

(2019) 01 BOM CK 0082
In the Bombay High Court
Case No : Writ Petition No. 4792 Of 2018

Gazala Yasmeen

APPELLANT

Vs

State Of Maharashtra And Ors

RESPONDENT

Date of Decision : 22-01-2019

Acts Referred:

Maharashtra Municipal Councils, Nagar Panchayats And Industrial Townships Act, 1965 — Section 9(1)(b), 21, 55A, 55B, 51A(1), 51A(1A), 51A(1A)(1), 55, 55A, 55(1)(1), 55(1)(2), 55(1)(3), 55(1), 55(1A), 308
Indian Penal Code, 1860 — Section 143, 294, 307, 323, 354A, 506
Maharashtra Municipal Councils And Nagar Panchayats (Qualifications and Procedure for Appointment Of Nominated Councilors) Rules, 2010 — Rule 4(a), 4(b), 4(c), 4(d), 4(e), 4(f) 4(g), 5

Citation : (2019) 3 BCR 52

Hon'ble Judges : Z.A. Haq, J

Bench : Single Bench

Advocate : R.L. Khapre, V.P. Maldhure, Sunil V. Manohar, J.B. Gandhi, S.A. Sahu, M.I. Dhatrak, S. Zia Qazi

Final Decision : Disposed Off

Judgement

1. Heard.
2. Rule. Rule made returnable forthwith.
3. The relevant undisputed facts are :

The general elections of the Municipal Council, Mangrulpir were held in November 2016. As per Section 51A-1A(1) of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 (for short "Maharashtra Act No.XL of 1965"). The petitioner is elected as the President of the Municipal Council directly by the voters. The petitioner is declared elected as the President of the Municipal Council on 31st December, 2016. The petitioner, in her capacity as the President of the Municipal Council had issued notice convening the meeting of the Councilors on 8th January, 2017 for holding the election of the Vice-President

and for nomination of two Councilors as per Section 9(1)(b) of the Maharashtra Act No.XL of 1965. As per Section 9(1)(b) of the Maharashtra Act No.XL of 1965, two Councilors were to be nominated for the respondent No.4 - Council. As per Rule 5 of the Maharashtra Municipal Councils and Nagar Panchayats (Qualifications and Procedure for Appointment of Nominated Councilors) Rules, 2010 (for short "Rules of 2010"), considering the relevant strength of the recognized parties, registered parties and groups, one Councilor was to be nominated from Bhartiya Janta Party and one Councilor was to be nominated from Rashtrawadi Congress Party. By communication dated 7th January 2017, the Designated Officer - Deputy Collector informed the petitioner, names of two persons who were proposed by the Bhartiya Janta Party and who were found to be eligible for nomination as the Councilors. By the communication dated 7th January 2017, the Designated Officer - Deputy Collector informed the petitioner, name of one person proposed by the Rashtrawadi Congress Party and found to be eligible to be nominated as Councilor. By communication dated 7th January 2017, the Designated Officer - Deputy Collector informed the petitioner that the person whose name was proposed by Bharip Bahujan Mahasangh for nomination was eligible to be nominated as Councilor, however, Bharip Bahujan Mahasangh was not having the relevant strength and, therefore, any person proposed by Bharip Bahujan Mahasangh cannot be nominated as Councilor of the Municipal Council. The meeting was held on 8th January 2017 and in the meeting, the petitioner nominated Shri Purushottam Lalchand Chitlange and Shri Maruf Khan Afzal Khan as the Councilors. Shri Maruf Khan is husband of petitioner and belongs to Bharip Bahujan Mahasangh.

4. The respondent No.3 - Ashok Mahadeorao Parlikar whose name was proposed by the Rashtrawadi Congress Party for nomination as Councilor filed an application under Section 308 of the Maharashtra Act No.XL of 1965 before the Collector challenging the nomination of Maruf Khan. The learned Collector dismissed this application by order dated 19th January, 2017 observing that the application was not maintainable and the nomination of Maruf Khan may be challenged in an election petition under Section 21 of the Maharashtra Act No.XL of 1965. The respondent No.3 - Ashok Mahadeorao Parlikar has filed petition under Section 21 of the Maharashtra Act No.XL of 1965 before the District Court which is pending. Simultaneously, the respondent No.3 - Ashok Mahadeorao Parlikar made complaint to the respondent No.2 - Hon'ble Minister on 14th July, 2017 under Section 55-A and Section 55-B of the Maharashtra Act No.XL of 1965 complaining that the petitioner is liable to be removed from the office of President of the Municipal Council as she has committed misconduct and her act of nominating her husband as the Councilor amounts to disgraceful conduct. The complaint is allowed by the Hon'ble Minister by the the impugned order. The Hon'ble Minister has held that the act of the petitioner nominating her husband as the Councilor amounts to disgraceful conduct, and has directed her removal from the office of President of the Municipal Council.

5. According to the respondent Nos.1 to 3, the petitioner has acted illegally and

has misconducted herself by nominating Maruf Khan (husband of the petitioner) as the Councilor though he belongs to Bharip Bahujan Mahasangh which does not have relevant strength, and the Designated Officer - Deputy Collector had also informed the petitioner that any person proposed by Bharip Bahujan Mahasangh cannot be nominated as it was not having relevant strength in the Council.

6. The petitioner contends that the three persons whose names were proposed by the Bhartiya Janta Party and Rashtrawadi Congress Party belonged to the same category, that is as per Rule 4(g) of the Rules of 2010, and as per the 2nd proviso below Rule 5 of the Rules of 2010, the petitioner was required to make every endeavour to ensure that one Councilor each, possessing qualifications referred to in Clauses (a) to (g) of Rule 4 of the Rules of 2010 is nominated. It is submitted that the first proviso to Rule 5 of the Rules of 2010 enables the President of the Municipal Council to nominate any member not belonging to any recognized party and / or registered party or group having relevant strength. It is submitted that the petitioner has followed the mandate of the 2nd proviso below Rule 5 of the Rules of 2010 and as the Designated Officer - Deputy Collector had informed the petitioner by the communication dated 7th January 2017 that Shri Maruf Khan is eligible to be nominated as Councilor and as Maruf Khan belongs to different category, having qualifications as per Rule 4(e) of the Rules of 2010, the petitioner exercised the powers conferred by the 1st proviso below Rule 5 of the Rules of 2010 and nominated Shri Maruf Khan as the Councilor. It is submitted that Shri Maruf Khan is an Advocate practicing for more than 19 years and is handling the legal matters of respondent No.4 - Municipal Council as its panel Advocate for considerable time, and as the recognized parties which have relevant strength in the Municipal Council had not suggested any other name from a different category than the category as per Rule 4(g) of the Rules of 2010, the petitioner nominated Maruf Khan. The petitioner justifies her action and contends that nomination of Shri Maruf Khan cannot be said to be illegal and the Hon'ble Minister has committed an error by recording that the act of the petitioner amounts to misconduct and disgraceful conduct and because of it, the petitioner is liable to be removed from the office of President of the Municipal Council.

It is submitted on behalf of the petitioner that the impugned order is bad in law as it is passed by the Hon'ble Minister without following the principles of natural justice and without affording an opportunity of hearing to the petitioner.

7. According to the respondent Nos.1 to 3, the parties before the Hon'ble Minister, including the petitioner, had submitted their written notes of arguments in September, 2017 and the date for hearing was fixed that time itself as 9th May 2018, and the petitioner failed to avail the opportunity of hearing and remained absent on 9th May 2018 and, therefore, in these facts, it cannot be said that there is violation of the principles of natural justice.

The petitioner has submitted that the date of hearing was fixed as 9th May 2018, in September 2017, however, subsequently the marriage ceremony of her close

relative was scheduled on 8th May 2018 and, therefore, she had requested for adjournment by communication dated 8th May, 2018.

8. Before this Court an affidavit is filed by the respondent No.6 pointing out that two first information reports are registered against Maruf Khan, one for offence under Sections 354-A, 294 and 506 of the Indian Penal Code and the other for offence under Sections 143, 307 and 323 of the Indian Penal Code and this is suppressed by Maruf Khan and the petitioner.

The petitioner contends that she was not aware about the registration of the first information reports against Maruf Khan. It is submitted that in any case, the accusations made against Shri Maruf Khan in the complaints filed with the police station are not of such nature that Shri Maruf Khan cannot be nominated as Councilor of the Municipal Council. It is further submitted that the registration of the first information reports against Shri Maruf Khan is not the consideration for removal of the petitioner from the post of the President of the Municipal Council.

9. After hearing the learned Advocates for the parties and examining the relevant provisions, I find that the following points arise for consideration in this petition:

(i) Whether the petitioner, who is elected as President of the Municipal Council directly by the voters, as per Section 51A-1 of the Maharashtra Act No.XL of 1965 can be removed from her office by the State Government under Section 55-A on the ground that while nominating the Councillors, she has nominated her husband and that too when person nominated by the party to which he belongs did not have relative strength in the Council ?

(ii) Whether the State Government can remove the President elected directly as per Section 51A-1A of the Maharashtra Act No.XL of 1965 without there being a requisition for removal of the President, signed by not less than one half of the total number of Councilors and without there being an enquiry by the Collector and findings recorded by the Collector on the enquiry regarding charges of misconduct against the President?

10. The Hon'ble Minister has removed the petitioner on the ground that her act of nominating her husband Maruf Khan as the Councilor amounts to "misconduct" and "disgraceful conduct" as contemplated by Section 55-A of the Act No.XL of 1965.

"Misconduct" has not been defined in the Act. Ordinarily, the expression "misconduct" means wrong or improper conduct, unlawful behaviour, misfeasance, wrong conduct, mis-demeanor, etc. As there are different meanings of the expression "misconduct", the same has to be construed with reference to the subject and the context wherein it occurs. Regard has to be paid to the aims and objects of the Statute. The provision for direct election of President of the Municipal Council is made to ensure better administration of Municipalities. The Municipality is a democratic institution of self-governance consisting of local people, for the local people and by the local people. (refer to the judgment given

in the case of Shambhu Murari Sinha V/s. Project & Development India Ltd. and another reported in 2002(3) SCC 667.)

As recorded earlier the Designated Officer - Deputy Collector had informed the petitioner the names of the persons who were found to be eligible to be nominated as Councilor and the Designated Officer informed the petitioner that Maruf Khan was eligible to be nominated as Councilor, however, he was not entitled to be nominated as he belongs to Bharip Bahujan Mahasangh which does not have the relevant strength to enable his nomination. According to the petitioner, she acted in consonance with the two proviso below Rule 5 of the Rules of 2010 and nominated Maruf Khan. In these facts, the action of the petitioner may at the most be said to be an error while exercising her powers but it cannot be said to be "misconduct" or "disgraceful conduct". While dealing with somewhat similar situation in the case of Ravi Yashwant Bhoir V/s. District Collector, Raigad and others reported in (2012) 4 SCC 407, the Hon'ble Supreme Court has laid down in paragraph Nos.11 to 19 as follows:

"11. "Misconduct" has been defined in Black's Law Dictionary, 6th Edn. as:

"A transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behavior, wilful in character, improper or wrong behavior, its synonyms are misdemeanor, misdeed, misbehavior, delinquency, impropriety, mismanagement offence, but not negligence or carelessness." "Misconduct in office" has been defined as:

"Any unlawful behavior by a public officer in relation to the duties of his office, wilful in character. Term embraces acts which the office - holder had no right to perform, acts performed improperly, and failure to act in the face of an affirmative duty to act."

12. P. Ramanatha Aiyar's Law Lexicon, Reprint Edn. 1987 at p.821 defines "misconduct" thus:

"The term 'misconduct' implies a wrongful intention, and not a mere error of judgment. Misconduct is not necessarily the same thing as conduct involving moral turpitude. The word 'misconduct' is a relative term, and has to be construed with reference to the subject-matter and the context wherein the term occurs, having regard to the scope of the Act or statute which is being construed. Misconduct literally means wrong conduct or improper conduct. In usual parlance, misconduct means a transgression of some established and definite rule of action, where no discretion is left, except what necessity may demand and carelessness, negligence and unskilfulness are transgressions of some established, but indefinite, rule of action, where some discretion is necessarily left to the actor. Misconduct is a violation of definite law; carelessness or abuse of discretion under an indefinite law. Misconduct is a forbidden act; carelessness, a forbidden quality of an act, and is necessarily indefinite. Misconduct in office may be defined as unlawful behaviour or neglect by a public officer, by which the rights of a party have been affected."

Thus it could be seen that the word 'misconduct' though not capable of precise definition, on reflection receives its connotation from the context, the delinquency in its performance and its effect on the discipline and the nature of the duty. It may involve moral turpitude, it must be improper or wrong behaviour; unlawful behaviour, wilful in character; forbidden act, a transgression of established and definite rule of action or code of conduct but not mere error of judgment, carelessness or negligence in performance of the duty; the act complained of bears forbidden quality or character. Its ambit has to be construed with reference to the subject-matter and the context wherein the term occurs, regard being had to the scope of the statute and the public purpose it seeks to serve....". (emphasis supplied)

(See also *State of Punjab v. Ram Singh* (1992) 4 SCC 54 : 1992 SCC (L&S) 793 : (1992) 21 ATC 435 : AIR 1992 SC 2188.).

13. Mere error of judgment resulting in doing of negligent act does not amount to misconduct. However, in exceptional circumstances, not working diligently may be a misconduct. An action which is detrimental to the prestige of the institution may also amount to misconduct. Acting beyond authority may be a misconduct. When the office-bearer is expected to act with absolute integrity and honesty in handling the work, any misappropriation, even temporary, of the funds, etc. constitutes a serious misconduct, inviting severe punishment. (Vide *Disciplinary Authority-cum-Regl. Manager v. Nikunja Bihari Patnaik* (1996) 9 SCC 69 : 1996 SCC (L&S) 1194, *Govt. of T.N. v. K.N. Ramamurthy* (1997) 7 SCC 101 : 1997 SCC (L&S) 1749 : AIR 1997 SC 3571, *Inspector Prem Chand v. Govt. of NCT of Delhi* (2007) 4 SCC 566 : (2007) SCC (L&S) 58 and *SBI v. S.N. Goyal* (2008) 8 SCC 92 : (2008) 2 SCC (L&S) 678 : AIR 2008 SC 2594).

14. In *Govt. of A.P. v. P. Posetty* (2000) 2 SCC 220 : 2000 SCC (L&S) 254, this Court held that since acting in derogation to the prestige of the institution / body and placing his present position in any kind of embarrassment may amount to misconduct, for the reason, that such conduct may ultimately lead that the delinquent had behaved in a manner which is unbecoming of an incumbent of the post.

15. In *M.M. Malhotra v. Union of India* (2005) 8 SCC 351 : 2005 SCC (L&S) 1139 : AIR 2006 SC 80, this Court explained as under: (SCC p.362, para 17)

"17.....It has, therefore, to be noted that the word 'misconduct' is not capable of precise definition. But at the same time though incapable of precise definition, the word 'misconduct' on reflection receives its connotation from the context, the delinquency in performance and its effect on the discipline and the nature of the duty. The act complained of must bear a forbidden quality or character and its ambit has to be construed with reference to the subject-matter and the context wherein the term occurs, having regard to the scope of the statute and the public

purpose it seeks to serve."

A similar view has been reiterated in *Baldev Singh Gandhi v. State of Punjab* (2002) 3 SCC 667 : AIR 2002 SC 1124.

16. Conclusions about the absence or lack of personal qualities in the incumbent do not amount to misconduct holding the person concerned liable for punishment.

(See *Union of India v. J. Ahmed* (1979) 2 SCC 286 : 1979 SCC (L&S) 157 : AIR 1979 SC 1022.)

17. It is also a settled legal proposition that misconduct must necessarily be measured in terms of the nature of the misconduct and the court must examine as to whether misconduct has been detrimental to the public interest. (Vide *Bank of India v. Mohd. Nizamuddin* (2006) 7 SCC 410 : 2006 SCC (L&S) 1663 : AIR 2006 SC 3290.)

18. The expression "misconduct" has to be understood as a transgression of some established and definite rule of action, a forbidden act, unlawful behaviour, wilful in character. It may be synonymous as misdemeanour in propriety and mismanagement. In a particular case, negligence or carelessness may also be a misconduct for example, when a watchman leaves his duty and goes to watch cinema, though there may be no theft or loss to the institution but leaving the place of duty itself amounts to misconduct. It may be more serious in case of disciplinary forces.

19. Further, the expression "misconduct" has to be construed and understood in reference to the subject matter and context wherein the term occurs taking into consideration the scope and object of the statute which is being construed. Misconduct is to be measured in the terms of the nature of misconduct and it should be viewed with the consequences of misconduct as to whether it has been detrimental to the public interest."

11. Similarly, "disgraceful conduct" is also not defined and for considering the term, same principles will have to be applied.

12. In the facts of the present case, if the act of the petitioner is examined keeping in view the above principles, it cannot be said that the petitioner has committed any misconduct or has conducted her duty disgracefully because of which she has lost the right to continue in the office and is liable to be removed.

13. There is another aspect which is required to be examined i.e. the point No.2 framed by me. Though none of the parties have made any submission on this aspect, while dictating the judgment I noticed the relevant provisions and it being consideration of law, I thought it fit to deal with the point.

14. The provisions which deal with the removal of President elected directly by the voters as per Section 51A-1A are Section 55-1 and Section 55-A of the Maharashtra Act No.XL of 1965. To examine the scheme of Section 55-A of the Maharashtra Act No.XL of 1965, the provisions of Section 55(1) are also relevant.

Section 55-A of the Maharashtra Act No.XL of 1965 provides for removal of President and Vice-President by the State Government on the ground of "misconduct" in the discharge of duties or for neglect or incapacity to perform duties or for being guilty of any "disgraceful conduct". It lays down that the State Government can exercise the powers under Section 55-A without prejudice to the provisions of Section 55-1A and Section 55 of the Maharashtra Act No.XL of 1965.

Section 55(1) which is amended by Maharashtra Act No.8 of 2002 lays down that a President shall cease to be the President, if the Councilors pass a resolution at a special meeting by majority of not less than three fourth of the total number of Councilors, against the President. The first proviso below Sub-section (1) of Section 55 of the Maharashtra Act No.XL of 1965, which is substituted by Maharashtra Act No.25 of 2018 w.e.f. 25th January 2018, specifically lays down that the provisions of Section 55-1 apply for the removal of the President directly elected under Section 51A-1A. Section 55-1 which is substituted by Maharashtra Act No.25 of 2018 w.e.f. 25th January, 2018 provides for the mechanism for removal of President directly elected under Section 51A-1A of the Maharashtra Act No.XL of 1965. It lays down that the requisition for removal of the President directly elected under Section 51A-1A of the Maharashtra Act No.XL of 1965 shall be signed by not less than one half of the number of Councilors and shall contain the charges of "misconduct" against such President and shall be sent to the Collector. The proviso below Sub-section (1) of Section 55-1 of the Maharashtra Act No.XL of 1965 lays down that no such requisition shall be sent within a period of two and half years from the date of election of such President. Section 55-1(2) lays down that upon receipt of the requisition, the Collector shall conduct enquiry of such charges and complete the enquiry within one month from the date of receipt of the requisition. The proviso below Sub-section(2) of Section 55-1 of the Maharashtra Act No.XL of 1965 lays down that the period of enquiry can be extended with the assent of the State Government but it cannot be extended beyond three months.

Section 55-1(3) of the Maharashtra Act No.XL of 1965 lays down that the Collector shall submit the findings of the enquiry to the State Government for taking appropriate action under Section 55-A.

The 2nd proviso below Section 55-A of the Maharashtra Act No.XL of 1965 provides that the government shall take decision on the report submitted by the Collector under Section 55-1 within six months from the date of receipt of the report.

15. The harmonious construction of Section 55-1 and Section 55-A including the proviso below Section 55-A of the Maharashtra Act No.XL of 1965 would lead to the conclusion that the President directly elected under Section 51A-1A of the Maharashtra Act No.XL of 1965 cannot be removed by the State Government under Section 55-A unless the motion is initiated by requisition signed by not less than one half of the total number of Councilors and routed through Collector and after the Collector conducts an enquiry as per Section 55-1(2) and submits

the findings / report of the enquiry to the State Government as per Section 55-1(3) of the Maharashtra Act No.XL of 1965. The provisions are required to be read harmoniously and interpreted in such manner, as the intention of Legislature appears to be that the President who is elected directly as per Section 51A-1A of the Maharashtra Act No.XL of 1965 should not be removed from the office by the State Government on its own and looking to the democratic principles, the requirement of requisition for removal of directly elected President by not less than one half of the total number of Councilors and then an enquiry by the Collector that too time bound and then findings of the enquiry by the Collector is necessitated. The 2nd proviso below Section 55-A of the Maharashtra Act No.XL of 1965 mandates that the State Government has to take decision on the report submitted by the Collector under Section 55-1 of the Maharashtra Act No.XL of 1965 and that too within six months from the date of receipt of the report. The provisions of Section 55-A does not give absolute power to the State Government to remove a President directly elected under Section 51A-1A of the Maharashtra Act No.XL of 1965.

16. In addition to the finding recorded earlier that conclusions of the Hon'ble Minister on the point of "misconduct" and "disgraceful conduct" are unsustainable, for the additional reasons recorded above, in my view, the Hon'ble Minister has committed patent error of jurisdiction and has exercised powers which are not vested with him. The Hon'ble Minister could not have directed removal of the petitioner from the post of President to which she is directly elected by the voters, without there being a requisition as per Section 55-1(1) and enquiry by the Collector as per Section 55-1(2) and findings of the enquiry as per Section 55-1(3) of the Maharashtra Act No.XL of 1965.

17. In view of the above, it has to be held that the impugned order is unsustainable in law and the removal of the petitioner from the office / post of the President of the Municipal Council is unjustified.

Hence, the following order:

(i) The impugned order is set aside.

(ii) The complaint made by the respondent No.3 before the Hon'ble Minister is dismissed.

(iii) It is held that the removal of the petitioner from the office / post of the President of respondent No.4 - Municipal Council is illegal. It is held that the petitioner is entitled to continue in the office / post of the President of Municipal Council until her term is complete or she is removed by following prescribed procedure as per law.

(iv) Rule is made absolute in the above terms.

(v) In the circumstances, the parties to bear their own costs.