

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.6520 OF 2018
WITH
WRIT PETITION NO.6521 OF 2018
WITH
WRIT PETITION NO.13307 OF 2018

Kamlesh Shobhnath Yadav ...Petitioner
vs.
Geeta Ramashish Yadav and Ors. ...Respondents

WITH
WRIT PETITION NO.6522 OF 2018
WITH
WRIT PETITION NO.9275 OF 2018

Kamlesh Shobhnath Yadav ...Petitioner
vs.
Dinesh Anant Salvi and Ors. ...Respondents

Mr. Y.S. Jahagirdar, Senior Advocate a/w. Mr. P.N. Patil, for the Petitioners.

Mr. Vishal Kanade I/b. Mr. Arun Singh, for Respondent No. 1 in WP. Nos. 6520, 6521 and 13307 of 2018.

Mr. D.D. Singh, for Respondent No. 1 in WP.No. 9275 of 2018 and 6522 of 2018.

Ms. Sheetal Bane, for Respondent No. 2 and 4.

Ms. Priyanka Chavan I/b. Mr. S.B. Shetye, for Respondent No. 3.

Mr. R.P. Kadam, AGP for Respondent-State.

CORAM : M. S. SONAK, J.

JUDGMENT RESERVED ON : MARCH 25, 2019

JUDGMENT PRONOUNCED ON : MARCH 27, 2019

JUDGMENT

- . Heard learned counsel for the parties.
2. The learned counsel for the parties agree that all these Petitions can be disposed of by a common judgment and order. In fact all these Petitions have been instituted by the Petitioners who have been declared as elected as Councillors. Accordingly, all these Petitions are taken up for disposal by a common judgment & order.
3. Rule. Rule in each of these Petitions returnable forthwith with consent and request of learned counsel for the parties.
4. In Writ Petition No. 6520 of 2018 and 6521 of 2018 the challenge is to the order dated 26th April, 2018 in Municipal Election Petition No. 62 of 2017 whereby the learned Judge has dismissed the Petitioners' application below Exhibits 19 and 20 seeking for rejection of the Election Petition by resort to the provision of Order VII Rule 11 of Code of Civil Procedure and in the alternate for framing the preliminary issues as proposed vide Annexure at Exhibit 20.
5. Similarly, in Writ Petition No. 6522 of 2018 and 9275 of 2018

the challenge is to the common order dated 26th April, 2018 made by the learned Judge dismissing the Petitioners' application at Exhibits 25 and 26 in Municipal Election Petition No. 12 of 2017, again for the purpose as aforesaid. The learned counsel appearing in these Petitions made it clear that there is virtually no difference between orders impugned in the present Petitions and the orders impugned in the previous two Writ Petitions.

6. In Writ Petition No. 13307 of 2018, the challenge is to the order dated 9th October, 2018 made by the learned Judge under Exhibit 23 in Municipal Election Petition No. 62 of 2017 rejecting the Petitioner's objection for exhibiting certain documents in the course of trial in the Election Petition.

7. Mr. Y.S. Jahagirdar, learned senior counsel for the Petitioners submit that this was a case where the learned Judge should have rejected the Election Petitions by resort to the provision of Order VII Rule 11 of Code of Civil Procedure. He submits that in the alternate, the issues as proposed by the Petitioners ought to have been framed and decided as preliminary issues or in any case as issues in the trial.

8. Mr. Jahagirdar points out that one of the allegations in the Election Petition is that the Petitioner had made illegal constructions and therefore stands disqualified under Section 16 (1D) of the Mumbai Municipal Corporation Act, 1888 (said Act). He submits that such issues of alleged disqualification have to be determined by the Chief Judge of the Small Causes Court only upon reference and there is no provision whereby any party can directly file a Petition before the Chief Judge seeking disqualification of an elected Councillor. He therefore submit that the learned Judge who has entertained the Election Petition under Section 33 of the said Act, has no jurisdiction whatsoever to order disqualification under Section 16(1D) of the said Act. He points out that this is something which is evident from the bare reading of the Election Petition and therefore the Election Petition ought to have been rejected.

9. Mr. Jahagirdar, learned senior counsel further contended that the learned Judge trying the Election Petition has no jurisdiction to declare the caste certificate produced by the Petitioners as invalid. He points out that one of the ground relates to alleged invalidity of caste certificate of the Petitioner and states

the learned Judge trying the Election Petition has no jurisdiction on account of the bar contained in Section 15 of the Maharashtra Scheduled Caste, Scheduled Tribes, De-notified tribes (Vimukti Jatis) Nomadic Tribes, Other Backward Classes and Special Backward Category (Regulation of issuance and verification of) Caste Certificate Act, 2000. He states that therefore the Election Petitions should have been rejected by resort to provision of Order 7 Rule 11 of Code of Civil Procedure.

10. Mr. Jahagirdar, the learned senior counsel, in the alternate and without prejudice submits that in terms of the said Act only a Chief Judge is empowered to try the Election Petition. He submits that the Chief Judge cannot delegate powers to any other Judge as has been done in the present case and on this count also Election Petitions are liable to be rejected.

11. Mr. Jahagirdar without prejudice to the aforesaid submits that several irrelevant issues have been framed and relevant issues have been omitted by the learned Judge. He points out that the issue of jurisdiction clearly arises in the matter and the same has not been framed. He points out that the issue of corrupt practices

has been incorrectly framed as there are absolutely no pleadings in to the Election Petitions to even suggest that the ground of corrupt practices has been made out. He point out that the issue of limitation arises and yet the learned Judge has refused to frame the same. For all these reasons he submits that the impugned orders are liable to be set aside.

12. Mr. Jahagirdar in context of challenge in Writ Petition No. 13307 of 2018 submits that learned Judge was not justified in postponing the decision on admissibility of the documents and approach of the learned Judge is contrary to the law laid down by the Full Bench of this Court in ***Hemendra vs. Subodh, 2008 (6) Mh. L. J. 886.***

13. Mr. Vishal Kanade, learned counsel for Respondent No. 1 in WP. Nos. 6520 of 2018, 6521 of 2018 and 13307 of 2018 defends the impugned order on the basis of reasoning reflected therein. He submits that none of the grounds raised in these Petitions, attract the provision of Order VII Rule 11 of Code of Civil Procedure. He submits that the issue of Chief Judge not being able to delegate powers was never raised at any stage and therefore cannot be

raised at this stage. He submits that the issues are already framed and the application which came to be rejected were only to delay the trial in the Election Petition.

14. Without prejudice and on basis of instruction, Mr. Kanade states that Respondents will have no objection if the issue regarding to corrupt practices is deleted. For all these reasons, he submits that the Petitions may be dismissed.

15. The rival contentions now fall for determination.

16. The provision of Order VII Rule 11 of Code of Civil Procedure *inter alia* provide for “Rejection of Plaint” where the suit appears from the statement in the Plaint to be barred by any law. If the Petitioners' applications seeking for rejection of the Election Petitions are perused, then it is apparent that no such ground was really made out in the applications. The grounds alleged relate to the dismissal of the Election Petitions *inter alia* on merits or on fundamental issues which require evidence. However, from the perusal of the application, it is quite clear that no grounds as contemplated under Order VII Rule 11(d) of Code of Civil Procedure

were at all made out by the Petitioners. Accordingly, it cannot be said that there is any jurisdictional error in the impugned order.

17. The issue of the jurisdiction of learned Judge or the contention that jurisdiction in such matters is exclusively vested only in the Chief Judge, was never raised. In any case, even this contention was not at all substantiated, based upon such contention, it is not possible to interfere with the impugned orders.

18. In so far as ground under Section 16(1D) of the said Act is concerned, it is necessary to note that Section 16 speaks of disqualified *for being elected* and *for being a councillor*. At least *prima facie* Mr. Kanade is right in his submission that the provision of Section 18 of the said Act apply to situation where it is alleged that any councillor *has become disqualified for office*. This, at least *prima facie* means that disqualification has been incurred after Councillor enters into office. Section 33 of the said Act, under which the Election Petition have been filed, entitles the learned Judge to go into issue as to whether the person was disqualified for being elected as Councillor. This is evident because even Mr. Jahagirdar did not dispute that improper acceptance of nomination

papers is a good ground to question the Election of elected Councillor, by instituting an Election Petition under Section 33 of the said Act. Accordingly, it cannot be said that in an Election Petition under Section 33 of the said Act at least *prima facie* the learned Judge is not entitled to go into the issue of disqualification under Section 16(1D) of the said Act. Besides, as has been held by the learned Judge the provision of Section 33 of the said Act refer to the expression *for any other cause*. At least *prima facie* this clause is wide enough to vest jurisdiction in the learned Judge to go into the issue of disqualification under Section 16(1D). In any case, based upon such contention there was no case made out to reject the Election Petitions by resort to Order VII Rule 11 of Code of Civil Procedure.

19. In so far as the issue of validity of caste certificate is concerned, again there is no dispute that these matters are pending before the appropriate authorities. In fact it is pointed out that the decision of appropriate authorities have been questioned in this Court and proceeding are pending. Depending upon the decision rendered on such issue, the learned Judge can ultimately decide whether the nomination of the Petitioners was correctly

accepted or not. Therefore, there is no case made out to warrant the rejection of the Election Petition on this ground.

20. In so far as the aspect of framing of additional issues or re-framing of issues are concerned, some limited relief is due to the Petitioners. Since Mr. Kanade on the basis of instruction has already conceded that issue relating to corrupt practices can be struck off, such issue is directed to be struck off in both the Election Petitions.

21. Similarly, learned trial Judge is directed to frame the issue of limitation as well as the issue of jurisdiction in the context of provision of Section 16(1D) of the said Act though at least *prima facie* it can not be considered that there is any serious infirmity in the view taken by the learned Judge. The issue is directed to be framed because observations at the stage of deciding application under Order VII Rule 11 Code of Civil Procedure are essentially observation to decide where a case is made out for rejection of the Election Petition at the threshold.

22. Therefore, the learned trial Judge is directed the delete the

issue of corrupt practices in both the Election Petitions and in addition to the same is directed to frame the following issues.

(1) Whether this Court has jurisdiction to try, entertain & dispose of the issue of disqualification under Section 16(1D) of the said Act ?

(2) Whether Election Petition is barred by the law of limitation ?

23. Accordingly, though, no case is made out to interfere with the impugned orders in so far as they reject the Petitioners' applications under Order VII Rule 11 of Code of Civil Procedure, some limited relief as aforesaid is due to the Petitioners, in the matter of deletion of the issue relating to corrupt practices and framing of two additional issues as aforesaid. Therefore, the rule is made partly absolute in the aforesaid terms in Writ Petition Nos. 6520 of 2018, 6521 of 2018, 6522 of 2018 and 9275 of 2018.

24. In so far as the Writ Petition No. 13307 of 2018 is concerned, from the perusal of the impugned order, it is clear that there is no jurisdictional error in the impugned order dated 9th October, 2018. The learned Judge has made it clear that exhibit of documents has nothing to do with the proving of documents and the party

producing the documents will have to prove such documents in accordance with law of evidence. This takes care of apprehension expressed by the Petitioners.

25. In **Hemendra** (supra) the full Bench of this Court has added a word caution that whilst exercising discretion judiciously for the advancement of the cause of justice for the reasons to be recorded, the Court can always work out its own modality depending upon the peculiar facts of each case without causing prejudice to the rights of the parties to meet the ends of justice and not to give the handle to either of the parties to protract litigation. From the perusal of the impugned order, it is clear that discretion has been exercised by he learned Judge act judiciously.

26. There is some substance in the contentions of Mr. Kanade that the Petitioners are trying to protract his trial in the Election Petition and therefore bent upon taking out the proceeding in furtherance of the same.

27. All these Petitions are disposed of with the following order:

(a) The Writ Petition Nos. 6520 of 2018, 6521 of 2018, 6522 of 2018 and 9275 of 2018 in so far as they challenged the impugned order refusing to reject the Election Petitions by resort to Order VII Rule 11 of Code of Civil Procedure are hereby dismissed.

(b) The Writ Petition Nos. 6520 of 2018, 6521 of 2018, 6522 of 2018 and 9275 of 2018 in so far as they challenged the impugned order refusing to delete certain issues or framing certain additional issues are partly allowed. The issue relating to corrupt practices is ordered to be deleted. In addition, the learned Judge is directed to frame the following additional issues.

(1) Whether this Court has jurisdiction to try, entertain & dispose of the issue of disqualification under Section 16(1D) of the said Act ?

(2) Whether Election Petition is barred by the law of limitation ?

(c) The Writ Petition No. 13307 of 2018 is hereby dismissed.

(d) The learned Judge is directed to dispose of the Election Petitions as expeditiously as possible and in any case within a period of six months from today.

(e) The parties to appear before the learned Judge on 4th April, 2019 at 11.00 am so that the Election Petitions can proceed in accordance with law.

(f) The interim orders if any, are vacated.

(g) There shall however no order as to costs.

(M. S. SONAK, J.)