

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

962 WRIT PETITION NO. 4002 OF 2019

Arjun S/o. Bhaurao Borude,
Age: 66 years, Occu: Business,
R/o. Borude Mala, Balikashram Road,
Ahmednagar.

...Petitioner

VERSUS

- 1) State Election Commissioner,
Served to be served on Election
Commissioner, Municipal
Corporation, Ahmednagar.
- 2) Babasaheb S/o. Sonyabapu Wakule,
Age: 55 years, Occu. Business,
R/o. Saevdi Gaon, Bolhegaon Road,
Ahmednagar.
- 3) Bharat S/o. Shriram Khakal,
Age: 45 years, Occu. Business,
R/o. Savedi, Ahmednagar.
- 4) Sarika W/o. Hanumant Bhutkar,
Age: 42 years, Occu: Household,
R/o. Dharmadhikari Male,
Bhutkarwadi, Ahmednagar.
- 5) Aarti W/o. Kisan Buge,
Age: 49 years, Occu; Household,
R/o: Nalegaon, Ahmednagar.
- 6) Manda W/o. Pandurang Gambhire,
Age: 42 years, Occu. Household,
R/o. Ajink Nagar, Bhutkarwadi,
Savedi Road, Ahmednagar.

- 7) Vandana W/o. Vilas Tathe,
Age: 55 years, Occu. Household,
R/o. Tathe Mala,
Pumping Station Road,
Bhutkarwadi, Ahmednagar.
- 8) Manisha W/o. Rajendra Baraskar,
Age: 36 years, Occu. Household,
R/o. Behind Savedi Bus Stand,
Savedi, Ahmednagar.
- 9) Pushpabai W/o. Nivruti Wakale,
Age : 55 years, Occu. Household,
R/o. Behind Hotel Parichay,
Savedi, Ahmednagar.
- 10) Ujwala W/o. Bahirinath Wakale,
Age: 38 years, Occu. Household,
R/o. Arjun Apartment,
Behind Hotel Satyam,
Savedi, Ahmednagar.
- 11) Rani W/o. Gorakh Bhutkar,
Age: 32 years, Occu. Household,
R/o. Bhutkarwadi,
Ahmednagar.
- 12) Rani W/o. Deepak Dangat,
Age: 28 years, Occu. Household,
R/o. Infront of Jankalyan Blood Bank,
Nalegaon, Ahmednagar.
- 13) Ravindra S/o. Raosaheb Baraskar,
Age: 48 years, Occu. Business,
R/o. Savedi Naka,
Ahmednagar.
- 14) Ravindra S/o. Vilas Wakale,
Age: 30 yers, Occu. Business,
R/o. Savedi Naka,
Behind Pressure Pump,
Ahmednagar.

- 15) Akash S/o. Baban Dandwate,
Age: 32 years, Occu. Business,
R/o. Savedi Gaon,
Ahmednagar.
- 16) Raju Bhingardive,
Age: 28 years, Occu. Business,
R/o. Bolhegaon Road, Savedi,
Ahmednagar.
- 17) Kishor S/o. Madhukar Joshi,
Age: 35 years, Occu. Business,
R/o. Dharmadhikari Mala,
Bhutkarwadi, Ahmednagar.
- 18) Pawan S/o. Arun Kumatkar,
Age; 26 years, Occu. Business,
R/o. Bourude Mala,
Ahmednagar.

..Respondents

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Advocate for Petitioner : Shri Dixit Sushant V.
Advocate for Respondent No. 1 : Shri Kadethankar Ajit B.
Advocate for Respondent No. 2 : Shri Kadam Gajanan G.
...

CORAM : N.J. JAMADAR, J.

DATE : 03/03/2021

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard finally, with the consent of the learned counsel for the parties.
2. The challenge in this petition is to an order dated 18th March, 2019 passed by the learned Civil Judge, Senior Division, Ahmednagar on

an application to summon witnesses (Exh. 73), in Election Petition No. 4 of 2018, whereby the learned Civil Judge, Senior Division, Ahmednagar was persuaded to reject the application to summon the witnesses on the premise that the petitioner had not made out a case for exercise of the powers under order XLI Rule 27 of the Code of Civil Procedure, 1908, (the 'Code').

3. The petition arises in the backdrop of following facts :-

a) The petitioner and the respondents No. 2 to 18 had contested election to the Ahmednagar Municipal Corporation, from Ward No. 6-B. Respondent No. 2 was declared elected. The petitioner assailed the election of respondent No. 2 by filing Election Petition No. 4 of 2018. It was the contention of the petitioner that respondent No. 2 had incurred dis-qualification as he has more than two children. The petitioner sought to substantiate the said claim by seeking witness summons to Dr. Nanasaheb Akolkar and Dr. Sunita Akolkar for production of documents as well as to depose before the Court.

b) The respondent No. 2 resisted the said application.

c) The learned Judge, after hearing the submissions on behalf of the petitioner and respondent No. 2, rejected the application opining that the proceedings before the learned judge were in the nature of an

appellate proceeding and it was governed by the provisions contained in order XLI Rule 27 of the Code. Thus, by the impugned order the application came to be rejected.

4. Heard learned counsel for the petitioner and learned counsel for respondents No. 1 and 2.

5. Learned counsel for the petitioner would urge that the learned Judge has completely misapplied the provisions contained in Section 434 of The Maharashtra Municipal Corporations Act, 1949, (the 'Act'). In the process, according to the learned counsel for the petitioner, the learned Judge lost sight of the provisions which govern the proceedings before the learned Judge. The attention of the Court was invited to the provisions contained in Section 2 (29) of the Act, which defines the term 'Judge'. Section 16, which provides for an election petition, and Section 418, which vests learned Judge with powers to summon the witnesses and compel the production of documents. In the face of these provisions, according to learned counsel for the petitioner, the impugned order is wholly unsustainable.

6. In opposition to this, the learned counsel for respondent No. 2 Shri Kadam submitted that the petitioner who has not approached the Court with clean hands is unworthy of any relief, especially in exercise of

the extraordinary writ jurisdiction. To this end, the learned counsel for respondent No. 2 invited the attention of the Court to the fact that for the same relief the petitioner had filed two prior applications : (Exh. 69), which was eventually not pressed, and (Exh. 71), which was rejected by the learned Judge by an order dated 07th March, 2019. Moreover, the witness to whom the petitioner sought to examine had himself appeared before the learned Judge and sought impleadment in Election Petition No. 4 of 2018, making serious allegations against the petitioner. The said application came to be rejected by the learned Judge by an order dated 21st January, 2019. However, the third party-applicant was given liberty to be heard in respect of the medical certificate allegedly issued by the said third party.

7. The learned counsel for respondent No. 2 urged with a degree of vehemence that there is a total suppression of aforesaid facts and the petitioner has approached the Court as if, for the first time, the prayer to issue summons to the witnesses came to be rejected. The aforesaid conduct of the petitioner, according to the learned counsel for respondent No. 2, dis-entitles him from equitable relief.

8. To begin with, reference to the relevant provisions of the Act, would be apposite.

Section 2 (29) of the Act defines the 'Judge' as under :

“29) "the Judge" 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]”

Section 10 of the Act enumerates the disqualifications for being a councillor. **Clause -(i) of Sub Section -(1)** disqualifies the person who has more than two children.

Section 16 of the Act reads as under :-

“16. Election petitions. - (1) If the qualification of any person declared to be elected 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.”

9. It is evident that the election petitions are tenable questioning both the qualification of a person to be elected as Councilor, as well as the validity of an election. An election is to be challenged by submitting an application to the Judge for determination of the dispute or question in that regard. In this context, the legality and correctness of the impugned order is required to be tested.

10. The learned Judge relied upon the provisions contained in

Section 434 of the Act. It reads as under :-

“434. Code of Civil Procedure to apply. - (1) Save as expressly provided by this Chapter the provisions of the Code of Civil Procedure, 1908 relating to appeals from original decrees shall apply to appeals to the Judge from the orders of the Commissioner and relating to appeals from appellate decrees shall apply to appeals to the District Court.

(2) All other matters for which no specific provision has been made under this Act shall be governed by such rules as the [State] Government may from time to time make after consultation with the High Court.”

11. From the phraseology of Sub Section (1) of Section 434, it becomes abundantly clear that the provisions relating to an appeal from original decrees shall apply to the appeals to the Judge from the orders of the Commissioner and relating to appeals from the appellate decrees shall apply to the appeals to the District Court. The provisions which regulate the appeals under the Code thus become applicable when appeals lay before the Judge from the orders of the Commissioner under the provisions of the Act. The learned Judge, in the instant case, has clearly misapplied the provisions of Section 434 of the Act to the facts of the case.

12. The submission on behalf of respondent No. 2 that despite misapplication of the provisions the order impugned is otherwise sustainable, especially in the backdrop of the conduct of the petitioner,

appears attractive at the first blush. However, it does not carry much conviction. The learned Judge has not adverted to the necessity, desirability and justifiability of summoning the witnesses as sought by the petitioner. In short, merits of the prayer of the petitioner has not at all been adverted to. The learned Judge, on the contrary, was influenced by the provisions contained in Section 434 of the Act, which do not govern the issue then agitated before the learned Judge. All the contentions which respondent No. 2 has raised before this Court can very well be urged before the learned Judge while considering the justifiability of prayer to summon the witnesses.

13. In view of the above, the petition deserves to be allowed. Hence the following order is passed :

ORDER

- a) The petition stands allowed.
- b) The impugned order dated 18th March, 2019 passed by the learned Judge on the application (Exh. 73) stands quashed and set aside.
- c) The learned Judge shall decide the application (Exh. 73) afresh after providing an effective opportunity of hearing to the parties.

- d) All the contentions of all the parties are kept open for the consideration.
- e) The observations made by this Court in this order are only for the purpose of determining the instant petition and they shall not be construed as an expression of opinion on the merits of the matter.
- f) Rule made absolute in aforesaid terms.

(N.J. JAMADAR)
JUDGE

mahajansb/