

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 3558 OF 2018

Shri Santosh Vitthal Awate]
Age- 38 Years, Occ. Agriculture]
R/at: At Post Shelgaon,]
Taluka Khed, District-Pune.]...Petitioner

Versus

1. Shri Nagesh Navnath Awate]
Adult, Occ- Agriculture]
R/at: At Post Shelgaon,]
Taluka Khed, District-Pune.]
]
2. State of Maharashtra]...Respondents

Mr. P.B. Bhargude, Advocate for Petitioner.
Mr. Prashant Darandale, Advocate for Respondent No. 1.
Mr. A.R. Patil, APP for Respondent/State.

CORAM : S. S. SHINDE, J
RESERVED ON : 27th August 2019
PRONOUNCED ON : 18th October 2019

JUDGMENT

1. Rule. Rule made returnable and heard with the consent of learned counsel appearing for the parties.

2. This writ petition is filed with the following substantive prayers:-

A) That this Honourable Court be pleased issue writ of certiorari or writ in the nature of certiorari or any other writ, order or direction to quash and set aside the

orders passed in Criminal Entry No. 3795 of 2018 dated 31st July 2018 passed by the Addl. Sessions Judge, Pune, and consequently also be pleased to quash and set aside the order passed by Judicial Magistrate, First Class on 14th December, 2017 passed in Miscellaneous Application No. 5276 of 2017.

B) That this Honourable Court be pleased to issue writ of certiorari or writ in the nature of certiorari or any other writ, order or direction to quash and set aside the Judgment and order passed by Judicial Magistrate, First Class in Miscellaneous Criminal Petition No. 5276 of 2017 dated 14th December 2017.

3. Brief facts leading to filing the present petition are as follows:-

It is the case of the Petitioner that, elections for the Gram Panchayat of Shelgaon, Taluka Khed, District Pune were conducted between 22nd September 2017 and 17th October 2017. The said elections were held to elect representatives of the Gram Panchayat for a period from 2017-2022. In the said election Petitioner and Respondent No. 1 herein were contesting for the post of Sarpanch. The election was held on 16th October 2017 and the counting of votes took place on 17th October 2017. Respondent No. 1 secured 341 votes, while the Petitioner secured 339 votes and the Petitioner lost the election with a small margin of 2 votes. Respondent No. 1 at the time of filing the nomination form had mentioned in the said nomination form that, he was 21 years of age which is a requirement as per the provisions of the

Maharashtra Village Panchayat Act, 1958 as well as the various rules which are framed by the Election Commission of India. It is further the case of the Petitioner that, Respondent No. 1 had not completed the age of 21 years at the time of contesting the said election, and therefore, he could not have contested the election for the said post at all. It is alleged that, the documents which were given in support of the nomination form were all bogus documents. Thereafter, Petitioner tried to find out the real age of the Petitioner herein. In his enquiry he found various documents. After enquiry, the Petitioner challenged the election of Respondent No. 1 under the provisions of Section 14 of Maharashtra Village Panchayat Act, before the Collector, by Application No. 186 of 2017. During the pendency of the said application, when Respondent No. 1 filed his say/written argument, at that time it was disclosed that, he had filed an application before the Judicial Magistrate First Class, being Criminal Miscellaneous Application No. 5276 of 2017 under the provisions of Section 13 (3) of the Registration of Births and Deaths Act, 1969 (for short "said Act"). Said application was filed on 2nd December 2017 and without verifying the documents produced on record an order came to be passed by the learned Magistrate on 14th December 2017 thereby directing to issue a birth certificate, showing the date of Respondent No.1 as 8th August 1996. It is alleged that Respondent No.1 obtained the said order by forging the documents and misleading the JMFC. According to the Petitioner the said date 08/08/1996 is incorrect. It is averred that the Petitioner was not aware of the said order dated

14th December 2017. It was only when on 23rd March 2018, when Respondent No. 1 filed his written submissions before the Collector, that the Petitioner came to know about passing of the said order by Judicial Magistrate First Class. Thereafter the Petitioner made enquiry and came to know that Respondent No.1 obtained the order by misleading the learned Magistrate. Thereafter, the Petitioner preferred a revision, under the provisions of Section 397 of Code of Criminal Procedure, 1973, before the Sessions Court. The said Revision was filed on 31st May 2018. It is further the case of the Petitioner that, without hearing the Petitioner on merits and without appreciating the facts and record as well as the documents produced by the Petitioner and without issuing any notice to Respondent No. 1, the Sessions Court by a cryptic order dated 31st July 2018 summarily dismissed the Revision on the ground that the Sessions Court does not have jurisdiction and the Revision itself is not maintainable against the order passed by Judicial Magistrate First Class. Hence, the present petition.

4. Heard the learned counsel for the parties. Learned counsel appearing for the Petitioner submits that, the learned Sessions Court had not considered the fact that, the Revision Petition is in fact maintainable before the Sessions Court. It is submitted that the Sessions Court has, without hearing the Petitioner on merits and without deciding the Revision on merits, summarily dismissed the same. It is also submitted the revision as filed by the Petitioner is

maintainable under the provisions of the Criminal Procedure Code. The Sessions Court without assigning any reason, by a cryptic order has come to a conclusion that the revision is not maintainable. It is submitted that the age of Respondent No.1 at the time of contesting election is not 21 years as also he is not married, and Respondent No.1 has obtained the said certificates by misleading the learned Magistrate. It is also submitted that Respondent No.1 obtained the said certificate on the ground that he needs the certificate for the benefit of his son. The learned counsel for the Petitioner submits that Respondent No.1 has failed to give explanation before the learned Magistrate about his two aadhar card, one is showing his birth date as 08/08/1996 and other is showing 08/08/1997. It is also submitted that the address shown by Respondent No.1 is not correct. The learned counsel for the Petitioner therefore submits that the Sessions Court has totally lost sight of all the documents produced by Respondent No.1 on record. He also submits that Section 13(3) of the said Act mandates that the Magistrate after verification of the date of birth, shall pass the order. He submits that the orders passed by the both the Courts below are not proper, and the same deserves to be quashed and set aside.

5. It is submitted that, Section 15 of the said Act states that, if it is proved to the satisfaction of the registrar that any 'Entry' of a birth or death in any register kept by him is fraudulently made. Entry is always made by the

Registrar of Births and death and entry which is fraudulently made by the Register can be only corrected by virtue of Section 15 of the said Act. However, an entry which is made in pursuance of the order passed by the Judicial Magistrate under Section 13 (3) cannot be said to be fraudulent entry because that entry is made in pursuance of the order passed by the Judicial Magistrate, First Class. If the fraud is committed upon the Magistrate by supplying him incorrect document to get birth certificate, then it cannot be said that the entry has been fraudulently made, fraud which is contemplated by Section 15, namely the fraud is made upon the Registrar. If a fraud is practiced upon the Magistrate, the Registrar under Section 15 of the said Act, cannot sit in an Appeal or cannot be an adjudicating authority to see whether actually there was a fraud, committed upon the Magistrate or not. Section 15 only empowers him to see whether entry has been fraudulently made or not.

6. It is further submitted that, the word used in Section 13 (3) is order and not entry. Therefore, distinction between “order” and “entry” are two different things. Moreover, if the Judicial Magistrate exercises Executive power, then similarly it can be said that under Section 15 of the Registrar also exercises, its Executive power. Therefore, one Executive Authority cannot sit in an Appeal, over the order passed by Executive Authority, unless there is a substantive provision in a substantive Act or Rules thereunder. It is further submitted that, perusal of the judgment, in Smt. Muniyamma and others Vs. Devgauda and

others, reported in ILR 2013, Karnataka 4703 and the judgment of Gujrat High Court in Air 1998 Guj, 42: Karimbibi Vs Ankleshwar & others, which inter alia refers to the Division Bench of the Orissa High Court, in S.K. Rahimuddin Vs. Ojababedi and others clearly states that, power which is exercised by the judicial Magistrate, creates a valuable right in favour of a person and an obligation against certain persons and therefore he should hold an inquiry and in fact it further goes on to say that, notices should be issued to respondent, and persons likely to be affected by his order and issue a proclamation or in the news papers so as to give them an opportunity of being heard or raise objection. In case an objection is raised the same will have to be decided, if there is serious dispute the magistrate has to dismiss the petition and give liberty to the parties to approach the Civil Court. If this is the case, then the power exercises by the Judicial Magistrate, First Class, is an Adjudicating Power, where the said power is in the light of the said judgment is adjudicatory in nature. Whether it is permissible to say that the order is executive nature?

7. Moreover if the aforesaid judgments hold that, the following of procedure as laid in the aforesaid judgment by Magistrate is mandatory then without compliance of the said mandatory procedure certificate issued will not carry any presumptive value under section 114 of the Evidence Act. See Bharat Shete Vs Rohidas Walhekar 2012 (6) Bom CR 83. The judgment of this Court in Nisar Fatema Vs State 2018 Scc Online Bom 1964, was taken to the Supreme

Court SLP (Cr. Leave to Appeal 7869 of 2018), and the Supreme Court by the order, has dismissed the SLP, keeping the question of law open. If the question of law is kept open by the Hon'ble Supreme Court, can it be said that, the judgment given by the Bombay High Court, is a binding precedent on another Single Judge of this Court.

Moreover in the present petition the order of JMFC is challenged, writ is maintainable against an executive order and that alternative remedy is self imposed restriction and can always be done away with.

8. Learned counsel appearing for Respondent No. 1 relying upon the reasons assigned by the Judicial Magistrate submits that, he has issued certificate keeping in view the relevant record. It is submitted that, under Section 15 of the said Act, a remedy is provided before the Registrar to challenge the order passed by the Magistrate and therefore, revision filed by the Petitioner was not maintainable before the Sessions Court, the Additional Sessions Judge has rightly rejected the said revision as not maintainable. Learned counsel submits that, certificate issued by the Magistrate is keeping in view the documents produced by the Petitioner and after verifying the record and therefore, the order passed by the Magistrate needs no interference. It is submitted that, the said order was passed by the Magistrate in the administrative capacity and therefore, the question if giving hearing to the Petitioner would not arise. The Petitioner is no way concerned with the

issuance of such certificate by the Magistrate in favour of the Petitioner. In support of aforesaid learned counsel contention appearing for Respondent No. 1 pressed into service exposition of law by the learned Single Judge of the Bombay High Court (Coram: Sangitrao S. Patil, J.) in the case of Nisar Fatema d/o Amiruddin Ansari V/s. The State of Maharashtra & Ors, Writ Petition No. 844 of 2018 decided on 3rd August 2018. Therefore, learned counsel submits that, petition may be rejected.

9. Learned APP submits that, function of the Magistrate under Section 13 (3) of the said Act is not judicial and that the Magistrate exercises only executive powers. Therefore, learned APP submits that, petition is devoid of any merits and same may be rejected.

10. Heard learned counsel appearing for the parties at length. With their able assistance perused pleadings and grounds taken in the petition, annexures thereto, so also the other documents placed on record. The contention of the learned counsel for the Petitioner is that, the word used in section 13 (3) of the said Act is “order” and not “entry”. Therefore, distinction between “order” and “entry” are two different things. Moreover, if the Judicial Magistrate exercises Executive power, then similarly it can be said that, under Section 15 of the said Act the Registrar also exercises, its Executive Powers. Therefore, one executive Authority cannot sit in an Appeal, over the order passed by Executive Authority, unless there is a substantive provision in a Bhagyawant

substantive Act or Rules thereunder.

11. The aforesaid contention raised by the learned counsel for the Petitioner is no longer *res integra* and answered by the authoritative pronouncement of the Bombay High Court bench at Aurangabad in the case of Nisar Fatema (supra), wherein after considering scope, ambit and purport of Section 13(3), so also, Section 15 of the said Act, the learned Single Judge ruled that, the function of the Magistrate under Section 13(3) of the said Act is not judicial and, that the Magistrate exercises only Executive powers. The Magistrate after entertaining the application under Section 13(3) of the Act is not inferior Court within the meaning of Section 397 of the Code of Criminal Procedure. Therefore, order passed by the Magistrate under Section 13(3) of the said Act is not revisable under Section 397 of the Code of Criminal Procedure. It appears that, the learned Single Judge subscribed and followed the view taken by the Division Bench of the High Court of Madras in the case of P. Duraisamy Vs. The State represented by the Secretary to Government Department of Home (Prison) Fort. St. George Chennai LEX (MAD) 2017 4 10. The learned Single Judge has also considered the judgment cited by the learned counsel for the Petitioner herein in the case of Karimabibi wd/o Gulam Mohammad Mustufa Karodiawad and others Vs. Ankleshwar Municipality and others AIR 1998 Gujarat 42, and distinguish the same. Learned Single Judge in Para 13 of the said judgment has also observed that, the person aggrieved by

such an entry taking recourse to Section 13 (3) of the said Act, may seek its correction or cancellation by approaching the Registrar under Section 15 of the said Act.

12. The aforesaid judgment is a judgment of co-ordinate bench of equal strength and therefore, it is binding upon this Court. It is not in dispute that, the aforesaid judgment was challenged before the Hon'ble Supreme Court, and the Supreme Court did not cause interference in the impugned judgment and Special Leave Petition was dismissed keeping question of law open. However, as already observed this Court is in full agreement with the view taken by this Court in the case of Nisar Fatema (supra) and therefore, no interference is called for in the order passed by the Additional Sessions Judge, holding that the revision is not maintainable. Hence writ petition stands rejected. Rule stands discharged accordingly.

13. However, in case the Petitioner has locus to challenge the order of issuance of certificate in favour of Respondent No. 1 by the learned Judicial Magistrate under Section 13 (3) of the said Act, the Petitioner can approach the Registrar under Section 15 of the said Act. In case, the Petitioner is advised to approach the Registrar under Section 15 of the said Act, and the Petitioner files proceeding before the Registrar, and in case there is a delay, and if prayer for condonation of delay is made, the Registrar shall keep in view that the Petitioner was prosecuting the present writ petition with bonafide belief that

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same is maintainable. The Registrar shall take liberal approach while considering the prayer for condonation of delay.

14. Needless to observe that, all the issues/questions/aspects are kept open to be agitated by the parties before the Registrar, in case of challenge to the order under Section 13(3) passed by the Judicial Magistrate thereby issuing certificate in favour of Respondent No. 1. This Court has not expressed any opinion on merits, and it is for the Registrar to take appropriate decision in accordance with law.

[S. S. SHINDE , J]