
(2008) 02 P&H CK 0299
In the Punjab And Haryana At Chandigarh

Jagdish

APPELLANT

Vs

The State of Haryana and Others

RESPONDENT

Date of Decision : 25-02-2008

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Criminal Procedure Code, 1973 (CrPC) — Section 389
Penal Code, 1860 (IPC) — Section 148, 149, 302, 323, 419
Representation of the People Act, 1951 — Section 8

Citation : (2008) 151 PLR 689 : (2008) 3 RCR(Civil) 472

Hon'ble Judges : S.S. Saron, J;Daya Chaudhary, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

S.S. Saron, J.—This Writ Petition has been filed by the petitioner under Articles 226 and 227 of the Constitution of India for issuance of a writ especially in the nature of certiorari for setting aside the order dated 27.2.2007 (Annexure P5) passed by the Financial Commissioner, Development and Panchayats Department, Haryana (respondent No. 1) and order dated 14.11.2006 (Annexure P4) passed by the Deputy Commissioner, Jhajjar (respondent No. 2). In terms of the said orders, the petitioner has been removed from the office of Sarpanch, Gram Panchayat Village Gochhi, Block Beri, Distt. Jhajjar.

2. Case FIR No. 167 dated 19.10.1995 for the offences under Sections 148, 149, 323 and 302 IPC was registered against the petitioner. The learned Additional Sessions Judge, Jhajjar, in terms of his order dated 18/19.2.1999 convicted the petitioner for the offence u/s 302 IPC and sentenced him to undergo life imprisonment and a fine of Rs. 2,000/- was also imposed. Besides, the petitioner was also sentenced to rigorous imprisonment for two years and one year respectively for the offences under Sections 148 and 323 IPC. Against the said order of conviction and sentence passed by the learned Additional Sessions Judge, Jhajjar on 18/19.2.1999, the petitioner filed Criminal Appeal No. 164-DB of 1999 in this Court, which is pending. On an application u/s 389 Cr.P.C. filed by

the petitioner, he was granted bail by this Court vide order dated 27.8.1999 (Annexure P3).

3. Elections of the Gram Panchayat, village Gochhi, Block Beri, District Jhajjar were held in April, 2005. The petitioner contested the election and he was elected to the office of Sarpanch and since then he has been performing his duties as such. During the tenure of the petitioner as Sarpanch, a complaint dated 31.8.2006 was made, which was to the effect that the petitioner has been convicted in a criminal case. Accordingly, a show cause notice dated 31.8.2006 (Annexure P1) was issued by the Deputy Commissioner, Jhajjar (respondent No. 2) to the petitioner inter alia mentioning that his conviction for the offences under Sections 302/323 and 148 IPC come within the definition of moral turpitude. It was also submitted that the petitioner was ineligible for contesting the election for the office of Sarpanch in view of the provisions of Section 175(I) (a) of the Haryana Panchyati Raj Act, 1994 (for short - the Act). Therefore, his holding the post of Sarpanch was not in public interest. Before taking any action against the petitioner u/s 177 of the Act, he was given an opportunity in terms of the show cause notice to submit his reply within seven days. The petitioner filed his reply dated 5.9.2006 (Annexure P2) in which he submitted that he had got bail from this Court six years prior to the holding of the elections. It is submitted that Section 175(1)(a) of the Act is applicable only where an appeal etc. against the conviction has been dismissed. The appeal, it is submitted, is a continuation of the original case and therefore, since the appeal of the petitioner is still pending, no action was liable to be taken against him. It is also submitted that a compromise had been effected between him and the opposite party. The Deputy Commissioner, Jhajjar, vide impugned order dated 14.11.2006 (Annexure P4) held that the petitioner had incurred disqualification u/s 175(1)(a) of the Act. As such, his continuation as Sarpanch would be against public interest as well as against the provisions of the Act. Accordingly, it was ordered that the post of Sarpanch is declared vacant and that the petitioner should immediately hand over the entire movable and immovable property/record of the Gram Panchayat to the Panch having majority. The petitioner aggrieved against the said order, filed an appeal u/s 51(5) of the Act which has been dismissed by the Financial Commissioner-cum-Principal Secretary to Government, Haryana (respondent No. 1) vide order dated 27.2.2007 (Annexure P-5). It was observed that the conviction of the petitioner had not been stayed by the Appellate Court and that he had been convicted for life. Therefore, it could not be said that after his release on bail, a period of time of five years had lapsed and he is entitled to the benefit of Section 175(1)(a)(ii) of the Act. The petitioner aggrieved against the said orders has filed the present petition seeking quashing of the orders dated 14.11.2006 (Annexure P4) passed by the Deputy Commissioner, Jhajjar (respondent No. 2) and 27.2.2007 (Annexure P5) passed by the Financial Commissioner, Development and Panchyat Haryana (respondent No. 1).

4. Reply has been filed on behalf of respondents No. 1 and 2. It is submitted that the petitioner had incurred disqualification u/s 175(1)(a)(ii) of the Act. Therefore,

he is not entitled to continue as Sarpanch of the Gram Panchayat Gochhi. It is further submitted that the petitioner had contested elections despite the disqualification which he incurred and the complaint against him on the criminal side was held to be proved. It is also submitted that this Court had only granted bail to the petitioner and his conviction was never stayed.

5. Replication has been filed by the petitioner to the written statement of respondents No. 1 and 2 in which the assertions made in the petition have been reiterated. Respondent No. 3 has filed an application for vacating the interim order passed in favour of the petitioner.

6. Learned Counsel appearing for the petitioner vehemently contended that the procedure adopted by respondents No. 1 and 2 in removing the petitioner from the office of Sarpanch on the ground that he has incurred disqualification is absolutely illegal. It is submitted that the petitioner could only be removed from the office of Sarpanch by way of an election petition filed in accordance with Section 176 of the Act. In support of his contention, strong reliance is placed on a Division Bench judgment of this Court in Chander Bhan v. State of Haryana and Anr. C.W.P. No. 13338 of 2006 decided on 15.3.2007. Therefore, it is contended that the impugned orders are liable to be set aside and quashed. It is also contended that a Division Bench of this Court in Sahib Singh Vs. State of Haryana and Others, considered the question whether merely on finding the name of a Sarpanch/Panch in any FIR in itself implies defect of character likely to embarrass him in the discharge of his duty. In view of conflict between two judgments of this Court, the matter was admitted.

7. In response, learned Counsel for the State and respondent No. 3 have submitted that the petitioner admittedly was convicted for the offences under Sections 302, 148 and 523 IPC and therefore, he was disqualified even to file his nomination papers. The petitioner in his nomination papers suppressed the fact that he has been convicted. A reference has been made to the nomination paper (Annexure R2) filed by the petitioner wherein the relevant column regarding his conviction has not been answered by the petitioner. It is also submitted that the petitioner has rightly been removed from the office of Sarpanch in view of his conviction in a criminal case and in accordance with the provisions of Section 51(3)(b) of the Act, he could be removed by the Deputy Commissioner (respondent No. 2). The petitioner was disqualified to be a member of the Gram Panchayat at the time of his election.

8. Learned Counsel for the petitioner, however, has submitted that even if the petitioner had failed to disclose in his nomination papers (Annexure R2), about the disqualification that he had incurred in view of his conviction, the same could only be adjudicated by way of an election petition filed under the provisions of the Act.

9. We have given our thoughtful consideration to the contentions of the learned Counsel for the parties and also perused the record.

10. It may be noticed that the petitioner admittedly stands convicted for the offences under Sections 302, 148, and 323 IPC in terms of order dated 18/19.2.1999 passed by the learned Additional Sessions Judge, Jhajjar. He has been sentenced to undergo rigorous imprisonment for life and a fine of Rs. 2,000/- for the offence u/s 302 IP-Besides, he has been sentenced to undergo rigorous imprisonment for two years and one year respectively for the offences under Sections 148 and 323 IPC. All the sentences have been ordered to run concurrently. Against the order of conviction and sentence, the petitioner along with other accused filed Criminal Appeal No. 164-DB of 1999 in this Court. During the pendency of the appeal, the petitioner on an application u/s 389 Cr.P.C. has been granted bail to the satisfaction of Chief Judicial Magistrate, Rohtak Vide order dated 27.8.1999 (Annexure P3). The elections of the Gram Panchayat of village Gochhi were held on 8.4.2005 and the petitioner admittedly was elected as Sarpanch of the Gram Panchayat. Thereafter, a complaint was made regarding his conviction in a criminal case on the basis of the said complaint, the Deputy Commissioner, Jhajjar (respondent No. 2) issued a show cause notice dated 31.8.2006 (Annexure P1). The petitioner filed his reply (Annexure P2) to the said show cause notice. The Deputy Commissioner, Jhajjar (respondent No. 2) vide his order (Annexure P4) removed him from the office of Sarpanch in exercise of powers u/s 177 of the Act. The appeal against the same has been dismissed vide order dated 27.2.2007 (Annexure P5) passed by the Financial Commissioner, Haryana (respondent No. 1).

11. The question, therefore, that is required to be considered is whether the petitioner could be removed from the office of Sarpanch on account of the fact that he stood convicted in a criminal case before the elections were held and this fact was suppressed by the petitioner. Besides, whether the petitioner could be removed from the office of Sarpanch only by way of an election petition.

12. In order to appreciate the contentions, it would be necessary to advert to the provisions of Section 175 of the Act which provides for disqualification. For the purpose of the present case, Section 175(1)(a) of the Act is relevant which reads as follows:

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

(a) has, whether before or after the commencement of this Act, been convicted:

(i) of an offence under the Protection of Civil Rights Act, 1955 (Act 22 of 1955), unless a period of five years, or such lesser period as the Government may allow in any particular case, has elapsed since his conviction; or

(ii) of any other offence has been sentenced to imprisonment for not less than six months, unless a period of five years, or such lesser period as the Government may allow in any particular case, has elapsed since his release; or

(Emphasis added).

A perusal of the above shows that no person shall be a Sarpanch or a Panch of a Gram Panchayat or continue as such when he has, whether before or after the commencement of this Act, been convicted. Clause (i) relates to conviction under the Protection of Civil Rights Act, 1955 and Clause (ii) relates to conviction under any other offence where a person has been sentenced to imprisonment for not less than six months, unless a period of five years, or such lesser period as the Government may allow in any particular case, has elapsed since his release. The elections of the office of Sarpanch, Gram Panchayat Gochhi, Block Beri Distt. Jhajjar were held in April 2005: The petitioner stood convicted by the Additional Sessions Judge, Jhajjar on 18/19.2.1999, Later on, the sentence of imprisonment was suspended by this Court on 27.08.1999. The stigma of conviction or conviction itself is not wiped out on the release of a convict on account of suspension of his sentence. The period of five years having elapsed since/the release of the convict would not apply to release on suspension of sentence. The same would be applicable in respect of release on the completion of sentence. It is well-known that conviction is one thing and sentence is another. By release on account of the suspension of sentence, the conviction remains untouched and the stigma is not obliterated. In *Lalsai Khunte Vs. Nirmal Sinha and Others*, it was observed that the Appellate Court has power not only to suspend execution of sentence but also to stay order of conviction appealed against. Stay of order of conviction results in rendering the order temporarily non-operative. But this result does not ensue in case of suspension of the order under appeal. It was observed that where a person seeking to contest elections to Legislative Assembly or Parliament, having incurred disqualification u/s 8(3) of the Representation of People Act, 1951 due to order of conviction of an offence and sentence passed against him by the trial Court, prefers an appeal thereagainst and the Appellate Court only suspends the order of the trial Court and grants him bail, would not amount to temporarily wiping out the conviction so as to remove the disqualification. The provisions of Section 175(1)(a)(ii) of the Act also provide that no person shall be a Sarpanch, or a Panch of a Gram Panchayat or continue as such" who has, whether before or after the commencement of the Act, been convicted of any other offence, that is, offence other than under the Protection of Civil Rights Act, 1955 has been sentenced to imprisonment for not less than six months, unless a period of five years, or such lesser period as the Government may allow in any particular case; has elapsed since his release. In *P. Prabhakaran Vs. P. Jayarajan*, a five Judges Bench of the Hon"ble Supreme Court held that the question of disqualification under Sections 8 (1), (2) and (3) of the Representation of People Act will have to be determined on the date of scrutiny of the nomination and a subsequent event which has the effect of wiping out the disqualification has to be ignored. Therefore, it was observed that nomination of a person disqualified within the meaning of Section 8(3) of the Representation of People Act on the date of scrutiny of nomination u/s 36(2)(a) shall be liable to be rejected as invalid and such decision of the Returning Officer cannot be held to

be illegal or ignored merely because the conviction is set aside or so altered as to go out of the ambit of Section 8(3) of the Representation of People Act consequent upon a decision of a subsequent date in a criminal appeal or revision. It was observed that the factum of pendency of an appeal against conviction is irrelevant and inconsequential. So also an appellate judgment of a date subsequent to the date of nomination or election (as the case may be) and having a bearing on conviction of a candidate or sentence of imprisonment passed on him would not have the effect of wiping out disqualification from a back date if a person consequent upon his conviction for any offence and sentenced to imprisonment for not less than two years was actually and as a fact disqualified from filing nomination and contesting the election on the focal point dates of nomination or election (as the case may be). The case of appellate acquittal cannot be equated with the retrospective repeal of a disqualification by statutory amendment. What is relevant for the purpose of Section 8(3) is the actual period of imprisonment which any person convicted shall have to undergo or would have undergone consequent upon the sentence of imprisonment pronounced by the Court and that has to be seen by reference to the date of scrutiny of nominations or date of election. All other factors are irrelevant. A person convicted may have filed an appeal. He may also have secured an order suspending execution of the sentence or the order appealed against u/s 389 Cr.P.C. But that again would be of no consequence. What is suspended u/s 389 Cr.P.C. is not the conviction or sentence; it is only the execution of the sentence or order which is suspended. In *Ravikant S. Patil v. Sarvabhuma S. Bagali* (2007)1 S.C.C. 673 it was reiterated that disqualification on ground of conviction in a criminal offence is to be determined with reference to the date fixed of scrutiny of the nomination and subsequent acquittal would not be relevant to remove the disqualification as it existed on the date of scrutiny of nomination.

Therefore, evidently on the date of scrutiny of the nomination, the petitioner was disqualified from contesting as he had been convicted in a criminal case. The suspension of his sentence would not in any manner remove or obliterate his conviction. Action is liable to be taken on the basis of the conviction recorded without waiting for conclusion; of the appeal pending in this Court.

13. The contention of the learned Counsel for the petitioner that the petitioner can be removed only by way of an election petition is not tenable. Section 175(1)(a)(ii) of the Act, as already noticed, specifically provides that no person shall be a Sarpanch where he has been convicted or continue as such. This would mean that if a Sarpanch has been elected, he would not continue as such in view of his earlier conviction having come to light later as in the present case. This is for the reasons that the position has to be seen on the date of scrutiny of the nomination. The petitioner as already noticed suppressed the fact of his conviction. Besides, Section 51(3)(b) of the Act may also be noticed. The same reads as follows:

51(3)(b) The Director or the Deputy Commissioner concerned may, after such

inquiry as he may deem fit and after giving an opportunity of being heard to a Sarpanch or a Panch, as the case may be ask him to show cause against the action proposed to be taken against him, and by order remove him from his office-....

(b) if he was disqualified to be a member of the Gram Panchayat at the time of his election.

In terms of the above provisions, the Deputy Commissioner concerned may after inquiry as he may deem fit and after giving an opportunity of being heard to Sarpanch or Panch, as the case may be ask him to show cause for the action and by order remove him from his office if he is disqualified to be a member of Gram Panchayat at the time of his election. The order (Annexure P4) passed by the Deputy Commissioner, Jhajjar (respondent No. 2) has been passed in exercise of powers conferred u/s 177 of the Act. The petitioner in terms thereof was held to be disqualified for the post of Sarpanch. Besides, the post of Sarpanch, Gram Panchayat, Village Gochhi was also declared vacant. Section 177 of the Act relates to disqualification for continuing as members. Such Section (1) provides (a) that if any member of a Gram Panchayat, Panchayat Samiti or Zila Parishad who is elected, as such, was subject to any of the disqualifications mentioned in Section 175 at the time of his election; (b) during the term for which he has been elected, incurs any of the disqualifications, mentioned in Section 175, shall be disqualified from continuing to be a member, and his office shall become vacant. Section 177(2) provides for exercise of power where vacancy has arisen to be decided by the Director. Director in Section 2(xix) has been defined to mean Director of Panchayats appointed under the Act. Therefore, though the order has been passed by the Deputy Commissioner in exercise of powers u/s 177 of the Act, the same would not be of any consequence as the Deputy Commissioner has the power to remove a Sarpanch in terms of Section 51(3)(b) of the Act. In *Peerless General Finance and Investment Co. Limited and Another Vs. Reserve Bank of India*, it was held that exercise of power by an authority under a wrong provision, however, which action is within its competence, cannot be held to be invalid merely because it purports to be under a wrong provision, if it can be shown to be within its power under any other provision. In *B.S.E. Brokers Forum, Bombay and Others etc. Vs. Securities and Exchange Board of India and Others etc.*, it was held that it is well-established principle law that so long as the impugned power is traceable to the statute concerned, mere omission or error in reciting the correct provision of law does not denude the power of the authority from taking statutory action so long as its action is legitimately traceable to a statutory power governing such action. In the present case, the statutory power governing the action of removal of Sarpanch by the Deputy Commissioner (respondent No. 2) is traceable to the provisions of Section 51(3)(b) of the Act. Therefore, even if it is taken that the provisions of Section 177 are inapplicable, the order would be valid in view of the provisions of Section 51(3)(b).

14. The case of Chander Bhan (Supra), referred to, by the learned Counsel for the petitioner is a case where the petitioner was accused of an offence and a FIR was registered against him for the offences under Sections 419, 420, 467 and 468 IPC. Besides, it was alleged that he was in unauthorized possession of Shamlat land of the village Panchayat. Moreover, his election had been earlier set aside on a complaint of one Deep Chand. It was in the context of the said circumstances where the petitioner was only accused of offences and the matter whether he was or was not in unauthorized possession of Panchayat land was to be considered that it was observed that a person who is declared to be an encroacher prior to the date on which he was declared as elected and after the said order has attained finality, the question whether he stood disqualified in terms of Section 122 of the Act must be raised by way of an election petition. It was observed that the allegation of encroaching upon the land shall require adjudication through an inquiry. The present, however, is a case where the petitioner has admittedly been convicted. The case of Sahib Singh (supra) referred to by the learned Counsel for the petitioner, is also not of much relevance in the present case. The question raised in the said case was whether merely on finding the name of Sarpanch/Panch in any FIR in itself implies defect of character likely to embarrass him in the discharge of his duties. In view thereof and in view of conflict between two earlier judgments referred to in the order passed in the said case, the matter was admitted. Their Lordships were of the view that when a person is involved in a criminal case, the same may not in all events be such to be a moral turpitude liable to be in the discharge of his duty, needs deeper consideration and it was not such, which may be decided at the motion stage. Therefore, it was in the said context that where a Sarpanch was involved in a criminal case that the matter has been admitted.

15. In the present case, as already been noticed, the petitioner stands convicted and therefore, disqualified from continuing as a Sarpanch of the Gram Panchayat in terms of Section 175(1)(a)(ii) of the Act. Section 51(3)(b) of the Act authorises the Deputy Commissioner concerned, after such inquiry as he may deem fit and after giving an opportunity of being heard to a Sarpanch or a Panch, as the case may be, ask him to show cause against the action proposed to be taken against him and by order remove him from his office, if he was disqualified to be a member of the Gram Panchayat at the time of his election. As already been discussed the petitioner in view of his conviction in a criminal case was disqualified to be a member of the Gram Panchayat and the relevant date for determining the same is the date of scrutiny of the nomination. The order removing the petitioner from the office of Sarpanch has been passed by the Deputy Commissioner in accordance with the statutory provisions of the Act. Therefore, it cannot be said that only an election petition can be filed for seeking removal of a Sarpanch. The order passed by the Deputy Commissioner, Jhajjar (respondent No. 2) has been upheld by the Financial Commissioner, Development and Panchayats Department, Haryana (respondent No. 1). There is no infirmity in the orders passed by the Authorities below, which would warrant interference by

this Court in exercise of its supervisory writ jurisdiction.

16. Accordingly, this petition is dismissed.