

(2009) 04 BOM CK 0104

In the Bombay High Court

Case No : Writ Petition No. 1343 of 2009

Kailas Bhagwan Hajare

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 27-04-2009

Acts Referred:

Bombay Provincial Municipal Corporations Act, 1949 — Section 2(11), 31A, 31A(1), 451, 5(2)

Constitution of India, 1950 — Article 226

Maharashtra Municipal Corporation (Qualification and Appointment of Nominated Councillors) (Amendment) Rules, 2007 — Rule 3, 5, 5(1)

Maharashtra Municipal Corporations (Qualifications and Appointment of Nominated Councillors) Rules, 2007 — Rule 4

Citation : (2009) 4 BomCR 698 : (2009) 6 MhLj 490

Hon'ble Judges : Potdar A.V., J; Dabholkar N.V., J

Bench : Division Bench

Advocate : Mukul Kulkarni, for the Appellant; N.B. Khandare, G.P. for Respondent No. 1, P.M. Shah for S.P. Shah, for Respondents 2 and 3, V.D. Hon and V.J. Dixit for A.S. Sawant, for Respondent 5, for the Respondent

Judgement

Potdar A.V., J.—Rule. Rule made returnable forthwith. With the consent of the learned Counsel for the parties heard finally at the stage of admission.

2. By the present petition, under Article 226 of the Constitution of India, the petitioner has prayed in terms of prayer Clause "B" to quash and set aside the decision taken by the 4th respondent (Mayor of Dhule Municipal Corporation) on 31.1.2009 by rejecting the recommendation of the 3rd respondent in respect of the petitioner being nominated as Councillor of Dhule Municipal Corporation; in terms of prayer Clause "C" to quash and set aside the decision of nominating the 5th respondent as a nominated Councillor of respondent No. 2; in terms of prayer Clause "D" to declare the petitioner as a valid nominated Councillor of the 2nd respondent on the basis of the recommendations of 3rd respondent on 31.1.2009 and also prayed for interim reliefs in terms of prayer Clauses "E" to "H".

3. The facts, which gave rise to file the present petition, can be summarised as follows-

a. The petitioner was Councillor of Dhule Municipal Corporation during the period 1996 to 2001. He was nominated Councillor of Dhule Municipal Corporation during the term for the period 2003-08 and claimed to be eligible for being nominated as Councillor for the present term also.

b. It appears from the contents of the writ petition that the general elections of second respondent, Dhule Municipal Corporation (Hereinafter this Corporation will be referred as "said Corporation" in the body of the judgment) for electing 67 Councillors were held somewhere in the month of November 2008. It further appears that as per the record of the 3rd respondent, the Commissioner, the strength of the political parties/groups in the general body is as follows:

The competent authority has recognized the "Loksangram Gat" as a political group in the said Corporation.

c. As per the provisions of Bombay Provincial Municipal Corporation Act, 1949 (In short "B.P.M.C. Act 1949") 5 persons can be nominated as Councillors. The procedure is laid down in the rules called Maharashtra Municipal Corporation (Qualification and Appointment of Nominated Councillors) Rules of 2007 (in short Rules of the year 2007), which came to be amended on 21st April 2007 (in short the amended Rules after the year 2007). Under the amended Rules, powers to nominate Councillors vested in Mayor are taken away and are now vested with the Corporation.

d. It appears that on 31.1.2009 the Commissioner of the 3rd respondent in the said Corporation recommended names of 5 persons considering relative strength of the political groups, including the name of the present petitioner. It further appears that while considering the name of the present petitioner, the Commissioner, 3rd respondent, also considered the letter of support given in favour of the present petitioner by 3 members of B.J.P., 3 members of Shiv Sena and one member of B.S.P. Thus the total number of supporting members to the present petitioner is 14. On that day meeting for the consideration of the nominated members was scheduled at 11.00 a.m. It appears that in the said meeting the 4th respondent, the Mayor of the said Corporation rejected the name of the present petitioner and proceeded to propose the name of the 5th respondent and placed the same before the General Body for its consideration. It further appears that during the course of discussion of the said subject before the full house, the parties, which supported recommendation and nomination of the petitioner, stood by his side, but taking into consideration majority vote he was not nominated as Councillor. Hence, for the grounds stated and raised in the writ petition the petitioner has challenged the act of the 4th respondent and the action of the house of rejecting the nomination of the petitioner and accepting the nomination of the 5th respondent.

4. In response to the notice issued, the 4th respondent appeared and filed his

affidavit-in-reply to oppose the petition, inter alia contending that only to tarnish the reputation of the present respondent, wild and baseless allegations are made against him in the petition by the petitioner. According to this respondent, the allegation made against him that he has acted without jurisdiction by nominating the name of the 5th respondent is basically misconceived. According to this respondent nomination of 5th respondent as a Councillor is supported by the Resolution No. 03/2009 dated 31.1.2009 passed by the said Corporation. It appears that according to this respondent, under the amended Rules of the year 2007, the power is vested with the Corporation to nominate the Councillor, after consulting the recommendation by the Commissioner. In the meeting, the said Corporation declined to nominate the name of the petitioner as recommended by the Commissioner, and nominated the 5th respondent, by majority vote. It further appears to be the contention in this affidavit in reply that the quota fixed by the Commissioner, the 3rd respondent, considering the relevant strength of the parties is improper and hence, the said Corporation declined to accept the same and resolved to nominate the 5th respondent as a Councillor. In substance, it is submitted that there are no merits in the writ petition and therefore, prayed for the dismissal of the writ petition in limine.

5. In response to the notice issued, 5th respondent appeared and filed his affidavit-in-reply to oppose the writ petition, inter alia contending that an alternate remedy is available to the petitioner to challenge the resolution passed by the said Corporation u/s 451 of the BPMC Act, before the State Government. It is further alleged that without availing the said remedy the petitioner has approached this Court and hence this writ petition is not maintainable and, therefore, deserves to be rejected at the threshold. It further appears that the contention is raised that this respondent is nominated as a Councillor by the said Corporation and not by the Mayor, the 4th respondent. Hence, the allegations against the 4th respondent that he has acted without jurisdiction and power are unjust and improper. It also appears that the contention is raised that the writ petition suffers from non joinder of necessary parties as even though by the present writ petition the petitioner has challenged the resolution of the said Corporation dated 31.3.2009 still the other nominated Councillors, whose nomination would be affected if the resolution is turned down, are not made parties to the present writ petition. It further appears that this respondent claims to be eligible for being nominated as a Councillor as per Rules 3 and 5 of the Rules of the year 2007. Hence, the decision taken by the Corporation attains its finality. Thereafter the nomination of the present respondent is also published in the Government Gazette on 5.2.2009 by the Government of Maharashtra. According to this respondent, there is no challenge or it is not disputed or objected by the present petitioner in this writ petition. Hence, the writ petition is not sustainable in the eyes of law and liable to be dismissed.

6. In the backdrop of these facts, heard learned Counsel for the petitioner followed by the arguments of all the Senior Counsel respectively appearing for all the respondents.

7. It is not under dispute by the parties to the writ petition that the said Corporation has strength of 67 Councillors, as mentioned in para 4 of the writ petition. It is also not disputed that as per this strength and in law 5 Councillors are to be nominated as per the provisions of the B.P.M.C. Act and the relevant Rules framed by the State Government thereunder. Further it is also not disputed that the 3rd respondent has recommended names of 5 persons which include the name of the present petitioner and while placing the proposal before the House/ Corporation the 4th respondent, the Mayor, deleted the name of the present petitioner and proposed the name of the 5th respondent to be nominated as a nominated Councillor, which is opposed by the minority group, however, still accepted by the Corporation and Resolution No. 03/2009 was passed to that effect. In this premise, the only question for consideration is whether the Mayor has any right to propose rejection of the nomination of the petitioner as recommended by the Commissioner and to propose/recommend the name of the 5th respondent, which is ultimately" accepted by the Corporation on the strength of the majority vote in the Corporation.

8. Under Chapter I, Section 2(11) of the B.P.M.C. Act the Councillor is defined as under:

(11) "Councillor" means a person duly elected as a member of the Corporation; and includes a nominated Councillor who shall not have the right,-

(i) to vote at any meeting of the Corporation and

Committees of the Corporation; and

(ii) to get elected as a Mayor of the Corporation or a Chairperson of any of the Committee of the Corporation;

Thus, from the above referred definition of the nominated Councillor two facts are clear that the nominated Councillor has no voting right at any meeting of the Corporation or in any meeting of the Committee of the Corporation; second, the nominated Councillor has no right to get elected as a Chairperson of any of the Committee of the Corporation.

9. Chapter 2, Section 5(2)(a) deals with the number of seats of directly elected Councillors in ward elections while Section 5(2)(b) speaks about the nomination of the nominated Councillors, which reads as follows:

(b) such number of nominated Councillors not exceeding five, having special knowledge or experience in Municipal Administration, to be nominated by the Corporation in such manner as may be prescribed.

From the text of this Section it is clear that the nominated Councillors are to be nominated by the Corporation and not by the Commissioner.

10. During the course of arguments much emphasis was given by learned Senior Council Mr. Dixit, appearing on behalf of the 5th respondent, on amended Section 31A of the B.P.M.C. Act of which the Proviso deals with the powers of the

Corporation for nomination of any Councillor on any committee belonging to any such party or group. We are afraid, we cannot accept this submission as it is rightly pointed out by Senior Counsel Mr. P.M. Shah appearing for the 3rd respondent, the Commissioner, that the insertion of Section 31A in Chapter III of the B.P.M.C. Act, 1949 deals with the nomination of the Councillors of the various Committees of the Corporation mentioned in Sub-section (1) of Section 31A of the Act. We are in agreement with this submission and hold that the Proviso to Section 31A as well as the entire Section 31A is not applicable to decide the issue/question in the present writ petition.

11. Rules governing the procedure to be followed while nominating the Councillor to the Corporation were notified in the State Government Gazette published on 21.2.2007, which can be said to be the Rules of the year 2007 or the principal Rules. Rules 3 to 5 of these principal Rules are material, which require to be reproduced for its clear meaning and interpretation, which read as follows:

3. Determination of number of nominated Councillors - Subject to the provisions of Rule 4, the Mayor shall, in the first meeting of the Corporation after general elections, nominate such number of Councillors, not exceeding ten percent of the total number of elected Councillors or five, whichever is less;

Provided that, while determining the number of nominated Councillors, a fraction of less than one-half shall be ignored and a fraction of one half or more shall be reckoned as one.

4. Qualification for nomination - Any person who fulfils any of the following conditions shall be eligible for being nominated as a candidate for the office of the nominated Councillor,-

(a) has an experience as a medical practitioner in a Municipal Hospital for not less than five years;

(b) has an experience of not less than five years, as a member of recognized non-Government Organisations and community based organisations engaged in social welfare activities working within the area of Municipal Corporation or a Council;

(c) has an expertise in the field of municipal laws or labour laws;

(d) had been a Councillor for not less than five years;

(e) has an experience of working for not less than two years as a Municipal Commissioner; or

(f) has an experience of working for not less than five years as a Chief Officer of a Council or as a Deputy or Assistant Municipal Commissioner in a Corporation.

5. Nomination of Councillor In nominating the Councillors the Mayor shall take into account-the relative strength of recognized parties or registered parties or groups and nominate the members, as nearly as may be, in proportion to the strength of such parties or groups in the Corporation, after consulting Leader of

the House, Leader of Opposition and leader of each of such party or group; Provided that, nothing contained in this rule shall be construed as preventing the Mayor from nominating any member not belonging to any such party or group.

12. Some Rules of the principal Rules came to be amended by the State Government, which can be called as Amended Rules of the year 2007. In Rule 3 of the amended Rules the word "Mayor," in the principal Rules, is substituted by the word "Corporation".

13. Rule 5 of the principal Rules is substituted as follows-

5. Nomination of Councillors.- (1) For the purpose of nomination of Councillors, the Commissioner shall, after consulting the leader of the House, leader of opposition and leader of each recognised or registered party or group in the Corporation, and after taking into account the relative strength of such parties and groups and recommend the names of suitable persons to the Corporation for being appointed as a nominated Councillor. The names of such persons recommended shall not exceed the number of Councillors to be nominated in accordance with Rule 3.

(2) The Corporation shall, after considering the recommendation by the Commissioner, nominate the Councillors;

Provided that, if the Corporation decides not to accept the recommendation of the Commissioner with respect to a person so recommended, it shall record the reasons therefor.

14. At the opening of the arguments itself, learned Counsel appearing on behalf of the petitioner made it clear that he is restricting his prayer and even though he has challenged the entire Resolution No. 03/2009 dated 31.1.2009, yet the petitioner is restricting the challenge of this resolution to the extent of appointment of the respondent No. 5 as a nominated Councillor only.

15. During the course of arguments, learned Counsel for the petitioner drawn our attention towards the principal Rules of the year 2007 by which certain powers were vested with the Mayor by virtue of Rules 3 and 5 and the proviso to Rule 5, which powers were taken away by the amended Rules of the year 2007. In the premise, it is submitted that the action on the part of the 4th respondent, the Mayor, of rejecting the recommendation of the Commissioner while placing the same before the Corporation, which is later on accepted by the majority by the Corporation, itself is illegal and against the legal provisions and hence required to be quashed and set aside.

16. During the course of arguments, submitted on behalf of the 4th respondent, the Mayor, it is urged across the bar by learned Counsel Mr. V.D. Hon that the resolution was passed by the Corporation and not by the Mayor and in the premise the respondent No. 4 may not be faulted as he had turned down the recommendation of the petitioner and recommended the respondent No. 5 as a nominated Councillor to the said Corporation.

17. It is urged by Senior Counsel Mr. Dixit, appearing on behalf of the 5th respondent, that even though the Commissioner is empowered to recommend names of the Councillors to be nominated, yet the proviso to the amended Rule 5 clearly indicates that these recommendations are not binding on the Corporation and in its own wisdom the Corporation may decide not to accept the recommendation of the Commissioner and it is evident from the minutes, which are placed on record along with the writ petition that for the reasons recorded in the minutes of the meeting of the Corporation, the Corporation has rightly turned down the recommendation of the petitioner as recommended by the Commissioner, the third respondent, and in its own motion accepted the nomination of the 5th respondent by the Corporation. In the premise, it is submitted that the powers vested in the Commissioner are only to recommend the names of the persons to be appointed as nominated Councillors, which is not binding on the Corporation and hence it cannot be urged that the recommendation of the Commissioner is a supremacy over the powers of the Corporation. According to him, thus, from the amended Rules also there are no merits in the writ petition and the same is to be dismissed. It is further urged that as the petitioner has challenged the resolution dated 31.1.2009 the other nominated Councillors will also be affected, who are not joined as a party respondents to the writ petition. Hence on this ground also the petition ought to fail.

We are afraid, we cannot accept these submissions for the simple reason that at the time of opening of the arguments itself the petitioner has made it clear that even though the petitioner has challenged the Resolution No. 03/2009, yet, now, he is restricting himself to the challenge of the nomination of the 5th respondent only and not the entire resolution. Hence, according to us, even though the other nominated Councillors are not joined as party respondents, yet this petition will not suffer from non joinder of necessary parties.

It is also tried to urge that there is remedy available u/s 451 of the B.P.M.C. Act by which the aggrieved party can file a representation before the State Government to challenge the validity of the resolution or the order passed by the Corporation or any other authority in certain cases. We are afraid, we cannot accept this submission also for the simple reason that on bare reading of the text of Section 451 of the B.P.M.C. Act, 1949, it is clear that the scope of enquiry about the representation to the State Government is limited and like a revision. Secondly, the scope of such enquiry is so narrow that it will not cover the entire scope of the challenge and hence, we decline to accept this submission also. Otherwise also, it is settled legal position that availability of alternate remedy does not create a bar against exercise of powers under Article 226 of the Constitution of India, by this Court.

18. During the course of submissions advanced across the bar by learned Senior Counsel Mr. P.M. Shah, appearing for 3rd respondent, Commissioner, put emphasis on Rule 4 of the principal Rules, which speaks for the qualification for

nomination. According to him, a candidate to be recommended for appointment as nominated Councillor has to bear the qualification as emphasised in Rule 4 of the principal rules. According to him, the definition of the nominated Councillor, as contemplated u/s 2(11) of the B.P.M.C. Act; 1949, the nominated Councillor as having no voting right in the Corporation or in the committees of the Corporation then considering the qualification as enumerated in Rule 4 of the principal Rules, the eligibility of the nominated Councillors to be determined on that aspect. According to him, under the amended Rules of the 2007 even though the Municipal Commissioner is empowered to recommend the name of the Councillors. The recommendation of the Municipal Commissioner are not binding on the Corporation as the Corporation is the Supreme Authority to accept the recommendation of the Commissioner or not, which fact is clear from the Rule 5 of the amended Rules of the year 2007.

19. Considering the rival submissions across the bar in support of the rival contentions of the petitioner as well as respondents, when we consider the proviso i.e. proviso of the Rule 5 of the amended Rule of the year 2007, the same mandates that if the Corporation decides not to accept the recommendations of the" Commissioner with respect to a person so recommended, it shall record reasons therefor. Thus, it is evident that the recommendation of Commissioner is not binding on the Corporation and the same can be rejected, for the reasons to be recorded in writing. The question that arises for consideration is, whether there is power conferred upon either the Mayor or the Corporation to consider a name not recommended, for being nominated as Councillor. It was urged by Senior Counsel Mr. Shah that since nomination of Councillors is to be completed in the "first meeting" as per Rule 3, there is no room for calling fresh recommendations from Commissioner, for nomination at any later meeting and hence power to co-opt without recommendation must be read in between the lines. As the legislation and the Rules are silent in that respect, then we require to consider the intention of the legislature to that effect.

20. On bare reading of the principal rules, as notified on 21st February 2007 and amended Rules as notified on 21st April 2007, in Rule 3 the word "Mayor" is substituted by the word "Corporation". Under the principal rules ample powers were vested with the Mayor to recommend the name of the persons to be appointed as nominated Councillors and by virtue of the proviso to the old rule there was no constraint on the Mayor from nominating any person not belonging to any such party or group. On bare reading of the amended Rules of the year 2007 to that effect, by substituted Rule 5, these powers of the Mayor, including the powers specially given to the Mayor in the Corporation under the proviso of Rule 5 of the principal Rules, are totally taken away.

21. The text of the Rule 5 of the principal rules as well as the text of the Rule 5 of the amended rules, is very clear. As under the principal rules as well as in the amended Rules, the concerned shall consult with the larder of the House, leader

of the Opposition and leaders of each registered and recognized parties or groups in the Corporation and after taking into account relevant strength of such parties and groups, recommend the name of the suitable persons to the Corporation for being appointed as a nominated Councillors (underline is ours). Considering the underlined portion in the principal Rules as well as the amended rules, it is clear that while recommending the names of the persons to be nominated as Councillors, the concerned is required to consider the strength of the parties or groups in the Corporation. It is to be seen that the sanctioned strength of the persons to be nominated as Councillors is not more than 10% of elected Councillors or 5 whichever is less. The strength of the elected Councillors is 67. In the earlier part of the judgment we have given party/group wise strength of the elected Councillors in the said Corporation and considering the strength of the elected Councillors as 67 and the strength of the nominated Councillors as 5, for each nominated Councillor, the support strength ought to be 13 and it is not on surmises, but it is based on the representation in respect with the strength of the groups or parties in the Corporation.

22. It is evident from the minutes of the meeting placed on record along with the writ petition at page 21 to 25 that this position is made clear by the 3rd respondent while recommending the names of the 5 persons for appointment as nominated Councillors, which include the name of the present petitioner. It is further evident from the document at page 26 on record that the petitioner is supported by the group known as Loksangram group, by the elected Councillors from Shiv Sena and 3 Councillors from the B.J.P., comprising of 26 Councillors. Apart from it, it is further evident from the minutes of the meeting at page 27 to 50 that subsequent to the recommendation of the names of the persons to be nominated Councillors, the same were not placed before the Corporation for its approval by way of acceptance or refusal. However, in his right, the respondent No. 4 has not put the name of the recommended persons by the Commissioner and by rejecting the name of the petitioner proposed the name of the 5th respondent before the House/Corporation for its approval/acceptance. From this act it is evident that it is the respondent No. 4 who has projected/proposed the nomination of the 5th respondent, and then these recommendations were accepted by the Corporation by majority. The 4th respondent proposed the name of the respondent No. 5 by deleting the name of the petitioner and placed it before the Corporation, which is accepted by the Corporation. According to us, the act of the respondent No. 4 or the Corporation in recommending R-5 is not supported by any express legal provision. Submission of Senior Counsel Shri Shah, that because nominations are to be completed in the "first meeting" only, such power to co-opt without recommendation needs to be read by implication, cannot be accepted. The number of nominated Councillors have upper limit i.e. 10% of the number of elected members or five whichever is less, but there is no mandate that minimum number must be nominated. By virtue of Rule 5(1) as amended, the Commissioner is empowered to recommend only equal number of individuals, as to number of possible nominations. Naturally, a contingency arises

that there may remain vacancies to the extent of rejected recommendations. That by itself would not enable us to create a power in favour either of the Mayor or the House, to co-opt without recommendation, by our judicial pronouncements.

23. As we have already made it clear that all the powers and rights vested in the Mayor under the principal Rules were taken away by the amended Rules of the year 2007 by substituting the Corporation in place of Mayor in Rule 3 and by substituting Rule 5 in the amended Rule in place of Rule 5 of the principle Rules. While doing so, proviso to Rule 5 unamended, which to some extent, suggested power to co-opt beyond the consultation with leaders of House 8s opposition, of the Mayor, is not retained with the Corporation. The powers exercised by the 4th respondent of recommending R-5 for nomination was without any authority and jurisdiction and although later on accepted by the Corporation, is in clear violation of the Rules provided for the nomination of Councillors as provided under the amended rules and if the resolution is passed in violation of the legal provision and the Rules thereunder, then it requires to be set aside.

24. Thus, the act of respondent No. 4 of recommending R-5 for nomination and the Corporation in approving the name of the 5th respondent is in violation of the legal provisions and, therefore, to that effect the Resolution No. 03/2009 dated 31.1.2009 requires to be set aside. Hence, so far as the Resolution No. 03/2009 dated 31.1.2009 appointing respondent No. 5 as nominated Councillor of the said Corporation is hereby quashed and set aside. Since nomination of petitioner is rejected by the House, by majority vote and adequacy/inadequacy, correctness or otherwise of the reasons for his rejection was not urged at length, he cannot be considered for nomination. To take a practical view, that his nomination is rejected by majority vote is sufficient reason.

25. Rule made absolute on the terms indicated above writ petition stands disposed of with no order as to costs.