

(2012) 09 BOM CK 0107

In the Bombay High Court

Case No : Writ Petition No. 5613 of 2012

Ashok Balasaheb Chaugule

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 05-09-2012

Acts Referred:

Constitution of India, 1950 — Article 21, 243C, 243F, 243G, 25

Citation : (2012) 6 ALLMR 274 : (2012) 6 MhLj 782

Hon'ble Judges : S.C. Dharmadhikari, J

Bench : Single Bench

Advocate : P.B. Kakade, for the Appellant; R.M. Patne, A.G.P for Respondent Nos. 1 to 3 and Mr. Sandeep Koregave, for the Respondent

Judgement

S.C. Dharmadhikari, J.—This writ petition was heard on 3rd September 2012 and was placed today for judgment/order. Since the point involved in the writ petition is short, with consent of the parties, it is disposed of finally. Hence, Rule. The learned A.G.P waives service for respondent Nos.1 to 3. Respondent Nos.4 and 5 are duly served and respondent No. 5 is represented by Mr. Sandeep Koregave. Respondent No. 4 is a formal party and service on the same can be dispensed with. The petitioner has been disqualified on an application made by respondent No. 5. The proceeding is under the Bombay Village Panchayats Act, 1958. The Gram Panchayat of Tardal, Taluka Hatkanangale, District Kolhapur is the Gram Panchayat in question. The petitioner was elected as a Member of this Gram Panchayat in the elections held in 2007. An application for disqualification of the petitioner was made by respondent No. 5 alleging that the petitioner is disabled from continuing as a Member as he was disqualified in terms of section 14(1) (j-1) of the Bombay Village Panchayats Act, 1958 (for short "the Act").

2. It was alleged that the petitioner has more than two children. He had married one Vijayalaxmi and from this wedlock the petitioner has one son named Kunal. He was born on 16th September 2003. Thereafter, the petitioner married Smt. Annapurna and has two children from this wedlock, namely, a daughter born on

1st March 2008 and a son-Krutadnya born on 19th August 2009. Thus, the petitioner has incurred the disqualification and, therefore, a vacancy arises which should be filled in accordance with law. The question whether a vacancy had arisen was, therefore, to be determined by the Collector of Kolhapur District and which has been determined and decided by the said Authority. An appeal against his decision has been preferred by the petitioner, which appeal also has been dismissed by the Appellate Authority, namely, Additional Collector, Pune Division, Pune.

3. The only contention that has been raised before me and which was also urged before the Authorities is that the petitioner married Smt. Vijayalaxmi and from that wedlock he had one son Kunal. It is stated that Smt. Vijayalaxmi left the matrimonial home and never returned. The petitioner and Smt. Vijayalaxmi separated from each other by a divorce by mutual consent in terms of Deed of Divorce dated 24th March 2004. The child is in the custody of Smt. Vijayalaxmi permanently.

4. After this divorce from his first wife Smt. Vijayalaxmi, the petitioner married Smt. Annapurna and from that wedlock the couple was blessed with two children, namely, daughter was born on 1st March 2008 and son was born on 19th August 2009. If the petitioner has been elected as a Member of the Gram Panchayat in the year 2007, then, the application made after three years seeking to disqualify him, is not maintainable, firstly, on the ground that it is belated and secondly that the petitioner does not incur the disqualification in terms of the aforementioned statutory provision. That provision can be invoked only when the petitioner is stated to have more than two children from a single marriage. If the petitioner had contracted second marriage, then, it is that marriage which is relevant and the first marriage which was dissolved by a Deed of Divorce, cannot be taken into consideration.

5. The Authorities below concurrently found that there is no dispute with regard to the birth of the children as the public documents would evidence this fact. That on the own showing of the petitioner, he has contracted marriage with Smt. Vijayalaxmi and that he was blessed with a son from that marriage, is an undisputed factual position. Secondly, the petitioner has married for second time and from that marriage he has only two children, is also an undisputed position. In such circumstances, the findings of fact that the petitioner has three children, requires no interference in writ jurisdiction as it is consistent with the documents placed on record and cannot be termed as perverse.

6. The only contention now raised is that if the statutory provision is considered, it envisages disability from continuing as a Member during the term for which the petitioner has been elected provided he incurs any of the disqualifications mentioned in section 14 of the said Act.

7. The relevant provision is section 14(1)(j-1) of the Bombay Village Panchayats Act, 1958. It 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

Provided that, a person having more than two children on the date of commencement of the Bombay Village Panchayats, and the Maharashtra Zilla Parishads, and Panchayat Samitis (Amendment) Act, 1995 (hereinafter in this clause referred to as "the date of such commencement"), shall not be disqualified under this clause so long as the number of children he had on the date of such commencement does not increase:

Provided further than, a child or more than one child born in a single delivery within the period of one year from the date of such commencement shall not be taken into consideration for the purpose of disqualification mentioned in this clause;

.....

8. A bare perusal of the same would make it clear that no person shall be a Member of a Panchayat continue as such, who has more than two children. The proviso is clear that a person having more than two children on the date of the commencement of the Bombay Village Panchayats Act, 1958 and the Maharashtra Zilla Parishads and Panchayat Samities Act, 1995, shall not be disqualified under this clause so long as the number of children he had on the date of such commencement, does not increase. Provided further that a child or more than one child born in a single delivery within the period of one year from the date of such commencement shall not be taken into consideration for the purpose of disqualification mentioned in this clause.

9. There is an Explanation 5 for the purpose of clause (j-1) which is also relevant and which reads thus:

Explanation 5- For the purpose of clause (j-1),

(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.

10. A bare perusal of this explanation would make it clear that if a couple has only one child on or after the date of such commencement, any number of children born out of single subsequent deliver shall be deemed to be one entity and "child" does not include an adopted child or children.

11. The validity of a similar provision was questioned before the Hon"ble Supreme Court in the case of Javed and Others Vs. State of Haryana and Others, , where the Hon"ble Mr. Justice R.C. Lahoti, as the Hon"ble the Chief

Justice then was, speaking for the Bench, held that the provision of this nature has been enacted so as not to further or carry forward any religious purpose or motive but to ensure that the Gram Panchayats or such of the representative bodies do not ignore the importance of menace of rising population. In this context, what the Hon"ble Supreme Court has held is as under:

37. The above facts and excerpts highlight the problem of population explosion as a national and global issue and provide justification for priority in policy-oriented legislations wherever needed.

38. None of the petitioners has disputed the legislative competence of the State of Haryana to enact the legislation. Incidentally, it may be stated that Seventh Schedule, List II - State List, Entry 5 speaks of "Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration". Entry 6 speaks of "Public health and sanitation" inter alia. In List III - Concurrent List, Entry 20A was added which reads "Population control and family planning". The legislation is within the permitted field of State subjects. Article 243C makes provision for the Legislature of a State enacting laws with respect to Constitution of Panchayats. Article 243F in Part IX of the Constitution itself provides that a person shall be disqualified for being chosen as, and for being, a member of Panchayat if he is so disqualified by or under any law made by the Legislature of the State. Article 243G casts one of the responsibilities of Panchayats as preparation of plans and implementation of schemes for economic development and social justice. Some of the schemes that can be entrusted to Panchayats, as spelt out by Article 243G read with Eleventh Schedule is - Scheme for economic development and social justice in relation to health and sanitation, family welfare and women and child development and social welfare. Family planning is essentially a scheme referable to health, family welfare, women and child development and social welfare. Nothing more needs to be said to demonstrate that the Constitution contemplates Panchayat as a potent instrument of family welfare and social welfare schemes coming true for the betterment of people's health especially women's health and family welfare coupled with social welfare. u/s 21 of the Act, the functions and duties entrusted to Gram Panchayats include "Public Health and family Welfare", "Women and Child Development" and "Social Welfare". Family planning falls therein. Who can better enable the discharge of functions and duties and such constitutional goals being achieved than the leaders of Panchayats themselves taking a lead and setting an example.

39. Fundamental rights are not to be read in isolation. They have to be read along with the Chapter on Directive Principles of State Policy and the Fundamental Duties enshrined in Article 51A. Under Article 38 the State shall strive to promote the welfare of the people and developing a social order empowered at distributive justice - social, economic and political. Under Article 47 the State shall promote with special care the educational and economic

interests of the weaker sections of the people and in particular the constitutionally down-trodden. Under Article 47 the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties. None of these lofty ideals can be achieved without controlling the population inasmuch as our materialistic resources are limited and the claimants are many. The concept of sustainable development which emerges as a fundamental duty from the several clauses of Article 51A too dictates the expansion of population being kept within reasonable bounds.

40. The menace of growing population was judicially noticed and constitutional validity of legislative means to check the population was upheld in *Air India Vs. Nergesh Meerza and Ors.* (1981) 4 SCC 335. The Court found no fault with the rule which would terminate the services of Air Hostesses on the third pregnancy with two existing children, and held the rule both salutary and reasonable for two reasons - "In the first place, the provision preventing a third pregnancy with two existing children would be in the larger interest of the health of the Air Hostess concerned as also for the good upbringing of the children. Secondly, when the entire world is faced with the problem of population explosion it will not only be desirable but absolutely essential for every country to see that the family planning programme is not only whipped up but maintained at sufficient levels so as to meet the danger of over-population which, if not controlled, may lead to serious social and economic problems throughout the world."

41. To say the least it is futile to assume or urge that the impugned legislation violates right to life and liberty guaranteed under Article 21 in any of the meanings howsoever expanded the meanings may be.

The provision if it violates Article 25 ?

42. It was then submitted that the personal law of muslims permits performance of marriages with 4 women, obviously for the purpose of procreating children and any restriction thereon would be violative of right to freedom of religion enshrined in Article 25 of the Constitution. The relevant part of Article 25 reads as under:-

25. Freedom of conscience and free profession, practice and propagation of religion. - (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law -

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

43. A bare reading of this Article deprives the submission of all its force, vigour and charm. The freedom is subject to public order, morality and health. So the Article itself permits a legislation in the interest of social welfare and reform which are obviously part and parcel of public order, national morality and the collective health of the nation's people.

44. The Muslim Law permits marrying four women. The personal law nowhere mandates or dictates it as a duty to perform four marriages. No religious scripture or authority has been brought to our notice which provides that marrying less than four women or abstaining from procreating a child from each and every wife in case of permitted bigamy or polygamy would be irreligious or offensive to the dictates of the religion. In our view, the question of the impugned provision of Haryana Act being violative of Article 25 does not arise. We may have a reference to a few decided cases.

52. We find ourselves in entire agreement, with the view so taken by the learned Judges whose eminence as jurists concerned with social welfare and social justice is recognized without any demur. Divorce unknown to ancient Hindu Law, rather considered abominable to Hindu religious belief, has been statutorily provided for Hindus and the Hindu marriage which was considered indissoluble is now capable of being dissolved or annulled by a decree of divorce or annulment. The reasoning adopted by the High Court of Bombay, in our opinion, applies fully to repel the contention of the petitioners even when we are examining the case from the point of view of Muslim Personal Law.

59. In our view, a statutory provision casting disqualification on contesting for, or holding, an elective office is not violative of Article 25 of the Constitution.

60. Looked at from any angle, the challenge to the constitutional validity of Section 175 (1)(q) and Section 177(1) must fail. The right to contest an election for any office in Panchayat is neither fundamental nor a common law right. It is the creature of a statute and is obviously subject to qualifications and disqualifications enacted by legislation. It may be permissible for Muslims to enter into four marriages with four women and for anyone whether a Muslim or belonging to any other community or religion to procreate as many children as he likes but no religion in India dictates or mandates as an obligation to enter into bigamy or polygamy or to have children more than one. What is permitted or not prohibited by a religion does not become a religious practise or a positive tenet of a religion. A practice does not acquire the sanction of religion simply because it is permitted. Assuming the practice of having more wives than one or procreating more children than one is a practice followed by any community or group of people the same can be regulated or prohibited by legislation in the interest of public order, morality and health or by any law providing for social welfare and reform which the impugned legislation clearly does.

61. If anyone chooses to have more living children than two, he is free to do so under the law as it stands now but then he should pay a little price and that is of

depriving himself from holding an office in Panchayat in the State of Haryana. There is nothing illegal about it and certainly no unconstitutionality attaches to it.

Some incidental questions.

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.

12. This decision is followed in a later case, namely, Zile Singh Vs. State of Haryana and Others, . If the object sought to be achieved is borne in mind, then, it is clear that the provision must be seen de hors the personal law and the religious rites. This provision enables constitution of Village Panchayats as representatives of people and institutions of local self-government. If they are to be truly representative and secular in character, then, religious and considerations of like nature are out of place. If they have to be kept out and the provision is not to be construed in the light of what the personal law permits or the customs and usage or the personal law recognises, then, a conclusion is inevitable that the disqualification is incurred the moment the number of children exceeds two and the case not falling within the exception carved out in law. Equally, if the same does not fall within the explanation, then, irrespective of the marriages contracted, the disqualification is incurred. Precisely, for these reasons, the Hon''ble Supreme Court while analysing the challenge to a similar provision in the Haryana Act, has held as above. That judgment of the Hon''ble Supreme Court must be applied as it is on all fours to the present case as well. No other conclusion can be arrived at as that would encourage persons to fulfill their political ambitions and seek power by ingenious methods.

13. The law frowns upon illegitimate and immoral relationships by giving them minimal legal sanctity. However, the child is not branded illegitimate. The relationship and particularly matrimonial may have ended but the obligation and duty as parents of children born from such relationship continues. To remind persons like the petitioner that he continues to be a father of his child from a previous relationship that such restrictions are placed. Ultimately, the petitioner holds a elected office. He is a representative elected by the people. He is expected to serve their interests. The parents may end their relationship or a man and woman may abandon each other. However, their child is not treated as such. This assumes significance because in this case, the petitioner claims that

after having handed over custody of Kunal, the child from his previous marriage, to his first wife Vijayalaxmi, the petitioner cannot be treated as his father. The petitioner is a father of the child Kunal and continues as such even if his marriage with the child's mother is over. Equally, the mother continues as such. If persons like the petitioner are expected to fulfill their duties of an elected office and act as true representatives of people, then, their personal and social conduct should be blemishless. If population control, public health and morality are the standards and norms set by law, then, no escape route should be permitted or else, as the Hon'ble Supreme Court holds, the mischief can never be prevented nor can the malady be removed, which is precisely the legislative intent. For the lure or wish of a political office, to fulfill political ambitions the interests of children cannot be permitted to be sacrificed while complying with the statutory conditions and required norms. More so, when compliance therewith serves a beneficial and social purpose. In a given case, not only marriages would be disputed but equally divorce and separation would be pleaded. It may also be urged that the relationship is not a marriage and, therefore, children born from the same ought not be taken into account so as to be covered by the provision in question. Clearly, the legislature intended, by using the words such as "children" and "couple", that the personal laws and the provisions therein by which the marriage and divorce are governed, have no place in the scheme of things. In ordinary parlance the word "couple" *inter alia* means two people who are married or otherwise closely associated romantically or sexually (See Concise Oxford English Dictionary, Indian Edition, Third Impression 2007). Therefore, advisedly, the legislature has used this term in this broad sense and not signifying the relationship as husband or wife or by marriage alone. The intention is not to allow persons who are disqualified or ineligible and of questionable and doubtful character and whose morality is at stake to represent people in elected offices. Equally, they cannot be said to be true representatives of the people in institutions of local self-government. Therefore, to allow the petitioner to get away by urging that his first marriage has come to an end and children from the second marriage alone should be taken into consideration, would mean that the number of children that he has, should be computed qua number of marriages contracted and must have nexus or connection therewith. That is precisely kept out of the purview of this provision which applies to all religions and communities. In the above circumstances, the only contention raised before me must fail. There is no merit in this writ petition. Rule is discharged. However, there will be no order as to costs.