
(2014) 02 BOM CK 0185
In the Bombay High Court
Case No : Writ Petition No. 183 of 2014

Shaikh Shaifque	Vs	APPELLANT
Mohammed Ibrahim Moh. Yasin and Others		RESPONDENT

Date of Decision : 05-02-2014

Acts Referred:

Bombay Provincial Municipal Corporations Act, 1949 — Section 10 10(1)(i)
Constitution of India, 1950 — Article 226 227

Citation : (2014) 3 ABR 520 : (2014) 3 ALLMR 372 : (2014) 2 BomCR 260 :
(2014) 2 MhLj 659

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

Bench : Single Bench

Advocate : G.S. Godbole, instructed by Mr. Aparna A. Dhavale, for the Appellant; N.R. Bubna, for the Respondent

Final Decision : Dismissed

Judgement

R.M. Savant, J.—Rule, with the consent of the learned counsel for the parties i.e. the learned counsel for the Petitioner and the learned counsel for the Respondent No. 1 made returnable forthwith and heard. It is not necessary to issue notice to other Respondents as the Petitioner herein is the returned candidate and the Respondent No. 1 herein was the Election Petitioner, and therefore, they are the main contesting parties.

2. The writ jurisdiction of this Court under Articles 226 and 227 of the Constitution of India is invoked against the order dated 12/12/2013 passed by the learned Joint Civil Judge, Senior Division, Malegaon by which order the Election Petition being No. 2 of 2012 filed by the Respondent No. 1 herein was allowed and resultantly the election of the Petitioner from Ward No. 23-B of Malegaon Municipal Corporation came to be set aside.

3. The facts necessary to be cited for the adjudication of the Petition can be stated thus:-

The Petitioner herein had filed his nomination from Ward No. 23-B of the Malegaon Municipal Corporation for being elected as a Corporator from the said ward. The Respondents herein were the other candidates from the said ward. Elections for the Malegaon Municipal Corporation were held and the results were declared on 16/4/2012 in which elections the Petitioner was declared as elected from Ward No. 23-B.

4. The Respondent No. 1 herein aggrieved by the election of the Petitioner from the said Ward invoked Section 16 of the Bombay Municipal Corporations Act, 1949 now known as the Maharashtra Municipal Corporations Act (for the sake of brevity "the said Act") filed an Election Petition being No. 2 of 2012. In the said Election Petition, the Respondent No. 1 herein had challenged the election on various grounds amongst which was the ground of corrupt practice allegedly indulged in by the Petitioner as also the ground that the Petitioner had more than three children after the cut-off date i.e. 12/09/2001, and since the Petitioner had more than three children, on account of the child born after the cut-off date, he should be disqualified u/s 10(1)(i) of the said Act. The said provision i.e. Section 10(1)(i) of the said Act reads thus:-

10. Disqualification for being a Councillor: (1) Subject to the provisions of sections 13 and 404, a person shall be disqualified for being elected and for being a Councillor, if such person-

(ai)...

(aii)...

(a)...

(b) ...

(c) ...

(d) ...

(e)...

(f)....

(g)....

(h)....

(i) has more than two children:

Provided that, a person having more than two children on the date of commencement of the Maharashtra Municipal Corporations and Municipal Councils, Nagar Panchayats and Industrial Townships (Second Amendment) Act, 1995 (hereinafter in this clause (referred to as "the date of which 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.

Explanation: For the purposes of this clause,-

(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 Petitioner herein filed his reply to the said Election Petition and contended that his child named Shaikh Juned alias Shaikh Serjil was born on 30/08/2001 and no child was born after 12/09/2001 and therefore he was not liable to be disqualified to continue as a Corporator. The Petitioner denied the other allegations made against him in respect of the alleged corrupt practices indulged in by him.

6. On the basis of the pleadings of the parties, the issues were framed by the Court trying the said Election Petition. However, the Respondent No. 1 filed purshis which was numbered as Exhibit 130. In the said purshis the Respondent No. 1 stated that he is dropping all other grounds of challenge in the Election Petition except the ground that a child was born to the Petitioner after the cut-off date 12/09/2001. Hence what remained before the Trial Court was only the adjudication of the issue based on the said ground of challenge. The said issue which is Issue No. 2 which was framed by the Trial Court reads thus:-

Does the Petitioner prove that respondent No. 1 has procured third child on 18/09/01 and that has disqualified him to contest the election for Corporator ship?

The parties in assertion of their respective cases led both oral and documentary evidence. In so far as the Respondent No. 1 who was the Election Petitioner is concerned apart from himself, he examined 5 other witnesses amongst whom was a witness from Malegaon Municipal Corporation. The Petitioner herein apart from himself examined two other witnesses amongst whom was one Dr. Azam Hiadar Mansoori who according to him had conducted the delivery of the Petitioner's wife in respect of the child in question, and one Ashwin Vasant Pardeshi, the clerk of Taloda Municipal Council. The parties also led documentary evidence which documents are reflected in Paragraph 12 of the impugned order.

7. In the context of the challenge in the present Petition, the documents which are relevant are Exhibit 53, Exhibits 55 to 58, Exhibit 63, Exhibit 123 and Exhibit 127. The Trial Court proceeded to adjudicate upon the said issue, in the light of the assertions of the respective parties wherein the election of the Petitioner as a Municipal Corporator was challenged on the ground that he is having a child born after the cut-off date 12/09/2001 and the defence taken by the Petitioner that

the child born to him Shaikh Juned @ Shaikh Serjil was born on 30/08/2001.

8. The Trial Court proceeded to record its finding on the issue which has been adverted to herein above. The Trial Court proceeded on the basis as to whose case was more probable of acceptance. The Trial Court took into consideration the evidence led on behalf of the Petitioner of Dr. Mansoori and the clerk of Taloda Municipal Council Mr. Pardeshi. In so far as Dr. Mansoori is concerned, the Trial Court taking into consideration his evidence wherein he has stated that he had not maintained the record of his patients in respect of whom he had conducted deliveries which were to the extent of 2000 to 4000 deliveries, as also considering the fact that Dr. Mansoori was not in a position to answer to the suggestion put to him that document Exhibit 123 was issued by him 7 to 8 months back as also taking into consideration the contradictions between the evidence of Dr. Mansoori and the Petitioner as also the contradictions between the evidence of Dr. Mansoori and the evidence of clerk of the Taloda Municipal Council Mr. Pardeshi, recorded a finding that the credibility of the evidence of Dr. Mansoori was doubtful. In so far as the evidence of Mr. Pardeshi is concerned, the Trial Court observed that the said witness could not be believed to uphold the contention of the Petitioner that the child by name Shaikh Juned was born on 30/08/2001 at Taloda. The Trial Court therefore observed that considering the evidence which was led on behalf of the Respondent No. 1 herein the finding would have to be recorded that the certificate Exhibit 63 recording that Shaikh Juned was born on 18/09/2001 can hardly be doubted and that the change in name of the child from Shaikh Juned to Shaikh Serjil was recorded at the instance of the Petitioner. The Trial Court whilst recording the said finding has compared the signature on Exhibit 86 and the disputed signatures marked as Exhibit D on Exhibit 88 along with the admitted signature of the Petitioner on Exhibit 50 which was his nomination form and on such comparison came to a conclusion that the affidavit for change in name of the child from Shaikh Juned to Shaikh Serjil was made by the Petitioner. The Trial Court further observed that by no stretch of imagination it can be held that without any efforts made by the Petitioner i.e. the Opponent in the Election Petition and someone-else interested in him, the name of the child has been changed from Shaikh Juned to Shaikh Serjil.

9. The Trial Court thereafter proceeded to consider the case of the Respondent No. 1 based on the 5th child born to the Petitioner being Tanvir after the cut-off date. However, the Trial Court rejected the said case as the Election Petition as filed did not contain any challenge on the said basis. The learned counsel appearing on behalf of the Respondent No. 1 fairly conceded that it is not necessary for this Court to consider the said aspect.

10. The Trial Court accordingly by the impugned order allowed the Election Petition and issued a declaration that the election of the Respondent No. 1 on 16/04/2012 as a Corporator from Ward No. 23-B of Malegaon Municipal Corporation is illegal and void and therefore set aside.

11. Submissions on Behalf of Petitioner by the Learned Counsel Shri G.S. Godbole

1] That the Trial Court has erred in granting higher presumptive value to Exhibit 53 which was the birth certificate produced by the Respondent No. 1 than Exhibit 63 which was the birth certificate which was produced by the Petitioner especially having regard to the fact that Exhibit 63 was not challenged by the Respondent No. 1 before any forum;

2] That in the absence of any evidence as to who had recorded the fact of birth of the child Shaikh Juned @ Shaikh Serjil with the Malegaon Municipal Corporation, the entry made by Malegaon Municipal Corporation is suspicious and fraudulent;

3] That the entry in the Birth and Death Register of the Malegaon Municipal Corporation could not be relied upon without there being any evidence as regards the identity of the persons concerned. The Learned Counsel relied upon the Judgment of a Learned Single Judge of the Kerala High Court reported in Chirutha Amma Appili Amma Vs. Neelakanta Pillai Kunju Pillai and Others, .

4] That the Trial Court had erred in coming to a conclusion on the basis of comparison of the signature with the disputed signature marked as "D" on Exhibit 88 was that of the Petitioner and thereby in turn coming to a wrong conclusion that the application made for change of name of the child from Shaikh Juned to Shaikh Serjil was made by one of the relatives of the Petitioner;

12. Submissions on Behalf of the Respondent no. 1 by The Learned Counsel Shri N R Bubna

A] That the Election Petition being founded on the allegation that the Petitioner was disqualified on account of the child born after the cut-off date i.e. 12/09/2001, the Trial Court was entitled to consider the efficacy of both the birth certificates i.e. Exhibit 53 and Exhibit 63;

B] That the Trial Court after recording that the presumption which arises on account of the Birth Certificate Exhibit 63 is rebuttable has thereafter on a consideration of the evidence on record has rightly held that the change in the name of the child as mentioned in the birth certificate in respect of Shaikh Juned @ Shaikh Serjil was made by one of the relatives of the Petitioner;

C] That the Trial Court has correctly appreciated the oral evidence which was adduced on behalf of the Petitioner considering the contradictions that were there in the said evidence viz evidence of Dr. Mansoori and the Petitioner.

D] That the Trial Court having recorded a finding of fact as regards acceptability of the said birth certificate Exhibit 63 in which the date of birth of the child is mentioned as 18/09/2001, the said finding of fact does not merit any interference at the hands of this Court in its writ jurisdiction;

E] That this Court need not exercise its writ jurisdiction under 227 of the Constitution of India considering the findings recorded by the Trial Court. The

learned counsel for the Respondent No. 1 placed reliance on the judgment of a learned Single Judge of this Court reported in Naresh Sonwane Vs. Kishor Patil and Others, .

Consideration

13. Having heard the learned counsel for the parties, I have bestowed my anxious consideration to the rival contentions. It is on the basis of the assertions of the Petitioner and the Respondent No. 1 herein that the issue which has been adverted to herein above was framed by the Trial Court. The Petitioner's assertion is that the child born to him Shaikh Juned @ Shaikh Serjil was born to him on 30/08/2001 whereas according to the Respondent No. 1 the child born to the Petitioner was born on 18/09/2001 in respect of which assertions the parties have produced birth certificates being Exhibit 63 by the Petitioner and Exhibit 53 by the Respondent No. 1. In the light of the evidence which has come on record the Trial Court rightly proceeded on the basis as to whose case is more probable of acceptance and whether the presumption on account of the birth certificate issued by the Taloda Municipal Council i.e. Exhibit 63 is rebutted. Though initially a controversy was sought to be raised as regards the identity of the child Shaikh Juned @ Shaikh Serjil in view of the undisputed position which has now arisen on account of the admission which has come in the evidence of the Petitioner. The said controversy no more survives as it is accepted by the Petitioner that the person Shaikh Juned is the same person as Shaikh Serjil.

14. To prove the factum of birth of the child Shaikh Juned @ Shaikh Serjil on 30/08/2001 as evidenced by the certificate Exhibit 63, the Petitioner led his own evidence as well as the evidence of two other witnesses i.e. Dr. Ajam Mansoori and the employees of the Taloda Municipal Council Shri Ashwin Pardeshi. In so far as the evidence of the Petitioner is concerned, he has deposed that his first three children have been born at his residence at Malegaon. In so far as the 4th child is concerned, according to the Petitioner the said child was born at his wife's parental home at Nandurbar and that his birth has been reported to the Taloda Municipal Council by Dr. Mansoori. It has further come in the evidence of the Petitioner that he has not reported the birth of any of his children. In so far as the evidence of Dr. Mansoori is concerned, it is required to be noted that it has come in his evidence that he had not reported the birth of the child to Taloda Municipal Council and therefore he has in terms contradicted the case of the Petitioner. It is further required to be noted that though the said Dr. Mansoori claimed that he had conducted 2000 to 4000 deliveries in his career, he has stated that he has not maintained any record. He has also admitted that he is not in position to answer and does not remember as to when he had issued Exhibit 123 which is a certificate allegedly issued by him in respect of the birth of the said child Shaikh Juned @ Shaikh Serjil. In so far as the evidence of the clerk of Taloda Municipal Council Shri Ashwin Pardeshi is concerned, through him it has come on record that the pages relating to the relevant entry being No. 314 in the Birth and Death Register of the Taloda Municipal Council are torn. In so far as the

documentary evidence is concerned, it is required to be noted that the relevant parts of the Birth and Death Register wherein the entry of Shaikh Juned @ Shaikh Serjil are torn and therefore not available. The answer to the query raised by the Respondent No. 1 with Taloda Municipal Council vide Exhibits 57 and 58 is that there is no entry made in the name of Shaikh Juned @ Shaikh Serjil in the Birth and Death Register given vide Exhibit 59. It is on the basis of the aforesaid evidence on record the Trial Court held that the evidence led on behalf of the Petitioner does not support the case of the Petitioner in so far as the date of birth of the child Shaikh Juned @ Shaikh Serjil being 30/08/2001.

15. In juxtaposition to the evidence led by the Petitioner, the evidence in support of the said document Exhibit 53 is required to be considered, in support of Exhibit-53 the relevant documents are Exhibits 86, 87, 88 and 90. In so far as Exhibit 87 is concerned, it is an application dated 5-12-2011 addressed to the Malegaon Municipal Corporation for change of name of the child from Shaikh Juned to Shaikh Serjil. The name of the applicant is shown in the said Exhibit as Shaikh Shaifque Shaikh Samad Qureshi and the same has been signed by the applicant. The said application Exhibit 87 contains the following enclosures, the affidavit, Exhibit 88 which is the affidavit of Shaikh Shaifque Shaikh Samad Qureshi in support of the said application, the birth certificate and the ration card.

Now coming to Exhibit 86. Exhibit 86 is the birth report in form No. 1. It records change in name from Shaikh Juned to Shaikh Serjil and in the bottom half of the said document it is mentioned that the name has changed as per the application dated 5/12/2011. Since the Petitioner has disputed his signature on the said affidavit dated 5/12/2011, the said signature was marked as Exhibit-D on the said Exhibit 88. The Trial Court comparing the said disputed signature marked as Exhibit-D with the admitted signature on Exhibit 50 which was the nomination form filed by the Petitioner and on such comparison has come to a conclusion that the disputed signature is the signature of the Petitioner.

16. The matter does not rest there as there is other evidence to indicate that the application made for change of name of the child Shaikh Juned to Shaikh Serjil was made by the Petitioner. The Petitioner, it seems, had applied for the school leaving certificate in respect of his son Shaikh Serjil to Swes Model Primary School, Malegaon. The said school had issued the said school leaving certificate on 9/5/2012 to the Petitioner. It seems thereafter the said school leaving certificate was submitted to the Modern High School, Malegaon wherein the said child Shaikh Serjil was admitted. A perusal of the school leaving certificate issued by the Swes Model Primary School discloses that the date of birth mentioned therein is 18/09/2001. The said school leaving certificate bears the stamp and signature of the Head Mistress of the said Swes Model Primary School and it also bears the stamp of attestation of the Head Master, Modern High School, Malegaon. It seems that the said child Shaikh Sherjil was admitted to the Modern High School on 3/8/2012. The fact that the said school leaving certificate is endorsed with a stamp of the Head Mistress of Swes Model Primary School,

Malegaon, indicates that the said school leaving certificate was handed over to the Petitioner as the father of the child to facilitate his admission to another school and therefore since the said school leaving certificate bears the birth date 18/09/2001, the same was obviously entered in the school record on the basis of the birth certificate issued by Malegaon Municipal Corporation i.e. Exhibit 53. The said circumstance is another circumstance which leads to a conclusion that the application for change of name from Shaikh Juned to Shaikh Serjil was made by the Petitioner. The school leaving certificate issued by Swes Model Primary School therefore nullifies the attempts made by the Petitioner to disown the application made for change of name to the Malegaon Municipal Corporation Exhibit 87, and the attempts made by the Petitioner to disown the affidavit dated 5/12/2011 which was filed in support of the said change. It is also required to be noted that in the bonafide certificate which is issued by the Modern High School in respect of the student Shaikh Serjil, the said certificate also carries the same date of birth i.e. 18/09/2001. The said material therefore casts a serious doubt as regards the genuineness and bonafide of the birth certificate Exhibit 63 produced by the Petitioner of the Taloda Municipal Council. The trial Court was therefore right in coming to a conclusion that the case of the Respondent No. 1 herein who is the Election Petitioner based on Exhibit 53 is more probable than the case of the Petitioner which is based on Exhibit 63. In the light of the material which is referred to herein above, the contention of the learned counsel for the Petitioner that the Trial Court had erred in relying upon the birth certificate Exhibit 53 issued by the Malegaon Municipal Corporation cannot be countenanced.

17. In so far as disqualification on the said ground is concerned, one fact cannot be lost sight of is that every attempt is being made by the candidates against whom it is alleged that they have more than three children after the cut-off date to come out of the rigours of the said provision by innovating various kinds of defences so as to continue in office. A useful reference could be made to the judgment of this very Court involving the same provision viz. Section 10(1)(i) of the Bombay Provincial Municipal Corporation Act now known as Maharashtra Provincial Municipal Corporation Act. Paragraphs 10 and 17 of the said report are material and are reproduced herein under:-

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.

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 indicated above the Trial Court on the basis of the material has reached a conclusion that the child Shaikh Juned @ Shaikh Serjil being born after the cut-off 12/09/2001. The Petitioner on account of the said fact would stand disqualified u/s 10(1)(i) of the said Act. In my view minor discrepancies in the evidence led on behalf of the Respondent No. 1 herein would have no bearing on the conclusion reached by the Trial Court. The Trial Court can be said to have properly evaluated and weighed the evidence and has arrived at the said conclusion.

19. In so far as exercise of writ jurisdiction under Article 227 of the Constitution of India is concerned, a useful reference could be made to the judgment of the Apex Court reported in Surya Dev Rai Vs. Ram Chander Rai and Others, wherein the Apex Court has held that in exercise of certiorari of supervisory jurisdiction a Writ Court would not convert itself in the Court of Appeal and indulge in re-appreciation or revaluation of evidence. The view taken by the Trial Court cannot be said to be a view which could not have been taken in the facts of the present case. In that view of the matter no case for interference is made out. The above Writ Petition is accordingly dismissed. Rule discharged with parties to bear their respective costs.

After Pronouncement of Judgment

At this stage the learned counsel appearing on behalf of the Petitioner prays for continuation of the protective order which was granted by the Trial Court and which was continued in the above Petition. In the facts and circumstances of the present case where the Petitioner stands disqualified, the said prayer is refused.