

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.12569 OF 2015

Mohammed Ishak Kasim Ali Shaikh ... Petitioner
Vs.
Municipal Corporation of Greater Mumbai through
its Commissioner and Election Officer and others ... Respondents

Mr. Khan Mohd. Yousuf G. Panjatan for Petitioner.
Mr. Ramchandra K. Mendadkar a/w. Ms Helen Mahadik and Mr. C. K.
Bhangoji for Respondent No.3.

CORAM : R. G. KETKAR, J.
DATE : DECEMBER 16, 2015

P.C. :

Not on Board. At the request of Mr. Khan, taken up for admission.

2. Heard Mr. Khan, learned Counsel for petitioner and Mr. Mendadkar, learned Counsel for respondent No.3 at length. Mr. Khan seeks leave to delete respondents No.1 and 2. Leave to delete respondents No.1 and 2 is granted. Amendment shall be carried out forthwith. Rule. At the request and by consent of the parties, rule is made returnable forthwith and the Petition is taken up for final hearing.

3. By this Petition under Article 227 of the Constitution of India, petitioner has challenged the judgment and order dated 03.12.2015 below exhibit-41 as also order dated 08.12.2015 below exhibit-1 in Municipal Election Petition No.87 of 2012 passed by the learned Additional Chief Judge presiding over Court Room No.18 in the Court of Small Causes at Mumbai. By order dated 03.12.2015 below exhibit-41, the learned trial Judge rejected the application made by the petitioner, hereinafter referred to as the respondent No.3, under Order

VI, Rule 17 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for amending the written statement. By order dated 08.12.2015 below exhibit-1, the learned trial Judge kept the matter for final arguments. Mr. Khan submitted that the matter is kept on 22.12.2015 for final arguments. In other words, the learned trial Judge has closed the evidence of the respondent No.3.

4. Mr. Khan submitted that respondent No.3 took out application at exhibit-41 contending inter alia that respondent No.3 herein (hereinafter referred to as petitioner) has claimed that he belongs to Nhavi community which is recognized as OBC and also he does not belong to creamy layer. Petitioner has relied upon the certificate dated 19.09.1996 in support of these contentions. Respondent No.3 has contended that petitioner has falsely claimed that the said certificate is covered by Section 6 of the Caste Certificate Act, 2000. Mr. Khan submitted that the said fact was not within the knowledge of the respondent No.3 and the said fact came to his knowledge only on 12.10.2015 when petitioner has produced that certificate. On 23.10.2015, respondent No.3 made application under Right to Information Act, 2005 and got information on 26.10.2015. It is, therefore, necessary to bring this fact on record. Respondent No.3, therefore, filed application dated 24.11.2015 exhibit-41 for incorporating paragraphs 8A to 8G in the written statement.

5. Petitioner resisted that application and after hearing both sides, the learned trial Judge rejected the application. This is the order challenged by the respondent No.3. Mr. Khan submitted that as this development took place only in October 2015, it is necessary to bring these facts on record as petitioner has claimed declaration that after setting aside election of the respondent No.3, he may be declared as elected from the constituency which is reserved for OBC category. In

order to defeat the relief of declaration claimed by the petitioner, it is absolutely necessary to bring on record these facts, and therefore, the learned trial Judge ought to have allowed the amendment for deciding the real controversy between the parties.

6. Mr. Khan further submitted that by order dated 08.12.2015, the learned trial Judge has closed the evidence of respondent No.3 and kept the matter for final arguments on 22.12.2015. Upon taking instructions from the respondent No.3, who is present in the Court, he states that respondent No.3 will file affidavit in lieu of examination-in-chief and serve copy in advance on the other side on or before 21.12.2015 and will appear in the trial Court on 22.12.2015 for cross-examination at the hands of the petitioner.

7. On the other hand, Mr. Mendadkar supported the impugned order. He submitted that respondent No.3 has instituted Writ Petition No.4656 of 2013 in this Court challenging the caste certificate dated 19.09.1996 issued in favour of the petitioner. By order dated 10.06.2014, this Court disposed of the Petition and the operative part of the order read thus,

“(I) The Caste Validity Certificate dated 23.12.2011 is quashed and set aside;

(II) The matter of caste verification of the fifth respondent is remanded to the second respondent Caste Scrutiny Committee No.3 having its office at Bandra (E), Mumbai;

(III) We direct the fifth respondent to appear before the Caste Scrutiny Committee on 23rd June 2014 at 11.00 a.m. The petitioner shall produce an authenticated copy of this order before the Caste Scrutiny Committee;

(IV) The Caste Scrutiny Committee shall hold a fresh enquiry on the caste claim of the fifth respondent in accordance with law and shall pass a fresh order within a period of four

months from 23rd June 2014;

(V) We make it clear that we have made no adjudication on the caste claim of the fifth respondent and all contentions on merits are kept open;

(VI) It will be open for the petitioner and the fifth respondent to produce additional documents;

(VII) The Caste Scrutiny Committee to act upon the authenticated copy of this order;

(VIII) Writ Petition is disposed of on above terms.”

8. Caste Validity Certificate dated 23.12.2011 was quashed and set aside and the matter was remitted to the Caste Scrutiny Committee. The Caste Scrutiny Committee was directed to hold fresh enquiry of the petitioner and permitted the respondent No.3 and the petitioner to produce additional documents.

9. Mr. Mendadkar submitted that after considering the evidence on record, Caste Scrutiny Committee accepted the claim made by the petitioner as also upheld the validity of the caste certificate dated 19.09.1996. The Caste Scrutiny Committee passed order dated 21.11.2015, and till date, respondent No.3 has not challenged that order. He further relied upon Section 7(2) of the Maharashtra Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Other Backward Classes and Special Backward Category (Regulation of Issuance and Verification of) Caste Certificate Act, 2001 (for short 'Act') to contend that the order passed by the Scrutiny Committee under the Act is final and cannot be challenged before any authority or court except the High Court under Article 226 of the Constitution of India. He, therefore, submitted that no case is made out for interfering with the order dated 03.12.2015 passed below exhibit-41.

10. As far as the order dated 08.12.2015 below exhibit-1 is concerned, Mr. Mendadkar, upon taking instructions from the petitioner, who is present in the Court, states that the petitioner will cross-examine respondent No.3 on 22.12.2015.

11. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, respondent No.3 has filed application exhibit-41 for amending the written statement. The case made out in the application is that on 12.10.2015, petitioner had produced caste certificate dated 19.09.1996. It is not possible to accept this submission for more than one reason. In the first place, respondent No.3 had instituted Writ Petition No.4656 of 2013. Respondent No.3 had challenged the very caste certificate dated 19.09.1996 and the said caste certificate was annexed as exhibit-A as also the caste validity certificate dated 23.12.2011 at exhibit-B issued on the basis of non-creamy layer certificate dated 19.09.1996. It is, therefore, cannot be accepted that respondent No.3, for the first time, became aware of caste certificate dated 19.09.1996. Secondly, on 10.06.2014, this Court disposed of that Petition and directed the petitioner and respondent No.3 to appear before the Caste Scrutiny Committee and produce the documents. After considering the documents on record, by order dated 21.11.2015, the Caste Scrutiny Committee allowed the claim made by the petitioner. Having regard to Section 7(2) of the Act, it is only High Court under Article 226 of the Constitution of India, can examine the correctness of the decision of the Caste Scrutiny Committee, it will not be possible for the learned trial Judge to go into the question of validity or otherwise of that certificate. It will be open to the respondent No.3 to challenge the decision of the Caste Scrutiny Committee by instituting Writ Petition under Article 226 of the Constitution of India, if so advised. In fact,

respondent No.3 has already instituted Writ Petition (L) No.3366 of 2015 on the original side of this Court.

12. In view thereof as also having regard to the fact that the application does not satisfy the conditions of proviso to Order VI, Rule 17 C.P.C., I do not find that the learned trial Judge has committed any error in rejecting the application. The learned trial Judge relied upon the decision of the Apex Court in the case of **Vidyabai Vs. Padmalatha, 2009 (2) SCC 409** and held that the evidence of Corporation and State Election Commission is already closed and the matter is for evidence of respondent No.3. The learned trial Judge, therefore, held that trial has already commenced. In view thereof, challenge to order dated 03.12.2015 below exhibit-41 fails.

13. In view of the statement made by Mr. Khan for respondent No.3 and Mr. Mendadkar for petitioner, respondent No.3 shall file and serve copy of affidavit in lieu of examination-in-chief on the other side on or before 21.12.2015 and shall appear before the trial Court on 22.12.2015 for facing the cross-examination. Rule is made absolute in the aforesaid terms with no order as to costs.

14. It is made clear that the observations made herein are only for the purpose of considering the correctness of the impugned order and the learned trial Judge will decide the matter on the basis of evidence on record, without being influenced by the observations made herein and in accordance with law. Parties shall co-operate for disposal of the Petition. Order accordingly.

(R. G. KETKAR, J.)