

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****WRIT PETITION NO. 8674 OF 2019**

Taufiq Ismail Shaikh (Paillwan) ... Petitioner.

Vs.

Harun A. Gafoor Sayyad & Ors. ... Respondents.

Mr. B. D. Joshi i/b. Mr. S. Sakhare for the Petitioner.

Mr. Ashok B. Tajane for the Respondent No.1.

Mr. Samir Kumbhakoni for the Respondent No.8 and 9.

CORAM : A. S. GADKARI, J.

DATE : 12th MARCH, 2020

P. C.:-

By the present Petition under Article 227 of the Constitution of India, the Petitioner/Original Defendant No.1 has taken exception to the Order dated 17th March 2018 passed below Exhibit-38 in Election Petition No.64/2017, rejecting his application filed under Section 9 of the Code of Civil Procedure (for short "CPC"). By the said Application under Section 9 of CPC, it was contended by the Petitioner that, the Civil Court has no jurisdiction to entertain and try the said Election Petition.

2 Heard Mr. Joshi, learned counsel for the Petitioner, Mr. Tajane, learned counsel for the Respondent No.1 and Mr.

Kumbhakoni, learned counsel for the Respondent Nos.8 and 9. Perused the entire record annexed to the Petition.

3 The record indicates that, the Petitioner is an elected candidate (Councilor) from Ward No.21-A of the Solapur Municipal Corporation in the general elections held in the year 2017. The Respondent No.1, unsuccessful candidate, has challenged the election of the Petitioner by way of filing Election Petition No. 64 of 2017 on various grounds. One of the grounds raised by the Respondent No.1 in Election Petition is that, on the date of filing of the nomination form, the Petitioner had more than two children and despite the said fact, the Petitioner suppressed it while filling up nomination form, and submitted false information with the Election Commission/Election Officer and also played fraud with the concerned Authority.

4 The Petitioner filed an application below Exhibit-38 under Section 9 of the CPC contending that, in view of the aforesaid ground taken by the Respondent No.1 in Election Petition, it attracts Section 10(1)(i) of the Maharashtra Municipal Corporation Act (for short "the said Act") and therefore, for holding the Petitioner disqualified under the provision of Section 12 of the said Act, the procedure mentioned therein has to be adopted by the

Municipal Commissioner and therefore, the Civil Court does not have jurisdiction to entertain the said Petition. In other words, it is contended that, the Civil Court lacks jurisdiction to try and entertain such Election Petition on the ground as contemplated under Section 10(1)(i) of the said Act. The Trial Court by its impugned Order dated 17th March 2018 has rejected the said Application and directed that, the Election Petition to proceed. The Respondent No.1 filed reply dated 19th April, 2017 below Exhibit 40. As noted earlier, the Trial Court by its impugned Order has rejected the said Application filed below Exhibit 38.

5 Mr. Joshi, learned counsel for the Petitioner submitted that, once the Respondent No.1/Plaintiff takes a ground in the Election Petition that, the Petitioner has more than two children, Section 10(1) of the said Act comes into fray and therefore for holding the petition as disqualified, the Civil Court lacks jurisdiction for conducting proceedings for initiating enquiry under Section 12 of the said Act. It will be the Municipal Commissioner or any other Competent Authority established under the said Act who has jurisdiction for the same.

He further submitted that, where any doubt or dispute arises as to whether, Councilor has seized to hold Office as such

under Section 11 for violation of Section 10(1)(i) of the said Act, the proceedings under Section 12(1) of the said Act are imperative and it has to be conducted by the Municipal Commissioner under the said Act. In support of his contention, he relied upon the following three decisions:-

(i) Sajeda Nihal Ahmed Vs. Malegaon Municipal Corporation & Ors., reported in *2005 0 AIR (Bom) 81 & 2005 1 Mh.L.J. 87*.

(ii) The Commissioner, Nanded Waghala Municipal Corporation Vs. Surjitsing s/o. Jeevansing Girniwale, reported in *2007 (5) ALL MR 683*.

(iii) Noorjahan M. Aslam Ansari Vs. State of Maharashtra and Ors. reported in *2004 (3) Mh.L.J. 435*.

He further submitted that, in view thereof, Civil Court has no jurisdiction and therefore the proceedings which are being conducted by the Civil Court are of nullity. In support of this contention, he relied on the decision of the Hon'ble Supreme Court in the case of *Sarwan Kumar and Another Vs. Madan Lal Aggarwal* reported in *(2003) 4 Supreme Court Cases 147*.

6 Per contra, Mr. Tajane, learned counsel for the Respondent No.1 vehemently opposed the petition and submitted that, only Civil Court alone will have jurisdiction to try and entertain

an Election Petition challenging election of the Petitioner as Councilor of Solapur Municipal Corporation and the Municipal Commissioner or any other Competent Authority established under the said Act will have no jurisdiction to conduct it. He submitted that, it is the categorical allegation of the Respondent No.1 that, the Petitioner has played fraud upon the Election Commission/Authority while contesting the election and therefore the Respondent no.1 has filed the said Election Petition for cancellation of election and declaring the Respondent No.1 as an elected candidate in place of Petitioner. He therefore, prayed that, the present Petition may be dismissed summarily.

7 Mr. Kumbhakoni, learned counsel appearing for the Respondent Nos.8 and 9 supported the arguments of Mr. Tajne and also prayed that, the present Petition may be dismissed summarily.

8 At the outset, it is to be noted here that, the Respondent No.1 in Election Petition has made categorical allegation that, while filing his nomination form for contesting the said election, Petitioner has suppressed material facts that, he has four children. It is also alleged that, the Petitioner has played fraud upon the Election Commission/Authority by submitting false affidavit in that behalf. Though a reference to Section 10(1)(i) of the said Act is made

therein, it is with reference to and in support of the contention of suppression of facts by the Petitioner.

9 A minute perusal of Election Petition would indicate that, the Respondent No.1 in the said petition has not prayed for holding the Petitioner as disqualified, but has in fact prayed for setting aside his entire election on the grounds more specifically mentioned in the Petition. The Respondent No.1 has also prayed that, after setting aside the election of Petitioner, he may be declared as elected candidate from the concerned ward. Undoubtedly, this relief cannot be considered and adjudicated by Municipal Commissioner or by any other quasi judicial Authority established under the said Act and it is only for a Civil Court to declare the same.

Indubitably, questioning election of a Councilor as contemplated under Section 16 is different than holding him disqualified under Section 12 for attracting disabilities under Section 11 for becoming disqualified for being a Councilor under Section 10 of the said Act. It is only the Civil Court which has jurisdiction to entertain and try an Election Petition under Section 16 of the Act, to declare and/or set aside the election of a Councilor and to further declare the Petitioner therein (i.e. the unsuccessful candidate) as an elected candidate. However, under Section 12 of

the Act, it is the 'dispute', whether a Councilor has ceased to hold office as such under Section 11 arises, the Commissioner, shall refer the question to the Judge.

10 There cannot be any quarrel or dispute with respect to the ratio laid down in the aforestated decisions holding that, for conducting an enquiry under Section 10(1)(i) of the said Act, it will be the concerned Competent Authority who has jurisdiction to conduct the said enquiry. It is the settled position of law that in an Election Petition, trial is being conducted and not an enquiry and vice versa the Competent Authority established under the said Act will not have powers to entertain and try an Election Petition.

11 It appears herein that, the Application filed by the Petitioner under Section 9 of the CPC is wholly misconceived and was contrary to the established principles of law. The Trial Court has therefore, rightly rejected the said Application by its elaborate impugned Order. A minute perusal of impugned Order would indicate that, the Trail Court has not committed any error either in law or on facts while passing the impugned Order.

12 The Petition being dehors of merits, is accordingly dismissed.

13 Since the Election Petition is filed in the year 2017, the learned Civil Judge, Senior Division, Solapur seized of Election Petition No. 64 of 2017 is hereby directed to expedite the hearing of the said Petition and conclude it within a period of nine months from the date of receipt of the present Order.

(A. S. GADKARI, J.)