

(2010) 01 BOM CK 0077

In the Bombay High Court

Case No : Writ Petition No. 6639 of 2008

Ravikiran Deshmukh and Dattatraya Kachgunde

APPELLANT

Vs

The Additional Commissioner, Aurangabad Division and
Others

RESPONDENT

Date of Decision : 21-01-2010

Acts Referred:

Births, Deaths and Marriages Registration Act, 1886 — Section 20
Bombay Village Panchayats Act, 1958 — Section 14, 14(1), 16
Constitution of India, 1950 — Article 226, 227
Evidence Act, 1872 — Section 114

Citation : (2010) 4 BomCR 249 : (2010) 112 BOMLR 1256 : (2010) 3 MhLj 184

Hon'ble Judges : V.R. Kingaonkar, J

Bench : Single Bench

Advocate : R.N. Dhorde, holding for P.S. Dighe, for the Appellant; N.N. Jadhav, AGP for Respondents No. 1 and 2, N.L. Jadhav, for Respondent No. 3, Vivek Bhavthankar and S.S. Choudhari, for the Respondent

Final Decision : Allowed

Judgement

V.R. Kingaonkar, J.—The petitioners challenge order rendered by Additional Divisional Commissioner, Aurangabad in proceedings of appeal filed by respondent No. 3 against his disqualification to continue as Sarpanch of village panchayat, Asardoh (District Beed.). The Additional Divisional Commissioner allowed his appeal and held that he was not disqualified. The petitioners are aggrieved due to such decision because since beginning, an objection was raised by the petitioner No. 2 about eligibility of the respondent No. 3 - Bhagwan as a candidate on the ground that his nomination paper was invalid due to the fact that he was having third child after the cutoff date i.e. 13-09-2001.

2. Indisputably, elections of the Village Panchayat, Asardoh were due in the month of September, 2007 and the election programme was declared by the competent authority. On 24th September, 2007, the petitioner No. 2 had filed objection application before the Returning Officer. He alleged that the respondent

No. 3 was ineligible to file his nomination form because there were three children born to him and the third child was born after the cutoff date i.e. 13thth September, 2001. He asserted that as per the Government Resolution and the policy, the respondent No. 3 could not be permitted to contest the village panchayat election due to the reason that third child i.e. daughter, by name Vaishnavi, was born to him on 25thth September, 2002 out of wedlock with his wife by name Rajashri. The objection was overruled by the Returning Officer. The elections were held. The respondent No. 3 Bhagwan was elected from ward No. 1. He was later on elected as Sarpanch of Asardoh Village Panchayat. The petitioners filed Dispute No. 6 of 2007, challenging the eligibility of the respondent No. 3 to continue in the office of Sarpanch on the ground that he was disqualified u/s 14(1)(j)(i) of the Bombay Village Panchayat Act, 1958 (for short, "the BVP Act"). The learned Additional Collector heard concerned parties, including the respondent No. 3 and came to the conclusion that the latter was disqualified as Member of the Village Panchayat. It was held that the third child was born on 25thth September, 2002 and, therefore, the nomination of the respondent No. 3 could not have been accepted by the Returning Officer, nor he was entitled to continue in the office. Feeling aggrieved, the respondent No. 3 preferred an appeal bearing No. CR/165/08. By the impugned order, the learned Additional Divisional Commissioner allowed the appeal holding that the third child was born prior to the cutoff date and, therefore, the respondent No. 3 - Bhagwan did not incur disqualification under the law. Hence, the petition.

3. Heard learned Counsel for the parties.

4. Before I proceed to consider the rival submissions, it may be stated that the enquiry contemplated under provisions of Section 14 read with Section 16 of the BVP Act is not likewise that of adversarial trial. It is only a summary enquiry. The enquiry contemplated under the relevant provisions is of inquisitorial nature. The Collector is required to observe the principles of natural justice. However, the enquiry cannot be likewise that of a trial of civil suit or criminal case. The nature of such enquiry is clarified in *Sou. Suvarna Prakash Patil Vs. Anil Hindurao Powar, Mahesh Balasaheb Katkar, Gautam Devappa Sorate, Sou. Shobha Jaisingh Lohar and Balwant Dattatraya Kumkhar*, . A Single Bench of this Court held:

The action or enquiry contemplated in the proceedings u/s 14 (h) read with Section 16 is surely not an adversarial proceedings but, sui generis, and more in the nature of summary and inquisitorial proceedings....

5. It will be explicit, therefore, that the nature of disqualification incurred is the only fact to be stated in the complaint application and the complainant is not required to give details or adduce evidence in support of the averments. Even so, the petitioner No. 2 had submitted copies of the record maintained by Anganwadi Sevika in the survey register carried out under a scheme called "" (Integrated Child Development Service Scheme). It is pertinent to notice that the local survey is contemplated under the Scheme. Necessary entries are required to be taken by the public authorities in the Survey Register. Thus, it is necessarily a

public document. The entries are recorded after due preliminary enquiry. The entries in the survey register for the years 2005-2006 and 2006-2007 would show that birth date of Vaishnavi, who is the third child of the respondent No. 3 Bhagwan is shown as 25thth September, 2002. It appears that the entries were verified by the competent public authority. Therefore, the public record was available to show that the third issue was born after the crucial date. It is important to notice that similar entry was shown in the municipal record.

6. Section 14(1)(a)(j)(i) of the BVP Act reads as follows:

14 (1)No person shall be a member of a panchayat and continue as such, who
(a)has, whether before or after the commencement of this Act, been convicted

(i) *****

(ii) *****

(a1) *****

(b) *****

(c) *****

(d) *****

(e) *****

(f) *****

(g) *****

(h) *****

(i) *****

(j) *****

(j1) has more than two children:

Provided that, a person having more than two children on the date of commencement of the Bombay Village Panchayats and the Maharashtra Zilla Parishads and Panchayat Samitis (Amendment) Act, 1995 (hereinafter in this clause referred to as "the date of such commencement"), shall not be disqualified under this clause so long as the number of children he had on the date of such commencement does not increase:

Provided further 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 this clause; or....

7. There is no dispute about the fact that the stipulated date is 13thth September, 2001 and if it is proved that the third child is born after such date,

then the Member of Village Panchayat can be said to have incurred disqualification.

8. Now, coming to the findings of the learned Additional Collector, Ambajogai, it may be gathered that the necessary enquiry was conducted by him. The Additional Collector noticed that the entries in the survey register maintained by the Anganwadi Sevika in the Mata Seva Nondwahi and Balak Seva Nondwahi are quite clear. He noticed that wife of the respondent No. 3 was in her 27thth week of pregnancy as on 06-05-2002 when the concerned employee had taken the necessary note in the relevant register. It is of common knowledge that the Anganwadi Sevikas are required to conduct survey of the prospective mothers in order to ensure that proper medicines and dosages of the drugs prescribed by the Medical Officer are administered. It is part of the official duty assigned to them. Anganwadi Sevika and the other public servants had absolutely no reason to falsely prepare such record. The Village Officer i.e. Gram Sevak had informed that the Village Panchayat record did not show any entry regarding birth of the third female child born to the wife of the respondent No. 3. It is obvious that said Vaishnavi @ Nalini was not born at village Asardoh and, therefore, no such entry was taken in the birth register maintained by the Village Panchayat.

9. The respondent No. 3 filed an affidavit alleging that name of his third daughter was Nalini and she was born on 10-08-2001. There is no reference to birth of said Nalini either in the Village Panchayat record or the record maintained by the Municipal Council, Ambajogai. The respondent No. 3 did not adduce any tangible evidence to show that the third female child was born on 10-08-2001 i.e. before the stipulated date (13thth September, 2001). The respondent No. 3 had filed his written statement in which he admitted that the entries recorded in the Mata Seva register and Balak Seva register were correct and legal. He, however, pleaded that such entries cannot be admitted in evidence. In other words, it was not his contention that those entries were manipulated by the local authorities. What he wanted to submit before the Additional Collector is that said entries could not be read in evidence, perhaps because he was under the impression that it was not part of the public record. As stated before, such registers are maintained by the public servants and as such, the entries recorded in due course of the official business are necessarily part of the public record. Hence, the Additional Collector was right while relying on the said entries in order to reach conclusion that the third female child was born after the stipulated date.

10. The impugned order rendered by the Additional Commissioner is based upon subsequent rectification of the municipal birth register. The earlier entry in the municipal birth register indicated that the third female child (Vaishnavi) was born on 25thth September, 2002. It is pertinent to notice that the respondent No. 3 filed an application for rectification of the entry in the birth register on 25thth February, 2007. The conduct of the respondent No. 3 may be noticed. He did not seek rectification of the birth date since 2001 till February, 2007. He was knowing that the elections for the various wards in the Village Panchayat were

due in or about September/October, 2007. Assuming that the third child by name Nalini or Vaishnavi was born in the month of August, 2001, then it is difficult to appreciate why there was delay of about 6/7 years in filing of the application before the Chief Officer of the Municipal Council, Ambajogai for correction of such entry. The respondent No. 3 gave an affidavit in support of his application wherein he stated that on 10-08-2001, the female child (Nalini) was born at Dhanwantari Hospital, Ambajogai. He also produced a copy of the letter dated 20-02-2007, purported to have been issued by Dr. Somvanshi of Dhanwantari Hospital, Ambajogai. The recitals of the said letter purport to show that the medical practitioner had already sent a report for period between June to October, 2002 wherein date of delivery in respect of wife of the respondent No. 3, namely, Bhagyashri Patole, was shown as 25thth September, 2002. The medical practitioner allegedly informed that such report was incorrect and inadvertently, the mistake had occurred. It is worthwhile to notice that the medical practitioner allegedly stated in the letter dated 20-02-2007 that the delivery of said wife of the respondent No. 3 - Bhagwan was, in fact, on 10th August, 2001. There was no supporting evidence to show that the entry was recorded on 10-08-2001 in the concerned medical register nor the medical papers regarding such delivery were produced alongwith the letter.

11. The matter does not stop here. The medical practitioner who is joined subsequently as respondent No. 5 in this petition, categorically refuted the averment of the respondent No. 3 about issuance of such letter. He has filed affidavit stating that the letter dated 20-02-2007 is a forged document. He denied his signature on the said letter. The respondent No. 3 has placed on record certain copies of other letters issued by "Dhanwantari Multi Speciality Hospital" in order to show that signatures of the respondent No. 5 were changed from time to time. The letter dated 20-02-2007 appears to have been issued on letterhead of "Accident, Fracture and Trauma Care Centre, Ambajogai". The other letters, copies of which are placed on record by the respondent No. 3, are issued on letterhead of Dhanwantari Multi Speciality Hospital. It is not necessary to examine whether the version of the respondent No. 5 is untrue and in fact, he had issued the letter dated 20-02-2007. For, it would be subject matter of criminal investigation which I propose to direct. Suffice it to say that the respondent No. 5 did not subscribe to the stand taken by the respondent No. 3 in the context of mistake which was allegedly caused due to erroneous report submitted regarding birth date of the third child born to wife of the respondent No. 3.

12. Another reason ascribed by the appellate authority is that the respondent No. 3 had filed a civil suit in the context of same issue and status quo order was issued by the civil Court. It appears that exparte order was issued by the civil Court and the parties were directed to maintain status quo. The said order did not enure to the benefit of the respondent No. 3. The suit filed by the respondent No. 3 is pending. However, the status quo order is not in existence because subsequently it was declared due to passage of time in as much as it was issued

only uptill filing of the reply by the petitioners. Needless to say, such reason ascribed by the learned Additional Divisional Commissioner is quite improper and could not be of any relevance. The entry in the municipal record was again rectified by the Municipal Council when the respondent No. 5 informed vide letter dated 20-04-2008 that he had not issued the earlier letter dated 20-02-2007. Thus, it is quite clear that the respondent No. 5 had denied authorship of such letter when it was brought to his notice that on basis of his letter, the correction was carried out in the birth register.

13. Mr. Jadhav N.L. would submit that writ jurisdiction will not be available to the petitioners in view of the nature of dispute raised by them. He contended that this Court should not exercise jurisdiction under Article 226 and Article 227 because of involvement of disputed questions of fact. He submitted that the conduct of the respondent No. 5 is such that implicit reliance cannot be placed on the affidavit filed by him. He invited my attention to certain observations in *Gangadhar Tadme Vs. Trimbak Akingire and Others*, . A Division Bench of this Court held that the identity of the person authorized to give notice of birth u/s 20 of the Births, Deaths and Marriages Registration Act, 1886 should be clearly stated. Otherwise such entry in the birth register would not carry presumption available u/s 114 of the Evidence Act. Mr. Jadhav would submit that identity of the informant, on basis of whose information the first entry was recorded by the Municipal Council, is unclear and, therefore, there is no presumptive value attached to said entry. He contended that the earlier municipal record could not have been, therefore, relied upon by the Additional Collector. The stand taken by the respondent No. 5 in the so called letter dated 20-02-2007 clearly shows that intimation was given to the Municipal Council regarding the birth of the third child while sending report for the period between July to September, 2002. What was allegedly submitted was that there was inaccuracy in the given report. The question is not of presumptive value which can be attached to the earlier birth record. The question is whether after long period of the record remaining as it is, the rectification could be allowed without conducting proper enquiry. Another question is as to why since 2001, no step was taken to enter the birth in the relevant record and for the first time, in the month of February, 2007, it was found necessary by the respondent No. 3 to seek such rectification. These aspects are not properly considered by the appellate authority.

14. Mr. Jadhav invited my attention to certain observations in *Union of India (UOI) Vs. T.R. Varma*, . The Apex Court held that where there is a question on which there is a serious dispute, which cannot be satisfactorily decided without taking evidence, it is not the practice of Courts to decide it in a writ petition. He would further invite my attention to certain observations in *Secretary, O.N.G.C. Ltd. and Another Vs. V.U. Warriar, and Sawarn Singh and Another Vs. State of Punjab and Others*, . There cannot be duality of opinion that when disputed questions of facts are involved, ordinarily, the writ Court will not exercise the jurisdiction under Article 226 or Article 227. It does not, however, mean that the writ jurisdiction is totally unavailable when the contrary decisions of the

authorities are required to be considered. In the present case, the material question is whether the appellate authority has exercised the appellate jurisdiction with due care and caution. There were findings rendered by the learned Additional Collector, Ambajogai, after the summary enquiry carried out by him. The appellate authority was probably under the wrong impression that status quo order of the Civil Court in the suit (R.C.S. No. 86/2008) was favourable to the respondent No. 3 and, therefore, the judgement of the learned Additional Collector could be interfered with. The question involved herein is whether the order of the Additional Collector is based on material and is backed up by convincing reasons or that it could be reversed on the basis of reasons ascribed by the appellate authority. In other words, the issue relates to preference amongst the two orders. There is no straitjacket formula which can be applied while invoking jurisdiction under Article 226 or Article 227 in such matters.

15. In *Sou. Mangesha Ashok Chavan Vs. Mr. Sayajirao Damodhar Khamkar, Mr. Santosh Babanrao Mohite and The State of Maharashtra*, a Division Bench of this Court held that restriction on number of children is to create awareness of danger of increasing population. The Court repelled challenge to provision u/s 14(1)(j-1) of the Bombay Village Panchayat Act, 1958 in the above referred case.

True, the question of the birth date of the third child is apparently disputed one. Still, however, in such a matter often the Court will have to consider the disputed question. Take for example, if a member is disqualified due to nonpayment of taxes, the question whether he/she had paid up the taxes before filing nomination papers could be disputed one. It does not mean that the writ Court is not required to separate grains from the chaff. The contention that the petition should be thrown out due to involvement of disputed question about birth date of the third child does not appeal to me. Hence it is rejected.

16. The order rendered by the appellate authority is not founded on good material and the reasons ascribed are not convincing. The appellate authority should not have interfered with the order of the Additional Collector when it was based on the material gathered during course of the enquiry. Under these circumstances, the impugned order is liable to be set aside.

17. In the result, the petition is allowed. The impugned order is set aside. The Additional Collector, Ambajogai, is directed to lodge report with the concerned Police Station for taking cognizance of the forgery of documents, namely, the medical certificates or letters purportedly issued by the respondent No. 5. If it is found by the police authorities that the respondent No. 5 himself has prepared such letter dated 20-02-2007, then offence shall be registered against him for committing perjury and a report shall be submitted to this Court for taking cognizance of the offence of the perjury. The Additional Collector to submit compliance report within period of four weeks after receipt of the writ of this Court. If, however, it is found that the letter issued by the respondent No. 5 is fabricated, then necessary criminal action may be taken against the forger/

culprit. No costs.

18. Mr. N.L. Jadhav seeks stay to the judgement of this Court for four weeks. His request is granted. The effect of the judgement is stayed for four weeks.