

SAMPADA YOGESH WAGHDHARE

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v.

THE STATE OF MAHARASHTRA & ORS.

(Civil Appeal No.4056 of 2019)

APRIL 22, 2019

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[ASHOK BHUSHAN AND K.M. JOSEPH, JJ.]

Maharashtra Municipal Council Nagar Panchayat and Industrial Township Act, 1965:

ss. 44(1)(e) – Disqualification under – For unauthorized construction by the spouse of the Municipal Councillor/President of the Council – Held: Disqualifying a Councillor i.e. a democratically elected representative is a serious matter and the case against such person must be strictly proved – However, s. 44(1)(e) requires reasonable interpretation – If ingredients of the provision are established it must be given full play – Illegal temporary constructions/structures made by the Councillor, spouse or dependent would fall within the mischief of s. 44(1)(e) resulting in disqualification of the Councillor.

s. 44(1)(e) – Nature of – Held: Section 44(1)(e) creates an independent liability – The provision is neither dependent on a criminal action preceding it, nor is the Court to be influenced by the fact that making an unauthorized construction will have penal consequences.

Dismissing the appeal, the Court

HELD:1.1 Section 44(1)(e) of Maharashtra Municipal Council Nagar Panchayat and Industrial Township Act, 1965 falls in three parts. The first limb of Section 44(1)(e) declares *inter alia* that if a Councillor has constructed or constructs by himself [which would also include a construction by a lady Councillor], it would invite the wrath of the provision and it suffices to disqualify the Councillor. This is no doubt subject to construction being illegal or unauthorized, that is, in violation of the provisions of Maharashtra Municipal Council Act or Maharashtra Regional or Town Planning Act or the rules or bye-laws made under the said

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- A **Act.** Further, in order to attract the first limb, it is sufficient if the spouse of the Councillor or the dependent carries out any illegal or unauthorized construction as aforesaid. In short, if the Councillor, his spouse or dependent carries out any illegal or unauthorized construction as aforesaid, it suffices to incur disqualification for the Councillor. The policy underlying Section 44(1)(e) is to ensure that the highest level of probity is maintained by the Councillor and nearest members of the Councillor's family. It does not require the Councillor knowing the fact of the construction being made by her spouse or dependent. [Paras 8 and 9][220-B-G]
 - C 1.2 The second limb of Section 44(1)(e) provides that if a Councillor had directly or indirectly been responsible for or helped in his capacity as such Councillor in carrying out such illegal or unauthorized construction, the Councillor becomes amenable for action under Section 44(1)(e). The second limb does not deal
 - D with the construction by the Councillor, spouse or dependent. But insofar as any such illegal or unauthorized construction is carried out resulting in the Councillor being disqualified is concerned, the direct or indirect involvement of the Councillor or his help in the matter has to be established. It has to be
 - E established that the Councillor has been directly or indirectly responsible or helped in his capacity as such Councillor in carrying out of illegal or unauthorized construction. [Para 10][220-G-H; 221-A-B]
- 1.3 The third limb of Section 44(1)(e) has the following effect:
- F If a Councillor by a written communication obstructed or tried to obstruct any competent authority from discharge of his official duty in demolishing any illegal or unauthorized construction, the Councillor would incur disqualification under Section 44(1)(e). The last limb would also be attracted if the Councillor has physically obstructed or tried to obstruct any competent authority from discharging its official duty in demolishing any illegal or unauthorized construction. [Para 10][221-B-D]
 - G 1.4 Thus the Legislature has apparently distinguished between illegal or unauthorized construction, illegal or unauthorized structure being constructed by the Councillor's
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spouse or by dependents as it was the legislative intention that the Councillor will not carry out any such construction and he would also be in a position to prevent construction either by his spouse or a person who is dependent on him. The fact that embargo is against the construction by the dependent and not any relative or person not dependent on him would also indicate that illegal construction by the spouse or dependent stand on a different footing from persons who may not be so closely related to the Councillor. [Para 10][221-D-E]

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1.5 The words “such illegal or unauthorized construction” occurring in the second limb of Section 44(1)(e) could be said to refer to the construction made by the Councillor, his spouse or the dependent, and in such a case, the words “directly or indirectly responsible for” and the words “or helped in his capacity as Councillor”, would have to be applied. Such an interpretation would produce unreasonable results. When the Councillor constructs by himself, the words “or has directly or indirectly responsible for”, “or helped in his capacity as such Councillor” does not bear any meaning. The plain meaning of the first limb of Section 44(1)(e) is that in the case of construction by the Councillor himself, which is illegal, it would result in disqualification being incurred. The requirement of the Councillor being directly or indirectly being responsible for or helping in carrying out such construction in the capacity of Councillor in the case of the spouse or dependent also is not the statutory requirement. Having regard to the close relationship between the spouse and the Councillor on the one hand and the dependent and the Councillor on the other hand, the words “carrying out such illegal or unauthorized construction” has reference to construction which violates the provisions of the Town Planning Act, the MRTP Act or the Rules and the Bye-laws framed under those provisions. [Para 11][221-F-H; 222-A-B]

1.6 It is true that disqualifying the Councillor, is a serious matter. Councillors of local bodies, after the 73rd amendment to the Constitution, are democratically elected representatives of the people at the grass root level. It is also true that in the case of an Election Petition, the case against the respondent must be

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- A strictly proved. However, Section 44(1)(e), which is ordained by the Legislature, requires reasonable interpretation, and if the ingredients are established, it must be given full play. [Para 12][222-C-D]

- 1.7 If temporary constructions are made it would also fall
- B within the mischief of Section 44(1)(e). In other words, if temporary construction or structure have been illegally made by the Councillor, spouse or dependent, disqualification follows. In fact, more than one temporary construction was actually made. The order of the Collector would show that as per the report of the Sub Divisional Officer, the constructions were carried out, and out of which, 5 were temporary and which were no doubt removed. [Paras 14 and 16][222-G; 223-F-G]

2. It is not correct that as unauthorized construction also brings in its wake criminal action, action under Section 44(1)(e) will not lie. Section 44(1)(e) creates an independent liability or rather creates disqualification as provided thereunder. This is *de hors* the criminal action. There is nothing brought to the notice of the Court to conclude that action under Section 44(1)(e) must be preceded by a criminal action and conviction thereunder. Section 44(1)(e), as it stands, is neither dependent on a criminal action preceding it nor is the court to be influenced by the fact that making an unauthorized construction will have penal consequences. [Para 15][222-H; 223-A-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4056 of 2019.

- F From the Judgment and Order dated 19.04.2018 of the High Court of Judicature at Bombay in Writ Petition No. 4647 of 2018.

Vinay Navare, Sr. Adv., Ms. Gwen Karthika, Ms. Abha R. Sharma, Advs. for the Appellant.

- G Kunal Cheema, Nishant Ramakantrao Katneshwarkar, Amol Chitale, Mrs. Pragya Baghel, Advs. for the Respondents.

The Judgment of the Court was delivered by

K. M. JOSEPH, J. 1. Leave granted.

- H 2. The appellant who was elected as a Municipal Councillor was later elected as President of the Council on 11.02.2015. On the ground

that the husband of the appellant had carried out unauthorized constructions, the appellant came to be disqualified under Section 44(1)(e) of the Maharashtra Municipal Council Nagar Panchayat and Industrial Township Act, 1965 (In short “Maharashtra Municipal Council Act”). Section 44(1)(e) reads as follows:

“[(e) has constructed or construct by himself, his spouse or his dependent, any illegal or unauthorised structure violating the provisions of this Act, or the Maharashtra Regional and Town Planning Act, 1966 or the rules or bye-laws framed under the said Acts; or has directly or indirectly been responsible for, or helped in his capacity as such Councillor in, carrying out such illegal or unauthorised construction or has by written communication or physically obstructed or tried to obstruct, any Competent Authority from discharging its official duty in demolishing any illegal or unauthorised structure:]”

3. The disqualification was done on the basis of application dated 26.09.2016 by the second respondent. Initially, the Collector by order dated 04.05.2017 found the appellant disqualified. The appeal carried by her was unsuccessful. She challenged the statutory orders in a writ petition before the High Court. The High Court by the impugned order dismissed the petition.

4. We heard the learned counsel for the parties.

5. Mr. Vinay Navare, learned senior counsel appearing for the appellant, pointed out that husband of the appellant, who allegedly carried out the unauthorized constructions, had deemed permission within the meaning of Section 45(5) of the Maharashtra Municipal Council Act. It is further contended that the Court may consider that carrying out illegal activity attracts penal provision and it is a grave matter and the impugned order could not be sustained. He further submitted that a perusal of Section 44(1)(e) would show that the appellant cannot be held responsible even if her spouse had put up illegal structures.

6. *Per contra*, the learned counsel for the respondents essentially contended that the court may proceed on the basis that the construction which has been carried out on the basis of the so-called deemed provision may not be sufficient to disqualify the appellant. However, they only contended that admittedly the appellant carried out the construction of temporary structure.

- A 7. Rebutting the contention of the respondents regarding her husband having carried out temporary constructions, it is submitted by appellant that the impugned orders did not bear out any specific consideration of the same. The matter relates to disqualification which requires greater care.
- B 8. The first contention which we would address is that merely proceeding on the basis that her husband put up the structures, it is not sufficient to attract Section 44(1)(e) of the Maharashtra Municipal Council Act. We are afraid that the contention of the appellant in this regard cannot be sustained. A perusal of Section 44(1)(e) would show that it falls in three parts.
- C 9. The first limb of Section 44(1)(e) declares *inter alia* that if a Councillor has constructed or constructs by himself [which would also include a construction by a lady Councillor], it would invite the wrath of the provision and it suffices to disqualify the Councillor. This is no doubt subject to construction being illegal or unauthorized, that is, in violation of the provisions of Maharashtra Municipal Council Act or Maharashtra Regional or Town Planning Act (In short ‘MRTP Act’) or the rules or bye-laws made under the said Act. Further, in order to attract the first limb, it is sufficient if the spouse of the Councillor or the dependent carries out any illegal or unauthorized construction as aforesaid. In short,
- D if the Councillor, his spouse or dependent carries out any illegal or unauthorized construction as aforesaid, it suffices to incur disqualification for the Councillor. We have to take Section 44(1)(e) as it is. The vires of the said provision is not questioned. On a plain reading of the provision, it is not relevant to consider whether the Councillor was in any manner party to the construction which is made either by her spouse or dependent.
- E F The policy underlying the provisions is to ensure that the highest level of probity is maintained by the Councillor and nearest members of the Councillor’s family. It does not require the Councillor knowing the fact of the construction being made by her spouse or dependent. We have to take the law as it is and fulfil the intention of the Legislature.
- G 10. The second limb of Section 44(1)(e) provides that if a Councillor had directly or indirectly been responsible for or helped in his capacity as such Councillor in carrying out such illegal or unauthorized construction, the Councillor becomes amenable for action under Section 44(1)(e). The second limb does not deal with the construction by the Councillor,
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spouse or dependent. But insofar as any such illegal or unauthorized construction is carried out resulting in the Councillor being disqualified is concerned, the direct or indirect involvement of the Councillor or his help in the matter has to be established. It has to be established that the Councillor has been directly or indirectly responsible or helped in his capacity as such Councillor in carrying out of illegal or unauthorized construction. The third limb of Section 44(1)(e) has the following effect:

If a Councillor by a written communication obstructed or tried to obstruct any competent authority from discharge of his official duty in demolishing any illegal or unauthorized construction, the Councillor would incur disqualification under Section 44(1)(e). The last limb would also be attracted if the Councillor has physically obstructed or tried to obstruct any competent authority from discharging its official duty in demolishing any illegal or unauthorized construction. Thus, the Legislature has apparently distinguished between illegal or unauthorized construction, illegal or unauthorized structure being constructed by the Councillor's spouse or by dependents as it was the legislative intention that the Councillor will not carry out any such construction and he would also be in a position to prevent construction either by his spouse or a person who is dependent on him. The fact that embargo is against the construction by the dependent and not any relative or person not dependent on him would also indicate that illegal construction by the spouse or dependent stand on a different footing from persons who may not be so closely related to the Councillor.

11. The words "such illegal or unauthorized construction" occurring in the second limb of Section 44(1)(e) could be said to refer to the construction made by the Councillor, his spouse or the dependent, and in such a case, the words "directly or indirectly responsible for" and the words "or helped in his capacity as Councillor", would have to be applied. Such an interpretation, in our view, would produce unreasonable results. When the Councillor constructs by himself, the words "or has directly or indirectly responsible for", "or helped in his capacity as such Councillor" does not bear any meaning. The plain meaning of the first limb of Section 44(1)(e) is that in the case of construction by the Councillor himself, which is illegal, it would result in disqualification being incurred. The requirement of the Councillor being directly or indirectly being responsible

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- A for or helping in carrying out of such construction in the capacity of Councillor in the case of the spouse or dependent also is not the statutory requirement. Having regard to the close relationship between the spouse and the Councillor on the one hand and the dependent and the Councillor on the other hand, the words "carrying out such illegal or unauthorized construction" has reference to construction which violates the provisions of the Town Planning Act, the MRTP Act or the Rules and the Bye-laws framed under those provisions. Having disposed of the said contention of the appellant, we must proceed to consider the other contentions.

12. It is true that disqualifying the Councillor, is a serious matter. Councillors of local bodies, after the 73rd amendment to the Constitution, are democratically elected representatives of the people at the grass root level. It is undoubtedly also true that in the case of an Election Petition, the case against the respondent must be strictly proved. However, Section 44(1)(e), which is ordained by the Legislature, requires reasonable interpretation, and if the ingredients are established, it must be given full play.

13. As already noted, the construction made by the husband of the appellant falls into two parts. Construction has been made on the basis of deemed permission. In regard to deemed permission, the contention raised by the respondents apparently based on a regulation that before commencing construction, even if there is deemed permission, a notice was to be served on the local body, may not apply, as it is not in dispute that the said regulation itself is not applicable to the case at hand. This necessarily means that the case built up based on deemed permission not being effective, and therefore, there was unauthorized construction, cannot be pressed against the appellant and we also need not deal with the same.

14. The only question we are called upon to decide is the effect of temporary construction which had been made. There is no dispute that if temporary constructions are made it would also fall within the mischief of Section 44(1)(e). In other words, if temporary construction or structure have been illegally made by the Councillor, spouse or dependent, disqualification follows.

15. We do not find merit in the contention of the appellant that as unauthorized construction also brings in its wake criminal action, action under Section 44(1)(e) will not lie. Section 44(1)(e) creates an

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independent liability or rather creates disqualification as provided thereunder. This is *de hors* the criminal action. There is nothing brought to our notice to conclude that action under Section 44(1)(e) must be preceded by a criminal action and conviction thereunder. Equally, the argument that if disqualification is incurred under Section 44(1)(e) since unauthorized construction can be visited under law creating criminal liability, action under Section 44(1)(e) will not lie. We are of the view that this argument has no merit and Section 44(1)(e), as it stands, is neither dependent on a criminal action preceding it nor is the court to be influenced by the fact that making an unauthorized construction will have penal consequences.

16. The only contention which remains is regarding the temporary structures. Our attention was drawn to the application produced at page 55 of the SLP paper book. It is pointed out that construction for which permission was sought and in respect of which the deemed permission has been claimed, were not in relation to temporary construction. In particular, our attention was drawn to Column 26 which seeks details about the materials to be used in the construction. As against the column roof, it is stated ‘RCC: The floors are shown as ‘ceramic tiles’, against column walls, it is said ‘stone masonry’ and against Columns it is written ‘RCC’. Our attention was invited by respondents to the following paragraph in the order passed by the Collector which appear to set out the contentions of the appellant:

“Shed for the temporary residence of the workers is constructed and for that the permission of the Municipal Council is not necessary. However, even for this no evidence was adduced.”

From this, conclusion is sought to be drawn that the temporary constructions were made and the case of the appellant was that no permission is necessary. In fact, more than one temporary construction was actually made, it is pointed out on behalf of the respondents. The order of the Collector would show that as per the report of the Sub Divisional Officer, the constructions were carried out, and out of which, 5 were temporary and which were no doubt removed by Yogesh Waghdhare.

17. Learned senior counsel for the appellant would submit that in a matter relating to disqualification the case and finding against the returned candidate must have been more specific and clear. We are of

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- A the view that having regard to the order which has been passed, we do not think that any case is made out for interference. There is no case raised by the appellant that for temporary construction, permission was obtained. Appeal will stand dismissed. No order as to costs.

Kalpana K. Tripathy

Appeal dismissed.