

THE HON'BLE DR. JUSTICE B.SIVA SANKARA RAO

WRIT PETITION No.16511 OF 2017

ORDER:

This writ petition is filed, under Article 226 of the Constitution of India, for the following relief:

“to issue an order or direction, more particularly one in the nature of writ of certiorari, calling for all the connected records including the impugned orders of the Election Tribunal, Vikarabad, passed in E.O.P.No.18/2014, dated 25.04.2017 and to quash the same holding it as illegal, improper, unjust and contrary to law.”

2. Heard Sri A.Gangaiah Naidu, learned Senior Counsel, appearing for the Ms.G.Bhanupriya, learned counsel for the petitioner and Sri Vedula Srinivas, Government Pleader for Revenue, K.Amarnath Reddy and Suresh Bhakthula for the respondents and perused the material on record.

3. The brief facts of the case in a nutshell are as follows:

(a) As per the averments made in the affidavit filed in support of the writ petition, the submission of the petitioner is that State Election Commission issued notification dated 10.03.2014 for conduct of elections to Municipalities and Nagar Panchayats for Tandur Municipality. It is further submitted that the petitioner along with respondents 1, 5 and 6 contested in the said elections, for the post of Councilor of 23rd ward, Tandur Municipality and the petitioner secured 567 votes and the respondents 1, 5 and 6 secured 06, 396 and 319 votes respectively. As the petitioner herein secured

highest votes, he was declared as elected for the office of Councilor of 23rd ward of Tandur Municipality on 07.05.2014 and thereafter, taken oath along with other elected councilors.

(b) While so, the 1st respondent who secured only 06 votes, filed O.A.No.18 of 2014 on the file of Election Tribunal, Vikarabad, alleging that the petitioner got three children, which is disqualification under Section 13(B) of A.P. Municipalities Act, 1965(for short, "the Act"). The petitioner further submits that date of birth of his first son was shown as 16.07.1995, but, as per the certificates issued by the hospital authorities, bonafide certificate, school leaving certificate, aadhar card, voter id card etc., the date of birth of his first son is 16.07.1994. According to the petitioner, the above said documents were not considered by the election tribunal, while decreeing the election petition and also the tribunal relied only on the fabricated Meeseva certificate produced by the 1st respondent.

(c) The election tribunal, through its judgment, declared the election of petitioner as null and void, on the ground that he gave birth to three children, after the cutoff date i.e., 31.05.1995 and also declared that 5th respondent, who secured highest votes after the petitioner, was elected as councilor for 23rd ward of Tandur Municipality, Ranga Reddy District.

(d) It is the further case of the petitioner that the 5th respondent, who was elected as councilor, pursuant to the judgment passed by the election tribunal, have also three children and to that effect, a counter was filed vide I.A.No.80 of 2017, raising a preliminary objection of jurisdiction of the Court below and the said I.A. was dismissed on 24.04.2017 and the judgment in main election petition was delivered on 25.04.2017.

(e) It is the submission of the petitioner that the election tribunal has not considered the relevant documents produced by him showing that his son was born on 16.07.1994 and if it would have been considered, he was not disqualified as per Section 13(B) of Act. The said action of the election tribunal in declaring the 5th respondent was elected as Councilor, 23rd ward of Tandur Municipality, though he is having three children, is untenable and contrary to law.

4. Denying the averments made in the writ affidavit, counter affidavits have been filed by the respondents 1 and 5. According to the 1st respondent, the order of the court below does not suffer from any infirmities, which warrant the interference of this Court under Article 226 of the Constitution of India and is liable to be dismissed. He further submits that the scope of judicial review is very limited and this Court does not exercise Appellate jurisdiction over the orders of the Election Tribunal and appreciation of the

evidence falls outside the scope of judicial review. As per R.1, he filed O.P.No.18 of 2014 on the file of Senior Civil Judge, Vikarabad, which was notified as Election Tribunal, wherein petitioner herein is the 4th respondent and 5th respondent herein is also the 5th respondent therein, seeking to disqualify the petitioner/4th respondent, as he was having more than two children, ineligible for contesting for the post of Municipal Councilor, as per Section 13(B) of the Act, 1965 and to declare the R.5 as elected in respect of Ward No.23, as he stood in second position in the election.

5. The 1st respondent, in his counter, further submits that he was examined as PW1 and marked the documents as Ex.P-1 to Ex.P-20, the Municipal Commissioner was examined as RW-1, the petitioner was examined as RW-2 and 5th respondent was examined as RW-5. During the course of cross-examination, petitioner herein never examined the 1st respondent, as such, the court below treated the cross-examination as 'NIL' and the petitioner never filed any petition to recall PW-1 for cross examination. He further submitted that the petitioner herein created false birth certificate of the baby child by name Subiya Naaz as daughter of the 5th respondent through Mee Seva and subsequently, the 5th respondent filed a complaint against the petitioner and the same was registered as Crime No.49 of 2016 and charge sheet also filed by the police. The court below also clearly

discussed about the fraud played by the petitioner in its judgment.

6. Even the averments of the counter of the 5th respondent are also similar to that of the 1st respondent.

7. Before proceeding further with the matter within the limited scope of judicial review for any interference by sitting against the election tribunal, it is necessary to mention the relevant provisions and propositions. The qualifications and disqualifications provided under the Act are as follows:-

Section 13-Qualification of candidates: A person shall be qualified for election as a member only if his name appears on the electoral roll for the municipality and if he is not less than twenty one years of age.

Section 13A-General Disqualification: A person shall be disqualified for being chosen as, or for being a member of a Municipality if he is disqualified by or under any law for the time being in force for the purpose of elections to the legislature of the State concerned:

Provided that no person shall be disqualified on the ground that he is less than twenty five years of age, if he has attained the age of twenty one years.

Section 13B-Persons having more than two children to be disqualified: A person having more than two children shall be disqualified for election or for continuing as member:

Provided that the birth within one year from the date of commencement of the Andhra Pradesh Municipal Laws (Second Amendment) Act, 1994 (hereinafter in this Section referred to as the date of such commencement) of an additional child shall not be taken into consideration for the purposes of this section:

Provided further that a person having more than two children (excluding the child if any born within one year from the date of such commencement) shall not be disqualified under this section for so long as the

number of children he had on the date of such commencement does not increase:

Provided also that the Government may direct that the disqualification in this section shall not apply in respect of person for reasons to be recorded in writing.

Section 14-Disqualification for election or for holding office as a Member: A person holding an office of profit under a municipality, the Central Government or the State Government shall be disqualified for election or for holding office as member.

Provided that a person shall not be deemed to hold an office of profit under municipality by reason only that he is a Chairperson or member of a municipality in the State.

Provided further that a village officer who is not actually performing the functions or discharging the duties as such officer shall not be so disqualified.

Section 15-Other disqualifications of candidates:
 (1) A person who has been sentenced by a criminal court (a) to imprisonment for an offence under the Untouchability (Offences) Act, 1955; (Central Act 22 of 1955). (b) x x x x for any offence other than an offence of political character or any offence not involving moral delinquency, such sentence not having been suspended, reversed or the offence pardoned shall be disqualified for election as a member while undergoing the sentence and for five years from the date of the expiration thereof.

(2) A person shall be disqualified for election as a member if such person is, on the date fixed for scrutiny of nomination for election

(a) of unsound mind and stands so declared by a competent court, a deaf-mute or suffering from leprosy;

(b) an applicant to be adjudicated an insolvent or un-discharged insolvent;

(c) interested in a subsisting lease or contract entered into with or any work being done for, the council except as a share-holder, other than a director, in a company:

Provided that a person shall not be deemed to have any interest in such contract or work by reason only of his having a share or interest in

(i) any sale or purchase of immovable property or any agreement for the same; or (ii) any public loan raised by municipality or any security for the payment of money only; or (iii) any newspaper in which any advertisement relating to the affairs of the council is inserted; or (iv) the sale to the council of any articles in which he regularly trades, or the purchase from the council of any articles to a value in either case not exceeding five hundred rupees in the aggregate in any year during the period of the contract or work; (v) the occasional letting out on hire to the municipality or hiring from the municipality of any article for an amount not exceeding in the aggregate in any one year five hundred rupees;

(d) employed as a paid legal practitioner on behalf of the council or as a legal practitioner against the council;

(e) an honorary magistrate for the municipal town;

(f) already a member whose term of office as such will not expire before his fresh election can take effect, or has already been elected a member whose term of office has not yet commenced;

Explanation:- Nothing in this clause shall be construed as disqualifying a sitting member of a municipality for re-election as member to that municipality;

(g) the employee or employer or the official subordinate or official superior of a member holding office on the said date;

(h) in arrears of any kind due by him otherwise than in a fiduciary capacity to the municipality upto and inclusive of the previous year, in respect of which a bill or notice has been duly served upon him and the time if any specified therein for payment, has expired; or

(i) dismissed from service of the Central Government, the State Government, any municipality or any local authority for misconduct.

Section 16-Disqualification of members: (1) Subject to the provisions of Section 17, a member shall cease to hold his office, if he--

(a) is sentenced by a criminal court to such punishment and for such offence as is described in sub-section (1) of Section 15;

(b) becomes of unsound mind and stands so declared by a competent court;

(c) is a deaf-mute or is suffering from leprosy;

(d) applies to be adjudicated or is adjudicated an insolvent;

(e) subject to the proviso to clause (c) of Sub-section (2) of Section 15, acquires any interest in any subsisting contract made with, or work being done for, the council except as a share-holder, other than a director, in a company;

(f) is employed as a paid legal practitioner on behalf of the council or legal practitioner against the council;

(g) is appointed as an officer or servant under this Act or as an honorary magistrate for the municipal town;

(h) accepts employment under or becomes the official subordinate of any other member;

(i) ceases to reside for a period of more than six months in the municipality or within two kilometers from the outer limits therefrom;

(j) fails to pay arrears of any kind due by him, otherwise than in a fiduciary capacity, to the municipality within three months after a bill or notice has been served upon him under this Act, or where, in the case of any arrears, this Act does not require the service of any bill or notice, within three months after a notice requiring payment of the arrears, which notice it shall be the duty of the Commissioner to serve at the earliest possible date, has been duly served upon him by the Commissioner;

(k) absents himself from the meetings of the council for a period of three consecutive months reckoned from the date of the commencement of his term of office, or of the last meeting which he attended, or of his restoration to office as member under Sub-section (3), as the case may be, or within the said period less than three ordinary meetings have been held absents himself from three consecutive ordinary meetings held after the said date:

Provided that in the case of a woman member a period of not more than two months at a time shall be excluded in reckoning the period of absence aforesaid if, for reasons of physical disability due to advanced

stage of pregnancy and of delivery, such member absents herself from meetings of the council after giving a written intimation to the Commissioner of the date from which she would be absent:

Provided further that no meeting from which a member absented himself shall be counted against him under this clause if notice of that meeting was not duly served on him.

Provided also that nothing in this clause shall apply to an ex-officio member.

Explanation:- For the purpose of this clause, (i) ordinary meeting' shall mean a meeting referred to in sub-rule (1) of Rule (2) in Schedule I. (ii) where a meeting other than an ordinary meeting intervenes between one ordinary meeting and another ordinary meeting, those two ordinary meetings shall be regarded as being consecutive to each other.

(2) Where a person ceases to be a member under Clause (a) of sub-section (1) or under Section 19, he shall be restored to office for such portion of the period for which he was elected as may remain unexpired at the date of such restoration, if and when the sentence or order is annulled on appeal or revision and any person elected to fill the vacancy in the interim shall on such restoration, vacate office.

(3) Where a person ceases to be a member under clause (k) of sub-section (1), the Commissioner shall at once intimate the fact in writing to such person and report the same to the council at its next meeting. If such person applies for restoration to the council on or before the date of its next meeting or within fifteen days of the receipt by him of such intimation; the council may, at the meeting next after the receipt of such application, or suo motu restore him to the office of member;

Provided that a member shall not be so restored more than thrice during his term of office.

Section 19-Disqualification of persons convicted of election offences: Every person convicted of an offence punishable under Section 18 or under Chapter IX-A of the Indian Penal Code shall be disqualified from voting or from being elected in any election to which this Act applies from holding the office of member for a period of five years from the date of his conviction or for such shorter period as the court may, by order, determine.

Section 17-District Judge to decide questions of disqualifications of members: (1) Where an allegation is made by any voter or authority to the Commissioner in writing that any person who is elected as member has not qualified or has become disqualified under Section 13, Section 13-A and Section 13-B Section 14, Section 15, Section 16 or Section 19 and the Commissioner has given intimation of such allegation to the member and such member disputes the correctness of the allegation so made or where any member himself entertains any doubt whether or not he has become disqualified under any of those sections.

(a) such member or any other member may, within a period of two months from the date on which such intimation is given or doubt is entertained, as the case may be, and

(b) the Commissioner shall, either on the direction of the council or with the approval of the Government if no such direction is given within a period of two months from the date of placing of the matter by the Commissioner before the council, apply for a decision to the District Judge of the district in which the municipality is situated.

(1A) x x x

(2) The said Judge, after making such inquiry as he deems necessary, shall determine whether or not such person is disqualified and his decision shall be final.

(3) Pending such decision, the member shall be entitled to act as if he was not disqualified.

8. Here, Section 343ZA of the Act, speaks of election petition before Tribunal. It says no election under this Act shall be called in question except by an election petition presented in accordance with such rules as may be made in this behalf and to such authority as may be specified in such rules.

9. The Rules for decision of election disputes 1967, made under the Act by G.O.Ms.No.1118(MA) dt.17.08.1967 & G.O.

Ms.No.587(MA) dt.20.09.1967, adopted for the State of Telangana by replacement of the words Andhra Pradesh as Telangana in the Rules vide G.O.Ms.No.173 (MA&UD)(C.I), dt.23.11.2015. Rule 1 speaks of the election tribunal shall be the subordinate Judge concerned to exercise jurisdiction as a *persona designata* on presentation of petition with statement in concise form of material facts on which the petitioners rely and particulars of any corrupt practice which he alleges etc., and within 15 days from the date of declaration of the result of the election as per Rule-2. The Rule-3 speaks if the irregularities alleged in the petition are likely to affect the validity of the election of more than one returned candidate, the petitioner shall join as respondents to the petition all such returned candidates and may claim that election of the returned candidate is void and himself and any other candidate has been duly elected by joining as respondents all other candidates who were nominated for the election but had not withdrawn before the polling. The petitioner may even ask election as a whole is void. Rule-4 speaks of the deposit for the election petition to be entertained. Rule-6 speaks of enquiry of the election petition by the tribunal as nearly as may be in accordance with CPC to the trial of the suits provided gist of the evidence be recorded in memorandum of any witness examined and tribunal may refuse to examine any witness if their evidence is not material or for any frivolous grounds or to delay the proceedings.

10. In a case under the A.P.Panchayat Raj Act, in **Mellimi Lakshmi Kantam Vs. Election Tribunal-cum-Principal District Judge, West Godavari District at Eluru and others**¹, it was held that as per Sec.233 r/w.19 (3) and 22 (1) of Panchayat Raj Act and the rules made thereunder in 1995 rules 2 to 4 and 7 and Order 7 Rule 11; entertainment of petition filed for setting aside the election of one of the respondent Sarpanch and to declare the petitioner defeated candidate as duly elected to the said post even the prayer is on the ground of disqualification to contest for election, since the said prayer in the petition is in the nature of election petition and not an application under Sec.22(1) of the Act to decide only the question of disqualification, such a petition cannot be entertained by the District Judge as not designated as election tribunal and for no authority exists with the designation “Election Tribunal-cum-Principal District Judge” as arrayed. It was held there from that the District Judge got jurisdiction only to decide the question whether a person elected as member of the Panchayat has incurred the disqualification pointed out or not. Further he has no jurisdiction to decide petition filed to set aside the election of returned candidate, which is in the nature of election petition in view of the reliefs prayed for therein.

11. Thus, there cannot be any dispute on the maintainability of the election petition and the writ petition

¹ 2008 (1) ALT 388 DB

against the order of the election tribunal even the election is impugned on the ground of disqualification prescribed under Section 13(B) of the Act amended Act 15 of 2011 w.e.f.01.06.1994.

12. From the above coming back to the facts, the main dispute impugning the order of the election tribunal in O.A.No.18 of 2014 dated 25.04.2017 was that the date of birth of his first son is 16.07.1994 and not 16.07.1995 and the election tribunal relied on the wrong one obtained through Meeseva by the election petitioner which is the basis for declaring disqualification of the 4th respondent duly elected setting aside the election and of 5th respondent as duly elected in considering from the cut-off date 31.05.1995 and the 5th respondent declared as if duly elected was also having three children and not entitled to be so declared by the tribunal.

13. Among the writ petition respondents 1 to 7, the 1st respondent is the election petitioner-P.W.1 before the tribunal who was examined in chief on 09.07.2015, 21.07.2015 and 18.05.2015 and it was later coming for cross-examination, he was not cross-examined by the writ petitioner-R.4 to the election petition. The writ petition R.2-Election Officer was R.1 to the election petition and he was examined as R.W.1 in October, 2016 and was cross-examined by R.4(Writ Petitioner) besides R.5 to the Writ Petition and R.5 came to the witness box as R.W.3 and examined in December, 2016 and January,

2017 including cross-examination by election petitioner and the writ petitioner-R.4 to the election petition did not cross-examine him having taken time. The State represented by District Collector and the Election Officer-cum-District Collector and the District Election Officer-cum-District Collector and the Chief Election Officer of the State Election Commission remained ex-parte before the tribunal. The writ petitioner as R.4 filed I.A.No.454 of 2016 to reject the election petition that was dismissed on 07.11.2016 and even went unsuccessful in CRP No.5723 of 2016 in giving liberty to file application to decide as preliminary issue and I.A.No.80 of 2017 to decide as preliminary issue was filed only on 24.04.2017 by then the matter was already reserved for judgment after full-dressed enquiry before the election tribunal. Thereby the tribunal passed the order in the main matter itself on 25.04.2017 holding the election petition is maintainable and in dismissing the I.A.No.80 of 2017 thereby. From this background a perusal of the impugned order of the election tribunal as to its merits concerned shows that Exs.P.1 to P.20 were marked on behalf of the election petitioner-P.W.1 and Exs.R.1 to R.22 were marked on behalf of the other respondents-R.W.1 and 3 referred supra, for R.W.2-R.4 who is the writ petitioner filed his evidence in chief and did not turn up thereby treated with no value though observed as eschewed. The writ petitioner as R.4 filed three applications before the tribunal, one is to set aside the order

of treating no value to his evidence and to restore his evidence as R.W.2 and permit cross-examination of P.W.1 that were also at the fag end and ended in dismissal. He also filed I.A.No.320 of 2016 to amend his election petition counter that was allowed with the additional plea that the 5th respondent got a third child by name Subiya Naaz born on 18.02.2013 besides the two elder children Syed Jubeda Fatima born on 04.10.2006 and Syed Raheem Pasha born on 03.09.2008. It is on the factum of the petitioner was declared as elected (R.4 to the election petition) as Ward Councillor of Ward No.23 of Tandur Municipality on 12.05.2014 by virtue of the election petition allowed on 25.04.2017 by disqualified holding not duly elected declared R.5 as elected concerned, now to say R.5 also got three children born subsequent to the cut-off date of 1995 according to the amended plea of his counter as R.4 and not eligible to be declared as duly elected from said disqualification.

14. Undisputedly from the above, the petitioner-R.4 was not diligent to prosecute the matter either by cross-examination of P.W.1 or by his coming to witness box as R.W.2 to face including cross-examination. He cross-examined R.W.3-R.5 and there is nothing to show he confronted R.W.3 with any material documents to say R.W.3 is disqualified (election petition R.5). Coming to the disqualification to say not duly elected of the petitioner's candidature, the evidence of P.W.1 as discussed by the tribunal more particularly in para-10

onwards besides P.W.1 deposed R.5 cross-examined P.W.1 also suggested in support of P.W.1's evidence with reference to Exs.P.1 to P.20 of R.4 got three children from the record and the documents and he is to be declared as not duly elected and Election Officer was also given a complaint in this regard covered by Exs.P.1 to P.9 and P.10 is letter addressed by election authority to approach the election tribunal after declaration of result within the statutory period of 15 days. Among Exs.P.12 to 16, P.12 is the C.C. of ration card of R.4 noting the names of his three children and P.13 is birth of the first child of R.4 dated 16.07.1995 issued under Meeseva-a public document and Exs.P.14 to P.16 are the Aadhar cards of the three children of R.4 that also confirms from Ex.P.14 date of birth of first child as 16.07.1995 and the names are tallying with Ex.P.12 of the three children to say all the three children born after the cut-off date of disqualification to contest and to declare as elected. No doubt, as per Ex.P.13 date of birth of Iftakar Ahmed shown as 16.07.1995 among the three children of R.4 including Intayaz Ghani and Nishat Afza that is revealed from R.W.1's cross-examination by R.4 (Writ petitioner). Ex.R.22 filed by R.5 as R.W.3 in the election petition is the marks list with SSC certificate noting the date of birth of the said one among the three children of R.4 as 16.07.1995 confirming to Ex.P.13 as it is subsequent to the cut-off date of having the third child for disability to contest and to be elected for R.4. No doubt, Ex.R.22 for its marking

objection raised as not original and only colour xerox but it is observed by the tribunal as original, leave about it is R.4 that has to produce his child's said original SSC Certificate which also contains the date of birth and R.4 not only failed to disprove the same if at all it is a xerox for original with him withheld with no reason, for the same is not the sole basis but one of the corroborative pieces of evidence with reference to other documents discussed supra as rightly concluded by the tribunal of R.4 not only did not come to witness box to face cross-examination from his evidence treated with no value but also could not rebut said cogent evidence including as to the alleged plea giving adoption of one of his child to his sister for there is no registered adoption deed much less any said document filed and any proof of adoption shown with substance of acted upon, leave about adoption will not absolve the disqualification of having three children without even going into that aspect much less to make a controversy for no original substance to that. There is no necessity now to go further into Exs.R.17 to R.21 and the crime records including of FIR 49 of 2016 against R.4 which is outcome of a private complaint referred to police in registration of crime that was under investigation later. So far as jurisdiction aspect concerned, it is already answered above including herein in the previous paragraph referring to the Division Bench expression of this Court in **Mellimi Lakshmi Kantam** supra. It is needless to say if at all there is any disqualification

for R.5, the remedy is left open including to the writ petitioner to file application under Section 13(B) of the Act, before the District Judge concerned as laid down in the above expression among the two other expressions of 2006 (5) ALT 825 and 2007 (2) ALT 121 referred in the order in I.A.No.80 of 2017 dt.24.04.2017 by the election tribunal.

15. Accordingly and in the result and with these observations, the Writ Petition is disposed of without interfering with the order of the election tribunal by left open remedy of the writ petitioner if at all to impugn any disqualification of the Zubair Pasha (R.5 herein) to invoke the jurisdiction of the District Judge and prove the same for such a relief is no way a bar and left open by virtue of this order otherwise if at all to maintain any such petition within 15 days from the date of receipt of the order to entertain without any sort of any reference to any provision of limitation to its filing.

16. Consequently, miscellaneous petitions, if any, in this revision shall stand closed.

DR.B.SIVA SANKARA RAO, J

Dt.26.04.2018

vvr