

(2004) 11 BOM CK 0041

In the Bombay High Court

Case No : Writ Petition No. 6952 of 2004

Sunil Shirang Phad

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 25-11-2004

Acts Referred:

Maharashtra Municipal Councils Nagar Panchayats and Industrial Township Act, 1965
— Section 22, 325, 325(1), 44, 44(1)
Penal Code, 1860 (IPC) — Section 302

Citation : (2005) 4 BomCR 442

Hon'ble Judges : Naik A.B., J; Joshi A.H., J

Bench : Division Bench

Advocate : R.B. Raghuwanshi, instructed by P.D. Bachate, for the Appellant; E.P. Sawant, G.P. for respondents 1 to 3, for the Respondent

Judgement

Naik A.B., J.—Heard Shri Raghuwanshi, Advocate instructed by Shri Bachate, Advocate for petitioner and Shri E.P. Sawant, Government Pleader for respondents 1, 2 and 3. Respondent No. 4 is the State Election Commission.

Shri Kendre, Residence Deputy Collector, Beed is present in this Court. His presence is recorded. He has produced record of the proceedings before this Court.

2. Rule. Shri Sawant, learned Government Pleader waives service of notice to respondents 1 to 3. As notice to respondent No. 4 is concerned, he is not necessary party, as in this petition the main challenge is to the order passed by the Collector u/s 44 of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 (hereinafter referred to as the Act).

3. By consent of the parties, we take rule for final hearing forthwith.

4. By this petition, petitioner has challenged the order passed by Collector, Beed on 20th July, 2004 disqualifying him from the post of Councillor of Municipal Council, Parli Vaijnath. The said order is passed by the Collector u/s 44 of the Act.

5. The few facts emerging from the record are to be noted as under :

That the petitioner came to be elected as the member of the Municipal Council, Parli Vajinath from Ward No. 8 in general elections held in the year 2001. When the petitioner was holding the post of Councillor, he could not attend the meetings of the Council and in view of his absence, the Vice President Smt. N.N. Rode of the Municipal Council submitted an application on 5th January, 2004 bringing to the notice of the Collector that the petitioner has incurred disqualification as he remained continuously absent from the meetings of the Council for more than six months. He did not attend general body meetings continuously from 20th November, 2002. On receipt of this complaint, the Collector took up the matter for consideration, the Collector send notice to the petitioner at his residential address at Parli Vajinath. The notice so issued could not be served personally on the petitioner as at the material time, petitioner was in jail in connection with some criminal case lodged against him. The said notice was received by father of the petitioner who in turn submitted an application to the Collector bringing to his notice the fact that the petitioner is in jail and he cannot remain present before the hearing by the Collector. Accordingly, the Collector proceeded to consider the application filed by Vice President on 5th January, 2004 and by impugned order the Collector disqualified the petitioner from holding the post of the Councillor of the Municipal Council till the remaining period of the Council. After this order was passed, it appears that on 1st October, 2004, the election commission has declared election programme publishing various dates of election to the said post which has become vacant on account of disqualification of the petitioner. These two actions are impugned in this petition.

6. It is not disputed before us that the petitioner at the material time was in jail, (even now he is in jail. This petition is filed by his father) on account of a complaint filed against him and he is in District Prison at Beed,

7. Shri R.B. Raghuwanshi, Advocate in support of the petitioner contended that the impugned order is passed by the Collector in utter violation of the principles of natural justice. The Collector even did not bother to follow the procedure as contemplated u/s 44(3) of the Act. Shri Raghuwanshi contended that the action of the Collector being per se illegal and therefore, the said order is bad in law and is in violation of all settled principles of law. He contended that the petitioner being a elected representative, he could not be removed or disqualified in such a arbitrary manner. He contended that before passing order as contemplated u/s 44(3) of the Act, a personal notice is required to be given to the concerned Councillor but in the present case, without serving any notice as contemplated the order is passed. Shri Raghuwanshi further contended that admittedly the petitioner could not attend the meetings of the Council as he was in jail, and for that purpose this may be a disqualification in terms of Section 44(1), but according to the learned Counsel it is not the end of the matter. He submitted that thereafter the procedure as contemplated u/s 44(2), (3) and (4) is to be followed and at this stage, the hearing is required to be given to the petitioner.

8. The learned Counsel contended that there may be a disqualification as contemplated u/s 44(1) and (2) of the Act that disqualification will not take place unless and until order as contemplated u/s 44(3) is passed. Shri Raghuwanshi submitted that the Collector has not passed any order declaring the vacancy as referred to in Section 44(3) of the Act. Unless and until such order is passed by the Collector, there cannot be any vacancy and therefore, without giving decision on the point of vacancy, declaration of election by election commission is thus without jurisdiction and bad in law. Shri Raghuwanshi in support of his contention relied on following judgments of this Court in the case of (1) Shamrao Krishnarao Kadu v. Nandkishore Ghanshyamdas Jaiswal and Ors., reported in 1973 Mh.L.J. 667 , (2) Bhaskar Atmaram Joshi Vs. State of Maharashtra and Others, and unreported judgment of the learned Single Judge of this Court in S.N. Salunke v. State of Maharashtra, in Writ Petition No. 3179/2003, decided on 4th September, 2003 reported in 2004(2) Bom.C.R. 713 . In addition to three judgments of this Court, Shri Raghuwanshi has also relied on the judgment of the Apex Court in the case of Tarlochan Dev Sharma Vs. State of Punjab and Others, . Shri Raghuwanshi therefore submitted that the order passed by Collector disqualifying petitioner is per say bad in law and requires to be set aside.

9. Per contra, Shri Sawant, Govt. Pleader placed preliminary objection regarding maintainability of this petition. Shri Sawant contended that the order passed by Collector can be challenged by the petitioner by filing appeal as provided u/s 44(4) of the Act. Apart from the preliminary objection, Shri Sawant contended that admittedly the petitioner is in jail and therefore, the notice could not be served and therefore, notice was served on his father by taking help of Section 325(1) (a) of the Act. Shri Sawant, therefore, contended that as the notice was issued as contemplated u/s 325 of the Act and that notice was served on the father of the petitioner who in turn submitted an application to the Collector on 15th June, 2004 bringing to the notice of the Collector that the petitioner is in jail in connection with an offence registered against him u/s 302 of I.P.C. and therefore, it would not be possible for the petitioner to attend the hearing of the case. Therefore, Shri Sawant contended that the order passed by Collector is in conformity of the provisions of the Act. When confronted with the fact that the Collector has not declared the vacancy as contemplated u/s 44(3) of the Act, Shri Sawant has fairly conceded that the Collector has not given such declaration. Shri Sawant produced before us the record maintained by the Collector for the perusal of the Court. Having perused the record, we are shocked and surprised to note that the Collector has kept the order of disqualification ready on 5th May, 2004. On 5th May, 2004 notice of hearing was issued to the petitioner and that notice was served on the father of the petitioner on 14th June, 2004 and pursuant to that notice as stated above, the father of the petitioner has filed application showing inability of the petitioner to attend the hearing. The original record as perused by us, we have no doubt in our mind that the order was kept ready on 5th May, 2004. We fall short of the words to condemn the action of the Collector. The Collector in his power to disqualify the

elected representative is passing such an order which shocks our conscience. Be it as it may, as we are of the view that the said order is passed in violation of not only principles of natural justice but also statutory provisions of law. In our judgment, the Collector has failed in his duty to act impartially. We may note at this stage what the Apex Court has stated in the judgment of Terlochan Singh about the role of the executives. The Apex Court has made following comment in para 15, which reads thus :

"In the system of Indian Democratic Governance as contemplated by the Constitution Senior Officers occupying key positions such as secretaries are not supposed to mortgage their own discretion, volition and decision making authority and be prepared to give way or being pushed back or pressed ahead at the behest of politicians for carrying out commands having no sanctity in law. The conduct rules of Central Government Services command the civil servants to maintain at all times absolute integrity and devotion to duty and do nothing which is unbecoming of a Government servant. No Government servant shall in the performance of his official duties, or in the exercise of power conferred on him, act otherwise than in his best judgment except when he is acting under the direction of his official superior. In *Anirudhsinhji Jadeja and another Vs. State of Gujarat*, , this Court has held that a statutory authority vested with jurisdiction must exercise it according to its own discretion; discretion exercised under the direction or instruction of some higher authority is failure to exercise discretion altogether. Observations of this Court in *The Purtabpore Co., Ltd. Vs. Cane Commissioner of Bihar and Others*, , are instructive and apposite. Executive Officers may in exercise of their statutory discretions take into account considerations of public policy and in some context policy of Minister or the Government as a whole when it is a relevant factor in weighing the policy but they are not absolved from their duty to exercise their personal judgment in individual cases unless explicit statutory provision has been made for instructions by a superior to bind them. As already stated we are not recording, for want of adequate material, any positive finding that the impugned order was passed at the behest of or dictated by someone else than its author. Yet we have no hesitation in holding that the impugned order betrays utter non-application of mind to the facts of the case and the relevant law. The manner in which the power u/s 22 has been exercised by the competent authority is suggestive of betrayal of the confidence which the State Government reposed in the Principal Secretary in conferring upon him the exercise of drastic power like removal of President of a Municipality u/s 22 of the Act. To say the least what has been done is not what is expected to be done by a Senior Official like the Principal Secretary of a wing of the State Government. We leave at that and say no more on this issue."

(underlined by us)

These observations will aptly apply to the case in hand. The Collector in the present case has acted in utter violation of principles of natural justice, ignoring

the statutory provisions and the duty and responsibilities placed on him by the Act. Without going into other contentions raised in this petition the order dated 20th July, 2004 is required to set aside. We, therefore, set aside the order dated 20th July, 2004 and hold that all further actions thereafter are bad in law and accordingly nullified.

10. It is always open for the Collector to reconsider the entire issue after following the procedure as contemplated in Section 44(3) of the Act and if advised to proceed to pass appropriate order.

11. Though Shri Sawant raised preliminary objection regarding maintainability of the petition, we are of the view that the order passed by Collector is without jurisdiction and in violation of principles of natural justice, the Collector has exercised his jurisdiction and abused the powers vested in him by law in passing such order, as we noted that draft order was kept ready even before he issued notice to the petitioner. Therefore, in our opinion, this petition cannot be thrown on the ground of availability of alternate remedy. We hold that on facts of this case, the petition is maintainable. With this observation, we make rule absolute. No order as to costs.

12. It is open for the Collector to take appropriate steps and consider whether the vacancy arose on account of disqualification of petitioner. As vacancy was not declared as required by law, the process of election was therefore, without any authority of law and hence the notification issued by election commission is also declared illegal.