

---

**(2015) 04 RAJ CK 0215**  
**In the Rajasthan High Court**  
**Case No : Civil Writ Petition No. 1399/04**

Julfikar Ali Bhutto

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

---

**Date of Decision :** 30-04-2015

**Acts Referred:**

Rajasthan Panchayati Raj Act, 1994 — Section 19(1), 39, 39(1)(a), 39(2), 43

**Citation :** (2015) 04 RAJ CK 0215

**Hon'ble Judges :** Sangeet Lodha, J

**Bench :** Single Bench

**Advocate :** Paramveer Singh, for the Appellant; Rishabh Tayal and Rajesh Dadhich on behalf of P.R. Mehta, Advocates for the Respondent

**Final Decision :** Allowed

---

## Judgement

Sangeet Lodha, J.—This writ petition is directed against order dated 26.2.04 passed by the State Government in exercise of the power conferred under Section 63 of the Rajasthan Municipalities Act, 1959 (for short "the Act"), whereby the petitioner, an elected member of Municipal Board, Jalore, stands removed from the office, on account of having incurred disqualification in terms of provisions of Section 26(xiv) of the Act.

2. The petitioner was declared elected as member of the Municipal Board, Jalore, in the municipal elections held on 26.11.99. The election of the petitioner as member was questioned by an elector Bhopal Singh, by way of an election petition filed before the Election Tribunal under the provisions of Section 34 of the Act, on the ground that as on the date of filing of the nomination form, the petitioner was having more than two children and thus, was disqualified to contest the election in terms of provisions of Section 26(xiv) of the Act. The election petition was being contested by the petitioner by filing a reply thereto. However, later the election petition was dismissed as withdrawn vide order dated 7.10.03 passed by the Election Tribunal.

3. At the same time, the proceedings were initiated against the petitioner by the State Government under Section 63 of the Act, for his removal as member of the Municipal Board on the ground that on account of birth of the additional child, he has incurred disqualification in terms of provisions of Section 26(xiv) of the Act. According to the petitioner, the charge sheet alleged to have been issued by the State Government was never served upon him and the proceedings for his removal were initiated and concluded behind his back. Be that as it may, after inquiry the charge being proved against the petitioner, vide order dated 26.2.04 issued by the State Government, the petitioner was removed as member of the Municipal Board, Jalore and was declared to be disqualified for contesting the election in future.

4. Precisely, the case of the petitioner is that the order impugned passed by the State Government in gross violation of principles of natural justice is not sustainable in the eyes of law. That apart, the stand of the petitioner is that the third child is alleged to have been born on 19.1.99 i.e. prior to the election of the petitioner as member of Municipal Board, Jalore and therefore, for pre-election disqualification, the State Government had no jurisdiction to initiate the proceedings for removal of the petitioner in terms of provisions of Section 63(1) (c) of the Act. Accordingly, it is submitted that the inquiry proceeding initiated by the State Government, acting without jurisdiction and the consequential order passed, stand vitiated on this count alone.

5. A reply to the writ petition has been filed on behalf of the respondents taking the stand that a complaint was submitted to the State Election Commission Rajasthan, Jaipur by one Shri Bhopal Singh, which was forwarded to the District Collector, Jalore for enquiry. The District Collector, Jalore in his turn referred the matter for enquiry to the Sub Divisional Officer, Jalore. After enquiry, the Sub Divisional Officer submitted the report recording the finding that the petitioner has three children. The report submitted by the Sub Divisional Officer was forwarded to the Secretary, Local Self Government in the month of April, 2001 and thereupon, the enquiry under Section 63 of the Act was initiated against the petitioner. It is submitted that the charge sheet alongwith memorandum of charges was forwarded by the Enquiry Officer for service upon the petitioner several times but could not be served and therefore, the same was pasted at his house on 16.7.02. Thus, the case of the respondents is that despite service of the charge sheet, the petitioner did not appear before the Enquiry Officer and therefore, the order proceeding ex parte was passed by the Enquiry Officer against him on 30.1.03. It is submitted that it is a finding of fact that the petitioner's second child was born on 18.2.97 and thus, the male child born subsequent thereto i.e. on 19.1.99 was a third child. Accordingly, it is submitted that the factum of birth of the third child being not in dispute, the petitioner having incurred disqualification prior to election, has rightly been removed as member of the Municipal Board, Jalore, by the State Government in exercise of the power conferred under Section 63 of the Act.

6. Learned counsel for the petitioner reiterating the stand taken in the writ petition submitted that the charge sheet and the notice for hearing were never served upon the petitioner and therefore, the Judicial Officer appointed to conduct the enquiry has erred in passing the order proceeding ex parte against him and the enquiry report submitted pursuant to the ex parte proceedings taken, being violative of elementary principle of natural justice, deserve to be quashed on this count alone. Learned counsel submitted that in terms of provisions of Section 63(1)(c), the State Government is empowered to initiate the proceedings for removal of the member of the Municipal Board only in a situation, where after the election such member has incurred any disqualification mentioned in Section 18 or Section 26 or has ceased to fulfill the requirement of Section 24 of the Act. Learned counsel submitted that it is not in dispute that the third child is alleged to have been born to the petitioner on 19.1.99, much prior to the date of election i.e. 26.11.99 and therefore, for pre-election disqualification, the proceeding initiated by the State Government for removal of the petitioner as member of Municipal Board, Jalore, is ex facie without jurisdiction. Learned counsel submitted that pre-election disqualification can only be adjudicated by the District Judge in an election petition filed under Section 26 of the Act. In support of the contention, learned counsel has relied upon a Full Bench decision of this court in the matter of " Sameera Bano (Smt.) Vs. State of Rajasthan and Others, AIR 2007 Raj 168 : (2007) 2 RLW 1674 .

7. On the other hand, the counsel appearing for the respondents submitted that since the charge sheet and the notice of hearing could not be served upon the petitioner despite efforts being made time and again, the same were affixed at his house and therefore, the stand taken by the petitioner that the same were never served upon him, is absolutely incorrect. In this regard, learned counsel has relied upon the report of the process server placed on record as Annexure R-1. Learned counsel submitted that the factum of additional child having been born to the petitioner after the cut off date and the petitioner having more than two children as on the date of filing of the nomination form being not in dispute, the order impugned passed by the State Government in exercise of the power conferred under Section 63(1)(c) of the Act is well within its jurisdiction and does not suffer from any infirmity or illegality. Learned counsel submitted that by virtue of the provisions of Section 63(1)(c), a member who has incurred disqualification in terms of provisions of Section 26 of the Act, cannot be continued in the office. Learned counsel submitted that even pre-election disqualification is covered by the provisions of Section 63(1)(c) of the Act.

8. I have considered the rival submissions and perused the material on record.

9. Precisely, the question which arises for consideration of this court in the instant petition is whether the question regarding pre-election disqualification can be adjudicated only in election petition filed before the District Judge under Section 36 of the Act or it can also be adjudicated by the State Government by way of an enquiry to be conducted by the Judicial Officer in terms of provisions of

## Section 63 of the Act?

10. The controversy raised rolls around the provisions of Sections 26 (xiv), 34(a) and 63(1)(c) of the Act, which may be beneficially reproduced:

"26. General disqualifications for members A person, notwithstanding that the is otherwise qualified, shall be disqualified for being chosen as (or for being) a member of a board

...XXXX..... XXX..... XXX

(xiv) who has more than two children.

..... XXX..... XXX.....

Provided that

(a) to (d)...xxxx....xxxxx....

(e) the birth within (three) year from the date of the commencement of the Rajasthan Municipalities (second Amendment) Act, 1992 (Rajasthan Act No. 32 of 1992), herein after in this clause referred to as the date of such commencement, of an additional child shall not be taken into consideration for the purpose of the disqualification mentioned in clause (xiv) and a person having more than two children (excluding the child, if any, born within (three years) from the date of such commencement) shall not be disqualified under that clause for so long as the number of children he has on the date of such commencement does not increase. Explanation. For the purpose of clause (xiv), any number of children born out of a single delivery shall be deemed to be one entity and any child given in adoption shall not be excluded while computing the number of children.

34. Grounds on which election may be called in question The election of any person as member of a board may be questioned by an election petition on one or more of the following grounds, namely,

(a) that on the date of election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under this Act, or

....XXXX..... XXX.

63. Removal of Members (1) The State Government may, subject to the provisions of sub-section (2) and (3), remove a member of a board on any of the following grounds, namely

xxx..... xxxx..... xxxxx

(c) that after his election he has incurred any of the disqualification mentioned in section 18 or section 26 or has ceased to fulfill the requirement of section 24."

(2) Notwithstanding anything contained in sub-section (1) where it is proposed to remove a member on any of the grounds specified in clause (c) or clause (d)

of subsection (1), as a result of the inquiry referred to in the proviso to that subsection and after hearing the explanation of the member concerned, the State Government shall draw up a statement setting out distinctly the charge against the member and shall send the same for inquiry and findings by judicial officer of the rank of a District Judge to be appointed by the State Government for the purpose.

(3) The judicial officer so appointed shall proceed to inquire into the Charge in the prescribed manner, hear the member concerned if he makes appearance, record his findings on each matter, embodied in the statement as well as on every other matter he considers relevant to the charge and send the record along with such findings to State Government, which shall thereupon pass (final orders or order for re-enquiry by any such other officer as may be deemed proper."

11. At the outset, it would be appropriate to notice the factual position which is not in dispute. The petitioner was declared elected as member of Municipal Board, Jalore in elections held on 26.11.99. The election of the petitioner as member was questioned by one Shri Bhopal Singh by way of an election petition filed before the Election Tribunal on the ground that as on the date of election, he was disqualified to be chosen as member of Municipal Board inasmuch as, he was having more than two children on the date of filing of nomination form. The election petition preferred by Shri Bhopal Singh as aforesaid stood dismissed as withdrawn vide order dated 7.10.03 passed by the Election Tribunal, Jalore in election petition No. 4/2000.

12. As per the enquiry report placed on record as Annexure 3, the charge against the petitioner was that after his election as member of Municipal Board, Jalore his wife Smt. Shaina gave birth to a girl child on 18.2.97 and thus, he has incurred disqualification in terms of provisions of Section 26 of the Act. But the fact remains that the third child is alleged to have been born to the petitioner on 19.1.99 and not on 18.2.97 as observed by the Enquiry Officer in the enquiry report. Be that as it may, the disqualification of the petitioner to be a member of the Municipal Board, subject matter of enquiry was pre-election disqualification and not the post election disqualification. Thus, it is a common ground between the parties that the order impugned passed by the State Government directing removal of the petitioner as member of the Municipal Board, Jalore is based on the finding recorded by the Enquiry Officer regarding his pre-election disqualification and not the post election disqualification.

13. A bare perusal of Section 26(xiv) makes it abundantly clear that a person notwithstanding that he is otherwise qualified shall be disqualified for being chosen as a member of a Municipal Board, who has more than two children. As per proviso (e) to Section 26 of the Act, a child born within three years from the date of the commencement of the Rajasthan Municipalities (second Amendment) Act, 1992, an additional child born shall not be taken into consideration for the disqualification mentioned in clause (xiv) and a person having more than two

children (excluding the child, if any, born within three years) from the date of such commencement shall not be disqualified under the clause for so long as number of children he has on the date of such commencement does not increase.

14. As per the allegations levelled, the petitioner's second child was born on 18.2.97 and third child born on 19.1.99 and therefore, the question of the exclusion of the third child born in terms of provisions as contained in proviso (e) to Section 26 of the Act does not arise and thus, undoubtedly, if the allegation of birth of third child as on 19.1.99 is open to be inquired into by the State Government under the provisions of Section 63 of the Act and is found to be proved, the petitioner shall be treated to be disqualified for being chosen and continue as the member of the Municipal Board, Jalore.

15. A bare perusal of the provisions of Section 63(1)(c) reveals that the enquiry against an elected member of a Board can be initiated only if a member of the Board after his election has incurred inter alia any disqualification under Section 26 of the Act. It is not in dispute that the petitioner is alleged to have incurred disqualification for being chosen as member of the Municipal Board, prior to the date of his filing the nomination form and thus, the alleged disqualification of the petitioner being not the disqualification incurred after his election as member of the Municipal Board, the same is not covered by the provisions of Section 63(1)(c) of the Act and thus, the action of the State Government in initiating the proceedings against the petitioner for his removal as member of the Municipal Board on the basis of his pre-election disqualification is ex facie without jurisdiction.

16. As a matter of fact, the controversy raised in the matter stands covered by a Bench decision of this court in Sameera Bano's case (supra), wherein the question involved was whether the dispute relating to pre-election disqualification can be adjudicated only in an election petition before the District Judge under Section 43 of the Rajasthan Panchayati Raj Act, 1994 read with Rule 80 of the Rajasthan Panchayati Raj (Election) Rules, 1994 or it can also be adjudicated by the authority under Section 39(2) of Act of 1994 read with Rule 23 of Rajasthan Panchayati Raj Rules, 1996.

17. The provisions of Section 19(1) of the Act providing for more than two children as disqualification for the qualification for election as Panch or Member of Panchayati Raj Institution and Section 39(a) of the Act which deals with "cessation of membership" of the member if he is or becomes subject to any disqualification specified which were under consideration of the Full Bench of this court, are almost pari materia to the provisions of Section 26(xiv) and Section 63(1)(c) of the Act which are subject matter of consideration of this court in the present petition.

18. The provisions of Sections 19(1) and 39 of the Act of 1994 to the extent germane to the present controversy may be quoted for ready reference:

"19. Qualifications for election as a Panch or a Member: Every person registered

as a voter in the list of voters of a Panchayati Raj Institution shall be qualified for election as a Panch or, as the case may be, a member of such Panchayati Raj Institution unless such person-

.....

(1) has more than two children;

.....

Provided that-

.....

(iv) the birth during the period from the date of commencement of this Act, hereinafter in this proviso referred to as the date of such commencement, to 27th November, 1995, of an additional child shall not be taken into consideration for the purpose of the disqualification mentioned in clause (1) and a person having more than two children (excluding the child, if any, born during the period from the date of such commencement to 27th November, 1995) shall not be disqualified under that clause for so long as the number of children he had on the date of commencement of this Act.

39. Cessation of Membership:- (1) A member of a Panchayati Raj Institution shall not be eligible to continue to be such member if he -

(a) is or becomes subject to any of the disqualifications specified in section 19: or

..XXX.....

(2) Whenever it is made to appear to the Competent Authority that a member has become ineligible to continue to be a member for any of the reasons specified in sub-section (1), the Competent Authority may, after giving him an opportunity of being heard, declare him to have become so ineligible and thereupon he shall vacate his office as such member:

Provided that until a declaration under this sub-section is made, he shall continue to hold his office."

19. After due consideration of the said provisions, the Full Bench by a majority decision answered the question in negative holding that the pre-election disqualification can be adjudicated only in the election petition before the District Judge under Section 43 of the Act read with Rule 80 of the Rules of 1994 and cannot be adjudicated by the authority under Rule 23 of the Rules of 1996.

20. It is pertinent to note that as per the provisions of Section 39(1)(a) of the Act of 1994, provides that an elected member of a Panchayati Raj Institution shall not be eligible to continue to be such member if he has incurred disqualification in terms of Section 19 of the Act and therefore, it was certainly a debatable question as to whether a person who has incurred the disqualification in terms of Section 19(1) even prior to his election as panch or member, can at

all continue as member of the Panchayati Raj Institution and whether such disqualification incurred can be adjudicated by the authority under Rule 23 of the Rules read with Section 39(2) of the Act and the Full Bench of this court after due consideration of the said provisions ruled that the pre-election disqualification cannot be adjudicated by the authority under Rule 23 of the Rules of 1996 read with Section 39(2) of the Act. But then, Section 63(1)(c) of the Act provides in quite unequivocal terms that the State Government is empowered to initiate the proceedings for removal of the member of the Municipal Board only in case where such member has incurred disqualification mentioned in Section 18 or Section 26 or has ceased to fulfill the requirement of Section 24 after the election. Thus, it can be safely concluded that the pre-election disqualification is not open to be adjudicated upon by the State Government by way of inquiry under Section 63 of the Act.

21. The action of the respondents in initiating the inquiry proceedings against the petitioner under Section 63 of the Act for his removal as member of the Municipal Board, Jalore, on account of his pre-election disqualification, having being held to be without jurisdiction, the other questions raised by the petitioner in the writ petition are not required to be gone into by this court.

22. In the result, the writ petition is allowed. The inquiry initiated against the petitioner under Section 63 of the Act for his removal as member of the Municipal Board, Jalore and the impugned dated 26.2.04 passed by the State Government pursuant thereto, are quashed. No order as to costs.