

(2016) 05 BOM CK 0068

In the Bombay High Court

Case No : Letters Patent Appeal No. 162 of 2012 in Writ Petition No. 5606 of 2012

Vishwas Laxman Bhagat

APPELLANT

Vs

Devendra Gana Bhagat

RESPONDENT

Date of Decision : 06-05-2016

Acts Referred:

Bombay Village Panchayats Act, 1959 — Section 14(1)(j1), 16(2)

Citation : (2016) 4 AIRBomR 219 : (2016) 4 BCR 520 : (2016) 4 MhLJ 178

Hon'ble Judges : S.C. Dharmadhikari and Dr. Shalini Phansalkar Joshi, JJ.

Bench : Division Bench

Advocate : Mr. P.K. Dhakephalkar, Sr. Counsel, a/w. Mr. C.G. Gavnekar and Mr. G.S. Hiranandani, Advocate, for the Appellant; Mr. R.V. Pai, a/w. Mr. A.R. Pai, i/by Mr. Sanjay Gavade, Advocate, Ms. Sushma Bhende, A.G.P, for the Respondent

Final Decision : Dismissed

Judgement

Dr. Shalini Phansalkar Joshi, J.—This Letters Patent Appeal is preferred by the Original Petitioner, being aggrieved by the Judgment and Order dated 31st July 2012, passed by learned Single Judge of this Court in Writ Petition No.5606 of 2012. By the impugned Judgment and Order, learned Single Judge has confirmed the Judgment and Order dated 21st June 2012 passed by the Additional Divisional Commissioner, Konkan Division, Mumbai in Appeal bearing No.Appeal/Desk/VP/28/2012, thereby confirming the Judgment and Order dated 16th January 2012 passed by the District Collector, Raigad in Dispute Application No.41 of 2010. By these orders, the election of the Appellant as a Member and Sarpanch of Gram Panchayat, Usurli-Khurd is held as invalid on the count that he has incurred disqualification under Section 14(1)(j-1) of the Maharashtra Village Panchayats Act (Act No.III of 1959), (for short "the Act), since he is having more than two children.

2. The facts, which are relevant and material, for deciding this Appeal may be stated as follows :-

In the General Election to the Grampanchayat, Usurli-Khurd, held in October 2010, Appellant was elected as one of the Members of the Grampanchayat from Ward No.3. Subsequent thereto, Appellant was further elected as Sarpanch in the first meeting of the Members of the Grampanchayat held on 1st November 2010. Respondent Nos.1 to 4 herein, on 11th November 2010, moved Dispute Application under Section 14(1)(j-1), read with Section 16(2), of the Act before the Collector, Raigad, alleging, inter alia, that the Appellant is having three children, namely, Pranjal Vishwas Bhagat, born on 17th July 2002; Vishwati Vishwas Bhagat, born on 22nd August 2003; and Shreya Vishwas Bhagat, born on 20th May 2010, thereby the Appellant has incurred disqualification, as provided under Section 14(1)(j-1) of the Act. It was further alleged that the Appellant did not disclose this fact at the time of filing his nomination paper and even after he was elected as "Member" and, subsequently, as "Sarpanch". It was, therefore, prayed that the Appellant was liable to be removed, as disqualified under the said provision. In support of this Dispute Application, Respondent Nos.1 to 4 produced (i) Birth Certificates of three children of the Appellant; (ii) Birth Certificate dated 14th October 2010 of the third child Shreya, issued by Dr. Panandikar Hospital; (iii) letter dated 22nd October 2010 of Medical Officer, Primary Health Centre, Ajiwali; (iv) the letter dated 21st October 2010 issued by the Medical Officer, Primary Health Centre, Ajiwali, containing details of the registration of pregnant women and medical services provided to them, which included the name of Appellant's wife in respect of her third pregnancy.

3. Appellant resisted the Dispute Application by filing a detailed reply dated 28th February 2011, contending, inter alia, that he had only two daughters, namely, Pranjal and Vishwati. It was his case that the third child Shreya was not his daughter and he is not concerned with her Birth Certificate. To substantiate his contention, Appellant has relied upon the Birth Certificate of Shreya, as produced by Respondent Nos.1 to 4, in which the name of Shreya's father was shown as "Vishwas Gajanan Patil" and mother's name as "Sandhya Vishwas Patil", residents of Usarli, Taluka Panvel. As against this, the name of the Appellant is "Vishwas Laxman Bhagat" and his wife is "Deepmala Vishwas Bhagat", both of them being the residents of Usurli-Khurd, Taluka Panvel. Thus, according to the Appellant, in view of the difference in surname, father's name and mother's name, as also the name of the village, where they are shown to be residents, he was not concerned with the third child Shreya and hence, there was no question of his incurring any disqualification as such.

4. In view of these rival contentions raised by the Appellant and Respondent Nos.1 to 4, the Collector, District Raigad, thought it fit to call for the report of enquiry from the Commissioner of Police. Pursuant thereto and as directed, the Police authorities held the enquiry and submitted the report to the Collector, District Raigad, substantiating the allegations made by Respondent Nos.1 to 4. In view of this report and the material produced on record by Respondent Nos.1 to 4, the Collector allowed the Dispute Application, while coming to the conclusion that Shreya was born to the Appellant and his wife and she being the third child

of the Appellant, Appellant has incurred disqualification under Section 14(1)(j-1) of the Act.

5. Aggrieved by this decision of the Collector, District Raigad, dated 16th January 2010, the Appellant preferred an Appeal before the Additional Commissioner, Konkan Division, Mumbai, and, as stated above, it came to be dismissed on 21st June 2012. Against these concurrent orders of the Collector and the Additional Commissioner, the Appellant filed Writ Petition No.5606 of 2012 in this Court and the learned Single Judge of this Court, by his Judgment and Order dated 31st July 2012, confirmed the concurrent finding of the authorities below and dismissed the Writ Petition.

6. While challenging this order of the learned Single Judge and the authorities below, the first and foremost submission advanced by learned counsel for Appellant is that, the entire Judgment and Order of the authorities and learned Single Judge is based on the report of enquiry conducted by the Police authorities. According to learned counsel for the Appellant, Section 16(2) of the Act mandates a duty on the District Collector to make enquiry and arrive at his own finding, whenever such enquiry is initiated by him suo-motu or on the application made to him by any person. It is urged that, in this case, the Collector, Raigad, has adopted a novel procedure, which is unknown to the Act, of inviting report from the Police authorities and relying solely on the said report to arrive at the conclusion. According to learned counsel for the Appellant, the Collector has not only thereby abdicated his own duty, but also called upon the Police to do something, which cannot be done. In his opinion, the Police can be called upon to initiate enquiry only when some cognisable offence is reported. In the instant case, there was no such question of any cognisable offence being reported. Therefore, calling upon the Police machinery to make such enquiry and relying upon the report of the enquiry conducted by the Police to disqualify the Appellant with regard to the elected post, which proceeding is of a civil nature, the Collector has misinterpreted relevant provisions of the law and, therefore, on this ground itself, the impugned order of the Collector, which is subsequently confirmed by the Additional Commissioner and the learned Single Judge of this Court, is required to be quashed and set aside.

7. Further, it is submitted that the Collector was expected and duty bound to make enquiry by following principles of natural justice, which contemplate recording of evidence and giving an opportunity to the Appellant to rebut the material adduced against him. In the instant case, it is urged that no such enquiry was initiated by the Collector himself. No opportunity of adducing evidence or rebutting the material produced by Respondent Nos.1 to 4 against the Appellant, was given to the Appellant and on this count also, the impugned order needs to be quashed. In support of this submission that adherence and compliance with the principles of natural justice is a must in any enquiry, reliance is placed on the authority of Narsingrao Gurunath Patil & Ors. v. Arun Gujarathi, Speaker & Ors., 2003 (1) Bom.C.R. 363.

8. Third submission advanced by learned counsel for the Appellant, which is by way of amendment in the Appeal Memo and is raised for the first time in this Appeal, pertains to maintainability of proceedings under Section 16(2) of the Act on the count that the alleged disqualification was incurred and was in existence much prior to even filing of the nomination paper. Hence, it is urged that, as, in effect, the Respondents are challenging the election of the Appellant, in view of the provisions of Article 243(O) of the Constitution of India, only an Election Petition, as contemplated under Section 15 of the Act, could have been filed. It is submitted that, only when the disqualification is incurred after election, a remedy under Section 16(2) of the Act can be availed and not otherwise. According to learned counsel for Appellant, therefore, once the election is over and the remedy of filing Election Petition is not availed, then, in the guise of entertaining a complaint alleging disability under Section 16(2) of the Act, the Appellant or an elected member like him cannot be compelled to undergo the same scrutiny or test. To re-enforce this submission, the reliance is placed by the learned counsel for the Appellant on the Judgment of the Hon'ble Supreme Court in *State of H.P. & Ors. v. Surinder Singh Banolta*, (2006) 12 SCC 484.

9. Thus, in sum and substance, the submission of learned counsel for the Appellant is that, if the proceedings under Section 16(2) of the Act were not maintainable at all, the question of disqualifying the Appellant does not arise. Even otherwise, according to him, the procedure adopted by the Collector, Dist. Raigad, in holding the enquiry also not being proper and according to law, on this count also, the concurrent findings recorded by the two authorities below, which are confirmed by the learned Single Judge of this Court, are required to be quashed and set aside.

10. Per contra, learned counsel for Respondent Nos.1 to 4 has completely endorsed and supported the findings of the authorities below and of the learned Single Judge by submitting that, in view of the concurrent fact findings of the two authorities below, which are further confirmed by the learned Single Judge of this Court, in the Appeal under Letters Patent, this Court cannot interfere into the said finding by entering into the disputed questions of facts and law. Secondly, it is urged that the provisions of Section 16(2) of the Act nowhere lay down the procedure to be adopted by the Collector for the purpose of holding enquiry. No rules are also framed for laying down such procedure. The only mandatory requirement, in view of Proviso to Section 16(2) of the Act, is that the person affected must be given an opportunity of being heard. In the instant case, the Collector has given such opportunity to the Appellant. Even in the enquiry conducted by the Police authorities, the statements of the Appellant and his wife were recorded. Hence, according to learned counsel for Respondent Nos.1 to 4, there is no question of Collector adopting any novel procedure or the principles of natural justice being not followed. It is urged that the documentary evidence produced on record by Respondent Nos.1 to 4 was otherwise also independently sufficient to arrive at the conclusion that Appellant has incurred such disqualification in view of the birth of third child Shreya. Hence, according to

learned counsel for Respondent Nos.1 to 4, there is absolutely no scope for this Court to interfere in the concurrent findings of the authorities below and of the learned Single Judge of this Court.

11. As to maintainability of the application under Section 16(2) of the Act, learned counsel for Respondent Nos.1 to 4 submitted that, the challenge to the maintainability of the proceedings was never raised before any of the authorities below or even before the learned Single Judge of this Court. For the first time, it is raised in this Appeal and such challenge is also not maintainable in the light of the view taken by this Court, (Coram : S.C. Dharmadhikari, J.), in the case of Santosh Maruti Walanj v. Manoj Sadashiv Jadhav, 2013 (2) Mh.L.J. 68. It is urged that in this Judgment of our High Court, the Judgment of the Supreme Court in State of H.P. & Ors. v. Surinder Singh Banolta (Supra) was considered and distinguished on the facts. According to learned counsel for Respondent Nos.1 to 4, the remedy, as provided under Section 16(2) of the Act, cannot be blocked merely because the said ground of disqualification could have been taken up when the nomination paper was filed by the Appellant or in the Election Petition, under Section 15 of the Act. As per the submission of learned counsel for Respondent Nos.1 to 4, this is a last ditch attempt made by the Appellant to save his post, the election to which was completely vitiated in view of the disqualification incurred by him and proved on record by the voluminous evidence, the genuineness of which is not disputed or challenged.

12. In the light of these rival submissions and upon these allegations and denials, with the assistance of learned counsel appearing for the parties, we have perused the impugned orders of the authorities below and also of the learned Single Judge of this Court. We have also perused the documents filed on record before the Collector including the report of enquiry conducted by the Police. The learned counsel for the parties have also elaborately taken us through the relevant statutory provisions and the decisions of this Court and the Hon'ble Supreme Court.

13. In our considered opinion, for properly appreciating the rival contentions raised by the parties in the case, it would be advantageous to refer firstly to the facts of this case.

14. Undisputedly, in the Election to the Grampanchayat, Usarli, conducted in October, 2010, Appellant was, initially, elected as the "Member" and, subsequently, as the "Sarpanch" of the village in the first meeting of the Members of Grampanchayat held on 1st November 2010. Thereafter, the Dispute Application, under Section 14(1)(j-1), read with Section 16(2), of the Act, was filed by Respondent Nos.1 to 4 before the Collector on 11th November 2010. The only ground on which the Appellant's disqualification was sought was that of Appellant having more than two children, as laid down under Section 14(1)(j-1) of the Act. Along with the Dispute Application itself, Respondent Nos.1 to 4 had produced the Birth Certificates of three children of the Appellant, namely, Pranjal ? born on 17th July, 2002, Vishwati ? born on 22nd August 2003, and the

third child Shreya ? born on 20th May 2010. In addition thereto, Respondent Nos.1 to 4 had also produced on record the Certificate dated 14th October 2010, issued by Dr. Panandikar Hospital, where the birth of the third child Shreya had taken place. Respondent Nos.1 to 4 further produced on record the crucial piece of evidence, like, the letter dated 22nd October 2010 issued by the Medical Officer, Primary Health Centre, Ajiwali, stating that the Appellant's wife Deepmala was pregnant for third time. Her name was also entered in "R-15 Register" and her delivery took place on 20th May 2010. A further letter dated 21st October 2010 was also issued by the Medical Officer, Primary Health Centre, Ajiwali, giving the details of the registration of pregnant women and medical services provided to them under the Scheme of Village Health and Protection of the Children, in which name of Appellant's wife is appearing in respect of her third pregnancy.

15. Appellant herein has not disputed genuineness of these documents, which were produced by Respondent Nos.1 to 4 along with the Dispute Application. Moreover, these documents are issued by the competent statutory village authorities, like, the Medical Officer, and that too along with the concerned record, which was statutorily required to be maintained by those authorities. Hence these documents carry evidential value. The only dispute raised by the Appellant is in respect of the Birth Certificate of the third child Shreya, as issued by the Grampanchayat on the ground that, in the said Birth Certificate, the names of the parents of the child are mentioned as "Vishwas Gajanan Patil" and "Sandhya Vishwas Patil". Moreover, they were shown to be the residents of Usarli, Taluka Panvel, whereas, Appellant is the resident of Usarli-Khurd, Taluka Panvel. Hence, on account of the difference in the surname, the parent's name and the name of the village, Appellant has contended that he has no concern with the said Birth Certificate. Except for this contention, there is no specific denial to the case put by Respondent Nos.1 to 4 on the factual aspects and other three documents, which prove that Appellant's wife Deepmala was pregnant for the third time and she gave birth to a girl child on 20th May 2010. No specific stand is taken by the Appellant on these factual aspects.

16. It appears that, only because Appellant has challenged the Birth Certificate of Shreya as having no concern therewith, the Collector thought it fit to direct the Police to visit the concerned area, the Rural Health set up and meet the public officials. This was to obtain information about how the Appellant and his wife, though residing in the same Taluka, are disputing the birth record. The contents of the records maintained by the Primary Medical Centres and the pregnancy record being not disputed, that the Collector desired corroboration. That is how in the peculiar facts and the difference in the names of the parents of the child Shreya that the Collector adopted this course, which cannot be a precedent for all cases. There is no abdication of the power to decide the Dispute Application, nor is the Collector blindly endorsing the report of the Police.

17. The report of the Police reveals that the statements of the Appellant and his

wife in the said enquiry, verification of the record confirms the fact that the third child Shreya is born to the Appellant and his wife. On the basis of above three documents, which, otherwise, were also establishing the paternity of the Appellant to the third child Shreya and completely supported and corroborated with the report by Police, certifying that the Appellant was very much concerned with the third child Shreya, the Collector arrived at the conclusion that Appellant has incurred disqualification in view of having more than two children and, accordingly, invalidated his election as a "Member" and also as a "Sarpanch". This is the Collector's independent application of mind to the materials placed on record. It is his overall assessment of the same which led to this conclusion.

18. This finding of the fact recorded by the Collector is then confirmed by the Appellate Authority, the Divisional Commissioner and also by the learned Single Judge of this Court. Hence, questioning those concurrent findings of facts in this Appeal is nothing but an attempt to invite us to do re-appreciation and reappraisal of the material on record. These factual aspects cannot be re-opened once the Appellant has been given full opportunity to rebut the case, as made out by the Respondents. Moreover, on such reappraisal, we also find that this finding of fact is based on the undisputed documents on record, corroborated with the Police report, hence, in our appellate jurisdiction, we are not inclined to interfere in this concurrent finding of fact. Otherwise also, there is absolutely nothing brought on record by the Appellant herein, to take any other view of the matter so as to disturb the said concurrent finding of fact.

19. Now coming to the contention of the Appellant that the Collector has abdicated his duty by adopting a novel procedure of calling upon the Police to make enquiry into the truthfulness of the allegations made in the Dispute Application, in this respect, it would be necessary to take recourse to the provisions of Section 16 of the Act. It is reproduced as follows :-

"16. Disability from continuing as member. - (1) If any member of a Panchayat

(a) who is elected or appointed as such, was subject to any of the disqualification mentioned in Section 14 at the time of his election or appointment, or

(b) during the term for which he has been elected or appointed incurs any of the disqualifications mentioned in Section 14, he shall be disabled from continuing to be a member, and his office shall become vacant.

(2) If any question whether a vacancy has occurred under this Section is raised by the Collector suo motu or on an application made to him by any person in that behalf, the Collector shall decide the question as far as possible within sixty days from the date of receipt of such application. Until the Collector decides the question, the member shall not be disabled under sub-section (1) from continuing to be a member. Any person aggrieved by the decision of the Collector may, within a period of fifteen days from the date of such decision, appeal to the State Government, and the orders passed by the State Government in such appeal shall be final :

Provided that no order shall be passed under this sub-section by the Collector against any member without giving him a reasonable opportunity of being heard."

20. Thus, even the bare perusal of Section 16(2) of the Act makes it clear that, this enquiry is in the nature of summary and inquisitorial proceedings, though it casts a duty on the Collector to make enquiry into such Dispute Application, it does not lay down any procedure, much less, the manner in which the enquiry is to be conducted. No rules are also framed for laying down the procedure to conduct such enquiry. The only mandate laid down in Proviso to sub-section (2) of Section 16 of the Act is that, no such order disqualifying a person shall be passed by the Collector against any Member, without giving him a reasonable opportunity of being heard. Except for this mandate, the provisions of Section 16 of the Act or any other provision under the Act does not lay down a specific procedure to be followed for the purpose of enquiry. It is left entirely to the discretion of the Collector as to the particular mode of enquiry, which he may deem fit, to adopt in facts and situation of that case. The Collector is, thus, while adjudicating the issue of disqualification, required only to follow the principles of natural justice and fair play.

21. In such situation, merely because the Collector has called for the report from the Police authorities to support and corroborate his finding and that too by way of additional safe-guard, it cannot be said that the Collector has adopted the mode, which is novel or not recognised under the Act. As stated above, it was his discretion to adopt a particular mode of enquiry and in the fact situation of this case, when the Birth Certificate of the third child Shreya was disputed by the Appellant as having no concern therewith, no fault can be found if the Collector had thought it fit to ask the Police to verify the truthfulness of the contents of the said Birth Certificate, so as to ascertain whether the said Birth Certificate belongs to the third child of the Appellant. It can hardly be said that, by calling upon the Police to do so, the Collector has abdicated his duty or has adopted a mode which is novel to the Act. For the sake of emphasis, it may be reiterated that, in addition to this Birth Certificate, there were three other documents, genuineness of which, or, the contents thereof, were not at all disputed by the Appellant and the order passed by the Collector goes to show that he has mainly relied upon these three documents and, in support thereof, on the report of the Police. Therefore, if for the sake of arguments the said report is excluded from consideration, even then, these three other documents were and are more than sufficient to prove that the third child Shreya very much belongs to the Appellant and his wife.

22. As to the submission of learned counsel for the Appellant that such report of enquiry by Police can be called for only in the criminal proceedings and not in civil proceedings, we are not at all inclined to accept the same. It is merely a assistance, which the Collector can very much seek from the Police, especially, in the facts of the present case, wherein the Appellant has denied any concern with the Birth Certificate of his third child Shreya.

23. Coming to the next submission advanced by learned counsel for the Appellant that the Appellant was not given any opportunity of being heard in the proceedings by the Collector, in our considered opinion, it is too late in a day for the Appellant to raise such contention. It is pertinent to note the Appellant has appeared before the Collector, filed his written say taking objections and denying the contents of the Dispute Application. His statement and the statement of his wife were also recorded by the Police. He challenged the report submitted by the Police. He also further challenged the order of the Collector before the Additional Divisional Commissioner. In the face of adequate opportunity of rebuttal, enjoyed by Appellant, he cannot contend that he was not given opportunity of hearing in the proceedings. Moreover, the Appellant has made only vague denial and has not taken any specific stand that he was obliged to do, so that he needs to be given an opportunity to prove it. When he challenged the Birth Certificate, the Collector had taken care to see that the enquiry is made in the said Birth Certificate to ascertain whether it was really of the third child of the Appellant. Thus, having participated in the proceedings, without any protest or demur, in our opinion, it is too late in a day for the Appellant to urge that he was denied a fair and adequate opportunity to defend himself or to rebut the allegations levelled against him. The findings of fact arrived at against him by the authorities below, being based on the record, they cannot be brushed aside on such a vague complaint and grievance of the Appellant in this Letters Patent Appeal.

24. Even in the authority relied upon by learned counsel for the Appellant that of Narsingrao Gurunath Patil (Supra) referred above, it was held that, whether the principles of natural justice were followed or not would necessarily depend upon the facts and circumstances of each case, including the nature of the action, the grounds on which the action is taken, the material on which the allegations are based, the attitude of the parties, the nature of the plea raised in the reply, the request for further opportunity, the admission by conduct or otherwise of the parties, all these materials in order to know whether the principles of natural justice are followed or not. Their applicability, thus, depends upon the context of facts and circumstances of each case.

25. As held by the Supreme Court in the case of Chairman, Board of Mining Examination and Chief Inspector of Mines v. Ramjee, (1977) 2 SCR 904, "natural justice is no unruly horse, no lurking land mine, nor a judicial cure-all. If fairness is shown by the decision-maker to the man proceeded against, the form, features and the fundamentals of such essential process full propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating. We can neither be financial nor fanatical but should be flexible yet firm in this jurisdiction. No man shall be hit below the belt ---- that is the conscience of the matter."

26. In the case of Ravi Naik v. Union of India and Ors., the Supreme Court cited

with approval, following passage from Administrative Law :-

"The Judges, anxious as always to preserve some freedom of manoeuvre emphasis that it is not possible to lay down rigid rules as to when the principles of natural justice are to apply; nor as to their scope and extent. Everything depends on the subject-matter. The so-called rules of natural justice are not engraved on tablets of stone. Their application, resting as it does upon statutory implication, must always be in conformity with the scheme of the Act and with the subject-matter of the case. In the application of the concept of fair play, there must be real flexibility. There must also have been some real prejudice to the complainant, there is no such thing as merely technical infringement of natural justice."

27. In the case of K.L. Tripathi v. State Bank of India & Ors., the Supreme Court has further elaborated, by observing that, the concept of fair play in action must depend upon particular facts between the parties..... There is no requirement of cross-examination to be fulfilled to justify fair play in action. When on the question of facts there is no dispute, no real prejudice has been caused to a party aggrieved by an order, by absence of any formal opportunity of cross-examination per se does not invalidate or vitiate the decision arrived at fairly. This is more so, when the party against whom an order has been passed does not dispute the facts and does not demand to test the veracity of the version of the credibility of the statement.

28. According to Supreme Court, the principles of natural justice are such means of achieving ends of justice. They cannot be perverted to achieve the very opposite end that would be a counter protective exercise.

29. In the case of M.C. Mehta v. Union of India, the Supreme Court pointed out that, "there can be certain situations in which an order passed in violation of natural justice need not be set aside under Article 226 of the Constitution of India. For example, where no prejudice is caused to the person concerned, interference under Article 226 is not necessary".

30. Thus, point to be stressed is that the principles of natural justice cannot be reduced to hard and fast formula. These principles cannot be put in straight jacket. Hence, unless some prejudice is shown to have been caused by non-observance of such principles of natural justice, the decision arrived at by the authorities cannot be vitiated or quashed and set aside.

31. In the instant case, absolutely there is no allegation that any prejudice was caused to the Appellant. Assuming that no evidence was led before the Collector, it was because genuineness of the documents produced on record by Respondent Nos.1 to 4 before the Collector was not disputed, nor contents thereof were in the realm of dispute. If on the basis of such undisputed documents the finding is arrived at, it can hardly be called as vitiated merely because there was no recording of evidence as such. The perusal of the impugned order of the Collector, Dist. Raigad, clearly goes to prove that he has considered all the

aspects of the case before passing the order. Proper and valid reasons are given by him while arriving at the decision. The enquiry contemplated before him is also not some elaborate, like, a trial, but, it is an enquiry of summary nature, wherein Appellant has not taken any specific stand, nor offered to produce evidence to substantiate such stand so as to persuade the authority to drop the proceedings against him on the finding that the Appellant has not incurred disqualification at all. In view thereof, in such proceedings, when the question of technicalities of pleading and inadequacy of evidence will not arise at all, the Appellant cannot succeed by finding fault with the procedure adopted by the Collector because the law casts obligation on the Collector to address himself to all the materials relevant for consideration so as to form his opinion on the question of disqualification.

32. Hence, the authority relied upon by learned counsel for the Appellant that of *State Bank of India v. National Housing Bank & Ors.*, (2013) 16 SCC 538, which pertains to totally different facts and circumstances of the case, cannot be made applicable to the present case.

33. The last submission, which is introduced by way of amendment in the Appeal Memo and is advanced for the first time in this Appeal and not before any of the authorities below or even before the learned Single Judge of this Court, is about the maintainability of the proceedings itself under Section 16(2) of the Act. According to learned counsel for the Appellant, as the alleged disqualification was incurred by the Appellant even prior to filing of the nomination papers, in view of the provisions of Article 243(O) of the Constitution of India, only an Election Petition, as contemplated under Section 15 of the Act, could have been filed. It is urged that the nomination papers for the General Election to the Gram-panchayat were filed in October 2010 and as per the case of Respondent Nos.1 to 4, the third child was born to the Appellant on 20th May 2010. Therefore, it is urged that only when the disqualification was incurred after election and as not in the present case where it has occurred before election, a remedy under Section 16(2) of the Act could be availed of and not otherwise.

34. To substantiate this submission, learned counsel for the Appellant has relied upon the Judgment of the Apex Court in the case of *State of H.P. & Ors. v. Surinder Singh Banolta (Supra)*, wherein the provisions of Himachal Pradesh Panchayat Raj Act, 1994, particularly Section 122 of the Act, which pertains to disqualification of the elected members to Panchayat, were for consideration before the Hon'ble Supreme Court and in the particular provisions of the said Act, it was held that, "once, thus, a person is declared to be an encroacher prior to the date on which he has been declared as elector and if the said order has attained finality, the question as to whether he stood disqualified in terms of the provisions of Section 122 of the Act must be raised by way of an Election Petition alone". It was further held that, "otherwise it may result into two parallel proceedings, which cannot be allowed to continue at the same time".

35. As against it, learned counsel for Respondent Nos.1 to 4 had placed reliance

on the Judgment of the Supreme Court in *Dhirendra Pandua v. State of Orissa and Ors.*, AIR 2009 SC 163, wherein, on conjoint reading of Sections 18 and 38 of Orissa Municipal Act, 1950, it was held that, "Sections 18 and 38 of the said Act operate in two independent fields. The scope of enquiry under Section 18 of the Act, which is prior to the election, is limited as compared to scope of enquiry under Section 38 of the Act, which is after the election. It was further held that the question of disqualification to hold an office would arise at the stage posterior to the election and as such, when the disqualification continues, even if it was incurred prior to the election, the proceedings subsequent to the election on the same disqualification can be very much maintainable and there is no necessity of filing separate Election Petition.

36. According to us, the issue raised for our consideration in this Appeal is no more *res-integra*, as in the case of *Santosh Maruti Walanj (Supra)*, this Court, wherein one of us, (Coram : S.C. Dharmadhikari, J.), had occasion to decide this controversy. In the said decision, issue raised for consideration was, "whether Section 16(1)(a) of the Act is inconsistent with Article 243N or 243-O of the Constitution of India, therefore, null and void and be declared as such and while addressing this issue, it was held that the ambit and scope of the provisions of Sections 15 and 16 of the Act is different. It was held that,

"There is power to question the validity of election and determination of dispute in relation thereto and that is a forum which has been made available by section 15. There is a provision by which disability to continue as a member upon election is taken care of and that is an aspect dealt with by section 16. Section 16 is therefore on the statute book because it is not pertaining to validity of election as understood in section 15. It is a provision which enables the question of vacancy caused by disability to continue as a member to be decided. The disability to continue might arise on the basis of disqualification incurred subsequent to election or person who might be disqualified for being elected has been elected but his continuance is put in issue. Therefore, the words "disqualification" and "disability" both have been used by the State Legislature and with some specific object and purpose. The disqualification disables a person to continue. Disability also arises if a legal right is impaired or sought to be curtailed and that in this case is to continue as a member of the Grampanchayat. I do not see how any conflict arises because the State Legislature deems it fit not to either repeal or do away with section 16(1)(a). Section 16 therefore covering a broad field and enabling a very wide question to be agitated and raised, that does not mean that by virtue of Article 243-N, the same is inconsistent and therefore stands repealed automatically. I do not find any inconsistency. Even in the Constitution of India itself one may note several Articles by which upon election as a member of the Lok Sabha/Parliament or Council of States, a question of person's disqualification can be raised and the President of India has been empowered and equally the Governor of the State to take note of such issues and have them decided (See Article 102 and Article 191 of the Constitution of India). Therefore, there being no inconsistency, I do not find that section 16(1)

(a) stands repealed being inconsistent with Article 243-N of the Constitution of India. There cannot be any inconsistency with Article 243-O because this not a case of only a person's election being questioned but what is being questioned is his disability to continue on the footing he was disqualified for being elected."

37. As to the question "whether in view of remedy of Election Petition available under Section 15 of the Act, and if not availed, proceeding under Section 16 can be maintainable, it was held that,

"The distinction is made in Section 15 and Section 16. An issue of validity of elections in terms of the earlier provision can be raised by any candidate at such election or by any person Qualified to vote at the election to which such Question refers whereas the Question of vacancy caused by the disability of a member to continue can be raised by the Collector suo motu or on an application made to him by any person. Therefore and when the Question can arise in case of elected or appointed members, then, I see no inconsistency between section 16(1)(a) and Article 243-O of the Constitution of India."

38. As to the Judgment of the Supreme Court in the case of State of H.P. & Ors. v. Surinder Singh Banolta (Supra), it is clearly distinguishable as it merely aims at avoiding the possibility of there being two parallel proceedings which may result into contradictory and conflicting decisions. It does not carve out a ban to the maintainability of proceeding under Section 16(2) of the Act. This is also not a case where any parallel proceedings are filed or rejected. Things might have been different to some extent if the Respondent or any other person had filed an Election Petition on the same allegations and facts and were not successful therein. Then depending upon the findings and conclusions of the Court therein, in a given case, it could be held that an Appellant is not disabled and can continue in the office.

39. Thus, ultimately, whether a proceeding under Section 16(2) of the Act is maintainable or not is a question of fact and no general rule can be laid down that if remedy of Election Petition is not availed, then remedy under Section 16(2) of the Act is also barred. The very fact that under Section 16(2) of the Act, the Collector himself, suo-motu, can initiate such enquiry makes it clear that this enquiry is not barred on the count that Election Petition is not filed or there was no aggrieved party or aggrieved party has not come forward. After all, it is the sanctity attached to the office, which needs to be protected by ensuring that disqualification incurred by the member does not vitiate the same. In this case, there is nothing on record to show that Respondent Nos.1 to 4 or any other person has earlier raised the same allegation by way of Election Petition and it was decided or was pending at the time of filing this application under Section 16(2) of the Act. Thus, when there was no prior adjudication concluded or pending in the same allegations as raised in this Application, then holding that the present proceedings were not maintainable would be doing violence to the plain language of Section 16(2) of the Act.

40. In the facts of the present case, as the disqualification incurred by the Appellant on account of the birth of third child continued even after his election, he becomes disqualified to remain in his office. It is not only that his election to the office is vitiated on account of this disqualification, but his remaining in office is also vitiated. Hence, as held by Supreme Court in the case of *Dhirendra Pandua v. State of Orissa (Supra)*, "It is axiomatic that the question of disqualification to hold an office would arise at the stage posterior to the election i.e. after a person is elected as a Councilor. The provision appears to have been made to ensure that no Councilor, who has incurred disqualification on any of the grounds, mentioned in Sections 16 and 17 of the Act, either prior to the election or after the election at any time during the tenure for which he is elected should be allowed to hold the office. Precisely for this reason, unlike in Section 19, no period of limitation has been prescribed for presentation of a petition under Section 38 of the Act to the District Judge".

41. In this respect we may also draw support from the decision of this Court in *Anand s/o Babasaheb Jadhav v. Shivbhushan s/o Laxman Jadhav and Ors.*, 2013 (3) Mh. L.J. 778, wherein, exactly the similar question of law fell for consideration before the Division Bench of this Court. In the said case also, Appellant, a member of Village Panchayat, was disqualified under Section 14(1) (j-1) of the Act for having more than two children. As the remedy of Election Petition was not resorted to, a challenge was raised to maintainability of proceeding under Section 16(2) of the Act. A specific question of law was raised for consideration, "as to when the remedy of Election Petition is lost, a ground which was available for challenge of Election Petition, cannot be agitated or brought in use by filing a claim for disqualification, since the disqualification alleged was preexisting?" and it was held that,

"Legislature has, in its wisdom, enacted the amendment and have created a statutory barrier both, for election as well as continuation as a member in the office of Panchayat if the person has or gets third child after commencement of the Amending Act, which event does not fall in the bracket of the exceptions carved out by the said clause. The Policy Law and Public Law will have to be given overriding effect over an individual rights to challenge. Giving to-by to the statutory enactment of attaching disqualification to a person who has more than two children when the third is begotten after the commencement of the Amendment Act, would mean openly compounding the Act and defeating the said provision. The amended Village Panchayats Act, therefore, will have to be given overriding effect over the right of challenge left at the sweet will of a relater. Section 14(1)(j-1) of Bombay Village Panchayats Act is a doctrinal amendment and all efforts ought to be made to uphold its enforcement. Individual rights and procedural matters should take a back seat in the context of procedural and personal rights on one hand, opposed to the policy of State Policy Law and Public Law on the other hand. The remedy of election petition which was not resorted, does not confer upon the appellant the legitimacy which inherently lacks in the regime of policy legislation."

42. In the ultimate analysis, therefore, we have no hesitation in holding that, considering the object and purpose behind introducing Section 14(1) (j-1) of the Act, by way of amendment in 2000, and giving it purposive construction, bearing in mind the sanctity of the public office, which Appellant holds, it has to be held that, in view of his incurring and continuing with disqualification incurred by him, he has rendered himself disable to hold the said office. From the mere fact that remedy of Election Petition was not availed does not remove his disqualification, nor confer on him the legitimacy, which he inherently lacks.

43. To sum up, therefore, all the contentions raised by learned counsel for the Appellant for challenging the impugned order passed by learned Single Judge, being found without merits and hence rejected, we hold that Appeal needs to be dismissed and, accordingly, stands dismissed.

44. At this stage, a request is made by the learned counsel appearing for the Appellant to continue the interim order for a period of twelve weeks so as to enable the Appellant to challenge this Judgment in Higher Court. This request is opposed by Mr. Pai, learned counsel appearing for Respondent Nos.1 to 4.

45. We have heard both sides on this limited point. There is a disability for the Appellant to continue as a Member on account of his having suppressed the birth of the third child. That is why the Collector has passed an order and declared the Appellant's seat vacant. The learned Single Judge granted ad-interim stay to his Judgment and Order, which was continued by the Division Bench on 21st August 2012.

46. The term of office of the Appellant as a "Sarpanch" has come to an end. That came to an end, according to Mr. Pai, in November 2015. The Appellant has to face prosecution and other proceedings arising out of the order of the Collector. We do not think that such proceedings deserve to be stayed, after it was held concurrently that the Appellant is the father of the third child. Hence, the request is refused.