

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 9721 OF 2016

Umesh Devrao Pawale ..PETITIONER

VERSUS

Bapurao Nagorao Gajbhare and Others ..RESPONDENTS

WITH

WRIT PETITION NO. 9722 OF 2016

Umesh Devrao Pawale ..PETITIONER

VERSUS

Pralhad Shankarrao Aade and Others ..RESPONDENTS

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Mr. R.N. Dhorde, Senior Advocate h/f Mr. A.B. Shinde and Mr. A.M. Gaikwad, Advocates for petitioner in both matters.

Mr. V.D. Hon, Senior Advocate h/f Mr. A.B. Bilolikar, Advocate for Respondent No.1 in WP 9721/16.

Mr. H.V. Patil, Advocate for Respondent No.1 in WP 9722/16.

Mr. S.N. Kendre, A.G.P. for Respondent No.2 in both matters.

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CORAM : T.V. NALAWADE, J.

DATED : 25th OCTOBER, 2016

ORDER :

1. The first petition is filed to challenge the judgment and order of Election Petition No. 2 of 2012 which is pending in the Court of Civil Judge, Senior Division, Nanded and second proceeding is filed to challenge the order passed in Election Petition No.1 of 2012 which was

pending in the same Court. Both the election petitions were filed against the petitioner of present two proceedings for setting aside his election as Councilor to the Nanded Municipal Council on the ground that after the relevant date three children were borne to him. Both the election petitions were decided together and the petitions are allowed. Both the sides are heard.

2. The present petitioner was declared elected as Councilor on 15th October, 2012. In the nomination form, he had made declaration that he was having two issues on the date of nomination. He had contested election in the year 2007 also and at that time also he had made declaration that he was having two issues. Two election petitions were filed by two different persons on the same ground. Similar contentions were made in both the election petitions.

3. In the election petitions there was contention that the first issue was borne to the present petitioner on 13th October, 2001 (daughter), the second issue was borne on 15th December, 2003 (son) and the third issue was borne on 04th January, 2007 (son). It was contended in the election petitions that in the year 2007 also he had made false declaration that he was having only two issues and as after 19th January,

2001, three issues were borne to him so he was disqualified to continue as Councilor and he was not eligible to contest the election and so it was necessary to set aside the election.

4. The present petitioner filed say to the aforesaid petitions. He admitted that daughter by name Nikita was borne on 13th October, 2001 and son by name Vedant borne on 15th December, 2003. He however denied that Amit, the third son was borne to his wife on 4th January, 2007. He contended that he was living in joint Hindu family with his younger brother – Raju and one son was borne to Raju on 04th January, 2007. He contended that his son – Vedant died due to illness at Hyderabad on 24th November, 2007 and after that he adopted the son borne to younger brother viz. Amit @ Sahil on 20th June, 2010 and the said adoption was also registered. Thus he contended that three children were not borne after the relevant date and so election cannot be set aside.

5. In the election petitions, the learned Civil Judge, Senior Division, Nanded considered a issue like whether the petitioner of election petition proves that the Councilor was not qualified and eligible to contest the election as he was having three issues and they were borne after the relevant date and whether the petitioner was entitled to get the relief of

setting aside of election. This Court made order to bring two proceedings to one and same Court of Civil Judge, Senior Division when both matters were part heard on application made by present petitioner and time was fixed by this Court for deciding the petitions as the petitions were filed in the year 2012 and there was possibility that present petitioner – Councilor was playing tactics to protract the decision of the matter.

6. It appears that after making of the order by this Court, the learned Counsel for petitioner from election petitions took steps and matter was taken on board. On that date, the present petitioner was expected to lead evidence. The evidence of petitioner from election petition was already over in both the proceedings. After that date, Councilor was in Election Petition No. 1 of 2012 to lead the evidence but matter was adjourned to 30th August, 2016, 31st August, 2016, 01st September, 2016 and 2nd September, 2016 as adjournments were sought by present petitioner. Ultimately order was made by Civil Judge, Senior Division, Nanded on 02nd September, 2016 to strike off the evidence of present petitioner and matter was kept on 03rd September, 2016 for arguments. On 03rd September, 2016, application was moved by learned Counsel for the present petitioner for setting aside the aforesaid order and for giving permission to give evidence of the witnesses. On 03rd

September, 2016, the argument of learned Counsel for petitioner was started and it was completed on 06th September, 2016 and the matter was adjourned to 07th September, 2016 for argument of Counsel of present petitioner. Similarly in other proceeding – Election Petition No.2 of 2012 many adjournments were sought by present petitioner when the matter was before other Court. Evidence of the petitioner of that election petition was closed but from January, 2016 adjournments were sought for present petitioner. The advocate was not turning up. Unfortunately in February, 2016 this Court (other Hon'ble Judge) stayed the proceeding when proceeding was filed for transfer of the proceedings to bring them in one Court by present petitioner and this stay was continued till 29th August, 2016.

7. Roznamas of the aforesaid two proceedings show that in the past also the evidence of present petitioner was closed due to tactics played by the present petitioner and cost of Rs.5,000/- was also imposed when permission was granted to him to lead evidence. Even when there was direction of this Court to expedite the matter, tactics were played by present petitioner to protract the decision. In Election Petition No. 2 of 2012, adjournment was sought on 31st August, 2016 on the ground that Counsel was not ready with the matter, then on 1st September, 2016 on

the ground that Counsel had gone to other station – Tirupati and on the same ground adjournment was sought on 02nd September, 2016. Ultimately on 02nd September, 2016, the Court rejected the application. Again on 03rd September, 2016 adjournment was sought and on that date when the time was sought for argument for the present petitioner, the last chance was granted. Then on 03rd September, 2016, another application was filed for present petitioner at Exhibit 146 and again request was made for setting aside the previous order of closer of evidence and striking of defence. On 3rd September, 2016 this application was rejected and cost was also imposed in view of the previous conduct and then the matter was taken on 07th September, 2016. On that date, present petitioner applied for permission to produce some documents and the same was allowed.

8. Most of the circumstances are matter of record. It is not disputed that the petitioner was having two issues. The petitioner is also not disputing that Amit, so called third issue was borne on 04th January, 2007. It is the case that Amit was not born to his wife but he was adopted.

9. The record in respect of birth certificate of Amit is totally inconsistent with the aforesaid defence taken by present petitioner. The record shows that he had started proceeding under Birth and Death Registration Act before the Magistrate by making application to make an entry of date of birth of one issue borne to his wife from him by name Amit. He had contended that Amit was borne to his wife on 04th January, 2007 at his residential place Pandurang Nagar, Nanded. In support of his contention he filed affidavit and certificate of the local body – Corporation that this birth was not registered in the record of Corporation. Copy of the ration card was also produced. It was submitted for present petitioner by learned Senior Counsel who argued for him that after following necessary procedure, entry of birth date was taken in the register as per the direction given by the Magistrate under the aforesaid Act. Copies of all the papers of the said enquiry are produced on the record. Copy of ration card shows that in his family in the year 2010, he had shown only three members and all of them were adults. They were the Councilor, his wife and brother Sanjay. Admittedly in the nomination form filed for present election and in declaration he has mentioned that he has two issues.

10. The aforesaid circumstances need to be kept in mind while considering his other evidence that Amit was taken in adoption by him from his brother – Raju and the adoption document was registered in the year 2010. He has produced birth certificate in respect of one male issue borne to wife of Raju on the same date i.e. 4th January, 2007.

11. In view of Section 10 of the Bombay Provincial Municipal Corporation Act, adopted son is excluded for the operation of the provision. If Amit was really adopted, then there was no need to mention his name in nomination form and making declaration in that regard. Under the Birth and Death Registration Act also there is no provision to make registration of the birth of the son by giving new name to the adopted son when the birth of the said male issue was already registered under the Act.

12. The aforesaid circumstances shows that in the year 2007 when the petitioner contested the election to the local body, he was having three issues and Amit was borne on 04th January, 2007. But he had made declaration that he was having only two issues. Even if his contention that his second son – Vedant was borne on 15th December, 2003, died subsequently is accepted as it is, the fact remains that after the relevant

date three issues were borne to him and they were alive on 04th January, 2007. A person who is in politics can do anything. If Amit was really adopted, there was no necessity for present petitioner to go for registration of his birth again to show that Amit was borne to his wife. This circumstance created by petitioner himself can be used for proceeding of the present nature. There is record of aforesaid nature in respect of registration of birth of Amit against present petitioner. In view of these circumstances, nothing could have been achieved by allowing him to examine the witnesses to show that on that date a son was borne to Raju's wife or by proving that he had taken son of Raju in adoption subsequently. In view of the aforesaid conduct of the petitioner and the record which includes declaration, affidavit filed before the competent authority like Magistrate in the past about the birth of Amit, this Court holds that the Court of Civil Judge, Senior Division, Nanded has not committed any error in holding that the ground of having three issues borne after relevant date is proved against the present petitioner.

13. The learned Senior Counsel for petitioner submitted that due to such decision, during the entire life the petitioner will be prevented from contesting any election of local body, State Legislature, etc. It can be said that it is open to the petitioner to approach Civil Court to get

declaration in view of the cause of action created by present proceeding and there he can prove that Amit was borne to wife of his brother – Raju. However in view of aforesaid circumstances, it will be necessary for present petitioner to make the two persons who had filed election petitions and also the Government as party defendants in the said suit. Further, it will be necessary for him to prove the case on the basis of D.N.A. test. Such proceeding will give an opportunity to the Civil Court also to take action for perjure. Such precaution needs to be taken before giving of declaration in favour of petitioner as there are aforesaid circumstances and there is probability that he created false record to see that he remains in active politics. So this Court holds that it is not possible to interfere in the decision given by Civil Judge, Senior Division, Nanded. In the result both the petitions are dismissed.

(T.V. NALAWADE, J.)

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