

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

WRIT PETITION NO.9947 OF 2018

Umesh Deorao Pawale,
Age 44 years, Occu.Aгри. and
Business,
R/o Bapuniwas, Pandurang
Nagar, Nanded,
Taluka and District Nanded

.. Petitioner

Versus

1. The State of Maharashtra,
Through its Principal Secretary,
Urban Development Department,
Mantralaya, Mumbai
2. The Commissioner,
Nanded Waghale City
Municipal Corporation,
Nanded.

.. Respondents

Mr R.N. Dhorde, Senior Advocate i/b Mr V.R. Dhorde, Advocate for
petitioner
Mr P.S. Patil, Addl.G.P. For respondent no.1
Mr M.D. Narwadkar, Advocate for respondent no.2
Mr S.M. Kulkarni and Mr O.B. Boinwad, Advocates for applicants in
C.A.No.1150 of 2019 and C.A.No.1149 of 2019 for intervention

-WITH-

CIVIL APPLICATION NO.1149 OF 2019
AND
CIVIL APPLICATION NO.1150 OF 2019
IN
WRIT PETITION NO.9947 OF 2018

Prakash s/o Raghunath Kadam

.. Applicant

Versus

The State of Maharashtra and ors.

.. Respondents

Mr S.M. Kulkarni and Mr O.B. Boinwad, Advocates for applicant
Mr P.S. Patil, Addl. G.P. for respondent no.1
Mr M.D. Narwadkar, Advocate for respondent no.2
Mr R.N. Dhorde, Senior Advocate i/b Mr V.R. Dhorde, Advocate for
petitioner in W.P.

**CORAM : S.V. GANGAPURWALA AND
ANIL S. KILOR, JJ.**

**DATE OF RESERVING THE
JUDGMENT : 20.09.2019**

**DATE OF PRONOUNCING THE
JUDGMENT : 17.10.2019**

JUDGMENT (Per Anil S. Kilor, J.)

1. Rule. Rule returnable forthwith. Heard finally by the consent of parties.

2. The petitioner was elected as a councillor of Nanded Waghala City Municipal Corporation in the year 2012. Validity of his election was questioned by way of Election Petition u/s 16 of Maharashtra Municipal Corporation Act, 1949 (for short 'the Act'). The Civil Court set aside the election of the petitioner on the ground u/s 10 (1)(i) of the Act, for having more than two children. The said order setting aside election of the petitioner was confirmed upto Hon'ble Apex Court. The petitioner again contested the General Elections held in the year 2017. Objection to his nomination on the ground of having more than two children, came to be rejected by the Returnig Officer. The rejection of objection to nomination remained unchallenged. The petitioner once again got elected as a councillor. This time no Election Petition was filed by any defeated candidate or by any voter. However, the Municipal Commissioner on his own motion disqualified him, vide order Dt. 24.8.2019, exercising powers u/s 12 of the Act, on the same ground u/s 10 (1)(i) of the Act. By the present petition petitioner is calling in question the legality and propriety of the said order Dt. 24.8.2019, on the ground of jurisdiction and applicability of section 11(a) of the Act to his case.

3. Heard learned senior advocate Mr. R.N. Dhorde, assisted by learned Advocate Mr. V.R. Dhorde for petitioner, the learned AGP Mr P.S. Patil for State, the learned counsel Mr Narwadkar for respondent no. 2-Municipal commissioner and learned counsel Mr S.M. Kulkarni and Mr Boinwad for intervenor.

4. The learned senior Advocate for the petitioner submits that, on setting aside election of the petitioner in Election Petition, it was assailed in W. P. No. 9721/2016, before this court. While dismissing the said writ petition, on the request of the petitioner, this court had granted permission to the petitioner to approach the civil court to get the declaration that the third child Amit was born to wife of his brother Raju. He submits that accordingly civil suit was filed and the same is pending. Therefore, he submits that till the issue whether the third child Amit is of the petitioner or of his brother, is pending for adjudication, the Commissioner ought not to have disqualified the petitioner on the ground of having more than two children.

5. He further argues that language of section 12 of the Act makes it clear that Municipal Commissioner lacks jurisdiction to disqualify any councillor of the Corporation. To fortify this argument, he relied upon judgements of this court in the matter of **Smt. Noorjahan M. Aslam Ansari vs. State of Maharashtra and Ors. 2004 (2) ALL MR 1, Mrs. Sajeda Nihal Ahmed vs. Malegaon Municipal Corporation and Ors. 2005 (1) ALL MR 864.**

6. He also attacks the applicability of section 11(a) of the Act to the case of the present petitioner. He submits that alleged

disqualification was pre-existing at the time of election and objection to petitioner's nomination on the ground of alleged disqualification, was rejected by the Returning Officer at the time of scrutiny. He emphasised on the fact that petitioner on being elected as councillor, no election petition was filed by anybody under section 16 of the Act. He further submits that it is clear from the language of Section 11 of the Act that it applies to disqualification incurs after the election and not to the pre-existing disqualification on the date of election, therefore, according to him section 11 (a) would not attract in this case.

7. Per contra, the learned counsel for respondent Municipal Commissioner, supports the order of disqualification of petitioner. He argues that while setting aside petitioner's election the civil court in clear terms held that the petitioner was having three issues. The said finding was affirmed by this court and the Hon'ble Apex court, therefore, according to the learned counsel for the Commissioner, since, on the date of the election the petitioner was holding disqualification for being elected as councillor, no further enquiry as contemplated under section 12 of the Act, through 'the Judge', is needed.

8. The learned AGP and learned counsel for intervenors have adopted the stand taken by respondent no. 2 Commissioner and prayed for dismissal of the petition.

9. At the first place, we are not impressed by the contention of the petitioner that during the pendency of civil suit for declaration to the effect that the third child namely Amit was born to wife of his brother Raju, the Commissioner ought not to have disqualified him on the ground of having more than two children. The said contention of the petitioner is rejected for the simple reason that in the Election Petition while setting aside the election of the petitioner of the year 2012, the civil court had given categorical finding that the petitioner was having three issues. The said finding was confirmed upto Apex court, therefore, according to us pendency of civil suit will not come to rescue the petitioner in this matter.

10. The law relating to elections is well settled right from the case of N.P. Punnuswami (AIR 1952 SC 64). In the said case the Hon'ble Apex Court has held that the right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitation imposed by it.

11. The Hon'ble Apex Court , in case of **Sadashiv H. Patil -vs Vithal D. Teke and Ors 2001 (1) Mh.L.J. 312** had an occasion to deal with provisions regarding disqualification under the Maharashtra Local Authority Members' Disqualification Act 1987. It is observed thus:

“13. A finding as to disqualification under the Act has the effect of unseating a person from an elected office held by him pursuant to his victory at the polls in accordance with democratic procedure of constituting a local authority. The consequences befall not only him as an individual but also the constituency represented by him which would cease to

be represented on account of his having been disqualified. Looking at the penal consequences flowing from an elected Councillor being subjected to disqualification and its repercussion on the functioning of the local body as also the city or township governed by the local body the provisions have to be construed strictly. A rigorous compliance with the provisions of the Act and the Rules must be shown to have taken place while dealing with a reference under Section 7 of the Act.”

12. Thus before moving to the questions involved in the present petition whether Commissioner is competent to pass an order of disqualification on his own, against an elected Councillor under section 12 of the Act and whether against a Councillor who held a disqualification before being elected as a Councillor, section 11(a) applies to unseat him from his elected office, as disqualified, it is necessary to refer to the relevant provisions of the Act.

13. Chapter II of the Act deals with constitution of Municipal Corporation including qualification, disqualification, elections of the councillors and election petition. Sections 10, 11, 12 and 16 are material for us to understand the scheme of the Act in respect of disqualification of any councillor and remedies available for determination of any such dispute. Therefore, relevant parts thereof are reproduced below:

section 10(1)(i) - **Disqualification for being a councillor :**

(1) Subject to the provisions of section 13 and 404, a person shall be disqualified for being elected and for being a councillor, if such person -

- (i) has more than two children

section 11 - **Disabilities from continuing as councillor.** -

A councillor shall cease to hold office as such if at any time during his term of office he, -

- (a) becomes disqualified for being a councillor by reason of the provisions of section 10;

section 12 - **Questions as to disqualification to be determined by the Judge.** -

(1) 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.

(2) On a reference being made to the Judge under subsection (1), such councillor shall not be deemed to be disqualified until the Judge after holding an inquiry in the manner provided by or under this Act determines that he has ceased to hold office."

section 16 (1) **Election petitions.** - If the qualification of any person declared to be elected as a councillor is disputed, or if the validity of any election is questioned, whether by reason of the improper rejection by the [State Election Commissioner] of a nomination, or of the improper reception or refusal of a vote, or by reason of a material irregularity in the election proceedings, corrupt practice or any other thing materially affecting the result of the election, any person enrolled in the municipal election roll may at any time within ten days after the result of the election has been declared submit an application to the Judge for the determination of the dispute or question.

14. Section 10 of the Act provides disqualification for being a councillor of a Corporation. It enumerates the grounds on which a person shall be disqualified for being elected and for being a councillor subject to the provisions of section 13 and 404 of the Act. Clause (i) of sub-section (1) of section 10 envisages that if a person has more than two children, such person shall be disqualified for being elected and for being a councillor.

15. Like section 10, section 11 enumerates certain grounds on which a councillor shall cease to hold office as councillor if at any time during his term of office he attracts any of the clauses (a) to (d) of section 11. Clause (a) of section 11 of the Act which is relevant for the present petition in hand, talks about cessation of holding of office by a councillor if he/she becomes disqualified for being a councillor by reason of the provisions of section 10.

16. While interpreting section 11, words of limitation such as 'during the term of office' must receive their due share in the interpretation. For these words "any time during his term of office", it is necessary to refer sections 6 and 6A of the Act. Section 6 provides duration of Corporation. Sub-section (1) of section 6 says that every Corporation, unless sooner dissolved, shall continue for a period of five years from the date appointed for its first meeting and no longer. Section 6A of the Act speaks of 'term of office' of councillors which shall be co-terminous with the duration of the Corporation.

17. Thus, the 'term of office' of councillors is five years, unless sooner a Corporation is dissolved and words 'during the term of

office' restrict the applicability, to any of the disabilities enumerated under section 11 of the Act, incurred by a councillor after the date of first meeting of a Municipal Corporation as stipulated under section 6 of the Act, on being elected as a councillor.

18. If any disability to continue to hold the office as a councillor under section 11 of the Act, arises, 'the judge' as defined under section 2(29) and means in the city of Pune, the Judge of the Court of Small Causes and in any other City, the Civil Judge, Senior Division having jurisdiction in the City, shall hold an enquiry under section 12 of the Act, to determine any such doubt or question referred by the Commissioner on the request of the Corporation constituted under section 5 of the Act, under section 12 of the Act.

19. Section 16 of the Act provides a remedy of Election Petition if the qualification of any person declared to be elected as a councillor is disputed, or if the validity of any election is questioned on any of the grounds mentioned in the said provision. Any person enrolled in the municipal election roll can submit an application under section 16 to 'the Judge' for determination of such dispute or question, within ten days after the result of the election has been declared.

20. According to us, one more provision relating to nomination needs to be referred for proper appreciation of the scheme. Chapter I of Schedule D deals with Election Rules. Rule 9 is relating to nomination of candidates. Sub-rule (1) of Rule 9 says that a person who is qualified to be elected as a councillor under the provisions of

the Act, may be nominated as a candidate at the ward election. Sub-rule (9) of Rule 9 enumerates grounds for rejection of nomination. Clause (a) of sub-rule (9) of Rule 9 provides rejection of nomination if the Returning Officer at the time of scrutiny of nomination after summary enquiry is of the view that on the date fixed for the scrutiny of the nomination, the candidate was either not qualified or was disqualified for being chosen as a councillor under the provisions of the Act.

21. A conjoint reading of the above referred provisions of the Act and Rules makes the scheme clear that two independent remedies are provided. Election dispute by the way of Election Petition under section 16 of the Act, for disqualification which are enumerated under section 10 of the Act pre existing on the date of election. The remedy under section 12 is provided for any disability incurred by a councillor during his term of office i.e after being elected as a councillor. Thus section 12 and section 16 of the Act operate in two independent fields. There are some more factors which further clarify the position that both the said provisions operate in two independent fields, which are as follows.

22. We cannot ignore a notable difference between two different words used by legislature, namely "disqualification" and "disability" in sections 10 and 11, respectively. Word 'disability' connotes state of lacking quality or something which creates difficulty for an individual in executing a task or action. Whereas 'disqualification' connotes to stop someone from being in a competition or doing something

because they are unsuitable or they have done something wrong. Use of two different words by legislature, shows it's intention to provide two independent remedies for two different contingencies i.e. for pre existing disqualification at the time of election and for disqualification incurred after election.

23. It is important to note that under section 12 of the Act, no limitation for raising the dispute is given, as it is provided under section 16 of the Act. Similarly, under section 12, dispute is permitted to be raised by councillor/s only. Whereas Election Petition under section 16 of the Act can be submitted by any person enrolled as a voter for such Municipal election.

24. In addition to remedy under Section 16 by the way of election petition, which can be filed only after the result of election has been declared, remedy to raise objection to nomination is provided during the process of election, under Rule 9 of the Election Rules and any voter to such election can raise objection to the nomination.

25. It must also be considered that in Section 11 of the Act, the words "at the time of his election or appointment" in addition to words "during his term of office", are not used by the legislature. If the intention of the legislature was to include both the situations namely pre-existing disqualification at time of election and disqualification incurred after the election during the term of office, the legislature would have used language as used in Section 16 of the Maharashtra Village Panchayats Act, 1959 i.e. "disqualification at the time of election or appointment and during the term for which the member has been elected or appointed incurs any of the disqualification".

26. In the case of **Consumer Education and Research Society Vs. Union of India and ors.**, reported in **(2009) 9 SCC 648**, the Hon'ble Apex court relied upon two judgments of Constitution Benches in **Election Commissioner of India -vs- Saka Venkata Rao and Brundaban Nayak -vs - Election Commissioner of India** and it is held :

45. Article 101 (3) provides that if a Member of either House of Parliament becomes subject to any of the disqualifications mentioned in Article 102, his seat will thereupon become vacant. Article 103 provides that :

"103. Decision on questions as to disqualifications of members :- (1) if any question arises as to whether a Member of either House of Parliament has become subject to any of the disqualifications mentioned in clause (1) of Article 102, the question shall be referred for the decision of the President and his decision shall be final."

The use of the words "becomes subject to" in Article 101 and in Article 103 clearly demonstrates that these articles contemplate a situation where a sitting MP incurs the disqualification during his tenure and they do not apply to a candidate who held a disqualifying office of profit before being elected as a Member of Parliament.

46. This does not mean that a Member, who was holding a disqualifying office of profit when he was elected and sworn in as an MP, is immune from challenge. Separate provisions deal with pre-election disqualifications. Section 36 of Representation of the People Act, 1951 (hereinafter "the RP Act") provides that the Returning Officer shall examine the nomination papers and shall decide all objections which may

be made to any nomination and may after a summary inquiry, if any, reject the nomination if he is of the view that on the date fixed for the scrutiny of nominations the candidate was either not qualified or was disqualified for being chosen to fill the seat under the provisions of Article 102 or 191. Even if his/her nomination is not rejected and a person holding a disqualifying office of profit, is elected as an MP, an election petition can be filed under section 100(1) (a) of RP Act which provides that if the High Court is of the opinion that on the date of his election, a returned candidate was disqualified from being chosen to fill the seat under the Constitution, the High Court shall declare the election of the returned candidate to be void.

50. Thus, it is clear that where a person was under a disqualification at the time of his election, the provisions of Articles 101(3)(a) and 103 will not apply. He/She will continue as a Member unless the High Court in an election petition filed on that ground, declares that on the date of election, he/she was disqualified and consequently, declares his/her election to be void. It follows, therefore, that if an elected candidate was under a disqualification when he was elected, but no one challenges his/her election, he/she would continue as a Member irrespective of the fact that he/she was under a disqualification when elected.

27. Hon'ble Apex Court, in the case of **State of Himachal Pradesh and Ors., Vs. Surinder Singh Banolta**, reported in **AIR 2007 SC 903**, has held :

16. The provisions of the Act, as noticed hereinbefore, have been enacted pursuant to or in furtherance of the constitutional mandate contained in Part IX of the Constitution of India. The provisions of the Act, therefore,

are required to be construed strictly in terms thereof. Clause (b) of Article 243 O of the Constitution of India mandates that no election shall be set aside save and except by an order passed by the Authorised Officer. In our considered opinion, Section 122 of the Act must be read in the light thereof. Section 162 of the Act expressly provides for the exclusive jurisdiction of the Authorised Officer to determine the existence or otherwise of any ground enumerated in Section 175 of the Act.

17. Once, thus, a person is declared to be an encroacher prior to the date on which he has been declared as elector and if the said order has attained finality, the question as to whether he stood disqualified in terms of the provisions of Section 122 of the Act, in our opinion, must be raised by way of an election petition alone. If the submission of Mr. Attri is to be accepted, the same may result in an anomalous position.

18. If a candidate or a voter had the knowledge that the elected candidate was disqualified in terms of Section 122 of the Act, he may file an application. The order of eviction may come to the notice of some other person after the election process is over. A situation, thus, may arise where two different proceedings may lie before two different authorities at the instance of two different persons. Two parallel proceedings, it is well settled, cannot be allowed to continue at the same time. A construction of a statute which may lead to such a situation, therefore, must be avoided. It will also lead to an absurdity if two different Tribunals are allowed to come to contradictory decisions.

19. Furthermore, it is a well-known principle of law that where literal interpretation shall give rise to an anomaly or absurdity, the same should be avoided. [See Ashok Lanka

v. Rishi Dixit, (2005) 5 SCC 598 and M.P. Gopalkrishnan Nair v. State of Kerala (2005) 11 SCC 45].

20. It is also a well-settled principle of law that in a case where a statute is found to be obscure the same must be interpreted having regard to the constitutional scheme. In a case of this nature, the doctrine of purposive construction should be applied. [See *Bombay Dyeing & Mfg. Co. Ltd.*(3) v. *Bombay Environmental Action Group & Ors.* (2006) 3 SCC 434, *Nathi Devi v. Radha Devi Gupta* (2005) 2 SCC 271, *Lalit Mohan Pandey v. Pooran Singh & Ors.* (2004) 6 SCC 626, *Indian Handicrafts Emporium & Ors., v. Union of India & Ors.*, (2003) 7 SCC 589 and *Balram Kumawat v. Union of India & Ors.*, (2003) 7 SCC 628].

21. It is also well-settled that the entire statute must be read as a whole. The relevant provisions of the Constitution as also those in the statute must, thus, be read harmoniously. [See *Bombay Dyeing (supra)* and *Secretary, Department of Excise & Commercial Taxes and Others v. Sun Bright Marketing (P) Ltd., Chhattisgarh and Another* [(2004) 3 SCC 185]. So read, we are of the opinion that the Division Bench of the High Court was correct in its view. The matter might have been different if Respondent No. 1 was declared to be an encroacher after the election process was over and, thus, becoming disqualified to continue to be an office-bearer of Panchayat or Zilla Parishad.

28. Thus, we have no hesitation to hold that the applicability of sections 11 and 12 of the Act are not inapt, in the context, to include within its scope pre existing disqualification. The remedies for such pre-existing disqualification are 1) by way of raising objection to nomination under Rule 9 of the Election Rules; 2) by filing Election Petition under section 16 of the Act.

29. In the light of above observations we further hold that at the time of General Elections in the year 2017, the petitioner was holding the alleged disqualification under section 10(1)(i) of the Act and the alleged disqualification admittedly was not incurred by the petitioner after being elected in the year 2017, as a councillor and during his term of office as a councillor, therefore to the facts of present case, section 11(a) the Act will not apply.

30. As regards the issue whether Municipal Commissioner is competent to pass an order of disqualification on his own against elected councillor under section 12 of the Act, is no more *res integra*. This Court, in catena of judgments has clearly laid down that the authority contemplated under Section 12 of the Act is “the Judge” and it does not cover “Municipal Commissioner”. The Commissioner is not competent to pass an order of disqualification on his own against the elected councillor. As contemplated by section 12(1) Commissioner is required to make reference to the Judge on a request by Corporation. This position was clearly settled in the following decisions of this court in the matters of -

Faruk Shah Anwar Shah Vs. State of Maharashtra and ors. reported in **2017 (3) Mh.L.J. 210;**
Mallesh Shivan Shetty Vs. Commissioner, Kalyan Dombivali Municipal Corporation and ors., reported in **2016 (3) Mh.L.J. 901;** **Madhukar Deoman Patil Etc. Vs.State of Maharashtra and ors.** reported in **2004 (4) Mh.L.J.485;** **Commissioner Vs. Surjitsing Jeevansing Girniwale,** reported in **2007 (5) All M.R.683;** **Shailesh Manohar Patil Vs.Thane Municipal Corporation and**

ors., reported in 2016 (4) Mh. L.J. 194; Smt. Noorjahan M. Aslam Ansari Vs. State of Maharashtra & Ors., reported in 2004 (2) ALL M.R. 1; Mrs. Sajeda Nihal Ahmed Vs. Malegaon Municipal Corporation & Ors., reported in 2005 (1) ALL M.R. 864

31. In the present matter, undisputedly the Commissioner had on his own, taken up the matter without the authority under section 12 of the Act and disqualified the petitioner as a Councillor. The impugned order is without any force of law and validity. Thus, the impugned order dated 24.8.2019 passed by the Municipal Commissioner suffers from vice of ***corum non judice***. The order which is nullity in the eyes of law cannot be allowed to withstand for a moment also. Accordingly, the impugned order dated 24.8.2019 is hereby set aside. The petition is allowed in above terms. Rule is made absolute accordingly. No costs.

32. In view of disposal of Writ Petition, pending civil applications are disposed of.

(ANIL S. KILOR, J.)

(S.V. GANGAPURWALA, J.)

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