

(2009) 04 GUJ CK 0004

In the Gujarat High Court

Case No : Letters Patent Appeal No. 366 of 2009 In Special Civil Application
No"s. 2069 and 3968 of 2009 With Civil Application No. 3843 of 2009

Devabhai Parbatbhai Avadia and Others

APPELLANT

Vs

Competent Authority, Appointed under Anti Defection Act,
and Another

RESPONDENT

Date of Decision : 24-04-2009

Acts Referred:

Gujarat Provision for Disqualification of Members of Local Authorities for Defection
Rules, 1987 — Rule 3, 7(7)

Citation : (2009) 3 GLH 385

Hon'ble Judges : K.S. Radhakrishnan, C.J.;Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Navin Pahwa for M/s. Thakkar Assoc.s 1 - 3, for the Appellant;
Tushar Mehta, A.A.G. with Ms. Monali Bhatt, AGP for Respondent 1, Mr. Vijay H.
Patel with Mr. Harshadray A. Dave for Respondent 2, for the Respondent

Final Decision : Dismissed

Judgement

Mr. Akil Kureshi, J.—In the present appeal, the appellants original petitioners have challenged a judgement and order dated 20.3.2009 passed by the Learned Single Judge in Special Civil Application No. 2069/2009. The appellants are members of Morbi Nagarpalika elected on symbol of Bharatiya Janta Party(BJP for short). The post of president of Morbi Nagarpalika felt vacant on account of resignation of the incumbent on 14.6.2007. A meeting was therefore, convened to elect a new president on 2.7.2007 under the chairmanship of Deputy Collector, Morbi.

1.1 Respondent No. 2 herein alleging defiance of whip by the appellants filed Petition No. 14/2007 before the Designated Officer seeking their disqualification as members of the Morbi Nagarpalika. In the said application it is stated inter-alia that the appellants are the members of the Nagarpalika elected on the symbol of BJP. A meeting of office bearers of the party was held on 30.6.2007 and decision was taken that the party should nominate its candidate for the post

of president and all members should vote for such a candidate. The Councilor Narsibhai Vastabhai Dabhi was elected for such nomination and a whip to this effect was also issued. The appellants however, had joined hands with the councilors belonging to the Congress party and despite several attempts they could not be contacted and had deliberately avoided service of whip. They had not even cared to find out whether any whip has been issued by the party or not. They had defied the directives of the party and one of them i.e. Devabhai Parbatbhai Avadiya, appellant No. 1 herein had contested for the post of president contrary to whip of the party. Such conduct of the appellants was not pardoned by the party. It is therefore, prayed that these members should be disqualified in terms of Rule 3 of the Gujarat Provision for Disqualification for Members of Local Authorities for Defection Rules 1987.(herein-after referred to as the Defection Rules). It may be noted that said application was supported by affidavit dated 17.10.2007 in which it is stated that the contents of paragraphs No. 1 to 8 are based on personal knowledge.

1.2 The appellants herein, thereafter moved an application dated 29.1.2009 stating inter-alia that they are seriously disputing the issuance of any mandate by the party and in fact no mandate was issued. They therefore, sought permission to lead evidence in following terms :

"2. Respondent further states that looking to the seriousness of the matter and issues involving question of fact more particularly with regard to issuance of mandate, respondents request this Hon"ble Authority to order the petitioner as well as the respondents to lead the evidence to that effect and if the petitioner is not interested in leading the evidence, Respondents request this Hon"ble Court to permit the present respondents to cross-examine the petitioner so that truth can be brought on record. Hence, in the interest of justice, the present respondents pray this Hon"ble Court to pass appropriate order for leading evidence, in the interest of justice."

1.3 The said application however, came to be turned down by the Authority by an order dated 20.2.2009 observing inter-alia that as per Rule 7(7) of the Defection Rules, officer has to follow the principles of natural justice while deciding the question of disqualification and in the said rule there is no provision for cross examination.

2. It is this order which came to be challenged by the appellants before the Learned Single Judge in Special Civil Application No. 2069/2009.

3. However, before advertng to the decision of Learned Single Judge, it may be noted that on behalf of the appellants, yet another application came to be made on 17.3.2009, in which it is stated inter-alia that their application for cross examination has been rejected by the Designated Officer. The said decision has been challenged before the Learned Single Judge which is pending. They may be permitted to lead evidence in support of their case. It is stated by the Counsel that on the said application, the Designated Officer has not passed any order.

4. Learned Single Judge dismissed the petition of the appellants herein holding that there is no absolute proposition that right to cross examination would form part of principles of natural justice and it: depends on facts and circumstances of each case. It was further observed that the Designated Officer has not yet formed any opinion and respondent No. 2 has also not entered the witness box. Under such circumstances, not accepting the request for cross examination cannot be said to be in violation of principles of natural justice.

5. On 2.4.2009, Letters Patent Appeal was heard for preliminary hearing by this Bench and following order was passed :-

"Interim stay against further proceedings before the Authority for a period of two weeks. Post the matter on 15.4.2009."

6. It appears that on that very day, the Designated Officer passed an order disqualifying all the appellants. The appellants therefore, moved Civil Application No. 3968/2009 and prayed for stay of implementation of said order dated 2.4.2009 in which the Bench on 6.4.2009 granted stay in terms of prayer 16(C) of the application and thereby suspended the execution and implementation of the said order dated 2.4.2009.

7. Learned Advocate Shri Navin Pahwa appearing for the appellants submitted that the Designated Officer by not allowing the appellants to cross examine the original applicant committed a serious breach of principles of natural justice. He contended that several disputed questions of fact are involved in the proceedings and it was therefore, necessary that the original applicant who had filed application on affidavit be allowed to be cross examined.

7.1 He further contended that alternatively the appellants had also prayed for permission to lead their own evidence through their application dated 17.3.2009 which remained undecided till last.

7.2 It was contended that Rule 7(7) of the Defection Rules clearly requires the Designated Officer to follow the principles of natural justice. Procedure followed by the Designated Officer was therefore, in breach of Rule 7(7). Learned Single Judge also erred in holding that there was no breach of principles of natural justice.

7.3 Reliance was placed on the decision of the Apex Court in case of Ravi S. Naik and Sanjay Bandekar Vs. Union of India and others, , wherein in paragraph 26, while turning down the case of the members facing disqualification, it was observed that they had not come forward to give their evidence nor sought permission to cross examine the witness with respect to the statement made by him before the Speaker.

7.4 Reliance was also placed on decision in case of New India Assurance Company Ltd. Vs. Nusli Neville Wadia and Another, , wherein the Apex Court observed that :

"45. If some facts are to be proved by the landlord, indisputably the occupant should get an opportunity to cross-examine. The witness who intends to prove the said fact has the right to cross-examine the witness. This may not be provided by under the statute, but it being a part of the principle of natural justice should be held to be indefeasible right. (See K.L. Tripathi v. SBI and Lakshman Exports Ltd. V. CCE)"

8. On the other hand, learned Additional Advocate General Shri Tushar Mehta appearing for the Designated Officer opposed the appeal. He contended that whether permission to cross examine the complainant be granted would depend on ; facts of each case and no straight jacket formula can be provided. In the facts of the case, the Designated Officer was justified in not granting such permission when it was found that the appellants were through successive litigations attempting to delay the proceedings. Relying on Rule 10A of the Defection Rules, he submitted that the said Rule requires the concerned member to verify whether any mandate has been issued by his party.

8.1 Reliance was placed on the decision of the Apex Court in the case of Jagjit Singh Vs. State of Haryana and Others, , to contend that requirements of natural justice cannot be put in straight jacket and each case must be judged on its own facts.

9. Learned Advocate Shri Vijay Patel appearing for respondent No. 2 contended that the said respondent had not entered the witness box to give his evidence. The appellants therefore, were rightly not granted permission to cross examine him.

10. Having thus heard learned Advocates for the parties, we find that Rule 7 of the Defection Rules provides for procedure to be followed by the Designated Officer while dealing with subject of disqualification of members of Panchayat, Municipality, etc. Sub-rule(7) thereof reads as follows :

"(7) The procedure which shall be followed by the Chief Secretary or designated officer for determining any question and the procedure which shall be followed by the officer for the purpose of making a preliminary inquiry under sub-rule(4) shall be consistent with the rules of natural justice and neither the chief Secretary or designated officer shall come to any findings that a councillor or member has become subject to disqualification under the Act without affording a reasonable opportunity to such councillor or member to represent his case and to be heard in person."

11. Under sub-rule(7) of Rule 7 thus the Designated Officer has to follow the procedure which is consistent with the principles of natural justice and to ensure that the finding that a member has become subject to disqualification is not reached without affording a reasonable opportunity to such councilor or member to represent his case and to be heard in person. It cannot be disputed that if evidence of any person either on oath or rendered through a statement on affidavit is to be relied upon to render a member disqualified, such person must

be permitted to be cross examined by the concerned member. Any departure from this basic requirement would certainly be in violation of principles of natural justice. Therefore, the view of the Designated Officer that Rule 7(7) does not envisage cross examination of the applicant cannot be approved. However, when we are dealing with the proceedings for disqualification under the Defection Rules, whether the applicant upon whose petition the disqualification proceedings have been initiated should be permitted to be cross examined and whether the member concerned should be permitted to lead his oral evidence, must depend on facts of each case and no rigid or uniform formula which would apply in every case can be laid down.

12. It may be noted that in Rule 8 of the Defection Rules, it is provided inter-alia that :

"A petition rising the question as to whether a councillor or member has become subject to disqualification under the Act shall be determined as expeditiously as possible and an "endeavor to determine the question within two months" from the date on which the petition is made under Rule 6"

The proceedings under the Defection Rules therefore, need to be completed as expeditiously as possible.

13. In case of Jagjit Singh v. State of Haryana and others (supra) the Apex Court made following observations :

"13. The question whether reasonable opportunity has been provided or not cannot be put in a strait-jacket and would depend on the fact-situation of each case.

14. At the outset, we may mention that while considering the plea of violation of principles of natural justice, it is necessary to bear in mind that the proceedings, under the Tenth Schedule, are not comparable to either a trial in a Court of law or departmental proceedings for disciplinary action against an employee. But the proceedings here are against an elected representative of the people and the judge holds the independent high office of a Speaker. The scope of judicial review in respect of proceedings before such Tribunal is limited. We may hasten to add that howsoever limited may be the field of judicial review, the principles of natural justice have to be complied with and in their absence, the orders would stand vitiated. The yardstick to judge the grievance that reasonable opportunity has not been afforded would, however, be different. Further, if the view taken by the Tribunal is a reasonable one, the Court would decline to strike down an order on the ground that another view is more reasonable. The Tribunal can draw an inference from the conduct of a member, of course, depending upon the facts of the case and totality of the circumstances.

26. Considering that rules of natural justice are flexible, let us now examine the facts of the present case where the petitioners filed their replies to the complaint and were asked by the Speaker to watch the video recording and point out

doctoring thereof, if any. The question is that having failed to do so, can they be heard on the facts of the present case, to say that non-grant of opportunity to cross-examine Ashwani Kumar and to adduce evidence has resulted in violation of rules of natural justice on having simply denied that they have not joined the Indian National Congress? Had they availed of the opportunity and pointed out how the recording was not correct and it was doctored and then not permitted to lead evidence, the argument that there has been violation of principles of natural justice may have carried considerable weight. The petitioners cannot be permitted to sit on the fence, take vague pleas, make general denials in the proceedings before the Tribunal of the nature under consideration. Under these circumstances, mere denial of opportunity to cross-examine or adduce evidence may not automatically lead to violation of principles of natural justice. The principles of natural justice cannot be placed in such a rigid mould. The Court, on facts of a case despite denial of opportunity to lead evidence, may come to the conclusion that reasonable opportunity has been afforded to the person aggrieved. The principles of natural justice are flexible and have to be examined in each case.

27. The question to be asked in the ultimate analysis would be whether the person aggrieved was given a fair deal by the Authority or not? Could a reasonable person, under the circumstances in which Tribunal was placed, pass such an order? Answer to these questions would determine the fate of the case."

14. The question of granting permission for cross examining the applicant therefore, shall have to be judged depending on facts of the case and if such permission is denied, the decision of the Designated Officer shall have to be judged on the touchstone whether "the person aggrieved was given a fair deal by the Authority or not". In the present case, the appellants had approached this Court at a stage when the Designated Officer had not passed the final order on the application seeking disqualification. During the pendency of the proceedings as already noted such final order has been passed.

15. In that view of the matter and in view of the observations made here-in-above, we do not find that the order of the Designated Officer as well as judgement of the Learned Single Judge need to be interfered with. Whether rejection of the application of the appellants dated 29.1.2009 seeking cross examination of respondent No. 2 herein and not deciding the application dated 17.3.2009 seeking permission to lead evidence, has caused any prejudice to the appellants, can be examined only by testing the validity of the ultimate disqualification order if challenged.

16. Before concluding, we would like to clarify few aspects :

(a) We make it clear that even in a disqualification proceeding, if the evidence of any witness rendered either on oath or on affidavit, is sought to be relied upon by the

Designated Officer to pass any order adverse to a member, such member would

have the right to seek cross examination of such a witness.

(b) In Civil Application No. 3968/2009 one of the prayers is to set aside disqualification order dated 2.4.2009. No amendment in the Letters Patent Appeal to this effect has been sought or granted. Learned Advocates for the parties have also not advanced any arguments. In this order, we have not examined the legality of the same and leave it to the appellants to seek their remedy in accordance with law.

(c) Validity of Rule 10A of the Defection Rules is not in challenge in the present appeal.

(d) Learned Single Judge in his impugned judgement in paragraph-25 made following observation :

"25. It is also required to be observed here that the petitioners are branded as defectors. They were elected on the ticket of a particular political party. They have changed their side subsequently. Morally and even legally to some extent, if the allegations against them are proved, they are not entitled to continue as members of Morbi Nagar Palika. The rule of morality requires that they should have resigned and sought the fresh mandate of the people. In any case, the persons who are not coming before the Court with clean hands or with sound moral background will have no right to claim equity or to invoke equitable jurisdiction of this Court."

We are of the opinion that that at an interlocutory stage, when disqualification proceedings were still pending before the ; Designated Officer, such observations ought not to have been made which would adversely affect the rights of the parties. These observations are therefore, set aside. Subject to above observations and clarifications, Letters Patent Appeal is dismissed. Civil Applications also stand dismissed accordingly.