

(2003) 09 BOM CK 0053

In the Bombay High Court

Case No : Writ Petition No. 3179 of 2003

Sajjan Narayanrao Salunke

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 04-09-2003

Acts Referred:

Maharashtra Municipal Councils Nagar Panchayats and Industrial Township Act, 1965
— Section 44(1)
Penal Code, 1860 (IPC) — Section 307

Citation : (2004) 1 ALLMR 893 : (2004) 2 BomCR 713 : (2004) 1 MhLj 43

Hon'ble Judges : A.P. Deshpande, J

Bench : Single Bench

Advocate : V.D. Salunke, for the Appellant; S.K. Kadam, AGP for Respondent Nos. 1 and 2, P.M. Shah, for K.J. Ghute Patil, for Respondent No. 3, S.T. Shelke and B.R. Sontakke Patil, for the Respondent

Final Decision : Allowed

Judgement

A.P. Deshpande, J.—Heard. Application for intervention is allowed. Rule made returnable forthwith. By consent of parties, taken up for final hearing.

2. The elections of the Municipal Council, Tuljapur were held in December 2001 and the petitioner came to be elected as Councillor from a seat reserved for O.B.C. A crime came to be registered against the petitioner at Police Station Tuljapur bearing No. 16/2002 on 18-2-2002 for the offence punishable u/s 307 of the Indian Penal Code. After registration of the crime on 18-2-2002, the petitioner came to be arrested on 22nd February, 2002. From 22-2-2002 till 24-2-2002, the petitioner was in police custody and from 24-2-2002 to 10-10-2002 the petitioner was detained in magisterial custody. The petitioner came to be released on bail on 10-10-2002. As the petitioner was in jail from 24-2-2002 to 10-10-2002, he could not and he did not attend any meeting of the municipal council. It is the case of the petitioner that because of the fact that he was in jail, no notice was sent to him by the Municipal Council intimating the

date of the meetings and he did not receive any notice. The petitioner claims that he learnt that there is a meeting to be held on 4-7-2002 and as such, well in time, he had moved the Judicial Magistrate First class seeking permission to attend the meeting and claimed his release on that ground. The said application was rejected on 17-2-2002 by the Judicial Magistrate and as a result thereof, the petitioner could not attend the meeting. The relevant fact is that the petitioner came to be arrested on 22-2-2002 and till his release on bail on 10-10-2002, he did not attend any meeting of the Council. As a result of the said absence of the petitioner from attending the meeting, a show cause notice came to be issued by the Collector to the petitioner purportedly u/s 44(1)(d) of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965. Section 44(1)(d) reads thus:--

"A councillor shall be disqualified to hold office as such, if at any time, during his term of office, he (a) to (c)...

(d) absents himself during six successive months from the meetings of the Council, except with the leave of absence granted by the Council by a resolution on his written application for such leave."

3. After receipt of the show cause notice, the petitioner submitted his explanation/reply to the show cause notice dated 8-10-2002 on 24-10-2002. Not being satisfied with the explanation, the Collector proceeded to pass the impugned order on 23-5-2003 disqualifying the petitioner from being the member of the council in exercise of powers u/s 44(1)(d) of the Act.

4. Relying on the phraseology used in Section 44(1)(d), Shri Salunke, the learned counsel for the petitioner has contended that the phrase "absents himself occurring in Section 44(1)(d) connotes a voluntary absence and not a forced absence. He submits that the phrase "absents himself" cannot be equated with the phrase "remains absent". The learned counsel has placed reliance on the Division Bench judgment of the Bombay High Court reported in Bhaskar Atmaram Joshi Vs. State of Maharashtra and Others, . The Division Bench was called upon to interpret the same phrase viz. "absents himself appearing in Section 36 of the City of Nagpur Corporation Act. The provision contained in Section 36 is pari materia with the provision contained in Section 44(1)(d) of the Municipal Councils Act. The provision that fell for consideration of the Division Bench reads thus :--

"Any member of the Standing Committee, who absents himself from a meeting of the standing committee during the two consecutive months, shall cease to be a member of the Standing Committee and his office as such member shall be vacant and he shall not be eligible for re-election to the committee during the unexpired term of the Corporation."

5. The petitioner in the above referred judgment was elected councillor who was thereafter elected as member of the Standing Committee. Because of his detention under the Maintenance of Internal Security Act, he was detained in

judicial custody and as such, could not and did not attend the meeting of the Standing Committee. As a result of remaining absent in the meeting of the Standing Committee, the petitioner therein was declared disqualified by the Commissioner and the said order was challenged before the Bombay High Court. The Division Bench while interpreting the phrase "absents himself" has observed in para 9 and 10 as under:--

(9) "It cannot be forgotten that Section 36 of the Act deals with the disqualification. Normally a Councillor is entitled to continue as a member of the Standing Committee for a term for which he is elected. The said term is cut short because of absence from the meetings. A further consequence of this absence is that he is not even eligible for re-election to the Standing Committee during the unexpired term of the Corporation. Therefore, the consequences of his absence are penal in nature. It is well settled that such a provision must be construed strictly. If the Legislature in its wisdom has used the phraseology, namely "absents himself and not "remained absent" or "was not present", then, in our opinion, a construction cannot be put on these words to mean that mere absence of a member from the meetings should mean that he has absented himself from the meetings. The phraseology used clearly indicates that a Councillor should absent himself from the meetings in spite of the fact that he had an opportunity to attend the meetings. This contemplates that after due notice the Councillor was in a position to attend the meeting and has failed to attend the same because of his own conduct or volition. In our opinion unless it is shown that there was some sort of wilful act on the part of the Councillor or at least a culpable negligence in keeping himself away from the meeting could be attributed to him, it cannot be said that he has "absented himself from the meeting. In our opinion, the phrase "absented himself will normally come into play when a member is in a position to take some decision and either wilfully or due to his own conduct or negligence does not exercise his volition in favour of attending the meeting. As observed by the Nagpur High Court in Wamanrao v. Corporation of the City of Nagpur "Misc. Petn. No. 322 of 795.5 dt. 2-1-1956 (Nag.) (cited supra) the phraseology "absented himself cannot be equated with "remained absent" or "was not present". If the Legislature wanted that mere absence or non presence should amount to disqualification, then, it could have used such a phraseology. If the construction as put up by the learned counsel for the Municipal Commissioner is accepted, the word "himself will become redundant. According to the settled rules of interpretation, it must be presumed that every word used in the Act has been inserted by the Legislature with some purpose behind it. The Court cannot reduce statutory words to nothing or to surplusage. In any case as far as possible a construction rendering any part of the section redundant should be avoided, unless it leads to ambiguity or manifest injustice. Effect must be given to all the words used in the statutory provision, for Legislature is deemed not to waste its words or to say something in vain. As observed by the Supreme Court in Aswini Kumar Ghosh and Another Vs. Arabinda Bose and Another, "It is not a sound principle of construction to brush

aside words in a statute as being inapposite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the Statute."

(10) "Further it must be remembered that in dealing with a provision relating to disqualification, in a sense, we are dealing with a penal provision. In these circumstances, it would not be proper to extend the-scope of the provision by reading into the words something which is not there or by treating a word redundant and thereby widen the scope of the provision. It is also equally well settled that for ascertaining the meaning of a section it is not permissible to omit any part of it. The section must be read as a whole and together. If, therefore, the words used, namely -"absents himself are read together, then, it is obvious that mere absence from the meetings is not enough, but it should be further shown that a Councillor has remained absent from the meetings though it was humanly possible for him to attend the meetings."

While concluding the judgment the Division Bench has observed in Para 11 as under :

"From the record it is quite clear that no notice of the meeting was received by the petitioner personally, nor he had a knowledge of the meetings. Assuming that he had a knowledge of the meetings and the notices were served upon him, he was prevented from attending the meetings because of his detention under the MISA. The absence from the meetings was not the result of his own conduct, but he was prevented from attending the meetings for the reasons beyond his control. If this is so, in our opinion, it cannot be said that the petitioner had "absented himself from all the meetings of the Standing Committee during two consecutive months."

6. The learned counsel appearing for the petitioner advances his submissions further, seeking support from a Latin Maxim "Lex non cogit ad impossibilia".

It is contended that the petitioner could not attend the meeting though he was very much ready, willing and desirous of attending the same, for the reason beyond the control of the petitioner, viz. he being detained in jail. To expect someone who is detained in jail to attend the meeting will amount to expecting a person to perform an impossible act. It is then submitted that the relevant section has to be construed strictly for two reasons:

- (1) That a person cannot be expected to perform an impossible act and
- (2) As the section deals with disqualification, the same is penal provision.

Reliance is placed on a Division Bench judgment reported in 1996(2) M.L.J. 627 "Rajkumarsingh s/o Dr. K.B. Singh v. Amravati University, Amravati and Anr." in which Clause 16 of Ordinance No. 55 of the Amravati University fell for interpretation of the Division Bench. It provided that an examinee, who has not passed or fail to present himself at the examination in the four consecutive examinations inclusive of the first, shall not be allowed to prosecute his studies

for the 1st M.B.B.S. Course provided that a person may be permitted to take examination after the said examination, if he produces a certificate from the Dean/Members of the Medical College to the effect that he was under treatment of the Physician or surgeon in the College Hospital and as such was not in a position to present himself for an examination. In the facts of the said case, the petitioner candidate could not present himself at the examination as he did not have requisite attendance. In the said context, the Court observed thus :--

"It is well settled principle of law that the law does not compel a man to do that which he cannot possibly do and the said principle is well expressed in legal maxim. "Lex non cogit ad impossibilia", is squarely attracted to the facts and circumstances in the present case. The unforeseen circumstances beyond the control of a student, if resulted in non-appearance in the examination, such circumstances cannot be construed to mean that he failed to present himself at the examination. In this view of the matter, the examination of winter 1993, summer 1994 and winter 1994 in which according to the respondent No. 1, the petitioner did not present himself at the examination, cannot be considered against the petitioner and it cannot be held that he did not pass or failed to present himself at the examination in the four consecutive examinations inclusive of the first."

7. Reverting back to the observations made by the Division Bench in Bhaskar Atmaram Joshi Vs. State of Maharashtra and Others, to the effect that the provision in regard to disqualification is a penal provision, the same has to be strictly construed. If the legislator has, in its wisdom used the phraseology "absents himself and not "remained absent" or "was not present", then the construction cannot be put on these words to mean that mere absence of a member from the meeting should mean that he has absented himself from the meeting. The phraseology used clearly indicates that a councillor should absent himself from the meeting in spite of the fact that he had an opportunity to attend the meeting.

8. Per contra, the learned senior counsel, Shri Shah has pointed out that the law laid down by the Division Bench in Bhaskar Atmaram Joshi Vs. State of Maharashtra and Others, has no application to the scheme contained in Section 44(1)(d) of the Municipal Councils Act. He submits that the language used in Section 36 of the City of Nagpur Corporation Act and the language used in Sub-section (d) of Section 44, is entirely different. Sub-section (d) provides for an exception, which is absent in Section 36 of the City of Nagpur Corporation Act.

9. The learned counsel has submitted that reading of Sub-section (d) of Section 44 reveals that it postulates only two types of cases :

(1) absence with leave of the council and (2) absence without leave of the council.

The thrust of Section 44 (d) is on "leave of the Council" and not on absence or the nature of the absence.

By laying emphasis on the word "except" used in the said section, it is contended that a councillor shall be disqualified to hold the office if he remains absent during six consecutive months from the meetings of the council, except with the leave of absence granted by the council. It is submitted that the only exception which can save a person from incurring a disqualification, because of absence, is grant of leave by the council. In other words, all types of absence, be it voluntary or forced, is subject to the exception i.e. leave of absence either granted or not granted by the council. It is difficult to agree to the said submission for the reason that the same will result in doing violence to the language of the section. In the first place, the said construction would render the word "himself appearing in the phrase "absents himself redundant and in the second place, the focus of the provision would not be the "absence" but "leave".

Plain reading of the section reveals that it intends to tackle the "mischief of absence and not of obtaining of leave of the Council, by adherence to discipline.

In my opinion, the exception which provides for obtaining of a leave of absence from the council would apply to only those cases of absence, which absence is not for the reasons beyond the control of the person concerned. The exception is only to operate viz-a-viz the main provision and if the main provision is strictly and narrowly construed taking into its fold all types of absence, except forced absence, then the exception in regard to leave will only apply to the cases covered by the main provision and thereby, all types of cases of forced absence would stand excluded. The question of grant of leave by the Council would be relevant only when the absence is not for reasons beyond the control of the Councillor.

10. In the result, I am persuaded to take the same view as is taken by the Division Bench in the Bhaskar Atmaram Joshi Vs. State of Maharashtra and Others, while interpreting the phrase "absents himself appearing in Section 44(1) (d). If this be the position, then obviously absence of the petitioner in the instant case being for reasons beyond his control, he would not fall within the purview of the phrase "absents himself used in Section 44(1)(d), and if that be so, the petitioner does not incur any disqualification. As I am of the view that as the absence of the petitioner was for reasons beyond his control, he does not incur a disqualification u/s 44(1)(d) and hence, the impugned order passed by the Collector, disqualifying the petitioner dated 23-5-2003, deserves to be quashed and set aside.

11. Before I part with the judgment, it is necessary to state that the instant petition is filed during the pendency of the appeal preferred by the petitioner before the State Government, as the State Govt. had not decided the stay application and the Collector had proceeded with the process of election, with a view to fill in the post, which was declared vacant as a result of disqualification of the petitioner. This Court being of the view that the petition is prima facie covered by the Judgment reported in Bhaskar Atmaram Joshi Vs. State of Maharashtra and Others, , by order dt. 12th August, 2003, granted interim relief

in the nature of stay to the order passed by the Collector. As a result of grant of interim relief, the process of election was suspended. Shri Shelke, the learned counsel for the Election Commission states that during the pendency of the petition, the State Govt. has dismissed the appeal filed by the petitioner by order dated 12-8-2003. The said order is also challenged by amending the petition. Parties were put on notice that the matter will be heard and finally decided at admission stage, and accordingly the petition is disposed of by this judgment.

12. Hence, I pass the following order :

"The writ petition is allowed, the order dated 23-5-2003 passed by the Collector, Osmanabad in file No. 2002/GB-DESK-1/MUN/WS/2010 is quashed and set aside. The judgment and order dt. 12-8-2003 passed by the learned State Minister for Urban Development in appeal No. MUN/4203/549/PK-72/2003/NV-15 is quashed and set aside."

13. Rule made absolute in above terms, with no orders as to costs.