

(2008) 02 GUJ CK 0088

In the Gujarat High Court

Case No : Special Civil Application No. 1121 of 2008

Bharatbhai Dhanjibhai Modi

APPELLANT

Vs

Collector and Others

RESPONDENT

Date of Decision : 05-02-2008

Acts Referred:

Constitution of India, 1950 — Article 14, 141, 21, 226, 243G

Gujarat Municipalities Act, 1963 — Section 11(1), 38(1)

Medical Termination of Pregnancy Act, 1971 — Section 3(2)

Citation : AIR 2008 Guj 106 : (2008) 1 GLH 772 : (2008) 2 GLR 1128

Hon'ble Judges : Ravi R. Tripathi, J; M.S. Shah, J

Bench : Division Bench

Advocate : Suresh M. Shah, for the Appellant; None for Respondent Nos. 1 to 4, for the Respondent

Final Decision : Dismissed

Judgement

M.S. Shah, J.—What is challenged in this petition under Article 226 of the Constitution of India, is the show-cause notice dated 14-5-2007 issued by the Collector, Porbandar under the provisions of Clause (h) of Sub-section (1) of Section 11 of the Gujarat Municipalities Act, 1963 (hereinafter referred to as "the Act"). By the said notice, the petitioner is called upon to show cause why the petitioner should not be removed from the office of Councillor of Porbandar Municipality as the petitioner's third child was born on 16-12-2006 and thus the petitioner has incurred disqualification under the above Clause read with Section 38 which provide that the Councillor who has more than two living children after the period of one year from the date of commencement of the Gujarat Local Authorities Laws (Amendment) Act, 2005 (which Amendment Act came into force on 4-8-2005) shall be disabled from continuing to be a Councillor and his office shall become vacant. The petitioner has also challenged the constitution validity of Clause (h) of Section 11(1) of the Act.

2. Section 11(1) of the Act reads as under:

11. General disqualifications for becoming a Councillor.

Vacation of seat. Decision of State Government in case of disputes.

(1) No person may be a Councillor:

(h) who has more than two children:

Provided that a person having more than two children on the date of commencement of the Gujarat Local Authorities Laws (Amendment) Act, 2005 (hereinafter in this Clause referred to as "the date of such commencement"), shall not be disqualified under this Clause, so long as the number 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 under this Clause.

Explanation:- For the purpose of this Clause,:

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

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

Section 38(1)(a) of the Act reads as under:

38. Disabilities from continuing as a Councillor.

(1) If any Councillor during the term for which he has been elected or nominated:

(a) becomes subject to any disqualification specified in Section 11, or

(b) to (d) ...

he shall subject to the provisions Sub-section (2) be disabled from continuing to be a Councillor and his office shall become vacant.

3. The constitutional validity of the above provisions is challenged on the ground that the provisions are violative of the petitioner's fundamental rights under Articles 14 and 21 of the Constitution of India, and also on the ground that the said provisions are inconsistent with the provisions of Section 3(2) of the Medical Termination of Pregnancy Act, 1971 which is a Central Act and that by virtue of the provisions of Article 254 of the Constitution, the provisions of Section 11(1) (h) of the Gujarat Municipalities Act, 1963 being inconsistent with the provisions of the Central Act, cannot be permitted to operate.

4. There is no dispute about the fact that the petitioner's third child was born after one year from the date of commencement of the Amendment Act and that the conditions for applicability of the said Clause are satisfied.

5. At the hearing of this petition, attention of the learned Advocate for the

petitioner was invited to the decision of a Bench of three learned Judges of the Apex Court in *Javed and Others Vs. State of Haryana and Others*, upholding the constitutional validity of similar provisions in the Panchayats and Zila Parishads, Haryana Panchayati Raj Act, 1994, which read as under:

175(1) No person shall be a Sarpanch, Upa-Sarpanch or a Panch of a Gram Panchayat or a member of a Panchayat Samiti or Zila Parishad or continue as such, who:

(q) has more than two living children:

Provided that a person having more than two children on or up to the expiry of one year of the commencement of this Act, shall not be deemed to be disqualified.

177(1) If any member of a Gram Panchayat, Panchayat Samiti or Zila Parishad:

(a) who is elected, as such, was subject to any of the disqualifications mentioned in Section 175 at the time of his election;

(b) during the term for which he has been elected, incurs any of the disqualifications, mentioned in Section 175,

shall be disqualified from continuing to be a member, and his office shall become vacant.

The Apex Court observed that the said provisions were not violative of Article 14 or Article 25 of the Constitution. The Court further held that, one of the objects of the enactment is to popularize family welfare/family planning programme which is consistent with the National Population Policy. To carry out the said purpose of the Act as well as the mandate of the Constitution under Article 243G (analogous to Article 243W of the Constitution for Municipalities) the Legislature has made a provision for making a person having more than two living children ineligible to either contest for the post of Panch or Sarpanch. Such a provision would serve the purpose of the Act as mandated by the Constitution. The Apex Court further held that, such a legislation cannot be held to be discriminatory or suffering from the vice of hostile discrimination as against its citizens simply because Parliament or the legislatures of other States have not chosen to enact similar laws. A uniform policy may be devised by the Centre or by a State. However, there is no constitutional requirement that any such policy must be implemented. Such policies can be implemented in a phased manner. More so, when the policies have far-reaching implications and are dynamic in nature, their implementation in a phased manner is welcome for it receives gradual willing acceptance and invites lesser resistance. To make a beginning, the reforms may be introduced at the grass-root level. There is nothing wrong in the State having chosen to subscribe to the national movement of population control by enacting a legislation which would go a long way in ameliorating health, social and economic conditions of rural population, and thereby, contribute to the development of the nation.

Finally, while concluding, the Apex Court made the following observations:

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.

62. ...

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 women folk, 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.

64. Hypothetical examples were tried to be floated across the Bar by submitting that there may be cases where triplets are born or twins are born on the second pregnancy, and consequently, both of the parents would incur disqualification for reasons beyond their control or just by freak of divinity. Such are not normal cases and the validity of the law cannot be tested by applying it to abnormal situations. Exceptions do not make the rule nor render the rule irrelevant. One swallow does not make a summer; a single instance or indicator of something is not necessarily significant.

65. The challenge to the constitutional validity of Sees. 175(1)(q) and 177(1) fails on all the counts. Both the provisions are held intra vires the Constitution. The provisions are salutary and in public interest. All the petitions which challenge the constitutional validity of the abovesaid provisions are held liable to be dismissed.

(Emphasis supplied)

In spite of the aforesaid direct and binding decision of the Apex Court, the learned Advocate for the petitioner submits that, although the provisions may not be violative of Article 14 or Article 25 of the Constitution, the provisions are violative of Article 21 of the Constitution and are also inconsistent with the provisions of the Hindu Marriage Act, 1955. Relying on the decision of the Apex Court in *Vinita Saxena Vs. Pankaj Pandit*, it is contended that the husband denying the right of the wife to enjoy the marital bliss and to have children will be treated as inflicting mental cruelty on the wife which would constitute a ground for decree of divorce. It is submitted that the impugned provisions of the State Act are therefore, inconsistent with the provisions of the Hindu Marriage

Act, 1955 as well as the provisions of the Medical Termination of Pregnancy Act, 1971, and therefore, by virtue of provisions of Article 254 of the Constitution, the provisions of the State Act will have to yield to the provisions of the said Central Acts.

6. We have carefully considered the submissions made by the learned Advocate for the petitioner. In the first place, when the constitutional validity of an identical provision is upheld by the Apex Court in *Javed and Others Vs. State of Haryana and Others*, , it is not open to this Court to examine the challenge to the constitutional validity of the provision on some other grounds. As per the settled legal position, the decision of the Apex Court directly on the question of constitutional validity is binding on this Court under Article 141 of the Constitution of India and cannot be permitted to be whittled down on the ground that the Act may be considered unconstitutional on some other grounds not considered by the Apex Court.

In *Suganthi Suresh Kumar Vs. Jagdeeshan*, , the Apex Court has held as under:

It is impermissible for the High Court to overrule the decision of the Apex Court on the ground that Supreme Court laid down the legal position without considering any other point. It is not only a matter of discipline for the High Courts in India. It is the mandate of the Constitution as provided in Article 141 that the law declared by the Supreme Court shall be binding on all Courts within the territory of India. It was pointed out by this Court in *Anil Kumar Neotia and Others Vs. Union of India (UOI) and Others*, that the High Court cannot question the correctness of the decision of Supreme Court even though the point sought before the High Court was not considered by the Supreme Court.

Similarly in *Suga Ram @ Chhuga Ram Vs. State of Rajasthan and Others*, the Apex Court has again held that:

Judicial discipline to abide by declaration of law by Apex Court, cannot be forsaken, under any pretext by any authority or Court, be it even the highest Court in a State, oblivious to Article 141 of the Constitution of India, 1950 (in short the "Constitution").

7. Apart from the above view of the matter, in our considered opinion, the impugned provisions of the State Act cannot be said to be inconsistent with the provisions of the Hindu Marriage Act, 1955. Reliance placed on the decision in *Vinita Saxena Vs. Pankaj Pandit*, is thoroughly misconceived. The undisputed facts in that case were that the appellant-wife was 24 years of age when she got married in 1987. The marriage lasted for five months. The marriage between the parties was not consummated as the respondent-husband was not in a position to fulfill the matrimonial obligation. The wife filed petition for decree of divorce on two grounds - that the husband had treated the wife with cruelty and that the husband was suffering from severe mental disorder (Paranoid Schizophrenia) of such a kind and to such an extent that the appellant - wife could not reasonably be expected to live with the respondent husband. The trial Court dismissed the

petition and the High Court confirmed the judgment of the trial Court. The Apex Court held that the uncontroverted evidence of the appellant wife had proved the case on every count. The appellant had proved beyond doubt that the respondent suffered from mental disorder and that the appellant suffered cruelty by and at the behest of the respondent. It was in the above context that the Apex Court made observations in Paragraphs 42 and 43 of the judgment including reference to the observations of the Division Bench of the Delhi High Court in *Rita Nijhawan Vs. Balakishan Nijhawan*,

8. Those observations made in a different context altogether cannot be quoted out of context for the purpose of assailing the constitutional validity of statutory provisions which have been held by the Apex Court to be salutary and in public interest. The statutory provisions under challenge do not take away the right of the wife to enjoy the marital bliss, nor do they impinge upon her right to prevent pregnancy. We may again refer to the observations made by the Apex Court in Para 63 of the judgment in *Javed's case* (supra) that with the awareness which is arising in Indian women folk, they are not helpless as to be compelled to bear a third child even though they do not wish to do so.

9. We may now refer to the provisions of the Medical Termination of Pregnancy Act, 1971. The preamble indicates that it is an Act to provide for the termination of certain pregnancies by a registered medical practitioner and the matters connected therewith or incidentally connected thereto. Section 3(2) provides that a pregnancy may be terminated by registered medical practitioner,:

3. When pregnancies may be terminated by registered medical practitioners,-

(1) ...

(2) Subject to the provisions of Sub-section (4), a pregnancy may be terminated by a registered medical practitioner,:

(a) where the length of the pregnancy does not exceed twelve weeks, if such medical practitioner is, or

(b) where the length of the pregnancy exceeds twelve weeks, but does not exceed twenty weeks, if not less than two registered medical practitioners are,

of opinion, formed in good faith, that:

(i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or

(ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

Explanation I:- ...

Explanation II:- Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy

may be presumed to constitute a grave injury to the mental health of the pregnant woman.

(3) In determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in Sub-section (2), account may be taken of the pregnant woman's actual or reasonably foreseeable environment.

Sub-section (4) makes it mandatory to have consent of the pregnant woman for termination of pregnancy except in case of minors or lunatics in whose case the consent of the guardian is made mandatory.

(Emphasis supplied)

10. We fail to see how the impugned provisions of the Gujarat Municipalities Act can be said to be inconsistent with the provisions of the Medical Termination of Pregnancy Act, 1971. We, therefore, see no inconsistency whatsoever between the impugned provisions of the said Act and the provisions of the Hindu Marriage Act, 1955 and the provisions of Medical Termination of Pregnancy Act, 1971.

We find no merit in this petition. The petition, is therefore, summarily dismissed.