

(1960) 02 BOM CK 0014

Bombay High Court

Case No: Special Civil Application No. 1321 of 1959

Ganpat Sambhaji Patil

APPELLANT

Vs

Extra Assistant Judge

RESPONDENT

Date of Decision: Feb. 27, 1960

Acts Referred:

- Bombay District Municipal Act, 1901 - Section 15(1)(ea)
- District Municipalities Act - Section 22

Citation: (1960) 62 BOMLR 884

Hon'ble Judges: V.S. Desai, J; S.T. Desai, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

V.S. Desai, J.

The two petitioners are persons whose election to the Municipality of Islampur has been declared invalid on an application made by respondent No. 3 u/s 22 of the District Municipal Act. The ground on which the election of the petitioners has been held to be invalid is u/s 15(7)(ea) in that they had failed to pay arrears due by them to the municipality within three months after a special notice in that behalf had been served upon them.

2. The two petitioners were members of the municipality in the years 1952-53 also and during that year they and five other members of the municipality had been responsible for making unauthorised appointments of octroi clerks and peons. u/s 42 of the District Municipal Act, these seven persons as Councillors were liable for the misapplication of the funds of the municipality since the said misapplication had happened through or been facilitated by gross neglect of their duty as Councillors. An objection with regard to these unauthorised appointments of octroi clerks and peons was taken by the Examiner of the Local Fund Accounts and he made a report that a sum of Rs. 846-6-3 was to be paid in the municipal treasury or municipal

account by the Councillors who were responsible for making the appointment of octroi clerks and peons. Pursuant to this report of the Examiner of Local Fund Audit Account, on March 1, 1955, the General Body of the Municipality has resolved that the amount as per the audit objection should be recovered from the persons concerned. In pursuance of that resolution of the General Body, on January 4, 1956, the Managing Committee had passed a resolution resolving that the amount which was found due from the seven Councillors as per the audit note of the Examiner of Local Fund Accounts should be recovered from the said Councillors. On January 23, 1956, notices were issued to the petitioners that a sum of Rs. 846-6-3 was due from each one of them in respect of the pay and allowances of the octroi clerks and peons unauthorisedly appointed by them and that they should make the said payment forthwith in the municipal office. The petitioners, however, did not make the payment as required by these notices. The petitioners thereafter offered themselves as candidates for the municipal election from ward No. 3 and submitted their nomination papers. The date for the submission of the nomination papers was October 10, 1957. On October 11, 1957, opponent No. 3 raised an objection to the nomination of the petitioners, the objection raised being one u/s 15(1)(ea) that they had failed to pay the arrears due by them to the municipality. As against petitioner No. 2, the further objection was that in addition to this sum of Rs. 846-6-3 which he had not paid to the municipality, he was also in arrears to the extent of Rs. 228-4-0 which he had not paid to the municipality, although the same was demanded from him. These objections were rejected at the time of the scrutiny by the Returning Officer, and the nominations of the petitioners were accepted. Then at the election, which was held on November 5, 1957, and the result of which was declared on December 6, 1957, the petitioners were declared as duly elected Councillors from Ward No. 3 of the Islampur Municipality. Opponent No. 3 thereafter filed an application u/s 22 of the District Municipal Act to the District Judge of South Satara challenging the election of the petitioners on the ground amongst others that the petitioners were disqualified to be Councillors u/s 15(7)(ea) of the District Municipal Act and that the objections taken to the nomination of the petitioners by opponent No. 3 should have been accepted by the Returning Officer. There were other objections also raised in this election petition, but they have not been considered by the learned Assistant Judge who heard and decided this application, because he has upheld the objections that the petitioners were disqualified u/s 15(1)(ea) of the District Municipal Act and their election, therefore, was liable to be set aside. The learned Assistant Judge, therefore, by the final order which he has passed on August 12, 1959, has set aside the election of the petitioners and has ordered a fresh election to be held in respect of Ward No. 3 of the Islampur Municipality. Aggrieved by the decision and order passed by the learned Assistant Judge, the petitioners have filed the present Special Civil Application.

3. Mr. R. A. Jahagirdar, who appears for the petitioners, has urged before us that the petitioners were not disqualified u/s 15(1)(ea) of the Bombay District Municipal Act.

His argument briefly stated is that in order that Section 15(1)(ea) may apply there must be arrears due from the person to the municipality and he must have failed to pay these arrears within three months after a special notice calling upon him to pay those arrears is served upon him. Mr. Jahagirdar argues that the arrears to which Section 15(1)(ea) refers must be arrears which are due under the provisions of the District Municipal Act and which the municipality has power to recover under the mode of recovery contained in Chap. VIII of the District Municipal Act. According to Mr. Jahagirdar, it is not any demand whatsoever which the Municipality has made by a special notice that can come within the meaning of the word "arrears" as used in Section 15(7)(ea). In the present case, says Mr. Jahagirdar, there is no case of any arrears due from the petitioners to the municipality, within the meaning of Section 15(7)(ea). The claim of the municipality is in respect of damages caused to the municipality by the alleged wrongful act of the petitioners and other Councillors. This claim for damages against the petitioners is not admitted by the petitioners and it has not yet been determined by a proper forum. According to Mr. Jahagirdar, the mere objection raised in the audit note of the Examiner of Local Fund Accounts is not sufficient to fix the liability in respect of the subject matter of that objection on the petitioners nor to constitute it a determined amount which by that reason becomes due from the petitioners to the municipality. Mr. Jahagirdar has also argued in the alternative that the matter of the liability of the petitioners which arises as a result of the audit objection raised by the Examiner of the Local Fund Accounts is a matter which is not yet finally decided and still is in an undetermined state. Proceedings in that connection under the Local Audit Act are pending before the Commissioner and are not yet finalised. Mr. Jahagirdar, therefore, says that the Commissioner being seized of the matter, and the procedure for fixing the liability and also for recovering the same having been provided by the Local Funds Account Act, the liability of the petitioners can only be determined or fixed as provided under the Local Funds Audit Act and the municipality has no jurisdiction to proceed in any other way to enforce the said liability or recover the amount thereof. Mr. Jahagirdar, therefore, says that the notices which the municipality has issued on January 23, 1956, it was not competent to issue and consequently the failure to pay the same in accordance with those notices will not constitute a failure u/s 15(1)(ea) of the District Municipal Act.

4. We are not impressed by either of the two arguments raised before us by Mr. Jahagirdar. The provision of Section 15(7)(ea) is as follows:

No person may be a Councillor---

who fails to pay any arrears of any kind due by him to the Municipality (otherwise than as a trustee) within three months after a special notice in this behalf has been served upon him....

The provisions speak of "any arrears of any kind". This expression, in our view, covers not only arrears which are recoverable under the provisions of Chap. VIII but

other arrears also. What is required for this section to operate is that there must be arrears due from the person to the municipality. Now, the meaning of the word "arrears" would ordinarily be "what is ascertained due and has remained unpaid or an outstanding debt". The words "any arrears of any kind" in s. 15(7)(ea) would no doubt include the arrears in respect of taxes, fees or other amounts claimable by the municipality under the provisions of the Municipal Act, but we do not think that the word "arrears" mentioned in Section 15(1)(ea) is confined only to arrears claimable by way of taxes, cesses etc. under the provisions of the Act. Any ascertained sum due to the municipality which has not been paid would be an arrear within the expression "any arrears of any kind" used in Section 15(7)(ea), Mr. Jahagirdar has then argued that the claim made by the municipality in the notices which it had served upon the petitioners cannot be regarded as an ascertained sum due from the petitioners to the municipality so as to constitute an arrear within the meaning of Section 15(1)(ea). The argument is that the claim made by the municipality is in respect of the liability for the misapplication of the municipal funds by reason of the alleged unauthorised act of the petitioners and other Councillors. This liability is not admitted by the petitioners; nor has it been determined by any competent Court or by any other competent authority. Mr. Jahagirdar, therefore, has argued that unless the claim of the municipality in respect of this liability is either admitted by the petitioners or it has crystallised into a decree of Court or an order of any competent authority, it would not be an ascertained sum of money which is due from the petitioners to the municipality. We do not think that the argument urged by Mr. Jahagirdar can be accepted. The arrears u/s 15(1)(ea) are arrears due in accordance with the notice which the municipality has served on the person. The arrears may not be due in law or the person against whom the claim is made may have a valid defence to escape liability in respect thereof. But the fact that the liability is disputed or that the validity of the claim is challenged will not make it a claim which is not for arrears within the meaning of Section 15(7)(ea). So long as the municipality is entitled to make a claim and has made a claim for an ascertained sum of money and has served a notice calling upon the person to make that payment, the failure to pay in accordance with this notice within the period of 3 months will be sufficient to constitute it a failure to pay the arrears within the meaning of Section 15(7)(ea). The view which we are taking receives support from a case decided under the Bombay Village Panchayats Act by a Division Bench of this Court, which is [Ramchand Hirachand Kothadiya and Others Vs. District Deputy Collector, Baramati Division, Poona and Others,](#) . Section 8(i) of the Village Panchayats Act had provided a disqualification for a person contesting a Village Panchayat election if he had failed to pay any tax or fee due to the Panchayat within three months from the date on or before which the amount of such tax or fee was required to be paid by him in accordance with the bill presented to the person under Sub-section (4) of Section 91. The person who had offered himself as a candidate for the election had not paid the tax within three months of the date of bill presented to him, but had filed a suit challenging the imposition of the tax. The

nomination paper filed by him was rejected by the Returning Officer on the ground that he had incurred a disqualification by reason of the provisions of Section 8(7). It was contended that he had not incurred the disqualification because he had not admitted that the tax was due from him but, on the other hand, had challenged it by filing a suit, and unless the amount of the tax which was claimed in the bill was proved to be legally and validly due from him, he could not be said to have incurred the disqualification. This argument was negated and it was pointed out that in order to constitute a failure to pay a tax within the meaning of the provisions of Section 8(1) the failure must be to pay the tax which is due not in law or legally but which is due under a bill which is presented by the Panchayat and has not been paid by the candidate. It was pointed out that in order to see whether the disqualification was incurred under that provision, the Returning Officer was not required to embark upon an enquiry as to whether the tax was legally due and validly recoverable from the candidate. All that he had to see was whether there was a bill in respect of the tax by the Panchayat and whether payment had been made within the period specified in accordance with the bill or not. The same principle, according to us, will have to be applied in interpreting the provisions of Section 15(1)(ea). In our opinion, the Returning Officer in considering whether disqualification has been incurred u/s 15(7)(ea) has not to embark upon a judicial enquiry for the purpose of determining whether the arrears are legally due from the candidate and whether or not he has a valid defence to escape in respect of the amount claimed in the notice. The first contention, therefore, which Mr. Jahagirdar has raised, fails.

5. The next contention of Mr. Jahagirdar is that since the liability of the petitioners in the present case has been found in the audit objection under the Bombay Local Fund Audit Act, the machinery provided under the Local Funds Audit Act can alone be availed of by the municipality in having the liability fixed on the petitioners and also for the purpose of enforcing the liability. The proceedings under the Bombay Local Fund Audit Act in respect of this liability are still going on and the Commissioner is seized of the matter under the Local Fund Audit Act. Until, therefore, the matter is finally decided under the provisions of the said Act, the municipality cannot proceed to issue notices to the petitioners in respect of the said liability. According to this argument, therefore, the notices which were issued by the municipality the Municipality was not competent to issue and, therefore, the claim made in those notices cannot amount to arrears within the meaning of Section 15(1)(ea). In our opinion, this contention is also not tenable. The liability of the petitioners exists because of their having allowed the misapplication of the Municipal funds and it extends to the extent to which those funds have been misapplied. It is not a liability which arises under the Bombay Local Fund Audit Act, although the liability may have been discovered in the audit of the accounts of the municipality under the provisions of the Bombay Local Fund Audit Act, "We also do not agree with Mr. Jahagirdar when he says that the liability having been discovered under the provisions of the Local Fund Act can only be proceeded against by

following the machinery provided by the Local Fund Act. u/s 8 of the Bombay Local Fund Audit Act, the Examiner has to prepare a report of the accounts which he has audited and examined and has to send a copy of the report to the local Authority concerned and also to such Officers and Bodies as the Government may direct. Now, u/s 9 of the Act this report which the Examiner has to make, must contain among other things payments which appear to the Examiner to be contrary to law and the amounts of any deficiency or loss which appears to him to have been caused by the gross negligence or misconduct of any person. Then, u/s 10, the Chairman of the Local Authority, on receipt of the report which the Examiner has made, has to take steps to remedy the defects or irregularities which have been pointed out in the report. It will thus be seen that on receiving the report of the Examiner of the Local Fund, the municipality has to proceed to take steps to remedy the defects pointed out in the report. It is in pursuance of the audit objection which was taken in the present case that the municipality by the Resolution of the General Body resolved to call upon the petitioners to repay to the municipality the amount by which the fund of the municipality was misapplied as a result of the unauthorised act of the petitioners. It was in pursuance of this resolution of the General Body that the Managing Committee had issued the notices calling upon the petitioners to make the payment in respect of these amounts. It cannot be said that the municipality could not have issued these notices to the petitioners and it cannot also be urged that the provisions of the Bombay Local Fund Audit Act preclude the municipality from taking steps to recover the amount in respect of which audit objections are taken except by following the procedure which is provided under the Bombay Local Fund Audit Act. It is no doubt true that u/s 11 of the Bombay Local Fund Audit Act, the Commissioner has been given power to surcharge the amount of the Fund misapplied on persons who are responsible for the misapplication. It is also true that Section 12 of the Act provides that the amount certified by the Commissioner as surcharged, if not paid by the person concerned within one month of his receipt of the decision of the Commissioner, can be recovered through the Civil Court on an application made by the Collector as if it was an amount decreed by the Court in favour of the Collector. But the fact that this procedure is provided under the Bombay Local Fund Audit Act does not, in our view, preclude the municipality from proceeding to recover the amount by issuing notices to the persons concerned calling upon them to pay the amounts. We do not, therefore, agree with the contention raised by Mr. Jahagirdar that the notices issued by the municipality to the petitioners in the present case were incompetent.

6. As we have pointed out earlier, against petitioner No. 2, there was a further objection raised that he had also failed to pay an amount of Rs. 228-4-0 which was due from him to the municipality. It appears, however, that no special notice in respect of this amount has been served on petitioner No. 2 by the municipality and consequently the failure to pay the said amount cannot be regarded as a failure to pay the arrears within the meaning of Section 15(1)(ea) of the Bombay District

Municipal Act. However, since there was a failure on the part of both of the petitioners to pay the amount of Rs. 846-6-3 in respect of which special notices were issued to them by the municipality, in our opinion, both of them were rightly held as disqualified to be members of the municipality by the learned Extra Assistant Judge.

7. The result, therefore, is that the Special Civil Application filed by the petitioners fails and must be dismissed. The Rule is accordingly discharged with costs.