
(2007) 07 BOM CK 0022

In the Bombay High Court

Case No : Writ Petition No. 1847 of 2007

Naresh Sonwane

APPELLANT

Vs

Kishor Patil and Others

RESPONDENT

Date of Decision : 25-07-2007

Acts Referred:

Bombay Provincial Municipal Corporations Act, 1949 — Section 10, 11, 12
Constitution of India, 1950 — Article 226, 227
Evidence Act, 1872 — Section 34, 35, 73, 74

Citation : (2007) 6 ALLMR 759 : (2007) 6 MhLj 801

Hon'ble Judges : R.M. Savant, J

Bench : Single Bench

Advocate : B.R. Wanna, for the Appellant; K.C. Sant, for respondent Nos. 1 to 4, V.H. Dighe, Asstt. Govt. Pleader for respondent Nos. 5 to 7 and P.R. Patil, for the Respondent

Final Decision : Dismissed

Judgement

R.M. Savant, J.—Rule, made returnable forthwith and with the consent of parties, heard.

2. This petition impugns the order dated 12-3-2007 passed by the IInd Joint Civil Judge, Senior Division, Jalgaon in Reference No. 1 of 2007. By the said order, the Reference No. 1 of 2007 made by the respondent No. 8, Commissioner, Municipal Corporation, Jalgaon has been allowed and consequently, a declaration has been issued that the respondent No. 1 herein stands disqualified as a Municipal Corporator of the Jalgaon Municipal Corporation on account of he having a third child after the cut of date.

3. The factual matrix involved in the petition is stated thus -

The election of the petitioner was held sometime in September, 2003 and the results were declared on 14-9-2003. The petitioner herein and the respondent Nos. 1 to 4 have been declared as elected Corporators of the said Municipal

Corporation. The respondents Nos. 1 to 4 herein on 10-10-2005 filed an application under Sections 10, 11 and 12 of the Bombay Provincial Municipal Corporation Act, hereinafter referred to as "the said Act". In the said application, the respondents Nos. 1 to 4 herein stated that the petitioner's wife namely; Anita has delivered third child on 8-12-2003 and in terms of the amendment effected to Section 10 of the said Act, the present petitioner has incurred a disqualification and, therefore, cannot continue as a Corporator. The respondent Nos. 1 to 4 had annexed documents in support of the said application. On receipt of the said application, the Commissioner of the Municipal Corporation issued a notice to the petitioner calling upon him to show cause, The Commissioner called upon the petitioner to explain as to whether Nana Baliram Sonwane and Naresh Baliram Sonwane is one and the same person. The Commissioner upon receipt of the reply of the petitioner referred the matter to the Court of Civil Judge, Senior Division for adjudication of the said issued by his order dated 15-10-2005. This was in terms of the mandate of the said Act.

4. On receipt of the Reference by the Civil Court, the said Reference was numbered as Reference No. 1/2007. The Reference Court had issued notices to the respondents in said Reference which included the petitioner. The petitioner and his wife thereafter appeared in said Reference and submitted their say/written statement on 14-11-2005. The Reference was proceeded with by the learned Joint Civil Judge, Senior Division, Jalgaon. The applications in the said Reference i.e. the respondents Nos. 1 to 4 herein led evidence of 5 witnesses in support of their case. The petitioner examined himself in support of his denial. The respondents Nos. 1 to 4 herein also produced a host of documents in support of their case. The said documents were principally the record of the hospital where the wife of the petitioner had given birth to the third child as also the record relating to the school wherein the third child has been enrolled as also some other supporting documentary evidence. The trial Court, on the basis of the material before it, came to a conclusion that the child born on 8-12-2003 in Maher Hospital, Jalgaon was the third child of the petitioner and, therefore, the petitioner stood disqualified on the application of Section 10 of the said Act. The said judgment, of the trial Court dated 12-3-2007 as indicated above is the subject matter of the above petition.

5. I have heard learned Counsel for the petitioner Shri B.R. Warma, learned Counsel for respondents Nos. 1 to 4 Shri K.C. Sant, learned Asstt. Govt. Pleader Shri V.H. Dighe for respondents No. 5 to 7 and Shri P.R. Patil, learned Counsel for the respondent No 8.

On behalf of the petitioner, the principal submission of the learned Counsel Shri Warma was that since the consequences of the application of the respondents Nos. 1 to 4, would have the result of disqualification of the petitioner, the charge of having third child was therefore to be proved beyond doubt by the said respondents. It is submitted by Shri Warma that on the basis of the material that was before the trial Court, it could not be said that the said charge was proved

beyond doubt. It was further submitted by Shri Warma that the evidence produced by the respondents Nos. 1 to 4 herein cannot be said to be cogent evidence which conclusively brings home the said charge. The trial Court, according to Shri Warma, by a process of relating the evidence to each other has come to a conclusion that the said events form a chain and, therefore, the charge that the petitioner had a third child on 8-12-2003 was proved. This according to the learned Counsel, could not have been approach of the trial Court in matter as serious as the disqualification of a sitting Corporator. Shri Warma further submitted that the findings of the trial Court were in fact perverse. Shri Warma submitted that the documents on which principally reliance was placed by the trial Court could not have been said to be proved as the person i.e. Dr. Nitin Choudhari through whom the said documents were sought to be proved was not in position to state as to who had written the contents of the said documents. Shri Warma also sought to draw the attention of this Court to various alleged discrepancies in the evidence so as to contend that the respondents Nos. 1 to 4 have failed to discharge their burden of proving the charge against the petitioner. Shri Warma lastly submitted that the trial Court could not have compared the signature of the petitioner on various documents, and as such, the said exercise has been held to be risky in the context of the trial unless the opinion of an expert is available on record. Shri Warma, therefore, submitted that the finding of the trial Court in respect of the said signature was, therefore, uncalled for. It was submission of Shri Warma, learned Counsel for the petitioner that the respondents Nos. 1 to 4 had failed to bring home the charge against the petitioner.

6. On the other hand, it is contended on behalf of the respondents Nos. 1 to 4 i.e. the applicants in the said Reference that on the basis of the material produced before the trial Court, the learned Judge had rightly come to a conclusion that the child born on 8-12-2003 is the third child of the petitioner herein. Learned Counsel for the respondents Nos. 1 to 4 Shri Sant submitted that the proceedings contemplated u/s 10 of the said Act is in the nature of an inquiry and if on the basis of the material produced before it, the trial Court comes to the conclusion that the charge is proved against the petitioner herein, it cannot be said that the evidence was lacking so as to prove the charge to the hilt. The learned Counsel for the respondent Nos. 1 to 4 further submitted that the crucial documents are the documents Exhibits 67, 68 and 69 of the hospital wherein the child was born as also Exhibit 78 i.e. admission form of Sanskar Play School wherein the child was admitted. According to the learned Counsel, the said documents unmistakably point out that Nana Baliram Sonawane and Naresh Baliram Sonwane is one and the same person as also Nita Nana Sonwane and Anita Nana Sonwane is also the same person. The learned Counsel for the respondents Nos. 1 to 4 submitted that the said entry in the documents of the hospital are purposely made possibly at the behest of the petitioner abovenamed who wanted to hide the identity of the parents of the child, for obvious reasons as the child was born after the petitioner was elected as a Municipal Corporator.

The learned Counsel further submitted that it cannot be said that the signature and the other details in the said documents are similar by coincidence. The learned Counsel further submitted that the petitioner may deny the contents of the said documents but the petitioner having not denied his signatures on the said documents, the trial Court was right in drawing its conclusion, based on the said documents. The learned Counsel submitted that the findings of the trial Court are, therefore, based on cogent evidence and required no interference by this Court in its jurisdiction under Article 227 of the Constitution of India. The learned Counsel for the respondents Nos. 1 to 4 relied upon the judgment of the Apex Court reported in Umesh Chandra Vs. State of Rajasthan, in support of his submission that the documents of the hospital being part of the record of the hospital maintained in the usual course of business were admissible in evidence. Para 10 of the said judgment which is relevant is reproduced hereunder:

10. The first document wherein the age of the appellant was clearly entered in Ext. D-I which is the admission form under which he was admitted to class III in St. Teresa's Primary School, Ajmer. In the admission form, the date of birth of the appellant has been shown as 22-6-1957. The form is signed by Sister Stella who was the Headmistress. The form also contains the seal of the school. DW, Ratilal Mehta, who proved the admission form, has clearly stated that the form was maintained in the ordinary course of business and was signed only by the parents. The evidence of Ratilal Mehta (DW 1) is corroborated by the evidence of Sister Stella (DW 3) herself who has also endorsed the fact of the date of birth having been mentioned in the admission form and has also clearly stated on oath that the forms were maintained in regular course and that they were signed by her. She has also stated that at the time when the appellant was first admitted she was the headmistress of St. Teresa's Primary School, Ajmer. The High Court seems to have rejected this document by adopting a very peculiar process of reasoning which apart from being unintelligible is also legally erroneous. The High Court seems to think that the admission forms as also the School's register (Ext. D-3) both of which were, according to the evidence, maintained in due course of business, were not admissible in evidence because they were not kept or made by any public officer. u/s 35 of the Evidence Act, all that is necessary is that the document should be maintained regularly by a person whose duty it is to maintain the document and there is no legal requirement that the document should be maintained by a public officer only. The High Court seems to have confused the provisions of Sections 35, 73 and 74 of the Evidence Act in interpreting the documents which were admissible not as public documents or documents maintained by public servants u/s 34, 73 or 74 but which were admissible u/s 35 of the Evidence Act which may be extracted as follows:

35. Relevancy of entry in public record made in performance of duty. - An entry in any public or other official book, register or record, stating a fact in issue or relevant, fact, and made by a public servant in the discharge of official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such books, register or record is kept, is itself a relevant fact.

The learned Counsel for the respondents Nos. 1 to 4 also relied upon the judgment of the Apex Court reported in *Ajit Savant Majagavi Vs. State of Karnataka*, in support of his submission that the power to compare the disputed signature is clearly available u/s 73 of the Evidence Act though extreme caution and judicial sobriety require that the Court should not normally take upon itself the responsibility of comparing the disputed signature with that of the admitted signature or handwriting and in the event of slightest doubt leave the matter to the wisdom of expert. Para 38 of the said judgment is relevant and is reproduced hereunder:

38. As a matter of extreme caution and judicial sobriety, the Court should not normally take upon itself the responsibility comparing the disputed signature with that of the admitted signature or handwriting and in the event of slightest doubt, leave the matter to the wisdom of experts. But this does not mean that the Court has not the power to compare the disputed signature with the admitted signature as this power is clearly available u/s 73 of the Act, [See *The State (Delhi Administration) Vs. Pali Ram*,].

7. On behalf of the respondent No. 8, learned Counsel Shri P.R. Patil, submitted that the petitioner's conduct is one of diffidence. The petitioner has not opposed the charge against him with the vehemence that is required of a person against whom an allegation is being made. The learned Counsel drew my attention to the written statement filed on behalf of the petitioner which is one of only denial. Learned Counsel for the respondent No. 8 submitted that the petitioner being a Corporator, a higher standard of probity was required from him than a common man. The petitioner if he was so serious about the charge made against him, he ought to have seen to it that his wife steps in the witness box and also denies the said fact. Merely stating that the respondents have failed to bring home the charge and, therefore, discharge the burden is a conduct of unbecoming of a Municipal Corporator faced with the charge i.e. stands disqualified on account of having third child. The learned Counsel, therefore, submitted that the Court will bear in mind the said aspect also. Learned Counsel drew my attention to the signatures on the nomination form for the elections to the Municipal Corporation in the year 2003, the signature of the petitioner on the affidavit, accompanying the said nomination form, the signature in the reply sent by the petitioner to the show cause notice issued by the Commissioner and the admission form of the Sanskar Play School and submitted that this Court should draw its own conclusion. Learned Counsel for respondent No. 8 relied upon the judgment reported in *Ram Bhual Vs. Ambika Singh*, in which it has been held that the pleadings in an election petition must be construed strictly and the failure to deny the relevant and crucial allegations in the election petition cannot succeed. The learned Counsel submitted that in the instant case also the crucial allegations contained in the show cause notice of the Commissioner to which were annexed the documents, the petitioner did not deny the same but gave a vague reply.

8. The learned Counsel also relied upon the Judgment of the Apex Court reported in *Lohia Properties (P) Ltd., Tinsukia, Dibrugarh, Assam Vs. Atmaram Kumar*, in which it has been held that non-traverse would constitute an implied admission. Applying the said judgment to the facts of the instant case, learned Counsel submitted that since the petitioner had failed to traverse the allegations made, they have been impliedly accepted.

9. Learned Counsel relied upon the judgment of the Apex Court in the case of *Surya Dev Rai Vs. Ram Chander Rai and Others*, in the matter of the scope of judicial review under Article 227 of the Constitution of India. Paragraphs 38(3) and 38(8), are relevant for the purpose, and are reproduced below:

38(3) Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction i.e. when a subordinate Court is found to have acted (i) without jurisdiction - by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction - by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.

38(8) The High Court in exercise of certiorari or supervisory jurisdiction will not convert itself into a Court of appeal and indulge in reappreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

Learned Counsel relying upon the said judgment, contended that on the basis of material before it, if the trial Court has taken a view which is plausible then this Court should not interfere under Article 227 of the Constitution of India. The learned Counsel lastly relied upon the judgment of the Apex Court in the case of *Khalil Ahmed Bashir Ahmed Vs. Tufelhussein Samasbhai Sarangpurwala*, , which also reiterates the scope of judicial review under Article 227 of the Constitution of India. Learned Counsel, therefore, submitted that the petitioner had made out no case for invocation of the writ jurisdiction.

10. I have considered the rival contentions. It is to be borne in mind that the proceedings have arisen on account of the respondents Nos. 1 to 4 herein filing an application against the petitioner stating that the petitioner stands disqualified on account of the fact that a third child is born to him on 8-12-2003. The said provision has been inserted in the said Act sometime in the year 2001. One of the reasons possibly of inserting the said provision was to make the peoples representatives as the trend setters, so that they could set an example for others. The said provision reflects, the policy of the State in the matter of population control. However, a wholesome provision which ought to have been welcomed by representatives of people in various democratic institutions is unfortunately sought: to be subverted as the lucre of the chair seems to be more enticing than adherence to law. Therefore, by various means the provisions of law are sought to be thwarted. The instant case, in my view, is an attempt to

thwart the said provision as contained in Section 10 by the petitioner.

11. The reference proceedings commenced in view of the report made by the Commissioner of the Municipal Corporation to the Civil Court on 15-12-2003, however, it would be relevant to narrate pre-trial facts so that the machinations of the petitioner to conceal the birth of the third child can be seen. At the outset, it needs to be mentioned, that it is common knowledge that the birth of a child is usually reported by the parents and more especially the father. However, in the instant case, what is significant to note is that the birth of the child born on 8-12-2003 is reported by one Sakharam Chindhu Choudhari and not the father. The same seems to have been done for obvious reasons as the child was born on 8-12-2003 i.e. after the elections of the Municipal Corporation which were held in the same year i.e. in September, 2003. The name of the father was reported as Nana Baliram Sonwane and the name of the mother is reported as Nita Nana Sonwane. The reasons for the same cannot be far to seek. Obviously, the same was done at the instance of the parents who in the instant case was the petitioner abovenamed as will be seen from the subsequent part of this judgment.

12. Another aspect to be noted is that the Commissioner of the Corporation on receiving a complaint from the respondents Nos. 1 to 4 herein had called upon the petitioner to show cause as to whether the person mentioned in the said documents which were annexed to the application, Nana Baliram Sonwane and Naresh Baliram Sonwane is one and the same person. The petitioner vaguely replied to the show cause notice that he would have to see the documents and without seeing the said documents, he would not be in position to reply to the same. The normal reaction of a person who stands accused of a false charge would always be that he has nothing to do with the said documents as he has no third child. However, the petitioner's reply speaks volumes and since it is a reaction first in point of time, the same would have a bearing on the decision as to whether the charge is brought home against the petitioner.

13. In support of their case, the respondents Nos. 1 to 4 have examined as many as five witnesses. The said five witnesses have deposed on various aspects. The said depositions, however, are in respect of the birth of the third child in the Maher Hospital on 8-12-2003 and whether Nana Baliram Sonwane is the same person as Naresh Baliram Sonwane and whether Nita Nana Sonwane is the same person as Anita Naresh Sonwane. The respondents Nos. 1 to 4 have also through the said witnesses brought various documents on record in support of their case. In view of the machinations of the petitioner to conceal identity of the parents of the male child born on 8-12-2003 by recording that the parent's name was Nana Baliram Sonwane and Nita Nana Sonwane, the controversy boiled down to the fact whether the said persons are one and the same. The crucial documents are Exhibits 67, 68 and 69 which are the hospital record of the said Maher Hospital, Jalgaon and Exhibit 78 which is the admission form of the Sanskar Play School. It is significant to note that the said documents are produced by independent persons Dr. Nitin Choudhary and Mr. Shah who have

nothing to do with either of the parties. The said documents have been maintained by the said hospital and school in the usual course of business. In document Exhibit 67, the name of the patient is mentioned as Nita Nana Sonwane and full name of Nana is stated as Nana Baliram Sonwane and the address is mentioned as 396, Jaikisanwadi, Jalgaon. This document records that on 8-12-2003 at 6.31 A.M. the patient Nita Sonwane delivered a male child and she was in the hospital till 15-12-2003. The document Exhibit 68 is the document of the Corporation which is usually filled in, in the maternity home and it states that the name of the father of the male child born on 8-12-2003 at Maher Hospital, Jalgaon as Nana Baliram Sonwane and the name of mother as Nita Nana Sonwane. The name of the person who has given the said information appears to be one Sudhakar Chindhu Choudhari. The document Exhibit 69 is the indoor patients case register of the said Maher Hospital which mentions the name of the mother of the child born on 8-12-2003 as Anita Naresh Sonwane.

It has come in the evidence of Dr. Nitin Choudhari that number of the indoor patient who delivered child on 8-12-2003 was indoor patient No. 02050020. The documents Exhibits 67 and 69 also state the number of the patient as 02050020. Therefore, though the document Exhibit 67 mentions the name as Nita Nana Sonawane, it can safely be said that Nita is in fact Anita Naresh Sonawane, as the number of the patient in both the documents is the same. The documents having come from the custody of an independent person like Dr. Choudhari, there was no reason to disbelieve the same and, therefore, the conclusion drawn by the trial Court on the said basis, in my view, cannot be faulted with.

14. The document Exhibit 78, is the school admission form of Sanskar Play School. The name of the student is mentioned as Aryan Naresh Sonawane, whose date of birth is mentioned as 8-12-2003 and father's name is mentioned as Naresh Baliram Sonawane and the phone number of the father is mentioned as 2240669 and address mentioned as 396, Jaikisanwadi, Jalgaon. If the said documents, Exhibits 68, 69 and 78 are read together with, then they can only lead to an irresistible conclusion that Nita is Anita Baliram Sonwane and Nana is Naresh Baliram Sonwane. That apart, Exhibit 71 is the F.I.R. in CR. No. 209/98. The said F.I.R. mentions the name of the accused as Nana " Naresh Baliram Sonwane.

15. It is also significant to note that the petitioner herein, in his cross-examination has stated that - 396, Jaikisanwadi, Jalgaon is his address and 2240669 is his phone number. The said address and the phone number is appearing in various documents which have been produced by respondents Nos. 1 to 4, some of which have been referred to in this judgment. Therefore, to say that the same is a co-incidence would be a travesty. Therefore, in my view, if the said evidence is taken together, there can be no room for doubt that the male child born on 8-12-2003 is that of the petitioner. The submission of the learned Counsel for the petitioner that there is no cogent evidence on record to bring home the said charge is, therefore, misfounded. In my view, the findings of the

trial Court that Nana is Naresh Baliram Sonawane and Nita is Anita Nana Sonawane cannot be faulted with. Though a word of caution has been mentioned in respect of comparing of signatures of documents but as laid down by the Apex Court in the judgment reported in Ajit Savant Majagavi Vs. State of Karnataka, , it is not as if the Court does not have the power to go into the same. However, as a matter of caution and judicial sobriety the Court usually does not enter into the said arena. However, in the instant case, looking to the petitioner's signatures on various documents, the finding of the trial Court on that score also, in my view, cannot be faulted with. As the similarity in signature of the petitioner is blatant to the naked eye.

16. In my view, therefore, the minor discrepancies here and there in the evidence would have no bearing on the conclusions reached by the trial Court. It is not as if the trial Court has proceeded on conjectures and surmises. The trial Court, in my view, on the basis of a proper evaluation and weighing of evidence has come to a conclusion that the third child born on 8-12-2003 is in fact, the child of the petitioner herein, and in view of the provisions of Section 10 of the said Act, the petitioner stands disqualified.

17. It would not be out of place to mention here that the petitioner herein should have been candid as a higher degree of probity is expected from a peoples representative. But unfortunately, the petitioner by his machinations, has made every attempt to conceal the parentage of the child born on 8-12-2003 in the said Maher Hospital with the obvious intention to wriggle out of the provision of disqualification as contained in the said Section 10.

18. As held by the Apex Court in the judgment reported in Surya Dev Rai Vs. Ram Chander Rai and Others, , the scope of writ petition under Article 227 of the Constitution of India is limited. As is well settled, the High Court in exercise of certiorari or supervisory jurisdiction will not convert itself into Court of Appeal and indulge in reappreciation or revaluation of evidence. In that view of the matter, no case for interference is made out by the petitioner and the petition is accordingly dismissed. Rule discharged with costs.

19. At this stage, an oral Application is made for continuance of the ad-interim reliefs granted by this Court on 3-5-2007.

In view of the fact that the petitioner stands disqualified on account of having a third child the said application is rejected.