
(2012) 09 AP CK 0049
In the Andhra Pradesh High Court
Case No : C.M.A. No. 275 of 2012

Mrs. G. Vanaja G. Shivajothi	Vs	APPELLANT
Mrs. V. Bhanumati and others		RESPONDENT

Date of Decision : 17-09-2012

Acts Referred:

Hyderabad Municipal Corporation Act, 1955 — Section 80

Citation : (2012) 6 ALT 309

Hon'ble Judges : G. Krishna Mohan Reddy, J; Ashutosh Mohunta, J

Bench : Division Bench

Advocate : C.V. Mohan Reddy, Representing Sri S. Srinivas Reddy, for the Appellant; D. V. Seetharam, Representing Sri Mir Masood Khan, for the Respondent

Judgement

G. Krishna Mohan Reddy

1. This appeal is preferred challenging order dated 14-03-2012 passed in Election O.P. No. 508 of 2010 (O.P.) on the file of the Court of Chief Judge-cum-Election Tribunal, City Civil Court, Hyderabad (for short "Tribunal"). Whereas the petitioner herein is the first respondent, the first respondent herein is the petitioner and the remaining respondents herein are also are the respondents in the O.P. For the sake of convenience, we refer the parties as they are arrayed in the O.P.

2. The petitioner filed the O.P. u/s 71(2) r/w Section 79(2) (d) of Greater Hyderabad Municipal Corporation Act, 1955 as amended by Act No. 14 of 2008 (for short "GHMC Act") requesting to declare election of the first respondent (returned candidate) to the office of the Greater Hyderabad Municipal Corporation as Corporator from Ward No. 108 of Borabanda Division as void on the ground of disqualification u/s 21-B of the GHMC Act and consequently to declare him (petitioner) as the elected candidate for the that post, being the first runner up in the said election, from Ward No. 108 of Borabanda Division, Hyderabad (for short "the Ward") and to direct the first respondent to pay the costs of the petition.

3. Basing on the averments, the Tribunal framed two points for determination as follows:

1) Whether the petitioner is entitled to seek a declaration that the election of the 1st respondent to the post of Corporator/Member of Ward Number 108, Borabanda, Greater Hyderabad Municipal Corporation is invalid? And, if so, whether the petitioner is also entitled to further declaration that the said respondent is not entitled to continue as Corporator of the said Ward?

2) If the answer to the Point Number 1 is in the positive, whether the petitioner being the candidate, who had secured second highest number of votes, next to the 1st respondent is entitled to be declared as elected to the post of the Corporator of the Ward?

4. The Tribunal held both the points in favour of the petitioner declaring the election of the first respondent as void and further declaring the petitioner as elected for the post consequently. In fact the question of legality of the second point with regards to the declaration of the petitioner as candidate elected for the post was not considered with reference to the relevant provisions of law. As a matter of fact, learned counsel for the first respondent here has conceded the first point held in favour of the petitioner, but questioned the legality of upholding the claim of the petitioner under the second point by the Tribunal. As the first point is conceded, the same point need not be examined while disposing of the present appeal.

5. Thereby it is only to be examined whether the petitioner, being the candidate who secured second highest number of votes, is entitled to be declared as elected to the post of Corporator for the Ward. Here it is to be very much reckoned with that admittedly the respondents 2 to 11 also contested for the same post and were defeated.

6. Learned counsel for the first respondent would contend that none of the provisions of GHMC Act or the Representation of the People Act, 1950 (for short "RP Act") provide for declaring the second candidate as the elected candidate for the post following the declaration of the election of the first candidate as void. Section 80 of GHMC Act and Section 101 of RP Act which may be referred only speak of declaration of such candidate, who secured second highest number of votes in an election, as elected candidate when the returned candidate was proved to have obtained highest number of votes by corrupt or illegal practices which is not the case to adopt the analogy incorporated in the said provision. Even otherwise when there are more than two candidates who contested for the post, it is just impossible to come to a conclusion that the votes polled for the first respondent/returned candidate would have been polled to the petitioner, who secured the second highest number of votes in the election, in case the voters got opportunity to believe that the first respondent was disqualified to contest the election. Hence, the Tribunal erroneously granted the declaration in favour of the petitioner.

7. Learned counsel for the petitioner has drawn the attention of this Court to Sections 76, 77 and 80 of GHMC Act and also Section 101 of RP Act while contending that by virtue of these provisions the declaration of the petitioner as elected candidate following the declaration of the election of the first respondent as void, is quite valid and there is no need to interfere with the same finding of the Tribunal.

8. The declaration of the petitioner as the elected candidate for the post in consequence of the declaration of the election of the first respondent as void, is subject to the law laid down in this behalf. In other words nobody can claim any exclusive right of declaration of the election in the absence of any law framed to that effect. Thereby there should be a provision of law to enforce that when the election of a candidate for any post is cancelled for whatever reason, the next person, who secured the second highest number of votes, should be declared as the elected candidate to such post. Definitely an uncertainty arises when there are more than two candidates, who contested for the post, as to how the votes polled to the returned candidate would have been polled among the other candidates when it was known that the returned candidate was not eligible for the election to the post.

9. In fact Sections 71 to 87 of GHMC Act deal with the election petitions for the elections within the Municipal Corporations. We feel it appropriate to look into these provisions in the present context, they read as follows:

Section 71--Election Petition:- (1) No election held under this Act shall be called in question except by an election petition which shall be presented in such manner as may be prescribed.

(2) An Election petition calling in question any election may be presented on one or more of the grounds specified in clauses (i) and (ii) of Section 79 and Section 80 to the Election Tribunal by any candidate at such election or any voter, within two months from, but not earlier than the date of election of the returned candidate or if there are more than one returned candidate at the election and the dates of the election are different is the latter of those two dates.

Section 74--Relief that may be claimed by the Petitioner:-A Petitioner may claim any one of the following declarations:

- (a) that the election of the returned candidate is void
- (b) that the election of the returned candidate is void and that himself or any other candidate has been duly elected;
- (c) that the election as a whole is void.

Section 77--Decision of Tribunal:- At the conclusion of the trial of an election petition, the Tribunal shall make an order-

- (a) dismissing the election petition; or

- (b) declaring the election of the returned candidate to be void; or
- (c) declaring the election of the returned candidate to be void and the petitioner or any other candidate to have been duly elected; or
- (d) declaring the election to be wholly void.

Section 78--Other orders to be made by the Tribunal:-

(1) At the time of making an order u/s 77, the Tribunal shall also make an order-
(a) where any charge is made in the petition of any corrupt or illegal practice having been committed at the election, recording

(i) a finding whether any corrupt or illegal practice has or has not been proved to have been committed by or with the connivance of any candidate or his agent at the election, and the nature of that corrupt or illegal practice; and (ii) the name of all persons, if any, who have been proved at the trial to have been guilty of any corrupt or illegal practice and the nature of that practice, together with any such recommendations as the Tribunal may think proper to make for the exemption of any person from any disqualification which he may have incurred in this connection u/s 20 and in respect of any disqualification arising out of failure to lodge return of election expenses with reference to clause (1) of Section 22.

(b) ...

(2) ...

Section 79--Grounds for declaring election to be void:-

(1) If the Tribunal is of opinion that the election has not been a free election by reason that bribery, undue influence or group intimidation has extensively prevailed at the election, the Tribunal shall declare the election as a whole to be void;

Explanation:- In this section:-

(a) the expressions bribery" and undue influence" have the meanings given to them in Section 17; and

(b) the expression group intimidation" means any interference or attempt to interference by a community, group or section with the free exercise by another community, group or section of the right to vote or refrain from voting by intimidation, coercion, social or economic boycott, threat of such boycott or other similar means.

(2) Subject to the provisions of sub-section (3), if the Tribunal is of opinion-

(a) that the election of a returned candidate has been procured or induced or the result of the election has been materially affected, by any corrupt or illegal practice; or

(b) that any corrupt practice has been committed by a returned candidate or his

agent or by any other person with the connivance of a returned candidate or his agent; or

(c) that the result of the election has been materially affected by the improper reception or refusal of a vote or by the reception of any vote which is void; or by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act or of any other Act or rules relating to election, or by any mistake in the use of any prescribed form;

(d) that on the date of his election a returned candidate was disqualified to be elected as a Member under this Act; the Tribunal shall declare the election of the returned candidate to be void.

(3) If in the opinion of the Tribunal, a returned candidate has been guilty, by an agent other than his election agent, of any corrupt practice specified in (Section 18), but the Tribunal is satisfied that

(a) no such corrupt practice was committed at the election by the candidate or his election agent, and every such corrupt practice was committed contrary to the orders, and without the sanction or connivance of the candidate or his election agent;

(b) all such corrupt practices were of a rival and limited character or took the form of customary hospitality which did not affect the result of the election;

(c) the candidate and his election agent took all reasonable means for preventing the commission of corrupt or illegal practices at the election; and

(d) in all other respects the election was free from any corrupt or illegal practice on the part of the candidate or any of his agents; then the Tribunal may decide that the election of the returned candidate is not void.

Section 80--Grounds for which a candidate other than the returned candidate may be declared to have been elected:- If any person who has lodged a petition has, in addition to calling in question the election of the returned candidate, claims a declaration that he himself or any other candidate has been duly elected and the Tribunal is of opinion-

(a) that in fact the petitioner or such other candidate received a majority of the valid votes; or

(b) that but for the votes obtained by the returned candidate by corrupt or illegal practices, the petitioner or such other candidate would have obtained a majority of the valid votes;

the Tribunal shall, after declaring the election of the returned candidate to be void, declare the petitioner or such other candidate, as the case may be, to have been duly elected.

Sections 81--Procedure in case of an equality of votes:-If during the trial of an election petition it appears there is an equality of votes between any candidates

at the election and that the addition of a vote would entitle any of those candidates to be declared elected, then -

(a) any decision made by the Returning Officer under the provisions of this Act shall, in so far as it determines the question between those candidates, be effective also for the purpose of the petition; and

(b) in so far as that question is not determined by such a decision, the Tribunal shall decide between them by lot and proceed as if the one on whom the lot then falls had received an additional vote.

Section 83 deals with filing appeal before the High Court against the order passed by the Tribunal under Sections 77 and 78.

Section 87--Procedure when no member is elected:-(1) If at a general election or bye-election no Member is elected, a fresh election shall be held on such date as the State Election Commissioner may fix in this behalf. (2) The term of office of a Member elected under subsection (1) shall expire at the time at which it would have expired if he had been elected at the general election or bye-election, as the case may be.

10. Sections 80 to 107 under Chapters II and III of the RP Act deal with election petitions. These provisions may be referred to have an idea about the intendment of the legislature in framing election laws.

Section 100 of this Act provides of grounds for declaring an election to be void. It reads subject to the provisions of sub-section (2), if the High Court is of the opinion-

(a) that on the date of his election a returned candidate was not qualified, or was disqualified to be chosen to fill the seat under the Constitution or this Act or the Government of Union Territories Act, 1963 (20 of 1963) or

(b) that any corrupt practice has been committed by a returned candidate or his election agent by any other person with the consent of a returned candidate or his election agent: or

(c) that any nomination has been improperly rejected; or

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected-

(i) by the improper acceptance of any nomination; or

(ii) by any corrupt practice committed in the interests of the returned candidate by a person other than that candidate or his election agent or a person acting with the consent of such candidate or election agent or

(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void; or

(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act, the High Court shall declare the election of the returned candidate to be void.

(2) if in the opinion of the High Court, a returned candidate has been guilty by an agent other than his election agent, of any corrupt practice but the High Court is satisfied-

(a) that no such corrupt practice was committed at the election by the candidate or his election agent and every such corrupt practice was committed contrary to the orders, and without the consent, of the candidate or his election agent;

(b) that the candidate and his election agent took all reasonable means for preventing the commission of corrupt practices at the election; and

(c) that in all other respects the election was free from any corrupt practice on the part of the candidate or any of his agents then the High Court may decide that the election of the returned candidate is not void.

The wording of Sections 101 and 102 of the RP Act is akin to the Sections 80 and 81 of the GHMC Act with regards to the procedure to be adopted to declare an election as void as the case may be.

11. Here the question of electing the petitioner for the post of Corporator after declaring the election of the first respondent as void is subject to the provisions of Section 80 of GHMC Act which is akin to Section 101 of the RP Act. Thereby in order to do so, it should be that in fact the petitioner received majority of the valid votes polled or but for the votes obtained by the returned candidate by corrupt or illegal practices, the petitioner could have obtained majority of the valid votes polled. This is not a case where the petitioner got majority of the valid votes nor this is a case where but for the votes obtained by the returned candidate by corrupt or illegal practices, the petitioner would have obtained a majority of valid votes, which rule out the application of Section 80 of the GHMC Act. None of the other provisions enumerated enables to declare a candidate as elected in consequence of declaring the election of returned candidate as void on the ground that the returned candidate was having three children by the relevant date apart from the fact that when more than two candidates contested for the post, it would be practically difficult to come to a conclusion that but for the votes obtained by the returned candidate by corrupt or illegal practices, the petitioner or such other candidate would have obtained majority of the valid votes in order to declare the petitioner or such other candidate as the case may be as duly elected for whatever reason because it is difficult to ascertain as to which of the votes polled to the returned candidate could have been polled to any one of them in the said circumstances.

12. This predicament is well explained by the Apex Court in PRAKASH KHANDRE v. Dr. VIJAYA KUMAR KHANDRE AIR 2002 SC 2345, while examining similar question under similar circumstances with reference to the post of MLA of a

particular place. The Apex Court, while referring to various judgments, held in para-14 therein as follows:

(14.) HOWEVER, in an election where elected candidate is declared to be disqualified to contest election and there are more than two candidates contesting election, there is no specific provision under the Act under which the person who has secured the next highest number of votes could be declared as elected. The Act is silent on this point. Further, it cannot be presumed that the votes secured by the disqualified elected candidates would have been wasted or would have been secured by the next candidate who has secured more votes. If disqualified candidate was not permitted to contest the election then how the voters would have voted in favour of the candidate who has secured more votes than other remaining candidates would be a question in the realm of speculation and unpredictability. In such a situation, declaring the election of the returned candidate on the ground of his initial disqualification to contest the election by itself would not entitle the election petitioner or any other candidate to be declared elected.

The Apex Court further observed:

(24) IN view of the aforesaid settled legal position, in our view the impugned order passed by the High Court declaring the election petitioner as elected on the ground that the votes cast in favour of elected candidate (appellant) are thrown away was totally erroneous and cannot be justified. As held by the Constitution Bench in Konappa's case that some general rule of election law prevailing in the United Kingdom that the votes cast in favour of a person who is found disqualified for election may be regarded as "thrown away" only if the voters had noticed before the poll the disqualification of the candidate, has no application in our country and has only merit of antiquity. We would observe that the question of sending such notice to all voters appears to us alien to the Act and the Rules. But that question is not required to be dealt with in this matter. As stated earlier, in the present case for one seat, there were five candidates and it would be impossible to predict or guess in whose favour the voters would have voted if they were aware that elected candidate was disqualified to contest election or if he was not permitted to contest the election by rejecting his nomination paper on the ground of disqualification to contest the election and what would have been voting pattern. Therefore, order passed by the High Court declaring the election petitioner Dr. Vijay Kumar Khandre as elected requires to be set aside.

13. Thereby even supposing that the case on hand could be brought within the purview of the relevant provisions of the GHMC Act and, still the petitioner could not be declared as the candidate elected for the post following the declaration of the election of the first respondent as void.

14. Therefore, the declaration of the petitioner as the candidate elected is erroneous and unsustainable. In the result, the Civil Miscellaneous Appeal is allowed in part confirming the order of setting aside the election of the appellant/

first respondent and setting aside the order of election of the first respondent/petitioner as Corporator consequent upon setting aside the election of the appellant/first respondent. No costs.