
(2002) 02 RAJ CK 0126
In the Rajasthan High Court
Case No : Civil Writ Petition No. 497 of 2002

Prabhu Dayal Saini

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 06-02-2002

Acts Referred:

Rajasthan Municipalities Act, 1959 — Section 18, 26, 60, 63

Citation : (2002) 3 RLW 1396 : (2002) 2 WLC 427

Hon'ble Judges : Shiv Kumar Sharma, J

Bench : Single Bench

Advocate : Naina Saraf, for the Appellant; M. Rafiq, A.A.G. and Ashok Pareek, for the Respondent

Final Decision : Dismissed

Judgement

Sharma, J.—The petitioner was suspended from the post of Chairman/Vice Chairman/Member Municipal Board Dausa on the allegation that number of his children exceeded and he acquired dis-qualification u/s 26 of the Rajasthan Municipalities Act, 1959 (in short, "1959 Act") vide order dated Jan. 8, 2002. As a consequence thereof another order came to be passed on January 8, 2002 whereby Smt. Biban Bano was directed to take charge of the post of Chairman, Municipal Board Dausa. The petitioner in the instant writ petition seeks to quash the aforequoted orders.

2. According to the facts averred in the writ petition the elections of Municipal Board Dausa were held on August 20, 2000. The petitioner contested the election from Ward No. 10 and was declared elected. Thereafter, the petitioner was elected as Vice Chairman of the Municipal Board Dausa. The election of the petitioner from Ward No. 10 was challenged by one Laxmi Narain by filing election petition u/s 34 of the 1959 Act. The main ground of challenge of the election of the petitioner was that the petitioner was having more than three living children as such he was ineligible to contest the election of Member Municipal Board Dausa.

3. The petitioner submitted reply to the election petition. During the pendency of the election petition no confidence motion was passed against Smt. Pinky Rajoriya, Chairman Municipal Board Dausa and she was removed from the post of Chairman. Being Vice Chairman of the Municipal Board Dausa, the petitioner was given the charge of the post of Chairman vide order dated January 3, 2002.

4. On a complaint made against the petitioner that his wife gave birth to third child on July 10, 1996 and thereby the petitioner became disqualified u/s 26(xiv) of the 1959 Act, an enquiry was conducted by the SDO Dausa. On January 8, 2002 the State Government suspended the petitioner from the post of Chairman/Vice Chairman/Member of the Municipal Board on the ground that he was disqualified u/s 26(xiv) of the 1959 Act. By another order issued on January 8, 2002 charge of the post of Chairman/Vice Chairman was handed over to Smt. Biban Bano.

5. The petitioner assailed the aforequoted orders on the following grounds:

(a) The petitioner was suspended on the charge that he has got third child on 10.7.96 and thus acquired disqualification u/s 26 of the 1959 Act and election petition on the same ground is already pending before the District Judge Dausa. As the matter is sub-judice before the learned District Judge the respondents were not entitled and competent to pass the aforequoted orders.

(b) The petitioner's wife gave birth to the third child on 10.7.1996 and he was elected as a member Municipal Board on 20.8.2000. It is clear that as per the alleged allegation the third child was born before his election. Section 33(2) of the 1959 Act provides that no election shall be called in question except by an election petition in accordance with the provisions of the Act. Article 243ZG(b) provides that no election to any Municipality shall be called in question except by an election petition presented to such authority and in such manner as provided for by the Legislature of the State. The election of the petitioner has already been challenged by way of election petition, the respondents were not competent to suspend the petitioner on the alleged ground of disqualification prior to his election.

(c) The alleged date of getting the third child is prior to his election which cannot be the subject matter u/s 63 of the 1959 Act as the petitioner has not incurred disqualification after the election under Sections 18, 26 and Section 24 of the 1959 Act.

(d) The disqualification acquired u/s 26 of the 1959 Act can only be challenged by way of filing election petition and no other remedy is available. As the election petition is already pending against the petitioner the respondents cannot suspend the petitioner on this ground.

(e) No charge-sheet has been given to the petitioner and no proceedings u/s 63 of the 1959 Act are commenced against him, thus the State Government cannot place a member under suspension against whom proceedings have not been

commenced and no charge sheet has been served.

(f) The State Government has power to suspend a member u/s 63 only if he acquires a disqualification after his election. Admittedly the petitioner has not acquired any disqualification after his election as such the State Government was not empowered under law to suspend the petitioner.

(g) A member can be suspended only after adopting the procedure as prescribed u/s 63 of the Act. As the petitioner acquired alleged disqualification u/s 26 of 1959 Act before the election and the only remedy available against him is election petition.

(h) That the impugned orders have been passed by the State Government without application of mind and without examining the merits of the matter.

(i) The petitioner was given notice on 14.5.2001 and he filed a reply to the notice. The impugned orders have been passed on January 8, 2002 after a long delay.

6. The respondents 1 and 2 submitted reply to the writ petition denying the allegations mentioned in the writ petition. The respondents averred that petitioner had three living sons namely Yogesh Saini, who was born on 10.9.1992, Lokesh @ Nantu who was born on 16.3.1995 and Rakesh @ Chhota whose date of birth was 10.7.1996. The respondents enclosed the certificate Annexure R/1 which shows that Smt. Kanti Devi w/o Shri Prabhu Dayal Saini delivered a male child at 11.45 p.m. on 10.7.1996, which is registered at Serial No. 59 of the birth register. The certificate further shows that this was the fourth delivery but since first child of the petitioner had expired in the year 1990 itself therefore, the petitioner has got only three sons. After receipt of complaint the SDO submitted his enquiry report to the Collector on 29/31.3.2001 which was forwarded to the Government. The SDO in his report prima facie found the affidavit submitted by the petitioner on non-judicial stamp of Rs. 5/- attested by Notary Public that a child was born to his wife on 10.7.1996 and he suddenly expired on 15.6.1997 to be false. The SDO found that a son was born out of the wedlock of the petitioner and his wife on 10.7.1996 which fact was substantiated from school records. In the certificate issued by the Head Master dated 8.1.1998 showed that the son of petitioner Yogesh Kumar Saini studying in standard II was shown to have been born on 10.9.1992 and another son Nantu of the petitioner is studying in I standard was shown to have been born on 16.3.1995. The third son who was young apparently born on 10.7.1996. Preliminary enquiry report has also been annexed with the reply. In the reply it was further averred that the petitioner submitted a false affidavit before the Returning Officer that he had no child born to his wife after February, 1994. In the application dated 30.8.2000 submitted to the Executive Magistrate the petitioner enclosed an affidavit and stated that his son Bindu Saini was born on 10.7.1996 and he expired on 15.6.1997. In reply to the notice dated 14.5.2001 the petitioner submitted that since already an election petition has been filed against him the

enquiry u/s 63 cannot be proceeded against him. The Government did not find the explanation of the petitioner satisfactory and, therefore, decided to place the petitioner under suspension and vide order dated 16.1.2002 referred the matter to the Joint Legal Remembrancer for Judicial enquiry.

7. It was further averred in the reply that Smt. Biban Bano had already taken the charge from the petitioner of the post of Chair person Municipal Board Dausa on 8.1.2002. It was submitted that since proceedings u/s 63 of 1959 Act was pending against the petitioner and the same has been ordered to be sent to the Joint Legal Remembrancer for Judicial enquiry on 16.1.2002, the petitioner's contention is absolutely wrong that no enquiry is pending against him u/s 63 of the 1959 Act.

8. The respondent No. 3 also submitted separate reply and raised preliminary objection that the petitioner produced fabricated document Annexure-3. The other facts stated in the reply to the writ petition by the respondents 1 and 2 have been reiterated by the respondent No. 3.

9. I have heard the learned counsel for the parties and scanned the material on record.

10. From the writ petition, and the replies to the writ petition filed by the respondents following facts emerge:

(i) That the petitioner contested election from Ward No. 10 on 20.8.2000 of Municipal Board Dausa and was elected as Member of the Municipal Board Dausa.

(ii) Laxmi Narain son of Kalu Ram Saini filed elected petition u/s 34 of the 1959 Act against the petitioner in the Court of District Judge Dausa and the same is sub-judice.

(iii) From Annexure-3 it is revealed that three sons of petitioners, whose names mentioned below, are studying as on 8.3.2001 in Shivaji Adarsh Upper Primary School Babaji ki Chhawani Dausa:

Yogesh Kumar Saini : 25.12.90 Lokesh Kumar Saini : 10.10.1992 Rakesh Kumar Saini : 26.2.1994.

(iv) Vote of no confidence motion was passed against Smt. Pinkey Rajoria on 2.1.2002 and the petitioner was given the charge of the Chairman of the Municipal Board on 3.1.2002.

(v) A complaint was filed against the petitioner before the State Government that the petitioner wife gave birth to a third child on 10.7.96 and thus he has become disqualified u/s 26(XIV) of 1959 Act.

(vi) The matter was enquired into by the SDO Dausa. Preliminary enquiry report was also submitted by him.

(vii) The petitioner was given show cause notice on 14.5.2001.

(viii) The petitioner gave reply to the show cause notice and denied that his wife has given birth to the third child on 10.7.96.

(ix) Certificate dated 27.8.2000 shows that Smt. Kanti Devi wife of Prabhu Dayal Saini delivered male child on 10.7.1996 at 11.45 p.m. This was the fourth delivery but since first child of the petitioner had expired in 1990, therefore, the petitioner had got only three sons.

(x) The petitioner submitted a non-judicial stamp attested by Notary Public that a child was born to his wife on 10.7.96 and he suddenly expired on 15.6,1997.

11. The learned counsel for the petitioner placed reliance on Nauratanmal Tak v. State (1), Mohan Lal v. State (2), Mukesh Kumar v. State (3), Kaptan Singh v. State (4), Nand Lal v. State (5), Brundeban v. Election Commissioner (6), Prem-prakash v. State (7), Ashok Kumar v. State (8), Narayana Lal Birla v. State (9) and Ramgopal v. State (10).

12. Mr. M. Rafiq, learned Addl. Advocate General and Mr. Ashok Pareek, learned counsel for the respondent No. 3 placed reliance on RLR 2001 (2) 579 (11), WLC 2000(2) 231 (12), RLR 2000(3) 16 (13) 2001(8) SCC 540 (15), WLC 1992(2) 463 (16), K. Venkatachalam Vs. A Swamickan and Another, and Deputy Commercial Tax Officer and Others Vs. Corromandal Pharmaceuticals and Others,

13. Section 26 of the 1959 Act provides general disqualifications for the members. u/s 26(xiv) a person, notwithstanding that he is otherwise qualified shall be disqualified for being chosen as (or for being) a member of a Board who has more than two children. As per proviso (e) to Section 26, the cut-off date for third child is November 27, 1995. A member of the Board may be removed by the State Government u/s 63(1)(c) of the 1959 Act that after his election he has incurred any of the disqualifications mentioned in Section 18 or Section 26. A member may be placed under suspension u/s 63(4) by the State Government against whom proceedings have been commenced u/s 63.

14. The main argument canvassed on behalf of the petitioner was that it was not open to the respondents to proceed against the petitioner u/s 63 of the 1959 Act as according to the allegations against the petitioner he had incurred the disqualification u/s 26(xiv) before the election and the case of the petitioner was not covered u/s 63(1) (c) of 1959 Act. Similar argument was advanced before the Divisions Bench of this Court in Rakesh Ghatiwal v. State of Rajasthan (21) and it was indicated in para 7 that - "In our considered opinion, Section 63(1)(c) of the Act has to be construed as having already incurred disqualification mentioned in Section 18 or Section 26. In such type of cases, in our considered opinion there was no need to proceed against the appellant by way of separate election petition." SLP preferred against this judgment was dismissed by the Hon"ble Supreme Court on Feb. 9, 2001.

15. A close look at Section 26(xiv) of 1959 Act demonstrates that disqualification mentioned therein is a disqualification in continuity. A person, notwithstanding

that he is otherwise qualified, is disqualified for being chosen as (or for being) a member of a Board who has more than two children. Such person was, before election, disqualified for being chosen as a member of a Board and even after his election, he having more than two children, continuously incurred disqualification u/s 26(xiv) therefore, State Government may proceed against him u/s 63(1) of 1959 Act.

16. That takes me to the next plank of attack that as the commencement of the proceedings did not take place as per Section 63 (4) of 1959 Act, the petitioner could not have been placed under suspension.

17. In *Ugamsee Modi v. State of Rajasthan* (22) the D.B. of this Court held that "proceedings under Sub-section (2) of Section 63 of the Act must be taken to have commenced against the petitioner when on those allegations he was called upon to show cause and explain his conduct."

18. *Mohan Lal v. State of Rajasthan* (23) was the case wherein the Division Bench of this Court indicated thus-

"After a complaint is received by the Government against a member or Chairman, a preliminary inquiry has to be undertaken to verify whether there is any substance in the allegations made against such person and after holding that inquiry as contemplated by proviso to Sub-section (1) of Section 63, if the Government decides to take action against such person, it may issue show cause notice to him and also take further action for conduct of an inquiry in accordance with the provision laid down u/s 63(2), (3), (4) and (5). Though for purposes of Sub-section (1) of Section 63 a preliminary inquiry would be held to have been commenced no sooner cognizance is taken of a complaint by the Government against such officer, yet proceedings should be taken to commence in the meaning of the term under Sub-section (4) to Section 63 only when process in order to issue against such person, or when the authority makes up its mind to take action. At that stage the Government makes up its mind whether or not to take action and that in our opinion, is the stage of commencement of proceedings for purpose of Section 63(4)."

19. Coming to the facts of the instant case it may be noticed that on a complaint being received against the petitioner that the petitioner's wife gave birth to a third child on July 10, 1996 the matter was enquired into by the SDO and preliminary inquiry report was submitted by him. The petitioner was given show cause notice on May 14, 2001. The petitioner submitted explanation which was not found satisfactory by the State Government. The petitioner vide order dated January 8, 2002 was placed under suspension and vide another order issued u/s 69-A of 1959 Act Smt. Biban Bano was directed to take charge. I am not impressed by the submissions advanced before me by the learned counsel for the petitioner. I am satisfied that the petitioner's case is ex facie covered u/s 63(1)(c) and the proceedings have been commenced against him u/s 63 of the 1959 Act.

20. In view of what I have discussed hereinabove I find no merit in the writ petition, it stands dismissed without any order as to costs.