

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 4924 OF 2018

Bhimrao s/o Deorao Gaikwad
Age 40 years, Occ. Business,
R/o. Shirur Kasar, Tq. Shirur Kasar
District Beed

...Petitioner

versus

1. The State of Maharashtra
Through the Secretary
Urban Development Ministry
Mantralaya, Mumbai 400032
2. The Collector,
Beed, District Beed
3. Nagar Panchayat Shrirur Kasar
Tq. Shirur Kasar, Dist. Beed
Through its Chief Officer
4. Vinod s/o Maroti Ingole
Age 38 years, Occ. Agriculture
R/o. Shirur Kasar
Tq. Shirur Kasar, District Beed
5. Angad s/o Prabhakar Pansambal,
Age 26 years, Occ. Labour
R/o. Shirur Kasar
Tq. Shirur Kasar, District Beed
6. Tatyasaheb @ Bharat s/o
Sheshrao Pansambal,

Age 31 years, Occ. Agriculture
R/o. Shirur Kasar
Tq. Shirur Kasar, District Beed

7. Prabhakar s/o Nivrutti Bansode
Age 63 years, Occ. Agriculture
R/o. Shirur Kasar
Tq. Shirur Kasar, District Beed

8. Shaikh Gafur s/o Shaikh Chand
Age 60 years, Occ. Labour
R/o. Shirur Kasar
Tq. Shirur Kasar, District Beed

9. Shaikh Najir s/o Shaikh Ismail,
Age 40 years, Occ. Labour
R/o. Shirur Kasar
Tq. Shirur Kasar, District Beed

10. State Minister for Urban Development
Department,
Mantralaya, Mumbai – 400 032.

...Respondents

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Mr. V. D. Salunke, advocate for the petitioner

Mrs. V.N. Patil-Jadhav, A.G. P. for respondent Nos. 1, 2 and 10

Mr. N.V. Gaware, advocate for respondent No.4

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CORAM : N. M. JAMDAR, J.
DATED : 4 DECEMBER 2018

ORAL JUDGMENT :-

1. Rule. Rule made returnable forthwith. Learned counsel for respondents waive service. The petition is taken up for final disposal.

2. The petitioner was a councilor of Municipal Council, Shirur Kasar, District Beed, elected from ward No.15 in the elections held in the year 2015. The petitioner, by the impugned orders, has been disqualified from holding the post of Councilor on the ground that he has more than three children born after the cut-off date.

3. The respondent No. 4 filed an election application No. 21 of 2015 before the Collector, Beed. According to respondent No. 4, the petitioner had filed a nomination paper in which he had stated that his fourth child was born on 9 November, 2001, which is after the cut-off date of 12 September 2001. According to respondent No.4, the child Pravin having born after the cut-off date and being fourth child, the petitioner was disqualified and could not contest the election under the provisions of Section 16(1) (k) of the Maharashtra Municipal Council, Nagar Panchayats and Industrial Townships Act, 1965 (hereinafter for short referred to as “the said Act”).

4. The petitioner filed his reply on 24 November 2015. The petitioner annexed a birth extract of child Pravin from Shirur Ghodnadi, which according to the petitioner showed the birth date of the fourth child Pravin as 23 March 2000 i.e. prior to the cut-off date. The petitioner sought to give explanation regarding the school

register entry of said Pravin, stating that since the petitioner is belonging to Nomadic Tribe and uneducated, due to oversight, this entry was made. The petitioner also controverted the other documents produced by respondent No.4 - complainant.

5. The Collector, Beed considered the record and the rival contentions of the parties. The Collector took a note of the statement made by the petitioner in the nomination paper, the school register of Kalikadevi Secondary and Higher Secondary School, Shirur Kasar and the birth extract certificate from Municipal Council, Shirur Kasar of which birth date of fourth child is shown as 9 November, 2001. The Collector found that the documents relied upon by the petitioner i.e. birth certificate from Shirur Ghodnadi showing birth date of fourth child Pravin as 23 March 2000, could not be relied upon, as the name of the mother was different and that the birth register entry relied upon mentioned the number of children as three, when the petitioner had four children and this record was not reliable. The Collector also considered the letter addressed to the Chief Officer of Shirur Kasar Municipal Council and bonafide certificate issued by the school. The Collector held that the case of the petitioner that Pravin was born on 23 March 2000, could not be accepted and overwhelming record showed otherwise. By order dated 15 May 2018, the Collector allowed the application filed by respondent No.4 and declared that the petitioner

was disqualified to hold the post of Councilor of Shirur Kasar Municipal Council. The petitioner, thereafter, filed an appeal before the Hon'ble Minister under the provisions of the said Act. According to the petitioner, since the Hon'ble Minister was not available and there were ensuing elections to the Municipal Council, he had to approach this Court with the present petition.

6. The petition was taken up before the learned vacation Judge on 19 May 2018. On 20 May 2018, the learned vacation court by way of ad-interim order permitted the petitioner to cast his vote in the election of “26-Osmanabad-Latur-Beed Local Authority Constituency” and his vote was to be counted only if it became decisive. The petitioner had made this request since the petitioner was desirous of voting in the said elections. The petitioner was directed to approach the Minister and the request of the petitioner regarding the casting of vote in the election of the President and Vice President of Municipal Council was also to be considered. These orders were challenged before the Apex Court, however, the Apex Court did not interfere in these directions.

7. Again the petition came up for hearing on 11 June 2018. On that date, restraint put under order dated 20 May 2018 regarding declaration of the election result was vacated. On 1 October 2018, the petitioner was permitted to remain present in the general body

meeting and was permitted to mark his attendance. The petition was directed to be listed for hearing. Meanwhile, the learned Minister by order dated 29 August 2018 dismissed the appeal filed by the petitioner and confirmed the order passed by the Collector. The petitioner has also challenged the said order in this petition.

8. I have heard Mr. V.D. Salunke, learned Advocate for petitioner, Mrs. V.N. Patil-Jadhav, learned A.G.P. for respondents no. 1, 2 and 10 and Mr. N.V. Gaware, learned Advocate for respondent no.4 and also considered the rival submissions.

9. Mr. Salunke, learned counsel for the petitioner submitted that merely because the petitioner has made a statement in the nomination paper giving a particular date of birth of his fourth son does not mean that there should not be any full-fledged enquiry regarding this aspect as contemplated. It is his contention that burden is on the respondent-complainant to prove that the fourth child was born to the petitioner after the cut-off date. Mr. Salunke further submitted that school record, relied upon and produced by the respondent, is not believable, as there is no reference as to who has given the information of school register. He submitted that while filing the nomination paper the entries in the school record were specified in the nomination paper. Mr. Salunke submitted that the birth certificate produced from Shirur Kasar Municipal Council

is also not reliable, firstly because it states the information given by the Tahsil office and not by the parent or any doctor. He submitted that there is also a birth certificate issued by the Municipal Council which shows that the birth date of child Pravin as 9 September 2001, which is prior to the cut-off date. Mr. Salunke submitted that, as against this unreliable evidence, the petitioner has produced the birth certificate and birth register from Shirur Ghodnadi Municipal Council. He submitted that this entry is genuine and is made pursuant to the information given by the family of the petitioner. He submitted that entry has been made as per Section 20 of the Registration of Births and Deaths Act 1969. He submitted that the birth certificate issued by Municipal Council, Shirur Ghodnadi clearly specifies the date of birth as 23 March, 2000 and place of birth shown as Dr. Muley Hospital. The learned counsel submitted that this birth certificate issued by Shirur Ghodnadi Municipal Council and birth register being maintained as per the provisions of Section 20 of the Act should have been given highest probative value, instead the authorities have placed reliance on the record produced by the respondent, which was entirely unreliable. Mr. Salunke submitted that in the birth certificates of the children of the petitioner produced by the respondent No.4 wherein there are various defects, such as outward numbers are missing and mother's name is also not stated therein. The learned counsel submitted that when there is an authentic record in the form of Birth Register, there

was no need to produce the record of the school register and that too, which is of questionable value. Mr. Salunke relied upon the decision of this Court in the case of *Mahesh Tarachand Suryawanshi vs. State of Maharashtra*¹, to contend that the entry made in the birth register has presumptive value and when put up against the school register, they will have to be given overriding effect. The learned counsel submitted that since the respondent No.4 has not taken any objection at the time of filing of nomination paper, his subsequent application should not be considered and the impugned orders be set aside. Mr. Salunke in order to buttress his submissions, placed reliance on decisions of *Sunil vs State of Haryana*², *Bishnudas Behara vs. State of Orissa*³, *R. Deepak vs. The Chairman, Tamil Nadu Uniform Service Recruitment Board, Chennai – 2*⁴, and *Kulai Ibrahim vs. State*⁵.

10. Mr. Gaware, learned counsel for the respondent No.4 submitted that the petitioner himself has given declaration in the nomination paper that the child Pravin was born on 9 November, 2001. Even the school register and bonafide certificate show his date of birth as 9 November 2001 and so also the birth certificate issued by Shirur Kasar Municipal Council shows his date of birth as 9

1. *Mh.L.J. (Cri.) 2014 (3) 353*

2. 2010 Cri.L.J. 839

3. 1997 Cr.L.J. 2207

4. Unreported decision of Madras High Court passed in Writ Petition (MD) no.9800 of 2009 dated 21 October 2009.

5. 2014 AIR SCW 4022

November 2001. Mr. Gaware submitted that in view of this clear and unequivocal evidence, no further enquiry was, in fact, necessary. He submitted that the petitioner has neither withdrawn declaration nor has stated that it was a mistake. He submitted that the school record as well as the entry in the nomination paper has been made by the petitioner on his own accord and there is no case of any tampering. Mr. Gaware submitted that only to create some confusion and take advantage of the fact that the petitioner was involved in the functioning of the Shirur Kasar Municipal Council, birth certificate was created showing the date of birth as 9 September 2001. He submitted that the only document on which the petitioner has relied upon, is the birth certificate of village Shirur Ghodnadi, which does not inspire confidence. He submitted that the name of the mother of the child in the birth certificate is different. There is declaration that, including the child born, there are three children. He also submitted that there is no such place as Shirur Bhalgaon and it is surprising the name of the child Pravin is entered, as in respect of other children there is no such name. Mr. Gaware submitted that the birth certificate mentioning the place of birth of the child at Shirur Bhalgaon, has been issued for the first time on 8 December 2015. The learned counsel accordingly opposed for grant any relief in this petition. Mrs. Patil-Jadhav, learned Assistant Government Pleader supported the impugned orders.

11. Section 16(1) (k) of the Act, under which the petitioner is disqualified reads thus:-

“16. Disqualifications for becoming Councillor

(1) No person shall be qualified to become a Councillor whether by election, or nomination, who, -

(a)

to

(j)

....

(k) 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 such 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 purpose 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”.

12. The parameters of scrutiny under Articles 226 and 227 of the Constitution of India needs to be kept in mind. This is not an appellate jurisdiction. In the present case, two authorities have examined the evidence. The Act has established the first authority and an appellate authority. The appellate order is made final. The Act does not contemplate any further appeal. The scope of this petition cannot be to assess the evidence afresh. The superior Court will only examine whether there is jurisdictional error or any perversity in the evaluation of evidence by the two authorities. In this case, therefore, what is to be seen is whether both the authorities have taken into consideration the relevant pieces of evidence or have omitted any material evidence from consideration. Evaluation of each piece of evidence and to weigh them against one another to arrive at a finding of fact, is the task of the fact finding authority.

13. As regards the contention of the petitioner that the burden of providing disqualification is on the respondent-complainant, this is not a case where the petitioner in the nomination form has given the date of birth of the fourth child as before the cut-off date, and the Respondent seeks to assert that it is after the cut-off date. In such case, the burden may be on the complainant. The nomination paper of the petitioner is on record. The petitioner filed his nomination for contesting the election from the Ward No. 15 of Shirur Kasar Municipal Council. The form contains an affidavit. In this column

the petitioner he has filled in the details. He has given his name, ward number, education and the date of birth of the children. Form contains a specific column, column No.6, regarding number of children. It has two sub categories. First stipulates his number of children as on that date. Second the number of children born after the cut-off date i.e. 12 September 2001. This because of the specific requirement in view of Section 16(1) (k) of the Act.

14. The petitioner has made a statement on oath giving the date of birth of child Pravin as 9 November 2001. After filling in all these columns, the petitioner has verified on oath as he has stated everything truthful. Under a specific column, he has again reiterated that if there is fourth child after the cut-off date, he would become disqualified. Thereafter, the petitioner has signed the said verification. Again there has been examination before the Returning Officer, where he has signed. To this nomination form, the petitioner has annexed the birth details of the children. This entry in the nomination form specifying the date of birth of fourth child as 9 November 2001 is not a mistake. Neither the petitioner states so anywhere. The school record of the date of birth of child Pravin in the form of bonafide certificate and the school register of Kalika Devi School Secondary and Higher Secondary School is also 9 November 2001.

15. In view of this declaration of the petitioner on oath and the school register, the contention of the petitioner that burden is on the respondent to demonstrate otherwise has to be rejected. The declarations given on oath for contesting the public office must have sanctity. These declarations cannot be trivialized in this fashion. The declarations given by the candidate in the nomination form are to be put in public domain and one who seeks to contest the election, is expected to depose truly and fairly that all details he believes to be true. Petitioner does not even contend that this statement on oath was inadvertently written or that there was any manipulation. The entries in the nomination paper on oath were on his own accord.

16. The decisions in the cases of *Mahesh Tarachand Suryawanshi vs. State of Maharashtra*, *Sunil vs State of Haryana*, *Bishnudas Behara vs. State of Orissa*, *R. Deepak vs. The Chairman, Tamil Nadu Uniform Service Recruitment Board, Chennai – 2* and *Kulai Ibrahim vs. State. (supra)* on which the petitioner has relied upon, arise from the criminal prosecution. It is trite that in the criminal cases the entire burden is on prosecution. In the present case, the same degree of burden cannot be placed on the respondent in view of the declaration of the petitioner himself alongwith the school record. The argument of the petitioner on burden of proof comes to this : 'I will make a statement on oath in the nomination form which I do not say it was incorrect, yet the burden is on the complainant to

show that what I said on oath is correct while I am free to take a stand contrary to my statement on oath.' If, such stand by the elected representative is allowed, it will make a mockery of the solemn statement made on oath and will bring the election process in disrepute. On the basis the statement made on oath in the nomination form itself the petitioner was not entitled to contest the election.

17. As far as the bonafide certificate in the school register of Kalika Devi Secondary and Higher Secondary School is concerned, these are admittedly the documents pertaining to child Pravin. These documents have been produced by the Head Master of the concerned school in the enquiry. Both these documents have come from the authorities in charge of it and it is not the case of the petitioner that the respondent-complainant has, at any point of time, created any documents. The bonafide certificate specifically states that the entry in the school register, on the date of birth of child Pravin was 9 November 2001. Though there is register of one more school viz. Manurkar Maharaj English School, in which the entry is different, this record is unquestionable.

18. The school record showing the date of birth as 9 November 2001, is standing for more than a decade. It is for the petitioner to explain how this entry was made. The burden is not on the complainant. There is no gain saying by merely stating that how this

entry in the school register was made is not known. Unless the petitioner shows that this long standing entry made at the time of admission of the child in the school was by way of manipulation, he cannot wriggle out the effect of this entry. Both the documents, first, the petitioner's own statement and second, the birth register of the child maintained by the school, produced by the school authorities clearly show that the date of birth of child Pravin is 9 November 2001. The third document that is also consistent with the date of birth as 9 November, 2001. That is the birth certificate of child Pravin issued by the Shirur Kasar Municipal Council, which shows the entry as 9 November 2001.

19. It is sought to be contended by the petitioner that there is one more certificate of 9 September 2001 issued by the same Municipal Council and therefore, there is an inconsistency. The petitioner's case now is that the date of birth of child Pravin is 23 March 2000 and it is not the case of the petitioner that the date of birth of child Pravin is 9 September 2001. On the other hand, the contention of the respondent that the document showing the date of birth as 9 September 2001 is endorsed subsequently to create confusion using his influence in the concerned Council, is plausible. There is no supporting evidence of any kind that the date of birth of Pravin was 9 September 2001 and neither it is the case of the petitioner any time. Therefore, this birth certificate of 9 September

2001 is of no value. It is also to be noted that the petitioner was in a position of exercising influence at the relevant time.

20. Turning down to the case of the petitioner now advanced that the date of birth of child Pravin was 23 March 2000. This, as noted earlier, is contrary to the petitioner's own statement on oath and school record, which is accepted by both the authorities. The question is whether the conclusion of both the authorities can still be called as perverse.

21. Petitioner has produced a birth certificate of child Pravin issued by Shirur Ghodnadi Municipal Council. Firstly, this birth certificate shows the name of the mother as Tulsa Shankar Gaikwad. That the name of the petitioner's wife is Sangeeta and that it appears elsewhere as Sangeeta, is not a disputed position. The explanation of the petitioner is that his wife was also known as Tulsa, is hardly satisfactory. Secondly, in the column where number of children has to be mentioned, it is specified as three, including the one born. It is not clarified why it was not four. As far as the other entries in the same register, the names of children are not appearing but the name 'Pravin' is entered by hand. Photo copy of the Register is placed on record. It shows that the name is entered in different ink as the ink appears bold than in rest of the entries.

22. It is the contention of the learned counsel for the petitioner

that this birth record having maintained under Section 20 of the Act should be given highest value over other documents. In the present case, the best possible evidence is the statement of the petitioner himself on oath, supported by the school record. Perusal of this birth record and certificate produced by the petitioner does not inspire utmost confidence. Name of the mother is admittedly not Sangeeta. Even the entries are mentioned as three children.

23. Faced with this position, both the authorities have gone by the unquestioned school record and the statement made by the petitioner on oath. It was well within their jurisdiction to do so. Merely because another view is possible is not a ground to interfere with this assessment of evidence. In fact, in this case, another view is not possible.

24. In these circumstances, no interference is warranted in the impugned orders. The petitioner has been rightly disqualified by both the authorities.

25. The writ petition is dismissed. Rule discharged. No order as to costs.

(N. M. JAMDAR, J.)

rlj/