

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

WRIT PETITION NO.2058 OF 2016

Ashok s/o Sakharam Lute,
Age-54 years, Occu:Business,
R/o-Sarang Sadan, Main Road,
Naregaon, Tq. and Dist-Aurangabad.

...PETITIONER

VERSUS

- 1) The State of Maharashtra,
Through its Secretary,
Urban Development Department,
Mantralaya, Mumbai,
- 2) The Commissioner,
Municipal Corporation,
Aurangabad,
- 3) Gokulsingh Sampatsing Malke,
Age-33 years, Occu:Business,
R/o-Naregaon, Aurangabad,
Tq. and Dist-Aurangabad,
- 4) Dr. Rajendra Pardeshi,
Jijai Hospital, Pundliknagar,
Aurangabad, Tq. & Dist-Aurangabad.

...RESPONDENTS

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Mr.N.L. Jadhav Advocate for Petitioner.
Mr.V.M. Kagne, A.G.P. for Respondent No.1.

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**CORAM: R.M. BORDE AND
A.I.S. CHEEMA, JJ.**

DATE : 25TH FEBRUARY, 2016

ORAL ORDER [PER R.M. BORDE, J.] :

1. Petitioner is seeking writ of quo warranto or appropriate writ or direction to declare that Respondent No.3 is disqualified to hold the elected office of Corporator in view of the bar contained in Section 10(1)(i) of the Maharashtra Municipal Corporations Act, 1949 (Act of 1949).

2. The Petitioner contends that Respondent No.3 has more than two children and by virtue of the provision of Section 10(1)(i) of Act of 1949 he was disqualified to contest election for the elected office of the Councillor of the Municipal Corporation.

3. The general elections of Municipal

Corporation, Aurangabad took place in April 2015 and Respondent No.3 got elected as a Councillor having secured 1717 votes, whereas the Petitioner, who was contesting candidate opposing the candidature of Respondent No.3, secured 1089 votes and was defeated. The Petitioner contends that Respondent No.3 is instrumental in suppressing the fact that he has more than two children alive and since he has more than two children alive who were born after cut off date, he has incurred disqualification. It is also contended that Respondent No.3, apart from suppressing the material fact, has indulged in manipulating the record so as to gain the benefit. The factum of Respondent No.3 having more than two children alive and as regards incurring of disqualification, came to the knowledge of the Petitioner at later point of time, after lapse of limitation provided under the Act of 1949 for availing of the remedy of presenting an election petition and as such the Petitioner is approaching

this Court, seeking declaration of quashment of election of Respondent No.3.

4. The Petitioner contends that since Respondent No.3 is guilty of suppressing the material facts and that the fraudulent act of Respondent No.3 has come to the knowledge of Petitioner late, the Petitioner is justified in approaching this Court claiming the relief as sought for in this Petition. It is also contended that, in these peculiar circumstances the Petitioner cannot be left remedy-less and as such in exercise of extra ordinary jurisdiction under Article 226 of the Constitution of India, cognizance of this Petition needs to be taken.

5. Section 10 of Act of 1949 provides for disqualification of the Councillor and Sub-section (1)(i) provides that if the person has more than two children born after the date of commencement of the Maharashtra Municipal Corporations and

Municipal Councils, Nagar Panchayats and Industrial Townships (Second Amendment) Act, 1995 shall be disqualified from contesting election. Whereas the person having more than two children prior to enforcement of amendment is saved from the net of disqualification. Section 16 of the Act of 1949 provides for remedy of Election Petitions. It is provided that if the qualification of any person declared to be elected as a councillor is in dispute, any person enrolled in the municipal election roll may at any time within ten days after the result of the election has been declared, submit an application to the Judge for the determination of the dispute or question.

6. In the instant matter, admittedly the Petitioner has not availed of the remedy provided under the Act of 1949 although he was the contesting candidate opposing the candidature of Respondent No.3.

7. The Petitioner relies upon the constitutional provision contained in Article 243V of the Constitution of India, wherein it is recorded that a person shall be disqualified for being chosen as, and for being a member of a Municipality if he is so disqualified by or under any law for the time being in force for the purposes of elections to the Legislature of the State concerned. At the same time Sub Article (2) of Article 243V of the Constitution cannot be lost sight of, which provides that, if any question arises as to whether a member of a Municipality has become subject to any of the disqualifications mentioned in clause (1), the question shall be referred for the decision of such authority and in such manner as the Legislature of a State may, by law, provide. There is a specific bar imposed for entertaining the challenge to the election of the Municipalities in view of Article 243ZG, which provides that notwithstanding anything in this Constitution, the validity of any law relating to

the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 243ZA shall not be called in question in any Court. It is further provided that no election to any Municipality shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State as has been referred above.

8. Section 16 of the Act of 1949 provides for remedy of tendering election petition within ten days from the date of declaration of result of election. Failure of the elector or the candidate at the election to present the election petition for any reason, within the time stipulated, cannot be construed as ground for giving go-bye to the Constitutional mandate prohibiting the Courts from entertaining the challenge by any mode except as provided under the law made by the Legislature of

the State.

9. The Petitioner places reliance on the Judgment in the matter of **K. Venkatachalam vs. A. Swamickan and another**, reported in (1999) 4 S.C.C. 526 : (1999) A.I.R. (S.C.) 1723. It is contended, relying upon the aforesaid Judgment, that Respondent No.3 herein has played fraud on the Constitution and as such the Petitioner is justified in availing the remedy by presenting the instant Petition raising challenge to the election. In the reported matter the returned candidate was not elector in electoral role of constituency and fraudulently sworn affidavit impersonating himself using similarity in name of another person. The appellant before the Supreme Court was disqualified for being member of the Legislative Assembly of Tamil Nadu as he did not possess the basic qualification prescribed under Clause (c) of Article 173 of the Constitution read with Section 5 of the Representation of the

Peoples Act, 1951. Apart from this, there was no dispute and in fact there was no challenge to the findings recorded by the High Court that *Venkatachalam* - appellant before the Supreme Court was not an elector in the electoral roll for the Lalgudi Assembly Constituency for general elections of December 1984 and that he, in blatant and fraudulent manner, represented to be an elector of that constituency while using the similarity in the name of another person. This fact was considered by the Supreme Court and also the impact of Article 193 of the Constitution which provides penalty for sitting and voting when a person is not qualified to be member of the Legislative Assembly.

10. The facts giving rise to the instant matter are not comparable with the facts arising before the Supreme Court in the reported Judgment. The Petitioner, in the instant Petition, alleges that Respondent No.3, who is elected candidate,

incurs statutory disqualification since he has more than two children alive and born after the notified date. The issue raised before the Court has not been earlier determined by any competent Court and there is no adjudication as regards allegations levelled by Petitioner. The objection raised is capable of being disputed by Respondent No.3 and as such the controversy shall have to be adjudicated by a forum prescribed under the relevant Legislation i.e. the Maharashtra Municipal Corporations Act, 1949. The contention of the Petitioner that the act of Respondent No.3 i.e. elected candidate in contesting elections despite alleged disqualification amounts to fraud on the Constitution, cannot be accepted since the allegations are in the nature of disputed questions which are required to be dealt with by the forum prescribed under the Act of 1949. The allegations in respect of manipulation of record and forgery can not be scrutinized without proper enquiry in the matter and only mode of enquiry is

provided under the Act of 1949, which has not been
availed by the Petitioner.

11. For the reasons recorded above, we find
no substance in the Petition. The Writ Petition
stands rejected, summarily.

[A.I.S. CHEEMA, J.]

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[R.M. BORDE, J.]