

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR**

WRIT PETITION NO. 5075 OF 2019
WITH
WRIT PETITION NO. 6236 OF 2019

W.P.NO.5075/2019.

Mrs. Tilottama W/o.Sanjay Kinkhede,
Aged 50 years, Occupation : Business,
R/o. 2nd Floor, Kinkhede's Vijay Apartments,
Behind Labour Court, Opposite Chitnavis
Center, Temple Road, Civil Lines, Nagpur-
440001.

.... **PETITIONER.**

// **VERSUS** //

1. The Municipal Commissioner, Nagpur,
Nagpur Municipal Corporation,
Civil Lines, Nagpur – 440 001.
2. Mrs. Pragati W/o. Ajay Patil,
Aged about 52 years, Occupation :
Business, R/o. Flat No.A-3/4
Forest Housing Society, Behind
Center Point School, Nagpur-440013.
3. State of Maharashtra, Urban Development
Department, Mantralaya, Mumbai-400 032

.... **RESPONDENTS.**

Shri Amit Kinkhede, Advocate for Petitioner.
Shri J.B.Kasat, Advocate for Respondent No.1.
Shri M.G.Bhangde, Sr. Advocate a/b. Shri B.N.Mohta, Adv. for Respondent No.2
Ms Ketki Joshi, G.P. for Respondent No.3.
Shri S.P.Bhandarkar, Adv. a/w. Ms Sejal Lakhani, Adv. to Assist the Court.

WITH

WP.NO.6236/2019.

Sau.Pragati W/o. Ajay Patil,
Aged 52 years, Occ.: Business,
R/o. 3/4, Forest Housing Colony,
Seminary Hills, Nagpur, District :
Nagpur.

.... **PETITIONER.**

// **VERSUS** //

1. Nagpur Municipal Corporation,
Through its Commissioner,
Nagpur.
2. Mrs. Tilottama W/o.Sanjay Kinkhede,
Aged 48 years, Occupation : Business,
R/o. 288/5, C-2, 2nd Floor, Vijay Apartment,
Behind Labour Court, Civil Lines, Nagpur,
District : Nagpur.

.... **RESPONDENTS.**

Shri M.G.Bhangde,Sr.Advocate a/b.Shri B.N.Mohta, Adv.for Petitioner.
Shri J.B.Kasat, Advocate for Respondent No.1.
Shri Amit Kinkhede, Advocate for Respondent No.2.
Shri S.PBhandarkar, Adv. a/w. Ms Sejal Lakhani, Adv. to Assist the Court.

CORAM : Z.A.HAQ, VM.DESHPANDE AND AMIT B. BORKAR, JJ.

DATE OF RESERVING THE JUDGMENT : 22/02/2021.

DATE OF PRONOUNCING THE JUDGMENT: 23/03/2021.

JUDGMENT : (Per : Z.A.Haq, J.)

1. Heard.

2. The results of the elections to the Nagpur Municipal Corporation were declared on 23rd February 2017. Mrs. Tilottama Sanjay Kinkhede (Petitioner in Writ Petition No.5075 of 2019) and Mrs. Pragati Ajay Patil (Respondent No.2 in Writ Petition No.5075 of 2019) had contested elections from Prabhag 14-D. Mrs.Pragati Ajay Patil was declared elected. On 3rd May 2017, Mrs.Tilottama submitted representation under Section 10(1D) read with Section 12 of the Maharashtra Municipal Corporations Act, 1949 (hereinafter referred to as “the Maharashtra Act No.LIX of 1949”) to the Municipal Commissioner contending that Mrs.Pragati and her husband Shri.Ajay Patil had carried out illegal and unauthorized construction at Flat bearing No.3/4, Forest Housing Society, Behind Center Point School, Nagpur, that Mrs.Pragati and her husband had encroached over 1250 sq.ft. out of the property bearing Survey No.56/1, situated at Telangkhedi, Nagpur, as also encroachment and illegal/unauthorized construction was made by Mrs. Pragati and her husband in the flat situated in Gulmohar Apartments, Tilak Nagar, Nagpur and at the property situated at Survey No.70(1-B) at Tilak Nagar, Nagpur. Mrs.Tilottama prayed that inquiry regarding encroachment/illegal and unauthorized construction by Mrs. Pragati and her husband should be made and it be declared that the structures in question are illegal and unauthorized and a report be forwarded to the Civil Judge Senior Division, Nagpur as per the provisions of Section 12 of the Maharashtra Act No.LIX of 1949. The Municipal Commissioner caused an inquiry in the matter and passed an order on 2nd July 2019, *prima-facie* observing that some illegal/ unauthorized construction exists in the

properties of Mrs.Pragati. The Municipal Commissioner referred the matter to the general body of the Municipal Corporation for appropriate decision regarding referring the matter to Civil Judge Senior Division, as per Section 12 of the Maharashtra Act No.LIX of 1949.

Being aggrieved by the reference of the matter to the general body of the Municipal Corporation, Mrs. Tilottama has filed Writ Petition No. 5075 of 2019 praying that the Municipal Commissioner be directed to refer the matter to the Civil Judge Senior Division directly, as per Section 12 of the Maharashtra Act No.LIX of 1949. According to Mrs.Tilottama, as per Section 12 of the Maharashtra Act No.LIX of 1949, the Municipal Commissioner is not required to refer the matter to the general body of the Municipal Corporation, and he has to directly refer the matter to Civil Judge Senior Division.

Being aggrieved by the *prima-facie* observations made by the Municipal Commissioner in the order dated 2nd July 2019 about the illegal/unauthorized construction, Mrs. Pragati has filed Writ Petition No. 6236 of 2019 praying that the order passed by the Municipal Commissioner on 2nd July 2019 be quashed. According to Mrs.Pragati, the Municipal Commissioner could not have examined the merits of the contentions raised by Mrs.Tilottama, and on receiving the representation, the Municipal Commissioner should have referred it to the general body of the Municipal Corporation and if at all any inquiry was to be made on the representation, it could have been only by the general body of the Municipal Corporation.

3. When both the writ petitions were heard by Division Bench (Shri.Sunil B. Shukre and Shri.Avinash G. Gharote, JJ), the Division Bench opined that there appears to be conflict between the view taken in the judgment given in the case of *Edwin Francis Britto..vs..Municipal Corporation, Greater Mumbai*, reported in **(2006) SCC Online 791 = 2006(6) Bom.C.R. 92**) and the view taken in the judgment given in the case of *Mallesh Shivan Shetty..vs..Kalyan-Dombivali Municipal Corporation*, reported in **2016(3) Mh.L.J. 901**. The Division Bench, by order dated 4th January 2021, formulated 3 questions/points for reference to Larger Bench and directed the Registry to place the matter before the Hon'ble Chief Justice for considering the constitution of Larger Bench. The three points formulated by the Division Bench are as follows:

“(A) Whether the expression 'has constructed' as used in Section 16 (1D) of the BMC Act and Section 10 (1D) of the MMC Act would include an unauthorized/illegal construction, erected by a Councillor, before being elected as a Councillor so as to attract the disqualification ?

(B) Whether the expression “has constructed” would include an unauthorized construction already in existence, when acquisition of the property is made by the Councillor, whether before or after he assumes office as a Councillor ?

(C) Whether the reference to the Judge, as provided for, in Section 18 of the BMC Act and Section 12 of the MMC Act, can be done by the Municipal Commissioner as a person being incharge of the Corporation, or is required to be done by the General Body of the Corporation ?”

4. Accordingly, the matter is placed before us. In the meantime, Mrs.Pragati filed Civil Application (CAW) No. 309 of 2021 contending that as

the Division Bench had also shown disagreement with the view taken by another Division Bench of this Court at Aurangabad (Shri S.V. Gangapurwala and Shri Anil S. Kilor, JJ) in **Writ Petition No.9947 of 2018** (*Umesh Deorao Pawale ..vs.. State of Maharashtra and another*), additional point should be formulated as follows:

“Whether the enunciation of law in the case of Umesh Pawale making distinction between pre-existing disqualification and the disqualification incurred during the term of the Councillor and that there are separate remedies for these two contingencies viz. “Election Petition” under Section 16 of the Maharashtra Municipal Corporations Act, 1949 in the former case and reference under Section 12 in the later case, is correct ?”

When Civil Application (CAW) No. 309 of 2021 came up before the Division Bench for hearing on 17th February 2021, it was pointed out to the Division Bench that the Full Bench was already constituted, and hearing on the matter was fixed for 18th February 2021. Hence, the Division Bench, after recording that both the sides conceded that the additional point was ancillary to the points already framed, left it to the Full Bench to consider the request for framing and deciding the additional point.

5. Before adverting to the submissions made by the learned Advocates, we feel it proper to reproduce the relevant provisions i.e. Section 10(1D), Section 11(a), Section 12 and Section 16 of the Maharashtra Act No.LIX of 1949, which read as follows:

“10. Disqualification for being a councillor.

(1) ...

(1-1A) ...

(1A) ...

(1B) ...

(1C) ...

(1D) A Councillor shall be disqualified for being a Councillor, if such Councillor has constructed or constructs 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. Such disqualification shall be for the remainder of his term as a Councillor from the date of the declaration of such structure to be illegal or unauthorised by the concerned authority under the provisions of the said Acts or, as the case may be, from the date of commission of the act of interference or obstruction by the Councillor against the Competent Authority.]

(1E) ...

(1F) ...

(2) ...

11. Disabilities from continuing as councillor.

A councillor shall cease to hold office as such if at any time during his term of office he, -

(a) becomes disqualified for being a councillor by reason of the provisions of section 10;

(b) ...

(c) ...

(d) ...

12. Questions as to disqualification to be determined by the Judge.

(1) If any doubt or dispute arises whether a councillor has ceased to hold office as such under section 11, such councillor or any other councillor may, and at the request of the Corporation, the Commissioner, shall refer the question to the Judge.

(2) On a reference being made to the Judge under sub-section (1), such councillor shall not be deemed to be disqualified until the Judge after holding an inquiry in the manner provided by or under this Act determines that he has ceased to hold office.

16. Election petitions.

(1) If the qualification of any person declared to be elected a councillor is disputed, or if the validity of any election is questioned, whether by reason of the improper rejection by the [State Election Commissioner] of a nomination, or of the improper reception or refusal of a vote, or by reason of a material irregularity in the election proceedings corrupt practice, or any other thing materially affecting the result of the election, any person enrolled in the municipal election roll may at any time within ten days after the result of the election has been declared submit an application to the Judge for the determination of the dispute or question.

(2) The [State Election Commissioner] may, if it has reason to believe that an election has not been a free election by reason of the large number of cases in which undue influence or bribery has been exercised or committed by order in writing, authorise any officer [of the Commission] to make an application to the Judge at any time within one month after the result of the election has been declared for a declaration that the election of the returned candidate or candidates is void.

(2A) No election to any Corporation shall be called in question except by an election petition presented to the Judge referred to in sub-section (1) and no Judge other than the Judge referred to in sub-section (1) shall entertain any dispute in respect of such election.

(3) The judge shall decide the applications made under sub-section (1) or (2) after holding an inquiry in the manner provided by or under this Act.

Explanations. - For the purposes of this section -

(1) "corrupt practice" means one of the following practices, namely :-

(a) any gift, offer or promise by a candidate or his agent or by any person with the connivance of a candidate or his agent of any gratification, pecuniary or otherwise, to any person whomsoever, with the object directly or indirectly of inducing a person to stand or not to stand as, or to withdraw from being a candidate at an election or a voter to vote or refrain from voting at an election or as a reward to a person for having so stood or not stood or for having withdrawn his candidature or a voter for having voted or refrained from voting;

(b) any direct or indirect interference or attempt to interfere on the part of a candidate or his agent or of any other person with the connivance of the candidate or his agent with the free exercise of any electoral right, including the use of threats of injury of any kind or the creation or attempts to create fear of divine displeasure or spiritual censure, but not including a declaration of public policy or a promise of public action or the mere exercise of a legal right without intent to interfere with a legal right;

(c) the procuring or abetting or attempting to procure by a candidate or his agent or by any other person with the connivance of a candidate or his agent, the application by a person for a voting paper in the name of any other person whether living or dead or in a fictitious name or by a person for a voting paper in his own name when, by reason of the fact that he has already voted in the same or some other ward, he is not entitled to vote;

(d) the removal of a voting paper from the polling station during polling hours by any person with the connivance of a candidate or his agent;

(e) the publication by a candidate or his agent or by any other person with the connivance of the candidate or his agent of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate's election;

(f) any acts specified in paragraphs (a), (b), (d) and (e) when done by a person who is not a candidate or his agent or a person acting with the connivance of a candidate or his agent;

(g) the application by a person at an election for a voting paper in the name of any other person, whether living or dead, or in a fictitious name, or for a voting paper in his own name when, by reason of the fact that he has already voted in the same or another ward, he is entitled not to vote; or

(h) the receipt of, or agreement to receive, any gratification of the kind described in paragraph (a) as a motive or reward for doing or refraining from doing any of the acts therein specified.

(2) a corrupt practice shall not be deemed to have been committed in the interests of a returned candidate if the Judge is satisfied that it was of a trivial and limited character which did not affect the result of the election, that in all other respects the election was free from any corrupt practice on the part of the candidate or any of his agents, that it was committed without the

sanction or connivance or contrary to the orders of the candidate or his agents, and that the candidate and his agents took all reasonable means for preventing the commission of corrupt practices at the election.”

6. The fundamental objection raised on behalf of Mrs. Pragati is that the reference on Points (A), (B) and (C) is on the premise that there appears to be conflict between the view taken in the case of *Edwin Francis Britto* and the view taken in the case of *Malleesh Shivan Shetty*, however, the submission made before Division Bench on this aspect is incorrect, inasmuch as the submission is made overlooking the relevant aspect that the judgment in the case of *Edwin Francis Britto* is delivered by the learned Single Judge and the judgment in the case of *Malleesh Shivan Shetty* is given by Division Bench of this Court and in such situation it cannot be said that there is any conflict in the views taken by coordinate Benches. The learned Senior Advocate appearing for Mrs. Pragati submitted that the Division Bench, still could have referred the points for consideration by Larger Bench, however, such course could have been adopted only after recording disagreement with the view taken in the case of *Malleesh Shivan Shetty*, and recording reasons for the disagreement. However, this is not done by the Division Bench while proposing the reference in the present case.

Shri M.G.Bhangde, learned Senior Advocate submitted that even for showing disagreement with the view taken by the Division Bench in the case of *Umesh Deorao Pawale*, the Division Bench has not discussed the reason for the disagreement and has simpliciter recorded disagreement and,

observing that the additional point as suggested by the Civil Application (CAW) No. 309 of 2021 is an ancillary point can be examined by the Full Bench. It is further submitted that the judgment given in the case of *Mallesh Shivan Shetty* is challenged before the Hon'ble Supreme Court and the appeal is pending after leave is granted. It is submitted that the judicial propriety requires that as the point is subjudiced before the Hon'ble Supreme Court, the Full Bench should not delve on the issue as to whether the view taken in the case of *Mallesh Shivan Shetty* is proper or not.

It is argued that there is no authoritative pronouncement by any Division Bench of this Court on the point as to whether the expression "has constructed" used in Section 10(1D) of the Maharashtra Act No.LIX of 1949 would include illegal/unauthorized construction made by the Councillor before being elected as such, so as to attract the disqualification, and therefore, it is open for the Division Bench to pronounce its view on the point, and Full Bench need not consider the point.

It is further argued that the dispute as to whether the alleged construction is illegal/unauthorized is itself subjudiced before the Division Bench, that as per Section 12 of the Maharashtra Act No.LIX of 1949, the issue whether the alleged construction is made before or after elections will have to be decided by the Civil Judge and without adjudication on the relevant factual aspects, the reference on Point (A) is premature and academic at this stage and need not be examined. Reliance is placed on the

judgment given by Full Bench of this Court in the case of *Dr. Parthsarathi ..vs.. Maharashtra Medical Council, Mumbai*, reported in **2021(2) Mh.L.J. 322**.

Alternatively, it is submitted that as per Section 10(1D) of the Maharashtra Act No.LIX of 1949, disqualification would be attracted if the illegal/unauthorized construction is made by a Councillor, which necessarily means that if the illegal/unauthorized construction is made after election of the concerned person as Councillor, and if any illegal/unauthorized construction is made prior to the election, it would be illegal/ unauthorized construction by a citizen/person and not by a Councillor as contemplated by Section 10(1D) of the Maharashtra Act No.LIX of 1949 and in such situation Section 10(1D) of the Maharashtra Act No.LIX of 1949 would not be attracted.

7. As regards Point (B), it is argued on behalf of Mrs.Pragati that the point, whether acquisition of the property with illegal/unauthorized construction would attract disqualification as per Section 10(1D) of the Maharashtra Act No.LIX of 1949, is not required to be examined by the Full Bench as there is no judgment on the point and it can be considered by the Division Bench of this Court.

8. As regards Point (C), it is argued on behalf of Mrs. Pragati that the language of Section 12 of the Maharashtra Act No.LIX of 1949 is clear and unambiguous and there cannot be any doubt that the reference to the Civil Judge as per Section 12 of the Maharashtra Act No.LIX of 1949 is

required to be made by the Municipal Commissioner, however, the Municipal Commissioner has to make the reference only on request of the general body of the Municipal Corporation. According to the learned Senior Advocate appearing for Mrs. Pragati, the Municipal Commissioner cannot take any steps for referring the matter to Civil Judge Senior Division unless request for that purpose is made by the general body of the Municipal Corporation.

9. As regards the additional point i.e. Point (D), it is argued by Shri.M.G.Bhangde, learned Senior Advocate that the view taken in the case of *Umesh Deorao Pawale* is based on the judgment given by the Hon'ble Supreme Court in the case of *Consumer Education & Research Society.vs.Union of India & Oth.*, reported in **(2009) 9 SCC 648** and the Referral Bench has not given any sound reason for disagreeing with the view taken in the case of *Umesh Deorao Pawale*. It is submitted that the view taken by the Division Bench in the case of *Umesh Deorao Pawale* is proper and if the disqualification as per Section 10 of the Maharashtra Act No.LIX of 1949 is pre-existing, then remedy of filing election petition under Section 16 of the Maharashtra Act No.LIX of 1949 would be available, and if the disqualification as per Section 11 of the Maharashtra Act No.LIX of 1949 is incurred after election, then reference as per Section 12 of the Maharashtra Act No.LIX of 1949 would be the remedy.

10. Shri Amit Kinkhede, learned Advocate appearing for Mrs.Tilottama submitted that points of reference are rightly formulated and referred by the Division Bench and it cannot be said that the points of

reference are not required to be answered by the Full Bench. It is submitted that the object of inserting Section 10(1D) of the Maharashtra Act No.LIX of 1949 is to ensure that the Municipal Corporation fulfills its duty of ensuring that appropriate action as per law is taken against illegal/unauthorized construction, and if Section 12 of the Maharashtra Act No.LIX of 1949 is not read down to mean that it gives powers to the Municipal Commissioner to make *prima-facie* inquiry regarding allegations of illegal/unauthorized construction, and if substance is found in the allegations, to refer the representation/complaint to Civil Judge Senior Division, then the very object of inserting Section 10(1D) of the Maharashtra Act No.LIX of 1949 would be frustrated. It is submitted that the argument made on behalf of Mrs. Pragati that the Municipal Commissioner can refer the matter to Civil Judge Senior Division only on the request made by the general body of the Municipal Corporation cannot be accepted and if it is accepted then there is every chance that the complaint/representation regarding illegal/unauthorized construction would not be inquired into fairly and within stipulated time, as the Councillor against whom the complaint/representation might be made would be the member of the general body.

It is argued that the disqualification as per Section 10(1D) of the Maharashtra Act No.LIX of 1949 would be attracted in both the cases i.e. when the illegal/unauthorized construction is made prior to the election, or after the election. To support the above interpretation of the expression “has constructed” or “constructs”, reliance is placed on the following judgments:

- i) Judgment given in the case of *Goppulal..vs..Thakurji Dwarakadheeshji*, reported in (1969) 1 SCC 792;
- ii) Judgment given in the case of *Hindustan Lever ..vs. Ashok Kate*, reported in (1995) 6 SCC 326;
- iii) Judgment given in the case of *Ganpat Ram Sharma ..vs.. Gayatri Devi*, reported in (1987) 3 SCC 576.

11. Relying on the judgment given in the case of *Abhiram Singh and Another..vs..C.D.Commachen(Dead) by Lrs. & oth.*, reported in (2017) 2 SCC 629, it is argued that the expressions used in Section 10(1D) of the Maharashtra Act No.LIX of 1949 should be given purposive meaning so that the object of the provision is fulfilled.

12. As far as Point (B) is concerned, Shri.Amit Kinkhede, learned Advocate argued that if the expressions used in Section 10(1D) of the Maharashtra Act No.LIX of 1949 are interpreted keeping in view the object for which the provision is inserted, then it would not make any difference whether the illegal/ unauthorized construction is made by the Councillor himself, or the Councillor acquires property with illegal/ unauthorized construction already made by the earlier owner before acquisition.

13. Making submission on the Point (C), it is argued that Section 12 of the Maharashtra Act No.LIX of 1949 is substantive as well as procedural law and the provision should be interpreted in such a manner that the object of the provision is not defeated and frustrated. It is argued that the provisions of Section 12 of the Maharashtra Act No.LIX of 1949

cannot be interpreted to leave the question of reference to Civil Judge Senior Division on political considerations. It is argued that if it is held that the Municipal Commissioner does not have power to refer the matter to Civil Judge Senior Division directly or on his own, and the reference by the Municipal Commissioner to the Civil Judge Senior Division can only be on the request made by general body of the Municipal Corporation, then political considerations would come into play inasmuch as the general body of the Municipal Corporation would be extremely slow in requesting the Municipal Commissioner to refer the question of disqualification of the Councillor to Civil Judge Senior Division. To support the argument regarding reading down the provisions of Section 12 of the Maharashtra Act No.LIX of 1949, Shri Amit Kinkhede, learned Advocate relied on the judgment given in the case of *Speaker, Orissa Legislative Assembly..vs..Utkal Keshari Parida*, reported in **(2013)11 SCC 794**.

14. Regarding the additional point for consideration, it is argued on behalf of Mrs. Tilottama that even in the case of pre-existing disqualification as per Section 11 of the Maharashtra Act No.LIX of 1949, the question of disqualification can be referred to Civil Judge Senior Division as per Section 12 of the Maharashtra Act No.LIX of 1949.

15. Submission is made by the learned Advocate appearing for Mrs. Tilottama that the ratio laid down in the judgments relied upon by the learned Senior Advocate appearing for Mrs. Pragati is no longer a good law in view of the ratio laid down by the judgments given by the Larger Benches.

16. Shri.Amit Kinkhede, learned Advocate submitted that the Division Bench which has made the reference, has shown disagreement with the view taken by another Division Bench in the case of *Mallesh Shivan Shetty*, and with the view taken in the case of *Umesh Deorao Pawale*, and has formulated the points for consideration by the Larger Bench which request is accepted by the Hon'ble Chief Justice and Full Bench is constituted to answer the points and therefore, it is not open for the other side to argue that the reference is uncalled for. It is submitted that the reason for reference cannot be gone into by the Full Bench once the Full Bench is constituted and called upon to answer the points framed for reference. It is submitted that the points may be answered in the light of the submissions made on behalf of Mrs.Tilottama.

17. The learned Government Pleader submitted that Section 12 of the Maharashtra Act No.LIX of 1949 provides for the categories of persons who can challenge the election of returned candidate, it having been introduced as per Article 243-B of the Constitution of India, and the provisions of Section 12 of the Maharashtra Act No.LIX of 1949 should be interpreted keeping in view the provisions of Article 243-B of the Constitution of India.

18. Shri. S.PBhandarkar, learned Advocate made submissions to assist the Court. He argued that Section 12 and Section 16 of the Maharashtra Act No.LIX of 1949 operate in different fields. He further submitted that the case of *Umesh Deorao Pawale* is rightly decided, and the

Division Bench, while formulating the points for reference has only expressed its disagreement with the view taken in the case of *Umesh Deorao Pawale*, however, the reason for doubting the correctness is not pointed out. It is submitted that the case of *Mallesh Shivan Shetty* is decided considering the provisions of Section 16(1D) of the Mumbai Municipal Corporation Act, 1888 and only because the provisions of Section 10(1D) of the Maharashtra Act No.LIX of 1949 are verbatim, it cannot be said that the Doctrine of Interpretation of *pari-materia* statute can be invoked unless it is pointed that Section 16(1D) of the Mumbai Municipal Corporation Act, 1888 and Section 12 of the Maharashtra Act No.LIX of 1949 are enacted with the same object and for the same purpose. It is submitted that the reference is made by the Division Bench without recording that there is any conflict in the judgments given by the coordinate Benches and it being so, Full Bench need not answer the points formulated for reference.

19. **Consideration of Point (A) :**

We find substance in the submissions made by Shri.M.G.Bhangde, learned Senior Advocate and Shri.S.P.Bhandarkar, Advocate that reference on this point need not be answered as it cannot be said that there is any conflict between the views taken by two coordinate Benches, the case of *Edwin Francis Britto* having been decided by learned Single Judge of this Court and the case of *Mallesh Shivan Shetty* having been decided by Division Bench of this Court. However, as Point (A) is of

general importance and arises for consideration in several matters, considering the judgment given by Full Bench of this Court in the case of *Dr. Parthsarathi ..vs.. Maharashtra Medical Council, Mumbai*, reported in **2021(2) Mh.L.J. 322** we feel it proper to answer Point (A) of reference on merits.

20. Shri Amit Kinkhede, Advocate has rightly argued that the provisions of Section 10(1D) of the Maharashtra Act No.LIX of 1949 should be interpreted, keeping in view the object with which it is brought on the statute book, and the object being to ensure that a Councillor who is representative of the residents of his Ward/Constituency does not indulge in illegal act of making illegal/unauthorized construction. Section 10(1D) of the Maharashtra Act No.LIX of 1949 lays down that “*A Councillor shall be disqualified for being a Councillor, if such Councillor “has constructed or constructs” by himself, his spouse or his dependent, any illegal or unauthorised structure....*” The expressions ‘**has constructed**’ or ‘**constructs**’ should be given their natural meaning. If the submission made by Shri.M.G.Bhangde, learned Senior Advocate is accepted then it would mean that a Councillor would not entail disqualification if he has constructed an illegal or unauthorized structure before being elected as a Councillor and though he, his spouse or his dependent continues to enjoy the illegal or unauthorized structure even after being elected as the Councillor. Had it been the intention of the legislature to exclude such Councillor who on his own or through his spouse or his dependent undertakes any illegal or unauthorized structure, from disqualification for such illegal or unauthorized structure, then the different expressions i.e. “has constructed” or “constructs”

would not have been used in Section 10(1D) of the Maharashtra Act No.LIX of 1949. On plain and simple reading of the provisions of Section 10(1D) of the Maharashtra Act No.LIX of 1949, it is clear that the legislature intended to put a curb on the illegal activity of illegal or unauthorized construction by a person who intends to get elected as a Councillor. Use of the words “has constructed” takes within its sweep the past-illegal activity also.

While considering the point, we deliberated on the issue as to whether the activity of constructing the illegal or unauthorized structure just prior to election would be a disqualification for being a Councillor or such illegal activity if undertaken long prior to the election would also be a disqualification. In our view, a time lag between construction of the illegal or unauthorized structure and election of the Councillor would not be relevant. Whether the illegal or unauthorized structure is constructed long back prior to the election or just before the election would not make any difference and in either case it would be a disqualification for being a Councillor. We answered Point (A) accordingly.

21. While deliberating on Point (A) as formulated for reference, we realized that further point interlinked with Point (A) as formulated for reference, is required to be considered, hence, we formulate following additional point for consideration:

“Whether a Councillor is disqualified from being a Councillor if he has undertaken construction of illegal/ unauthorized structure before acquisition of the property in question?”

22. There may be instances where illegal/unauthorized construction is made by the Councillor, his spouse or his dependent before acquiring title over the property in question. In such case, the Councillor will incur disqualification as per Section 10(1D) of the Maharashtra Act No.LIX of 1949. The emphasis is on the fact as to who has made illegal/unauthorized construction, and whether the Councillor, his spouse or his dependent has title over the property would not be relevant.

In a given case, a Councillor, his spouse or his dependent may construct illegal/unauthorized structure on rented premises. In such case also the Councillor will incur disqualification as per Section 10(1D) of the Maharashtra Act No.LIX of 1949.

There may be a situation where the Councillor, his spouse or his dependent may be an encroacher and responsible for illegal/unauthorized construction. In such case also the Councillor will incur disqualification as per Section 10(1D) of the Maharashtra Act No.LIX of 1949.

23. **As regards Point (B) :**

Section 10(1D) of the Maharashtra Act No.LIX of 1949 lays down that the Councillor shall be disqualified for being a Councillor if he “has constructed or constructs” **by himself, his spouse, or his dependent** any illegal or unauthorized structure violating the provisions of the Maharashtra

Act No.LIX of 1949 or the Maharashtra Regional and Town Planning Act, 1966 or the Rules or Bye-laws framed under the said Act. Again giving the expressions used in Section 10(1D) of the Maharashtra Act No.LIX of 1949 their natural meaning, illegal/unauthorized construction made by some person other than the Councillor, his spouse or his dependent would not entail disqualification as per Section 10(1D) of the Maharashtra Act No.LIX of 1949. The expression “has constructed” used in Section 10(1D) of the Maharashtra Act No.LIX of 1949 cannot be read in isolation as they are qualified by the Clause “**by himself, his spouse or his dependent**”. The elected Councillor cannot be subjected to the extreme penal action of disqualification for the illegal or unauthorized construction not undertaken by him, his spouse or his dependent. We answer Point (B) accordingly.

24. As regards Point (C), there is no serious dispute amongst the parties before us that the reference as per Section 12 of the Maharashtra Act No.LIX of 1949 has to be made to the Civil Judge Senior Division **by the Municipal Commissioner**. However, the dispute is whether the Municipal Commissioner can make reference to the Civil Judge Senior Division on his own or the Municipal Commissioner has to make reference to the Civil Judge Senior Division only on request made by the general body of the Municipal Corporation.

The submission of Shri Amit Kinkhede, Advocate is that, Section 12 of the Maharashtra Act No.LIX of 1949 has to be read down and

interpreted to mean that the Municipal Commissioner can make reference to the Civil Judge Senior Division directly and on his own. This submission is made on the foundation that if such interpretation is not given to the provisions of Section 12 of the Maharashtra Act No.LIX of 1949, then political considerations will come into play, inasmuch as general body of the Municipal Corporation may not be interested in referring the issue of disqualification of the elected Councillor to the Civil Judge Senior Division and it may avoid making request to the Municipal Commissioner to make reference to Civil Judge Senior Division. It is argued that in such case, the very object of inserting Section 12 of the Maharashtra Act No.LIX of 1949 would be frustrated.

Shri M.G.Bhangde, learned Senior Advocate submitted that the language of Section 12 of the Maharashtra Act No.LIX of 1949 is clear and unambiguous and it does not confer any power on the Municipal Commissioner to make reference to the Civil Judge Senior Division directly or on his own, and the Municipal Commissioner can make reference to the Civil Judge Senior Division only on request made by the general body of the Municipal Corporation. It is submitted that when the language of the provision is clear and unambiguous, the question of reading down the provision, doing violence to the language of the provision is not permissible, especially when there is no challenge to the validity of the provision.

25. Though the submission made by Shri Amit Kinkhede, Advocate *prima facie* appears to be justified, on minute consideration we are of the

view that the request for reading down the provisions of Section 12 of the Maharashtra Act No.LIX of 1949 cannot be accepted. The language of Section 12 of the Maharashtra Act No.LIX of 1949 clearly and unambiguously lays down that the Municipal Commissioner has to make reference to the Civil Judge Senior Division only on a request made by general body of the Municipal Corporation. Section 12 of the Maharashtra Act No.LIX of 1949 does not confer any power on the Municipal Commissioner to act directly and make reference to Civil Judge Senior Division on his own.

26. The submission made on behalf of Mrs. Tilottama that if the provisions of Section 12 of the Maharashtra Act No.LIX of 1949 are not read down to mean that the Municipal Commissioner has the power to make reference to the Civil Judge Senior Division directly and on his own, the very object and purpose of inserting the provision would be defeated, cannot be accepted. We cannot presume that a statutory body like general body of the Municipal Corporation would fail in its statutory obligation of acting as per the provisions of Section 12 of the Maharashtra Act No.LIX of 1949 within a reasonable time, and in a given case if it so happens, then the aggrieved person can always seek redressal of his/her grievance by approaching this Court and seeking appropriate Writ, Order or Directions. Under our constitutional scheme, no person is left remediless, and whenever a situation arises that the aggrieved person does not have any statutory remedy to seek redressal of his/her grievance, care of such situation is taken by the constitutional remedies.

Hence, we answer the Point (C) holding that as per Section 12 of the Maharashtra Act No.LIX of 1949, the Municipal Commissioner has to make reference to Civil Judge Senior Division, however, only on request made by the general body of the Municipal Corporation. The Municipal Commissioner cannot make reference to the Civil Judge Senior Division directly and on his own.

27. We have not examined the scheme of the provisions of Section 16(1D) and the scheme of Section 18 of the Mumbai Municipal Corporation Act, 1888 as the Mumbai Municipal Corporation Act, 1888 is not applicable to this region and at the time of hearing nothing is pointed out to us which requires comparative consideration of the provisions of the Mumbai Municipal Corporation Act, 1888 vis-a-vis the provisions of the Maharashtra Act No.LIX of 1949.

28. As far as the additional point is concerned, though it is argued that the Division Bench has not given any reason for showing disagreement with the view taken in the case of *Umesh Deorao Pawale*, as arguments were made on the point on merits and a submission was made that the point arises in many cases, we have taken up the additional point also for consideration.

29. In the case of *Umesh Deorao Pawale*, it is held that in case of pre-existing disqualification the remedy is to raise objection to the

nomination as per Rule 9 of the Election Rules and to file Election Petition as per Section 16 of the Maharashtra Act No.LIX of 1949. In paragraph No.28 of the judgment given in the case of *Umesh Deorao Pawale*, it is held that the applicability of Sections 11 and 12 of the Maharashtra Act No.LIX of 1949 are not inapt to include within its scope pre-existing disqualification. In the case of *Umesh Deorao Pawale*, challenge before the High Court was to the decision of the Municipal Commissioner under Section 12 of the Maharashtra Act No.LIX of 1949, disqualifying the returned candidate on the ground under Section 10(1)(i) of the Maharashtra Act No.LIX of 1949. In that case, it was argued that the Municipal Commissioner, on his own, could not have disqualified the returned candidate and the disqualification could have been only by the Civil Judge as per Section 12 of the Maharashtra Act No.LIX of 1949. In the case of *Umesh Deorao Pawale*, the Division Bench was not required to deal with the issue of availability of remedy under Section 12 and under Section 16 of the Maharashtra Act No.LIX of 1949. The point as to whether the remedy as per Section 16 of the Maharashtra Act No.LIX of 1949 would be available in case of challenge to the election on the ground of pre-existing disqualification, and the remedy under Section 12 of the Maharashtra Act No.LIX of 1949 would be available if the disqualification is incurred after election i.e. during the term of the Councillor, had not arisen for consideration. It is well settled that the ratio laid down by a judgment is only binding as a precedent and the ratio has to be culled out after examining that the point was raised, it was argued, it was considered and decided. In *Umesh Deorao Pawale*, the Division Bench has only decided that

under Section 12 of the Maharashtra Act No.LIX of 1949, the Municipal Commissioner does not have power to pass an order disqualifying the returned candidate and the powers are with the Civil Judge Senior Division. We have also taken the same view while answering Point (C).

30. Be that as it may, after considering the submissions made by the learned Advocates for the respective parties and considering the view taken by us that the disqualification as per Section 10 of the Maharashtra Act No.LIX of 1949 is incorporated under Section 11 by virtue of sub-section (a) of Section 11 of the Maharashtra Act No.LIX of 1949, we hold that it cannot be said that the remedy provided by Section 12 of the Maharashtra Act No.LIX of 1949 is available only in case of challenge to the election of the returned candidate if he incurs disqualification after election i.e. during the term as the Councillor, and the remedy as per Section 16 of the Maharashtra Act No.LIX of 1949 would be available only to raise challenge on the ground of pre-existing disqualification. In our view, either of the remedy would be available to the 'aggrieved person' having right to avail remedy as per Section 12 or Section 16 of the Maharashtra Act No.LIX of 1949, and as per the Doctrine of Election of Remedies, it would be the choice of the 'aggrieved person' to elect the remedy. We answer the additional point accordingly.

31. To sum up, the points of reference are answered as follows:

I) AS TO POINT (A) :

We hold that the expression “has constructed” used in Section 10(1D) of the Maharashtra Municipal Corporations Act, 1949 would also include an illegal/unauthorized construction erected by the Councillor before being elected as a Councillor so as to attract disqualification;

II) AS TO POINT (B) :

We hold that the expression “has constructed” used in Section 10(1D) of the Maharashtra Municipal Corporations Act, 1949 would include an illegal/unauthorized construction made by the Councillor, his spouse or his dependent, even if such illegal/unauthorized construction is made before acquisition of the property by the Councillor, his spouse or his dependent.

The expression “has constructed” used in Section 10(1D) of the Maharashtra Municipal Corporations Act, 1949 would not include an illegal/unauthorized construction **made by any person other than** the Councillor, his spouse or his dependent before acquisition of the property is made by the Councillor, his spouse or his dependent. However, the expression “has constructed” would include an illegal/unauthorized

construction made by the Councillor, his spouse or his dependent even before acquisition of the property by the Councillor, his spouse or his dependent.

III) **AS TO POINT (C) :**

Section 12 of the Maharashtra Municipal Corporations Act, 1949 does not confer any power on the Municipal Commissioner to act directly and make reference to Civil Judge Senior Division on his own. The Municipal Commissioner has to make reference to the Civil Judge Senior Division only on request made by general body of the Municipal Corporation.

IV) **AS TO ADDITIONAL POINT (D) :**

It cannot be said that the remedy provided by Section 12 of the the Maharashtra Municipal Corporations Act, 1949 is available only in case of challenge to the election of the returned candidate if he incurs disqualification after election i.e. during his term as Councillor.

Similarly, it cannot be said that the remedy as per Section 16 of the Maharashtra Municipal Corporations Act, 1949 would be available only to challenge election of the returned candidate on the ground of pre-existing disqualification.

In our view, either of the remedy would be available to the “aggrieved person” having right to avail remedy as per Section 12 or Section 16 of the Maharashtra Municipal Corporations Act, 1949 and as per the Doctrine of Election of Remedies, it would be the choice of the “aggrieved person” to elect the remedy.

32. The papers be placed before the Division Bench for further consideration of the writ petitions.

(AMIT B. BORKAR, J)

(VM.DESHPANDE,J)

(Z.A.HAQ, J)

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