

(2005) 07 BOM CK 0026

In the Bombay High Court

Case No : Writ Petition No. 3391 of 2005

Ramesh Gangadhar Korde

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 14-07-2005

Acts Referred:

Gujarat Panchayats Act, 1961 — Section 49(3)
Maharashtra Municipal Councils Nagar Panchayats and Industrial Township Act, 1965
— Section 16, 16(1), 2(7), 44, 45

Citation : (2006) 1 ALLMR 774 : (2006) 2 BomCR 157

Hon'ble Judges : Rebello F.I., J; Britto N.A., J

Bench : Division Bench

Advocate : Nitin Sambre, Sachin Sambre and Rahul Ghuge, P.L. Madholkar, for the Appellant; S.S. Ghate, for the Respondent

Judgement

Rebello F.I., J.—Rule. Heard forthwith.

2. The petitioner was elected as the President of the Municipal Council, Narkhed in District Nagpur in the elections held in January, 2002. He was opposed by one Ramesh Gupta, who was unsuccessful. The petitioner contends that he was being obstructed in the discharge of his functions by position members at the instance of Shri Gupta. In 1992 the Municipal Council, Narkhed had taken up development activities. After his election in January, 2002 he attended the meeting in the office of Deputy Director of Town Planning, Nagpur on 12th September, 2002 in order to take positive steps towards the completion of work undertaken in 1992. The Deputy Director of Town Planning, Nagpur instructed the petitioner to allow the procedure as mentioned in the minutes for completion of the work. A contract was signed and work was allotted to one M/s. Preetee Builder, Nagpur. It is the petitioner's case that he had no business connection nor was interested in the commercial transactions or work of any nature undertaken by the contractor M/s. Preetee Builder. The petitioner relies on a deed of partnership of the said contractor. It is the petitioner's case that with a view to get the works completed and to keep a watchful eye over the progress of the work a joint account was

opened bearing Account No. 59/1695 in the name of one of the contractor's partner Shri Nirmalkumar S. Athawale and himself in the capacity as the President of the Municipal Council, Narkhed so as to ensure proper and smooth execution of the project undertaken. The joint account was in the name of the President of the Municipal Council, Narkhed and not as partner or in his individual capacity. The account, it was contended, was opened with an intention to keep a watchful eye on the construction activities of the concerned firm so as to ensure the long prolonged work reaches finality. Various letters used to be addressed to the petitioner by the contractor seeking withdrawal of the amounts from the joint account to make payments towards the developmental activities which were relied upon.

It is the case of the petitioner that the nominated Councillor Dr. Amanuallah Kazi moved an application u/s 55-A of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965, hereinafter referred to as the Act, on the ground that the petitioner had incurred disqualification u/s 16(l)(i), 16(l)(h) read with Sections 44 and 45 of the Act and prayed for disqualification of the petitioner as President. The petitioner received notice of the application and was called upon to remain present on 6th November, 2003. The petitioner filed his written submissions indicating the factual position. It is the case of the petitioner that he approached this Court by Writ Petition No. 4904 of 2003 challenging the proceedings initiated against him. By an order dated 11th December, 2003 protection was given of 15 days, in case the matter goes against the petitioner.

3. The petitioner has also pleaded that he belongs to B.J.P., which is an opposition party in the legislative assembly in the State of Maharashtra. It is further the case of the petitioner that as such there was apparent political malice and bias. It may be mentioned that the order has been passed by the State Minister for Urban Development, who has not been joined as party considering the averments by the petitioner of malice and bias. In the notice issued it is set out that it was alleged that there was misconduct and disgraceful act on the part of the petitioner as an amount of Rs. 4,21,956/- has been paid to M/s. Preetee Builder, of which the petitioner was the partner. It was also mentioned that the necessary documents could be collected from the Collector, Nagpur and Chief Officer, Municipal Council, Narkhed and reply to the said show cause notice be made within 10 days.

The petitioner filed one more Writ Petition No. 2750 of 2004 seeking to set aside the show cause notice dated 27th May, 2004 so also the proceedings initiated, as according to him the issuance of the show cause notice and the direction to him to collect the documents from the office of the Collector and Chief Officer was arbitrary. The said petition came to be disposed by order dated 23rd September, 2004 with a direction that if an order adverse to the petitioner was passed that would not be acted upon for a period of 15 days. During the pendency of the proceedings the complainant A.R. Kazi expired on 12th January, 2005. It is the

petitioner's case that an order came to be passed on 1st June, 2005 in a predetermined manner and the petitioner has thereby been disqualified u/s 16(l)(j) of the Act also for a period of six years from the date of the order from holding the post of Councillor. It is the case of the petitioner that the respondent No. 5 convened a press conference and circulated the copies of the order dated 1st June, 2005 before the order was communicated to the petitioner. The fact that the order was in possession of respondent No. 5, it is set out, indicates the bias and mala fides as the order had not been served on the petitioner. It is the contention of the petitioner that the action done by him was in the interest of the Municipal Council and he had merely got the work completed which was pending for the last 7-8 years. The order, it is contended, is cryptic and the explanation offered by the petitioner has not been considered and hence the present petition.

4. At the hearing of the petition on behalf of the petitioner it is submitted that Section 16(l)(j) would not be applicable as there was no nexus between the joint account and the partnership as construed by the Honourable Minister. It is contended that opening of joint account by the petitioner in his capacity as President with a partner of the contractor's firm, cannot lead to an interference of partnership between the petitioner and the contractor. To consider that contention let us consider some of the provisions of the Act. Section 55-A of the Act reads as under :-

55-A. Removal of President and Vice-President by Government. - Without prejudice to the provisions of Sections 55-A and 55, a President or a Vice-President may be removed from office by the State Government for misconduct in the discharge of his duties, or for neglect or, incapacity to perform his duties or for being guilty of any disgraceful conduct, and the President or Vice-President so removed shall not be eligible for re-election or re-appointment as President or Vice-President, as the case may be during the remainder of the term of office of the Councillors.

Provided that, no such President or Vice-President shall be removed from office, unless he has been given a reasonable opportunity to furnish an explanation.

It would thus be clear from a reading of Section 55-A that there is no requirement of a formal complaint or complaint. All that is required is, that the President can be removed from the office for misconduct in the discharge of his duties or for neglect or incapacity to perform his duties or for being guilty of any disgraceful conduct if material comes in possession of the State Government, which prima facie discloses that Section 55-A is attracted.

We may now refer to the relevant provisions of Section 16. The relevant portion of Section 16 reads as under :

16. Disqualifications for becoming a Councillor. -

(1) No person shall be qualified to become a Councillor whether by election, or nomination, who -

...

...

...

(i) save as hereinafter provided, has directly or indirectly, by himself or his partner, any share or interest in any works done by order of a Council or in any contract with or under or by or on behalf of a Council.

The petitioner admittedly at the relevant time was the President and not an elected Councillor. However, Section 2(7) defines a Councillor to mean a person directly elected President and includes the nominated Councillor. In other words it is an inclusive definition which includes the President who is directly elected. By way of this inclusive definition provisions of Section 16 would be attracted in as much as for being directly elected as President, he must not suffer any of the disqualifications set out therein. Section 55-A becomes applicable if the President is elected and holds office and during his term of office if any of his acts amount to misconduct in the discharge of his duties or for being guilty of any disgraceful conduct. On consideration of the section of the Act and on a reading of the section we have no hesitation to hold that the provisions of Section 16 can be made into Section 55-A, meaning thereby that if the President incurs any of the disqualifications as set out u/s 16 in the course of his term as a President he is liable for removal u/s 55-A. The expression misconduct has not been defined under the Act nor the expression disgraceful conduct. We may now consider the expression misconduct as defined in Dictionaries and Law Lexicons as the expressions have not been defined under the Act, In the New International Webster's Comprehensive Dictionary, Encyclopedic Edition "misconduct" is defined as to behave improperly, to mismanage, improper conduct, bad behaviour. In the New Oxford American Dictionary, "misconduct" is defined to mean unacceptable or improper behaviour. In the Law Lexicon, P. Ramanatha Aiyar the term misconduct is described to imply a wrongful intention, and not a mere error of judgment. In Black's Law Dictionary, Eighth Edition, official misconduct means a public officer's corrupt violation of assigned duties by malfeasance, misfeasance, or nonfeasance. In so far as the expression "disgraceful" is concerned, the New Oxford American Dictionary explains it to mean shockingly unacceptable. In the New International Webster's Comprehensive Dictionary "disgraceful" is set out as characterized by or causing disgrace, shameful. In P. Ramanatha Aiyar's Law Lexicon "disgraceful conduct" is described as shameful behaviour. It is further set out that it need not be circumscribed to something done in the course of one's duty as member or office bearer. The term means any allegation which, because it is done by an elected member or office bearer is sufficiently apprehensible to be classified as disgraceful. It is in that context that we may consider the order passed against the petitioner and whether the material justified the passing of the order.

5. A perusal of the impugned order would disclose that several works were given

to M/ s. Preetee Builder, Nagpur. Out of that in respect of Reservation No. 54 a sum of Rs. 4,21,956/- was paid on 4th October, 2002 to the Contractor. Account being No. 59/1695 had been opened in the name of the petitioner and Nirmalkumar Shankarrao Athawale, who was a partner of the Contractor. There was another account No. 5/2627 of the firm where the sum of Rs. 4,21,956/- was deposited out of which a sum of Rs. 2,32,000/- from that account was diverted to Account No. 59/11695. The Authority acting u/s 55-A held that opening of a joint account by the petitioner with Nirmalkumar S. Athawale raises doubt regarding the duties performed by the President. The order notes that it was contended by the petitioner that Resolution was passed in the annual general meeting of the Municipal Council regarding opening of the joint account, A finding is recorded that no such evidence was produced. The Authority then held that considering the opening of the joint account with the partner of the Builder to whom the contract was awarded the petitioner incurred disqualification under the provisions of Section 16(1)(i) of the Act.

If may be mentioned that at the hearing of the petition on behalf of the petitioner the learned Counsel tried to submit that no submission was made on behalf of the petitioner before the Minister hearing the matter that a resolution was passed in the annual general body meeting regarding opening of the account and inspite of that the order so states. The learned Counsel was asked specifically as to whether he has in the petition raised such a plea considering the statement in the order. The learned Counsel on perusing the averments in the petition points out that such a contention has not been raised in the pleadings. Considering the order and in the absence of any pleadings it will not be possible for us to entertain the said contention that such a submission was not made.

6. The question, therefore, is whether the petitioner was entitled to be disqualified u/s 55-A of the Act for having opened an account with the partner of the contractor and depositing in the said account amounts received towards payments for the work done by the contractor for the Municipal Council from moneys received from the Council for work done under the contract. In his reply to the show cause notice the petitioner had set out that when he took over as the President the work was not completed. On enquiries into the matter reference was made to the Assistant Director of Town Planning who convened a meeting on 12th September, 2002. The Deputy Director of Town Planning observed that the said contractor would complete the construction within a period of 3 months provided an amount of Rs. 4.00 lakhs is paid to him out of the payment dues of Rs. 5,93,956/-. In compliance the Municipal Council issued a cheque for an amount of Rs. 4.21.956/- to the contractor in other words, the sum paid to the contractor was for the work already done under the contract. It is pointed out that certain Councillors had raised questions about amounts advanced to the contractor earlier and had sought enquiry. Opening of Account No. 59/1695 was admitted. The petitioner sought to explain that it was done, so that the amount which was paid to the contractor will be utilised by the

contractor for the purpose of construction of the complex only. It would thus be clear from these averments themselves that the amount of Rs. 4,21,956/- was issued to the contractor out of the sum of Rs. 5,93,956/- then due and payable to him for work done under the contract. The question, therefore, of the petitioner seeking to retain any control over the money due and payable to the contractor really would not arise. Assuming that it was so done, considering the material on record can it be accepted. The petitioner has also denied that the amount was withdrawn by the petitioner and utilised for his personal gain. In the resolution relied upon by the petitioner there is nothing to show that the Council had passed a resolution authorising the petitioner to open a joint account with the partner of the contractor. Any act of such a nature would require the authority of the Council. It would be difficult to presume and believe that the President of the Council will get the monies released first then open a joint account and then use the money. The easiest way would have been if the explanation why the account was opened is to be accepted was to release the money in instalments by the Council as and when the work was completed. The explanation is totally before of any rational explanation. It is in that context that we will have to examine whether that action amounts to misconduct in discharge of his duties or being guilty of any disgraceful conduct. As expressions have not been defined under the Act, therefore, the ordinary meaning assigned to them would have to be considered, including whether a reasonable man would consider the act complained of as amounting to misconduct or disgraceful conduct. Section 16(l)(ba) includes as a ground for disqualification, if a person is found guilty of misconduct in the discharge of his duties, or being guilty of any disgraceful conduct u/s 55-A. In that context from, the disqualifications as set out u/s 16(1), acts amounts to misconduct and/or disgraceful conduct, could be those disqualifications as set out in Sections 16(al) to (ac) and 16(1), 16(g) amongst others. The finding recorded by the respondent No. 1 and its English translation supplied does not either use the expression misconduct or disgraceful conduct. What the respondent No. 1 has however held is that by opening a joint account in the bank with the partner of the builder, the petitioner has violated the provisions of Section 16(l)(j) of the Act. As noted earlier this finding would bring if within the meaning of the expression misconduct or disgraceful conduct. On behalf of the petitioner learned Counsel tried to submit that the money was withdrawn in terms of the instructions given by the contractor. The statement of account has been annexed to which the amount of Rs. 2,32,000/- was not deposited by cheque, but by cash as seen therein. Similarly, no amounts have been withdrawn by cheque. The entire amounts have been withdrawn by cash and on 17th January, 2003 the account shows nil. Most of the amounts have been withdrawn between the period 7th November, 2002 and 23rd December, 2002. It is not possible to accept the argument advanced on behalf of the petitioners that the account was opened for seeing that the work was expedited and completed. Even otherwise it is impossible to accept the petitioner's contention that the amount was retained for the purpose of completing the other incomplete work in which event the entire amount could have been transferred.

Instead of that only a part of the amount was transferred. No explanation has been given for that. Also as noted earlier the most simple thing to have control over the money so that the incomplete work was completed was to release the moneys as and when part of the incomplete work was completed or at various stage of completion. A reasonable person considering these aspects of the matter can only draw a reasonable inference that the money deposited was not for the purpose as contended but for purposes other than that. This is more so, as nothing has been brought on record that the firm authorised its partner to open the account and considering that the only sum only Rs. 2.00 lakhs out of over Rs. 4.00 lakhs was transferred to the joint account and in the normal course the moneys ought to have been transferred by cheque to the account which has been opened and not by cash. This surely will be improper behaviour or unacceptable conduct on the part of the petitioner.

7. The expression used in Section 16(l)(j) is, has directly or indirectly by himself or his partner any share or interest in any work done by order of a Council or in any contract with or under or by or on behalf of a Council. Moneys were received based on a contract with the Council. The moneys transferred into the account standing in the name of the petitioner and a partner of the contractor were admittedly moneys received by the contractor from out of the contract. It is only that money which was transferred into the joint account of the petitioner and one of the partners. The petitioner had a control over that money. This is, therefore, a presumption that the money was transferred and withdrawn by cash at least partly for the benefit of the petitioner, out of the money paid under the contract to the contractor by the Council. This presumption could have been rebutted by the petitioner. The only explanation given has been rejected. In our opinion the tests required u/s 16(l)(j) of the Act have been satisfied and as such Section 55-A would be attracted.

On behalf of the respondents and interveners learned Council has drawn our attention to a judgment of the learned Judge of this Court in Smt. Indumati Laxman Bhakare v. State of Maharashtra and Ors. 2004(4) All.M.R. 89. The issue therein was different. The husband of the elected candidate had been awarded various contracts by the Municipal Council. A finding was recorded that on the date the nomination was filed there was a contract subsisting. The learned Judge further held that the disqualification arises not only where the contract is subsisting, but where any share or interest in any work done by order of a Municipal Council. The petitioner, however, had control over the moneys deposited in the joint account of himself and the contractor. It can, therefore, be reasonably said that he had interest in the contract as the money could not be withdrawn without his authorisation and this did not have the sanction of the Council. We are clearly, therefore, of the opinion that the impugned order does not suffer from any illegality or that it. does not meet the tests as required u/s 55-A of the Act.

8. Even otherwise the expression "misconduct" or disgraceful conduct in Section

55-A of the Act need not be controlled by Section 16 of the Act. It can include other acts or conduct not included in Section 16 but have a bearing on the functioning, duties and powers, of the President whilst in office. Any act which would reasonably indicate that the President benefited from a contract given or an ongoing contract, would amount to an act falling within the expression misconduct or disgraceful conduct as also acts amounting to improper behaviour or unacceptable conduct. As explained earlier it is not possible to accept the petitioner's contention on the face of the material on record that the joint account was opened to ensure that the work was completed. The only reasonable inference which a reasonable man can draw is that the petitioner benefited from the opening of the joint account with a partner of the contractor. Our attention was invited to a judgment of a learned Single Judge of Gujarat High Court in *Anishbhai Ishabhai Patel Vs. State of Gujarat and Others*, . The issue arose out of a proceeding u/s 49(3) of the Gujarat Panchayats Act. The section conferred powers for the removal of officers as set out therein if they had been guilty of misconduct in the discharge of his duties or if he has been guilty of any disgraceful conduct. It is that context that the learned Judge was considering the expression misconduct and disgraceful conduct. The learned Judge observed that a person, knowing what he is doing, also being conversant with the consequences, it does something which is wrong, bad, illegal or causing loss or damages, his conduct obviously would tantamount to misconduct. Misconduct, therefore, has to be in the discharge of the duties. Disgraceful conduct in the context of that Act the Court held need not be necessarily in the discharge of duties. The learned Judge held that disgraceful conduct considering the section would mean any allegation, which, because it is done by an elected member or office bearer, is sufficiently reprehensible to be classified as disgraceful. We find in the instant case that the petitioner while holding the office of President got an account opened with himself and a partner of the contractor. He was fully aware that he was not authorised to open such an account. The amount transferred into that account was moneys not belonging to the petitioner and to the other partner who was joint account holder, but money which the partnership was entitled to and which it had received for work done out of which a part amount was transferred from the account of the partnership to the joint account of the petitioner and the partner of the petitioner. The moneys, therefore, deposited was under the control amongst others of the petitioner. Money was not transferred by cheque, but by cash as can be seen from the documents placed on record before this Court. The explanation given by the petitioner as to why the account is opened, as we have set out earlier, is not an explanation a reasonable person would accept. Under these circumstances it is reasonable to infer that the moneys were for the benefit and use amongst others of the petitioner. The act of the petitioner, holding the high office of President without the consent of the Council or other State Authorities opening a joint account and having control over the joint account over which the Council had no right in our opinion would amount to misconduct and if not a misconduct to disgraceful conduct.

9. For the aforesaid reasons rule is discharged. In the circumstances of the case there shall be no order as to costs.

10. At this stage learned Counsel for the petitioner seeks stay of the above order for a period of six weeks. Considering the facts and circumstances the impugned order is partly stayed to the extent that the disqualification will not be effective for a period of six weeks from today. However, during this period the petitioner would not be entitled to vote in any meetings of the Council or its Committees and deal with any financial matters except in the ordinary course of business. No major contracts or works will be awarded to contractors by the petitioners during the said period.