

BOMBAY HIGH COURT

Dattatraya

Vs.

Prabhakar

Civil Revn. Appln. No. 303 of 1968

(Kantawala, C.J., Tulzapurkar and Masodkar, JJ.)

07.02.1974

JUDGEMENT

Kantawala, C.J.

1. Applicant Dattatraya Narhar Pitale has filed this Revision Application against the order of the learned Extra Assistant Judge, Amraoti setting aside his election to Amraoti Municipal Council from Ward No. 25. The Elections to Amraoti Municipal Council were held in July, 1967 under the Maharashtra Municipalities Act, 1965 (hereinafter referred to as 'the Act'). There were several Wards within the limits of Amraoti Municipal Council and from Ward No. 25 there were 3 candidates viz. the applicant, opponent No. 1 and opponent No. 2. The applicant secured highest number of votes viz. 352 while opponent Nos. 1 and 2 respectively secured 203 and 198 votes. As the applicant secured highest number of votes, he was declared elected.

2. On August 21, 1967 opponent No. 2 filed an election petition under Section 21 (1) of the Act challenging the validity of the election of the applicant. The only ground on which the validity of the election was challenged was that the wife of the applicant was employed as the Head-Mistress in Municipal Marathi Girls I. E. M. School, Amraoti, that she was residing with the applicant in the same house and that accordingly the applicant was disqualified under Section 16 (1) (i) of the Act. This election petition was heard before the learned Extra Assistant Judge. It was admitted on behalf of the applicant before him that the wife of the applicant was residing with him and that she was employed as the Head-Mistress in the Municipal School. But on his behalf two contentions were raised before the learned Judge; firstly it was contended that having regard to the provisions of Rule 15 (1) of the Maharashtra Municipalities Election Rules, 1966 (hereinafter referred to as 'the Rules') and Section 44 of the Act, it was not permissible to opponent No. 2 to challenge the validity of his election on the ground that the applicant was disqualified having regard to the provisions of Section 16 (1) (i) of the Act: secondly it was contended that the mere employment of his wife as Head- Mistress in the Municipal School was

not a disqualification within the meaning of Section 16 (1) (i) of the Act. Both these contentions of the applicant were rejected by the learned Judge and by his Order dated July 21, 1968 set aside the election.

3. It may incidentally be observed that while these proceedings were pending one Suganchand Choudhari initiated proceedings before the Collectors Amravati under Section 44 of the Act for declaring that by reason of the employment of the wife of the applicant he was disqualified within the meaning of Section 16 (1) (i) of the Act, that he was disabled from continuing to be a Councilor and the Office ought to be declared vacant. In these proceedings the Collector decided against Suganchand Choudhari and took the view that the applicant incurred no disqualification within the meaning of Section 16 (1) (i) of the Act.

4. Against the order passed by the learned Extra Assistant Judge the applicant has come in revision before us.

5. This revision application initially came up for hearing before Gatne J. but the learned Judge found that there were some conflict amongst the decisions of the Division Bench of this Court and he thought it proper to refer this matter to the Full Bench for decision. Accordingly the matter has come up before us for decision.

6. Mr. Deshpande on behalf of the applicant contended that in a petition under Section 21 of the Act the election of a successful candidate can only be challenged on the ground that he is guilty of corrupt practice and that it is not permissible in such a petition to urge by way of a ground a plea as regards disqualification of Councilor as contemplated by Section 16 (1) (i) of the Act. His argument is that disqualification on the ground of Section 16 (1) (i) can only be agitated in proceedings as can be resorted to as provided by Section 44 of the Act Secondly he contended that by the mere fact that the wife of the applicant was employed as the Head-Mistress in Municipal Marathi Girls I. E. M. School the applicant was not disqualified within the meaning of Section 16 (1) (i) of the Act.

7. The Act was enacted with a view to provide for a unified pattern for the constitution, administration and powers of municipalities in the State of Maharashtra and make better provision therefore. Before it was enacted a Committee was appointed by the Government of Maharashtra to advise it on the matters to be covered by this Act and after considering the report of the said Committee it was considered expedient to unify, consolidate and amend the law relating to municipalities in the State.

8. The word "Councilor" is defined in Section 2 (7) and it means a person who is duly elected or co-opted or nominated as a member of the Council. Chapter II deals with Municipal Councils. Sections 10 to 20 therein pertain to election and publication of names of elected, co-opted and nominated Councilors. Section 21 deals with disputes in respect of election, co-option or

nomination of Councilors. Section 15 in the above group of Sections deals with qualification for candidates. Under that Section every person whose name is included in the list of voters maintained under Section 11 and who is not disqualified for being elected a Councilor under this Act or any other law for the time being in force, shall be qualified and every person whose name is not included in the list or who is so disqualified for being a Councilor, shall not be qualified to be elected as a Councilor at any election. Section 16 deals with disqualification for becoming a Councilor. There are several disqualifications enumerated in sub-section (1) thereof and we are concerned with disqualification contained in clause (i) of sub-section (1). It provides that no person shall be qualified to become a Councilor whether by election, co-option or nomination, who, save as hereinafter provided has directly or indirectly, by himself or his partner, any share or interest in any work done by order of a Council or in any contract with or under or by or on behalf of a Council. Section 17 confers power to make rules regulating elections upon the State Government. Under that section the State Government may make rules to provide for or to regulate matters in respect of elections to be held under this Act. In sub-section (2) thereof various specific matters are mentioned and without prejudice to the generality of the foregoing powers conferred by sub-section (1) the State Government may make rules with regard to all or any of the matters mentioned therein viz. *inter alia* the nomination of candidates, form of nomination paper, objections to nominations, security of nominations and appeals against acceptance or rejection of nomination papers. Section 18 provides for circumstances under which a duly qualified person can be nominated by the State Government. Provision is made as regards disputes in respects of election, co-option or nomination of Councilors in Section 21. The material part of Section 21 is as under:-

"21. (1) : No election, co-option or nomination of a Councilor may be called in question, except by a petition presented to the District Court by a candidate at the election or by any person entitled to vote at the election within ten days after the publication of the names of the Councilors in the Official Gazette under Section 19 or 20, as the case may be."

(2) Any such petition :

(a) shall contain a concise statement of the material facts on which the petitioner relies,

(b) shall, with sufficient particulars, set forth the ground or grounds on which the election, co-option or nomination is called in question, and

(c) shall be signed by the petitioner and verified in the manner laid down in the Civil Procedure Code, 1908, for the verification of pleadings.

(3) A petitioner may claim all or any one of the following declarations:-

(a) that the election of all or any of the returned candidates is void; or

(b) that the election of all or any of the returned candidates is void and that he himself or any other candidate has been duly elected; or

(c) that the co-option or nomination of all or any of the co-opted or nominated Councilors is void.

(4) xx xx xx

(5) Such petition shall be inquired into and disposed of by the District Judge or by any

Judge not lower in rank than an Assistant Judge to whom the case or such cases generally may be referred to by the District Judge.

(6) xx xx xx

(7) xx xx xx

(8) xx xx xx

(9) The Judge, after such inquiry as he deems necessary, may pass suitable order and his order shall be conclusive.

(10) If the petitioner has, in addition to calling in question the election of the returned candidate, claimed a declaration that he himself or any other candidate has been duly elected and the Judge is satisfied that

(a) the petitioner or such other candidate received sufficient number of valid votes to have been elected; or

(b) but for the votes obtained by the returned candidate by corrupt practices the petitioner or such other candidate would have obtained sufficient number of valid votes to have been elected, the Judge may after declaring the election of the returned candidate void, declare the petitioner or such other candidate to have been duly elected :

Provided that-

(i) for the purpose of such computation, no vote shall be reckoned as valid if the Judge finds that any corrupt practice was committed by any person known or unknown in giving or obtaining it:

(11) after such computation, if any, equality of votes if found to exist between any candidates and the addition of one vote would entitle any of the candidates to be declared elected, one additional vote shall be added to the total number of valid votes found to have been recorded in favour of the candidate or candidates, as the case may be, selected by lot drawn in the presence of the Judge in such manner as he may determine.

(11) Where any charge is made in the petition of any corrupt practice, the Judge shall make an order recording the names of all persons including any candidates, if any, who have been proved at the trial to have been guilty of any corrupt practice and the nature, of that practice and may disqualify any such person for becoming a Councilor or a Councilor or member of any other local authority for such period not exceeding six years but not less than two years from the date of the order as the Judge may specify in the order :

Provided that, no person shall be named in such order unless-

(a) he has been given notice to appear before the Judge and to show cause why he should not be so named: and

(b) if he appears in pursuance of the notice he has been given an opportunity of cross-examining any witness, who has already been examined by the Judge and has given evidence against him, of calling evidence in his defence and of being heard.

(12) If the Judge sets aside the election of a candidate on the ground that a corrupt practice has been committed by the returned candidate or his election agent or by any other person with the consent of the candidate or his election agent and if such candidate's

name has not been included in any order made under sub-section (11) the Judge shall declare such candidate disqualified for becoming a Councilor or a Councilor or member of any other local authority for such period not exceeding six years but not less than two years from the date of the order, as the Judge may specify in the order."

The corrupt practices are defined in Section 22 but we are not concerned with the same as it is not the case of any party that the successful candidate is guilty of corrupt practice. Section 44 of the Act provides for disqualification of Councilor during his term of office. The provision of this section will be considered a little later when a particular contention in respect thereof will be considered.

9. In exercise of the powers conferred by Section 17 the Government of Maharashtra has made the (sic) Rule 12 provides for nomination of candidates. Rule 13 provides for scrutiny of nomination papers. Under this rule it is obligatory upon the Returning Officer to examine the nomination papers and decide all objections which may be made to any nomination and may, either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary, reject any nomination paper on any of the grounds specified in sub-rule (2) of Rule 13. Against the decision of the Returning Officer accepting or rejecting the nomination paper an appeal is provided in Rule 15. Such appeal may be either disposed of by the District Judge himself or by any Judge not lower in rank than an Assistant Judge to whom the case may be referred to by the District Judge. The decision of the District Judge on appeal under this rule and subject only to such decision, the decision of the Returning Officer accepting or rejecting the nomination of a candidate, shall be final and conclusive and shall not be called in question in any Court. Under Section 321 all rules made under the Act shall be subject to the condition of previous publication. Sub-section (4) thereof provides that every rule made under this Act shall be laid as soon as may be after it is made before each House of the State Legislature while it is in session for a total period of 30 days which may be comprised in one session or in two successive sessions, and if, before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, and notify such decision in the Official Gazette, the rule shall from the date of publication of such notification have effect only in such modified form or be of no effect as the case may be.

10. The first contention of Mr. Deshpande on behalf of the applicant is that having regard to the provision of Section 21 of the Act the election can only be challenged on the ground that the successful candidate is guilty of corrupt practice. Section 21 makes common provision for challenging the validity of an election or co-option or nomination of a Councilor and the procedure for challenging election, co-option or nomination is by a petition presented to the District Court by a candidate at the election or by any person entitled to vote at the election. It is obligatory upon the petitioner to furnish in the petition, inter alia, with sufficient particulars of ground or grounds on which election, co-option or nomination is called in question. Such petition

has to be enquired into and disposed of by the District Judge or by any judge not lower in rank than an Assistant Judge to whom the case may be referred to by the District Judge. For the trial of such petition the Judge shall have the power of a Civil Court including those which are enumerated in sub-section (7) of Section 21 mentioned above. The Judge after such inquiry as he deems necessary may pass suitable order and his order shall be conclusive. Looking to the scheme of Section 21 it does not contain any specific provision limiting the ground on which an election or co-option or nomination of a Councilor can be challenged. In the absence of such limitation, the election, co-option or nomination of any Councilor can be challenged on any ground which is permissible under law for challenging the validity of such election, co-option or nomination. Reference was, however, made by Mr. Deshpande to sub-section (10) and sub-section (12) of Section 21 for contending that the election of a Councilor can only be challenged on the ground that the successful candidate has been guilty of corrupt practice. Both sub-section (10) and subsection (12) do refer to corrupt practice by the successful candidate whose election is declared void but there is nothing in the language of any of these two subsections to limit the scope of an election petition only to corrupt practice as contended. Sub-section (10) deals with a case where apart from challenging the election of the returned candidate, the petitioner substantially wants a declaration that he himself or any other candidate should be declared to be duly elected Councilor. While dealing with this question, clause (b) of sub-section (10) provides that if the Judge is satisfied that but for the votes obtained by the returning candidate by corrupt practices the petitioner or such other candidate would have obtained a sufficient number of valid votes to have been elected the Judge may, after declaring the election of the returned candidate void, declare the petitioner or such other candidate to have been duly elected. Sub-section (12) deals with cases of disqualification to be imposed upon the returned candidate when his election is set aside with a view to prevent him from becoming a Councilor or member of any other local authority. Under the sub-section if the Judge sets aside the election of a candidate on the ground that a corrupt practice has been committed by the returned candidate or his election agent or by any other person with the consent of the candidate or his election agent, the Judge shall declare such candidate disqualified for becoming a Councilor or member of any other local authority for such period not exceeding six years but not less than two years from the date of the order as the Judge may specify in the order. There is nothing in the language of subsection (10) or sub-section (12) to restrict the ground of challenge to the validity of an election to a mere corrupt practice. These sub-sections provide for specific things which can be done or should be done in specified contingencies. That this is the correct interpretation of the provision of Section 21 also appears from an earlier decision of the Division Bench of this Court dealing with similar provision of the Bombay Village Panchayats Act, 1958. The Division Bench of Abhyankar and Wagle JJ, in (*Radhabai Bajranglal Jaiswal v. State of Maharashtra*¹) decided on 11-2-1964 (Bom.), while considering the ground on which the validity of an election can be challenged under the Bombay Village Panchayats Act, took the view that the right created by Section 15 (1) of that Act in every person qualified to vote at an election to bring in question the validity of an election by filing an application within 15 days after the date of the declaration of the result of the election is an unqualified right which includes a right to challenge the election on every ground on which an

election can generally be challenged, which will of course include improper acceptance or rejection of a nomination paper, may be corrupt practice as defined in Section 15 (6) and/or any other illegality or irregularity materially affecting the result of the election. Sub-section (5) of Section 15 provides for two contingencies and indicates the action to be taken by the Election Tribunal in those contingencies. But from this provision it cannot be said that an election of a Panchayat member is not liable to be challenged or called in question on any other ground on which an election can usually be challenged. The ambit of enquiry provided by Section 15 (2) is in no way restricted or limited by anything stated or indicated in that sub-section which created the jurisdiction in the Election Tribunal to make the enquiry. An election cannot be called in question only on grounds to which reference is made in clause (a) or (b) of sub-section (5) of Section 15. It should not be overlooked that Section 21 contains a general provision for challenging the validity of an election, co-option and nomination and if under the scheme of this section the election can be challenged only on the ground that the returned candidate has been guilty of corrupt practice, it will not fit in with challenging the validity of co-option or nomination of a Councilor .

11. The question then arises whether it is permissible to the petitioner filing an election petition challenging the validity of an election to urge as a ground that the successful candidate is disqualified as contemplated by Section 16 and that is why his election should be set aside. The argument of Mr. Deshpande is that having regard to the provisions of Section 17 of the Act read with Rule 15 (10) of the Rules and Section 44 of the Act the ground as regards acceptance or rejection of the nomination paper of any

¹ Spl. Civil Appln. No. 345 of 1962

candidate including the returned candidate on the ground that he is disqualified under Section 16 cannot be taken up for challenging the validity of an election of the returned candidate. He has also contended that if the ground of challenge is disqualification, then, the only permissible remedy is the one provided in Section 44 of the Act. In exercise of the powers conferred by Section 17 rules have been made by the State Government in relation to nomination of candidates, form of nomination paper, objections to nomination, scrutiny of nomination papers and appeal against the acceptance or rejection of nomination papers. Under Rule 12 any person may be nominated as a candidate for election to fill a seat, if he is qualified to be chosen to fill that seat under the provisions of the Act, Rule 13 provides for scrutiny of nomination papers. Sub-rule (i) thereof provides for class of persons who can remain present at the time when the nomination paper is to be scrutinized. Under that sub-rule the candidates, one proposer of each candidate and one other person duly authorized in writing by his candidate but no other person may attend at the time and place fixed for the scrutiny of the nomination papers and the Returning Officer shall give them all reasonable facilities for examining the nomination papers of all candidates which have been delivered as required by sub-rule (2) of Rule 12. The nature of inquiry and the ground on which the nomination paper may be rejected are provided in sub-rule (2). Under that sub-rule the Returning Officer shall examine the nomination papers and decide all objections which may be made to any nomination and may, either on such objection or on his

own motion, after such summary inquiry, if any, as he thinks necessary, reject any nomination paper on any of the following grounds, that is to say :

- "(a) that the candidate is not qualified or is disqualified for election under the Act.
- (b) xx xx xx
- (c) xx xx xx
- (d) xx xx xx
- (e) xx xx xx"

It is obligatory upon the Returning Officer under sub-rule (6) to endorse his decision on each nomination paper either accepting or rejecting the same and if the nomination paper is rejected, he has to record in writing a brief statement of his reasons for such rejection. Under sub-rule (8) immediately after all the nomination papers have been scrutinized and decisions accepting or rejecting the same have been recorded, the Returning Officer shall prepare a list of validly nominated candidates. It is clear from the provision of Rule 13 that only a limited class of persons are intended to remain present when the nomination papers are to be scrutinized; only the candidates, one proposer of each candidate and one other person duly authorized in writing by each candidate can remain present. A voter as such is not entitled under this rule to remain present at the time of scrutiny of the nomination papers. Further it is clear that the nature of inquiry that has to be conducted by the Returning Officer before either accepting or rejecting the nomination papers on the ground of objections raised or suo motu is described to be a summary inquiry. An appeal against the decision of the Returning Officer either accepting or rejecting the nomination paper is provided in Rule 15 and such appeal lies to the District Judge of the District in which the municipal area is situate. The right to prefer such an appeal is only conferred upon the candidate who is aggrieved by the decision of the Returning Officer accepting or rejecting the nomination paper. Thus, under Rule 15 a person other than the candidate including the voter has no right to prefer an appeal against the decision of the Returning Officer. An appeal presented under Rule 15 can be disposed of either by the District Judge himself or it may be disposed of by any Judge not lower in rank than an Assistant Judge to whom the case may be referred to by the District Judge. Such Judge not lower in rank than an Assistant Judge is for the purpose of suit regarded as District Judge. Sub-rule (10) of Rule 15 provides that the decision of the District Judge on appeal under this rule, and subject only to such decision, the decision of the Returning Officer, accepting or rejecting the nomination of a candidate shall be final and conclusive and shall not be called in question in any Court. Relying upon the language of sub-rule (10) of Rule 15 the argument of Mr. Deshpande is that when specific provision is made as regards conclusiveness of the decision of the Returning Officer and that of the District Judge on appeal, it is not permissible to any person to go behind the said decision and urge, by way of a ground for challenging the validity of an election, any plea like disqualification which could be urged at the stage of scrutiny of the nomination papers. Great emphasis is laid by him upon the provision saying that the decision is final and conclusive and shall not be called in question in any Court. His submission is that when a decision is made final and conclusive, the jurisdiction of every

Civil Court as well as the Election Tribunal is thereby taken away to go into any question which are considered either by the Returning Officer or the District Judge while accepting or rejecting the nomination paper. Undoubtedly sub-rule (10) makes the decision final and conclusive and further provides that the said decision cannot be called in question in any court. But it shall not be overlooked that this is a provision contained in Rules made under the provisions contained in Section 17 of the Act. It is well settled that the provisions of the Act are always superior and the rules that are made in exercise of the power conferred by statute cannot be inconsistent with the provisions of the Act and cannot override or take away the right which had been conferred by the provisions of the statute itself. After all making of rules is in the nature of subordinate legislation and that cannot have greater force than the provisions of the statute itself or the effect of overriding its provisions. Such rules can neither be inconsistent with the Act nor derogatory from the provisions thereof.

12. Ordinarily every effort should be made to reconcile various provisions that occur in the statute and the rules made in exercise of the powers conferred thereby. If such reconciliation is not possible and the rules are inconsistent with the provisions of the statute, then the rules to that extent will be bad and the provisions of the statute will prevail. In Section 21 a specific right is conferred upon an elector or a voter to challenge the validity of the election, co-option or nomination of a Councilor . That section does not limit the ground on which the validity of such election, co- option or nomination can be challenged. So it is open to an elector to challenge the validity on any ground on which such an election, co-option or nomination can be challenged in law. A voter or an elector has no right to appear either before the Returning Officer or the District Judge hearing an appeal under Rule 15 while considering the question of acceptance or rejection of the nomination paper. In our opinion, Rule 15 (10) cannot be given such overriding effect as to take away completely the right of an elector or a voter to challenge the validity of an election, inter alia, on the ground of wrongful acceptance or rejection of the nomination paper of a candidate. It is clear from the language of Section 15 that one of the ingredients necessary by way of qualification for a candidate is that he is not disqualified for being elected a Councilor under the provisions of the Act or any other law for the time being in force. Thus if a candidate is disqualified either under the Act or under any other law, then, it is always open to an elector or a voter to challenge the validity of his election on the ground of such disqualification. That this is the correct view is clear from the decision of *Abhyankar and Wagle, JJ. Spl. Civil Appln. No. 345 of 1962 (Bom)* above referred. While considering similar question in relation to rejection of nomination paper under the provisions of the Bombay Village Panchayats Act and rules made thereunder, the Division Bench took the view that, "the finality that is given to the appellate decision of the Mamlatdar in the matter of rejection of a nomination paper is given by the Rules. The Rule made under the Act cannot have the effect of cutting down or restricting the statutory right given to an elector of bringing in question an election under Section 15 (1) or the ambit of jurisdiction given to the Judge appointed on an election tribunal in making enquiry into a challenge to such an election. The mere fact that a candidate whose nomination paper has been rejected has challenged the rejection by an appeal and that order has become final cannot

possibly restrict the right of an elector to bring in question the election of a returned candidate under Section 15 on that ground. The candidate is not deprived of that right when he is entitled to file an election petition in his capacity as an elector as well.

13. Reliance is placed upon another decision of the Division Bench of this Court in *Venkatrao Vithalrao v. Vithal Sambhaji*, reported in² This was a case relating to validity of an election under the Maharashtra Zilla Parishads and Panchayat Samities Act, 1962. In that case the election of a returned candidate to the Zilla Parishad was challenged by a voter in an election petition under Section 27 of that Act on the ground that he was disqualified under Section 16 (i) (h) of the Act, being a Police Patel. The voter could not challenge the nomination at the time of scrutiny as he was not a candidate himself. It was found that the returned candidate was a Police Patel at the time of nomination. The Division Bench of this Court (Tambe and Palekar, JJ.) took the view that, "though the voter has a right to challenge the validity of the election of the returned candidate, he cannot challenge it on the ground which could have been raised before the Returning Officer at the time of the scrutiny." An argument similar to the one advanced by Mr. Deshpande was accepted by this Court in that decision. In that case one of the contentions that was urged on behalf of the petitioner was that the finality and conclusiveness which is given in sub-rule (8) of Rule 20 operates only against the candidates and other persons mentioned in sub-rule (i) of Rule 19, who have been given a right to appear before the Returning Officer and challenge the nomination of any candidate. It was urged that Section 27 of the Act conferred an unqualified right on a voter to challenge the validity of election of a returned candidate, that there was no limitation placed on his right by Section 27 and therefore the Court could not be justified in placing any restriction on that right by holding that it was not open to a voter to challenge the election of a returned candidate on the ground of improper acceptance of his nomination paper. That contention was not accepted by this Court and this Court observed as under :

"It is true that Section 27 read by itself indicates that an unqualified right is conferred on a voter to challenge an election. In other words, Section 27 read by itself would show that a voter could challenge the election of a returned candidate on any ground available to him under the law. But then, it is a well settled rule of construction that a statute has to be considered as a whole, and the intention of the Legislature has to be gathered not from reading one section isolated from other sections having relevance to the subject-matter of the legislation. Chapter II deals with the constitution of Zilla Parishads, and has been divided under different heads. Sections 10 to 37 fall under the head "Election of Councilors." Sections 14 and 27 fall under this head. They both relate to the same subject-matter. The intention of the Legislature in respect of this subject-matter has to be gathered from the various provisions contained in the sections falling under this head and as already stated, the Legislature while dealing with the subject-matter has, in clear terms expressed in sub-section (2) of Section 14 its intention of giving finality to the decision of the Returning Officer either accepting or rejecting the nomination paper. It is, therefore, that the Legislature has directed that the appeal to be provided against such a decision of

the Returning Officer should lie to a Judge not below in rank of a District Judge, and it is to this decision of such a high Judicial Officer that the Legislature has directed that finality should be given. These two Sections, 14 (2) and 27 (2), will have to be read together in construing, and when so construed, it becomes apparent that though the voter has been given a right to challenge the validity of the returned candidate, he cannot challenge that election on the ground which could have been raised before the Returning Officer at the time of the scrutiny of the nomination paper. And the relevant rule, viz clause (a) of sub-rule (2) of Rule 19 shows that the nomination of a candidate could be challenged on the ground that he was disqualified for being chosen to fill the seat by or under the Act. This ground, therefore, would not be open to the voter for challenging the election under Section 27 of the Act. It is true that voters other than the candidate, i.e. the agents and proposers of each candidate and one other person authorised in writing by each candidate only, have not been given a right to appear at the time of the scrutiny of the nomination paper and raise objections to the acceptance of the nomination paper, and the voters apart from these persons would not have the opportunity of objecting to the nomination paper. But from that it does not necessarily follow that voters other than those mentioned in sub-rule (2) of Rule 19 would have or must have that right by filing an election petition, and therefore, we must read that right in Section 27, or we must hold that that right is not taken away by the rules framed to give effect to the intention of the Legislature disclosed in sub-section (2) of Section 14 of the Act. It has to be kept in view that in matters of election, there are no common law or inherent rights as such. The rights in relation thereto are only those as can be inferred from the provisions of the Act.

x x x x

x x x x

The fact, therefore, that a voter other than those mentioned in sub-rule (2) of Rules 19 has no right to challenge the validity of the nomination paper, would be no ground for holding that he has a right to raise that challenge in an election petition."

14. The well recognised distinction that exists between the provisions of the statute and those of rules made in exercise of the power of subordinate legislation was overlooked in this case. If rules cannot be reconciled with the provisions of the statute under which they are framed, then, the provisions of the statute must always prevail, though every possible attempt should be made to reconcile if it could be done, but if they cannot be reconciled, then, to the extent to which the provisions of rules are inconsistent with the provisions of statute or derogatory from the provisions the rules to that extent will be bad and they

²(1963) 1 Mah LJ 834

cannot be given overriding effect over the provisions of the statute. This aspect of the matter which was considered by the earlier Division Bench in Radhabai's case Spl. Civil Appln. No. 345 of 1962, decided on 11-2-1964 (Bom) was overlooked. Apart from this, even the language of Section 14 (2) of Maharashtra Zilla Parishads and Panchayat Samities Act is materially different from that of Section 17 of the Act. In our view, the view taken in Radhabai's case is preferable to

the view that has been taken in Venkatrao's case 1963 Mah LJ 834 by the Division Bench.

15. Under Section 21 of the Act the validity of election, co-option or nomination can be challenged either by a candidate at the election or by any person entitled to vote at the election. The grounds on which the validity of such election can be challenged are not different to a candidate on the one hand and to a person entitled to vote at the election on the other. The language of Section 21 being uniform, the grounds of challenge to the validity of an election will be the same, either it is at the instance of a voter or at the instance of a candidate. If in view of the provisions of Rule 15 (10) the right of a voter to challenge the validity of an election on the ground of disqualification of a candidate is taken away, it will result in substantially taking away the right of a voter to challenge the validity of election of a returned candidate on such grounds as are permissible to him in law. The fact that a candidate is not disqualified is one of the necessary qualifications before he can file his nomination paper. Now a voter can, in an election petition to set aside the election of a returned candidate, take various grounds including the ground of disqualification. He may either urge that the candidate whose nomination paper was filed was wrongfully rejected at the time of scrutiny or he may as well urge that even one of the defeated candidates whose nomination paper was accepted was wrongfully accepted, because in either of the two cases the result of election will be materially affected if the decision of the Returning Officer or the District Judge in appeal therefrom is treated as erroneous. When the nomination paper of a candidate has been wrongfully rejected, then, it will be a pure surmise to think how many votes he could have secured if he was in the field at the time when the poll took place; so also, when the nomination paper of any defeated candidate has been wrongfully accepted, another defeated candidate or a voter can equally contend that the nomination of paper of such defeated candidate was wrongfully accepted and if he was not in the field, then, even the defeated candidate would have secured the votes which were cast in favour of the defeated candidate. This will be a ground on which the validity of an election of a returned candidate can be challenged having regard to the scope and ambit of Section 21 and the decision arrived at is the result of summary inquiry cannot be so treated as to deprive a voter or a candidate to have a proper and fuller inquiry at the trial of an election petition. Thus, in our opinion, it is not possible to take the view that on proper construction of Rule 15 (10) read with Section 17 of the Act it is not permissible either to a candidate or to an elector to challenge the validity of an election of a returned candidate on the ground that he was disqualified under the provisions of Section 16 (1) of the Act.

16. The argument of Mr. Deshpande, then, was that Section 44 contains a specific provision for making an inquiry whether a Councilor becomes subject to disqualification during the tenure of his office which ultimately results in his office becoming vacant. The material part of Section 44 for our purpose is as under :

"44 (1) : A Councilor shall be disqualified to hold office as such if at any time during his term of office, he -

(a) is or becomes subject to any of the disqualifications specified in Section 16 except the disqualification specified in clause (h) of sub-section (1) of that section;

x x x x

and he shall be disabled subject to the provisions of sub-section (3) from continuing to be a Councilor and his office shall become vacant :

x x x x

(2) When a Councilor whether elected, co-opted or nominated incurs any of the disqualifications in sub-section (1), it shall be the duty of the Chief Officer to submit a report to the Collector within one month of his becoming aware of disqualification through any source whatsoever.

(3) In every case the authority to decide whether a vacancy has arisen shall be the Collector. The Collector may give his decision on receipt of the report of the Chief Officer under Sub-section (2), or on his own motion or on an application made to him by a voter and such decision shall be communicated to the Councilor concerned, the Chief Officer and the applicant, if any. Until the Collector decides that a vacancy has arisen and such decision is communicated as provided above, the Councilor shall not be deemed to have ceased to hold office.

(4) Any person aggrieved by the decision of the Collector may within a period of fifteen days from the date of receipt of the decision of the Collector by him, appeal to the State Government and the orders passed by the State Government shall be final;

Provided that, no order shall be passed under sub-section (3) by the Collector or under sub-section (4) by the State Government in appeal, against any Councilor without giving him a reasonable opportunity of being heard.

Explanation :- If any elected, co-opted or nominated Councilor were subject to any disqualification specified in Section 16, at the time of his election, co-option or nomination, as the case may be, and continues to be so disqualified, the disqualification shall, for the purposes of this section, be deemed to have been incurred during the term for which he is elected, co-opted or nominated."

Section 44 contains a specific provision for declaring that a Councilor is disqualified from continuing to be as such on the ground of disqualification therein provided and thereupon his office shall become vacant. The sphere over which Section 44 operates is not the same as the sphere over which Section 21 operates, though to a certain extent the field may overlap. For challenging the validity of an election a petition has to be presented under Section 21 within ten days after the publication of the names of the Councilors while petition under Section 44 can be taken at any time during the term of office of a Councilor. The underlying object of the provision of Section 21 is to give an opportunity to a candidate or a voter to challenge the validity, inter alia, of an election. If the petitioner is successful in such challenge, then, the election will be declared void with the result that even though the returned candidate was declared as successful candidate, he in law at no time became a Councilor as such, while under Section 44 until a declaration is made that the Councilor is disqualified and is disabled from

continuing to be a Councilor having regard to the provisions of sub-section (3) of Section 44 he continues to hold the office of Councilor and it is only upon a final decision of the Collector that vacancy arises and when such decision is communicated to the Councilor concerned, he ceases to hold the office of Councilor and his office becomes vacant from and after that date. It should not be overlooked that every conceivable ground for challenging the validity of an election by reason of disqualification is permissible under Section 44, if regard be had to the explanation thereto. Undoubtedly the effect of the explanation to Section 44 is to widen the scope of operative part of the section itself, but that too to a limited extent. The explanation provides that if any elected, co-opted or nominated Councilor were subject to any disqualification specified in Section 16, at the time of his election, co-option or nomination, as the case may be, and continues to be so disqualified, the disqualification shall, for the purpose of this section, be deemed to have been incurred during the term for which he is elected, co-opted or nominated. The words "continues to be so disqualified" contemplate that such disqualification must be existing at least at the point of time of the election, or co-option or nomination. A candidate might have incurred a disqualification under Section 16 at the time when he files his nomination papers even it might have continued when the nomination papers were scrutinized, but such disqualification may not exist at the time when the polling takes place and the result of poll is declared. Such a case can never be covered by Section 44. But the validity of an election of a returned candidate can on such ground be also challenged either by a candidate or by a voter in a petition under Section 21.

17. It was, however, strenuously contended by Mr. Deshpande that under Section 21 the order passed by the District Judge after inquiry is made conclusive. So also under Section 44 the order passed by the State Government has been made final. The argument was that the authorities trying the election petition under Section 21 and the authorities dealing with disqualification under Section 44 are entirely different and as they have power to act upon the same field, they may come to inconsistent judgment and controversy will arise Which decision will prevail over the other. Therefore, implied limitation should be read in the language of Section 21. When a ground of disqualification is taken in an election petition to challenge the validity of an election of a returned candidate, the inquiry is pertaining to the disqualification existing from the date of the nomination upto the date of announcement of the result and not thereafter because any disqualification which has arisen for the first time, after declaration of the result cannot be a ground for challenging the validity of an election under Section 21. Primarily the election tribunal constituted under Section 21 is an authority which is empowered to go into this question after exercising judicial powers of a Civil Court. The jurisdiction under Section 21 is not conferred upon the District Judge as a person designate but that jurisdiction is conferred upon the District Court and that is why the decision given under Section 21 is subject to revision by the High Court as it is a decision of a subordinate Court. Ordinarily one will expect that when in a petition under Section 21 the validity of an election of a returned candidate is challenged on the ground, inter alia, of disqualification, the authority clothed with the power under Section 44 will normally not proceed with the enquiry until the matter is finally decided by the Court. If,

however, notwithstanding the proceedings under Section 21 either the Collector or the State Government proceeds to go into the question of disqualification, then, undoubtedly the decision of a judicial forum conferred with the power of a Court must always prevail.

18. Reliance was placed by Mr. Deshpande upon several decisions of the Supreme Court. He referred us to the case of *Ravanna Subbanna v. G. S. Kaggeerappa*³, In this case the

³ AIR 1954 SC 653

provisions of Sections 14 and 20 of Mysore Town Municipalities Act, 1951 came up for consideration. Upon interpretation of Section 14 the Supreme Court took the view that,

"Where a person is elected as a Councilor in contravention of the provisions relating to disqualification as contained in Section 14, the election of such a Councilor automatically becomes void without requiring it to be set aside by an election petition under Section 20 of the Act. At any rate, if the seat becomes vacant and if under sub-section (5) of Section 14 the Government is made the final authority to determine such dispute, it would be unreasonable to hold that the same matter could be also agitated before the Election Commissioner under Section 20, with the attendant risk of a conflict of decision between the two authorities."

At the outset it may be stated that the language of Section 14, which came up for consideration before the Supreme Court, is materially different from that of Section 44 with which we are concerned. That section enumerated different grounds of disqualification and thereafter provided that, "if any person is elected as a Councilor in contravention of these provisions, his seat shall be deemed to be vacant." Having regard to the language the Supreme Court took the view that in such cases the election automatically becomes void without requiring it to be set aside by an election petition under Section 20 of the Act. However, on the question of interpretation of Sections 14 and 20, no opinion was expressed by the Supreme Court. It is observed that to reconcile the provisions of Section 20 with those of Section 14 of the Act it would be necessary either to put a restricted interpretation upon sub-section (3) of Section 14 or on sub-section (5) of Section 20, but on that question no opinion was expressed by the Supreme Court. Whether two remedies under the two sections are cumulative the Court observed that it will not be a reasonable assumption to consider the two sections as cumulative. Under Section 44 of the Act with which we are concerned by reason of disqualification the Councilor does not automatically cease to be Councilor. On the contrary, the provision of sub-section (5) of Section 44 clearly indicates that until the Collector decides that vacancy has arisen and such decision is communicated as provided in the section, the Councilor shall not be deemed to have ceased to hold office. Thus, the provisions which came up for consideration before the Supreme Court not being similar to those of Section 44, the decision of the Supreme Court will not be of any assistance to us in putting correct interpretation on the provisions of Section 44.

19. Reference was also made by Mr. Deshpande to the decision of the Supreme Court in *Election*

*Commission, India v. Saka Venkata Subba Rao*⁴, In that case the respondent, who had been convicted and sentenced to rigorous imprisonment for 7 years, was elected a member of the Madras Legislative Assembly. At the instance of the Speaker of the Assembly, the Governor of Madras referred to the Election Commission, which had its offices permanently located at New Delhi, the question whether the respondent was disqualified and could be allowed to sit and vote in the Assembly. The respondent thereupon applied to the High Court of Madras under Article 226 of the Constitution for a writ restraining the Election Commission from enquiring into his alleged disqualification for membership of the Assembly. While considering this question, the provisions of Articles 190 (3) and 192 (1) were considered by the Supreme Court and it was held that these articles are applicable only to disqualifications to which a member becomes subject

⁴1953 SCR 1144

after he is elected as such, and neither the Governor nor the Election Commission had jurisdiction to enquire into the respondent's disqualification which arose long before his election. The provisions of Articles 190 (3) and 192 (1) are not in *pari materia* to those of Section 44 of the Act with which we are concerned. In Article 190 (3) the words used are "becomes subject" and in Article 192 (1) they are "has become subject" and these words were interpreted to indicate a change in the position of the member after he was elected, but the provision that his seat is to become thereupon vacant, that it to say, the seat which the member was filling theretofore becomes vacant on his becoming disqualified reinforces the view that the article contemplates only a sitting member incurring the disability while so sitting. Incidentally while dealing with the contention of the Attorney-General in this case the Supreme Court pointed out that if that contention was accepted, it will lead to conflicting decisions by the Governor dealing with a reference under Article 192 and by the Election Tribunal inquiring into an election petition under Section 100 of the Parliamentary statute. The provisions of Section 44 of the Act are materially different from those of Articles 190 (3) and 192 (1). Moreover, we are concerned with the ambit of jurisdiction of the Election Tribunal which is clothed with the power to decide the election petition under Section 21 and in the absence of any limitation or restrictions imposed upon the grounds on which an election can be set aside, normal rule must prevail, namely, that on every legal and justified ground on which an election can be challenged in law will be open to the petitioner to urge for challenging the validity of an election of the successful candidate.

20. Reference was also made to the decision of the Supreme Court in *Kabul Singh v. Kundan Singh*⁵, The effect of Section 30 of Representation of the People Act, 1950 came only for consideration. Having regard to the provisions of the said statute it was held that the finality of the electoral roll cannot be challenged in a proceeding challenging the validity of the election. Right to vote being purely a statutory right, validity of any vote is to be examined on basis of provisions of the Act. The entries found in the electoral roll are final and they are not open to challenge either before a Civil Court or before a Tribunal which considers the validity of any election. While examining the scheme of the Act and especially Sections 14 to 24 by themselves in the matter of preparation and maintenance of electoral rolls, it is clear from those provisions that the entries found in the electoral roll are final and they are not open to challenge either

before a Civil Court or before a Tribunal which considers the validity of any election. The principle laid down by the Supreme Court in this case cannot be attracted if we have to scrutinize and examine various provisions of one and the same Act. The provisions of the Act, inter alia, deal with election co- option and nomination of Councilors, and all the relevant provisions which need have to be taken into account. If this is the position in law, then, every attempt should be made to reconcile various provisions of the Act and if need there be a restricted effect has to be given to the provisions thereof in order that the provisions are harmonised with each other. Upon such interpretation we have taken the view that the provisions of Rule 15 (1) as they relate to summary inquiry are final at that stage but the right to agitate the same question in an election petition either at the instance of a candidate or a voter is not lost in a petition under Section 21. We have equally pointed out that the provisions of Section 44 and Section 21 of the Act operate upon different field, though to a certain extent there is a possibility of overlapping. This is not a case where any particular section should be regarded by itself as a complete code exhausting the

⁵ AIR 1970 SC 340

remedies of a party for agitating any controversy. Thus, this decision of the Supreme Court is not of any assistance in interpreting the scheme of Section 21 and the grounds which can be taken for the purpose of challenging the validity of an election. Reference was also made by Mr. Deshpande to the decision of the Bombay High Court in *Narayan Maruti v. District Judge, Kolaba*⁶, Section 15 of Bombay Municipal Act, was construed by the Division Bench in Narayan Maruti case. Its provisions were similar to those of Mysore Town Municipalities Act, which were considered by Supreme Court in AIR 1954 Supreme Court 653 and having regard to these provisions the Division Bench took the view that no jurisdiction is conferred upon the District Judge to decide whether any disqualification attaches to the Councilor under Section 15. His jurisdiction is confined to deal with election petitions and an election petition by its very nature must be restricted to bringing before the Court either a mal- practice or a corrupt practice or an irregularity that takes place in the course of the election. The provisions of this section were, however, later on amended and they again came up for consideration before the Division Bench of this Court in *Keshav Govind Kulkarni v. Extra Asst. Judge, South Bombay*⁷, The provisions of sub-sections (1A) and (1B) of Section 15 of Bombay District Municipal Act, 1901 which were considered in Narayan Maruti's case having been deleted when this case was decided the Division Bench took the view that in an election petition filed under Section 22 of the Bombay District Municipal Act, 1901, the petitioner can challenge the validity of the nomination of the opponents on the ground that they were disqualified from standing for election under Section 15 (1) of the Act. Thus, it is quite apparent that the question whether a ground of disqualification of a candidate can be urged for challenging the validity of an election will depend upon the language of the statute and upon proper interpretation of Section 21. In our opinion, such a ground is always open either to a candidate or to a voter who is entitled to challenge the validity of election.

21. This brings us to the next contention of Mr. Deshpande that the Applicant has not incurred disqualification prescribed by Section 16 (1) (i) of the Act. That section provides that "no person

shall be qualified to become a Councilor whether by election, co-option or nomination who save as hereinafter provided, has directly or indirectly, by himself or his partner, any share or interest in any work done by order of a Council or in any contract with or under or by or on behalf of a Council. Two arguments were advanced for contending that the case of the Applicant does not fall within this provision. Firstly it was contended that the word "contract" used in this section is not wide enough to include "employment" with the Municipal Council and secondly it was stated that merely because the wife of the Applicant is Head-Mistress of the Municipal School it cannot be said that thereby the Applicant had any direct or indirect interest in contract with or under or by or on behalf of the Council. In support of his first plea our attention was invited to the provisions of earlier statute and especially those of Section 15 (1) (f) of Bombay District Municipal Act, 1901. It provides that, "no person may be a Councilor , who save as hereinafter provided has directly or indirectly by himself or his partner, any share or interest in any work done by order of a municipality or in any contract or employment with or under, or by, or on behalf of, a Municipality." The argument was that employment was intended to be regarded as a disqualification the Legislature has done so by express words and it was further stated that since the word 'contract' or 'employment' is used by Section 15 (1) of the Bombay District Municipal Act, it shows that the word 'contract' by

⁶ AIR 1953 Bom 288

⁷61 Bom LR 1151

itself is not wide enough to include within its scope 'employment' with the Municipality. It is undoubtedly true that while enumerating disqualification under Section 16 of the Act the word 'employment' has been deleted. But sometimes simply because an alteration is made in the language of the statute it does not automatically follow that the provisions are materially altered. Such an alteration may become necessary if it is found that the word was superfluous and the word 'contract' was wide enough to include within its scope also 'employment.' It should not be overlooked that the provisions of the Act were made with a view to consolidate the position and if reference be made to the provisions of Section 15 (b) of C. P. and Berar Municipalities Act, 1922 it is quite clear that the language is similar to that of Section 16 (1) (i) of the Act. Under Section 15 (1) of the C. P. and Berar Municipalities Act, 1922 no person shall be eligible for election or nomination as a member of a committee, if such person has directly or indirectly any share or interest in any contract with, by or on behalf of the committee, while owning such share or interest. As the object of the present Act is to unify, consolidate and amend the law relating to municipalities prevailing in different parts of the State of Maharashtra prior to reorganization of States (sic) were considered and provisions of Section 16 (1) (i) are incorporated for uniform legislation for the whole of the State. It is not disputed that the wife of the Applicant is the Head-Mistress of the Municipal School conducted by Amravati Municipal Council. Such an employment presupposes a contract between the wife of the Applicant on the one hand and the Municipal Council on the other. Under the terms of contract the Municipal Council can call upon the wife of the Applicant to discharge obligations as the Head-Mistress while on the other his wife as an employee can insist on payment of or remuneration to which she may be entitled to having regard to the terms of the contract. Thus, a contract subsists right from the employment till her termination and if that is so, omitting unnecessary words it can be said that the applicant

has direct or indirect interest in any contract with or under or by or on behalf of a Council. It was urged that in case of employment like Head-Mistress of a Municipal School there cannot be contract because she occupies a particular status and reliance was placed upon the observation of the Supreme Court in *Roshan Lal Tandon v. Union of India*⁸, The Supreme Court had occasion to consider the position of a Government servant under Union of India and it was held that the Government servant acquired a status. The argument was once the status is acquired the contractual obligation is obliterated. That is not borne out by the decision of the Supreme Court in this case. Actually it was pointed out that it (status) is much more than a purely contractual relationship voluntarily entered into between the parties. Thus, while considering the position of a Government servant the Supreme Court held that undoubtedly he has acquired a status having regard to the rights created by the various provisions and rules made under Articles 309, 310 and 311 of the Constitution of India. But it is not possible to take the view that simply because an employee has acquired a status there ceases to be contractual relationship of master and servant between employee and employer.

22. The contention then was that merely because a wife is an employee with the Municipal Council it cannot be said that the husband has direct or indirect interest in the contract with or under or by or on behalf of the Municipal Council. Reference was made to the decision of the Supreme Court in *Gulam Yasin Khan v. Sahebrao Yeshwantrao Walaskar*⁹, The Supreme Court in this case has taken the view that mere relationship of a

⁸ AIR 1967 SC 1889

⁹1966 Mah LJ 269

person with an employee of the Municipal Committee will not justify the inference that such person has interest, direct or indirect, to the employment under the Municipal Committee and he cannot become disqualified with reference to the provisions of Section 15 (1) of the C. P. and Berar Municipalities Act, 1922. The fact whether the petitioner has interest, direct or indirect, in the contract under or on behalf of a council will depend upon facts of each case. In Gulam's case the son of a candidate was employed under the Municipal Committee but he was staying entirely separate from his father. That is not the position in the present case. It is admitted that the wife of the Applicant is staying with him. When such is the position, then both husband and wife have mutual interest in the earning of each other. On the contrary, if a view was taken that the husband has no direct or indirect interest in the contract of his wife with the Municipal Council, there is likely to be a conflict of interest and duty between the two. If any action is contemplated against the wife by reason of any misconduct or default on the part of the Head-Mistress, then, it will be the duty of the Municipal Council to see that the case is decided on its own merits irrespective of other considerations. Placed in such a situation, the husband will naturally be faced with a conflict between interest and duty. Even likelihood of conflict, in our opinion, will suffice. Thus, in our opinion, it is not possible to accept the contention of Mr. Deshpande that the Applicant has not incurred disqualification prescribed by Section 16 (1) (i) of the Act. 5Â3 23. In the result, Revision Application fails and rule is discharged with costs. Application dismissed.