

(2012) 07 BOM CK 0193
In the Bombay High Court
Case No : Writ Petition No. 4529 of 2011

Bharat Vitthal Shete

APPELLANT

Vs

Rohidas Manaji Wahleker and Others

RESPONDENT

Date of Decision : 11-07-2012

Acts Referred:

Births, Deaths and Marriages Registration Act, 1886 — Section 19, 19, 20, 20, 21
Evidence Act, 1872 — Section 114, 14, 15, 16

Citation : (2012) 5 ALLMR 497 : (2012) 6 BomCR 83

Hon'ble Judges : S.S. Shinde, J

Bench : Single Bench

Advocate : S.K. Shinde, for the Appellant; P.S. Shinde, Advocate Respondent No. 1, Mr. K.J. Ghute Patil, A.G.P. Respondent Nos. 3 to 5 and Mr. A.B. Gatne, Advocate Respondent No. 6, for the Respondent

Final Decision : Allowed

Judgement

S.S. Shinde, J.—Rule. Rule made returnable forthwith. With the consent of parties heard finally. This writ petition takes exception to the judgment and order in Grampanchayat Appeal No. 27 of 2011 passed by the Additional Commissioner, Nashik Division, Nashik dated 25th May 2011, thereby confirming the judgment and order dated 24th January 2011, passed by the Additional Collector, Ahmednagar in Grampanchayat Dispute No. 48 of 2010.

2. It is the case of the petitioner that, the election of village Grampanchayat Pimpalgaon Khand, for the period 2010 to 2015 was held on 22nd August, 2010. The petitioner herein is declared elected member of the said Grampanchayat by defeating the respondent No.1 and other candidates who contested the said election from his ward. Thereafter, after few days the petitioner is elected as Sarpanch of the said Grampanchayat.

The respondent No.1 herein, filed Dispute on 14th September, 2010, before the respondent No. 3 for setting aside the election of the petitioner as per the provisions of Section 14(1)(j)(1) of the Bombay Village Panchayat Act, 1958 (For

short,"said Act"), on the ground that, the petitioner is having three children, and third child by name Sarthak is born on 7th November, 2007 after cut off date prescribed by the notification in official gazette under said Act.

The petitioner herein, after receipt of the notice of the Dispute filed by the respondent No.1 before the Additional Collector, Ahmednagar, filed his reply. It is the case of the petitioner that, after receipt of the notice of the aforesaid Dispute, the petitioner came to know that, one lady by name Kusum gave birth to one child by name Sarthak on 7th November, 2007, and the name of the petitioner is shown as father of the said child. Therefore, the petitioner filed Regular Civil Suit No. 136 of 2010 for declaration that, the said Kusum is not his wife and child Sarthak is not born from the petitioner to the said Kusum. At the time of filing the writ petition, the said suit was pending for final decision, and during pendency of the writ petition the said suit is finally decided.

3. The petitioner in his reply contended that, the name of his wife is Sunita and not Kusum. He has two daughters from wife Sunita. In the ration card also the name of Sunita and two daughters is mentioned. It is further contended that, in the said certificate on which reliance has been placed by the respondent No.1, there is no mention of name of an informer, neither it is signed by him. Therefore, said certificate cannot be relied, as it cannot be said to be the certificate issued by following provisions of Sections 19, 20, 22(2) of the Births, Deaths and Marriages Registration Act, 1886, and it has no presumptive value as per Section 114 of the Evidence Act. The petitioner has also contended that, the respondent No. 3 has no jurisdiction to set aside the petitioner's election, as per provisions of Sections 14 and 16 of the said Act, and only the Civil Court has jurisdiction u/s 15 of the said Act to set aside the election.

On 24th January, 2011 the respondent No. 3 allowed the Dispute No. 48 of 2010 and set aside the election of the petitioner as Grampanchayat Member/Sarpanch though he has no jurisdiction do so.

Being aggrieved by the judgment and order dated 24th January, 2011 passed by the respondent No. 3 in Dispute No.48 of 2010, the petitioner preferred Appeal No. 27 of 2011 before the respondent No.4 on 25th February, 2011 and prayed for setting aside the judgment and order passed by the respondent No.3.

By the judgment and order dated 25th May, 2011, the respondent No. 4 herein, dismissed the appeal filed by the petitioner. Hence this writ petition.

4. This writ petition was initially heard for admission on 27th June, 2011 by this Court, and upon hearing, this Court was pleased to issue notice to the respondents. It was further ordered that, the petitioner may attend the proceedings of the Grampanchayat but shall not be entitled to vote nor shall draw allowances. From perusal of order sheets, it further appears that, interim order passed by this Court is continued time to time and is in force till date.

The learned Counsel appearing for the petitioner urged that, the petitioner is

having only two issues by name Poonam and Monika from his wife by name Sunita, and names of his wife and daughters are entered in the ration card issued by the respondent No.5. However, the said document has not been considered by the authorities. It is submitted that, the names of said Kusum and Sarthak are not mentioned in the ration card. It is submitted that, the petitioner is having only wife Sunita, and there is no question of having any other wife by name Kusum and son by name Sarthak, however, somebody by playing fraud on the authorities, got entered the name of the petitioner in the birth extract showing that, the petitioner is father of said Sarthak.

It is submitted that, the petitioner filed Regular Civil Suit No. 136 of 2010 for declaration that, the said Kusum is not his wife and the child Sarthak is not born to said Kusum from the petitioner. The learned Counsel submitted that, at the time of filing this writ petition, the said suit was pending, however, now the said suit has been decided by the Civil Judge, Junior Division, Akole. In said suit, compromise decree is drawn between the petitioner herein, i.e. plaintiff and Kusum, wife of Bhaurao Kere and Sarthak through mother Kusum Kere, and in terms of the said compromise decree, there is no any relationship between the plaintiff and the defendant No.1, and the defendant No. 2 is not begotten from the plaintiff i.e. petitioner herein, to the respondent No.1. The said position has been admitted by the respondent No.1 Kusum. While entering the name of Sarthak in the birth register, the name of the plaintiff i.e. petitioner herein, is inadvertently recorded as father of said Sarthak, and said position/fact is admitted by the defendant No.1. The marriage of the respondent No. 1 was solemnized with one Bhaurao Kere, and the said fact has been admitted by the respondent No.1 Kusum. The said marriage was performed 21 years back.

The learned Counsel invited my attention to the details mentioned in the decree passed by the Civil Court. The learned Counsel submits that, in view of the decree passed by the Civil Court, the judgments and orders impugned in this petition deserve to be set aside. The learned Counsel also invited my attention to the pleadings and grounds taken in the writ petition and submitted that, this petition deserves to be allowed. The learned Counsel also invited my attention to the rejoinder affidavit filed on behalf of the petitioner. Along with the said rejoinder, the petitioner has annexed the judgment and decree passed by the Civil Judge, Junior Division, Akole dated 10th October, 2011. Therefore, relying upon the pleadings in the petition, grounds taken therein, rejoinder affidavit and annexures to the petition and rejoinder affidavit, the Counsel for the petitioner submits that, this writ petition deserves to be allowed.

5. The respondent No.1 has filed affidavit in reply. The learned Counsel appearing for the respondent No.1 submits that, the Additional Collector, Ahmednagar and the Additional Commissioner, Nashik Division, Nashik have held that, third child of the petitioner is born on 7th November, 2007 which is after cut off date i.e. 12th September, 2001. The learned Counsel invited my attention to the provisions of Section 20 and 22(1) of the Births, Death and Marriages

Registration Act and also provisions of Section 114 of the Evidence Act and submitted that, the birth certificate which is issued by the competent authority is after following the mandatory provisions of law. In the said certificate, the place of birth is also mentioned as "Satpute Hospital". It is also submitted that, the petitioner was elected for the year 2010 and he was declared as elected on 22nd August, 2010. The birth certificate of the third child was registered on 20th November, 2007. It is submitted that, on the day of registration of certificate, the petitioner has not taken any objection. It is submitted that, the petitioner has contested the election for the year 2010 and for that purpose, the election voters list was also prepared. In the voters list the petitioner's name is appearing at Sr. No. 144 i.e. Shete Bharat Vittal and in the same voters list at Sr. No. 256 the name of the Smt. Shete Kusum Bharat is appearing. Moreover, the name of her husband is shown as Shete Bharat and relation is also disclosed. Therefore, in such circumstances, order of disqualification of the petitioner is legal and sustainable and both the learned authorities have rightly held that the petitioner is disqualified being a member of Grampanchayat.

It is further submitted that, third child of the petitioner was also administered the BCG and CHICKEN Pox Vaccine for the year 2007-08 and his name is also appearing at Sr. No. 62 and 63 in the register as Ku. Sarthak Bharat Shete. It is submitted that, the petitioner has not established that, while recording birth entry, the Registrar has not followed the mandatory procedure u/s 22 of the said Act and therefore, the authorities have rightly held that, third child of the petitioner is after cut off date and therefore, he is disqualified to be continued, as a member of the Grampanchayat.

Therefore, the Counsel appearing for the respondent No.1 relying upon the averments in the affidavit in reply would submit that, there are convincing documents which were placed on record and after considering the said documents and evidence, both the Forums below have concurrently held that, Sarthak is begotten to Kusum from the petitioner, after cut off date and as such, third child is born after the said cut off date. Both the Forums below have rightly held that, the petitioner is not entitled to be continued as a Member/Sarpanch of the Grampanchayat and therefore, this Court may not interfere in the findings recorded by the Forums below.

6. The learned A.G.P. appearing for the State relying upon the findings recorded by the Additional Collector, Ahmednagar and the Additional Commissioner, Nashik Division, Nashik, would submit that, this writ petition may be dismissed.

7. I have given anxious consideration to the rival submissions, perused the pleadings and grounds taken in the petition, annexures thereto, the affidavit in reply filed by the respondent No. 1, rejoinder affidavit filed by the petitioner and also the decree passed by the Civil Court which is placed on record by the petitioner alongwith rejoinder affidavit and I am of the considered opinion that, the judgments and orders impugned in this writ petition, cannot be sustained for the reasons stated herein below.

I have carefully perused the judgment and order of the Additional Collector, Ahmednagar in Dispute No. 48 of 2010. From careful perusal of the said judgment, the concerned authority has taken note of the fact that, the petitioner herein has filed Regular Civil Suit No. 136 of 2010 before the Court of the Civil Judge, Junior Division, Akole for declaration that, Smt. Kusum Bhaurao Kere is not the wife of the petitioner, and her son Sarthak is not begotten from the petitioner. However, the Additional Collector, Ahmednagar has observed that, there is no any order passed by the Civil Court in the said civil suit. The Additional Collector, Ahmednagar has mainly considered the birth certificate dated 2nd September, 2010 issued by the Sangamner Municipal Council, Sangamner. The said certificate is issued under the relevant provisions of the Maharashtra Birth and Death Registration Rules, 2000. In the said certificate, the name of the father of Sarthak is shown as Bharat Vitthal Shete. It is observed by the Additional Collector, Ahmednagar that, though the petitioner has stated that, the said certificate is false, however, he has not proved that, how the said certificate is false, by bringing cogent evidence on record. The second ground assigned is that, though Regular Civil Suit No. 136 of 2010 is filed by the petitioner, there is room for doubt that, the said suit is filed to create the evidence. Accordingly, on the aforesaid two grounds, the Additional Collector, Ahmednagar held that, third child is born after 12th September, 2001 and therefore, since there are more than two issues after cut off date to the petitioner, in view of the provisions of Section 14(j1) of the Bombay Village Panchayat Act, 1958 and in view of the provisions of the Bombay Village Panchayat and the Maharashtra Zilla Parishad and Panchayat Samitee (Amendment) Act, 1995, the petitioner herein, is not eligible to be continued as a Grampanchayat Member of village Pimpalgaon Khand, Taluka Akole District Ahmednagar and accordingly, the Additional Collector, Ahmednagar allowed the application filed by the respondent No.1 herein. In the operative part of the order, the Additional Collector, Ahmednagar cancelled the Membership of the petitioner.

8. The said judgment and order was challenged by the petitioner herein, before the Additional Commissioner, Nashik Division, Nashik by way of filing the Appeal No. 27 of 2011. From careful perusal of the judgment of the appellate authority, it appears that, the appellate authority has also mechanically endorsed the findings recorded by the Additional Collector, Ahmednagar. The appellate authority has taken a note of the fact that, Regular Civil Suit No. 136 of 2010 is filed by the petitioner before the Civil Court. It further appears that, the petitioner herein, has raised specific ground in the appeal that, in the certificate which is placed on record by the respondent No.1 herein dated 5th February, 2010 issued by the Sangamner Municipal Council, Sangamner, there is no mention of the information that, on whose instance the said entry about birth of Sarthak, has been taken, and there is no signature of the person who has given the said information about the birth. Therefore, the said certificate cannot be relied upon, since it has no presumptive value as per the provisions of Section

114 of the evidence Act. However, said contention has not been considered at all. The appellate authority has not considered the provisions of Births, Deaths and Marriages Registration Act, 1886. When such contention was raised by the petitioner, the authorities were bound to refer to the provisions of Section 19 to 22 of the above mentioned Act.

The petitioner has placed on record the copy of the certificate at Exhibit-B on Page 19 of the compilation of the writ petition, and upon perusal of the said certificate, it is abundantly clear that, there is no mention in the said certificate, on whose instance, the said entry has been taken. The said certificate is also not signed by any person, on whose instance, such entry of birth of Sarthak is taken. Though the Counsel appearing for the respondent No.1 strenuously contended that, in the said format i.e. birth certificate, there is no column for mentioning, on whose instance, such entry is taken and also there is no any column for signature, the said argument is devoid of any merits and same stands rejected. When the provisions and in particular provisions of Section 22 of the Births, Death and Marriages Registration Act provides that, when an entry of a birth or death has been made by the Registrar of Births and Deaths u/s 19, the person giving notice of the birth or death must sign the entry in the register in the presence of the Registrar. There is also proviso to Section 22 of the said Act which provides for, it shall not be necessary for the person giving notice to attend before the Registrar or to sign the entry in the register if he has given such notice in writing and has furnished to the satisfaction of the Registrar such evidence of his identity as may be required by any rules made by the State Government in this behalf.

9. In the present case, as observed earlier, the Additional Collector, Ahmednagar or the appellate authority has not adverted to the said provisions at all. In the case of Gangadhar Tadme Vs. Trimbak Akingire and Others, , this Court had occasion to consider the provisions of Section 19, 20 and 22(2) of the Births, Deaths and Marriages Registration Act, 1886 and the provisions of Section 114 of the Evidence Act and this Court, in the facts of that case, held that, in order to give presumptive value to the entries made in the register of birth, the condition specified under subsection (1) of Section 22 of the Births, Death and Marriages Registration Act has necessarily to be satisfied. It is a mandatory provision and noncompliance thereof will result in the registration to be as not the one done under the said Act. If the registration ceases to be the one under the said Act, any certificate issued in relation to such entries cannot have legal sanctity. Any certificate issued without compliance of the mandatory requirement u/s 22(1) of the said Act, cannot be considered as a certificate issued under the provisions of the said Act and any such certificate, therefore, will not carry presumptive value u/s 114 of the Evidence Act.

In the present case, bare perusal of the certificate in respect of the third child produced by the respondent No.1 herein, which is placed on record by the petitioner discloses that, there is no mention about on whose instance such entry

has been taken. Neither the name of the person is disclosed nor his address or identity. Therefore, the said certificate cannot have presumptive value u/s 114 of the Evidence Act nor it can be said to be a certificate issued under the said Act bearing in mind the provisions of section 22(2) of the said Act.

In the case of Sushil Kumar Vs. Rakesh Kumar, the Supreme Court in the facts of that case held, mere production of a document in evidence showing that that, the date of birth of the original applicant is 10th February, 1960 is not sufficient, and the admission register or transfer certificate issued by the primary school, cannot be relied, in absence of any evidence to show that, the date of birth was recorded at the instance of a responsible person. Therefore, if the said analogy is applied in the facts of this case, an inevitable conclusion would be, that the certificate issued by the Sangamner Municipal Council, Sangamner showing the name of petitioner as father of the said Sarthak, does not disclose that the said entry is taken at the instance of any responsible person, much less any person. This aspect has not been considered either by the Additional Collector, Ahmednagar or the appellate authority. Both the Forums have not considered the contention of the petitioner that, the marriage of said Kusum with Bhaurao Kere is in subsistence and therefore, subsisting said marriage, there is no question of birth of Sarthak to Kusum from the petitioner.

10. Apart from what has been discussed herein above, it appears that, when the Dispute was pending before the Additional Collector, Ahmednagar and further appeal was pending before the appellate authority, and even at the time of filing the writ petition, Regular Civil Suit No. 136 of 2010 filed by the petitioner herein, was pending in the Court of the Civil Judge, Junior Division, Akole. There was no final adjudication of the said suit. The petitioner, alongwith rejoinder affidavit has placed on record the judgment and the decree passed in Regular Civil Suit No. 136 of 2010. While exercising the writ jurisdiction, it is not appropriate for this Court to find out its effect and render the findings thereupon visavis facts involved in the case. The respondent No.1 in his affidavit in reply has also mentioned certain entries in the voters list and other documents, which were not noticed by the Additional Collector, Ahmednagar or appellate authority while deciding the Dispute or Appeal and therefore, in my considered opinion, in the light of the aforesaid discussion, proper course would be to set aside the impugned judgments and order passed by the Additional Collector, Ahmednagar dated 24th January, 2011 in Grampanchayat Dispute No. 48 of 2010 and Additional Commissioner, Nashik Division, Nashik in Appeal No. 27 of 2011 and restore Appeal No.27 of 2011 to its original file so as to have opportunity to the petitioner to place on record the copy of the judgment and decree in Regular Civil Suit No. 136 of 2010 before concerned Forum, and also opportunity to the respondent No.1 to place on record the other documents than the documents which are already considered by the Forums below, and advance arguments on the basis of said new documents.

Therefore, the impugned judgment and order passed by the Additional Collector,

Ahmednagar dated 24th January, 2011 in Grampanchayat Dispute No. 48 of 2010 and Additional Commissioner, Nashik Division, Nashik in Appeal No. 27 of 2011 dated 25th May, 2011 is quashed and set aside. Appeal No. 27 of 2011 is restored to its original file. The Additional Commissioner, Nashik Division, Nashik to hear the said appeal afresh, after allowing the petitioner to place on record the certified copy of the judgment and decree passed by the Civil Court in Regular Civil Suit No. 136 of 2010 and also the respondent No.1 to place on record any other documents which are already not on record in support of his case. It is needless to observe that, while hearing the appeal, the appellate authority should keep in mind the provisions of section 19 to 22 of the Births, Deaths and Marriages Registration Act, 1886, and also the judgment of this Court in the case of Gangadhar s/o Gonduram Tadme (supra). The appellate authority to hear the appeal expeditiously and render the decision thereon. Since the order of the Additional Collector, Ahmednagar and also the appellate authority is quashed and set aside, necessary consequences would follow. The writ petition is allowed to the above extent and same stands disposed of. Rule made absolute on the above terms.