IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

WRIT PETITION NO. 2482/2023

(KHAIRUNISA SHEIKH CHAND **VERSUS** CHANDRASHEKHAR DAULATRAO CHINCHOLKAR & OTHERS)

Office Notes, Office Memoranda of Coram, appearances, Court's orders of directions and Registrar's orders.	*Court's or Judge's order*

Shri Sukrut Sohoni, counsel for the petitioner.
Shri Ram Karode, counsel for the respondent no.1.
Ms Sangita Jachak, Assistant Government Pleader for the respondent nos.3 and 4.

CORAM : A. S. CHANDURKAR AND MRS VRUSHALI V. JOSHI, JJ.

DATE ON WHICH ARGUMENTS WERE HEARD : JUNE 20, 2023
DATE ON WHICH ORDER IS PRONOUNCED : AUGUST 19, 2023

The question referred to the Division Bench for consideration is "whether the expression 'two children' used in Section 14(1)(j-1) of the Maharashtra Village Panchayats Act, 1959 (for short, 'the Act of 1959') has been used in a generic sense so as to include all children from the present or previous spouse or whether said expression had been used in a restricted sense to mean that only children born from the present spouse" ?

2. At the outset, we may indicate the reasons for the question being referred to the Division Bench. The petitioner herein came to be disqualified as the Member of the Gram Panchayat under Section 14(1)(j-1) of the Act of 1959 on the ground that she had more than three children after the cut-off date. It is her case that her husband Sheikh Chand had two sons from the earlier marriage and the third child was born from the marriage with the petitioner. The petitioner was held to be disqualified by the Divisional Commissioner and that order was challenged in the present writ petition. The decision in *Girika Badamrao Pandit Versus State of Maharashtra & Others* [**2012(5) Mh.L.J. 658**] was relied upon by the counsel for the petitioner to urge that the disqualification was not attracted since she had only one child from her marriage. After considering the said decision alongwith the decision

in *Ashok Balasaheb Chaugule Versus The State of Maharashtra & Others* [**2012 (6) Mh.L.J. 782**] wherein cognizance of children born from the petitioner's earlier marriage was also taken, the learned Single Judge expressed his inability to agree with the observations in *Girika Badamrao Pandit* (supra) that the expression 'çhildren' could not be adopted in a generic term and instead it ought to include all children whether from the present or earlier spouse living or no more and also including the step children. In view of such disagreement, the aforesaid question has been referred to the Division Bench.

3. In *Girika Badamrao Pandit* (supra) an objection was raised to the nomination form of the respondent no.3 therein on the ground that she had five children of which one child was born after the cut-off date. As a result, she was not qualified to contest the elections in view of the provisions of Section 16(1)(k) of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965. The Returning Officer had rejected the nomination form of the respondent no.3 but the appeal preferred by her came to be allowed by the District Court. While challenging the order passed by the District Court, it was urged that since the respondent no.3 was married to one Shantilal who had four issues from his first wife and on his marriage with the respondent no.3 after the death of his first wife had another child, the respondent had thus five children. This contention was turned down by holding that the respondent no.3 had only one child from her marriage with Shantilal. Though Shantilal had four issues from his earlier wife who had expired, the step children of the respondent no.3 could not be taken into consideration for holding that the respondent no.3 had more than two children. The learned Single Judge further observed that had Shantilal been the candidate then it would have been a different case and as the respondent no.3 had given birth to only one child she was not disqualified from contesting the elections.

In *Ashok Balasaheb Chaugule* (supra) the petitioner had married one Vijayalaxmi and from that wedlock had one son. The petitioner thereafter married Annapurna and had two children from this wedlock. It was held that the petitioner had incurred disqualification and was thus removed from the membership of the Gram Panchayat. It was urged before the learned Single Judge that the petitioner had one son from the previous wedlock and after being separated by virtue of divorce by mutual consent, the petitioner had re-married and from the subsequent wedlock had two children. The petitioner therefore was not disqualified under Section 14(1)(j-1) of the Act of 1959. The learned Single Judge held that the object behind introducing the said provision was population control, public health and morality. The intention was not to allow persons who are disqualified or ineligible and of doubtful character whose morality is at stake to represent people in elected office. Hence to allow the petitioner to get away by urging that as his first marriage had come to an end, the children from the second marriage alone should be taken into consideration would mean that the number of children would be required to be computed *qua* the number of marriages contracted. The same was not permissible and the disqualification of the petitioner for having more than two children was upheld.

4. Shri Sukrut Sohoni, learned counsel for the petitioner submitted that the expression 'two children' in Section 14(1)(j-1) of the Act of 1959 was used in a restricted sense to mean only biological children to be considered as leading to the disqualification. According to him, the stepchildren of the 'person' or the spouse were not liable to be taken into consideration for applying such disqualification. According to the learned counsel, the decision in *Girika Badamrao Pandit* (surpa) correctly interpreted the *pari materia* provisions in that regard. He referred to the decision in *Javed & Others Versus State of Haryana & Others* [**(2003) 8 SCC 369**], *Ibrahim Ashraf Patel & Another Versus Jamrood Bee Nizamoddin Kazi Since deceased through L.Rs. & Others* [**2001(3) Mh.L.J. 886**], *Mukhtar Ahmad & Others Versus Mahmudi Khatoon*

& Others [**AIR 2011 Jhar 28**], Mukhtar Ahmad & Another Versus Mahmudi Khatoon & Others [**2010(2) JLJE 636**] and *Kallu Khan (deeased through L.Rs Smt.Basiran Bi & Others Versus Abdul Aziz (Dr.) & Others* [**2007(4) MPLJ 498**] to urge that the disqualification was restricted only to the biological children of the 'person' are concerned.

5. On the other hand Shri Ram Karode, learned counsel for the respondent no.1 referred to the decision in *Janabai Versus Additional Commissioner & Others* [**2018(5) Mh.L.J. 921**] to urge that the expression 'person' was considered by the Hon'ble Supreme Court in the context of Section 14(1)(j-3) in a wide manner. The same was not liable to be narrowly construed so as to render the issue of number of children in the context of disqualification to become redundant. Reference was made to the decision in *Devidas Motiramji Surwade Versus Additional Commissioner, Amravati & Others* [**2017(1) Mh.L.J. 102**], the judgment of the Karnataka High Court in **Criminal Petition No. 8508 of 2022** [*Khaleel Ul Rehman & Others Versus Sharaffunnisa Muniri @ Ashraf Unnisa*] decided on 02.03.2023 and the judgment of the Hon'ble Supreme Court in **Special Leave Petition (C) No. 18571 of 2018** [*Mukesh Kumar & Another Versus The Union of India & Others*] in that regard. According to him, the view as taken in *Ashok Balasaheb Chaugule* (supra) was the correct view since the same had nexus with the object sought to be achieved behind the enactment of Section 14(1) (j-1) of the Act of 1959.

Ms Sangita Jachak, learned Assistant Government Pleader appearing for the Collector submitted that the disqualification was attracted when the biological parent had more than two children and only in that context the disqualification under Section14(1)(j-1) would stand attracted.

6. Clause (j-1) to Sub-section (1) of Section 14 which has been inserted pursuant to Maharashtra Act XLIV of 2000 reads as under :-

"*14. Disqualifications.*

[1] No person shall be a member of a panchayat continue as such, who –

(j-1) has more than two children:"

Explanation 5 for the purposes of Clause (j-1) reads as under :-

"*(i) where a couple has only one child on or after the date of such commencement, any number of children born out of a single subsequent delivery shall be deemed to be one entity;*

(ii) 'child' does not include an adopted child or children"

7. A perusal of Section 14(1) indicates that it provides for various disqualifications which if incurred render a member of the panchayat disabled to continue as such. Sub-Section (1) of Section 14 refers to various disqualifications including conviction under the Statutes mentioned therein, being adjudged by a Competent Court to be of unsound mind or being adjudicated as an insolvent and not having obtained discharge, etc. The disqualification is attracted in various situations enumerated in Section 14(1) of the Act of 1959. The object behind prescribing these disqualifications is to render such 'person' who has suffered the prescribed disqualification disentitled to continue as the member of the panchayat. In the light of various distinct disqualifications being prescribed therein the expression 'person' would have to be construed when applied to the disqualification in question. In other words, the expression 'person' would have to be interpreted by keeping in mind the nature of disqualification prescribed.

8. In *Javed* (supra) the challenge to the vires of Sections 175(1)(q) and 177(1) of the Haryana Panchayati Raj Act, 1994 was considered. Under Section 175(1) no person being a Sarpanch, Upa-Sarpanch of a Gram Panchayat or a Member of a Panchayat Samiti or Zilla Parishad could continue as such if he/she had more than two living children in view of Clause (q) thereof. While considering whether such classification was arbitrary it was held that the number of children prescribed was based on legislative wisdom and was in the nature of a policy. The disqualifications prescribed had a nexus with the purpose sought to be achieved by the Act. The validity of said provisions was upheld since they sought to achieve a laudable purpose being

consistent with the National Population Policy. It was then held that the disqualification on the right to contest an election by having more than two living children did not contravene any fundamental right nor did it cross the limits of reasonability. The observations in paragraphs 62 and 63 of the aforesaid decision require reference and the same read as under : -

> "*62. It was submitted that the enactment has created serious problems in the rural population as couples desirous of contesting an election but having living children more than two, are feeling compelled to give them in adoption. Subject to what has already been stated hereinabove, we may add that disqualification is attracted no sooner a third child is born and is living after two living children. Merely because the couple has parted with one child by giving the child away in adoption, the disqualification does not come to an end. While interpreting the scope of disqualification we shall have to keep in view the evil sought to be cured and purpose sought to be achieved by the enactment. If the person sought to be disqualified is responsible for or has given birth to children more than two who are living then merely because one or more of them are given in adoption the disqualification is not wiped out.*
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> *63. It was also submitted that the impugned disqualification would hit the women worst, inasmuch as in the Indian society they have no independence and they almost helplessly bear a third child if their husbands want them to do so. This contention need not detain us any longer. A male who compels his wife to bear a third child would disqualify not only his wife but himself as well. We do not think that with the awareness which is arising in Indian womenfolk, they are so helpless as to be compelled to bear a third child even though they do not wish to do so. At the*

> *end, suffice it to say that if the legislature chooses to carve out an exception in favour of females it is free to do so but merely because women are not excepted from the operation of the disqualification it does not render it unconstitutional.*"
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> (emphasis supplied)

9. The observations to the effect that if a person sought to be disqualified is responsible for or has given birth to children more than two who are living have been made keeping in mind the purpose sought to be achieved and the evil sought to be cured. Further observations that a male who compels his wife to bear a third child would disqualify not only his wife but himself as well are also material and the same would have to be borne in mind in the present context. In the light of the observations in paragraphs 62 and 63 referred to hereinabove, it becomes clear that the expression 'person' is required to be applied in the context of a male member who is responsible or who has fathered more than two children and in the context of a female member who has given birth to children more than two. These children could be from the same wedlock or any earlier wedlock of either spouse. Where the earlier wedlock of such male or female member has resulted in the birth of a child/ children, the same cannot be excluded while considering as to whether such male/female member has incurred disqualification under Section 14(1)(j-1) of the Act of 1959. To put it otherwise, if a male member through his previous wedlock has fathered a single child and in his subsequent wedlock has fathered two children, the disqualification would be attracted since such male member is responsible for having more than two children in view of Clause (j-1) to Sub-section (1) of Section 14 of the Act of 1959. Similar analogy would apply if a female member has given birth to a child/children from her earlier wedlock and has again given birth to children/child in her subsequent wedlock resulting in she being the mother of more than two children in terms of Clause (j-1) to Sub-section (1) of Section 14 of the Act of 1959. The children born only from the present wedlock of a male/female member would not govern the

situation when such male/female member has had a previous wedlock and has a child/children born from such wedlock.

It will therefore have to be held that the expression 'two children' relates to the 'person' who is a member of a panchayat and who is sought to be disqualified under Clause (j-1) to Sub-section (1) of Section 14. In case of a male member, if he is responsible for the birth of more than two children irrespective of the number of wedlocks, the disqualification would be attracted. Same analogy would apply to a female member when she has given birth to more than two children irrespective of the fact that the child/children are born from the previous or present wedlock.

10. At this stage, it would be necessary to refer to the decision of the Hon'ble Supreme Court in *Janabai* (supra). Therein challenge was raised to the disqualification of *Janabai* to her continuing as Member of the Gram Panchayat on the ground that there had been encroachment upon Government land since 1981 by her father-in-law as well as her husband and that she was using the said land. The question considered therein was with regard to construing the word 'person' in the context of Section 14(1)(j-3) of the Act of 1959 as regards the issue of 'encroachment' in the context of disqualification. The Hon'ble Supreme Court considered its earlier decision rendered in the case of *Sagar Pandurang Dhundare Versus Keshav Aaba Patil & Others* [**2018(1) Mh.L.J. (S.C.) 1**] wherein it was held that the beneficiary of such encroachment was not liable to be removed under Section 14(1)(j-3) of the Act of 1959 since such encroachment was committed by the predecessor of the elected member and not the said member himself. After referring to the provisions of Section 53 as well as Section 184 of the Act of 1959, the Hon'ble Supreme Court held in paragraph 29 as under :-

> "*29. We may note here with profit that the word 'person' as used in section 14(1)(j-3) is not to be so narrowly construed as a consequence of which the basic issue of "encroachment" in the context of disqualification becomes absolutely redundant. The legislative intendment,*

> *as we perceive, is that encroachment or unauthorized occupation has to be viewed very strictly and Section 53, therefore, provide for imposition of daily fine. It is also to be borne in mind that it is the Panchayat that has been conferred with the power to remove the encroachment. It is the statutory obligation on the part of the Panchayat to protect the interest of the properties belonging to it. If a member remains in occupation of an encroached property, he/she has a conflict of interest. If an interpretation is placed that it is the first encroacher or the encroachment made by the person alone who would suffer a disqualification, it would lead to an absurdity. The concept of purposive interpretation would impel us to hold that when a person shares an encroached property by residing there and there is continuance, he/she has to be treated as disqualified. Such an interpretation subserves the real warrant of the provision. Thus analysed, we are of the view that the decision in Sagar Pandurang Dhundare (supra) does not lay down the correct position of law and it is, accordingly, overruled.*"

11. The aforesaid decision thus held that while interpreting the word 'person' as used in Section 14(1)(j-3) of the Act of 1959 it could not be narrowly construed so as to render the basic issue of 'encroachment' in the context of disqualification becoming absolutely redundant. The village panchayat having been conferred with the power to remove encroachment and it being the statutory obligation on the part of village panchayat to protect the properties belonging to it, it was clear that if such member remains in occupation of an encroached property, he/she would have a conflict of interest. Adopting the principle of purposive interpretation, the Hon'ble Supreme Court held that when a person shares an encroached property by residing there and continues to do so he/she has to be treated as disqualified and such interpretation would subserve the intention behind the said provision. The earlier decision in *Sagar Pandurang Dhundare* (supra) rendered by a Bench of two Hon'ble Judges was accordingly overruled.

In our view, the word 'person' occurring in Section 14(1) of the Act of 1959 when applied in the context of Clause (j-1) would refer to the member itself. The object is to disqualify such 'person' who is responsible for or who has given birth to children more than two. The object behind the said provision is to disable such 'person' from continuing as member of the panchayat if he is responsible for giving birth to more than two children or she has given birth to more than two children irrespective of such children being born from the previous or present wedlock. It is not the object of the said provision to discourage re-marriage of a spouse who has more than two children from his/her previous wedlock. Hence, in the present context, the word 'person' would mean the member of the panchayat alone. When the member of the panchayat is a male, he would be disqualified if he is responsible for the birth of more than two children, irrespective of the number of wedlocks. Similarly, when the member of the panchayat is a female, she would be disqualified if she has given birth to more than two children, irrespective of the number of wedlocks. The ratio of the decision in *Javed* (supra) guides us in this regard.

12. The learned Single Judge in *Girika Badamrao Pandit* (supra) has held that for incurring such disqualification it is the person concerned meaning the member who should have more than two children. The step children of such person cannot be included in the term 'çhildren'. Similarly, in *Ashok Balasaheb Chaugule* (supra) the candidate therein had one child from his previous wedlock and after separation having re-married had two children from the subsequent wedlock. The disqualification was stated to be attracted and the ground that the earlier marriage had come to an end was not permitted to be taken since the same would have defeated the object behind prescribing such disqualification. Both these decisions correctly consider the provisions in that regard.

13. The question as referred is answered as under:-

The expression ‘two children’ used in Section 14(1)(j-1) of the Maharashtra Village Panchayats Act, 1959 in the context of a male ‘member’ would include all his children for whose birth he is responsible, irrespective of the fact that they were born from his previous and/or present wedlock. In the context of a female ‘member’, it would include all children whom she has given birth to, irrespective of the fact that they were born from her previous and/or present wedlock. The expression ‘two children’ has direct nexus with the word ‘member’ as used in Section 14(1)(j-1) of the Act of 1959.

14. The writ petition be placed before the learned Single Judge for its consideration on merits.

(MRS. VRUSHALI V. JOSHI, J.) (A. S. CHANDURKAR, J.)

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