

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

WRIT PETITION NO.11656 OF 2018

**SULTANABEE SHAKIL PATEL
VERSUS
THE ADDITIONAL DIVISIONAL COMMISSIONER AURANGABAD AND
OTHERS**

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Advocate for the Petitioner : Shri Thombre S.S.
AGP for Respondents 1 and 2 : Shri S.K.Tambe.
Advocate for Respondent 3 : Shri A.A.Khande.

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CORAM: RAVINDRA V. GHUGE, J.

DATE :- 18th December, 2018

Per Court:

1 On 23.10.2018, this Court had passed the following order :-

"1 After this Court passed an order on 19.10.2018, Shri Thombre, learned counsel for the Petitioner, has cited the judgment delivered by this Court (Coram : R.K.Deshpande, J.) in the matter of Dnyaneshwar Patiram @ Ratiraj Shirbhiye vs. Divisional Commissioner and others, 2012 (5) Bom. C.R. 225. The contention is that it was specifically held in the said judgment that the cut off date for disqualification is 12.09.2001 and the disqualification will stand postponed by one year.

2 I find from paragraph 22 of the said judgment in Dnyaneshwar Patiram (supra) that this Court specifically held that "It will have, therefore, to be held that the first proviso does not protect the cases where there is increase in the number of children specified in the main provision, after the cut-off date 12.09.2001".

3 In the case of Javed vs. State of Haryana, 2003 (8) SCC

369, the Honourable Supreme Court concluded, based on the Haryana Panchayati Raj Act, 1994 that the proviso permits the person who has more than two children on or after the expiry of one year after the commencement of the Act, which would rescue him from disqualification. In *Dnyaneshwar Patiram (supra)*, this Court, therefore, held that the normal period of gestation is nine months and if a woman had conceived at the commencement of the Act, then any one of such couple would not be disqualified.

- 4 In the last portion of paragraph 23, it was held in *Dnyaneshwar Patiram (supra)* that “The operation of second proviso is thus restricted to a period of one year from the date of commencement of the said Act. It protects the cases where elections are also held within a period of one year from the date of commencement of the said Act. The proviso neither provides protection in cases where a third child is born after a lapse of one year from the date of commencement of the said Act, nor does the cases where elections are held after a lapse of one year from the date of commencement of the said Act. The life of second proviso came to an end on 12.09.2002. In the present case, the date of commencement is 12.09.2001, whereas the period of one year expired on 12.09.2002.”
- 5 I find from *Dnyaneshwar Patiram (supra)* that neither of the learned Advocates appearing for the respective sides have ever pointed out the correct position of law to this Court that sub-section (j-1) of Section 14(1) was introduced by Section 2(a) of the Maharashtra Act No.44/2000 w.e.f. 13.09.2000. It was never pointed out to this Court in *Dnyaneshwar Patiram (supra)* that the date of commencement of the Act is 13.09.2000 and the first proviso below sub-section (j-1) protects a person having more than two children on the date of the commencement of the Act, which is 13.09.2000, if the number of children as on the date of such commencement, do not increase thereafter. As such, it is noticeable from the entire judgment in *Dnyaneshwar Patiram (supra)* that there is no reference at all of the date of commencement 13.09.2000 as this date was

never brought to the notice of this Court.

- 6 *This Court has interpreted the said provision 14(1)(j-1) in Gautam Rama Latke vs. The State of Maharashtra and others, 2018 (3) ABR 156, (Writ Petition No.1097/2018 (Aurangabad Bench) decided on 26.02.2018), that the second proviso below sub-section (j-1) is aimed at protecting those persons who are covered by the first proviso, but it was beyond their control that the number of children increased after the cut off date 13.09.2000. In Gautam Latke (supra), this Court specifically framed Issue No.A 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)?"

- 7 *In Gautam Latke (supra), while considering the explanation below Section 16(2)(e) of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961, it was noticed that the disqualification clauses under sub-sections (1)(n) and (2)(e) of Section 16 were pari materia and almost identical to Section 14(1)(j-1) of the Maharashtra Village Panchayats Act and the proviso there below. The purpose, object and effect of the proviso was also considered in view of the judgment of the Honourable Supreme Court in S.Sundaram Pillai and others vs. V.R.Pattabiraman and others, (1985) 1 SCC 591 wherein, it was observed that a proviso would never have the effect of nullifying the main provision and the intent and object under the Act. A proviso would only qualify or would act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision. Since the State of Maharashtra intended to promote family planning and encourage small families considering the population explosion, such provisions were introduced in the Maharashtra Village Panchayats Act, the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961 and the*

Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965, simultaneously.

- 8 *It cannot be overlooked in view of Section 16(2)(e) of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961 by which, it is provided that a person shall not be disqualified if he has more than two children on the date of commencement of the Bombay Village Panchayats Act and the Maharashtra Zilla Parishads and Panchayat Samitis (Amendment) Act, 1995 so long as the number of children on the date of such commencement does not increase. A child or more than one child born in a single delivery within the period of one year from the date of commencement of the Act, would not be considered for the purpose of disqualification, is the proviso.*
- 9 *Shri Thombre submits that notwithstanding a candidate has more than two children on the commencement of the Act on 13.09.2000, the date of such commencement has been postponed to enable the candidates to have more children in that one year. I find that the said contention is not only fallacious, but, if accepted, would defeat the very purpose and object of introducing the disqualification clause on 13.09.2000.*
- 10 *Shri Thombre seeks to take advantage of the observations of this Court in Dnyaneshwar Patiram (supra) in paragraph 22 where it is held that "the first proviso does not protect the cases where there is increase in the number of children specified in the main provision, after the cut off date 12.09.2001." I find that the learned Advocates appearing in Dnyaneshwar Patiram (supra) lost sight of the fact that the cut off date is 13.09.2000. The cut off date was never 12.09.2001 and the second proviso below Section 14(1)(j-1) of the Maharashtra Village Panchayats Act has to be considered in view of Section 16(2)(e) of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961 by which, it is clearly mandated that a candidate having two children or more on the date of commencement of the said three Acts, is prohibited from increasing the number of his children from the date of commencement which is 13.09.2000.*

- 11 *In view of the above, I find that Section 2(a) of the Maharashtra Act No.44 of 2000 introducing the cut off date as 13.09.2000 under Section 14(1)(j-1) was not brought to the notice of this Court in Dnyaneshwar Patiram (supra) and hence, the said judgment is based on incorrect submissions of the learned Advocates representing the parties. As such, the judgment in Dnyaneshwar Patiram (supra) would not assist the Petitioner as the birth of her third child on 03.09.2001 will have to be held to have been born after the cut off date 13.09.2000.*
- 12 *There is one more issue involved in this case. Since this petition is being heard, the above stated issues can be dealt with after the Petitioner takes a specific stand with regard to the fourth child, namely, Amir having been born on 17.10.2011. The District Collector as well as the Additional Divisional Commissioner have dealt with the said issue and have concluded that though there is correction made by the Petitioner with regard to the birth date of the third child from 11.06.2002 to 03.09.2001, the fourth child is said to be born on 17.10.2011. The Additional Divisional Commissioner has recorded the contention of the Petitioner that the fourth child is not her biological child. The record before the authorities below is that the name of the father of the fourth child is shown to be the brother of the Petitioner's husband.*
- 13 *In the above backdrop, I deem it appropriate to follow the procedure as in the matter of Bilal Isak Shaikh vs. State of Maharashtra and others, 2018 (5) BCR 740, (Writ Petition No.12077/2017 Aurangabad Bench, decided on 05.07.2018), and coincidentally, the said Petitioner/ Bilal Shaikh was represented by Shri Thombre, learned Advocate when he had alleged that the elected member in the said petition has created a picture that an excess child was the daughter of his brother. The said judgment of this Court has been sustained by the Honourable Supreme Court.*
- 14 *As such, the Petitioner (Sultanabee Patel) and her*

husband, namely, (Shakil Patel) along with his brother (Yakil Patel) and his wife (Rehana), shall enter individual affidavits taking a stand as regards who are the biological parents of the fourth child Amir. After these individual affidavits are filed and if the Petitioner and her husband disown the fourth child Amir, this Court would thereafter, direct the DNA test of the four affiants as well as the child Amir in order to have a greater assistance.

- 15 *I am passing this order notwithstanding the contention of Shri Thombre that the original Complainant/ Respondent No.3 herein had given up the said issue before the Additional Divisional Commissioner. The learned Advocate for Respondent No.3 submits that as it is a matter of fact, he would canvass the said point in this Court.*
- 16 *Considering the procedure followed in Bilal Isak Shaikh (supra), it is made clear that if any of these litigants is exposed to have played a fraud on this Court or on the lower authorities, costs of Rs.5 lac would be imposed on such litigant besides directing the registration of the First Information Report by the District Collector, Aurangabad or by the learned Registrar (Judicial) of this Court so as to initiate criminal proceedings against such fraudulent litigant.*
- 17 *The learned Advocates for the Petitioner and Respondent No.3 seek time to take instructions and file affidavits on the next date, if so advised by their clients.*
- 18 *The learned Advocate for the Petitioner submits that the Petitioner is holding the charge of the Sarpanch. I strongly disapprove the said contention since the disqualification is instantaneous and there is no question of willingness of handing over of the charge of the Sarpanch without any protective orders of the authorities, much less of this Court ever since the lodging of this petition on 11.10.2018. The Up-Sarpanch shall, therefore, continue to exercise the powers and functions of the Sarpanch in view of the fact that the Tahasildar,*

Khultabad had already communicated to the District Collector by his communication dated 31.08.2018 that the post of Sarpanch of Village Panchayat, Loni had fallen vacant. The Up-Sarpanch shall, therefore, continue to exercise the functions as an in-charge Sarpanch. Nevertheless, the elections shall not be declared for filling up the post of the Sarpanch till the affidavits are filed by the respective sides as it depends as to what stand the litigating sides would now take in these proceedings.

- 19 *Stand over to 27.11.2018 in the urgent admission category.*
- 20 *The affidavits shall be filed on or before the next date. In the event, any of the parties as noted above, is not inclined to file an affidavit, he is at liberty to make such a statement on 27.11.2018."*

2 When this petition was placed before the learned Single Judge assigned with the 2018 writ petitions, he has referred the file to this Court considering the earlier order passed by this Court. It was, therefore, observed in the order dated 04.12.2018 that the Petitioner has to approach this Court if she desires to withdraw this petition.

3 The learned Advocate for the Petitioner submits, on instructions, that the Petitioner as well as her husband, henceforth, will not contest any such elections which suffers a bar of having more than two children.

4 In addition to the above, the learned Advocate for the Petitioner submits that the Petitioner desires to donate an amount of Rs.10,000/- for the treatment of poor patients.

5 In view of the above, this Writ Petition is disposed of as withdrawn by recording that the impugned judgment of the Additional Divisional Commissioner shall be binding on the Petitioner and the Petitioner and her husband would be precluded from contesting any such elections, where the bar of more than two children applies.

6 The Petitioner shall deposit an amount of Rs.10,000/- (Rupees Ten Thousand) as donation for the Ghati Hospital, Aurangabad (Government Medical College and Hospital, Aurangabad), to be deposited with the Medical Officer, High Court Dispensary, Aurangabad, either in cash or by Demand Draft, to be drawn in the name of "Dean, Government Medical College and Hospital Dengi Samiti, Aurangabad" and produce a receipt of such deposit before the Registry of this Court on or before 11.01.2019, failing which, this order shall stand recalled and the writ petition would stand restored to the file of this petition and would then be considered on its own merits.