

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

WRIT PETITION NO. 9882 OF 2017

SAGARBAI GAUTAM BHISE
VERSUS
THE ADDITIONAL DIVISIONAL COMMISSIONER
AURANGABAD AND OTHERS.

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Advocate for Petitioner : Mr.S B Ghatol Patil h/f S K
Savangikar

AGP for Respondents-State : Mr. S P Tiwari
Advocate for Respondent 4 : Mrs M.A. Kulkarni

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CORAM : V.K. JADHAV, J.

Dated: March 21, 2018

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PER COURT :-

1. Heard finally with consent at admission stage.
2. By way of this writ petition, the present petitioner has challenged the order passed by respondent No.1 Additional Divisional Commissioner, Aurangabad Division, Aurangabad in preliminary objection application in case No.ZPPS/Member/Disqualification/34/2017 dated 4.7.2017. In the year 2017 the elections of Zilla Parishad, Hingoli was declared by the State Election Commission of Maharashtra and nominations were invited from the

candidates from date 27.1.2017 to 1.2.2017. On 2.2.2017, one Bhagwat Khandare and Smt. Kusum Khandare had submitted their objections to the Returning Officer, Zilla Parishad, Hingoli against nomination form submitted by the present petitioner on the ground that the petitioner is having third child after the cut-off date and also on the ground of encroachment on the government land. Respondent No.3 returning officer has rejected said objection and accepted nomination of the petitioner. Thereafter, the present petitioner is declared elected from Falgaon Block (Block No.1) as a Member of Zilla Parishad, Hingoli. On 28.2.2017 one Devidas Ramkisan Gavande has filed Election Petition no.14/2017 under section 27 of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961 (hereinafter referred to as the 'Act of 1961') against the present petitioner and others before the District Judge, Hingoli. On 23.3.2017 present respondent no.4 has filed an application no.34/2017 before the Additional Divisional Commissioner, Aurangabad for disqualification of the petitioner on the same ground.

Petitioner has raised preliminary objection before the Additional Commissioner about maintainability of the said proceedings. Said Preliminary objection raised by the petitioner is rejected by the Additional Divisional Commissioner by impugned order dated 4.7.2017. Hence, this writ petition.

3. Learned counsel for the petitioner submits that, the learned Additional Divisional Commissioner, Aurangabad Division, Aurangabad has failed to consider the provisions of Section 27 (1) and sub section (5)(a) of the Act of 1961, and, passed the impugned order. Learned counsel submits that, in terms of the provisions of sub-section (5)(a) of section 27, even on holding an enquiry as provided under section 27 of the Act of 1961, if 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 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 said candidate if he has been elected. Learned counsel submits that, in terms of the said provisions, one Shri Devidas Ramkisan Gawande has filed election petition no.14/2017 on the ground that the petitioner is having third child born after the cut-off date and he has submitted a false claim at the time of filing of his nomination even though he incurred said disqualification prior to filing of the nomination and, as such, he shall be declared as disqualified and fresh elections may be held. Learned counsel submits that, in view of the ratio laid down by this Court in a case **Shrikrishna Wasudeo Dhage Vs. Shivcharan s/o Trimbakrao Kalne and others reported in 2010 (3) Mh.L.J. 281**, the impugned order passed by the Additional Divisional Commissioner, Aurangabad Division, Aurangabad, rejecting thereby the preliminary objection raised by the petitioner is liable to be quashed and set aside and, further proceedings initiated by the learned Additional Commissioner in terms of the provisions of sub-section (2) of Section 40 are also liable

to be quashed and set aside. Learned counsel submits that, the initiation of the proceedings by the Additional Divisional Commissioner is without jurisdiction. Learned counsel submits that, in terms of the ratio laid down by the Apex Court in a case State of Himachal Pradesh and others Vs. Surinder Singh Banolta reported in AIR 2007 Supreme Court 903, the initiation of the proceedings by the learned Commissioner under the provisions of Section 40 of the Act of 1961 are not maintainable.

4. Learned counsel for respondent No.4 submits that, the order passed by the Additional Divisional Commissioner, Aurangabad is proper, legal and correct and in terms of the provisions of Section 40 sub-section (2) of the Act of 1961. Learned counsel submits that, there is no reason to interfere in the order passed by the Additional Divisional Commissioner rejecting thereby the preliminary objection raised by the petitioner in the proceedings initiated under the provisions of section 40 sub-section (2) of the Act of 1961.

5. I have also heard the learned AGP for the respondent State.

6. In terms of the provisions of section 27 (1) and particularly sub-section (5)(a) of section 27, one Shri Devidas Ramkisan Gawande has filed Election Petition and same is pending before the District Court, Hingoli. In the said Election Petition, the petitioner therein has completed his evidence. Election petition is now posted for evidence of the respondent including the present petitioner. Meanwhile, respondent no.4 herein has filed an application no.34/2017 before the Additional Divisional Commissioner, Aurangabad Division, Aurangabad for disqualification of the present petitioner under the provisions of section 40 read with section 16 of the Act of 1961. Admittedly, said application no.34/2017 has also raised the same objection which is subject matter of the election petition. The petitioner has raised preliminary objection before the Additional Divisional Commissioner, Aurangabad Division, Aurangabad and by impugned order dated 4.7.2017 the

Additional Divisional Commissioner, Aurangabad Division, Aurangabad has rejected the said objection by holding that the dispute is maintainable before the authority under the provisions of section 40 (2) read with section 16 (1) (n) of the Act of 1961.

7. In view of the controversy raised as above, it would be appropriate to reproduce herein below sub-section (1) and (5)(a) of section 27 which is relevant for present discussion.

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

(1) If the validity of any election of a Councilor 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)

(3)

(a)

(b)

(4)

(a)

(b)

(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.

8. In terms of the provisions of sub-section (5) (a), if the validity of any election of a councilor or the legality of any order made or proceedings held under section 26 is brought in question by any candidate or by any other person as contemplated under section (1) of section 27 within the period as stipulated therein and in terms of clause (a) of sub-section (5), if on holding such inquiry, 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, the judge 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.

9. In a case **Shrikrishna Vs. Shivcharan** (supra), relied upon by the learned counsel for the petitioner, in identical facts, in paragraph nos. 15 and 16 of the judgment this court has made following observations :-

“15. The contention of respondent no.1 Shivcharan therefore, itself shows that he pointed out incorrect or false declaration on affidavit and use of false certificate by petitioner while filing his nomination paper. The disqualification was therefore in existence since prior to election. Section 27 of the Zilla Parishad Act, permits an Election Petition to be filed before the District Judge by any candidate at such election or by any person qualified to vote at such election within 15 days, after the date of declaration of result of election. Section 58 [1-A] permit respondent no.1 to look into the aspect of disqualification of petitioner in the light of provisions of Section 16. Section 62[3] permits Commissioner to look into such issue of disqualification suo moto or on an application made to him by any person. In this background provisions of Sub-section [5] of section 27 show that the District Judge trying election petition can declare a person who has submitted false claim or false certificate as disqualified for the purpose of that election. The words "or submitted a false claim or a false caste certificate" have been inserted by Maharashtra Amendment Act no. 34 of 2000. These words were not in

the statute book when the Division Bench of this Court decided the case of Manik Mallappa Karale vrs. Kisan Nagurao Patil and others (supra). It is therefore, obvious that if petitioner has submitted a false affidavit or false declaration with false certificate to show his entitlement to contest election, he could have been declared as disqualified under section 27[5][a] in Election Petition by the District Judge, and his election could have been set aside.

16. Thus, in Writ Petition No.5034/2009 possibility of two parallel proceeding as expressed by the Hon'ble Apex Court in its judgment in the case of State of Himachal Pradesh and others vrs. Surinder Singh Banolta (supra) is not ruled out. It therefore follows that the said judgment clinches the issue involved in the present matter. The disqualification of petitioner Shrikrishna on the ground of having more than two children therefore, ought to have been asserted in the election petition under section 27 of the Maharashtra Zilla Parishad and Panchayat Samitis Act, 1961 and recourse to remedy of disqualification before respondent no.5 is not available. The application filed by the present respondent no.1 Shivcharan before respondent no.5 under section 58[1][e] read with Section 62 and 16 and 16[1][n] of that Act is therefore not maintainable. The impugned order dated 06.11.2009 passed by the Additional Commissioner, Amravati Division, Amravati is therefore without jurisdiction. Same is therefore liable to be quashed and set aside and is accordingly quashed and set aside. Writ Petition is thus allowed, by making Rule absolute accordingly with no order as to cost.”

10. This court in the afore cited case had an occasion to consider the provisions of section 27 sub-section (5) wherein the words “or submitted a false claim or a false caste certificate” have been inserted by the Maharashtra amendment Act 34 of 2000. This court has, therefore, held that, it is obvious that, if the petitioner has submitted a false affidavit or false declaration with false certificate to show his entitlement to contest election, he could have been declared as disqualified under section 27 sub-section (5)(a) in Election Petition by the District Judge, and his election could have been set aside. In terms of the provisions of section 27 sub-section (5)(a) and in the facts of the said case which are identical, this court has observed that the disqualification of the petitioner Shrikrishna on the ground of having more than two children therefore, ought to have been asserted in the election petition under section 27 of the Maharashtra Zilla Parishad and Panchayat Samitis Act, 1961 and recourse to remedy of disqualification before respondent no.5 (i.e. Additional Commissioner) is not available.

11. In the instant case, the petitioner herein alleged to have been submitted a false claim about his third child by making a statement on affirmation that he has no third child after the cut-off date. In the aforesaid election petition, the ground has been raised that the petitioner herein has raised a false claim about his third child born before cut-off date, even though, he incurred disqualification before contesting the election and in terms of the provisions of section 27 sub-section (5)(a), his election is required to be set aside on the ground of said disqualification.

12. In view of the above legal provisions and the observations made by this Court and further observations made by the Apex Court in the case of State of Himachal Pradesh and others Vs. Surinder Singh Banolta reported in AIR 2007 Supreme Court 903, the proceedings before the Additional Divisional Commissioner, Aurangabad Division, Aurangabad in terms of the provisions of section 40 sub-section (2) are not maintainable. This petition is thus deserves to be

allowed. Hence, following order.

O R D E R

- I. Writ Petition is hereby allowed in terms of prayer clause "C".
- II. The impugned order passed by the Respondent No.1-Additional Divisional Commissioner, Aurangabad Division, Aurangabad in preliminary Objection Application in case No.ZPPS/Member/Disqualification/34/2017 dated 4.7.2017 is hereby quashed and set aside.
- III. Preliminary objection application No. ZPPS/Member/Disqualification/34/2017 is hereby allowed.
- IV. In terms of prayer clause of the said preliminary objection, the further proceedings pending before the respondent no.1 in application No.34/2017 are held to be not maintainable.
- V. Writ Petition accordingly disposed of. No costs.

(**V.K. JADHAV, J.)**

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