

**(2008) 06 BOM CK 0034**

**In the Bombay High Court**

**Case No :** Letters Patent Appeal No. 139 of 2008 in Writ Petition No. 1964 of 2008

Baliram Vitthal Deokate

APPELLANT

Vs

Nabhiladas Narayan Bhagat and Others

RESPONDENT

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**Date of Decision :** 20-06-2008

**Acts Referred:**

Maharashtra Zilla Parishad and Panchayat Samitis Act, 1961 — Section 16, 16(1), 16(2)

**Citation :** (2008) 5 ALLMR 143 : (2008) 5 BomCR 83

**Hon'ble Judges :** Khanwilkar A.M., J; Dongaonkar S.R., J

**Bench :** Division Bench

**Advocate :** Shantanu Ghatge, for the Appellant; S.D. Malke, for R-1 and Bharti Dangre, A.G.P. for R-2 and 3, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

1. Heard Counsel for the parties.

2. The principal question that arises in the present proceeding is: whether the appellant stood disqualified to contest the election of Panchayat Samiti due to the third child born on 20th August, 2002, after the cut off date i.e. 12th September, 2001, having regard to the mandate of Section 16(1)(n) of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961.

3. It is not in dispute that the disqualification on account of number of children became applicable in respect of child born after 12th September, 2001. Section 16 of the Act deals with the matters on account of which the incumbent incurs disqualification. In so far as the case in hand is concerned, the relevant provision is Section 16(1)(n) of the Act.

4. Section 16 of the Act reads thus:

16. Disqualifications: (1) Subject to the provisions of Sub-section (2), a person shall be disqualified for being chosen as, and for being, a Councillor:

- (a) ...
- (b) ...
- (c) ...
- (d) ...
- (e) ...
- (f) ...
- (g) ...
- (h) ...
- (i) ...
- (i) ...
- (k) ...
- (l) ...
- (m) ...

(n) if he has more than two children.

Besides the said provision, it would be apposite to advert to Clause (e) of Sub-section (2) of Section 16. The same reads thus-

(2) Notwithstanding anything contained in Sub-section (1),:

- (a) ...
- (b) ...
- (c) ...
- (d) ...

(e) a person shall not be disqualified under Clause (n) of Sub-section (1) for being chosen as, or for being, a Councillor, if he has having more than two children on the date of commencement of the Bombay Village Panchayats Act and the Maharashtra Zilla Parishads and Panchayat Samities (Amendment) Act, 1955 (Mah. XLIV of 2000) (hereinafter in this clause referred to as, the date of such commencement"), so long as the number of children he had on the date of such commencement does not increase:

Provided that, a child or more than one child born in a single delivery within the period of one year from the date of such commencement shall not be taken into consideration for the purpose of disqualification mentioned in Clause (n) of Sub-section (1).

Explanation: For the purposes of Clause (n) of Sub-section (1) and Clause (e) of

this subsection,:

(i) where a couple has only one child on or after the date of such commencement, any number of children born out of a single subsequent delivery shall be deemed to be one entity;

(ii) "child" does not include an adopted child or children.

5. The other provisions of the Act are not relevant, for which no reference is made in this order.

6. The authority before whom respondent No. 1 raised issue about disqualification incurred by the appellant (petitioner), took the view that the appellant was disqualified on account of the fact that third child was born on 20th August, 2002, after the cut off date. That decision was put in issue by way of writ petition before this Court, which was initially considered by the learned Single Judge.

7. The learned Single Judge in the impugned order dated 1st April, 2008 has opined that the explanation offered by the petitioner that the third child was born due to failure of the Tubectomy operation (family planning operation), that is not exempted u/s 16(1)(n) of the Act.

8. The appellant has not only questioned that view taken by the learned Single Judge, but in the first place has vehemently asserted that the learned Single Judge in spite of being informed of similar petition being W.P. No. 532/07, pending in the High Court for final hearing where interim relief was also granted in particular, order dated 17th April, 2007, proceeded to summarily dismiss the petition preferred by the petitioner, which was impermissible. To buttress this submission, reliance is placed on the decision in the case of (Bir Bajrang Kumar v. State of Bihar and Ors.) reported in 1985 DGLS 210 : AIR 1987 S.C. 1345.

9. We shall deal with this argument in the first instance. Indeed, the appellant is right in pointing out the decision of the Apex Court in Bir Bajrang Kumar (supra). However, that will be of no avail to the appellant in the fact situation of the present case for the reasons which we would presently indicate. In the first place, the question on merits can be addressed by us in the present appeal. Therefore, the fact that other writ petition is pending before the learned Single Judge of this Court need not detain us from deciding the issue in question. For, the jurisdiction in appeal before the Division Bench and that of Single Judge in writ petition is not a co-ordinate one. Besides, it is not as if two contradictory decisions will be passed in the same case, which was the position noticed by the Apex Court in the abovesaid decision. There is yet another reason which persuades us to decide the issue immediately. It is so because the ensuing election is already slated to be held on 22nd June, 2008. Even if the grievance of the appellant was to be accepted and the appellant relegated before the learned Single Judge in terms of the decision of the Apex Court, it would not be possible to resolve the principal controversy before the date of elections. In our opinion, it

is necessary to address the issue immediately also because if the appellant was to be elected in the ensuing election, it will result in multiplicity of proceedings as the said election would then be questioned before the appropriate forum. To overcome all these difficulties, it would be appropriate to decide the issue forthwith.

10. Accordingly, we would straight way address the controversy brought before us on merits. From the admitted facts, it is established that the third child was born to the appellant on 20th August, 2002, which is after the cut off date i.e. 12th September, 2001. In view of the mandatory provision of Section 16, the authority was justified in holding that the appellant was disqualified in terms of Section 16(1)(n) of the Act. The explanation offered by the appellant that the third child was born due to circumstances beyond the control of the appellant, does not take the matter any further. As the provision is in relation to the matter of disqualification of a member of Panchayat Samiti, the provision will have to be construed as it is. Clause (n) in plain terms postulates that if the candidate has more than two children, he stands disqualified to be chosen as, or for being, a Councillor or member of Panchayat Samiti, as in the present case.

11. The exception to that rule is spelt out by the Legislature in Sub-section (2) of Section 16, in particular Clause (e) of Sub-section (2). It is common ground that Clause (e) or the proviso thereto of Sub-section (2) to Section 16 has no application to the case on hand. For, the appellant had only two children before the commencement of the Act. Whereas that number has increased to three after the cut off date. Reverting to the explanation, it provides amongst others, where a couple has only one child on or after the date of commencement of the Act, any number of children born out of a single subsequent delivery shall be deemed to be one entity; and child does not include an adopted child or children. Neither the proviso to Clause (e) of Sub-section (2) or the explanation thereunder are attracted in the present case. In other words, only the excepted category spelt out in the provision can be excluded from the rigours of Sub-section (1) of Section (16) of the Act. As the ground of child born on account of reasons beyond the control due to operation failure or for whatever reason is not envisaged by (he statute, accepting that argument of the appellant would inevitably result in diluting the mandate of the provision relating to disqualification - if not rewriting the same, which cannot be countenanced.

12. In this view of the matter, the grievance of the appellant will have to be rejected and instead the opinion recorded by the authority below as confirmed by the learned Single Judge will have to be upheld.

13. There is one more grievance which was made on behalf of the appellant. According to the appellant, respondent No. 1 had no locus to file application before the authority, which decided the issue against the appellant. We are not impressed by this contention. The fact that respondent No. 1 has locus or otherwise is insignificant, once the authority takes the cognizance of the admitted factual position. The authority is obliged to give effect to the provisions

of disqualification in its letter and spirit. The authority having decided to exercise that power in the fact situation of the presence case, the grievance regarding respondent No. 1 having no locus will be of no avail.

14. Taking any view of the matter, the appeal is devoid of any merit. The same is dismissed. No order as to costs.