

(2011) 02 CHH CK 0079
In the Chhattisgarh High Court
Case No : Election Petition No. 17 of 2009

Dr. Shobha Ram Banjare

APPELLANT

Vs

Doman Lal Korsewada and Others

RESPONDENT

Date of Decision : 07-02-2011

Acts Referred:

Chhattisgarh Civil Services (Pension) Rules, 1976 — Rule 42, 42(1)
Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11, 151
Constitution of India, 1950 — Article 101(3), 102, 124(2), 173, 190(3)
Government of Union Territories Act, 1963 — Section 14, 33, 34, 4
Representation of the People Act, 1951 — Section 36, 36(2)

Citation : AIR 2011 Chh 78

Hon'ble Judges : T.P. Sharma, J

Bench : Division Bench

Judgement

T.P. Sharma, J.—By this application under Order 7, Rule 11 read with Section 151 of the Code of Civil Procedure, 1908 (for short "Code"), Respondent No. 1 has prayed for dismissal of election petition for want of cause of action.

2. As per allegation made in election petition by Petitioner, his nomination form has been illegally rejected by the returning officer on the ground that present Petitioner is not competent to contest the election in terms of Article 191(1)(a) of the Constitution of India Being a person holding office of profit under the State Government, other than an office declared by the legislature of the State by law not to disqualify its holder.

3. As per brief facts on the basis of allegation made in election petition, the present Petitioner Dr. Shobha Ram Banjare was holding office of profit under the State Government as Senior Medical Officer at Civil Hospital, Kharsiya. With a view to contest Chhattisgarh State Assembly Election to be held in the year 2008, he submitted his application for voluntary retirement in terms of Rule 42 of the Chhattisgarh Civil Services (Pension) Rules, 1976 (for short "the Rules, 1976") on 15-4-2008 in prescribed Form No. 28 through proper channel after giving three months notice. He again submitted application to the Director,

Health Services on 24-8-2008 for immediate retirement on the ground of contesting the election to be held in October -November, 2008. His charge was given to other officer on 16-10-2008 by his superior officer. No dues and no inquiry certificate have also been provided to Petitioner. After filling the nomination form for contesting election, objection was made by Respondent No. 1 and other persons before the returning officer stating the ground that present Petitioner is enjoying office of profit under the State Government, therefore, he is disqualified for contesting assembly election. After considering objection and material produced on behalf of Petitioner, returning officer Assembly Consistency No. 67 Ahiwara rejected the nomination form of Petitioner vide order dated 29-10-2008. Finally Respondent No. 1 was declared as returned candidate in the assembly election. After notification, Petitioner has filed present election petition substantially on the ground of illegal rejection of his nomination form.

4. Respondent No. 1 has filed preliminary objection as I. A. No. 2 for dismissal of election petition under Order 7, Rule 11 read with Section 151 of the Code on the ground that the returning officer has rightly rejected the nomination form of Petitioner and present Petitioner is not having any ground or cause of action for filing such petition. By filing aforesaid preliminary objection Respondent No. 1 has alleged that at the time of filling the nomination form present Petitioner was holding office of profit under the State Government other than an office declared by the legislature of the State by law not to disqualify its holder, therefore, he was disqualified for membership and for being chosen as, and for being, a member of the Legislative Assembly of the State Government, therefore, the returning officer has rightly rejected the nomination form of Petitioner.

5. As per annexures, pleading and objection, the present Petitioner was working as Senior Medical Officer, Civil Hospital, Kharsiya and was holding office of profit under the State Government on 15-4-2008 which has not been declared by the legislature of the State by law not to disqualify its holder, much before filling of nomination form. As per Annexure P/1 with intent to contest State Assembly Election on completion of 20 years of his service present Petitioner as submitted Form No. 28 for voluntary retirement as required under Rule 42(1)(a) of the Rules, 1976. As per Annexure P/4, his charge was given to another authority by his superior officer. As per Annexure P/5, competent authority has issued no dues and no inquiry certificate. The present Petitioner has submitted nomination form duly filled by him before the returning officer. As per Annexure P/10, present Respondent No. 1 has filed objection before the returning officer on the ground that the present Petitioner is working as Government Doctor, therefore, he is not entitled to contest such election. As per Annexure P/11, on 29-10-2008 the present Petitioner has filed reply in which he has specifically alleged that he has filed the application for voluntary retirement in form 28 under Rule 42(1)(a) of the Rules, 1976 on 15-4-2008. He has also obtained no dues and no inquiry certificate. After providing an opportunity of hearing to the parties, considering the objection made by Respondent No. 1 and other persons and material produced on behalf of Petitioner, vide order dated 29-10-2008 the returning

officer has rejected the nomination form of Petitioner on the ground that the present Petitioner has not produced any material to prove the fact that his application for voluntary retirement has been accepted by the competent authority and in absence of such proof, he is not entitled to contest assembly election.

6. I have heard Mr. Varun Sharma, counsel for Petitioner, Mr. B.P. Sharma with Mr. Ajay Singh, counsel for Respondent No. 1, Dr. N.K. Shukla, Senior Advocate with Mrs. A. Sengupta, Advocate for Respondent No. 3 and Mr. Rakesh Kumar Jha, Deputy Government Advocate for Respondent Nos. 17 & 18, perused election petition, I. A. No. 2 and annexures filed on behalf of Petitioner as Annexures P/1 to P/14.

7. Learned Counsel for Petitioner vehemently argued that as per Rule 42(1)(a) of the Rules, 1976 Government servant is competent to submit his application for voluntary retirement after giving three months notice which the present Petitioner has submitted much before filling of nomination form. Voluntary retirement is a unilateral act of the party. When Petitioner submitted his application for voluntary retirement and duly filled up form, nothing is remained for Petitioner from such retirement and it shall be deemed that he has been retired on the date of such application for voluntary retirement. The Act of submitting voluntary retirement application and factum of voluntary retirement is a act of unilateral character which came into effect when such act indicating the intention to retire the office is communicated to the competent authority because the authority whom the act of retirement is communicated is not required to take any action and such retirement takes effect from the date of such communication. Learned Counsel further argued that Petitioner has submitted his voluntary retirement form to the competent authority, he has also submitted no dues certificate and no inquiry certificate as required for voluntary retirement, he has handed over the charge of the office to other authority in compliance of the direction of the superior authority, therefore, nothing was remained for Petitioner or for the competent authority to retire Petitioner and such retirement takes effect from the date of its communication to the authority.

8. Learned Counsel placed reliance in the matter of Moti Ram Vs. Param Dev and another,) in which the Supreme Court has held that resignation from membership and Chairmanship of H.P. Khadi and Village Industries Board with a request to accept the resignation with effect from particular date and in case of approval of the Chief Minister on subsequent dates, resignation from the office of Chairman shall take effect from the date when resignation is communicated to the competent authority because act of resignation is unilateral act and no action is required to take by the authority whom such resignation is submitted.

9. On the other hand, learned Counsel for Respondent No. 1 opposed the petition and argued that on the date of scrutiny of nomination form submitted by Petitioner he was holding office of profit under the State Government other than an office declared by the legislature of the State by law not to disqualify its

holder, he was Government Doctor, although he has tendered his application for voluntary retirement in accordance with Rule 42(1)(a) of the Rules, 1976, but same has not been accepted by the competent authority at the time of filling of such nomination. The present Petitioner was under obligation to submit proof of such acceptance of voluntary retirement on behalf of the competent authority but he has not submitted any document to show that his application for voluntary retirement has been accepted by the competent authority. In absence of such proof, only presumption was possible that the present Petitioner was holding office of profit under the State Government other than an office declared by the legislature of the State by law not to disqualify its holder and was disqualified for contesting assembly election, therefore, the returning officer has rightly rejected the nomination form of Petitioner. By rejecting such nomination form, the returning officer has not committed any illegality and the present petition does not disclose any cause of action or ground.

10. Learned Counsel placed reliance in the matter of *Nayana D/o Dnyanoba Pawar v. Vimal W/o Nandkishor Mundada*; D.N. Wanawale 2007 LS (Bom) 740: (AIR 2008 (Bom) 1789 in which High Court of Bombay has held that resignation/retirement and its acceptance is a bilateral act and in absence of any intimation of acceptance of retirement application, employee holds the office of profit till receiving of acceptance by competent authority.

11. Undisputed facts of the present election petition reveal that initially the present Petitioner was holding office of profit under the State Government other than an office declared by the legislature of the State by law not to disqualify its holder or being chosen as a member of the Legislative Assembly. As per Annexures P/1, P/2, P/3 and other relevant documents, the present Petitioner has submitted application for voluntary retirement in duly filled Form No. 28 as required under Rule 42(1)(a) of the Rules, 1976. No dues certificate and no inquiry certificate were also provided to Petitioner. Vide application dated 24-8-2008, he has also requested the Director, Health Services for his early retirement. Vide Annexure P/7, Petitioner has submitted his nomination form on 25-10-2008. After filing the objection on behalf of Respondent No. 1 and other persons, he filed reply vide Annexure P/11. The present Petitioner has complied with the provisions of Rule 42(1)(a) of the Rules, 1976. After filling the nomination form, the returning officer is required to scrutinize the nomination form in accordance with the provisions of Section 36 of the Representation of the People Act, 1951 (for short "the Act, 1951")-The returning officer is empowered to reject the nomination form on the ground mentioned in Sub-section (2) of Section 36 of the Act, 1951 which reads as under:

36. Scrutiny of nominations.- (1) xxx

(2) The Returning Officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination and may, either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary, reject any nomination on any of the following grounds:

(a) that on the date fixed for the scrutiny of nominations the candidates either is not qualified or is disqualified for being chosen to fill the seat under any of the following provisions that may be applicable, namely Articles 84, 102, 173 and 191,

(Part II of this Act, and Sections 4 and 14 of the Government of Union Territories Act, 1963 (20 of 1963))

(b) that there has been a failure to comply with any of the provisions of Section 33 or Section 34; or

(c) that the signature of the candidate or the proposer on the nomination paper is not genuine.

12. Candidate is not competent to contest election contrary to the provisions of Article 191 of the Constitution of India. Returning Officer is required to reject nomination of candidate if such is contrary to the provisions of Article 191 of the Constitution of India. Article 191 of the Constitution of India reads as under:

191. Disqualifications for membership.-(1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State--

(a) if he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder;

(b) if he is of unsound mind and stands so declared by a competent Court;

(c) if he is an undischarged insolvent;

(d) if he is not a citizen of India, or has voluntarily acquired the citizenship of foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State;

(e) if he is so disqualified by or under any law made by Parliament.

(Explanation.- For the purposes of this clause, a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State specified in the First Schedule by reason only that he is a Minister either for the Union or for such State.

(2) xxx

13. Definitely, in the present case Petitioner has submitted his application for voluntary retirement much prior to filling of nomination form, but at the time of passing the order of rejection by returning officer Petitioner has not submitted any document to show that his application for voluntary retirement has been accepted by the competent authority.

14. In the matter of Moti Ram Vs. Param Dev and another, , the Supreme Court

has held that in case of tendering resignation by the Chairman of H.P. Khadi and Village Industries Board with request to accept the resignation with effect from some date the authority to whom such resignation is submitted is not required to do anything and aforesaid tendering resignation is unilateral act. The Supreme Court has observed in para 16 as under:

16. As pointed out by this Court, "resignation" means the spontaneous relinquishment of one's own right and in relation to an office, it connotes the act of giving up or relinquishing the office. It has been held that in the general juristic sense, in order to constitute a complete and operative resignation there must be the intention to give up or relinquish the office and the concomitant act of its relinquishment. It has also been observed that the act of relinquishment may take different forms or assume a unilateral or bilateral character, depending on the nature of the office and the conditions governing it. (See: Union of India (UOI) and Others Vs. Gopal Chandra Misra and Others,). If the act of relinquishment is of unilateral character, it comes into effect when such act indicating the intention to relinquish the office is communicated to the competent authority. The authority to whom the act of relinquishment is communicated is not required to take any action and the relinquishment takes effect from the date of such communication where the resignation is intended to operate in praesenti. A resignation may also be prospective to be operative from a future date and in that event it would take effect from the date indicated therein and not from the date of communication. In cases where the act of relinquishment is of a bilateral character, the communication of the intention to relinquish, by itself, would not be sufficient to result in relinquishment of the office and some action is required to be taken on such communication of the intention to relinquish, e.g., acceptance of the said request to relinquish the office, and in such a case the relinquishment does not become effective or operative till such action is taken. As to whether the act of relinquishment of an office is unilateral or bilateral in character would depend upon the nature of the office and the conditions governing it.

15. For resignation of the office by members of H.P. Khadi and Village Industries Board Act, legislature has made provisions in Section 7 of H.P. Khadi and Village Industries Board Act but no such provision has been made relating to Chairman which reads as under:

7. Resignation of office by members.-Any member may resign his office by giving notice in writing to the Government of Himachal Pradesh and, on such resignation being notified in the Official Gazette by the Government of Himachal Pradesh, shall be deemed to have vacated his office.

16. Section 7 provides that member may resign his office by giving notice in writing to the Government of Himachal Pradesh and on being notified the same shall be deemed that he has vacated his office which clearly reveals that the act of resignation by the member is unilateral and the Government is not required to do anything relating to acceptance of his resignation.

17. In the matter of Nayna D/o Dnyanoba Pawar: (AIR 2008 (NOC) 1789) (supra), the High Court of Bombay has held that resignation of an employee cannot walk out of service anytime of his own, it is a bilateral act and it cannot be treated as completed unless accepted by the competent authority.

18. Considering the nature of relinquishment of office by the employer in a contract of employment, in the matter Moti Ram Vs. Param Dev and another, of the Supreme Court has held that the act of retirement is bilateral character and resignation of an employee is effective only on acceptance of the same by the employer and there are various offices which can be relinquished by unilateral act of the holder of the office and acceptance of resignation is not required. In the matter of Moti Ram (supra) the Supreme Court has also observed in paras 17 and 18 as under:

17. Under the Constitution of India there are various offices which can be relinquished by unilateral act of the holder of the office and acceptance of resignation is not required, e.g., President (Article 56(a)), Vice-President (Article 67(a)), Deputy Chairman of Rajya Sabha (Article 90(b)), Speaker and Deputy Speaker of Lok Sabha (Article 94(b)), Judge of the Supreme Court (Article 124(2) (a)), Judge of a High Court (Article 217(1)(a)). As regards member of either House of Parliament or a member of a House of Legislature of a State, originally, the position was that he could resign his office by unilateral act and the acceptance of resignation was not required. The requirement of acceptance of such resignation was introduced in Articles 101(3)(b) and 190(3)(b) by the Constitution (Thirty-third Amendment) Act, 1974. Similarly, in Company Law, a Director of a company is entitled to relinquish his office at any time he pleases by proper notice to the company and acceptance of the resignation is not required. (See: *Glossop v. Glossop*, (1907) 2 Ch 370 and Halsbury's Laws of England, 4th Ed., Vol. 7, p. 316, para 536).

18. A contract of employment, however, stands on a different footing wherein the act of relinquishment is of bilateral character and resignation of an employee is effective only on acceptance of the same by the employer. Insofar as Government employees are concerned, there are specific provisions in the service rules which require acceptance of the resignation before it becomes effective. In *Raj Kumar Vs. Union of India (UOI)*,), it has been held:

... But when a public servant has invited by his letter of resignation determination of his employment, his services normally stand terminated from the date on which the letter of resignation is accepted by the appropriate authority, and in the absence of any law or rule governing the conditions of his service to the contrary, it will not be open to the public servant to withdraw his resignation after it is accepted by the appropriate authority. Till the resignation is accepted by the appropriate authority in consonance with the rules governing the acceptance, the public servant concerned has *locus poenitentiae* but not thereafter,

19. While dealing with the same question in the matter of Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, the Supreme Court has taken same view which reads as under:

....A resignation by an employee would, however, normally require to be accepted by the employer in order to be effective. It can be that in certain circumstances an employer would be justified in refusing to accept the employees resignation as, for instance, when an employee wants to leave in the middle of a work which is urgent or important and for the completion of which his presence and participation are necessary. An employer can also refuse to accept the resignation when there is a disciplinary inquiry pending against the employee. In such a case, to permit an employee to resign would be to allow him to go away from the service and escape the consequences of an adverse finding against him in such an inquiry. There can also be other grounds on which an employer would be justified in not accepting the resignation of an employee.

20. As held by the High Court of Bombay in the matter of Nayna D/o Dnyanoba Pawar (AIR 2008 (Bom) 1789) (supra) and as held by the Supreme Court in the matter of Moti Ram Vs. Param Dev and another, , the act of relinquishment/ resignation of the post by art employee under a contract of employment is a bilateral act and such resignation or relinquishment will be effective only on acceptance of the same by the employer.

21. In the present case, the present Petitioner has not produced any document to show that his application for retirement/relinquishment of the post has been accepted by his employer. In absence of such document. It is difficult to hold that at the time of filling such nomination form the present Petitioner was not holding office of profit. In these circumstances, Petitioner was disqualified for being chosen as a member of the Legislative Assembly in accordance with Article 191 of the Constitution of India and the returning officer was under obligation to reject his nomination in accordance with Section 36(2)(a) of the Act, 1951. By rejecting such nomination, the returning officer has not committed any illegality. Petitioner has not taken any ground in his election petition other than illegal rejection of his nomination, in these circumstances, election petition is without cause of action and in absence of any cause of action, election petition is liable to be dismissed.

22. Consequently, I. A. No. 2 filed on behalf of Respondent No. 1 under Order 7, Rule 11 read with Section 151 of the Code deserves to be allowed and it is hereby allowed. As a result, election petition filed on behalf of Petitioner is liable to be dismissed and it is hereby dismissed.

23. Parties shall bear their own costs.

24. Memo of cost be drawn up accordingly.