

(2000) 03 GUJ CK 0112
In the Gujarat High Court

Case No : Special Civil Application No's. 1252 and 1411 of 2000

Kanjibhai Babaldas Patel

APPELLANT

Vs

Election Officer

RESPONDENT

Date of Decision : 10-03-2000

Acts Referred:

Citation : (2001) 1 GLR 259

Hon'ble Judges : J.N. Bhatt, J

Bench : Single Bench

Advocate : N.D. Nanavati and P.K. Jani, in SCA No. 1252/2000 and P.M. Thakkar, for Thakkar Associates in SCA No.1411/2000, for the Appellant; U.A. Trivedi, AGP. for Respondent No. 1 and P.M. Thakkar for Thakkar Associates for the Respondent No. 2 in SCA No. 1252/2000, N.D. Nanavati and P.K. Jani for respondent No. 2 in SCA No. 1411/2000, for the Respondent

Judgement

J.N. Bhatt, J.—Rule in both the petitions, service of which is waived by Mr U.A.Trivedi, learned AGP, for respondent No.1 in both the petitions. Service of rule is waived by M/s.Thakkar Associates for respondent No.2 in Special Civil Application No.1252 of 2000, whereas, Mr P.K.Jani waives service of rule on behalf of respondent No.2 in Special Civil Application No.1411/2000.

2. Both these petitions, under Article 226 of the Constitution of India, are interconnected and raise common questions and also arise out of a common impugned order, dated, 2nd March, 2000. Therefore, they are being disposed of by this common judgment, upon request.

3. Special Civil Application No.1252/2000 is filed by the petitioner, whose nomination came to be rejected in the election for the Agricultural Produce Market Committee, Visnagar, whereas, in Special Civil Application No.1411/2000, the petitioner therein had raised objection against the nomination of the petitioner in SCA No.1252/2000. For the sake of convenience, facts of first petition, i.e. Special Civil Application No.1252/2000, are highlighted, and it is hereinafter referred to as the first petition and Special Civil Application

No.1411/2000 is referred to, as the second petition.

4. The petitioner in the first petition was the member of Agricultural Produce Market Committee, Visnagar (hereinafter referred to as the "Market Committee"). He was the Chairman of the Agricultural Produce Market Committee, Visnagar. When he was the Chairman, a donation of Rs.1 lac was given to one charitable hospital on 27th September, 1995, out of the funds of the Committee. Thereafter, the Market Committee in its meeting, dated 25th June, 1999 by a resolution passed by 2/3rd majority, removed the petitioner as a member of the Market Committee and also resolved to recover an amount of Rs.1 lac from the petitioner. The petitioner filed Special Civil Application No.4307/99 in this Court which was dismissed. Against the said order, LPA was also filed and there is no interim order in favour of the petitioner in the said LPA.

5. The Director of Agricultural Marketing and Rural Finance passed the order, dated 5th October, 1999, whereby, the petitioner came to be removed as member of the Market Committee. He exercised his powers u/s 13(1) of the Gujarat Agricultural Produce Markets Act, 1963, which was followed by a Special Civil Application before this Court, in which, the petitioner was relegated to the remedy of revision before the State Government and the State Government by the order, dated 14.2.2000, dismissed the Revision Application. In the meantime, the Director published the election programme and in exercise of the said powers, the respondent No.1 came to be appointed as the Election Officer. The election programme has been notified. Final list of voters is published on 25th January 2000 and nominations papers were to be filed from 1st March 2000. The petitioner filed his nomination paper for being elected from agricultural constituency.

6. Since the petitioner had apprehension that his nomination papers will be rejected on some grounds, he had preferred Special Civil Application No.1052 of 2000, before this Court. Therein, order was passed on 28th February, 2000. The order passed in the said petition was served upon the respondent, on 1st March, 2000. Even then, the Election Officer rejected the nomination of the petitioner on 2nd March, 2000. That is how the first petition came to be filed by the petitioner questioning the legality and validity of the rejection of his nomination by the respondent No.1.

7. The second petition is filed by a person who had raised objection against the nomination of the petitioner in the first petition. The second petition is filed, inter alia, contending that the respondent, Election Officer, did not consider two grounds out of three raised before him and, therefore, the grounds which, according to the petitioner, were not considered by the respondent, Election Officer, should be considered by this Court while determining the merits of the first petition.

8. In short, in the light of the factual scenario emerging from the record of both these petition, a short question which requires determination and adjudication is

as to whether the impugned order removing the petitioner in the first petition from the member of the Market Committee exercising powers under Rule 16 of the Gujarat Agricultural Produce Market Rules, 1965, (Rules for short) would constitute, a disqualification for contesting subsequent election or not? In other words, the exercise of power by the Election Officer under Rule 16 of the Rules, is vulnerable, or without authority or illegal?

9. Before the merits of both the petitions are examined, it may be mentioned, at this juncture, that under Rule 28 of the Rules, provision is made for determination of the validity of the election. Question has been raised that since a special statutory remedy in an election Tribunal is provided and the election process is on, this Court should not exercise its extra-ordinary writ powers under Article 226 of the Constitution, as it would, otherwise, tantamount to arresting the election process, whereas, it has been contended by the other side that the impugned order disqualifying the petitioner in the first petition from contesting the election is unauthorised, illegal and without jurisdiction and, therefore, this Court should exercise its powers under Article 226 of the Constitution of India.

10. The celebrated proposition of law and certain aspects of the law in a situation like the one on hand has been, virtually, very well expounded and extensively explored by catena of judicial pronouncements and both the sides have relied on many decided cases of this Court and the Hon"ble Apex Court.

11. Following aspects are required to be highlighted so as to appreciate the merits of both the petitions:

(1) It is true that, ordinarily, when statutory, special mechanism is provided for determination of the election dispute, the same should be allowed to be resolved in the special election Tribunal.

(2) The jurisdiction of this Court under Article 226 of the Constitution of India, which is extraordinary, plenary, equitable and special can be invoked in exceptional cases when the Court is satisfied that :

(a) The impugned order even in a election matter is ultra vires, like that, in violation of the statutory provisions;

(b) In a case where it is without jurisdiction;

(c) That it is violative of basic and fundamental principles of law;

(3) It cannot be gainsaid that any authority, administrative or quasi-judicial or the Tribunal can pass orders in the light of the statutory provisions. In other words, the impugned order must have the sanction of law, more so in a case like the one on hand where the resultant effect upon disqualification visits the person with serious and severe civil consequences.

(4) A decision on question as to disqualification even though is final, even under the provisions of Xth Schedule to the Constitution, the decision of the Speaker is also subject to judicial scrutiny. Judicial review under Article 226 is very wide

and, therefore, this Court is empowered to put any impugned order which is not supportable by law, in a proper legal shape.

(5) The Court would be inclined to interfere with the order of an authority even in case of election matter and even in a case of disqualification when:

- (a) it is ultra vires, like that, it is in contravention of the mandatory provisions,
- (b) it is vitiated by malafides,
- (c) it is palpably in colourable exercise of power,
- (d) it is being based on extraneous or irrelevant consideration,
- (e) it is perverse,
- (f) it is based on no evidence,
- (g) it is in violation of the principles of natural justice or even in case of breach of procedural rule.

The above proposition could, hardly, be countered.

(6) The scope of Article 226 of the Constitution has been, time and again, articulated and highlighted. Undoubtedly, judicial review is a basic feature of the Constitution of India. All actions, therefore, of the State, or its Authorities and Officers, must be, carried out, in accordance with the law or the Constitution and within the permissible parameters. Not only that, a Writ Court could go into the constitutionality of the law, but also the procedural part on administrative action as a part of judicial review.

(7) The Writ Court is entitled to issue directions, writ or orders to the inferior Court or Authorities, if the impugned order, is found vulnerable or without any sanction of law.

(8) It is true that while exercising powers under Article 226 of the Constitution of India, and examining the merits of the impugned order, the Writ Court cannot be converted into an appellate Court. It is not the domain of the writ Court to examine the quality of the order. The main anxiety of the Court while exercising powers under Article 226 of the Constitution of India is to see as to whether the impugned order is having the sanction of authority or law or not. Adequacy or sufficiency will not be a criterion but the source and sanction for passing the impugned order, or when it is tainted, it becomes necessary to exercise powers of judicial review under Article 226 even in an election at a time when without arresting the process, already, scheduled, the wrong order could be put into right shape.

12. In view of the aforesaid settled proposition of law, it would be expedient and appropriate, at this stage, to consider the material and relevant aspects which are, virtually, incontrovertible:

1. The nomination form of the petitioner in the first petition came to be rejected by virtue of the impugned order of the respondent Election Officer, as he has been removed from the membership in exercise of the powers u/s 13(1) and also section 33(11A) of the Act.

2. The removal of the petitioner from the membership of the Market Committee is taken as the basis for holding him disqualified for the subsequent election.

3. The respondent, Election Officer, in course of the hearing, on account of the three objections raised by the petitioner in the second petition, has found the petitioner in the first petition disqualified and has recorded disqualification on the basis of the earlier removal from the membership of the Market Committee. Thus, two other points which were raised by the petitioner in the second petition, are not, specifically, manifested in the order.

4. Obviously, therefore, there are two probabilities, either, the said two grounds are not acceptable, or the said two grounds were also considered but not dealt with in the impugned order. Out of the three grounds, two grounds, which are not considered are that (i) the petitioner in the first petition is not eligible to contest from the constituency of an agriculturist, as he has not been able to prove that he is an agriculturist and that (ii) the petitioner in the first petition is a trader and he had also represented for long the traders constituency.

5. The election programme is, already, notified and polling date is 13th March, 2000.

6. The petitioner in the first petition had filed Special Civil Application No.1052 of 2000 and it came to be rejected in view of the grounds stated in the order dated 28.2.2000, which will be considered hereinafter.

13. There is consensus that there is no any provision, statutorily, supplied for disqualification from contesting the next election much less on account of the removal by the respondent from the membership of the Market Committee, in view of the provisions of section 13(1) and section 33(11A) of the Act. So, it could, safely be said that there is no statutory provision for disqualification. It is in this context the impugned order disqualifying the petitioner in the first petition from contesting the election on account of removal is required to be examined and appreciated. Needless to state that disqualification entails serious social stigma. In absence of any statutory provision, merely because a member was earlier removed, could be characterised as a reason for disqualification? It is not appropriate, at this juncture, to probe as to why since 1963, when the Act came into force, the provisions for disqualification have not been supplied statutorily. Nonetheless, in absence of any legal sanction, statutory provision, or any authority, the respondent cannot reach to the conclusion for rejecting the nomination form only on the basis of the earlier order of removal from the membership on account of some delinquency. It was, vehemently, contended that even in absence of any specific provision, the rejection of nomination is justified for the simple reason that the petitioner came to be removed from the

membership, the tenure of which enures upto 6.4.2000 and since the process of subsequent election has commenced within the same period and the ground on which the respondent has recorded the impugned order is supported. In the opinion of this Court, it is not correct to say, in absence of any other provision, entitling the Election Officer to cancel the nomination, simply because the subsequent election period commenced before the conclusion of the earlier membership period from which one is removed. Needless to mention that the Election Officer has to consider the provisions of Rule 16. It is not permissible for the Election Officer to travel beyond the ambit of Rule 16. It would be expedient, at this stage, to refer to the provisions of Rule 16 of the Rules, which reads as under:

"16. Disposal of objections and rejection of nomination: - (1) The Election Officer shall then examine the nomination papers and shall decide all objections which may be made at the time of scrutiny to any nomination and may, either on, such objection or on his own motion after such summary enquiry, if any, as he thinks necessary, reject any nomination on any of the following grounds, namely:--

(i) that the proposer is a person whose name is not in the relevant list of voters, or

(ii) that the nomination has not been made in accordance with these rules.

(2) The Election Officer shall endorse on each nomination paper his decision accepting or rejecting the same and if the nomination paper is rejected, shall record in writing a brief statement of his reasons for such rejection. The scrutiny shall be completed on the day fixed in this behalf and shall not be adjourned on any ground."

14. It could, very well, be visualised from the aforesaid provisions of rule 16 that disposal of objections and rejection of nomination is in a defined or ear-marked domain. He is empowered to reject any nomination on any one of the grounds enumerated in rule 16. Innovative and ingenious exercise of power and interpretation of rule 16 by the respondent in rejecting the nomination of the petitioner, in the first petition, connecting with the removal period is not only unsupportable and unacceptable but is, clearly, unauthorised. He cannot make a ground which is not conceived in rule 16. Rejection of a nomination by an election officer in exercise of power under Rule 16 has to be exercised within the provisions of Rule 16 and judiciously.

15. If the impugned order is allowed to stand, it would, undoubtedly, tantamount to adding and rewriting the provisions of rule 16.

16. In this context, it must be remembered that, ordinarily, the Writ Court should be at loath to invoke the extra-ordinary jurisdiction under Article 226 in an election matter. But in an exceptional case, like the one on hand, when the authority, who is an Election Officer, has exercised power which is non-existent or totally misconceived exercise of authority, the action of the authority must be

brought under the legal parameters. It is in this context, the Founding Fathers of the Constitution of India have characterised the provisions of Article 226, which emanates valuable power of judicial review, as one of the basic features of the Constitution. In short, there is no limitation or fetter on the power as such. It is the self-imposed inhibition. The powers under Article 226 of the Constitution of India can be exercised even when alternative efficacious remedy, like the provisions under Rule 28 as in the present case, is available and writ Court's jurisdiction is not taken away. It is a matter of prudence. It is a matter of self-imposed restriction that when alternative efficacious remedy is available, ordinarily, the Writ Court would not invoke the extra-ordinary, plenary jurisdiction under Article 226 of the Constitution of India. Therefore, it must be noted that as and when any error culminating into miscarriage of justice or any action or order which is unauthorised, illegal, perverse, it can be set right by this Court exercising powers under Article 226 of the Constitution of India.

17. It would be interesting to refer to the observations made by this Court in an order dated 28.2.2000 in Special Civil Application No.1052/2000, since it will have a very material impact on the propositions and the points canvassed. It is expedient to reproduce the whole order:

"The petitioner is desirous of contesting the forthcoming election to the Market Committee, but apprehends that he may not be issued a nomination form or if issued, his nomination may be rejected on the ground of his past removal u/s 13 of the Gujarat Agricultural Produce Market Act, 1963. The petitioner apprehends such non-issuance of nomination paper or its rejection on the ground that his order of removal from membership of the Market Committee passed u/s 13 of the Act had become final. That removal was made on an allegation that in 1995 when he was a chairman, a donation of rupees one lakh was given to a Public Trust Hospital, in which he was one of the trustees. Thereafter, in the elections of 1996, he was elected as a member, but later on he was removed on the recommendation of the Market Committee u/s 13 of the Act.

18. The learned Senior Counsel appearing for the appellant has drawn the attention of the court to the provisions of section 13 and 14 of the Act and submitted that there was no disqualification entailed on removal of a member u/s 13 of the Act. He stated that even under the Rules, there was no such disqualification.

19. The learned counsel appearing for the Caveator Market Committee submitted that the petition is premature and that the apprehension of the petitioner is ill-founded. He was unable to show any provision which entailed disqualification due to the removal of a member u/s 13 of the Act.

20. It is obvious that the apprehension of the petitioner if he is not disqualified, would be wholly ill-founded. There is no apparent reason for the petitioner to apprehend that he will not be issued nomination form or if issued, his nomination will be rejected. Nor is there is a valid reason for him to apprehend that the

Returning Officer would not do his duty impartially. At this stage the petition being premature, it is rejected. Direct service permitted."

21. A mere glance at the factual scenario emerging from the the record would go to show that the impugned order, rejecting the nomination on the grounds stated, therein, cannot be sustained, being without sanction of law, or in other words, unauthorised and without jurisdiction.

22. The case law relied on by the learned advocates for the parties is not required to be, individually, examined as the broad propositions emerging from the decisions are not in controversy.

23. It would be, really, interesting to quote a passage of the author H.W.R.Wade in Administrative Law, 5th Edition at page 592:

"The discretion to withhold remedies against unlawful action may make inroads upon the rule of law and must therefore be exercised with the greatest care. In any normal case, the remedy accompanies the right. But the fact that a person aggrieved is entitled to certiorari ex debito justitiae does not alter the fact that the court has power to exercise its discretion against him, as it may in the case of any discretionary remedy. This means that he may have to submit to some unlawful administrative act which is ex hypothesi ultra vires. For, as has been observed earlier, a void act is in effect a valid act if the court will not grant relief against it."

24. In so far as the contention of learned counsel Mr Thakkar with regard to the definition of "Agriculturist" and the resultant submission that the petitioner in the first petition in reality is not an agriculturist and in the light of the facts and circumstances and the documentary evidence produced would go to show that he has been a trader and not an agriculturist and, therefore, he is otherwise also incompetent to contest and represent the constituency of agriculturist. This submission is required to be rejected on two grounds. Firstly, that it was agitated before the respondent Election Officer before the impugned order came to be recorded, though, it is true that this submission is not manifested in the impugned order and that is precisely the allegation of the petitioner in the first petition that the order is without application of mind. Otherwise also, there are two probabilities. Either this contention was, though raised, not dealt with or it was raised and considered and not found favour with. In either case, in the peculiar facts of the present case, and special circumstances emerging from the record of the present group of two petitions, cannot be gone into, at this stage. Since the contention pertaining to eligibility of the petitioner in the first petition as an agriculturist is one of the objections raised before the respondent, before the impugned order came to be recorded, learned counsel Mr Thakkar has placed reliance on the definition of "agriculturist", "trader" and "joint family" occurring in section 2. Section 2(ii) defines "agriculturist, whereas, section 2(viii) provides the definition of "joint family" and section 2(xiii) prescribes the definition of a "trader". Relying upon the aforesaid provisions and other documentary evidence

placed in the second petition, it was contended that even if the impugned order is not supportable on the grounds stated in the order, the petitioner in the first petition is otherwise also ineligible to contest the election as he is not an agriculturist. It may be stated that this Court, at this stage, is examining the merits of the order recorded by the respondent, whereby, nomination of the petitioner in the first petition came to be rejected on the ground of removal, which periods spreads upto 6.4.2000 and falls within the process of subsequent election is in focus. Obviously, this Court is not inclined to enter into that dispute which requires also some investigation of facts, as there is serious dispute about it. So on both the counts, the second contention is required to be rejected.

25. In view of the aforesaid discussions and the proposition of law highlighted hereinbefore and considering the relevant provisions of law, the impugned order dated 2nd March, 2000 is required to be quashed. The election is not yet held. The polling date is 13th March, 2000. Therefore, without arresting or postponing the date of election and the process, the impugned order rejecting the nomination of petitioner first petition is quashed and set aside. Special Civil Application No.1252 of 2000 is, accordingly, allowed. Rule is made absolute accordingly. Special Civil Application No.1411 of 2000 is dismissed and the rule is discharged.