

(2009) 05 BOM CK 0054

In the Bombay High Court

Case No : Writ Petition No. 3744 of 2008

Manoj Bansilal Biyani

APPELLANT

Vs

Sameer Krishnadhan Karr and The Collector

RESPONDENT

Date of Decision : 08-05-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 15(4)
Constitution of India, 1950 — Article 141
Maharashtra Local Authority Members Disqualification Act, 1986 — Section 10, 3(1), 7, 8, 8(1)
Maharashtra Local Authority Members Disqualification Rules, 1987 — Rule 6, 6(4), 7, 7(5), 8
Representation of the People Act, 1951 — Section 86(1)

Citation : (2009) 05 BOM CK 0054

Hon'ble Judges : V.R. Kingaonkar, J

Bench : Single Bench

Advocate : P.M. Shah, i.b., S.P. Shah, for the Appellant; R.N. Dhorde and D.V. Tele, AGP, for the Respondent

Final Decision : Allowed

Judgement

V.R. Kingaonkar, J.—By this petition, the petitioner challenges order rendered by learned Collector, Jalgaon, on application No. 9/2007 whereby petition filed by the petitioner u/s 3(1)(a) of the Maharashtra Local Authority Members' Disqualification Act, 1986 and under Rule 6 of the Maharashtra Local Authority Members' Disqualification Rules, 1987 came to be rejected.

2. There took place election for the posts of councillor of Municipal Council, Bhusawal on 19th & 20th November, 2006. The petitioner claims to be the President of a pre-poll coalition called "Shahar Bachav Aghadi". He asserted that said "Aghadi" had set up candidates in the municipal elections by issuing necessary "A-B" forms to the concerned candidates. He further asserted that the respondent No. 1 submitted the nomination form from ward No. 16 as a candidate of the said Aghadi. The respondent No. 1 was declared elected from

the said ward on 21-11-2006. The respondent No. 1 allegedly filed an affidavit dated 05-03-2007 in writ petition No. 853/2007 which was filed by one Ashokkumar Agasdas Maidasani. In his affidavit, the respondent No. 1 stated that he was not at all part and parcel of any Aghadi, whatsoever, and had no connection with the "Shahar Bachav Aghadi, Bhusawal". The petitioner submitted a petition before the learned District Collector, Jalgaon , seeking disqualification of the respondent No. 1 due to his subsequent misconduct of the betrayal to the Aghadi.

3. The respondent No. 1 resisted the petition on various grounds. He contended that the petition was not duly verified as provided under Rule 6(4) of the Maharashtra Local Authority Members' Disqualification Rules, 1987 (for short, "the MLAMD Rules"). He also alleged that the petition was untenable because the necessary affidavit in support of the petition was not filed. The respondent No. 1 contended that he had contested the election as an independent candidate and was elected as such from the ward No. 16. He further asserted that the documents filed alongwith the petition were not duly and legally verified and, therefore, could not be taken into account. Thus, he denied that he was a candidate set up by the "Shahar Bachav Aghadi". He asserted that the petition was liable to be dismissed on preliminary grounds due to infringement of the Rule 6 (4) and Rule 7 of the MLAMD Rules.

4. The petitioner later on submitted a duly verified petition alongwith a separate affidavit on 14-09-2007. He filed an application to consider the amended petition and the affidavit by substituting the same in place of the original petition.

5. The learned Collector heard the parties to the petition. The learned Collector held that the compliance of Rule 6(4) and Rule 7 of the MLAMD Rules was not made by the petitioner. He held that these are mandatory provisions and the non-compliance of the Rules, in any respect, would result in dismissal of the petition. He referred to "Sadashiv H. Patil v. Vithal D. Teke and Ors." 2001 (1) Mh.L.J. 313 (SC), Mirza Kadir Baig Rasul Baig Vs. District Collector and Others, and Hariharrao Vishwanathrao Bhosikar Vs. Datta Anandrao Pawar and Others, , in order to reach conclusion that the strict compliance with the said Rules is necessary. The learned Collector, therefore, held that the petition was defective and as such, was liable to be dismissed. Thus, the disqualification reference petition was disposed of/dismissed vide the impugned order.

6. Heard learned Counsel for the parties.

7. Clinching question is whether minor defects in the manner of verification of the reference petition filed under the Maharashtra Local Authority Members' Disqualification Act, 1986 (for short, "the MLAMD Act") and non-filing of the affidavit could be regarded the major and incurable procedural defects which could entail dismissal of the election reference petition or the same could be regarded as curable defects. The next question is whether the learned Collector failed to properly exercise his discretion to allow substitution of the amended

petition with due verification of the pleadings and the affidavit dated 14-09-2007 in the place of the original reference petition as sought by the petitioner and, thereby, committed patent error while rejecting the reference petition.

8. Before I embark upon scrutiny of the rival submissions, let it be noted that the question whether the respondent No. 1 had voluntarily given up his membership of the "Shahar Bachav Aghadi" and thereby incurred disqualification as provided u/s 3(1)(a) of the MLAMD Act is not considered by the learned Collector on merits. The election reference petition pertains to post-poll conduct of the respondent No. 1. Broadly stated, two (2) types of misconduct can be contemplated. The pre-poll misconduct, in any manner like adoption of corrupt practices, spreading hatred between two (2) religious groups, seeking votes on basis of caste/religion, etc. are covered by the provisions of the Representation of the People Act, 1950. The post-poll misconduct also was required to be redressed. Consequently, Xth Schedule was added to the Constitution by 52nd Amendment Act, 1985 under Articles 102(2) and 191(2). The Xth Schedule pertains to provisions pertaining to disqualification on ground of defection, etc. The local laws like the MLAMD Act and the MLAMD Rules framed thereunder are *pari materia* with the provisions contained in the Xth Schedule and the Rules framed u/s 8 of the Xth Schedule. The Chairman or the Speaker of the House is empowered u/s 8(1) of the Xth Schedule to frame Rules for giving effect to the provisions of the Schedule. The comparison of the provisions of the MLAMD Act and the MLAMD Rules must be, therefore, made with the provisions contained in the Xth Schedule and the Rules framed thereunder for the purpose of consideration of the Reference seeking disqualification of an elected municipal councillor. In other words, the comparison of the provisions contained in the MLAMD Act and the MLAMD Rules cannot be made with the provisions contained in the Representation of the People Act, 1950 which deals with the issues pertaining to pre-poll misconduct of a candidate.

9. Mr. Shah seeks to rely on *Dr. Mahachandra Prasad Singh Vs. Hon. Chairman, Bihar Legislative Council and Others*, . The Apex Court interpreted the Rules pertaining to Bihar Legislative Council Members (Disqualification on Ground of Defection) Rules, 1994 and held that Rules 6 and 7 thereof were directory in nature. The Apex Court held that the omission to file an affidavit neither rendered petition invalid nor did it affect the assumption of jurisdiction by the Chairman to initiate proceedings to determine the question of disqualification of the members of the House. Mr. Shah would submit that in view of this authority of the Apex Court, the Division Bench judgement of this Court in *Sayyad Tahir Hussain Mainuddin and Rahul Ramesh Ambesange Vs. The State of Maharashtra and Others*, , could be regarded as *per incuriam*. He would submit that the learned Collector failed to properly appreciate the import of the relevant Rules and to classify the defects which could be regarded as curable and which could be regarded as non-curable. He seeks to distinguish case of "*Sadashiv H. Patil v. Vithal D. Teke and Ors.*" 2001 (1) Mh.L.J. 312. The learned Senior Counsel further contended that substitution of the duly verified petition and the affidavit

could be allowed in as much as there is no time-limit prescribed for filing of the reference petition and the substitution petition and the affidavit could be regarded as afresh petition. He pointed out that the learned Collector did not consider the amendment which was purportedly sought much before passing of the impugned order. Per contra, Mr. Dhorde supports the impugned judgement. He submits that in the teeth of Division Bench Judgement of this Court on the same question and the dictum of the Apex Court in "Sadashiv H. Patil" (supra), the impugned order is quite sustainable.

10. So far as the fact situation is concerned, it may be noticed that the reference petition filed by the petitioner was verified by him on solemn affirmation. He stated that the contents of the para Nos. 1 to 14 were true and correct to the best of his knowledge and information. The only defect was that each of the paragraph of the petition was not separately verified on solemn affirmation. He did not state which of the paragraphs were based on his personal knowledge and which of the paragraphs were based upon information received by him. The verification was of omnibus nature. Still, it was there at the bottom of the reference petition. It is explicit that he rectified the mistakes by filing a separate amended petition and duly verified the petition on 14-09-2007 alongwith an affidavit. The learned Collector did not pass any order on the application seeking amendment and substitution of the duly verified petition alongwith the affidavit.

11. In "Sadashiv H. Patil v. Vithal D. Teke and Ors." 2001 (1) Mh.L.J. 312 (SC), the controversy related to alleged disqualification of certain members of the Municipal Council on ground of defection. The Collector had declared the respondent Nos. 1, 2 and 3 in that case as disqualified councillors under the provisions of MLAMD Act. The Bombay High Court allowed their writ petitions and had quashed the order passed by the Collector. The Apex Court observed:

Looking at the penal consequences flowing from an elected Councillor being subjected to disqualification and its repercussion on the functioning of the local body as also the city or township governed by the local body the provisions have to be construed strictly. A rigorous compliance with the provisions of the Act and the Rules must be shown to have taken place while dealing with a reference u/s 7 of the Act.

The question involved in the given case was whether the whips issued, on the basis of which the disqualification was sought to be spelt out, did satisfy requirement of Section 3(1)(b) of the MLAMD Act. The Apex Court did not, however, deal with technical compliance of the Rules 6 and 7 of the MLAMD Rules. It is the general observation of the Apex Court that the provisions of the Act and the Rules were required to be strictly complied with in view of the consequence which was likely to befall on the elected councillor as well as the constituency represented by him. There cannot be duality of opinion that the relevant provisions of the Act and the Rules are required to be strictly adhered to.

12. In Sayyad Tahir Hussain Mainuddin and Rahul Ramesh Ambesange Vs. The

State of Maharashtra and Others, , a Division Bench of this Court had an occasion to consider the import of Rules 6 and 7 of the MLAMD Rules. The Division Bench held that any and every non-compliance of Rule 6 of the MLAMD Rules would meet with only one fate, namely, dismissal of reference petition by the Commissioner or Collector, as the case may be. There cannot be any doubt that the Division Bench judgement covers the issue involved in the context of interpretation of the Rules 6 and 7 of the MLAMD Rules. It is pertinent, however, to mention here that the observations of the Apex Court in Dr. Mahachandra Prasad Singh Vs. Hon. Chairman, Bihar Legislative Council and Others, were not brought to the notice of the Division Bench. It is explicit that in "Sayyad Tahir Hussain Mainuddin and Anr." (supra), there is no reference to the case of "Dr. Mahachandra Prasad Singh" (supra) and the issue was not examined in the light of observations in "Dr. Mahachandra Prasad Singh" (supra). It follows, therefore, that if the case of "Dr. Mahachandra Prasad Singh" (supra) is held to cover the field, then the judgement of the Division Bench of this Court will supercede the view of the Division Bench of this Court.

13. As stated before, the comparison could be between the provisions of the Xth Schedule and the provisions of the MLAMD Act and the MLAMD Rules. The Division Bench of this Court seems to have compared the provisions of Section 81 and 83 of the Representation of People Act, 1950 and the Rules 6 and 7 of the MLAMD Rules. It is observed:

If we are to consider the two schemes together i.e. Sections 81 to 83 on one side and read with Section 86 of Representation of People Act, and Rules 6 and 7 on the other side, there is one more striking difference. On reference to Section 86 (1) of Representation of People Act, 1951, it is evident that non-compliances stand classified into two groups. Non compliance of Sections 81, 82 and 117 invite the High Court to dismiss an election petition, but for non compliance of Section 83, the High Court, while considering election petition, is not required to dismiss the same. Thus, Representation of People Act classifies the defects in the election petition into two groups i.e. curable and not curable. On reference to language of Sub-rule (2) of Rule 7, it is evident that none of the defects in the reference petition or in other words non compliances of Rule 6 are pardonable. any and every non compliance of Rule 6 meets with only one fate i.e. dismissal of the reference petition either by the Commissioner or the Collector, as the case may be.

The Division Bench obviously did not compare the provisions of the Xth Schedule, which are *pari materia* with MLAMD Act and the MLAMD Rules. This could be the reason for reaching the conclusion that each and every non-compliance of the Rules 6 and 7 of the MLAMD Rules would lead to the inevitable result, namely, dismissal of the reference petition.

14. In "Dr. Mahachandra Prasad Singh v. Chairman, Bihar Legislative Council and Ors." (supra), the Apex Court observed:

The purpose and object of the Rules is to facilitate the job of the Chairman in discharging his duties and responsibilities conferred upon him by Paragraph 6, namely, for resolving any dispute as to whether a member of the House has become subject to disqualification under the Tenth Schedule. The Rules being in the domain of procedure, are intended to facilitate the holding of inquiry and not to frustrate or obstruct the same by introduction of innumerable technicalities. Being subordinate legislation, the Rules cannot make any provision which may have the effect of curtailing the content and scope of the substantive provision, namely, the Tenth Schedule. There is no provision in the Tenth (Xth) Schedule to the effect that until a petition which is signed and verified in the manner laid down in CPC for verification of pleadings is made to the Chairman or the Speaker of the House, he will not get the jurisdiction to give a decision as to whether a member of the House has become subject to disqualification under the Schedule....

There cannot be any dispute that sub-rules (1), (2) and (3) of Order 6 Rule 15 CPC were complied with. Learned Counsel for the petitioner has, however, laid great emphasis on the fact that Shri Salman Rageev had not filed any affidavit in support of his petition and consequently the provisions of Sub-rule (4) of Order 6 Rule 15 CPC which provides that the person verifying the pleadings shall also furnish an affidavit in support of his pleadings were not complied with. For the reasons stated earlier, we are of the opinion that the provisions of Rules 6 and 7 are directory in nature and on account of non-filing of an affidavit as required by Sub-rule (4) of Order 6 Rule 15 CPC, the petition would not be rendered invalid nor would the assumption of jurisdiction by the Chairman on its basis be adversely affected or rendered bad in any manner. A similar contention was raised before a Bench presided by Venkatachaliah, C.J. in "Ravi S. Naik v. Union of India" but was repelled.

15. Similarly, it may be gathered from the provisions of the MLAMD Act that there is no provision in the Act to the effect that until a petition which is signed and duly verified in the manner laid down in the CPC for verification of pleadings is made to the Collector/Commissioner, he will not get jurisdiction to render decision about disqualification under the Act. The procedural cobwebs are not meant to frustrate the object for which the enactment has been made. The procedure is in the aid of the authority and in order to facilitate smooth working of the quasi-judicial nature. Mr. Dhorde would submit that in view of Section 10 of the MLAMD Act, the Rules will have overriding effect and, therefore, compliance thereof is mandatory. He invited my attention to the expression "shall" as used in Rule 6(4) of the MLAMD Rules. He would submit that the intention of the Legislature is to make the Rules mandatory. He also invited my attention to Shridhar Vs. Nagar Palika, Jaunpur and Others, and submitted that if at all the view of the Division Bench is unacceptable, this Court should not travel beyond the same in view so as to maintain the judicial discipline.

16. In F.A. Sapa Etc., Etc., Vs. Singora and others, , the Apex Court held that

mere defect in verification of the Election Petition cannot be fatal to its maintainability. The Apex Court in *Murarka Radhey Shyam Ram Kumar Vs. Roop Singh Rathore and Others*, held that defect in verification in the Election Petition can be removed in accordance with the principles of the Civil Procedure Code. It was held as a curable defect.

17. Having given anxious consideration to the submissions of Mr. Dhorde, I find it difficult to countenance his argument. First, the mere use of expression "shall" in Rule 6(4) will not make it mandatory. For, unless there is penal consequence provided for, mere such expression does not ordinarily make the Rule mandatory. There is no question of taking any diametrically opposite view from the view of the Division Bench of this Court. What I think is that considering the dictum of the Apex Court in "*Dr. Mahachandra Prasad Singh*" (supra), the view taken by the Division Bench stands eclipsed. I am bound by the precedent handed down by the Apex Court in view of Article 141 of the Constitution. Mr. Dhorde submits that the judgement of the Division Bench and that of the Apex Court in "*Sadashiv H. Patil*" (supra) are the direct authorities on the concerned provisions of the MLAMD Act and, therefore, they should be followed. So far as "*Sadashiv H. Patil*" (supra) is concerned, there was no issue involved regarding the nature of Rules 6, 7 and 8 of the MLAMD Rules directly and substantially involved in the said matter. I mean to say whether Rule 6(4) is directory or mandatory was not the issue directly involved and contested. As against this, the judgement of the Apex Court in "*Dr. Mahachandra Prasad Singh*" (supra) deals with *pari materia* provisions though the Rules were the inhouse Rules framed by the Chairman of the Bihar Legislative Council. That hardly makes any difference. One cannot be oblivious of the provision of the Rule 7(5) of the MLAMD Rules, Sub-rule (5) reads as follows :

(5) The procedure which shall be followed by the Commissioner, or, as the case may be, Collector, for determining any question and for the purpose of making a preliminary inquiry under Sub-rule (4) shall be the same as the procedure followed by the respective Committees of Privileges of both the Houses of the State Legislature.

In other words, the inhouse Procedure as provided under the Rules framed by the Legislative Assembly or by the Chairman of the House or the Speaker, as the case may be, are required to be adhered to during the enquiry since they are the *pari materia* provisions.

18. Mr. Dhorde would further submit that the use of non-obstinate clause in Section 10 of the MLAMD Act shows that overriding effect has been given to the provisions of the MLAMD Rules. He seeks to rely on *Shri Vishin N. Kanchandani and Another Vs. Vidya Lachmandas Khanchandani and Another*, . There is no duality of the opinion that the Rules will have overriding effect regardless of inconsistencies therewith contained in any other law for the time being in force. The question of overriding effect of the Rules is, however, not involved in the present matter. They are not required to be compared with any other Rules as

such so as to locate whether in view of inconsistency, Rule 6(4) has to be given overriding effect. The purposive interpretation of the Rules would make it amply clear that Rule 6(4) is of directory nature. It need not be reiterated that there are certain curable defects and some of the defects are incurable. The defective verification of the petition could be cured. It is simply a procedural defect. The lis in such a matter is between the competent authority viz. Collector or Commissioner, as the case may be, and the member against whom charge of disqualification is made through the Reference Petition. Therefore, the Collector or Commissioner may permit rectification of the curable defects. In this view of the matter, the Reference Petition should not have been dismissed by the Collector. This is more so when another amended petition alongwith affidavit and attested documents was also presented much before the impugned order has been rendered.

19. For the foregoing reasons, I have no hesitation in holding that the impugned order is quite unsustainable. Hence, the petition is allowed. The impugned order is quashed. The Reference Petition stands restored and the petitioner be allowed to rectify the procedural deficiencies viz. verification of the petition, filing of the affidavit and attested documents as sought. The Rule is made absolute accordingly. No costs.