

(2006) 09 BOM CK 0081

In the Bombay High Court

Case No : Writ Petition No. 3391 of 2006

Umabai Dangore

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 22-09-2006

Acts Referred:

Constitution of India, 1950 — Article 367
General Clauses Act, 1897 — Section 13
Goa, Daman and Diu Municipalities Act, 1968 — Section 2(9)
Maharashtra Municipal Councils Nagar Panchayats and Industrial Township Act, 1965
— Section 10A(4), 15(1), 16, 2, 2(49)

Citation : (2006) 6 ALLMR 796 : (2006) 6 MhLj 33

Hon'ble Judges : B.P. Dharmadhikari, J

Bench : Single Bench

Advocate : Rajeev Madkholkar, for the Appellant; Kothari, Assistant Government Pleader for Respondent Nos. 1 and 2, A.S. Chandurkar and V.R. Choudhari, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Dharmadhikari, J.—By this petition, the petitioner seeks relief of quashing and setting aside of the order dated 3-7-2006. passed by the respondent No. 1 Hon"ble Minister, holding that the President of Municipal Council, is not eligible to vote in election for the post of Vice President, and thereby cancelling the said election, which had taken place on 20-12-2005.

2. The case of petitioner is that, she has been elected as Vice President of Municipal Council, Umarkhed (respondent No. 4) on 20-12-2005. The petitioner and respondent No. 3 were the only contesting candidates for the post of Vice President and, that petitioner secured 11 votes, while the respondent No. 3 secured 10 votes. According to her, in view of the provisions of Section 2(7), 2(49) and Section 51A of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 (hereinafter referred to as "the Municipal Council Act" or "the Act", for short), the President of Municipal Council is entitled

to cast vote for said election of Vice President and view taken by the respondent No. 1, is therefore unsustainable.

3. Considering the controversy involved in the matter and by consent of parties, the matter is taken up for final disposal at the stage of admission itself. Advocate Madkholkar, has argued for the petitioner, while Advocate A. S. Chandurkar, has argued for respondent No. 3. Advocate V. R. Choudhari, represented the respondent No. 4 - Municipal Council and respondent No. 5 -President and learned Assistant Government Pleader Shri Kothari, appeared for respondent Nos. 1 and 2.

4. Advocate Madkhokar, while opening his arguments has stated that, the respondent No. 1 while allowing the appeal preferred by the respondent No. 3, has relied upon the Division Bench ruling of this Court reported at Baburao Narayan Bagade and Others Vs. State of Maharashtra and Others, He argues that this ruling has no application at all in the facts of the present case. He invites attention to the earlier judgment of this Court reported at 7976 Mh.L.J. 695 Shripatrao Mahadeorao Jadhav and Ors. v. Lonawala Municipal Council, which interprets the phrase "Councillors" as used in Section 2(7) and "total number of Councillors" as used in Section 2(49), and argues that the Division Bench judgment in case of Bagade (supra), as relied upon by the respondent No. 1 is not taking correct view of the matter. He argues that the said judgment is not at all relevant and applicable. He has also invited attention to the provisions of Section 10A(4) of the Municipal Council Act, to States that in exercise of those powers the State Election Commission has issued directions on 13-12-2001, and has clarified that as the elected President is Councillor, he is entitled to participate and vote in the meeting to elect nominated Members and Members of Sub-committees. He argues that even this communication is not considered by the Division Bench in case of Bagade. He further invites attention to Section 51A(2), to state that the statute has placed embargo upon the voting rights of Collector or other officers, while for holding meeting to elect Vice President, no such embargo is placed on the rights of President. He further invites attention to the provisions of Sub-section (4) and Sub-section (5) of Section 55, to state that even there, only nominated Councillors have been prohibited from voting on any resolution, relating to removal of President. According to him, therefore, the impugned order passed by the respondent No. 1 shows total non application of mind to various provisions mentioned above, and also the Division Bench judgment. He further states, if a restriction upon the right of President to vote in the meeting to elect Vice President, is read into the provisions of Section 51A, it would be supplying "casus omissus". He contends that this is not permissible and to substantiate his argument he relies upon the judgment reported at Keshav Shankar Ekbote Vs. State of Maharashtra and Others, and 2006 (1) All M.R. 774 Ramesh Gangadhar Korde v. State of Maharashtra. He has also relied upon paragraph Nos. 8 to 15 and 20 of the judgment reported at State of Jharkhand v. Govind Singh .

5. As against this, Advocate Chandurkar, appearing for respondent No. 3 has contended that perusal of Section 2(7) and 2(49) clearly shows that the words Elected Councillors, as used in Section 51 A, cannot include the President. He further states that the definition of Councillor itself is sufficient to show that in election of Vice President directly elected President cannot vote. According to him Act recognizes distinction between President and elected Councillor and President is not equivalent to elected Councillor. He also invites attention to the view taken by the Division Bench of this Court, reported at 1976 Mh.L.J. 695 (supra), to substantiate his arguments. He has further stated that Section 51A (1) of the Municipal Council Act, contemplates that the elected Councillor may from amongst themselves elect Vice President. He states that first President is elected u/s 51(4) of the Municipal Council Act and thereafter, elections of Vice President is conducted. He contends that the President therefore, is not equal to Vice President, and two posts are different and independent under the scheme of the Act. He has invited attention to various other provisions like Section 51A(3) and 57(3), (4) and (5) for this purpose. He further argues that 1976 Judgment (supra), is not at all relevant for- deciding the controversy. He invites attention to New Websters Dictionary to point out the meaning of "from amongst themselves" used in Section 51 A(1). He further states that support sought to be taken by Advocate Madkholkar, from 1970 Mh.L.J. 953 Bhaskar and Anr. v. S. G. Daithankar, is not proper because the interpretation of total number of Councillors as done by said Division Bench has been overruled by 1988 Mh.L.J. 378 Ashok Maniklal Harkut v. Collector, Amravati and Ors.

6. Learned Assistant Government Pleader Shri Kothari, has adopted the arguments of Advocate Chandurkar, and has supported the impugned order.

7. The question which therefore, arises for consideration before this Court is - Whether in a meeting of Municipal Council, held u/s 51A to elect Vice President, President of Municipal Council is entitled to vote?

Section 51 A reads as under:

51 A. (1) Every council shall have a Vice President, who shall be elected by the elected Councillors from amongst themselves in the first general meeting convened under Sub-section (9) of Section 51. (2) The meeting to elect the Vice President shall be presided over by the President and if there is no President then by the Collector or such officer as the Collector may nominate specially in this behalf, but the Collector or such other officer shall have no right to vote.

The words used in Section 51A, therefore show that Vice President is to be elected by elected Councillors from amongst themselves. If the President is treated as elected Councillors then he becomes eligible to participate in the process along with the elected Councillors. Section 2(7) which defines the phrase - Councillor, reads as under:

(7) "Councillor" means a person duly elected as a Member of the Council, Directly Elected President and includes the nominated Councillor, who shall not

have the right -

- (i) to vote at any meeting of the Council and Committees of the Council; and
- (ii) to get elected as a Chairperson of any of the Committees of the Council;

This definition therefore, itself shows that a person duly elected as Member of Council, a directly elected President and nominated Councillors are all treated as Councillors in it. The other definition which is relevant for this purpose is Section 2(49), which defines the phrase "Total number of Councillors", as "in relation to a Council, means the total number of the elected Councillors of that Council". Thus, this sub-section contemplates the total number of elected Councillors, only as total number of Councillors.

8. Perusal of Division Bench judgment of this Court reported at 2006 (1) B.C.R. 382 (supra), reveals that the question which fell for consideration before the Hon"ble Division Bench was whether, President is elected Councillor and he is required to be counted while considering total number of Councillors for the purpose of no confidence motion. Out of 32 Councillors, 24 Councillors voted in favour of passing of no confidence, but the Presiding Officer declared the motion as failed by holding that 3/4th majority would be 25. The Presiding Officer treated the President as elected Councillor and therefore, calculated 3/4th Members required for passing of such motion merely at 25. The case of petitioners was that the President could not have been treated as elected Councillor, while the case of respondent before the High Court was that the President is elected Councillor. The provisions of Section 55(1), which contemplates removal of President by Councillors if motion of no confidence is passed by majority of not less than 3/4th of total number of Councillors. The phrase - total number of Councillor, used in Section 55(1), is defined u/s 2(49) and as already stated above, it means total number of elected Councillors of that council. The Division Bench has found that on plain reading of Section 2(7) read with Section 2(49) and Section 55(1), it is clear that only those Councillor can participate in the meeting who are elected Councillors and not the President, and hence while considering total number of elected Councillor, it was not open to include President for computing required 3/4th strength for passing the motion of no confidence. In paragraph No. 4 the Division Bench has noticed that, Section 9 and Section 51 of the Municipal Council Act, shows that the Act recognizes distinction between elected Councillors and President. It has thereafter-considered provisions-of Section 16, together with definition of Councillors as given in Section 2(7) and found that for the purpose of Section 16, expression Councillor would include President. It is observed that, Section 2(7) is an extended definition for the purposes which are set out under the Municipal Council Act. It is also observed that in other sections, two expressions "Elected Councillors" and "President" are used independently, so as not to confuse the President with elected Councillor. It is observed that Section 2(7) of the Municipal Council Act. gives only extended meaning to include not only elected Councillors, but also President and nominated Councillor who otherwise do not fall within that

expression whenever the context so requires. It is therefore, observed that the expression "total number of Councillors" as contained in Section 55 will have to be given its due meaning as set out in Section 2(49) of the Municipal Council Act. It is concluded that the terminology used differently in different sections makes it clear that the President is different from elected Councillors. The Division Bench has resorted to contextual interpretation.

9. Mr. Madkholkar, learned Counsel appearing for petitioners tried to contend that the judgment reported at 1970 Mh.L.J. 953 (supra), which considers scope of phrase "total number of Councillor" has not been considered in the case of Bagade (supra). This Division Bench judgment interprets the phrase total number of Councillors in the light of its later part i.e.. in relation to the council it has been held that the said phrase means total number of Councillors who have filled in all the elected seats and all the co-opted seats, and also the nominated Councillors in respect of such seats which are required to be filled in by nomination. It has been held that, the meaning sought to be given by contesting respondent to it namely, actual occupants of the elected and co-opted seats or nominated seats, would defeat the purpose of using the words in relation to council. It is apparent that the controversy considered is in entirely different background and the judgment is therefore not relevant for deciding the controversy being considered by me or being considered by the Division Bench in Bagade's case (supra). The fact that the Full Bench of this Court has in 1988 Mh.L.J. 378 (supra), not agreed with the interpretation is, hence, not of much significance.

10. 1976 Mh.L.J. 695 (supra), has been cited by the learned Counsel for petitioner. However, again the said judgment is not relevant, because the controversy there was - whether the President can take part in election of Members of standing committee. The provisions in Clause (c) of Section 66, clearly show that other Members of standing committee were to be elected by the Councillors and by virtue of Section 2(7) President is also deemed Councillor. Perusal of paragraph No. 8 of this Division Bench judgment shows a finding that, though the President is not an elected Councillor in its strict sense he is directly elected by entire electorate, he is deemed to be Councillor in view of Section 2(7) of the Municipal Council Act. Again, here the interpretation is in the context of other provisions.

11. 1976 Judgment, in the case of Shripatrao (supra), and 1970 Judgment in the case of Bhaskar (supra), both show that the Division Bench has construed the provisions which fell for consideration before them, noting that the context in a given situation did not indicate to the contrary. Perusal of para No. 8 of Shripatrao's Judgment clearly reveals this. Even in case of judgment of Bhaskar, perusal of paragraph No. 13, shows the same effort undertaken by the Hon'ble Division Bench. The judgment in the case of Bagade (supra), as already mentioned above, and as it is apparent from it reveals the same effort.

12. In fact there should be no dispute that in the scheme of the Act, the

President and Vice President are distinct and separate. There can also be no dispute that President and Elected Councillors are distinct. The President is directly elected u/s 15(1) by all voters in Municipalities. u/s 51(1) a Councillor is elected from wards and municipal area is therefore divided into wards and voters residing in that ward elect him as a Councillor. In paragraph No. 8 of the judgment in case of Shripatrao (supra), the Division Bench has found that Section 9 of the Act, emphasizes separate and distinct identity of President and Elected Councillors. Perusal of paragraph No. 4 of the judgment of Division Bench in case of Bagade (supra) again shows the same conclusion.

13. Section 2 of the Municipal Council Act begins with the following words "In this Act, unless the context otherwise requires." It is therefore clear that all definition in the Act are subject to context. If otherwise required, said requirement of context has to prevail over the meaning given in the definition clause.

14. In Arolkar Ghanshyam Govind Vs. Chandrakant Tukaram Korgaonkar and others, the question which falls for consideration is whether the co-opted Councillor can nominate another Councillor for being elected to the office of the Vice President. In Section 2(9) of the Goa, Daman and Diu Municipalities Act, 1968 Councillor has been defined to mean - a person who is duly elected or co-opted or nominated as Member of council. Rule 3 of the Goa, Daman and Diu Municipalities (President and Vice-President Elections) Rules, 1969 permits a Councillor to nominate another Councillor for election by delivering to the said Officer a nomination paper completed in Form-I, signed by himself as proposer. The petitioner before High Court was elected Councillor and his name was proposed for office of Vice President, to be elected at that meeting by nomination made by one co-opted Councillor of said council. As the nomination paper was rejected on the ground that the co-opted Councillor had no right to vote at the motion, and therefore no right to propose and nominate the petitioner as a candidate for election of Vice President. It is in this background, that the Division Bench found that the definition clause itself clarified that it was subject to context and meaning would change if context otherwise required. In paragraph No. 10 of the judgment the Division Bench has considered the provisions of Section 52, Section 56 and found that, those who do not have right to vote shall have no right to nominate and it also found that, therefore the co-opted Councillor is not allowed to file nomination proposing a candidate for the election.

15. In K.V. Muthu Vs. Angamuthu Ammal, , the Hon"ble Apex Court has found that the definition of phrase "Members of his family" was preceded by words "unless the context otherwise requires", and in paragraph No. 12 it is observed that, the said definition set out in the section is to be applied and given effect to, but this Rule which is normal rule may be deviated, if there is something in context to show that the definition could not be applied. This judgment of Hon"ble Apex Court is followed by Full Bench of Delhi High Court in the judgment reported at Bajaj Departmental Stores, D. Bhowmick and Others, Ms. Devender Kaur and Others and D.S. Marketing Private Limited Vs. M.C.D. and Others, and

its para No. 25, is important.

16. In *M.T. Khan and Others Vs. Government of Andhra Pradesh and Others*, , the Hon"ble Apex Court in paragraph No. 10 has found that the constitutional scheme is that, when a constitutional post is required to be filled up by a person having the qualification specified therefor, he would alone perform the duties and functions, be it constitutional or statutory, attached to the said office. The constitution does not envisage that such functions be performed by more than one person. In paragraph No. 12, the Hon"ble Apex Court has found that the decision of High Court proceeded on the basis that having regard to provisions of Section 13 of the General Clauses Act, and Article 367 of the Constitution of India a singular would include a plural. The Apex Court observed that the High Court while adopting the said view committed an error insofar as it failed to take into consideration the crucial words occurring in Article 367 of the Constitution of India viz., "unless the context otherwise requires".

17. In *Ramesh Mehta Vs. Sanwal Chand Singhvi and Others*, , question was whether the expression "whole number" or "total number" is to mean "total number of elected Members" in view of the 74th Constitutional amendment. In paragraph No. 11, the Hon"ble Apex Court, has noticed that Section 3(36) of Rajasthan Municipalities Act, defined these expressions to mean total number of Members, holding the office at the given time. The said expression "whole number of Members" find place in Rules and the Apex Court found that therefore. Rules were to be read in the context of provisions of the said Act. The Apex Court further found that the basic scheme of the Act prior to 1994 and post 1994 Amendment remained unchanged. It also found that Section 3 begins with words "unless context otherwise requires". Though the amendment were carried out in the Municipalities Act in the year 1994, Rules were not altered. All Members who were not elected Members under the un-amended provision were treated as elected Members. The Apex Court found that very fact that Constitution made a difference between elected Member and nominated Member, in the matter of election and removal of Chairman, suggested that, a new interpretation was called for.

18. It is therefore, clear that the word "elected Councillors" appearing in Section 51A, will also to be required to be interpreted with reference to context in which they are used. Perusal of Section 2(7) clearly shows that it includes a duly elected Member, a directly elected President and also nominated Councillor within its sweep. The sub-section therefore itself makes distinction between the person duly elected as Member of Council, person directly elected as President and nominated Councillor. Section 2(49) makes reference to elected Councillors. It is therefore, obvious that section, 2(49), contemplates only a small group or fraction from the entire category of Councillor as defined, in Section 2(7). The Division Bench in case of *Bagade*, has accordingly interpreted the phrase - total number, of Councillors. When Section 51A(1) is looked into, it again uses the word "elected Councillors" and therefore, it only contemplates person duly

elected as Member Councillor and by implication it does not therefore envisage directly elected President and nominated Councillor. It is to be further noticed that Vice President is to be elected by elected Councillors from amongst themselves. Therefore, one of elected Councillors can become Vice President. If President is tried to be included in the phrase "Councillors", by implication, it would mean that President will also be eligible to contest election of Vice President. It is to be noted that the President is a person who is directly elected by all voters in municipal council, and in the scheme of the Act, he cannot become Vice President. Vice President necessarily has to be first elected as Councillor from ward in municipal area. Thus, such inclusion of President in the phrase would defeat the very scheme of the Act itself. The President and Vice President are two different authorities and that difference needs to be maintained.

19. The petitioner has relied upon the communication of the State Election Commissioner dated 13-12-2001. However, the said communication does not make reference to Section 10-A(4) of the Municipal Council Act, at all. Even if it is presumed that it is issued with reference to that power, in view of the judgment of the Hon'ble Apex Court reported at A.C. Jose Vs. Sivan Pillai and Others, (paragraph No. 25); Kanhiya Lal Omar Vs. R.K. Trivedi and Others, and Union of India (UOI) Vs. Association for Democratic Reforms and Another, (paragraph No. 56). It is apparent that such communication cannot be read as amending the provisions of the Municipal Council Act. In any case the said letter only speaks of participation by directly elected President, while electing nominated Members or Members on Sub-Committees. It does not speak of any voting right of such President in election of Vice President, with which I am concerned. The parties have not addressed this Court about the validity or otherwise of the said communication dated 13-12-2001 and hence I do not find it necessary to comment more on it, in this judgment.

20. In view of this finding, it is apparent that the respondent No. 5 President, could not have cast vote in the election of Vice President. So far as the arguments of learned Counsel for petitioner about casus owissus, or its application, same are misconceived and are not relevant here. The order passed by the respondent No. 1 on 3rd July, 2006 is therefore proper and warrants no interference in writ jurisdiction. Writ Petition is thus dismissed, with no order as to costs.

21. At this stage Advocate Gupta, for petitioner states that interim orders granted by this Court on 17-7-2006, should be continued for a period of two weeks to enable the petitioner to take further appropriate steps in the matter. The request is opposed by Advocate Chandurkar, who appears for respondent No. 3. However, in view of the Division Bench judgment of this Court in the case of Baburao Bagade (supra), and the view taken, I am not inclined to grant the request of the learned Counsel for petitioner. Request rejected.