

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
LETTERS PATENT APPEAL NO. 18 OF 2014
IN
WRIT PETITION NO.7307 OF 2012

Mr. Jitendrakumar Jagdish Indise. .. Appellant

Vs

Mr. Sambhaji Dhondiram Pandit and Others. .. Respondents

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Shri Sachin U. Dhakephalkar for the Appellant.

Shri S.M. Oak along with Shri Sagar Joshi i/b Shri Pranil Sonawane for the Respondent No.1.

Shri N.R. Bubna for the Respondent Nos.2 and 3.

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CORAM : A.S. OKA &
SMT.ANUJA PRABHUDESSAI, JJ

DATED : 23RD DECEMBER 2016

PC.:

1. By this Letters Patent Appeal, the Appellant has taken an exception to the order dated 14th September 2012 passed by the learned Single Judge in Writ Petition No.7307 of 2012. The issue is regarding disqualification of the first Respondent who was declared as an elected Councillor of the Thane Municipal Corporation constituted under the Mumbai Municipal Corporation Act, 1949 (for short “the said Act”). The disqualification was urged on the basis of the Clause (i) of Sub-section (1) of Section 10 of the said Act by contending that the first Respondent had more than two children. An order was made by the Municipal Commissioner on 7th May 2012 refusing to disqualify the first

Respondent who was declared elected as a Municipal Councillor/Corporator. He was of the view that the issue of disqualification be referred to the Competent Authority. It is this order which was subjected to a challenge before the learned Single Judge by filing a Writ Petition. The learned Single Judge noted from the admitted facts that the first Respondent had three children born on 28th July 1999, 8th June 2001 and 26th August 2003. However, the first child unfortunately expired on 21st November 2004. The learned Single Judge noted that the election was notified in the year 2012 and, therefore, on the date of filing of a nomination form, the first Respondent had not incurred disqualification under Clause (i) of Sub-section (1) of Section 10 of the said Act.

2. The submission of the learned counsel appearing for the Appellant who was the Writ Petitioner is that from Clause (i) of Sub-section (1) of Section 10 of the said Act, it is clear that the disqualification is incurred when a person incurs the disqualifications provided in Clause (i) of Sub-section (1) of Section 10 of the said Act. Relying upon a decision of the learned Single Judge of this Court in the case of *Ambadas Vithal Vaydande v. Dnyaraj Sitaram Sarvogod and Others*¹, he would urge that in a similar case, it is held that on the date on which the said Clause (i) was brought on the Statute Book, when a person has more than two children, the disqualification is incurred and

1 In W.P. No.4557 of 2007 decided on 6th July 2007

the subsequent events do not obliterate the disqualification.

3. We have given careful consideration to the submissions.

Clause (i) of Sub-section (1) of Section 10 of the said Act reads thus:

“10(1) Subject to the provisions of Sections 13, 17 and 404, a person shall be disqualified for being elected and for being a Councillor, if such person -

(a-1)

(a)

(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”.

4. Clause (i) of Sub-section (1) of Section 10 of the said Act incorporates a list of factual situations which incur disqualification. The disqualification is for being elected and for continuing as a Councillor. Thus, the disqualification arises when a nomination form for contesting the election is filed. If after a person is elected as a Councillor, he incurs disqualification contained in Sub-section (1) of Section 10 of the said Act, the person shall cease to hold the office.

5. In the decision on which the Appellant has placed reliance, the issue was of subsequent act of giving in adoption one of the three children to another person. It is in this context of the factual controversy that the learned Single Judge has held that the disqualification does not cease to be operate merely because one or more out of the three children are given in adoption. The reason is that notwithstanding the subsequent act of giving in adoption one of the three children to another person, the Councillor continues to have more than two children. Hence, the said decision has no application to the facts of this case. In the present case, admittedly, when the nomination form was filed, the first Respondent had only two living children. Therefore, on that date, the disqualification under Clause (i) of Sub-section (1) of Section 10 of the said Act was not attracted. That is precisely the view taken by the learned Single Judge in the impugned

order. We, accordingly, concur with the said decision. The Letters Patent Appeal is, therefore, dismissed.

(SMT.ANUJA PRABHUDESSAI, J)

(A.S. OKA, J)