
(1990) 03 KAR CK 0003

In the Karnataka High Court

Case No : Writ Petition No. 2419 and 2420 of 1988

Dharmappa Sabanna Madar

APPELLANT

Vs

Chief Secretary

RESPONDENT

Date of Decision : 19-03-1990

Acts Referred:

Karnataka Local Authorities (Prohibition of Defection) Act, 1987 — Section 4

Citation : (1990) ILR (Kar) 1637

Hon'ble Judges : Balakrishna, J

Bench : Single Bench

Advocate : V.T. Rayareddy, for the Appellant; Nimmiswamy, HCGP., for the Respondent

Final Decision : Dismissed

Judgement

Balakrishna, J.—The petitioners are aggrieved by the order dated 27-1-1988 passed by the Chief Secretary, Zilla Parishat, disqualifying them from the membership of the Mandal Panchayat, Murnal, Bagalkot Taluk, Bijapur District.

2. Few facts are necessary to be stated for the purpose of determination of the issues involved in these Writ Petitions.

3. The petitioners are members of the Murnal Mandal Panchayat, Taluk Bagalkot, District Bijapur, and that they are duly elected members is not in dispute. They belonged to Janata Party and they were elected on Janata Party Tickets as members of the Mandal Panchayat. On 30-12-1987, an ordinary meeting of the Mandal Panchayat was convened and the petitioners participated in the meeting. At the meeting, the petitioners opposed the confirmation of the resolution passed in Item-10 of the previous meeting of the Panchayat and further when the resolution was put to vote the petitioners opposed the resolution whereas seven members of the same party voted in favour of the resolution. It is also stated that the petitioners voted against the resolution along with one Congress-I member and one B.J.P. member besides two Independent members. The

petitioners do not dispute that they voted against the resolution or they opposed the confirmation of the minutes of the earlier proceedings relating to Item-10 in the Agenda. But their case is that there was no direction or party whip by the Janata Party and that they had no reasonable opportunity to put forth their case before the authority which passed the impugned order disqualifying them and that no time was granted at the time of hearing to produce the documents and also to lead oral evidence.

4. The learned Counsel for the petitioners strongly contended that though under certificate of posting the party whip is supposed to have been issued to the members of the Janata Party in the Mandal Panchayat, the Certificate of posting does not disclose the address of the petitioners and therefore the certificate of posting cannot be relied upon. It was also submitted that service of notice under certificate of posting is not the proper procedure but the communication of the whip should have been under Registered post.

5. The petitioners deny ignorance of the party whip and even go to the extent of asserting there was no party whip at all for any of the members belonging to Janata Party to vote in a particular manner.

6. The learned Counsel for the petitioners contended that the impugned order is vitiated for non-compliance with the requirement of Section 4 of the Karnataka Local Authorities (Prohibition of Defection) Act (in short the "Act") in as much as the Secretary of the Mandal Panchayat should have referred the complaint to the Chief Secretary, Zilla Parishat within 24 hours from the receipt of such a complaint for his decision and further the Chief Secretary of the Zilla Parishat should have decided the question within seven days after the receipt of the same by him. The contention is that there is non-compliance with these requirements of law.

7. On the other hand, the learned Government Pleader appearing for the State submitted that there is convincing material on record to establish that there was notice to the petitioners of the whip issued by the party and the petitioners chose to vote against the resolution defying the party whip at their own peril and It is not open to them at this stage to raise such contentions which they have not raised before the authority which passed the impugned order.

8. The learned Government Pleader made available the records relating to the proceedings and I do not find from the records any statement of objections filed by the petitioners and in the body of the impugned order also there is no reference to such objections or contentions of the petitioners. I have seen the certificate of posting and it contains only the names of all the members of the Janata Party. This certificate of posting relates to the communication issued to all the party members as to the manner in which they had to exercise their votes. Out of 11 members belonging to the Janata Party 9 members have voted in accordance with the party whip and only the petitioners (who are two in number) have flouted the whip, voting contrary to the whip. If nine members of the

Janata Party have voted in accordance with the whip the presumption will be that they have voted in unison respecting the party whip which would imply that these nine members had received the communication of the whip issued by the party. The absence of the addresses of the members in the certificate of posting (who voted in accordance with the whip) does not negative the presumption that the said nine members did receive the whip and implemented it. Notwithstanding the absence of addresses on the certificate of posting if nine members of the same party have received the communication, it is not either reasonable, appropriate or possible to believe the submission of the petitioners that they had not received the communication of the whip issued by the party. It is most unnatural that when all the eleven members of the Janata Party assembled at the meeting and exercised their votes they did not meet each other before taking a decision on the question of vote. At any rate there is no allegation that the petitioners were not on speaking terms with the other members of the same party when voting took place on 30-12-1987. In these circumstances, the conduct of the petitioners justifies the presumption that they voted contrary to the whip. It is true that there is no material on record at all to believe that the petitioners advanced the contention which their learned Counsel raised before this Court, at the time of enquiry before the impugned order was passed. I therefore hold that the petitioners have openly defied the party whip and it is too late for them to back-peddle and contend that they had no knowledge of it at all. I must observe that if the petitioners by courage of conviction had stood apart from nine other members of the same party, they should have held ground instead of resiling from the position they took on the date of voting instead of offering a flimsy excuse.

9. The whip, original of which is in the records, is dated 26-12-1987 and it is attached to the certificate of posting containing the names of the 11 party members. The voting took place on 30-12-1987 and the complaint was lodged by the Janata Party Secretary addressed to the Secretary, Mandal Panchayat on 14-1-1988. This complaint was forwarded by the Secretary of the Mandal Panchayat to the Chief Secretary, Zilla Parishat on 18-1-1988. After holding an enquiry the impugned order emerged on 21-7-1988.

10. Now the questions of law urged by the learned Counsel for the petitioners.

The first submission is that there is a failure on the part of Secretary, Mandal Panchayat to forward the complaint to the Chief Secretary, Zilla Parishat within twenty four hours as contemplated u/s 4 of the Act and that there was non-compliance with the proviso to Section 4 of the Act, inasmuch as the question was not decided by the Chief Secretary, Zilla Parishat within 7 days after receipt of the complaint by him.

11. The learned Government Pleader appearing for the State submitted that though Section 4 of the Act contemplates that the complaint should be communicated by the Secretary, Mandal Panchayat, within 24 hours of the receipt of the complaint by the Chief Secretary, Zilla Parishat, the time limit of 24

hours is only directory and not mandatory. The learned Government Pleader also submitted that the time limit of seven days provided by Section 4 within which time decision has to be rendered on the question referred to it, is equally directory and not mandatory. The further contention is that it is not shown how the petitioners are affected as a result of late or belated reference of the complaint by the Secretary of the Mandal Panchayat to the Chief Secretary of the Zilla Parishat and also on account of disposal of reference a short time beyond seven days. It would be necessary to reproduce Section 3 of the Act:

"3. Disqualification on the ground of defection:

(1) Subject to the provisions of Section 4, a Councillor or a Member, belonging to any political party, shall be disqualified for being such Councillor or member -

(a) If he has voluntarily given up his membership of such political party; or

(b) If he votes or abstains from voting in any meeting of the Municipal Corporation, Municipal Council, Zilla Parishad or Mandal Panchayat contrary to any direction issued by the political party to which he belongs or by any person or authority authorised by it in this behalf, without obtaining, in either case, the prior permission of such political party, person or authority and such voting or abstention has not been condoned by such political party, person or authority within fifteen days from the date of voting or such abstention.

Provided that no Councillor or Member shall be so disqualified if the number of Councillors or Members so voting or abstaining from voting constitutes not less than one half of the total number of Councillors or Members belonging to the political party in Zilla Parishad, Mandal Panchayat, Municipal Corporation or Municipal Council, as the case may be."

Thus the member of Mandal Panchayat would suffer disqualification under sub-section Kb) of Section 3 if the member votes or abstains from voting in any meeting of the Mandal Panchayat in violation of any direction issued by the political party to which he belongs without obtaining prior permission of such political party provided such voting or abstention has not been condoned by such political party within fifteen days from the date of voting or such abstention. There was no condonation of the voting or abstention in violation of the party whip is not in dispute. That the petitioners belong to Janata Party and they voted against the resolution whereas nine other members of the same party voted in favour of the resolution also is not in dispute. It is not the case of the petitioners that they do not belong to Janata Party. Their case is that they were not aware of the direction issued by the party which I have already rejected on the basis of material on record. Therefore, the question to be considered is whether the petitioners are liable to disqualification. It is necessary to refer to the proviso to Section 3(b) of the Act. According to the proviso, no member shall be disqualified if the number of members so voting or abstaining from voting constitutes not less than one half of the total number of members belonging to the political party in the Mandal Panchayat. The total number of members of the Janata Party in the

instant case is 11 and the number of members who have defied the party direction are two and nine others have voted in favour of the resolution. In these circumstances the proviso to Sub-section (b) of Section 3 will be of no assistance to the petitioners. Section 4 of the Act reads thus:

"Decision on the question as to disqualification on the ground of defection -

(1) Where a complaint under Sub-section (1) is received by the Chief Executive Officer of the concerned local authority, he shall, within twenty four hours from the receipt of such complaint, refer the same for decision to -

(i) in the case of Zilla Parishad, to the Chief Secretary to Government;

(ii) in the case of Municipal Corporation, to the Divisional Commissioner;

(iii) in the case of a City or Town Municipal Council to the Deputy Commissioner;

(iv) in the case of a Mandal Panchayat, to the Chief Secretary, to the Zilla Parishad;

who shall decide the question within 7 days after the receipt by him of the reference and his decision shall be final.

It is true that the complaint of defection was lodged by the party on 14-1-1988 with the Secretary of the Mandal Panchayat and thereafter the said Secretary referred the complaint for decision to the Chief Secretary of the Zilla Parishad vide letter dated 18-1-1988. The time of four days has elapsed between the date of receipt of the complaint from the Secretary Mandal Panchayat and then reference of the complaint to the Chief Secretary of the Zilla Parishad. According to Section 4 of the Act, reference shall be made within twenty-four hours from the receipt of such a complaint. The question whether or not the provision is mandatory or directory has to be considered in the context of impact of non-observation of the time limit on the proceedings as well as on the petitioners. The learned Counsel for the petitioners was not able to explain as to how the petitioners are affected just because the complaint was not referred to the Competent Authority within twenty-four hours but after a lapse of about 4 days and also as to how the proceedings are affected on account of this delay. The Intention that could be gathered from the word "shall" in the context Is that it would be preferable to refer the complaint for decision within twenty-four hours and the meaning of the word "shall" has to be construed as the meaning of the word "may". It cannot be said that by not submitting the reference for decision within twenty-four hours from the receipt of the complaint the purpose of law is defeated in the absence of any adverse consequences either to the petitioners or the proceedings in respect of which the decision is to be taken. It may also be mentioned that the provision of law in Section 4 of the Act contemplating a time limit cannot be applied too harshly or rigidly, especially in the context of the fact that the law is concerned with the administration of the affairs of a village republic. It would be unnatural and also unreasonable to presume that the intention of law was to obliterate a complaint If reference was not made within

twenty-four hours from the receipt of the complaint. Similarly, in regard to the word "shall" used in the sentence "who shall decide the question within seven days after the receipt by him of the reference and his decision shall be final," has to be held as directory and not mandatory. The Intention of this proviso appears to be that as far as possible the decision shall be rendered within seven days after the receipt of the reference and it cannot be said that the decision became null and void if it was not rendered within 7 days from the date of receipt of the complaint. What adverse consequences would follow if a decision is not rendered within a time limit of 7 days is not provided in the statute. In these circumstances, it is not possible to attach too much importance to the word "shall" in the sense that it is a statutory dictate and not a statutory direction. Looking from any angle after a careful consideration of these provisions of law and the non-existence of adverse consequences resulting from relaxation of the time limit set down under the said provisions, I am of the opinion that the word "shall" used in Section 4 has to be construed as "may", as flexibility would have it.

12. The learned Government Pleader appearing for the State referred to a decision of the Supreme Court in *The Remington Rand of India Ltd. Vs. The Workmen*, and relied on an observation by Subba Rao, J (as he then was) speaking for the majority of the Court that:

"For ascertaining the real intention of the Legislature the Court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered.

The Supreme Court observed keeping the above principles in mind, we cannot but hold that a provision as to time in Section 17(1) is merely directory and not mandatory. Section 17(1) makes it obligatory on the Government to publish the award. The limit of time has been fixed as showing that the publication of the award ought not to be held up. But the fixation of the period of 30 days mentioned therein does not mean that the publication beyond that time will render the award invalid."

In *Prakash Chand Maheshwari and Another Vs. The Zila Parishad, Muzaffarnagar and Others*, the Supreme Court posited:

"The next argument of the Counsel that the time schedule mentioned in Rules 4 and 5 in the Notification of January 28 not having been adhered to, the assessment was illegal, must be rejected on the face of it. These Rules laying down certain dates by which the work was directed to be taken in hand and

completed were merely directory and not mandatory. There was nothing in these rules to suggest that if the dates were not strictly observed any prejudice would be caused to the assessee. We find ourselves unable to accept the observations to the contrary in a Judgment of the Allahabad High Court dated 8-1-1963 rendered in Civil Miscellaneous Writ Petition 3160 of 1962 to which reference was made in this connection."

IN Mansoor Khan and Others Vs. State of U.P. and Others, the Supreme Court observed, thus:

"The fact that the scheme was not sanctioned within six months from the date of inviting objections cannot make the scheme illegal or ultravires. Even Section 31 merely provides that "the Board may, so far as may be, within six months sanction it" So, the period of six months within which the scheme has to be sanctioned is not an absolute limit. The provision regarding the scheme being sanctioned within six months is purely directory and not mandatory. The scheme is, therefore, valid."

In NARASIMHAIAH v. H.G. SINGRI GOWDA AND ORS. AIR 1966 SC 331 the Supreme Court held:

"It is necessary also to remember that the main object of giving the notice is to make it possible for the Councillors to so arrange their other business as to be able to attend the meeting. For an ordinary general meeting the notice provided is of seven clear days. That is expected to give enough time for the purpose. But a lesser period - of three clear days - is considered sufficient for "special general meetings" generally. The obvious reason for providing a shorter period of such meetings is that these are considered more important meetings and Councillors are expected to make it convenient to attend these meetings even at the cost of some inconvenience to themselves. Where the special general meeting is to dispose of some matter of great urgency it is considered that a period of even less than three clear days notice would be sufficient.

A consideration of the object of these provisions and the manner in which the object is sought to be achieved indicates that while the legislature did intend that ordinarily the notice as mentioned should be given it could not have intended that the fact that the notice is of less than the period mentioned in the section and thus the Councillors had less time than is ordinarily considered reasonable to arrange his other business to be free to attend the meeting, should have the serious result of making the proceedings of the meeting invalid. It is important to notice in this connection one of the provisions in Section 36 of the Act. It is in these words:

No resolution of a Municipal Council or any committee appointed under this Act shall be deemed invalid on account of any irregularity in the service of notice upon any Councillor or member provided that the proceedings of the Municipal Council or committee were not prejudicially affected by such irregularity. It is reasonable to think that the service of notice mentioned in this provision refers

to the giving of notice to the Councillors. Quite clearly, any irregularity in the manner of giving the notice would be covered by the words "irregularity in the service of the notice upon any Councillor". It appears to us, however, reasonable to think that in making such a provision in Section 36 the legislature was not thinking only of irregularity of the mode of service but also of the omission to give notice of the full period as required."

We are, therefore, of the opinion that the fact that some of the Councillors received less than three clear days notice of the meeting did not by itself make the proceedings of the meeting or the resolution passed there invalid. These would be invalid only if the proceedings were prejudicially affected by such irregularity. As already stated, nineteen of the twenty Councillors attended the meeting. Of these 19, 15 voted in favour of the resolution of no-confidence against the appellant. There is thus absolutely no reason for thinking that the proceedings of the meeting were prejudicially affected by the irregularity in the service of notice."

I therefore find no merit in these Writ Petitions. Hence, the Writ Petitions are dismissed. But in the circumstances of the case, there will be no order as to costs.