
(2012) 05 BOM CK 0059

In the Bombay High Court

Case No : Writ Petition No. 5073 and 9047 of 2011

Jeevan Patil

APPELLANT

Vs

The Mayor, Nanded-Waghala Municipal Corporation, Nanded
District Nanded and Others
 Mohd. Muqheet Mohd. Sab
Vs Nanded-Waghala Municipal Corporation, Nanded

RESPONDENT

Date of Decision : 11-05-2012

Acts Referred:

Bombay Provincial Municipal Corporations Act, 1949 — Section 19(1AA), 30, 31, 31(2A), 31A
Maharashtra Local Authority Members Disqualification Act, 1986 — Section 19(1AA)

Citation : (2012) 4 BomCR 4 : (2012) 114 BOMLR 1728

Hon'ble Judges : Sunil P. Deshmukh, J;A.S. Oka, J

Bench : Division Bench

Advocate : P.V. Mandlik, holding for Mr. Amol Gandhi in Writ Petition No. 5073 of 2011 and Mr. M.M. Nerlikar in Writ Petition No. 9047 of 2011, for the Appellant; Murar V. Deshpande, Advocate for respondent Nos. 1 and 3, Mr. B.L. Sagar Killarikar, Advocate for respondent No. 2 and Mr. N.B. Patil, AGP for respondent Nos. 4 and 5 in Writ Petition No. 5073 of 2011 and Mr. Murar V. Deshpande, Advocate for respondents 1 and 5 and Mr. G.R. Syed, Advocate for respondent Nos. 3 and 4 in Writ Petition No. 9047 of 2011, for the Respondent

Judgement

OKA, J.—These two Petitions can be conveniently disposed of by a common judgment and order. In Writ Petition No. 5073 of 2011, this Court passed an order on 14th September 2011 directing that the Petition shall be heard finally at the stage of admission. The issue involved in Writ Petition No. 5073 of 2011 is as regards the appointment of the leader of the opposition in the Municipal Corporation of City of Nanded-Waghala. (hereinafter referred to as "the said Corporation")

FACTS IN WRIT PETITION No. 5073 OF 2011

It will be necessary to make reference to the facts of the case in brief. In Writ Petition No. 5073 of 2011, the challenge is to the order dated 7th July 2011

passed by the Mayor of the said Corporation, by which the Mayor purportedly granted approval to the appointment of Respondent No. 2 in the said Petition, Shri Mahesh @ Balu Khomane as the leader of the opposition in the said Corporation.

2. The result of the general ward elections of the said Corporation was declared in October 2007, in which 73 Councilors were elected. Out of 73, 36 were of the Indian National Congress, 10 were of Nationalist Congress Party and 9 were of Shiv Sena Party. On 31st October 2010, one by-election was held. On the same day elections were held for 6 newly formed wards in the area newly added to the Corporation limits. In the said election, 4 Councillors belonging to the Indian National Congress, 2 Councillors belonging to Shiv Sena Party and one independent were elected. As of today, the party wise strength of the major parties in the said Corporation is as follows:

i)

Indian National Congress

:

40

ii)

Shivsena

:

11

iii)

Bhartiya Janata Party

:

03

iv)

Nationalist Congress Party

:

10

v)

Lok Bharati

:

04

3. According to the case of the Petitioner Jeevan Abajirao Ghogre Patil, on 8th November 2007, 10 Councillors of Nationalist Congress Party, 4 Councillors of Lokbharati party and 1 independent Councillor came together and they formed an aghadi or front which was known as "Rashtrawadi Lokbharati Nanded Vikas Aghadi". According to the case of the Petitioner, the said aghadi was registered with the Divisional Commissioner, Aurangabad and by a communication dated 15th November 2007, the Divisional Commissioner permitted the aghadi (front) to be formed in accordance with the provisions of Section 31A of the Bombay Provincial Municipal Corporation Act, 1949 (hereinafter referred to as "the said Act of 1949"). The Petitioner claims to be the leader of the said aghadi. It appears that the members of the said aghadi submitted a letter to the Mayor of the said Corporation on 4th November 2009 by which they informed the Mayor that the Petitioner Jeevan Abajirao Ghogre Patil should be appointed as the leader of the opposition. On the basis of the said letter, by communication dated 11th November 2009, the Mayor of the said Corporation recognized said Jeevan Abajirao Ghogre Patil as the leader of the opposition.

4. As pointed out earlier, in the year 2010, one by-election and fresh elections in respect of 6 new wards was held. It appears that in the said election, Indian National Congress Party got 4 seats and Shiv Sena political party got 2 seats and on one seat, independent candidate was elected. Thus, Shiv Sena became the second largest party after Indian National Congress. Its total Councillors increased to 11 and the Nationalist Congress Party continued to have 10 Councillors. It appears that the 2nd respondent Mahesh Khomane, who belongs to Shiv Sena party, made an application to the Mayor on 16th December 2010 requesting that he may be recognized as the leader of the opposition. It was pointed out that after the election in the year 2010, the total strength of the Councillors of Shiv Sena party increased to 11 and strength of Nationalist Congress Party continued to be 10. The 2nd respondent contended that as compared to the other parties, Shiv Sena political party was having highest number of Councillors next to the ruling Indian National Congress Party and therefore, the 2nd respondent Mahesh Khomane should be recognized as the leader of the opposition. By the impugned communication dated 7th July 2011, the Mayor recognized the 2nd Respondent as the leader of the opposition. This communication has been impugned in the Writ Petition No. 5073 of 2011.

FACTS IN WRIT PETITION No. 9047 OF 2011

5. Now turning to the facts of the Writ Petition No. 9047 of 2011, it appears that the challenge therein is to the communication dated 18th November 2011, by which the Petitioner in Writ Petition No. 5073 of 2011 in his capacity as the leader of the aghadi of Nationalist Congress Party, Lokbharati and one independent Councillor informed the Mayor that two Councillors viz. i) Arshad Hussain Irshad Hussain and ii) Sau. Jayashree Satyandra Jindam, who were the members of the aghadi should be appointed as members of the Standing Committee. In the said letter, the said Jeevan Abajirao Ghogre Patil stated that

he has been elected as the leader of the said aghadi and accordingly, he was recognized as the leader of the opposition. It is stated that the subsequent order passed by the Mayor challenging the recognition granted to the leader of the Shiv Sena party as the leader of the opposition has been subjected to challenge in this Court by filing a Writ Petition. It was contended that the Mayor should not entertain any communication made on behalf of the said aghadi.

6. On 19th November 2011, the aforesaid two Councillors nominated under the communication dated 18th November 2011, were nominated as the members of the Standing Committee. In this Petition also there is also a reference to the sanction granted by the Commissioner u/s 31A of the said Act of 1949 to the said aghadi. It was contended in the Petition that the 2nd respondent in the said Petition i.e. Jeevan Abajirao Ghogre Patil was neither the group of leader of aghadi nor group of leader of the Nationalist Congress Party. It must be noted here that the Petitioner in the Writ Petition is a member of Lokbharati party. The contention in the Petition is that Mayor and the Municipal Corporation ought not to have accepted the said communication dated 18th November 2011 as the said Jeevan Abajirao Ghogre Patil had no authority to issue the said requisition. It is, therefore, submitted that the resolution passed on 19th November 2011 nominating the said two persons, as members of the Standing Committee, is illegal. A relief is prayed for seeking a direction to appoint the Petitioner as the member of the Standing Committee of the said Corporation. It must be noted here that in this Petition, initially a limited ad-interim relief was granted by directing that the election to the post of Chairman of the Standing Committee shall be subject to further order in the Writ Petition. By further order dated 12th March 2012, ad-interim relief was granted restraining the 3rd and 4th respondents (Arshad Hussain Irshad Hussain and Sau. Jayashree Satyandra Jindam) from acting as members of the Standing Committee.

SUBMISSIONS IN WRIT PETITION No. 5073 OF 2011

7. The learned senior counsel appearing for the Petitioner in Writ Petition No. 5073 of 2011 invited our attention to Section 19-1AA of the said Act of 1949. He submitted that the said Act does not define the "party in opposition". He invited our attention to Section 31-A of the said Act of 1949. He submitted that the said provision recognizes the aghadi or front formed after the election. He submitted that in the facts of the present case, such aghadi by the name "Rashtrawadi Lokbharati Nanded Vikas aghadi" was registered by the Divisional Commissioner in accordance with Section 31-A of the said Act of 1949. He submitted that the said recognized aghadi has 15 members and after the election of October, 2010, the strength of Shiv Sena political party has only increased to 11. He submitted that Section 31-A of the said Act of 1949 legalizes the formation of post poll aghadi or front. He submitted that when Section 19-1AA uses the phraseology "the leader of the party in opposition", the leader of the opposition has to be the leader of the party in the opposition having highest numerical strength. He submitted that in view of Section 31-A, the party in opposition will include even

such aghadi or front formed u/s 31-A of the said Act of 1949, which is registered by the Divisional Commissioner. He submitted that the basic object of Section 19-1AA is to ensure that the leader of largest political party or aghadi which is not the party in power should be the leader of the opposition. He submitted that the Petitioner is a member of recognized aghadi, which is the party in opposition having the strength of Councilors which no other party possesses except the ruling party. He, therefore, submitted that the reference to the party in opposition in Section 19-1AA will have to be read as the largest party or the aghadi next to the ruling party. He submitted that the action of the Mayor of appointing the 2nd respondent as the leader of opposition is complete erroneous.

8. The learned senior counsel appearing for the Petitioner has relied upon the decision of the Division Bench of this Court in the case of Ulhas Vasantrao Bagul @ Aba Bagul vs. Pune Municipal Corporation and others (2009 (2) Bom. C. R. 841). He submitted that though the Division Bench has observed that for the purpose of Section 19-1AA, the aghadi and/or front registered under the provisions of The Maharashtra Local Authority Members' Disqualification Act, 1986 (hereinafter referred to as "the said Act of 1986") alone can be considered, the ultimate conclusion supports him. The learned counsel appearing for the 1st respondent Mayor pointed out that Section 31-A applies in a total different field. He submitted that as held by the Division Bench in the aforesaid case what can be considered is the alliance or front which is duly registered under the said Act of 1986 and the Rules framed there under. He submitted that the aghadi relied upon by the Petitioner is only for the purpose of Section 31-A of the said Act of 1949. He, therefore, submitted that the 1st respondent Mayor was justified in recognizing the leader of the Shiv Sena political party which is the largest opposition party in the Corporation as the leader of the opposition. He therefore, defended the action of the Mayor. The learned counsel appearing of the 2nd respondent opposed the Petition by pointing out that he being the leader nominated by the largest political party in opposition has been approved as the leader of the opposition.

SUBMISSIONS IN WRIT PETITION No. 9047 OF 2011

9. The learned counsel appearing for the Petitioner in Writ Petition No. 9047 of 2011 contended that the Petitioner is also a member of the aghadi which is duly registered u/s 31-A of the said Act of 1949. The learned counsel submitted that the 3rd respondent in the said Petition viz. Shri Jeevan Ghogre Patil is also a member of the same aghadi, but he is not the leader of the aghadi and therefore, he had no authority to make such nomination. He submitted that on the basis of the said unauthorized nomination, the Municipal Corporation has acted upon and Councillors suggested in the said communication have been appointed as the members of the standing committee. He, therefore, submitted that the interference is called for as regards election of said two seats.

CONSIDERATION OF SUBMISSIONS AND FINDINGS IN IN WRIT PETITION No. 5073 OF 2011

10. We have given careful consideration to the submissions. It will be necessary to advert to Section 19-1AA of the said Act of 1949, which reads thus:

19-1AA. Leader of Opposition.

(1) An elected Councilor who is, for the time being, the Leader of the Party in opposition, having greatest numerical strength and recognized as such by the mayor, shall be the Leader of the Opposition.

Explanation, -Where there are two or more parties in the opposition, having the same numerical strength, the Mayor shall, having regard to the status of the party, recognize the Leader of any one of such parties as a Leader of the Opposition for the purpose of this Act and such recognition shall be final and conclusive.

A reference will have to be also made to Section 31-A of the said Act of 1949.

31A. Appointment by nomination committees to be by proportional representation.

(1) Not with standing anything contained in this Act or the rules or bye-laws made thereunder, in the case of the following committees, except where it is provided by this Act, that the appointment of a Councilor to any Committee shall be by virtue of his holding any office, appointment of Councilors to these Committees, whether in regular or casual vacancies, shall be made by the Corporation by nominating Councilors in accordance with the provisions of sub-section (2);

(a) Standing Committee

(b) Transport Committee

(c) Any special Committee appointed u/s 30

(d) Any ad hoc Committee appointed u/s 31

(2) In nominating the Councilors on the Committee, the Corporation shall take into account the relative strength of the recognized parties or registered parties or groups and nominate members, as nearly as may be, in proportion to the strength of such parties or groups in the Corporation, after consulting the Leader of the House, the Leader of Opposition and the leader of each such party or group:

Provided that, nothing contained in this sub-section be construed as preventing the Corporation from nominating on the Committee any member not belonging to any such party or group:

Provided further that, for the purpose of deciding the relative strength of the recognized parties or registered parties or groups under this Act, the recognized

parties or registered parties or groups, or elected Councilors not belonging to any such party or group may, notwithstanding anything contained in the Maharashtra Local Authority Members' Disqualification Act, 1986, within a period of one month from the date of notification of election results, form the aghadi or front and, on its registration, the provisions of the said Act shall apply to the members of such aghadi or front, as if it is a registered pre-poll aghadi or front.

(3) If any question arises as regards the number of Councilors to be nominated on behalf of such party or groups the decision of the corporation shall be final.

11. As pointed out earlier, the party having highest number of Councillors in the Municipal Corporation is Indian National Congress having 40 Councillors. Thereafter the next largest party is Shiv Sena which is having 11 Councilors. The Nationalist Congress party (for short "NCP") comes third having the strength of 10.

12. The core issue to be decided is what is meaning of a party in opposition and whether such a party will include the aghadi or front registered u/s 31-A of the said Act of 1949. On this aspect, it must be noted that under the said Act of 1949, the words the "party" or "the party in opposition" are not defined by the said Act of 1949.

13. Perusal of Section 31-A shows that the same is applicable only the appointment of the Councillors to Standing Committee, Transport Committee, Special Committees and Adhoc Committees by nomination. Sub-Section (2) provides that while nominating the Councillors on the Committees, the relative strength of the recognized parties or registered parties or groups and nominate members, as the case may be, is required to be taken into consideration. Second proviso to Sub-Section (2) is relevant which provides that notwithstanding anything contained in the said Act of 1986, for the purposes of deciding relative strength of the recognized parties or registered parties or groups, the recognized parties or registered parties or groups or elected Councillors not belonging to any such parties or group, may within a period of one month from the date of notification of election results, form aghadi or front. It is further provided that on registration of such aghadi or front, the provisions of said Act of 1949 shall apply to the members of such aghadi or front as if it is a registered pre-poll aghadi or front. Thus, a legal fiction is created in case of aghadi or front formed within a period of one month from the date of notification of election results providing that such aghadi or front will be treated as pre-poll aghadi or front provided the same is registered.

14. It must be noted here that Sub-Section (2) of Section 31A refers to recognized parties, registered parties, groups, aghadi or front. Whereas Section 19-1AA makes no reference to groups or aghadi or front. Section 19-1AA makes reference only to "party in opposition". Even the explanation refers to two or more parties in opposition. Section 31-A was brought on the statute book after Section 19-1AA was brought and the Legislature has not chosen to incorporate a

proviso like the second proviso which is incorporated in Section 31-A in Section 19-1AA of the said Act of 1949. As stated earlier, Section 31-A deals with only the appointments of the Councillors by nomination to the committees which is to be made by proportional representation. Thus, the legal fiction created by the second proviso appears to be only for the purposes of nomination of Councillors to the Committees.

15. On this aspect, we must make a reference to the decision of the Division Bench of this Court in the case of Ulhas Vasanatrao Bagul @ Aba Bagul (supra). Section 19-1AA was considered by this Court. In fact, the issue of interpretation of Section 19-1AA in the context of Section 31-A specifically arose before this Court. This Court referred to proviso to Sub-Section (2) of Section 31-A and proceeded to observe thus:

25....

A perusal of the aforesaid proviso leaves no doubt that the registration of aghadi and/or front made in the present case by both N.C.P. and I.N.C. with some independents, by registering the same with 5th respondent Divisional Commissioner, is required to be considered only for the purpose of section 31-A of the said Act. This section 31-A relates to appointment by nomination on Committees to be by proportional representation, set out in that section. In our view, therefore, registration of aghadi and/or front for the purpose of section 31-A of the said Act will not be of any assistance whatsoever for the Petitioner to put up his case for being considered as a Leader of a Party in Opposition, u/s 19.1-AA of the said Act. In our view for claiming to be a party with greatest numerical strength in Opposition, the aghadis and/or fronts registered u/s 31-A of the said Act as one single unit is totally irrelevant and inconsequential. In our view for the purposes of Section 19.1AA of the said act aghadis and/or fronts registered as contemplated by the provisions of the Maharashtra Local Authority Members Disqualification Act, 1986 alone can be considered. The pre-poll or post-poll alliance registered and/or made in terms of the Disqualification Act alone will have a role to play when questions are required to be answered in the light of the provisions of section 19.1AA of the said Act.

(Emphasis added)

16. Thus, the law laid down by the Division Bench is that only the aghadi and/or front registered as contemplated by the said Act of 1986, can be considered for the purposes of Section 19-1AA. The ratio of the judgment is that for claiming to be a party in opposition with greatest numerical strength, the aghadis and/or fronts registered u/s 31-A of the said Act as one single unit are totally irrelevant and inconsequential. The learned counsel appearing for the Petitioner in Writ Petition No. 5073 of 2011 tried to urge that on facts the said decision will apply to the present case. What binds this Court is the ratio of the said decision which is reflected from paragraph 25 which is quoted above.

17. Coming back to the facts of the case, the communication dated 15th

November 2007 issued by the Divisional Commissioner, Aurangabad is on record, which records the grant of recognition to the aghadi formed by the Councilors of N.C.P. Lokbharati party and one independent. The name of the said aghadi or front is Rashtrawadi Lokbharati Nanded Vikas Aghadi. The recognition is specifically granted u/s 31-A of the said Act of 1949. In the affidavit of the Tahsildar in the office of the Divisional Commissioner, Aurangabad it is not stated that the said aghadi or front was registered as contemplated by the provisions of said Act of 1986. The second proviso to Section (2) of section 31-A of the said Act of 1949 has overriding effect over the said Act of 1986. On facts, it is crystal clear that aghadi formed by the Councilors of NCP, Lokbharati party and one independent Councilor was not registered or recognized for the purposes of the said Act of 1986. Going by the decision of the Division Bench of this Court in the case of Ulhas Vasantrao Bagul @ Aba Bagul (supra), the said aghadi will have to be kept out of consideration when the Mayor determines which is the party in opposition.

18. There is another important aspect of the matter. On plain reading of sub-Section (1) of Section 19-1AA, the Mayor is required to ascertain which is the party in opposition having greatest numerical strength and thereafter, the Mayor has to recognize the leader of the party in opposition as the leader of opposition. The aghadi or alliance which is not recognized or registered for the purposes of the said Act of 1986 cannot be treated as a party for the purposes of determining which party in opposition is having greatest numerical strength. The explanation to sub-Section (1) is very important. It provides that when there are two or more parties in opposition having same numerical strength, it is for the Mayor to recognize the leader of any one of such parties as the leader of opposition having regard to status of the party. Thus, from the scheme of Section 19-1AA it appears that the decision of recognition of the leader of the opposition by the Mayor is essentially a political decision. The explanation shows that a discretion has been conferred on the Mayor to take decision on the basis of the political considerations.

19. An argument was canvassed by the learned senior counsel appearing for the Petitioner Jeevan Abajirao Ghogre Patil that on 11th November 2009, the Mayor recognized the said Petitioner as the leader of the party in opposition after taking into consideration the alliance or front of N.C.P., Lokbharati party and one independent Councillor, as the said letter refers to a letter of Councillors forming part of the aghadi of NCP, Lokbharati party and an independent Councilor. Assuming that the then Mayor treated the said aghadi as the party in opposition, the law laid down by the Division Bench of this Court does not permit the Mayor to do so. Only aghadi or front which is recognized for the purposes of the said Act of 1986 can be taken into account but not aghadi or the front recognized u/s 31-A of the said Act of 1949. Therefore, this submission has no merit.

20. As the said aghadi registered under the second proviso to Section 31-A of the said Act of 1949 is required to be kept out of consideration, there cannot be any

dispute that Shiv Sena party is a party having highest number of Councillors next to ruling Indian National Congress Party.

21. Apart from this, we have already held that the determination made by the Mayor of the questions as to which is the party in opposition and which is the leader of the party in opposition involves political considerations. It involves the decision on political issues. The law is well settled. Normally the Courts are expected to refrain from entering into the arena of determination of political questions. In the present case, Section 19-1AA confers power on the Mayor to recognize the leader of the party in opposition and the exercise of power is based on the political considerations. We find that the impugned decision of the Mayor is not at all arbitrary or mala fide. In the facts of the case, this Court will be justified in declining to go into the determination of political questions or political issues. This is not a case where this Court can interfere with the decision of the Mayor by which Mahesh @ Balu Khomne was recognized as the leader of the opposition.

CONSIDERATION OF SUBMISSIONS AND FINDINGS IN WRIT PETITION No. 9047 OF 2011

22. Now that takes us to the merits of the Writ Petition No. 9047 of 2011. The averments made in the Petition show that the Petitioner is a member of Lokbharati party and got elected as A Councillor as the candidate of Lokbharati party. In the entire Petition, we find that the Petitioner has not disputed the existence of Rashtrawadi Lokbharati Nanded Vikas Aghadi. In fact, in paragraph 5, there are averments that the Divisional Commissioner has granted recognition u/s 31-A of the said Act of 1949 to the said aghadi. The main challenge is on the ground that though the said Jeevan Abajirao Ghogre Patil claiming to be a leader of the said aghadi nominated two Councillors for appointment to the Standing Committee, he is neither the leader of the said aghadi nor the leader of NCP and therefore, he had no right to address the communication dated 18th November 2011.

23. The fact that there was such aghadi in existence is not disputed by the Petitioner in Writ Petition No. 9047 of 2011. In fact he is a member of the said aghadi and admittedly, the said Jeevan Abajirao Ghogre Patil is also a member of it. We must be note here that Writ Petition No. 5073 of 2011 was filed by the said Jeevan Abajirao Ghogre Patil. In the said Petition he has claimed that he is the leader of the said aghadi having greatest numerical strength of elected Councillors. We may also note that these two Petitions have been regularly kept together on the Board and the Petitioner in Writ Petition No. 9047 of 2011 was fully aware of filing of Writ Petition No. 5073 of 2011 and further that the said Jeevan Abajirao Ghogre Patil was claiming to be the leader of the said aghadi. The Petitioner in Writ Petition No. 9047 of 2011 has not even filed intervention application for challenging the said status claimed by the Petitioner in Writ Petition No. 5073 of 2011. As stated earlier, the Petitioner in Writ Petition No. 9047 of 2011, is not disputing that the said aghadi was registered u/s 31-A of

the said Act of 1949. Thus, the Petitioner has challenged the nomination of two Councillors made on behalf of a registered aghadi of which he continues to be a member. There is nothing on record to show that any other member of the aghadi has raised any objection to action of the said Jeevan Abajirao Ghogre Patil of conveying nomination of two members of the aghadi for appointment to standing committee in accordance with Section 31A. Therefore, the challenge to the nomination must fail.

24. Another contention raised in the said Writ Petition by way of amendment is that Lokbharati Party is having 4 members and considering the strength of 4 members, proportional representation ought to have been given to the said party by nominating its one member to the Standing Committee. Once the said aghadi is recognized u/s 31-A of the said Act of 1949, Lokbharati party which is a constituent of the said aghadi cannot claim independent proportional representation and the proportional representation will have to be given to the aghadi considering its numerical strength. Therefore, we find no merit in these Writ Petitions. Accordingly, we pass the following order

i) Writ Petition No. 5073 of 2011 and Writ Petition No. 9047 of 2011 are rejected. There will be no order as to costs.