

(1987) 12 KAR CK 0005

In the Karnataka High Court

Case No : Writ Petition No's. 12984 to 12986 and 13098 to 13100 of 1987

D.R. Shivappa Gowda

APPELLANT

Vs

Zilla Parishad, Chief Secretary

RESPONDENT

Date of Decision : 03-12-1987

Acts Referred:

Constitution of India, 1950 — Article 20 (1), 213

Karnataka Local Authorities (Prohibition of Defection) Act, 1987 — Section 10, 3, 3 (1) (b)

Citation : (1988) ILR (Kar) 509

Hon'ble Judges : Bopanna, J

Bench : Single Bench

Advocate : Jayakumar S. Patil, H.K. Vasudeva Reddy, G.S. Visweswara, Ravi varma Kumar, Ravi varma Kumar, A.K. Subbaiah, K.S. Savanur and N.Y. Hanumanthappa, for the Appellant; N. Santosh Hegde; and B.J. Somayaji, HCGP for R-1; B. Veerabhadrapa, for R-2, for the Respondent

Final Decision : Dismissed

Judgement

Bopanna, J.—These batch of Writ Petitions raise an important question of law touching the interpretation of Article 20(1) of the Constitution and the relevant provisions of the Karnataka Local Authorities (Prohibition of Defection) Act, 1987 (hereinafter referred to as the Anti-Defection Act). The Karnataka Legislature just on the eve of the elections to the Zilla Parishads and Mandal Panchayats which came to be constituted under the provisions of the Karnataka Zilla Parishads, Taluk Panchayat Samithis, Mandal Panchayats and Nyaya Panchayats Act, 1983, issued an Ordinance called as "Karnataka Local Authorities (Prohibition of Defection) Ordinance, 1986". The Ordinance was promulgated on 29th December, 1986. By that Ordinance certain disqualifications were imposed on a Councillor or member belonging to any political party from voting or abstaining from voting in any meeting of the Zilla Parishad and Mandal Panchayat, contrary to any direction issued by the political party to which he belongs or any person or authority authorised in this behalf without obtaining in

either case the prior permission of such political party, if such voting or abstention have not been condoned by such political party, person or authority within 15 days of such voting or abstention.

2. Section 1 of the Ordinance provides that it comes into force at once. Section 3 of the Ordinance enumerates the grounds for disqualification on the ground of defection. Section 4 of the Ordinance provides the machinery for disqualifying the candidate on the ground of defection. Section 11 of the Zilla Parishads Act was amended by insertion of Clause (1 A). It reads as under:

"A person shall be disqualified for being a Councillor if he is so disqualified under the Karnataka Local Authorities (Prohibition of Defection) Ordinance, 1986."

Likewise, after Sub-section (1) of Section 154 of the Zilla Parishad Act, Sub-section 1A was incorporated as follows:

"A person shall be disqualified for being a member of the Zilla Parishad if he is so disqualified under the Karnataka Local Authorities (Prohibition of Defection) Ordinance, 1986."

This Ordinance, as noticed earlier, was brought into force on 29-12-1986, obviously because the Legislature was not in Session and that is the reason the Governor in exercise of his legislative power under Article 213 of the Constitution promulgated this Ordinance. This Ordinance was laid before the Assembly after re-assembly of the legislative Assembly and it ceased to operate at the expiration of six weeks from the re-assembly of the legislature. But it is not disputed that the Bill to pass the Anti-Defection Act was introduced on 30-1-1987. The Assembly passed the same on 5-2-1987. The Bill was sent to the Upper House i.e., the Legislative Council on 6-2-1987 and the Legislative Council passed the same on 12-3-1987 with certain amendments. With these amendments, the Bill was passed again by the Assembly on 1-4-1987. The Governor's assent was obtained on 2-5-1987 and the Act after the assent of the Governor was published on 5-5-1987.

3. According to the petitioners, the Ordinance lapsed on 13-3-1987 since the same was not approved before the expiration of six weeks period by a resolution of the Assembly and therefore during the period 13-3-1987, on which date it ceased to operate and the period 5-5-1987 on which date the Anti-Defection Act came into force, there was no law at all disqualifying the candidate in terms of Section 3 of the A.D. Act. It is common ground that election to the posts of Pradhan and Upapradhan of the various Mandal Panchayats were held between 8th April and 25th April, 1987. So, according to the petitioners, the elections which were held between these two dates were not covered by the Anti-Defection Law since there was no law in force between 13-3-1987 and 5-5-1987. Their further contention is that notwithstanding the fact the Act was made applicable with effect from 29-12-1986, that Act could not be given a retrospective effect and by giving such effect this Court would be violating the constitutional protection conferred on the petitioner under Article 20(1) of the

Constitution.

4. On these averments in the Writ Petitions, the principal questions that arise for consideration are:

1) What is the effect of the Ordinance as on 13-3-1987 ?

2) Is it correct to say that from 13-3-1987 to 5-5-1987 there was no law at all for disqualifying the defectors In terms of Section 3 of the Anti-Defection Act ?

3) Assuming there is no law, is it open to the Legislature to make the Act applicable to all cases with effect from the date of Ordinance i.e., 29-12-1986?

5. It is contended by the Counsel appearing for the contesting respondents that the Bill was placed before the Legislature before the expiration of six weeks from the date of the re-assembly of the Legislature and when that Bill was approved by the Legislature, the provisions of Article 213(2)(a) of the Constitution would not come into play at all for deciding the validity of the Act. If that contention is upheld then the effect of the Ordinance and the consequences of the Ordinance having not obtained the approval of the Legislature before the expiration of six weeks from the date of re-assembly would not arise for consideration. The only point that would arise for consideration is whether the Legislature could pass the A.D. Act with retrospective effect and if so whether Section 3 of the Act would be violative of the protection conferred on the petitioners under Article 20(1) of the Constitution?

6. The power of the Governor to promulgate the Ordinance is termed as a legislative power of the Governor as could be seen from the title to Chapter IV to the Constitution. That legislative power is for a limited period as provided under Article 213. In this case, admittedly, the Ordinance was replaced by the Act of the Legislature. u/s 10 of the Act, the Ordinance has been repealed. But notwithstanding such repeal anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under this Act. By giving retrospective effect to the Act, with effect from 29th December, 1986, the Legislature has validated all acts done or any action taken under the repealed Ordinance. Therefore, the question raised by the petitioners on the basis of the provisions of Article 213(2)(a) of the Constitution, in my view does not raise what could be called as a constitutional conundrum. If the law making power of the Legislature is taken into consideration under the scheme of the Chapter III of the Constitution, it could be seen that the power of the Legislature to make any law which is within its legislative competency is not circumscribed by any of the power that is given to the Governor either for making an Ordinance or for withholding his assent to a particular Bill in question.

7. Under Article 200 of the Constitution, when a Bill passed by both the Houses is presented to the Governor for his assent the Governor shall declare either that he assents to the Bill or that he withholds assent therefrom or that he reserves the Bill for the consideration of the President. Provided the Governor may, as

soon as possible after the presentation to him the Bill for assent, return the Bill together with a message requesting that the House or Houses to reconsider the Bill or any specified provisions thereof and in particular to consider the desirability of introducing any such amendments as he may recommend in his message and when a Bill is so returned, the House or Houses should reconsider the Bill accordingly and if the Bill is passed again by the House or Houses with or without amendment and presented to the Governor for assent, the Governor shall not withhold assent therefrom. Proviso to Article 200 is not material for the purpose of this case. So the intendment of Article 200 of the Constitution is that the Governor can only return the Bill making certain suggestions for amendment of the provisions of the Bill. But those suggestions are not binding on both the Houses. If the Bill is passed again without the amendments suggested by him, the Governor has to grant his assent to the Bill and the Bill becomes law. Article 201 is not relevant for this case since it is common ground that the Bill in question was not reserved for consideration of the President. The question that is raised by the petitioners is that the Ordinance having ceased to operate on 13-3-1987, the Act should have come on the Statute Book immediately thereafter. Also it is contended that the Act having received the assent of the Governor on 2-5-1987, there was no law between the period 13-3-1987 and 2-5-1987 which would have disqualified the petitions under the provisions of the Anti-Defection Act. But this contention over looks the provisions of Section 1(2) of the Act which makes the Act applicable with effect from 29th December, 1986. Since the Act was made applicable with effect from 29-12-1986 the fact that the Governor's assent was given only on 2-5-1987 would not render the provisions of the Act nugatory on the ground that between the period 13-3-1987 and 2-5-1987 the Governor's assent had not been obtained. The Governor's assent could not have been obtained because of the pendency of the Bills in the House between the period 30-1-1987 and 1-4-1987. If the Bill was under consideration by both the Houses, the Governor could not have possibly given his assent. As a matter of fact, the Governor had no power at all to give his assent to the Bill when the Bill was under consideration by both the Houses, Such assent was given after the Legislative Assembly finally passed Bill with the amendments proposed by the Legislative Council on 1-4-1987. So the assent of the Governor given on 2-5-1987 would validate the Act and the Act by such validation had come in the place of the Ordinance and by virtue of the retrospective effect given to the Act with effect from 29th December, 1986, even the period between 13-3-1987 to 2-5-1987 is undoubtedly covered by the provisions of the Act. In the circumstances, it is not possible to accept the contention of the petitioners that the Bill having not received the assent of the Governor on 13-3-1987, there was no law at all in force which could be operate against the petitioners.

8. That takes me to the next contention of the petitioners which is the substantial contention urged in these petitions. The petitioners case is that the protection conferred on them under Article 20(1) of the Constitution is taken away by the provisions of Section 1(2) of the Act. Article 20(1) of the

Constitution confers protection on a person if he has committed any offence in violation of a law which is not in force at the time of the commission of the act charged as an offence and protects him against the penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. According to the petitioners the words "penalty and offence" should not be understood in the manner that is understood in Criminal Jurisprudence. But they should be given a liberal interpretation so as to cover the loss of office that might be suffered by the petitioners if this Act were to be given a retrospective effect. Learned Counsel for the petitioners submitted that by suffering disqualification as provided u/s 3 of the Act, the persons who suffer such disqualification not only lose the elective office held by them but they are also disqualified u/s 11 of the Zilla Parishads Act. Such a drastic consequence of the violation of the provisions of Section 3 of the Act would amount to a penalty within the meaning of that word in Article 20(1) of the Constitution. Though the learned Counsel for the petitioners were not able to place any authority to show that the disqualification contemplated u/s 3 of the Anti-Defection Act would amount to an offence as interpreted by the Supreme Court while considering the provisions of Article 20(1) of the Constitution, they maintained that if it is held by the Court that the disqualification suffered by them could be equated to the word "penalty" as found in Article 20(1) of the Constitution then as a corollary that "penalty" would be a sequel to the "offence" in Article 20(1) and if so construed, it is open to this Court to hold that Section 3 of the Anti-Defection Act would be violative of Article 20(1) of the Constitution. They relied on the provisions of the General Clauses Act and also on the provisions of the relevant provisions of the Indian Penal Code to drive home the point that loss of office would amount- to forfeiture of property and forfeiture of property is also one of the modes of punishment under the Indian Penal Code. That takes me to the interpretation of Article 20(1) of the Constitution. Such a provision is in the Constitution of all the democratic countries in this world.

9. The relevant provisions of Article 11(2) of the Universal Declaration of Human Rights, 1948 are as under:

"No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."

(See Criminal Law: Text and Materials, Page 75 - By C.M.V. Clarkson and H.M. Keating)

This Declaration of Human Rights has found a place in our Constitution and the language of this Declaration gives some indication as to the proper meaning to be given to the words "offence" and "penalty". In the Declaration it is made clear that an offence must be a penal offence. The contention of the learned Counsel for the petitioners is based on the provisions of Section 53 of the Indian Penal Code which provides for five types of punishments. Death, imprisonment

for life, imprisonment, which is of two descriptions, namely, (1) Rigorous, that is, with hard labour (2) Simple, Forfeiture of property; and - Fine. Their further contention is that even assuming that the act of defection u/s 3(1)(b) is not an offence within the meaning of the provisions of Article 20(1) of the Constitution, the conditions that have been hedged for exonerating a person from such act u/s 3 of the Act would make the provisions of the Act unworkable in regard to the acts of defection committed by the petitioners between the period 13-3-1987 and 5-5-1987.

10. Mr. Savanur appearing for some of the petitioners has invited my attention to the provisions of Sections 295, 296 and 305 of the Zilla Parishads Act and also to the provisions of Sections 2, 40 and 43 of the Indian Penal Code. He submitted that the word "offence" should be understood as defined u/s 3(26) of the General Clauses Act and what the General Clauses Act says is that the word "offence" should be understood as defined under the Indian Penal Code. Section 2 of the Indian Penal Code provides that "every person shall be liable to punishment under that Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within India." The Section does not in any way come to the aid of the petitioners because the punishment for the offence committed under that Section is only for any act or omission contrary to the provisions of the Indian Penal Code. Section 3 of the Anti-Defection Act does not create any offence as defined in the Penal Code. Section 40 of the Penal Code provides as under:

"Except in the Chapters and Sections mentioned in Clauses 2 and 3 of this Section, the word "offence" denotes a thing made punishable by this Code.

In Chapter IV, Chapter VA, and in the following Sections, namely. Sections 64, 65, 66, 67, 71, 109, 110, 112, 114, 115, 116, 117, 187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388, 389 and 445, the word "offence" denotes a thing punishable under this Code, or under any special or local law as hereinafter defined."

Placing reliance on this provision Mr. Savanur contended that the word "offence" could also denote a thing punishable under any special or local law as in this case under the Anti-Defection Act. That contention again depends on the meaning to be given to the word " offence" and whether that meaning would cover the act of defection which is covered by the provisions of Section 3 (1)(b) of the Anti-Defection Act. I have already referred to Section 53 of the I.P.C. Sections 295, 296 and 305 of the Zilla Parishads Act deal with certain offences committed under that Act and not with offences under the Indian Penal Code. u/s 295 of the Zilla Parishads Act every member of a Mandal Panchayat or a Zilla Parishad and every officer and servant employed under a Mandal Panchayat or Zilla Parishad shall be deemed to be a Public servant within the meaning of Section 21 of the Indian Penal Code and the Prevention of Corruption Act, 1947 (Central Act II of 1947) for the time being in force, and therefore if he commits any offence as defined under the Prevention of Corruption Act, 1947 then he as a public servant

will be liable for the punishment provided for under the provisions of that Act. Section 296 (1) provides that all fines imposed by a Magistrate for any offence under that Act, or under any rule or bye-law made thereunder in any prosecution instituted by or on behalf of a Mandal Panchayat shall be credited to the Mandal Panchayat Fund of such Panchayat. Section 296(2) provides that all fines imposed by a Magistrate for any offence under that Act or under any rule or regulation made thereunder in any prosecution instituted by or on behalf of a Zilla Parishad shall be credited to the fund of such Zilla Parishad. Section 305 deals with the jurisdiction of the Magistrate in regard to offence committed under the Act. It is as under:

"Any prosecution under this Act or under any rule, regulation or bye-law thereunder may save as therein otherwise provided, be instituted before any Magistrate, and every fine or penalty imposed under or by virtue of this Act or any rule, regulation or bye-law thereunder and also all claims to compensation or other expenses for the recovery of which no special provision is otherwise made in this Act, may be recovered on application, to such Magistrate by the distress and sale of any moveable property within the limits of his jurisdiction belonging to the person from whom the money is claimed."

These provisions deal either with the offences committed under the provisions of the Prevention of Corruption Act or offences committed under the Zilla Parishads Act. Even Section 11 of the Zilla Parishads Act does not make the acts of defection u/s 3(1)(b) of the Anti-Defection Act an offence. Therefore it will not be correct for this Court to rely on the provisions of the Zilla Parishads Act or the provisions of the Indian Penal Code to come to the conclusion that acts of defection enumerated u/s 3 of the Anti-Defection Act should be equated to the word "offence" as found in Article 20(1) of the Constitution. So the next limb of the argument would be whether "forfeiture of property" which is one of the modes of punishment u/s 53 of the Indian Penal Code would come within the ambit of the provisions of Section 3 of the Anti-Defection Act. This question has been answered by the Supreme Court in State of West Bengal Vs. S.K. Ghosh, In that case a Constitution Bench of the Supreme Court had to deal with the validity of the Criminal Law Amendment Ordinance (38 of 1944) and Sections 12(1) and 13(3) of the said Ordinance. An argument was advanced before the Supreme Court that forfeiture as provided u/s 13(3) of the said Ordinance in case of offences which involve embezzlement of Government money or property would attract the provisions of Article 20(1) of the Constitution. The Supreme Court repelling this contention observed as under :

"The argument for the respondent is apparently based on the use of the word forfeited in Section 13(3) and also on the use of the word "forfeiture" in Section 53 of the Indian Penal Code. There is no doubt that forfeiture in Section 53 of the Indian Penal Code is a penalty but when Section 13(3) speaks of forfeiting to His Majesty the amount of money or value of the other property procured by the accused by means of the offence, it in effect provides for recovery by the

Government of the property belonging to it, which the accused might have procured by embezzlement etc., The mere use of the word "forfeited" would not necessarily make it a penalty. The word "forfeiture" has been used in other laws without importing the idea of penalty or punishment within the meaning of Article 20(1) Reference in this connection may be made to Section 111(g) of the Transfer of Property Act (No. 4 of 1882) which talks of determination of a lease by forfeiture. We are therefore of opinion that forfeiture provided in Section 13(3) in case of offences which involve the embezzlement etc., of Government money or property is really a speedier method of realising Government money or property as compared to a suit which it is not disputed the Government could bring for realising the money or property and is not punishment or penalty within the meaning of Article 20(1). Such a suit could ordinarily be brought without in any way affecting the right to realise the fine that may have been imposed by a Criminal Court in connection with the offence."

In the light of this enunciation of law by the Supreme Court on the meaning of the word "forfeiture" as it occurs in a penal statute like the Criminal Law Amendment Ordinance 1944 the petitioners will have to make a very strong case to justify their contention that Article 20(1) is attracted to the facts of this case. The decisions on which the petitioners relied do not also advance this contention.

11. The Supreme Court in *Dhartipakar Madan Lal Agarwal Vs. Rajiv Gandhi*, observed as follows:

"Right to contest election or to question the election by means of an election petition is neither common law nor fundamental right instead it is a statutory right regulated by the statutory provisions of the Representation of the People Act, 1951. There is no fundamental or common law right in these matters. This is well settled by catena of decisions of this Court in *N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others*, , *Jagan Nath Vs. Jaswant Singh and Others*, , *Jyoti Basu and Others Vs. Debi Ghosal and Others*, . These decisions have settled the legal position that outside the statutory provisions there is no right to dispute an election. The Representation of the People Act is a complete and self contained Code within which any rights claimed in relation to an election or an election dispute must be found. The provisions of the CPC are applicable to the extent as permissible by Section 87 of the Act. The scheme of the Act as noticed earlier would show that an election can be questioned under the statute as provided by Section 80 on the grounds as contained in Section 100 of the Act."

On the very same analogy it should be held that the provisions of the Zilla Parishads Act and the provisions of the Anti-Defection Act provide their own machinery for deciding all questions relating to the validity of an election. The Anti-Defection Act cannot be termed as a revolutionary piece of legislation since the Parliament had also considered such a legislation by the 52nd Amendment to the Constitution which paved the way for the incorporation of the 10th Schedule in the Constitution relating to disqualification on grounds of defection. Clause (2) of the 10th Schedule reads as under:

"2. Disqualification on ground of defection - (1) Subject to the provisions of paragraphs 3, 4 and 5, a member of a House belonging to any political party shall be disqualified for being a member of the House, -

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

(b) if he votes or abstains from voting in such house 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, with out 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 such voting or abstention.

Explanation. For the purposes of this sub-paragraph --

(a) an elected member of a house shall be deemed to belong to the political party, if any, by which he was set up as a candidate for election as such member;

(b) a nominated member of a house shall, --

(i) where he is a member of any political party on the date of his nomination as such member, be deemed to belong to such political party;

(ii) in any other case, be deemed to belong to the political party of which he becomes, or as the case may be, first becomes, a member before the expiry of six months from the date on which he takes his seat after complying with the requirements of Article 99, or as the case may be, Article 188.

(2) An elected member of a house who has been elected as such otherwise than as a candidate set up by any political party shall be disqualified for being a member of the house if he joins any political party after such election.

(3) A nominated member of house shall be disqualified for being a member of the house if he joins any political party before the expiry of six months from the date on which he takes his seat after complying with the requirements of Article 99 or, as the case may be, Article 188.

(4) Notwithstanding anything contained in the foregoing provisions of this paragraph, a person who, on the commencement of the Constitution (Fifty-second Amendment) Act, 1985, is a member of a house (whether elected or nominated as such) shall, -

(i) where he was a member of a political party immediately before such commencement, be deemed, for the purposes of sub-paragraph (1) of this paragraph, to have been elected as a member of such house as a candidate set up by such political party;

(ii) in any other case, be deemed to be an elected member of the house who has been elected as such otherwise than as a candidate set up by any political party for the purposes of sub-paragraph (2) of this paragraph, or, as the case may be deemed to be a nominated member of the house for the purposes of sub-

paragraph (3) of this paragraph."

Clause 6 of this Schedule provides for the machinery to go into the question of disqualification on ground of defection. The provisions of our Act more or less are similar to the provisions found in the 10th Schedule to the Constitution.

12. The constitutional validity of the Anti-Defection Act is not challenged in these petitions. So it is un-necessary to go into that question. But the fact that remains to be considered is whether the Legislature could make this Act with retrospective effect. This point does not present any difficulty for this Court as the legislature had advisedly left nothing for implication on this question. The Act itself gives the provisions retrospective effect with effect from 29th of December 1986. As observed by the Supreme Court in *The State of Maharashtra Vs. Vishnu Ramchandra*, the question whether an enactment is meant to operate prospectively or retrospectively will have to be decided in accordance with the well settled principles. It is stated by the Supreme Court that:

"The cardinal principle is that statutes must always be interpreted prospectively, unless the language of the statutes makes them retrospective either expressly or by necessary implication. Penal statutes which create new offences are always prospective, but penal statutes which create disabilities, though ordinarily interpreted prospectively, are some times interpreted retrospectively when there is a clear intendment that they are to be applied to past events. The reason why penal statutes are so construed was stated by Erle, C.J., in *Midland Rly. Co. v. Pye* (1861) 10 C.B. NS 179 in the following words :

"Those whose duty it is to administer the law very properly guard against giving to an Act of Parliament a retrospective operation, unless the intention of the legislature that it should be so construed is expressed in clear, plain and unambiguous language; because it manifestly shocks one's sense of justice than an act, legal at the time of doing it, should be made unlawful by some new enactment."

This principle has now been recognised by our Constitution and established as a Constitutional restriction on legislative power."

13. The petitioners are not disputing the power of the State Legislature to give retrospective effect to Anti-Defection Act. What they say is that regard being had to the consequences of Section 3 of the Act, the protection under Article 20(1) of the Constitution could not be taken away. So the short question is whether Section 3 which creates a disability or imposes a disqualification creates an offence. This very point came up for consideration before the Supreme Court in the aforesaid case. The Constitutional validity of the provisions of Section 57 of the Bombay Police Act was considered by the Supreme Court in that case. Section 57 reads as under:

"Removal of persons convicted of certain offences--

If a person has been convicted --

(a) of an offence under Chapter XII, XVI or XVII of the Indian Penal Code (XIV of 1860), or

(b) twice of an offence u/s 9 or 23 of the Bombay Beggars Act, 1945 (Bom XXIII of 1945), or under the Bombay Prevention of Prostitution Act, 1923 (Bom XI of 1923), or

(c) thrice of an offence within a period of three years u/s 4 or 12A of the Bombay Prevention of Gambling Act, 1887 (Bom. IV of 1887), or under the Bombay Prohibition Act, 1949 (Bom XXV of 1949) the Commissioner, the District Magistrate or the Sub-Divisional Magistrate specially empowered by the State Government in this behalf, if he has reason to believe that such person is likely again to engage himself in the commission of an offence similar to that for which he was convicted, may direct such person to remove himself outside the area within the local limits of his jurisdiction, by such route and within such time as the said officer may prescribe and not to enter or return to the area from which he was directed to remove himself."

The Bombay High Court on a consideration of this provision took the view that this Section was intended to be used only when a person was convicted subsequent to the coming into force of the Act and that being a penal Section has to be interpreted prospectively. The learned Judge repelled the arguments of the Government Pleader that Section 57 of the Bombay Police Act merely re-enacted the provisions of Section 27 of the City Bombay Police Act of 1902 and that a liability incurred under that Act was preserved by the subsequent Act. The Supreme Court in reversal of the Judgment of the High Court observed:

"Now, Section 57 of the Bombay Police Act, 1951, does not create a new offence nor makes punishable that which was not an offence. It is designed to protect the public from the activities of undesirable persons to have been convicted of offences of a particular kind. The Section only enables the authorities to take note of their convictions and to put them outside the area of their activities, so that the public may be protected against a repetition of such activities. As observed by Philimore. J. in *Rex v. Austin* 1913 1 KB 551."

"No man has such a vested right in his past crimes and their consequences as should entitle him to insist that in no future legislation shall any regard whatever be had to his previous history."

"An offender who has been punished may be restrained in his acts and conduct by some legislation, which takes note of his antecedents; but so long as the action taken against him is after the Act comes into force, the statute cannot be said to be applied retrospectively. The Act in question was thus not applied retrospectively but prospectively."

14. In my view the ratio of this decision is applicable *proprio vigore* to the interpretation of the Act in question. The preamble itself makes it clear that it is an Act to prohibit defection by the Councillors of Municipal Corporations,

Municipal Councils and members of Zilla Parishads and Mandal Panchayats from the political parties by which they were set up as candidates and matters connected therewith. How the disqualification should operate is provided u/s 3 of the Act excerpted in the earlier part of this order. The fact that there had been defections both at the national level and the State level from one political party to another in this Country is a matter of common knowledge to all right thinking persons and instances are not wanting where not only individual candidates but the entire group of elected candidates belong to a particular political party by defection have changed sides and joined the party in power with a view to form a Government. So the legislature took note of these unhealthy trends and thought it fit to make this enactment firstly to curb defections and secondly to disqualify persons who in violation of party whip or party mandate vote or abstain from voting in any Zilla Parishad and Mandal Panchayat contrary to the directions issued by the political party to which they belong. Therefore it cannot be said that this Act which imposes certain disabilities on persons who defect from one party to another is a penal statute which creates an offence u/s 3 of the Act. The interpretation of Article 20(1) is well settled by a series of decisions of the Supreme Court commencing from Maqbool Hussain Vs. The State of Bombay, ending up with Shiv Dutt Rai Fateh Chand and Others Vs. Union of India (UOI) and Another, Shiv Dutt was a case where the Supreme Court had to consider the validity of certain provisions of Central Sales Tax (Amendment) Act 1976. Section 9 of the Amending Act reads as under:

"Levy and collection of tax and penalties -

(1) The tax payable by any dealer under this Act on sales of goods effected by him in the course of inter-State trade or commerce, whether such sales fall within Clause (a) or Clause (b) of Section 3, shall be levied by the Government of India and the tax so levied shall be collected by that Government in accordance with the provisions of subsection (2), in the State from which the movement of the goods commenced :

Provided that, in the case of a sale of goods during their movement from one State to another, being a sale subsequent to the first sale in respect of the same goods, the tax shall, where such sale does not fall within Sub-section (2) of Section 6, be levied and collected in the State from which the registered dealers effecting the subsequent sale obtained or, as the case may be, could have obtained the form prescribed for the purposes of Clause (a) of subsection (4) of Section 8 in connection with the purchase of such goods.

(2) Subject to the other provisions of this Act and the rules made thereunder, the authorities for the time being empowered to assess, re-assess, collect and enforce payment of any tax under the general sales tax law of the appropriate State shall, on behalf of Government of India, assess, reassess, collect and enforce payment of tax, including any penalty, payable by a dealer under this Act as if the tax or penalty payable by such a dealer under this Act is a tax or penalty payable under the general sales tax law of the State; and for this purpose they

may exercise all or any of the powers they have under the general sales tax law of the State; and the provisions of such law, including provisions relating to returns, provisional assessment, advance payment of tax, registration of the transferee of any business, imposition of the tax liability of a person carrying on business on the transferee of, or successor to, such business, transfer of liability of any firm or Hindu undivided family to pay tax in the event of the dissolution of such firm or partition of such family, recovery of tax from third parties, appeals, reviews, revisions, references, refunds, penalties, compounding of offences and treatment of documents furnished by a dealer as confidential, shall apply accordingly:

Provided that if in any State or part thereof there is no general sales tax law in force the Central Government may by rules made in this behalf make necessary provision for all or any of the matters specified in this sub-section.

(3) The proceeds in any financial year of any tax, including any penalty, levied and collected under this Act in any State (other than a union territory) on behalf of the Government of India shall be assigned to that State and shall be retained by it and the proceeds attributable to Union territories form part of the Consolidated Fund of India."

15. The contention taken before the Supreme Court is that the provisions of Section 9 of the Amending Act would be violative of Article 20(1) of the Constitution. The Supreme Court repelled this contention and observed thus:

"We shall now proceed to consider the question whether by reason of retrospective effect having been given to Sub-section (2-A) of Section 9 of the Act in so far as penalties are concerned by enacting Section 9 of the Amending Act Parliament has contravened Article 20(1) of the Constitution. In order to make good the deficiency in the Act pointed out by the majority judgment in *Khemka and Co. (Agencies) Pvt. Ltd. Vs. State of Maharashtra*, the validating provision contained in Section 9 of the Amending Act provided in substance that in so far penalties were concerned subsection (2-A) of Section 9 should be deemed to have had effect in relation to the period commencing on January 5, 1957 and ending with the date immediately preceding the date of commencement of the Amending Act. That is obvious from the similarity of the language between subsection (2-A) of Section 9 of the Act and Section 9(1) of the Amending Act. Section 9(2) of the Amending Act also contained the usual provision validating the levy of penalty completed prior to the commencement of the Amending Act and authorising the continuance of the proceedings for levy of penalty in respect of the period commencing from January 5, 1957. In the instant case it may be noted that in all the general Sales Tax Laws of the States, there were provisions requiring every dealer to comply with statutory requirements such as the filing of returns, the payment of the tax due within the specified time etc., and they were applicable to the dealers under the Act by reason of Section 9(2) of the Act. Notwithstanding such statutory provisions many dealers failed to perform their statutory duties. They would have been

liable to penalties mentioned in the relevant statutory provisions if the defaults committed by them were those committed under the said statutory provisions. On the basis of the language of Sub-section (2) of Section 9 of the Act in many States proceedings for levying penalties in accordance with the provisions relating to penalties in their respective General Sales Tax Laws were commenced against such defaulters under the Act and in some cases proceedings were completed and penalties were also recovered. Some High Courts also took the view that such penalties were validly leviable. But ultimately this Court by a majority of three to two-held in *Khemka's case* (supra) that since there was no express provision in the Act permitting the levy of such penalties, the proceedings relating to the determination and recovery of penalties were not valid. The Amending Act was, therefore, passed expressly to make the levy of penalties as per the General Sales Tax Laws in force in the State permissible with retrospective effect and also to validate all such previous proceedings. Article 20 of the Constitution reads thus:

"20. (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself."

The contention of the petitioners is that any act or omission which is considered to be a default under the Act for which penalty is leviable is an offence, that such act or omission was not an offence and no penalty was payable under the law in force at the time when it was committed and hence they cannot be punished by the levy of penalty under a law which is given retrospective effect. They principally rely on Article 20(1) in support of their case. Article 20(1) is modelled on the basis of Section (3) of Article 1 of the Constitution of the United States of America which reads:

"No bill of attainder or ex post facto law shall be passed". This clause has been understood in the United States of America as being applicable only to legislation concerning crimes. (See *Calder v. Bull* (1798) 3 Dall 386). The expression "offence" is not defined in the Constitution. Article 467 of the Constitution says that unless the context otherwise provides for words which are not defined in the Constitution, the meaning assigned in the General Clauses Act, 1897 may be given. Section 3 (38) of the General Clauses Act defines "offence" as any act or omission made punishable by any law for the time being in force. The marginal note of our Article 20 is "protection in respect of conviction for offences". The presence of the words "conviction" and "offences", in the marginal note "convicted of an offence", "the act charged as an offence" and "commission of

offence" in Clause (1) of Article 20, "prosecuted and punished" in Clause (2) of Article 20 and "accused of an offence" and "compelled to be a witness against himself in Clause (3) of Article 20 clearly suggests that Article 20 relates to the constitutional protection given to persons who are charged with crime before a Criminal Court. (See H.M. Seervai : Constitutional Law of India (3rd Edition) Vol. 1 page 759). The word "penalty" is a word of wide significance. Sometimes it means recovery of an amount as a penal measure even in a civil proceedings, An exaction which is not of compensatory character is also termed as a penalty even though it is not being recovered pursuant to an order finding the person concerned guilty of a crime. In Article 20(1) the expression "penalty" used in the narrow sense as meaning a payment which has to be made or a deprivation of liberty which has to be suffered as a consequence of a finding that the person accused of a crime is guilty of the charge."

16. The Supreme Court after considering the decisions in Maqbool Hussain Vs. The State of Bombay, Hatisingh Mfg. Co. Ltd. and Another Vs. Union of India (UOI) and Others, Commissioner of Wealth Tax, Amritsar Vs. Suresh Seth, ruled that the word "penalty" in Article 20(1) cannot be construed as including a "penalty" levied under the Sales Tax Laws by the departmental authorities for violation of statutory provisions and that a penalty imposed by the Sales Tax Authorities is only a civil liability, though penal in character. On the very same analogy it will not be difficult for this Court to hold that the disqualification prescribed u/s 3 of the Act is neither a penalty nor a punishment for any offence. This disqualification is a disability conferred on persons who defect from one party to another and such disabilities are imposed by the legislature for maintaining the purity in the democratic way of our life and also to ensure that persons selected by the political parties at the stage of nominations at the hustings and elected on the basis of the party ticket and party programme stick to the party policy and ideologies without succumbing to the lures of defection. In the circumstances though the consequences of such defection are rather drastic in the sense that a person who suffers disqualification is disqualified from entering public life for all time to come, the drastic nature of that disqualification would not make that disqualification an offence within the meaning of Article 20(1) of the Constitution. The loss of Office either for a temporary period or for an indefinite period could not be termed as a penalty within the meaning of Article 20(1).

17. A number of decisions on this point based on the provisions of the Income Tax Act and other Special Laws have been cited by the learned Counsel for the petitioners, but it is un-necessary to refer to them in view of the enunciation of law by the Supreme Court in Shiv Dutt Rai Fateh Chand and Others Vs. Union of India (UOI) and Another, , Shiv Dutt Rai Fateh Chand and Others Vs. Union of India (UOI) and Another,

18. Mr. Reddy appearing for the petitioners in W.P. Nos.7154 to 7157/87. advanced a novel argument based on Article 14 of the Constitution. He

maintained that in view of the new dimension given to the right to equality under Article 14 of the Constitution by the Supreme Court in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, case AIR 1978 SC 1628 and *D.S. Nakara and Others Vs. Union of India (UOI)*, the validity of Section 3 will have to be decided from the stand point of arbitrariness in the application of the provisions. What he submitted was that all these years there was no such prohibition for defection from one party to another and therefore suddenly on the eve of the Mandal Panchayat elections the legislature should not have introduced these provisions to disqualify the candidates who had defected. He submitted that the element of arbitrariness is that persons who had defected in the Parliamentary elections only a year earlier have not been touched by the vice of defection, but only in regard to the local bodies the legislature has thought it fit to introduce this drastic measure. His contention is that all persons who had defected and were successful in getting into the representative bodies notwithstanding such defections before this Act came into force in the month of December 1986 do not suffer the disqualification as provided u/s 3 of the Act. But these persons who defected after the Act came into force are made to suffer on account of such defections.

19. I am unable to find any merit in this contention. The question of arbitrariness does not arise at all on the facts and circumstances of this case. The preamble of the Act makes it clear that it is a provision to ensure purity in the elections and the legislature has thought it fit to bring this Act on the statute book just on the eve of the Zilla Parishad and Mandal Panchayat elections in order to ensure these local bodies which had been constituted for the first time under a new legislation which has far-reaching implications in the establishment of the Panchayat Raj and also in decentralising the powers of the Government, should function effectively, honestly and dutifully without any cross-voting or without the members resorting to floor crossing depending on the lure of inducements offered by the rival parties. The preamble to the Act and the provisions of the Act make it abundantly clear that this is another form of "political welfare" legislation, that is to say, it is meant to cleanse the body politic of the evils of defections and cross-voting. Therefore it is not possible to accept the contentions of Mr. Reddy that there is an element of arbitrariness in the applicability of the Act. Therefore the argument based on Article 14 of the Constitution is rejected.

20. Mr. Ravi varma Kumar submitted that the passing of the Bill is not a relevant factor to judge the validity of the life of an ordinance. According to him, once the ordinance ceased to have effect, the Court must give full effect to the consequences of such an event happening, that is to say, when the ordinance ceased to have any effect before the Act came into force, a constitutional vacuum has been created and that vacuum cannot be filled up by recourse to the provisions of the Constitution. He relied on paragraph 21 of the observations made by the Supreme Court in *Jawaharmal Vs. State of Rajasthan and Others*, . In that case the provisions of Section 4 of the Rajasthan Passengers & Goods Taxation (Amendment and Validation) Act (22 of 1964) came up for

consideration. The Supreme Court declared Section 4 as invalid and in excess of the powers of legislature. But it observed in paragraph 16 of its Judgment thus :

"The next question to consider is whether an Act which suffers from the infirmity that it does not comply with the requirements of Article 255. can be validated by subsequent legislation. There are two answers to this question. Article 255 provides, inter alia, that no Act of the Legislature of a State and no provision in any such Act, shall be invalid by reason only that some recommendation or previous sanction required by this Constitution was not given, if assent to the Act was given by the President later. The position with regard to the laws to which Article 255 applies, therefore, is that if the assent in question is given even after the Act is passed, it serves to cure the infirmity arising from the initial non-compliance with its provisions. In other words, if an Act is passed without obtaining the previous assent of the President, it does not become void by reason of the said infirmity; it may be said to be unenforceable until the assent is secured Assuming that such a law is otherwise valid, its validity cannot be challenged only on the ground that the assent of the President was not obtained earlier as required by the other relevant provisions of the Constitution. The said infirmity is cured by the subsequent assent and the law becomes enforceable. It is unnecessary for the purpose of the present proceedings to consider when such a law becomes enforceable, whether subsequent assent makes it enforceable from the date when the said law purported to come into force, or whether it becomes enforceable from the date of its subsequent assent. Besides, it is plain that the Legislature may, in a suitable case, adopt the course of passing a subsequent law re-introducing the provisions of the earlier law which had not received the assent of the President, and obtaining his assent thereto as prescribed by the Constitution....".

However, in paragraph 23 of the Judgment the Supreme Court while dealing with the arguments of the learned Advocate-General, who had supported the constitutional validity of Section 4 of the Act, observed thus:

"The learned Advocate-General strongly relied on the last part of Section 4. This part provides that the aforesaid enactments shall be, and be deemed always to have been, validly enacted, notwithstanding the aforesaid defects. The clause "notwithstanding the aforesaid defects" emphatically points to the fact that the Legislature thought that it could legislate retrospectively, and by such retrospective legislation, it could itself cure the infirmity in question. What has been overlooked by the Legislature is the fact that the infirmity in question can be cured only by obtaining the assent of the President and not by any legislative fiat. We have given our anxious consideration to the problem raised by the wording of Section 4 and we have come to the conclusion that it would not be possible to uphold its validity. On many occasions, this Court has tried to look at the substance of the matter and determine the issue in spite of the fact that the words or expressions used in the relevant provisions are either slovenly inappropriate or unhappy. But in the present case, however benevolently or

favourably we look at the provisions of Section 4, we see no escape from the conclusion that in enacting it, the Legislature appears to have clearly assumed "hat it can by itself cure the infirmity resulting from the non-compliance with Article 255 and all that it has to do in such a case is to obtain the assent of the President to its own view about its power to cure such an infirmity. We are satisfied that it is necessary that the true position in regard to the scope and effect of Article 255 must be clearly brought out in order to avoid any misapprehension in future."

In my view this paragraph in the Judgment of the Supreme Court does not in any way advance the point urged by Mr. Ravi varma Kumar. We are not faced with a situation where the State legislature finding certain incurable defects in the legislation had passed an Act with retrospective effect to cure such defects. No such defects are found in the Ordinance in question either from the drafting point of view or from the point of view of construction of the statute.

21. In this connection it is brought to my notice by Mr. Savanur, learned Counsel for some of the petitioners, a news item supposed to have emanated from the Law Department. That news item runs thus:

".....The ordinance promulgated in this regard on December 29, 1986 had lapsed on or about March 13 this year because it had not been replaced by a regular legislation within six weeks of the reconvening of the Assembly which began its budget session on January 29, this year. Such a replacement is mandatory under Article 213.

The delay in the Bill's passage in the Upper House caused it to lapse, according to official sources in the Law Department. Hence, though the law is enacted with effect from May 5, defections, cross-voting and defiance of party whips in Zilla Parishad, Mandal Panchayats and civic bodies that occurred between March 13 and May 4 will not attract the penal provisions of the Act, according to Law Minister A. Lakshmisagar.

This is because there is no provision to give retrospective. effect to the legislation with penal clauses....."

Apart from the fact that any statement made by the Department of Law or by the Minister for Law is not binding on this Court, such a statement appears to be clearly opposed to the constitutional provisions as also to the intendment of the provisions of Anti-Defection Act.

22. That takes me to another contention urged by the learned Counsel Mr Jaya kumar Patil on the un workability of the provisions of the Act during the period 13-3-1987 and 5-5-1987. This contention would have deserved serious consideration if the Legislature had not given retrospective effect to the Act. Now that the Act is in force with effect from 26th December 1986 the petitioners should have complied with the, provisions of the Act in order to exonerate themselves from the disqualification imposed u/s 3 of the Act. What all is

necessary to get out of the disqualification imposed by Section 3 is to take prior permission of the political party to which a member belongs or from any person or authority authorised by it in this behalf or seek condonation by such political party, person or authority within 15 days from the date of voting or abstention. Mr Jaya kumar Patil submitted that these provisions are not in pari materia with the provisions of Section 57 of the Bombay Police Act and therefore this Court has to distinguish the facts of this case from the facts of the case before the Supreme Court in *The State of Maharashtra Vs. Vishnu Ramchandra, THE STATE OF BOMBAY (NOW MAHARASHTRA) v. VISHNU RAMACHANDRA*. No doubt the provisions of Section 57 of the Bombay Police Act may not be in pari materia with the provisions of the Act in question. But in what way a mere change in the language of the relevant statutes would weaken the principle laid down by the Supreme Court in that case I am at a loss to understand. Here the members who cross voted or defected were aware of the provisions of the Ordinance and were deemed to have been aware of the Act since 26-12-1986 by virtue of the retrospective effect given to the Act u/s 1(2) of the Act and therefore the persons who voted or abstained from voting contrary to the direction issued by their political parties should have taken the necessary steps to avoid the disqualification either by taking prior permission of such political party, person or authority, or by approaching such political party or the person or authority with a request to condone their acts. The argument of Mr Jaya kumar Patil is that the Act does not provide for any such request to be made by the candidates concerned to his political party, but it is the political party itself which must condone the act of voting or abstention. In my view it does not make any difference as to the applicability of these provisions with retrospective effect all because the legislature has not made any provision for the candidates concerned to approach the political party or the authority concerned for permission or for the condonation of their act in voting or abstention from voting. In the absence of any specific prohibition in Section 3 and regard being had to the entire scheme of the Act I do not think that any candidate is prohibited from approaching a political party for permission or with a request to condone the acts of defection committed by him. It is open to the political parties suo motu to take note of the fact of cross voting or abstention from voting and condone such an Act. It is also open to the political parties on the request by a member who cross votes or abstains from voting to condone such acts. In the circumstances the conditions attached to Section 3(1)(b) of the Act for exonerating the persons concerned from the disqualification prescribed for acts of defection would not make any difference to the principles to be applied to this case in the light of the decision of the Supreme Court in *Vishnu Ramachandra case, THE STATE OF BOMBAY (NOW MAHARASHTRA) v. VISHNU RAMACHANDRA*. This is what the Supreme Court observed in para 12 of its Judgment:

"Now, S. 57 of the Bombay Police Act 1951, does not create a new offence nor makes punishable that which was not an offence. It is designed to protect the public from the activities of undesirable persons to have been convicted of

offences of a particular kind. The Section only enables the authorities to take note of their convictions and to put them outside the area of their activities, so that the public may be protected against a repetition of such activities."

23. Applying the very same ratio to the facts of this case, I am of the view that the Act is designed to protect public life from the activities of undesirable persons who defect from one party to another regardless of the political consequences and public interest. The Act only enables the authorities to take note of the defectors and to put them outside the area of democratic institutions. For all these reasons I am unable to find any difference either on authority or on principle in regard to the applicability of the decision of the Supreme Court in *The State of Maharashtra Vs. Vishnu Ramchandra*, to the facts of the present case. I am of the view that that decision is an authority for the proposition : that this Act is not an Act which is made in violation of the protection conferred on the citizens under Article 20(1) of the Constitution and (2) consequently, the provisions of Section 3 of the Act are retrospective in effect and therefore notwithstanding the fact that the Ordinance in question ceased to operate on 13-3-1987 it is open to the legislature to apply the provisions of this Act to all defections committed by the petitioners between the period 13-3-1987 upto the date the Act came into force.

24. Now coming to individual cases the petitioners in W.P.Nos.12984 to 12986 and 13098 to 13100 of 1987 have challenged the validity of the notices issued by the Chief Secretary of the Zilla Parishad in question to show cause why they should not be disqualified from the membership of the Mandal Panchayat. In view of the ruling of this Court that the Act is effective from 29-12-1986, it is open to the petitioners to file their objections to the show cause notices before the Chief Secretary against the proposed action. Therefore, these petitions are dismissed.