is accepted, then the petitioners do not wish to pursue their claim that the aforementioned sections or any part thereof is unconstitutional. In view of this, we would first consider whether the period of four months prescribed by second proviso to section 5-B of the MMC Act should be construed as directory or mandatory.

6. At this stage, it would be useful to refer to the state of affairs prevailing prior to the year 1995 and prior to enactment 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 (Maharashtra Act No. XXIII of 2001) (hereinafter referred to as "the Caste Certificates Validation Act"). Caste certificates were then issued by Tahsildars and were scrutinised and verified by non-statutory caste certification validation committees. In *Kumari Madhuri Patila and another Vs. Addl. Commissioner, Tribal Development and others*, , the Supreme Court noted that the procedure which was followed by the various scrutiny committees for validation of caste certificates was neither uniform nor appropriate. Many times persons not belonging to a backward class obtained certificates of belonging to a backward class and wrongly gained admissions to educational institutions or secured employment to reserved seats or posts. The Supreme Court held that an admission wrongfully gained or an appointment wrongfully obtained on the basis of a false social status certificate had the effect of depriving the genuine scheduled castes or scheduled tribes or other backward class candidates of the benefits conferred on them by the Constitution of India. The court also noted that some times genuine candidates were also denied admission to educational institutions or appointments to office or posts under a State for want of social status certificate while ineligible or spurious persons falsely gained entry thereto. For the purpose of streamlining the procedure for issuance of social status certificates, their scrutiny and approval, the Supreme Court laid down the procedure that should be followed. Since that decision in the State of Maharashtra, the procedure laid down therein has been followed. The Legislature of Maharashtra thereafter stepped in and enacted the Caste Certificates Validation Act (Act No. XXXIII of 2001) which provides for the regulation of issuance and verification of the caste certificates to the persons belonging to the scheduled castes, scheduled tribes, de-notified tribes (vimukta jatis), nomadic tribes and other backward classes and special backward category. u/s 2-B of the Caste Certificates Validation Act, 2000 the competent authority is appointed by the State Government by a notification in official gazette to issue caste certificates. Any person, who belongs to any of the backward classes, is

required to make an application to the competent authority for caste certificate in the prescribed manner. The competent authority, after satisfying itself about the genuineness of the claim and following the procedure prescribed issues a caste certificate. u/s 5 of the Act, any person aggrieved by an order of rejection of the application by the competent authority can file an appeal within 30 days before the appellate authority. Section 6 requires the government to constitute by a notification in official gazette, one or more Scrutiny Committees for verification of the caste certificate issued by the competent authority. Sub-section (4) of section 6 says that the Scrutiny Committee shall follow such procedure for verification of caste certificate and complete the verification of caste validity certificate within such time as prescribed. It may be noted here that though Sub-section (4) of section 6 speaks of grant of caste validity certificate within the time to be prescribed, no time limit has yet been prescribed for the caste scrutiny committee to complete the enquiry and pass an order validating or invalidating, as the case may be, the caste claim. Section 7 of the Act says that if a caste validation certificate was obtained by any person fraudulently, the Scrutiny Committee shall cancel and confiscate the certificate after following the prescribed procedure. Sub-section (2) of section 7 of the Act says that the order passed by the scrutiny committee shall be final and shall not be challenged before any court except High Court under Article 226 of the Constitution of India. Section 8 says that in an enquiry before the competent authority or the scrutiny committee, the burden of proving that the person belongs to a backward class shall be on the applicant. Section 9 confers powers of a civil court on the competent authority, the appellate authority and the scrutiny committee in respect of matters relating to summoning and enforcing attendance of any person, examining him on oath, requiring the discovery and production of any document, receiving evidence on affidavits, requisitioning any public record or copy thereof from any court or office and issuing commissions for the examination of witnesses or documents. Section 10 of the Act says that whoever not belonging to any of the backward class secures appointment to the government, local authority or government aided institutions or a cooperative society against a post reserved for such backward class shall on cancellation of the caste certificate by the Scrutiny Committee be liable to be debarred from the concerned educational institution or, as the case may be, discharged from the employment forthwith. Sub-section (4) of section 10 of the Act is material for the purposes of this petition and reads thus:

10. Benefits secured on the basis of false Caste Certificate to be withdrawn:

(1) ...

(2) ...

(3) ...

(4) Notwithstanding anything contained in any law for the time being in force, a person shall be disqualified from being a member of any statutory body if he had

contested the election for local authority, co-operative society or any statutory body on the seat reserved for any of Scheduled Castes, Scheduled Tribes, De-Notified Tribes (Vimukta Jatis), Nomadic Tribes, other Backward Classes and Special Backward Category by procuring a false Caste Certificate as belonging to such Caste Tribe or Class on such false Caste Certificate being cancelled by the Scrutiny Committee and any benefits obtained by such person shall be recoverable from such person as in arrears of land revenue and the election of such person shall be deemed to have been terminated retrospectively.

Sections 11 to 17 of the Act are not material for the decision on these petitions. Section 18 of the Act empowers the State Government to make rules to carry out the purposes of the Act and section 19 empowers the Government by notification in the official gazette to make such provisions not inconsistent with the provisions of the Act as may be necessary for removal of any difficulty which arises in giving effect to the provisions of the Act.

7. Sub-section (4) of Section 10 of the Caste Certificates Validation Act, 2000 provides that the person, who had contested an election for any local authority, cooperative society or other statutory body on a seat reserved for any of the backward classes by procuring false caste certificate as belonging to a backward class, on false certificate being cancelled by the Scrutiny Committee, be disqualified from being a member of such body, and his election shall be deemed to be terminated retrospectively. Perusal of Sub-section (4) of section 10 of the Caste Certificates Validation Act would show that Sub-section (4) of section 10 of the Caste Certificate Validation Act applies to a case where a person had already obtained a caste certificate as belonging to a backward class and had contested the election to a local authority, cooperative society or any other statutory body on a seat reserved for backward classes and the caste certificate is subsequently cancelled by the Scrutiny Committee. On such cancellation of the false caste certificate, the election of such person shall be deemed to have been terminated retrospectively. When an election to a local body is held to be terminated retrospectively by reason of a caste certificate produced by a successful candidate found to be false, fresh election is required to be held on the seat becoming vacant. This would obviously entail substantial expenditure for the fresh elections. In order to avoid such expenditure, section 5-B (without any provisos thereto) was initially added to the MMC Act by Maharashtra Act No. XXXV of 2006. The substantive provision of section 5-B requires every person desirous of contesting election to a seat of a councillor reserved for backward classes to submit along with nomination paper, a caste certificate issued by the competent authority and the caste validity certificate issued by the Scrutiny Committee in accordance with the provisions of the Caste Certificates Validation Act, 2000. Though Sub-section (4) of section 6 of the Caste Certificates Validation Act, 2000 enables the government to prescribe the time limit for the Scrutiny Committee to decide upon the validity of the caste certificate issued by the competent authority, no time limit has yet been prescribed. May be that on account of several cases relating to the caste validity certificate pending before

the Caste Scrutiny Committee and/or on account of sudden rush of cases that may come before it just before an election, the Scrutiny Committee may not be able to decide about the validity of the caste certificate issued by the competent authority in a fixed time and perhaps it is for this reason that the government has not yet prescribed the time limit within which the Scrutiny Committee is required to decide upon the validity of the caste certificate. If the Scrutiny Committee is not able to decide upon the caste certificate issued to a person who proposes to contest the election to a local body, the candidate would not be entitled to contest the election by reason of a substantive provision of section 5-B of the MMC Act. This may effectively be a hindrance to the constitutional mandate of reservation contained in Articles 243D and 243T of the Constitution of India. The Legislature of Maharashtra, therefore, added two provisos to section 5-B by Maharashtra Act No. IXL of 2006. The first proviso to section 5-B of the MMC Act provides that a person who has applied to the Scrutiny Committee for the verification of his caste certificate before the date of filing of the nomination paper, but who has not received the validity certificate on the date of filing of the nomination paper shall submit along with the nomination paper a true copy of the application preferred by him to the Scrutiny Committee for issuance of the validity certificate or any other proof for having made such application to the Scrutiny Committee and an undertaking that he shall submit within four months from the date of his election the validity certificate issued by the Scrutiny Committee. The second proviso to section 5-B of the MMC Act provides that if the person fails to produce the caste validity certificate within four months from the date of his election, his election shall be deemed to have been terminated retrospectively and he shall be disqualified for being a councillor. The object of the first proviso to section 5-B of the MMC Act, it appears to us, is to enable a backward class person who possesses a caste certificate issued by the competent authority and has applied to the Scrutiny Committee for issuance of a caste validity certificate, but the validity thereof has not been decided by the Scrutiny Committee for no fault of his, to contest the election. Articles 243D and 243T of the Constitution of India mandate reservation of seats in favour of persons belonging to scheduled castes and scheduled tribes. That mandate should not be frustrated merely by reason of the inaction on the part of the Caste Scrutiny Committee, of not being in a position to investigate the caste claim and issue a caste validity certificate. If a person belonging to a backward class possessing a caste certificate but not possessing the a caste validity certificate is prevented from even contesting the election at the threshold, constitutional mandate will be frustrated and, therefore, first proviso appears to have been added to section 5-B of the MMC Act providing that a person belonging to backward classes would be entitled to contest the election though he does not possess the caste validity certificate provided that on the date of filing of the nomination paper he has applied to the Scrutiny Committee for verification of his caste certificate and produces a proof that he has so applied. Initially, the second provisos to section 5-B gave a period of three months for production of a caste validity certificate. It was however noticed by

the Legislature that the caste claims were not determined either way by the Caste Scrutiny Committees within the said period of three months of the date of declaration of the election results and, therefore, by a legislative amendment the period was extended by one more month requiring the person to produce the caste validity certificate within a period of four months. It was pointed out to us that in many cases the Caste Scrutiny Committees have not decided the caste claims even within four months of the election. It was pointed out to us that in some cases Caste Scrutiny Committees have decided the caste claims in favour of the petitioners, that is to say that they have validated the caste certificates of the petitioners, but the petitioners were not actually informed of the said decisions nor were they issued caste validity certificates within four months of the elections. Consequently, the petitioners could not produce the caste validity certificates within a period of four months of the declaration of the election results and consequently orders have been passed to the effect that their elections have been terminated retrospectively and they are disqualified for being councillors as they have failed to produce the caste validity certificates within the statutory period of four months prescribed by section 5-B of the MMC Act. It is in these circumstances that we are called upon to consider whether the period of four months prescribed by proviso to section 5-B of the MMC Act for production of caste validity certificate be regarded as directory or mandatory.

8. Mr. Kumbhakoni, learned Associate Advocate General appearing for the State of Maharashtra, submitted that the right to contest an election is neither a fundamental right nor a common law right. It is a right conferred by a statute and must, therefore, be subject to the conditions which are prescribed by the statute. Section 5-B of the MMC Act clearly provides that every person desirous of contesting an election for a seat reserved for backward classes must produce along with the nomination paper the caste certificate issued by the competent authority and the validity certificate issued by the Scrutiny Committee in accordance with the Caste Certificate Validation Act. The first proviso to section 5-B of the MMC Act was added thereto subsequently with a view to craft an exception in favour of a person wanting to contest election who had obtained the caste certificate and submitted the same before the Scrutiny Committee for verification, but the Scrutiny Committee had not decided the application on the date on which the nominations were to be filed. By the first proviso to section 5-B of the MMC Act, such person who having obtained a caste certificate and having submitted the same to the Scrutiny Committee for verification was allowed to contest the election subject to two conditions, namely that (i) along with the nomination paper, he produced a copy of the application preferred to the Scrutiny Committee for issuance of validity certificate or any other proof for having made such application to the Scrutiny Committee and (ii) filed an undertaking that he would submit, within a period of three months (which was subsequently amended to four months) from the date of his election, the validity certificate issued by the Scrutiny Committee. Thus, submission of an undertaking that he would produce the caste validity certificate within four months from the

date of his election is a statutory condition governing the right to contest an election. The second proviso to section 5-B of the MMC Act provides that if the elected councillor failed to produce the caste validity certificate within a period of four months from the date of his election, his election shall be deemed to be terminated retrospectively and he shall be disqualified for being a councillor. The use of the word "shall" for the purpose of deemed termination of the election retrospectively was indicative of the intention of the Legislature that the provision was mandatory. Mr. Kumbhakoni further submitted that the statute provides not only the requirement of production of caste validity certificate within four months of the declaration of the results of an election but makes a further provision, which is penal in nature, that non-production of the caste validity certificate within four months would result in termination of the election retrospectively. As penal consequences are provided for breach of the provision, that was surest indication for holding that the provision was mandatory and not directory. In this regard, Mr. Kumbhakoni referred to the decisions of the Supreme Court in Sharif-ud-din Vs. Abdul Gani Lone, and the observations made in paragraph 34 of the decision of the Supreme Court in Kailash Vs. Nanhku and Others, .

9. In Sharif-ud-din v. Abdul Gani Lone (supra), the Supreme Court observed:

9. The difference between a mandatory rule and a directory rule is that while the former must be strictly observed, in the case of the latter substantial compliance may be sufficient to achieve the object regarding which the rule is enacted. Certain broad propositions which can be deduced from several decisions of courts regarding the rules of construction that should be followed in determining whether a provision of law is directory or mandatory may be summarised thus: the fact that the statute uses the word "shall" while laying down a duty is not conclusive on the question whether it is mandatory or directory provision. In order to find out the true character of the legislation, the court has to ascertain the object which the provision of law in question has to subserve and its design and the context in which it is enacted. If the object of a law is to be defeated by non-compliance with it, it has to be regarded as mandatory. But when a provision of law relates to the performance of any public duty and the invalidation of any act done in disregard of that provision causes serious prejudice to those for whose benefit it is enacted and at the same time who have no control over the performance of the duty, such provision should be treated as a directory one. Where, however, a provision of law prescribes that a certain act has to be done in a particular manner by a person in order to acquire a right and it is coupled with another provision which confers an immunity on another when such act is not done in that manner, the former has to be regarded as a mandatory one. A procedural rule ordinarily should not be construed as a mandatory if the defect in the act done in pursuance of it can be cured by permitting appropriate rectification to be carried out at a subsequent stage unless by according such permission to rectify the error later on, another rule is to be done in a particular manner and also lays down that failure to comply with the said requirement

leads to a specific consequence, it would be difficult to hold that the requirement is not mandatory and the specified consequence should not follow.

In *Kailash v. Nanhku* (supra), the Supreme Court cited with approval the observations by Justice G.P. Singh in his book "Principles of a Statutory Interpretation (9th Edn., 2004)" which are as follows:

The study of numerous cases on this topic does not lead to formulation of any universal rule except this that language alone most often is not decisive, and regard must be had to the context, subject-matter and object of the statutory provision in question, in determining whether the same is mandatory or directory, in an oft-quoted passage Lord Campbell said: "No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered.(p.338)

For ascertaining the real intention of the legislature, points out Subbarao, J. "the court may consider inter alia, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions; the fact that the non-compliance with the provisions is or is not visited by some penalty; the serious or the trivial consequences, that flow therefrom; and above all, whether the object of legislation will be defeated or furthered". If object of the enactment will be defeated by holding the same directory, it will be construed as mandatory, whereas if by holding it mandatory serious general inconvenience will be created to innocent persons without very much furthering the object of enactment, the same will be construed as directory.(pp.339-340)

Respectfully following the aforesaid decisions, we are of the view that no universal rule can be laid down to come to a conclusion whether any provision of a statute or rule is directory or mandatory. Language alone most often is not decisive and regard must be had to the context, subject matter and object of the statutory provision in question, in determining whether the same is mandatory or directory. The court may, inter alia, consider the nature and design of the statute and the consequences which would follow from construing it the one way or the other. The fact that the non-compliance of the provision is or is not vested by some penalty is relevant, but that alone is not necessarily decisive. The serious or the trivial consequences that follow from the breach and above all whether the object of the Legislature will be defeated or furthered by construing the statute directory or mandatory is material.

10. The object of section 5-B of the MMC Act is to ensure that only the persons belonging to backward classes are only elected and occupy the post of councillor reserved for backward classes. The persons, who do not belong to backward

classes but who falsely claim the social status of belonging to backward classes, should not usurp the benefit of reservation made in favour of backward classes. It is with this object that section 5-B was introduced by an amendment in the MMC Act requiring production of a caste certificate and caste validity certificate at the time of filing of the nomination paper. However, that object was defeated because even the genuine persons belonging to backward classes were some times denied the opportunity to contest election merely because though they had obtained the caste certificate had not been able to obtain the caste validity certificate from the Scrutiny Committee before the last date for filling up the nomination paper. Often on account of their backwardness, they were unable to make application for verification of the caste certificate well in advance of the proposed elections and some times though they had made applications for obtaining caste validity certificate well in advance, the same was not decided by the Scrutiny Committee for no fault of theirs. To deny such genuine persons belonging to backward classes an opportunity to contest the election would amount to travesty of the constitutional mandate of reservations in favour of the backward classes. It is for this reason that two provisos to section 5-B were added in the MMC Act enabling the persons belonging to backward classes to contest the election by producing at the time of nomination paper the caste certificate along with a proof of having applied for verification of the caste certificate and filing an undertaking for production of the caste validity certificate within the prescribed period. It is worthy to note that initially the period prescribed by the second proviso to section 5-B of the MMC Act for production of caste certificate was three months. The Legislature however was aware that the Scrutiny Committees were flooded with applications for validation of the caste certificates, especially in the aftermath of the elections to the municipalities, and were therefore unable to decide the applications within three months. The Legislature, therefore, by an amendment extended the period for production of caste validity certificate from three months to four months (vide Maharashtra Act No. XV of 2007). The penal consequence provided by the second proviso to section 5-B of the MMC Act is really not meant to operate against genuine and bonafide persons belonging to the backward classes, but is intended to operate against an impostor, a fraudster, a spurious person who, though not belonging to any of the backward classes, contests the elections on a false claim of having social status of backward class. It is in order to see that such impostors and fraudsters do not continue to reap the benefits as councillors and represent the constituency reserved for backward classes that a provision of automatic termination of election has been made. The object of penal provision is not to punish for the delay genuine persons whose caste claims have been accepted by the Scrutiny Committee, but to punish impostors or fraudsters who had wrongly claimed the social status of belonging to backward classes.

11. To illustrate the injustice likely to be caused by holding the period of 4 months as mandatory, the counsel for the petitioners invited our attention to the facts in Writ Petition No. 7142 of 2007, Writ Petition No. 7152 of 2007 and Writ

Petition No. 7164 of 2007, to which we would refer hereafter.

12. In Writ Petition No. 7142 of 2007, the elections to the respondent No. 1 Municipality were held on 7th January 2007 and the results were declared on 8th January 2007. The petitioner, who belongs to Sutar caste and who had obtained caste certificate No. 448 of 1996 dated 24th December 1996 and had applied to the Scrutiny Committee for validation of his caste certificate, filed nomination for the election to the post of councillor along with proof that he had applied to the Caste Scrutiny Committee for validation of his caste certificate and also gave an undertaking as required by the first proviso to section 9-A of the Municipalities Act. As per the said proviso, the petitioner was therefore required to produce the caste validation certificate within four months of 8th January 2007, i.e. on or before 7th May 2007. Though the petitioner attended the hearing before the Caste Scrutiny Committee, for no fault of his the Caste Scrutiny Committee did not decide upon the validity of the petitioner's caste certificate till 23rd July 2007. Immediately on 26th July 2007 the petitioner produced the same before the respondent No. 2. However, the respondent No. 2 by his order dated 17th September 2007 held that the petitioner was disqualified from being a councillor and his election stood terminated retrospectively as he had failed to produce the caste validity certificate within four months of the date of declaration of the results of the election.

13. In Writ Petition No. 7152 of 2007, the elections to the respondent No. 1 Municipality were held on 7th January 2007 and results were declared on 8th January 2007. The petitioner, who belongs to a Hindu Dhangar caste -a backward class, and who had obtained caste certificate No. CBS/1096/P-K-48/MKV-V dated 6th March 1996 as belonging to Hindu Dhangar caste and had applied to the Caste Scrutiny Committee for verification of his caste certificate, filled in the nomination form for election as a councillor to a reserved seat and submitted the caste certificate and proof of having applied for validation of the caste certificate to the Scrutiny Committee. Thereupon his nomination paper was accepted and he was allowed to contest the election and was declared elected on 8th January 2007. The Scrutiny Committee validated the caste certificate of the petitioner, but the order was received by the petitioner only on 21st January 2007. The petitioner immediately produced the same before the respondent No. 2. However, the respondent No. 2 by its order dated 17th September 2007 declared the petitioner to be disqualified as a councillor and also declared his election to terminate retrospectively for failure to produce the caste validity certificate within the statutory period of 4 months of the elections.

14. In Writ Petition No. 7164 of 2007, the elections to the respondent No. 1 Municipality were held on 7th January 2007 and results were declared on 8th January 2007. The petitioner, who belongs to Mali caste, which is other backward class, filled in nomination form by producing the caste certificate and a proof that she had applied to the Scrutiny Committee for validation of the caste certificate. She was elected. Subsequently her caste certificate was validated by the Scrutiny

Committee by its order dated 5th April 2007. However, the same was not informed to the petitioner till 21st July 2007 and consequently she could produce the validity certificate before the respondent No. 2 only on 23rd July 2007. She produced a letter dated 2nd August 2007 written by the Scrutiny Committee to the petitioner informing her that on account of paucity of staff in the office of the Scrutiny Committee, the decision of the Scrutiny Committee was not informed to the petitioner in time, for which the Scrutiny Committee has expressed regret. Despite this, the respondent No. 2 by its order dated 17th September 2007 held that the election of the petitioner stood terminated retrospectively on account of her failure to produce the caste validity certificate within the statutory period of 4 months.

15. The aforesaid three cases clearly show that the respective petitioners who were elected as councillors do belong to backward classes. Each of them did possess caste certificate of belonging to a backward class. Each of them had applied to the Scrutiny Committee for issuance of caste validity certificate and their applications were made well before the date of filling up of the nomination papers. Each of them had produced the proof before the Returning Officer that they had applied for validation of the caste certificate. Each of them subsequently produced the caste validity certificate before the appropriate authority. However, the certificate was not produced within 4 months of the declaration of the election results. The reason for non-production was totally beyond their control. In the first two cases, the Scrutiny Committee itself did not decide upon the validity of the caste certificate within 4 months of the declaration of results of the election. In respect of the third case, the Scrutiny Committee validated the caste certificate within 4 months of the declaration of the results of the election but did not communicate the decision to the petitioner. Thus, the petitioners were not at fault in any of the aforesaid cases.

16. If we hold that period of 4 months for production of caste validity certificate as mandatory, the consequence would result in frustration of constitutional mandate of reservation for backward classes contained in Articles 243D and 243T of the Constitution of India. That is impermissible. We are of the view that the period of 4 months is directory.

17. It is trite to say that when a statute requires anything to be done by a statutory authority or a government officer within a prescribed period and the citizen has no control over the statutory authority or the government officer requiring him to do the thing within the specified time, the provision of a statute or rule requiring the thing to be done within the specified time must be held to be directory. This is because the citizen has no control over the statutory authority or the government officer and he cannot suffer from the negligence of the statutory authority or the government officer in failure to perform the duty within the specified time. This principle was enunciated by the Constitution Bench of the Supreme Court in *Dattatreya Moreshwar Pangarkar Vs. The State of Bombay and Others*, wherein Das J. observed:

In my opinion, this contention of the learned Attorney-General must prevail. It is well settled that generally speaking the provisions of a statute creating public duties are directory and those conferring private rights are imperative. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the practice of the Courts to hold such provisions to be directory only, the neglect of them not affecting the validity of the acts done.

18. Mr. Kumbhakoni, learned Associate Advocate General, submitted that the principle laid down in Dattatraya's case has been diluted in view of the subsequent decision of the Supreme Court in I.T.C. Bhadrachalam Paperboards and Another Vs. Mandal Revenue Officer, A.P. and Others, . The decision of the Supreme Court in I.T.C. is rendered by a two Judge Bench. In para 20, therein the Supreme Court observed:

20. Sri Sorabjee then relied upon the proposition repeatedly affirmed by the Court that "generally speaking the provisions of a statute creating public duties are directory and those conferring private rights are imperative. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of the legislature, it has been the practice of the Courts to hold such provisions to be directory only, the neglect of them not affecting the validity of the acts done" (Dattatreya Moreshwar Pangarkar Vs. The State of Bombay and Others, reiterating the proposition in J.K. Gas Plant Manufacturing Company (Rampur) Limited v. Emperor 1947 F.C.R. 141. There can be little doubt about the proposition but it is difficult to agree that this principle can be employed to dispense with a mandatory requirement.

19. In our view, the decision in I.T.C. Bhadrachalam Paperboards (supra) does not in any way dilute the principle in Dattatraya's case; nay it affirms it. It only states that the principle in Dattatraya's case cannot be applied to dispense with the mandatory requirement of a statute. As the requirement of presentation of the caste validity certificate within a period of 4 months, in our view, is not mandatory, the decision in I.T.C. Bhadrachalam Paperboards cannot be pressed in service.

20. It must also be noted that the decision in case of Dattatraya was rendered by a Constitution Bench while I.T.C. was decided by a Bench of two Judges. The decision in Dattatraya was much binding on the two Judge Bench as it binds us.

21. Aims and object of section 5-B and the provisos thereto is that while persons belonging to backward classes get the benefit of reservation of seats, persons who do not belong to a backward class do not illegally usurp the benefit of

reservation in favour of backward classes. The real intention of the legislature is to ensure that the candidate elected to a reserved seat belongs to a backward class. The period of 4 months for production of caste validity certificate is merely a procedural requirement. It cannot supplant the constitutional mandate and even invalidate the election of a person who belongs to a backward class. We, therefore, hold that the period of 4 months prescribed for production of caste validity certificate by proviso to section 5-B of the MMC Act and the BPMC Act, section 9-A of the Municipalities Act, section 12-A of the Zilla Parishads Act and section 10-A of the Village Panchayats Act is merely directory. However, by holding it to be directory we do not mean to say that the elected candidate can go on seeking adjournments before the Scrutiny Committee at the time of hearing and continue to hold the post of a councillor. An impostor and a fraudster, who does not belong to a backward class, would always try to seek adjournments before the Scrutiny Committee so as to continue to reap the benefits of reservation. In such a case, the appropriate authority would not be powerless to declare his election to be terminated retrospectively on his failure to produce caste validity certificate within a reasonable time (which in no case can be shorter than the statutory period of 4 months). If, however, for no fault of his the Scrutiny Committee is unable to decide on the validity of his caste certificate and actually decides his claim say after about 5-6 months instead of 4 months, the period of 4 months cannot be held to be mandatory. If, however, the Scrutiny Committee invalidates the caste claim of the elected candidate and /or cancels the caste certificate obtained from the competent authority by him, then the election shall stand terminated forthwith on the decision of the Scrutiny Committee.

22. In the light of what is stated above, it would have to be examined to ascertain on the facts of each case whether the election of the petitioner therein is deemed to have been terminated. We, therefore, direct that the petitions may be placed on board before the appropriate Bench as per the roster for consideration of each of the cases.