

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.1097 OF 2018

Gautam s/o Rama Latke,
Age-48 years, Occu-Agriculture,
R/o Rajuri, Tal.Paranda,
Dist.Osmanabad

– PETITIONER

VERSUS

1. The State of Maharashtra,
Through the Secretary to the Rural
Development Department,
Mantralaya, Mumbai,

2. The Divisional Commissioner,
Aurangabad Division, Aurangabad,
Dist.Aurangabad,

3. The Chief Executive Officer,
Zilla Parshad Osmanabad,
Dist.Osmanabad

4. Chandrakant s/o Hari Hivare,
Age-Major, Occu-Agriculture,
R/o Anala, Tal.Paranda,
Dist.Osmanabad

– RESPONDENTS

Mr.V.J.Dixit, Sr.Counsel h/f Mr.A.R.Devkate, Advocate for the
petitioner.

Mr.S.K.Tambe, AGP for respondent Nos. 1 and 2.

Mr.R.N.Dhorde, Sr.Counsel h/f Mr.R.V.Naiknavare, Advocate for
respondent No.4.

Mrs.S.S.Renge, Advocate for respondent No.3.

(CORAM : RAVINDRA V. GHUGE, J.)

DATE : 26/02/2018

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. This case underlines the importance of family planning in a country which has already suffered population explosion.

3. The petitioner elected as a Councillor from the Anala (30) Constituency Zilla Parishad, Osmanabad, is aggrieved by the order of the Additional Commissioner dated 21/12/2017 by which he has been held to have incurred the disqualification to continue as a Councillor u/s 16(1)(n) r/w Section 16(2)(e) and Section 40 of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961 (For short, 1961 Act), for having fathered three children.

4. I have considered the strenuous submissions of Mr.Dixit, the learned Sr.Advocate appearing on behalf of the petitioner, the learned AGP on behalf of respondent Nos. 1 and 2, Mrs.Renge, learned Advocate for respondent No.3 / Zilla Parishad and Mr.Dhorde, the learned Sr.Advocate appearing on behalf of respondent No.4 who has moved the original application u/s 40 before respondent No.2,

seeking the disqualification of the petitioner.

5. The extensive contentions of Mr.Dixit can be summarized as under : -

[a] There wasn't no enough space in the nomination form to mention all the 3 children of the petitioner and hence, only two children were mentioned.

[b] The first two children, who are daughters namely Ms.Kalyani and Ms.Kirti are born on 01/11/2000 as twins and the male child Gaurav is born on 01/04/2005.

[c] The petitioner has not suppressed before the Divisional Commissioner that he has 3 biological children born from the same wife, Smt.Suvarna.

[d] The twins will have to be given the benefit under the first proviso to Section 16(2)(e) and as such the petitioner would not incur the disqualification under Section 16(1)(n).

[e] Considering the effect of Section 27 of the Act, the proceedings under Section 40 r/w 16 would not be maintainable before the Divisional Commissioner in so far as the incurring of disqualification is concerned, as such an application will have to be filed u/s 27, since the 3 children have been born prior to the election of the petitioner on

23/02/2017.

[f] Even though the petitioner has 3 children, he has not incurred the disqualification under Section 40 r/w 16 as the said disqualification has not occurred after his election on 23/02/2016.

[g] The defeated candidate namely Dattatraya Patil has moved E.P. No.4/2017 u/s 27 before the Civil Court and hence, the application filed by respondent No.4 herein, containing more or less similar pleadings and similar prayers, would not be maintainable in the light of the judgment delivered in the case of Jagannath Sherki (supra).

6. The submissions of Mr.Dhorde can be summarized as under :-

[a] An election petition u/s.27 has been filed by Dattatraya Patil, who is a different person.

[b] No such petition has been filed by respondent No.4.

[c] Respondent No.4 would stand on his own feet with regard to the application filed u/s 40 r/w Section 16 for the purposes of seeking a disqualification of the petitioner.

[d] Section 16 is referable to the proceedings u/s 40. Section 27 is for a completely different purpose.

[e] The nomination papers indicate that the petitioner has

mentioned the first girl child Ms. Kalyani and the male child Master Gaurav and has suppressed the existence of the second girl child Ms. Kirti.

[f] The petitioner has manipulated documents to suggest that Ms.Kalyani and Ms.Kirti have been born on the same day 01/11/2000 as twins and has suppressed the fact that Ms.Kirti has been born 01/09/2002.

[g] The view taken by this Court in Jagannath Laxman Sherki (supra) has been considered by the learned Division Bench in the matter of Santosh Chandansing Rawat Vs. Divisional Commissioner, Nagpur and others [2009(6) Mh.L.J. 828] while dealing with a Letters Patent Appeal in a different case.

[h] As such, the proceedings initiated by the petitioner would not be barred on the ground of a remedy u/s 27 as Section 27 is not the remedy for seeking disqualification.

7. The petitioner has relied upon the following judgments :

[1] *S.Sundaram Pillai and others Vs. V.R.Pattabiraman and others* [(1985) 1 SCC 591]

[2] *Jagannath Laxmanrao Sherki Vs. Divisional Commissioner, Nagpur Division, Nagpur and others* [2009(2) Mh.L.J. 949].

8. Respondent No.4 has relied upon the following judgments :-

[1] Santosh Chandansingh Rawat Vs Divisional Commissioner, Nagpur and others [2009(6) Mh.L.J.828]

[2] Javed and others Vs. State of Haryana and others [2003(4) All MR 707 (SC)]

[3] Jagannath Laxmanrao Sherki Vs. Divisional Commissioner, Nagpur Division, Nagpur and others [2009(2) All MR 668]

[4] Pundalik Kadhav Vs. District Deputy Registrar, Co-operative Societies, Chandrapur and others [1990(2) Mh.L.J. 925]

[5] Bhaskar Laxman Jadhav and others Vs. Karamveer Kakasaheb Wagh Education Society and others [(2013) 11 SCC 531]

[6] T.Vijendradas and another Vs. M.Subramanian and others [2008(1) All MR 446]

[7] A.V.Papayya Sastry and others Vs. Govt.of A.P. And others [(2007)4 SCC 221].

9. The learned AGP has placed before the Court the original record and contends that the Additional Divisional Commissioner, while considering the controversy, has proceeded on the belief that Ms.Kalyani and Ms.Kirti are born on the same date as twins and he

has therefore not gone into the allegations of fraud leveled by respondent No.4 against the petitioner herein. He has, however, concluded that the petitioner incurs the disqualification for having 3 children.

10. Considering the rival submissions and the conspectus of this case, it can be compartmentalized into 3 issues and which can be taken up for adjudication as under :-

Issue No.A - Whether the birth of the twins after the introduction of Section 16(1)(n) on 13/09/2000 till 12/09/2001, which is the cut off date as regards the disqualification for having more than 2 children, could be termed as 1 child considering the proviso below 16(2)(e) r/w the explanation for the purposes of clause "n" of Section 16 (1) and clause (e) of Section 16 (2) ?

Issue No.B - Whether the filing of the application/petition by respondent No.4 u/s 40 r/w 16 of the 1961 Act would be rendered untenable in Law in view of Section 27 of the said Act, in the light of the view taken by the learned Single Judge of this Court in the matter of Jagannath Laxmanrao Sherki Vs. Divisional Commissioner, Nagpur Division, Nagpur and others [2009(2) Mh.L.J. 949] (Writ Petition No.2016/2008 decided on 16/01/2009) ?

Issue No.C - Whether the petitioner could be said to be guilty of misrepresentation or fraud with regard to his number of children mentioned in the nomination form/papers ?

Issue No.A

11. Mr.Dixit has strenuously canvassed that the proviso below Section 16(2)(e) is equally applicable to Section 16(1)(n). The explanation to Section 16(1)(n) and 16(2)(e), would stand aloof from and unconnected with the proviso. For the sake of clarity, Section 16(1)(n) and (2)(e) are reproduced hereunder :-

“S.16. Disqualifications :- (1) Subject to the provisions of sub-section (2), a person shall be disqualified for being chosen as, and for being, a Councillor,-

***

***

***

(n) if he has more than two children;

***

***

***

(2) Notwithstanding anything contained in sub-section (1) –

***

***

***

(e) a person shall not disqualified under clause (n) of sub-section (1) for being chosen as, or for being, a Councillor, if he is having more than two children on the date of commencement of the Bombay Village Panchayats Act and the Maharashtra Zilla

Parishad and Panchayat Samitis (Amendment) Act, 1995 (hereinafter in this clause referred to as “the date of such commencement”), so long as the number of children he had on the date of such commencement does not increase:

Provided 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 clause (n) of sub-section (1).

Explanation.- For the purposes of clause (n) of sub-section (1) and clause (e) of this sub-section,-

(i) where a couple has only one child on or after the date of 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.”

12. The petitioner has placed reliance upon the judgment of the Hon'ble Apex Court in the case of S.Sundaram Pillai and others (supra). Paragraph Nos.27 to 33, 44 and 55 have been specifically referred to. Paragraph No.43 and 53 deal with the object of a proviso and an explanation, respectively. It would be apposite to reproduce paragraph No.43 for understanding the effect of the proviso and Section 53 with reference to the explanation, as under :-

“43. We need not multiply authorities after authorities on this point because the legal position seems to be clearly and

manifestly well established. To sum up, a proviso may serve four different purposes :

(1) qualifying or excepting certain provisions from the main enactment;

(2) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable;

(3) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and

(4) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision.

53. Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is-

(a) to explain the meaning and intendment of the Act itself,

(b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,

(c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,

(d) an Explanation cannot in any way interfere with or

change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and

(e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same.”

13. Before advertng to Section 16(1) and (2) and the proviso and explanation there below, it would be appreciate to understand the law laid down by the Hon'ble Apex Court in paragraph Nos.43 and 53 reproduced above. In given circumstances, a proviso may qualify or state an exemption to the main enactment. It may become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself. It may even act as an optional addenda to the enactment with the sole object of explaining the real intention of the statutory provision.

14. The statement of objects with regard to the amendment brought into effect by the Act of XLIV of 2000 on 13/09/2000, has been placed before me. It requires no debate that this amendment

was introduced in the Bombay Village Panchayats Act and the Maharashtra Zilla Parishads and Panchayat Samitis Act respectively, by the said Act of 2000. The intent and object was to discourage unnecessary growth in population and to popularize methods of family planning so as to control the growth in population. As has been said by the late Justice V.R.Krishna Iyer in one of his landmark judgments Jolly George Varghese and another Vs. The Bank of Cochin [(1980) 2 SCC 360] that 'to be poor, in this land of Daridra Narayana', excessive growth of population would be a heavy burden on this nation.

15. It cannot be ignored that worldwide and especially in several Asian countries and countries from Europe, America and Scandinavia, steps are taken for encouraging family planning and birth control alongwith the use of contraceptives for controlling the growth of population. The term “family planning” is more than often used as a synonym for birth control. Family planning is as important from the point of view of the mothers' health, as well as, keeping in view the financial and economic condition of a particular family. The uncontrolled growth of population is one of the most important reason, which creates economic problems in India. Unemployment, poverty, illiteracy and growing cost of living are intricately connected

with the unnecessary growth in population. It is seen all around and in all walks of life that cities, temples, markets, educational institutions, railway stations, bus stands etc., are over crowded. The Government of India has also formed a Family Planning Commission to control the increasing growth of population. Laws are introduced to curb child marriages which are said to be one of the main causes for such a growth.

16. India has a total area of 3287263 Sq.Kms out of which only 2973193 Sq.Kms constitutes land. China has a total area of 9596960 Sq.Kms out of which 9326410 Sq.Kms is the land area. It is projected that if effective steps are not taken for population control, India would cross the 1.5 billion mark by 2030. The population growth of India is 1.2% as in 2012-2013 and in China it is 0.5%. The population density of India is 367 persons per Sq.Km. as against 142 persons per Sq.Km in China. India is 2.58 times more dense than China. It is estimated as in July 2017 that the population of India is 1281935911 and China is 1379302771. As such, the necessity for population control, therefore, requires no debate.

17. Needless to state, the amendment to these two Acts in the State of Maharashtra was apparently introduced to ensure that

importance of family planning is brought to the notice of every individual and the citizens are educated to have lesser children considering population explosion. Since the arena of politics appears to be very attractive to a large chunk of the population, the legislature, in its wisdom, thought it fit to restrict the political aspirations of those candidates who have more children, as a measure of ensuring population control and to popularize family planning from the doorstep of the peoples' representative. With this object, the disqualification was introduced under the 1958 Act and the 1961 Act. The fact situation in this case will therefore have to be visualized from the object of the State to control the growth of population.

18. It is the strenuous contention of the petitioner that though a candidate who has more than 2 children would be disqualified, the strength of the number of children is to be viewed under the proviso to Section 16(1)(n). The proviso reproduced above is pressed into service to contend that the petitioner would not incur a disqualification for having more than 2 children u/s 16(1)(n) as the first two children have been born in a single delivery in the year from the commencement of the amendment on 13/09/2000 till the cut off date 12/09/2001. Mr.Dixit strenuously contends that the two

children born in one delivery would thus be covered by the proviso and would be treated as a single child. Mr.Dhorde has submitted that the proviso does not speak about twins being born so as to be treated as one child, as the phraseology of the proviso would only indicate that the birth of twins would not attract any disqualification for the petitioner under clause (n).

19. There is no dispute that on the date of the introduction of clause (n) u/s 16(1) and clause (e) u/s 16(2), which is 13/09/2000, the petitioner did not have a single child as the first delivery of his wife is said to have occurred on 01/11/2000. In my view, naturally, the delivery of twins on 01/11/2000 as is stated by the petitioner, in itself would not incur the disqualification under clause (n) of Section 16(1). In my view, keeping the intent and object of the introduction of the amendment in focus and the language used in the proviso, it would indicate that the birth of more than 1 child either as twins or triplets or quadruplets in a single delivery within a period of 1 year from the date of the commencement of Section 16(1)(n) and section 16(2)(e), would not be considered as a disqualification under 16(1)(n). Even if the petitioner had 1 child prior to the date of commencement, the birth of twins or triplets in a single delivery in the period of 1 year would not have attracted the disqualification under clause (n).

20. The petitioner having fathered twins on 01/11/2000, pre-supposes that he knew that he had two children in that one year from the commencement of the amendment ending with the cut off date 12/09/2001. For all purposes, he was aware that he has two daughters. The issue, therefore, would be as to whether the birth of his son on 05/04/2005 would still entitle the petitioner to the protection of the proviso on the premises that the two children born in one delivery would mean 1 child. Strenuous contention is that he would be entitled to the exception under the proviso and hence his two daughters would be termed as a single child.

21. In my view, this argument is put to rest for reasons more than one.

Firstly, that the proviso does not prescribe that the birth of more than one child in a single delivery would mean that all those children born in that single delivery would be treated as one child and hence the birth of Gaurav would technically render the petitioner a biological father of only two children. This is because the language of the proviso indicates that the children born in a single delivery, would not be taken into consideration for the purpose of disqualification under clause (n) which is in an eventuality aimed at

protecting those candidates who already have one child prior to the amendment. The proviso is not meant for insulating candidates who have given birth to two children in a single delivery in that period of one year and further become a parent of more children on the ground that the proviso would render birth of twins as a single child. The proviso is intended to protect those candidates who already have a child and would incur disqualification under fortuitous circumstances as twins are born in the second delivery which fell within the said period of one year. As has been held by the Hon'ble Apex Court in S.Sundaram Pillai case (supra) in paragraph No.43 that the proviso would be aimed at fulfilling the intention of the main enactment and for explaining the real intendment of the statutory provision.

Secondly, the explanation reproduced above protects candidates who have one child on or after the date of commencement and a subsequent delivery, after the commencement of the amendment leads to the birth of twins or triplets. Such a couple having only one child on or after the commencement would be insulated from the birth of twins or triplets in a subsequent delivery after that period of one year since it would purely be an act of God to bless the couple with more than one child and for which the couple

cannot be held liable as biologically it would be beyond their control to restrict the delivery to only one child. It is in this context that the explanation (i) for the purposes of clause (n) under 16(1) and clause (e) u/s 16(2) was introduced.

22. As such, the proviso would be of no assistance to the petitioner for the reasons set out above. In this backdrop, the birth of twins to the petitioner in a single delivery after the commencement of the amendment obviously makes the couple aware that they have parented two children. Once they are aware that the twins were born to them in a single delivery, it mandates that they can not have further children by treating the two daughters to be deemed to be one child. In this backdrop, explanation (i) will, therefore, not rescue the petitioner since considering the intent and object of the Act, the said explanation is aimed at saving those couples who have only one child on or after the commencement. When the petitioner knew that he had two children after the commencement, he cannot fall back upon the exception carved out in explanation (i).

23. The argument that the birth of the third child of the petitioner can be a ground for rescuing him from the disqualification by interpreting the second part of explanation (i) to mean that all

couples who have twins or triplets in that one year after commencement, shall be deemed to have only one child and thereafter again bear one more child. This would defeat the very purpose for which the enactment of 2000 was introduced. The view taken by the Hon'ble Apex Court in paragraph No.53 in S.Sundaram Pillai case (supra) with regard to the object of an 'explanation' would clearly indicate that such an explanation has to be interpreted to explain the meaning and intendment of the Act itself and to subserve the dominant object of the act. Such an explanation cannot interfere with or change the enactment and would be aimed at suppressing mischief and to advance the object of the Act.

24. As such, I answer issue No.A as above.

Issue No.B

25. The petitioner has strenuously canvassed that the proceedings under Section 40 initiated by respondent No.4 are rendered untenable in the light of the judgment delivered in Jagannath Sherki case (supra).

26. Section 26 reads as under :-

“S. 26. Power to declare persons elected in certain

contingencies -

If at any election after the counting of votes is completed, an equality of votes is found to exist between any candidates, and the addition of one vote will entitle any of those candidates to be declared elected, such officer as the State Election Commission may empower in this behalf shall forthwith decide between those candidates by lot, and proceed as if the candidate on whom the lot falls had received as additional vote.”

27. Section 27 reads as under :-

“S. 27. Determination of validity of elections; enquiry by Judge; Procedure -

(1) If the validity of any election of a Councillor or the legality of any order made or proceedings held under section 26 is brought in question by any candidate at such election or by any person qualified to vote at the election to which such question refers such candidate or person may, at any time within fifteen days after the date of declaration of the result of the election or the date of the order or proceeding apply to the District Judge of the district within which the election has been held, for the determination of such question.

(2) An enquiry shall thereupon be held by a Judge, not below the rank of an Assistant Judge, appointed by the State Government either specially for the case, or for such cases generally; and such Judge may, after such enquiry as he deems

necessary, pass an order confirming or amending the declared result of the election or the order of the officer empowered by the State Election Commission in that behalf under section 26, or setting the election aside. For the purpose of the said enquiry, the Judge may exercise any of the powers of a civil court, and his decision shall be conclusive. If the election is set aside, a date for holding a fresh election shall forthwith be fixed under section 14.

(3) All applications received under sub-section (1) –

(a) in which the validity of the election of Councillors to represent the same electoral division is in question, shall be heard by the same Judge; and

(b) in which the validity of the election of the same Councillor elected to represent the same electoral division is in question shall be heard together.

(4) Notwithstanding anything contained in the Code of Civil Procedure, 1908 (V of 1908), the Judge shall not permit –

(a) any application to be compromised or withdrawn, or

(b) any person to alter or amend any pleading.

unless he is satisfied that such application for compromise or withdrawal or application for such alteration or amendment is bonafide, and not collusive.

(5) (a) If on holding such enquiry the Judge finds that a candidate has, for the purpose of election, committed a corrupt practice within the meaning of sub-section (6) or submitted a false claim or a false Caste Certificate, he shall declare the candidate disqualified for the purpose of that election and of such fresh

election as may be held under sub-section (2) and shall set aside the election of such candidate if he has been elected.

(b) If in any case to which clause (a) does not apply, the validity of an election is in dispute between two or more candidates, the Judge, after a scrutiny and computation of the votes recorded in favour of each candidate, is of opinion that in fact any candidate in whose favour the declaration is sought has received the highest number of the valid votes, the Judge shall after declaring the election of the returned candidate to be void declare the candidate in whose favour the declaration is sought, to have been duly elected :

Provided that, for the purpose of such computation no vote shall be reckoned as valid if the Judge finds that any corrupt practice was committed by any person, known or unknown, in giving or obtaining it :

Provided further that, after such computation if any equality of votes is found to exist between any candidate and the addition of one vote will entitle any candidate to be declared elected, one additional vote shall be added to the total number of valid votes found to have been received in favour of such candidates selected by lot drawn in the presence of the Judge in such manner as he may determine.

(6) Any of the corrupt practices specified in section 123 of the Representation of the People Act, 1951 (43 of 1951), shall be deemed to be corrupt practices for the purpose of this section subject to the following modifications in the said section 123, that

is to say –

(a) in clause (1), in sub-clause (B), in the Explanation the words and figures “and duly entered in the account of election expenses referred to in section 78” shall be deleted;

(b) in clause (5), for the words, figures and brackets “provided under section 25 or a place fixed under sub-section (1) of section 29 for the poll” the words “or any place fixed for poll in accordance with the provisions of rules made by the State Government in that behalf ” shall be substituted;

(c) clause (6) shall be deleted;

(d) in clause (7), for the words “any person in the service of the Government” the words, brackets, letters and figures, “any person in any District Service referred to in clause (b) of section 239 of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961 (V of 1962) or from any person in the service of the Government shall be substituted, and in item (g), for the word “prescribed” the words “prescribed by rules made by the State Government in this behalf” shall be substituted.

(7) If the validity of any election is brought in question only on the ground of an error made by the officer charged with carrying out the rules made in this behalf under sub-section (2) of section 12 or of section 14, or of an irregularity or informality not corruptly caused, the Judge shall not set aside the election.

(8) If the Judge sets aside an election under clause (a) of sub-section (5) he may, if he thinks fit, declare any person by whom any corrupt practice has been committed within the

meaning of this section to be disqualified from being a member of any Zilla Parishad for a term of years not exceeding five and the decision of the Judge shall be conclusive :

Provided that, no such declaration shall be made unless such person has been given a reasonable opportunity to be heard.”

28. Section 40 reads as under :-

“S. 40. Disqualification of Councillor during term of office-

(1) Subject to the provisions of sub-section (2) of section 62, if any Councillor during the term of his office –

(a) becomes disqualified under sub-section (1) or (4) of section 16, or

(b) is, for a period of six consecutive months (excluding in the case of the presiding authority the period of leave duly sanctioned) without the permission of the Zilla Parishad, absent from meetings thereof [or is absent from such meetings for a period of twelve consecutive months.]

the office of such Councillor shall, notwithstanding anything contained in clause (c) of sub-section (1) of section 8, become vacant.

*[* *]*

[(2) If any question whether a vacancy has occurred under this section is raised either by the Commissioner suo motu or on

an application made to him by any person in that behalf, the Commissioner shall decide the question as far as possible within ninety days from the date of receipt of such application; and his decision thereon shall be final. Until the Commissioner decides that the vacancy has occurred, the Councillor shall not be disabled from continuing to be a Councillor :

Provided that, no decision shall be given against any Councillor without giving him a reasonable opportunity of being heard.]”

29. From the plain reading of Section 16, 26, 27 and 40, it appears that Section 16(1)(n) and 16(2)(e) can be invoked for disqualification of an elected candidate for having more than two children. Said remedy is not available u/s 27 r/w Section 26, which provides for questioning the validity of any election.

30. With the assistance of the learned Advocates, I have gone through Jagannath Sherki (supra). The issue was with regard to one elected representative having carried out certain works or contracts with the Zilla Parishad and having earned consideration pursuant to the said contract, which was entered into before he was elected, though he received the outstanding payment for the same after his election. It was concluded that the term "during the term of office"

would mean that the candidate should have used his position as an elected office bearer and should have undertaken work for consideration after his election so as to incur the disqualification under Section 16(1)(i) by having acquired a share or interest in the work done on contract for the Zilla Parishad. It was in this backdrop that this Court concluded that the proceedings under Section 40 in relation to Section 16(1)(i) would not be maintainable and an election petition filed under section 27 would be the remedy. The observations of this Court in paragraph No.7 to 11 read as under :-

“7. In view of the facts and legal position, it appears that the application made before the Commissioner seeking to set aside the election of respondent No. 3 was not tenable. If the petitioner wanted to get the election set aside, he could have filed election petition under Section 27 and if he wanted the Commissioner to take action under Section 40, he could have made prayer for declaration that respondent No. 3 had incurred disqualification for being a Councilor during the term of his office. In view of these circumstances, in my considered opinion, application under Section 16(1)(i) of the Act filed before the Commissioner and also the instant writ petition are not tenable and on this ground itself the application and this petition could be rejected.

8. The learned Counsel for the petitioner contends that the facts brought to the notice of the Commissioner in the application clearly indicate that the action could be taken under Section 40 also because respondent No. 3 had incurred disqualification

after assuming the post of Councilor as well as the President, on account of his interest in the contract with the Zilla Parishad, receipt of money by him in connection with that contract. Learned Counsel for the petitioner contends that suo motu action could be taken by the Commissioner under Section 40 in view of the facts and circumstances of the case. It is true that under Section 40 action can be taken by the Commissioner suo motu or on application. It appears that the Commissioner did not take such action suo motu and even though in the application filed by the petitioner before the Commissioner, the facts were stated, the prayer was in the form of election petition, which could not be entertained.

9. The learned Counsel for the petitioner relied upon several authorities in support of his contention that even if the work under contract is completed and the payment alone remains to be unpaid, still it cannot be said that the contract has come to an end. In support of this, he relied upon [Chatturbhuj Vithaldas Jesani vs. Moreshwar Parashram & others](#) - AIR 1954 SC 236; [Dattatraya Narhar Pitale Vs. Vibhakar Dinkar Gokhale & another](#) - 1975 Mh.L J. 701; [Dinkar Ananda Deore vs. Shantaram Punjaji & others](#) 1981 Mh. L. J. 673 and [Indumati Laxman Bhakare Vs. State of Maharashtra](#) 2004 (4) All MR 89. All these authorities supports the contention of the petitioner in respect of the interest by way of contract even if the work is completed, whether payment is yet to be made by the Municipal Council or Zilla Parishad or by the concerned Government or Government body.

10. *In view of the objection taken by the learned Counsel for respondent No. 3 to the tenability of the application in the form in which it was made before the Commissioner as well as in view of the prayers made in this writ petition, I am of the view that the said application as well as the writ petition are not tenable.*

11. *After some discussion at the bar, the learned Counsel for the petitioner seeks leave to move fresh application before the Commissioner under Section 40 read with Section 16(1)(i) of the Act in view of the fact that the interest of respondent No. 3 in the contract with Zilla Parishad was subsisting when he took over the charge as President and after taking over charge as President he had received certain amount. In my considered opinion, it will be in the interest of justice to grant such a leave to the petitioner.”*

31. In the instant case, issue is as regards the petitioner being the biological father of 3 children. In this context, utilizing the position of an elected representative to the Zilla parishad and acquiring interest or share in a contract would be a different matter. Such a candidate should have acquired the interest and the share for doing work during the period of his term of office. In the case of the petitioner, the birth of the third child after the cut off date or having the third child after the cut off date, would be a recurring cause of action and that would incur a disqualification for the candidate if he is already elected on the date of birth of the third child or if he is

elected after the birth of the third child. The language under Section 16(1)(n) indicates that a person can be disqualified for being chosen or for being a Councillor if he has more than 2 children. If he fathers a third child before or while enjoying the elected term, he would still incur the disqualification. He would be disqualified from being elected or continuing as a Councillor if he has 3 children, either born after the cut off date or if the third child is born after the cut off date.

32. The learned Division Bench in the matter of Santosh Rawat case (supra) has dealt with the view taken by the learned Single Judge in Jagannath Sherki case (supra). While considering the view taken by the learned Single Judge, it was concluded that the application filed u/s 40 with regard to seeking a disqualification under Section 16(1)(i) would be a remedy that is rightly available to the objectors. Paragraph No.8 of the Santosh Rawat judgment reads under :-

“8. Question whether action for removal on account of such continuing disqualification must be sought only under Section 27 through election petition and, it cannot be done via Section 40 also calls for scrutiny. Order dated 16/1/2009 passed by this court in writ petition 2016/2008 gave liberty to Respondent No.3 to file fresh application under Section 40 before Respondent No.1 Commissioner. That Writ Petition was filed by

present Respondent No.3 challenging order of Commissioner rejecting his earlier application under [Section 40](#) on the ground that contract was already completed by present Appellant and only because the payment was delayed for want of funds, receipt thereof by Appellant after his election would not be a ground for disqualification under [Section 16 \(1\)\(i\)](#). In that writ petition, present Appellant contended that because of provisions of [Article 243-O\(b\)](#) of the Constitution of India, his election could not have been set aside except through election petition under [Section 27](#). He contended that [Section 40](#) was therefore not available. These arguments are considered by this Court and it found that Commissioner can declare him disqualified if he is incurred such disqualification during the term of the office i.e. after he entered the office. The Commissioner is held not to have power to declare his election illegal or invalid or to quash that election. It is therefore found that application then filed seeking to set aside election of Appellant was not tenable. Then it was pointed out to this Court that as receipt of payment after election revealed his interest, Appellant could have been disqualified even suo motu by Commissioner. The then learned Single Judge applied his mind to various authorities like [Chaturbhuj Vithaldas Jesani vs. Moreshwar Parashram & Others](#) (supra), [Dattatraya Narhar Oitale vs. Vibhakar Dinkar Gokhale and another](#) -- 1975 Mh.L.J. 701, [Dinkar Ananda Deore vs. Shantaram Punaji and others](#)--1981 Mh. L.J. 673 and [Indumati Laxman Bhakre vs. State of Maharashtra](#) (supra) in paragraph 9 and concluded-- "All these authorities support the contention of the Petitioner in respect of the interest by way of

contract even if work is completed, when payment is yet to be made by Municipal Council or the Zilla Parishad or by the concerned Government or Government body". Present Respondent No. 3 was the Petitioner in Writ Petition No.2016/2008. In paragraph 10, it is also noticed that objection by present Appellant to earlier application under [Section 40](#) was because of its form. In paragraph 11, leave was given to said Petitioner to file fresh application under [Section 40](#) with direction to Commissioner to dispose it off within 90 days. All the objections /contentions of the parties have been left open for consideration by Commissioner. Thus, finding that an interest in work though completed subsisted if payment was not made is recorded in paragraph 9 and then liberty has been given. Hence, as liberty is given after hearing both sides and after recording of finding, present Appellant cannot in subsequent proceedings contend that even such application under [Section 40](#) not touching his election in any way, is not maintainable. It may be pointed out here that in fresh application filed by present Respondent No. 3, Appellant raised preliminary objection about this locus and then approached this Court in Writ Petition No.2952/2008 and sought direction to Commissioner to decide it. That writ petition was withdrawn on 15/6/2009. Appellant has already filed the Writ Petition No. 3783/2008 challenging constitutionality of [Section 40](#) (2) as it enables any person to seek disqualification. This Court has issued notice before admission in said matter on 15/1/2009. In any case, as the interest in work done survives during the term of office of Appellant, [Section 16](#) (1)(i) is clearly attracted and hence,

remedy under Section 40 of 1961 Act is rightly availed by Respondent No. 3. Section 40 does not prescribe any new disqualification but it lays down the procedure once disqualification under Section 16(1) (i) is found to be incurred or continued or available during the term of office. The words "and for being" in opening part of Section 16(1) stipulate existence of very same interest which disqualifies its holder for election also as bar for continuing as Councilor after the election. It is continuation of that interest which operates as disqualification and it does not require accrual of such interest again after the election. Continuing possession of such interest after election is sufficient without anything more. Interest which disqualifies at thresh-hold can not cease automatically because of a successful election. Section 16 does not specify the work as disqualification but it is interest in it and if interest continues even after the election is over, the legislature has made provision in Section 40 for removal of its holder to avoid conflict in interest and duty. By providing disqualifications for getting elected and even for continuing in the same section and then by providing separate remedies for removal of such hostile Councilors from the Zilla Parishad, legislature has provided a complete scheme which needs to be preserved and protected. Difference in nature of remedy under Section 27 and Section 40 cannot be used to defeat the otherwise clear legislative mandate so as to enable Appellant to continue as Councilor."

(Emphasis supplied)

33. Considering the view taken by the learned Division Bench, I do

not find that the view taken by the learned Single Judge in Jagannath Sherki case (supra) could be followed. In this view of the matter, I answer Issue No.B and conclude that the proceedings initiated by respondent No.4 cannot be said to be untenable in the face of Section 27.

Issue No.C

34. In so far as issue No.C is concerned, documents would speak louder than words. Humans may lie, but documents won't.

35. I have noticed from the nomination papers of the petitioner that he has declared a list of his dependents as being Suvarna Latke who is his wife and Ms.Kalyani and Master Gaurav as his children. He has not mentioned Ms.Kirti in his nomination form and papers annexed thereto. If he concedes that he has twin daughters, he could not have suppressed the very physical existence of Ms.Kirti. This surely amounts to a fraudulent act and calls for action against the petitioner.

36. During the dictation of this order, the learned Senior Advocate Mr.Dixit, after taking instructions, has submitted at 6.20 p.m. in the open Court that the petitioner, who is present in the Court, would file

an affidavit alongwith an individual affidavit of his wife Mrs.Suvarna Gautam Latke that, neither of them would ever contest any elections to any Body, Authority or any position for which a candidate having more than 2 children would be disqualified. He submits on instructions taken from the petitioner that such an affidavit would be filed within 10 days before the learned Registrar (Judicial) of this Court. By virtue of this statement, he submits that these affidavits would be filed for the purpose that this Court may show leniency and may not initiate any civil or criminal action against the petitioner for having caused any misrepresentation.

37. Mr.Dhorde, the learned Sr.Advocate submits that respondent No.4 is not interested in seeking any civil or penal action against the petitioner. If he and his wife are filing their individual affidavits as noted above, he would not press for any action either civil or criminal against the petitioner.

38. I am, therefore, refraining from going into this aspect as well as the contention of Mr.Dhorde that Ms.Kalyani and Ms.Kirti are in fact not twins, but were born on 01/11/2000 and 01/09/2002 respectively. I would also not be dealing with the contentions of Mr.Dhorde that the petitioner has subsequently got the school

records of Ms.Kirti manipulated so as to make the two daughters appear to be twins. I could have gone into this aspect, but for the declaration made by the petitioner in the Court that he and his wife would never ever contest any election for which the Law prescribes a disqualification for having more than 2 children. This therefore would amount to a punishment to the petitioner and his wife and hence, though I find that the petitioner has been fraudulent in mentioning the details of his children in his nomination form, I am not directing any action in this regard.

39. Considering the above, this petition is dismissed. Rule is discharged.

40. The original record tendered by the learned AGP is returned to him immediately in the open Court.

(RAVINDRA V. GHUGE, J.)