

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.2030 OF 2015

Shri Pradeep Walchand Raka ... Petitioner

Vs.

1. Bhiwandi Nizampur City Municipal
Corporation & anr. ... Respondents

Mr.K.S. Dewal i/b Jayesh Joshi and Gautam J. Jain for the
Petitioner

Mr.N.R. Bubna for Respondent No.1

CORAM: Mrs.MRIDULA BHATKAR, J.
RESERVED ON: JUNE 14, 2018
PRONOUNCED ON: JULY 13, 2018

JUDGMENT:

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

2. This petition under Article 227 of the Constitution of India is
filed to challenge the order dated 27.3.2014 passed by the learned
Civil Judge, Senior Division, Link Court, Bhiwandi, in M.A. No.355
of 2008, thereby declaring the petitioner i.e., respondent No.2 to
be disqualified u/s 10(1)(i) of the Bombay Provincial Municipal
Corporations Act. The application was made by the Bhiwandi
Municipal Corporation, through its Commissioner on the basis of

the complaint made by original respondent No.1 against the petitioner/original respondent No.2 that he had incurred disqualification as he was having a 4th child after the cut-off date in terms of amendment effected to section 10 of the BPMC Act. The elections to the Bhiwandi Municipal corporation were scheduled in the year 2007 and the present petitioner was nominated on 17.11.2007 as Councillor. Section 10 of the BPMC Act is about qualification and disqualification of the Corporators. The said section was amended w.e.f. 30.9.2000 in respect of disqualification. If the candidates are having more than 2 children shall be disqualified for being elected or for being Councillor after the cut-off date i.e., 13.9.2001. The petitioner was having 3 children prior to the cut-off date and his 4th child was born on 7.11.2001 and, therefore, respondent No.1 filed complaint with the Commissioner that he is to be disqualified.

3. At the outset, it is to be stated that the petitioner was elected in 2007 and his term ended in 2012 i.e., after 5 years. The Miscellaneous Application No.355 of 2008 challenging the election was filed immediately, which was allowed on 27.3.2014. The said order is challenged in this petition.

4. The learned Counsel for the petitioner has submitted that though the election term is over and the petitioner has worked as Councillor for these 5 years, it is necessary for the petitioner to challenge the order because once the order of disqualification is passed, then, it remains in force and it may be a disqualification or bar for him to contest elections in future. The learned Counsel has made three – fold submissions. Firstly, the application is not maintainable mainly on the ground of locus of the respondent. He has submitted that u/s 12(1) of the BPMC Act, reference is to be made by a Councillor or by an elected persons and not by any other third party. Moreover, after taking permission of the Corporation, the reference can be filed. Secondly, section 10(1) wherein the conditions of disqualification are mentioned, is not applicable to the petitioner, he being a nominated Councillor. He has submitted that the conditions are applicable only to elected Councillors. He pointed out section 9 of the Act. Thirdly, the learned Counsel has submitted that the date of birth of the child was wrongly mentioned as the child was not born on 7.11.2001 but his date of birth is 7.4.2001, thus, he was born prior to the cut-off date.

5. Mr.Bubna, the learned Counsel for Respondent No.1 – Corporation, submitted that the order passed by the learned Civil Judge, Senior Division, declaring the petitioner disqualified u/s 10(1)(i) of the BPMC Act, is legal and valid. He has submitted that the petitioner is a Councillor and his qualification and disqualification is governed under the BPMC Act. The learned Counsel has further argued that the petitioner has filled up the nomination paper which shows that he was having 4 children and he is disqualified to be nominated. It was argued that the petitioner took advantage of the incorrect record and has misled the Commissioner. He has submitted that the petitioner has filed the application for correction of date of birth of the child on 20.12.2005, as his birth date is 7.4.2001. He has supported the order passed by the learned trial Judge and has prayed that the Writ Petition be dismissed.

6. The election of a candidate can be challenged by pointing out the disqualification in two ways. Firstly, by filing reference u/s 12 of the BPMC Act and secondly, by way of election petition u/s 16 of the Act within 10 days from the election. This is not an election petition filed by the applicant u/s 16 of the Act but it is

specifically a reference preferred by the Corporation u/s 12 of the
BPMC Act. Section 12 of the Act reads thus:

“12. Questions as to disqualification to be determined by the Judge: - If any doubt or dispute arises whether a councillor has ceased to hold office as such under section 11, such councillor or any other councillor may, and at the request of the Corporation, the Commissioner shall, refer the question to the Judge.”

7. As per section 12 of the BPMC Act, a person, an elected candidate, can raise the issue by applying to the Corporation; the Corporation after obtaining the approval to make reference to the civil Court. Thus, the said application is not to be moved by any other person, but only by an elected candidate or the person who himself is facing the allegations of the disqualification. Thus, the section is a remedy available to the Corporator or elected person and it is not a provision used for prosecuting elected candidate. The Corporation or the Commissioner will have to take approval necessarily of the Standing Committee of the Corporation. Unless the resolution of the Standing Committee is passed, no such reference can be made u/s 12 of the Act before the civil Court by the Corporation. In the present case, respondent No.1 is a third person and he does not fit in the requirement of section 12 of the

Act. Resolution or approval of the Standing Committee to challenge the election of the petitioner is not produced before the civil Court. Under such circumstances, there is no compliance of section 12 of the Act. The reference cannot be entertained u/s 12 of the Act.

8. Moreover, the present petitioner is not an elected candidate but he is a nominated Councillor. Section 2(1) of the Act defines "Councillor", which states that Councillor means a person duly elected as a member of the Corporation and also includes nominated Councillor, who shall not have right to fit in any meeting of the Corporation. The present petitioner is not an elected one but a nominated one. For the purpose of disqualification of the nominated Councillor, the rules laid down under the Act are to be looked into. The learned Counsel for the petitioner Mr. Deval drew my attention to Rule 4 of the Rules under the Act. Rule 4 states about qualification for nomination and he has submitted that the petitioner has a special knowledge and expertise in other field. He also pointed out the manner in which section 10 is worded. I have considered the Rule 4 of the Maharashtra Municipal Corporations (Qualifications and Appointment of Nominated Councillors) Rules,

2012 as also section 10 of the Act. Thus, the Rules for qualification of nominated Councillors are different than the elected Councillors. They are based on the experience, expertise of different fields. Thus, in view of this rule also, the case of the Councillor cannot be challenged for disqualification.

9. The learned trial Judge has discussed about the wrong birth-date and the attempts made by the petitioner to change the date, however, it is not a correct reasoning but only a guesswork. To disprove the birth certificate issued by the proper authority, one needs to lead sufficient evidence, in absence of which no conclusion of doctored certificate can be drawn.

10. Thus, I am of the view that there is merit in the Writ Petition. The order passed by the learned trial Judge is illegal and devoid of merit and should be set aside. Accordingly, the Writ Petition is allowed. The order dated 27.3.2014 passed by the learned Civil Judge, Senior Division, Link Court, Bhiwandi, in M.A. No.355 of 2008, is hereby set aside.

11. Rule made absolute accordingly. No costs.

(MRIDULA BHATKAR, J.)