

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.844 OF 2018

Nisar Fatema d/o Amiruddin Ansari,
Age : 57 years, Occu. Service,
R/o H.No.9-4-195, Degloor Naka,
Nanded, Tq. and District Nanded

PETITIONER

VERSUS

1. The State of Maharashtra,
through Itwara Police Station,
Nanded, Tq. and District Nanded
2. The Commissioner,
Nanded Waghala City Municipal
Corporation, Nanded,
Tq. and District Nanded
3. The Education Officer,
Higher Secondary Education
Department, Zilla Parishad,
Nanded
4. The chief Executive Officer,
Zilla Parishad, Nanded
5. Patel Mohammad s/o Mohammad Kasim,
Age : 52 years, Occu. Social Service,
R/o Ram Rahim Nagar, Nanded,
Tq. and District Nanded

RESPONDENTS

(Respdt.No.5 is
original Revision
Petitioner)

Mr. Mahesh V. Ghatge, Advocate for the Petitioner
Ms. R.P. Gaur, A.P.P. for respondent Nos.1 and 3
Mr. R.K. Ingole, Advocate for respondent No.2
Mr. S.B. Pulkundwar, Advocate for respondent No.4
Mr. C.R. Deshpande, Advocate for respondent No.5

CORAM : SANGITRAO S. PATIL, J.

RESERVED ON : 19th JULY, 2018

PRONOUNCED ON : 3rd AUGUST, 2018

JUDGMENT :

The petitioner has challenged the vires of the judgment and order dated 22nd June, 2018, passed in Criminal Revision Petition No.33 of 2018 by the learned Additional Sessions Judge, Nanded, whereby he allowed the Revision Petition, set aside the order dated 30th November, 2017, passed by the learned Judicial Magistrate, First Class (5th Court), Nanded ("the Magistrate", for short) under Section 13 (3) of the Registration of Births and Deaths Act, 1969 ("the Act", for short) and further directed to cancel the entry in the Births and Deaths Register maintained by respondent No.2 - the Commissioner, Nanded-Waghala City Municipal Corporation, Nanded.

2. The petitioner was appointed as a teacher in Madina-Tul-Uloom Education Society's Higher Secondary School/Junior College at Nanded on 14th July, 1984. Her date of birth was recorded as 2nd March, 1960. According to the petitioner, her correct date of birth was 14th December, 1960. She applied to the Principal for

correcting the date of birth on 13th February, 1987. She further sent a reminder on 24th April, 1988. However, due to the dispute between two rival groups of the Education Society, the request of the petitioner for correction of her date of birth remained unattended. The petitioner was promoted to the post of Principal in the month of July, 2016. She filed O.M.C.A. (i.e. "Other Misc. Civil Application) No.905 of 2017 before the learned Chief Judicial Magistrate at Nanded on 23rd October, 2017 seeking an order under Section 13 (3) of the Act for making entry of her date of birth in the Register of Births and Deaths. It was assigned to the Judicial Magistrate, First Class (Court No.5), Nanded. The learned Magistrate allowed that application on 30th November, 2017 and directed respondent No.2 to register the date of birth of the petitioner as "14th December, 1960".

3. Being aggrieved by the said order, respondent No. 5, claiming himself to be the proposed President of Madina-Tul-Uloom Education Society, Nanded, challenged it by filing Criminal Revision Petition No. 33 of 2018. The learned Additional Sessions Judge, Nanded allowed that Revision Petition and quashed and set aside the

order passed by the learned Magistrate.

4. The learned counsel for the petitioner submits that though as per Section 13 (3) of the Act, the Judicial Magistrate, First Class is empowered to pass an order directing registration of the information in respect of birth or death in case it is not registered with the Registrar within a period of one year of its occurrence, the learned Magistrate does not function as a Court for entertaining the application seeking such order. The learned Magistrate works as a *persona designata*. He is not working as the Court inferior to the Court of Session within the meaning of sub-section (1) of Section 397 of the Code of Criminal Procedure ("Code", for short). The learned Magistrate does not conduct the proceedings as per the procedure prescribed for conducting summary/ summons or warrant trials under the Code. Basically, it is not a criminal proceeding, in the sense the learned Magistrate is not empowered to pass any sentence or inflict penalty. Consequently, the order passed by the learned Magistrate under Section 13 (3) of the Act is not amenable to revision under Section 397 of the Code. According to the learned counsel for the petitioner, the learned Additional Sessions Judge

had no jurisdiction to entertain the Criminal Revision Petition against the order passed by the learned Magistrate. According to him, the order passed by the learned Additional Sessions Judge being without jurisdiction, is a nullity and is liable to be quashed and set aside. In support of this contention, he relied on the judgment in the case of ***P. Duraisamy Vs. The State represented by the Secretary to Government Department of Home (Prison) Fort ST. George Chennai, LEX (MAD) 2017 4 10.*** He, therefore, prays that the impugned judgment and order may be quashed and set aside.

5. The only contesting party in this petition is respondent No.5, who had challenged the order passed by the learned Magistrate before the Sessions Court by filing Criminal Revision Petition. The learned counsel for respondent No.5 submits that the application under Section 13 (3) of the Act has to be entertained by the learned Magistrate, who is subordinate to the Sessions Court within the meaning of Section 397 of the Code. Therefore, the order passed by the learned Magistrate under Section 13 (3) of the Act certainly would be revisable under the revisional jurisdiction of the Sessions Judge vide Section 397 of the Code. Relying on

the judgment in the case of **Karimabibi wd/o Gulam Mohammad Mustufa Karodiawad and others Vs. Ankleshwar Municipality and others AIR 1998 Gujarat 42**, the learned counsel for respondent No.5 submits that the learned Magistrate did not issue notice to respondent No.5 before passing the impugned order. Therefore, the learned Additional Sessions Judge rightly quashed and set aside the order passed by the learned Magistrate. According to him, the learned Magistrate did not make proper enquiry and allowed the application filed by the petitioner for registration of her date of birth at the fag end of her career. The learned counsel supports the order passed by the learned Additional Sessions Judge and prays that the writ petition may be dismissed.

6. As seen from the rival contentions raised by the learned counsel for the contesting parties, the main question for consideration is whether the order passed by the learned Magistrate under Section 13(3) of the Act is revisable under Section 397 of the Code.

7. Section 13 of the Act reads as under:

"13. Delayed registration of births and deaths.—

(1) Any birth of which information is given to the Registrar after the expiry of the period specified therefore, but within thirty days of its occurrence, shall be registered on payment of such late fee as may be prescribed.

(2) Any birth or death of which delayed information is given to the Registrar after thirty days but within one year of its occurrence shall be registered only with the written permission of the prescribed authority and on payment of the prescribed fee and the production of an affidavit made before a notary public or any other officer authorised in this behalf by the State Government.

(3) Any birth or death which has not been registered within one year of its occurrence, shall be registered only on an order made by a Magistrate of the first class or a Presidency Magistrate after verifying the correctness of the birth or death and on payment of the prescribed fee.

(4) The provisions of this section shall without prejudice to any action that may be taken against a person for failure on his part to register any birth or death within the time specified therefor and any such birth or death may be registered during the

pendency of any such action."

8. From the above provisions, it is clear that the information as to any birth or death has to be given to the Registrar of the local area concerned, latest within one year of its occurrence and in case, any birth or death has not been registered within one year of its occurrence, it can be registered only on an order made by the Magistrate under Section 13 (3) of the Act. Section 15 of the Act empowers the Registrar to correct or cancel any entry of birth or death in the register kept by him if it is proved to his satisfaction that it was erroneous in form or substance or has been fraudulently or improperly made. Thus, even if the entry in respect of any birth or death is taken in the register pursuant to the order made by the Magistrate under Section 13 (3) of the Act, it can be corrected or cancelled under the above mentioned circumstances vide Section 15 of the Act. The Act does not provide for any appeal or revision of the order passed by the Magistrate.

9. No specific procedure has been laid down in the Act for deciding the application under Section 13 (3) of

the Act. From the nature of the proceeding before the Magistrate under Section 13 (3) of the Act, it cannot be termed as an "inquiry" within the meaning of Section 2 (g) or "judicial proceeding" within the meaning of Section 2 (i) of the Code. The Magistrate is not empowered to either punish or inflict penalty in such proceeding. The said proceeding is not governed under any of the procedures prescribed for summary/summons or warrant trials. The Magistrate deals with the application under Section 13 (3) as "*Persona Designata*" and not in the capacity of Presiding Officer of a Criminal Court under Section 11 of the Code. The nature of the proceeding *ex-facie* is of civil nature. In the circumstances, the provisions of the Code would not be applicable to the proceedings before the Magistrate.

10. Here, reference may be made to the judgment in the case of **P. Duraisamy** (supra), delivered by the Division Bench of the High Court of Madras, wherein it is held that the Magistrate of the First Class and the Presidency Magistrates are *persona designata* and only exercise executive functions under Section 13 (3) of the Act. It is further observed that had they been exercising judicial functions, their order would not

have been reviewable in the light of Section 362 of the Code of Criminal Procedure, whereas, Section 15 of the Act expressly provides for a mechanism to correct or cancel an entry in the Register of Births and Deaths, even if an order had been obtained via the Judicial Magistrate/Metropolitan Magistrate under Section 13 (3) of the Act. It is then observed, in paragraph Nos. 33 and 34 of the judgment, as under:-

“33. The Code of Criminal Procedure is itself not applicable to a proceeding under Section 13(3) of the RBD Act, for, the RBD Act does not say that the verification should be done by following the procedure laid in the Code of Criminal Procedure. Similarly, Section 4 of the Code clearly speaks about the procedure for dealing with offences. Section 13(3) of the RBD Act does not speak of any offence and ergo, the Magistrate cannot use the provisions of the Code of Criminal Procedure to conduct a verification about the correction of the birth / death. Notwithstanding this, this Court and Sessions Courts have been exercising revisional jurisdiction against orders passed by Judicial Magistrates/Metropolitan Magistrates under Section 13(3) of the RBD Act.

34. In view of the above discussion, we hold that the orders that have been passed by the Judicial Magistrates/Metropolitan Magistrates under Section 13(3) of the RBD Act hitherto, are not revisable under Section 397, Cr.P.C. and an entry so made in the register, can be corrected by resorting to the mechanism provided under Section 15 of the RBD Act."

11. In my view, the above observations of the Division Bench of the High Court of Madras make it sufficiently clear that the function of the Magistrate under Section 13 (3) of the Act is not judicial and that the Magistrate exercises only executive powers. The Magistrate while entertaining the application under Section 13 (3) of the Act is not inferior Court within the meaning of Section 397 of the Code. Therefore, the order passed by the Magistrate under Section 13 (3) of the Act is not revisable under Section 397 of the Code. I fully subscribe to the observations made by the Division Bench of the High Court of Madras.

12. In the case of **Karimabibi** (supra), cited by the learned counsel for respondent No.5, the learned Single Judge of the Gujarat High Court has given directions as to in what manner the application under

Section 13 (3) of the Act should be inquired into and decided. The question whether the order passed by the Magistrate under Section 13 (3) of the Act is revisable or not, was not involved in the said case. Moreover, the said judgment has been delivered by the learned Single Judge in a Special Civil Application challenging the order passed by the Magistrate under Section 13 (3) of the Act. It is, thus, clear that the order passed by the Magistrate was not challenged by filing Criminal Revision Application. This fact also indicates that the order passed by the Magistrate was not amenable to revisional jurisdiction under Section 397 of the Code.

13. As per Section 15 of the Act, if it is proved to the satisfaction of the Registrar that any entry of a birth or death in any register kept by him under this Act is erroneous in form or substance, or has been fraudulently or improperly made, he may, subject to such rules as may be made by the State Government with respect to the conditions on which and the circumstances in which such entries may be corrected or cancelled, correct the error or cancel the entry by suitable entry in the margin, without any alteration of the original entry, and shall sign the marginal entry and add thereto

the date of the correction or cancellation. The words "any entry of a birth or death in any register kept by him" would cover the entry made the Register of Births and Deaths even pursuant to the order passed by the Magistrate under Section 13 (3) of the Act. The information recorded in compliance with the order under Section 13 (3) is not conclusive proof of the death or birth of the person concerned. It binds the Registrar only to take entry of birth or death in the Register maintained by him. A person aggrieved by such an entry certainly may seek its correction or cancellation by approaching the Registrar under Section 15 of the Act. Respondent No.5, herein, should have taken resort to the remedy given under Section 15 of the Act instead of filing Revision Petition under Section 397 of the Code to challenge the entry taken pursuant to the order passed under Section 13 (3) of the Act.

14. As held above, the order passed by the learned Magistrate was not revisable under Section 397 of the Code. The learned Additional Sessions Judge exercised the jurisdiction which was not vested in him. The impugned order passed by the learned Additional Sessions Judge being without jurisdiction, is a nullity. It is liable to be quashed and set aside.

15. In the result, I pass the following order.

ORDER

- (i) The Criminal Writ Petition is allowed.
- (ii) The impugned judgment and order dated 22nd June, 2018, passed in Criminal Revision Petition No.33 of 2018 by the learned Additional Sessions Judge, Nanded, are quashed and set aside.
- (iii) The Writ Petition is disposed of accordingly.

Sd/-

[**SANGITRAO S. PATIL**]
JUDGE

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