

(2016) 01 GUJ CK 0118
In the Gujarat High Court

Case No : Special Civil Application No. 177 of 2016

Vipulbhai Mansingbhai Chaudhry

APPELLANT

Vs

State of Gujarat & 1 another

RESPONDENT

Date of Decision : 18-01-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Gujarat Co-operative Societies Act, 1961 — Section 76B(2)

Citation : (2016) AIR(Gujarat) 78

Hon'ble Judges : C.L. Soni, J.

Bench : Single Bench

Advocate : S.N. Shelat, Sr. Advocate with P.S. Champaneri, Advocate, for the Appellant; P.K. Jani, Addl. Advocate General with Niraj Ashar, AGP, for the Respondent

Final Decision : Disposed Off

Judgement

C.L. Soni, J. (Oral) - By the present petition filed under Article 226 of the Constitution of India the petitioner has challenged order dated 16.12.2015 at Annexure A passed by the Registrar, Cooperative Societies - respondent No.2 disqualifying the petitioner under Section 76(B)(2) of the Gujarat Cooperative Societies Act, 1961 ("the Act" for short) to contest the election or to hold office in Mehsana District Cooperative Milk Producers Union Limited ("the Union" for short) and in any other society for a period of six years.

2. Some relevant facts are as under :-

2.1 The petitioner, who was functioning as Chairman of the Union, was removed from the office of Chairman and also disqualified to contest the election and to hold office in the Union or in any other society by order dated 10.03.2015 under Section 76(B) (1)(2) of the Act. The petitioner was disqualified for three years against maximum period of four years as then provided in Section 76B(2) of the Act.

2.2 The removal and disqualification of the petitioner as affirmed by the Revisional Authority under Section 155 of the Act was challenged before this Court by filing Special Civil Application No.9618 of 2015. This Court vide judgment dated 29.09.2015 did not interfere with the order of removal, however, quashed the order of disqualification on the grounds that there was no notice for disqualification in the eye of law and that no order of disqualification could be passed with the order of removal as there has to be first order of removal and following such order of removal a decision by separate order for disqualification was required to be taken.

2.3 Thereafter, the petitioner was issued with show cause notice dated 03.10.2015 under Section 76B(2) of the Act asking the petitioner to show cause as to why the petitioner should not be disqualified to contest the election or to hold any office in the Union or in any other society for a period of six years.

2.4 It needs to be mentioned that by virtue of amending Act No.12 of 2015 which came into force on 10.04.2015, maximum period of four years for disqualification was substituted by six years. The notice dated 03.10.2015 was thus given on the basis of substituted provision for the proposed disqualification for six years.

2.5 It was after the said notice, the petitioner challenged the judgment dated 29.09.2015 rendered by the learned Single Judge in Special Civil Application No.9618 of 2015 concerning his removal by preferring Letters Patent Appeal No.1302 of 2015. In the said Letters Patent Appeal, judgment of the learned Single Judge was not interfered with however, for the proposed action of disqualification under Section 76B(2) of the Act, it was observed that if subsequent proceedings of taking action for disqualification were brought under challenge, right and contention for both the sides shall remain open.

2.6 The petitioner then preferred Special Civil Application No.17826 of 2015 challenging the show cause notice dated 03.10.2015 issued to the petitioner under Section 76B(2) of the Act. Said petition was rejected vide order dated 27.10.2015. Against the said order, the petitioner preferred Letters Patent Appeal No.1343 of 2015 which came to be allowed by the Division Bench vide its judgment dated 02.11.2015. Against this judgement, State filed SLP (Civil) No.32004 of 2015 wherein following order was made by the Hon'ble Supreme Court on 23.11.2015 :-

"Leave granted.

Ad-interim relief, as prayed for, is granted.

Issue notice on stay, returnable on 4th December, 2015.

Mr. Kapil Sibal, learned senior counsel, appearing on behalf of Mr. Anirudh Sharma, learned Advocate-on-Record, waives notice for the respondent.

However, the show cause notice may be replied by the respondent within two

weeks from today, if the respondent wants to reply the same.

List the matter on 4th December, 2015."

2.6.1 Ad interim relief prayed for in the SLP was in following terms :-

"8(A) grant ad-interim ex-parte order staying the operation & implementation of the judgment & orders passed by the Hon"ble High Court of Gujarat at Ahmedabad dated 2.11.2015 passed by the Hon"ble Division Bench of the High Court of Gujarat at Ahmedabad in Letters Patent Appeal No.1343/2015 in Special Civil Application No.17826/2015; and also permit the authority to proceed further with the impugned show cause notice.

(B) Pass such other or further order(s) as may be deemed fit and proper in the circumstances of the case."

By granting such ad-interim relief, the order of Division Bench was stayed and the concerned authority was permitted to proceed further with show cause notice.

2.7. The petitioner then filed Writ Petition (Civil) No.824 of 2015 before the Hon"ble Supreme Court of India challenging the vires of section 76B wherein no interim relief is granted. The petitioner then filed reply to the show cause notice on 07.12.2015. Thereafter, the petitioner filed SLP (Civil) No.33630 of 2015 against the order of Division Bench of this Court in LPA No.1302 of 2015 in so far as challenge was made to the order of his removal as Chairman of the Union under Section 76B(1) of the Act. Below quoted order was made by the Hon"ble Supreme Court in Civil Application No.13784 of 2015 on 07.12.2015.

"Tag with civil appeal arising out of SLP (C) No.33630/2015.

Hearing expedited.

It has been submitted by the learned senior counsel appearing for the respondent that the reply to the show cause notice is being filed today. In these circumstances, we direct that if any order adverse to the respondent is passed by the Registrar, Cooperative Societies, State of Gujarat, the same shall not be implemented for a period of four weeks from the date of communication of the order to the respondent."

2.8. After the aforesaid order, impugned order of disqualification dated 16.12.2015 was passed. This order is stated to have been served to the petitioner on 17.12.2015. However, the present petition to challenge the order of disqualification was moved before this Court on 06.01.2016.

3. Learned Senior advocate Mr. S.N. Shelat appearing with learned advocate Mr. P.S. Champaneri for the petitioner submitted that the show cause notice and the impugned order for disqualification are under the amended provision of Section 76(B)(2) of the Act which came into force on 10.04.2015. Mr. Shelat submitted that such amended provision would not apply retrospectively and retroactively for the delinquency committed for which the petitioner was removed under

Section 76(B)(1) of the Act prior to coming into force of amended provision of section 76(B)(2) of the Act. Mr. Shelat submitted that action for disqualification is stated to be in continuous of earlier action taken, however, provisions of section 76(B)(2) since amended by substitution, no action under the amended provision could be taken in continuous of earlier action of disqualification as disqualification imposed by earlier order survived only till this Court quashed it in earlier round of litigation. Mr. Shelat submitted that since there are no express parameters provided for taking action under section 76(B)(2) of the Act, strict construction of provisions of section 76(B)(2) of the Act is required and if strictly construed only grave acts could be considered for the purpose of disqualification.

3.1 Mr. Shelat submitted that it is a clear case of legal malice as concerned authority has disqualified the petitioner for maximum period ignoring the period of disqualification already suffered by the petitioner and also ignoring that even under the unamended provision for disqualification, though maximum period was 4 years, disqualification of 3 years was deemed proper. Mr. Shelat submitted that imposing of maximum disqualification by resorting to amended provision when the petitioner had already suffered disqualification and stigma, is nothing but malicious action in law against the petitioner.

3.2 Mr. Shelat submitted that charges of negligence and as regards prejudice to the interest of the society cannot now be part of impugned action of disqualification, as such could not be said to be grave in nature warranting disqualification after they were part of delinquency for the purpose of removal of the petitioner. Mr. Shelat submitted that the impugned order is arbitrary, discriminatory in character and in violation of Article 14 of the Constitution of India as right to form cooperative society is included in Article 19(1)(C) of the Constitution of India whereby complete autonomy to contest election is ensured.

3.3 Mr. Shelat submitted that this Court is primary reviewing authority and even as secondary reviewing authority as per Wednesbury principle, this Court can have judicial review of the impugned action to judge whether action of disqualification is passed by adopting something more than required in law or whether it satisfies the test of reasonableness and proportionality in the facts of the case.

4. Learned Additional Advocate General Mr. Prakash Jani on the other hand submitted that since there is statutory remedy of revision available to the petitioner under section 155 of the Act against the impugned order, this Court may not entertain the petition. Mr. Jani submitted that this Court has got limited juridical review of the action taken in exercise of statutory powers available with the concerned authority. Mr. Jani submitted that provisions for disqualification is not introduced for the first time by amendment act of 2015, but it has already been there in the statute right from 1982 when Section 76B was inserted in the Act. Mr. Jani submitted that when the order of removal was passed, in the text of the provision of disqualification maximum period provided for disqualification was of 4 years, however, by amended act of 2015, since term of office bearers of the

society is made of 5 years, legislature in its wisdom provided for disqualification for a period of 6 years so as to ensure that officer removed may not be permitted to hold office for at least for a period of term provided for the office.

5. Mr. Jani submitted that what is done by amending act of 2015 is only substitution of period of disqualification from 4 years to 6 years which cannot be termed as new provision for disqualification. Mr. Jani submitted that show cause notice dated 03.10.2015 is legal and valid in the eye of law as this Court in earlier round of litigation held that there was no show cause notice in the eye of law and only on this count order of disqualification was quashed and set aside. Mr. Jani submitted that when the order of disqualification was set aside on the ground that such disqualification was not after following proper procedure of issuance of notice, it was open to the concerned authority to issue show cause notice in accordance with law under existing provision of section 76B(2) of the Act and since existing provision permits disqualification for 6 years, notice was issued accordingly and such notice is therefore, legal and valid. Mr. Jani submitted that this Court has approved the action of issuing such show cause notice and by virtue of interim stay granted by the Hon''ble Supreme Court against the order made by the Division Bench in LPA No.1343 of 2015, it is not open to the petitioner to contend that under the amended provision no show cause notice could have been issued by the concerned authority. Mr. Jani submitted that in the nature of substitution made in the existing provision of section 76B(2) of the Act, it cannot be termed as repeal of existing provision. Mr. Jani submitted that the concept of fundamental right to form cooperative society and to have complete autonomy to contest election in the cooperative society cannot be brought into in the facts of the present case, as such concept would not diminish or vanish action for disqualification intended by the legislature under section 76B(2) of the Act, validity of which is upheld by this Court as back as in the year 1984. Mr. Jani submitted that there is no legal malice in taking action for disqualification under the amended provision but what is done is in fact for the benefit of the members of the society and people connected with such society. Mr. Jani submitted that simply because notice and the order for disqualification are issued for 6 years, is no ground to allege legal malice as having considered gravity of charges proved for which the petitioner was removed, disqualification of 6 years is well considered action.

6. Having heard learned advocates for the parties, it appears that when the petitioner seeks to challenge the order of disqualification by raising serious question as regards applicability of amended provisions for the purpose of disqualification including legal malice as one of the grounds of challenge and when different proceedings are taken before this Court and also before the Hon''ble Supreme Court concerning action of removal as also of disqualification, some of which are pending before the Hon''ble Supreme Court as on today, the Court in its discretion would not relegate the petitioner to avail of alternative remedy. Therefore, irrespective of objection raised by Mr. Jani as regards availability of alternative remedy, the Court has decided to hear and decide the

present petition on merits. Considering the nature of dispute raised, the matter is heard for final disposal at the admission stage with the consent of the learned advocates for the parties.

7. Section 76B(2) of the Act then existed when the order of disqualification with removal dated 10.03.2015 was passed reads as under :-

"76B. Removal of Officer - (2) The Registrar may, by order, direct that the officer so removed shall be disqualified to hold or to contest election for any office in the society from which he is removed and in any other society for a period not exceeding four years from the date of the order and such officer shall stand disqualified accordingly."

8. When this Court passed judgment dated 29.09.2015 quashing the order of disqualification as stated above, the Gujarat State Cooperative Societies (Amendment) Act, 2015 (Amended Act, 2015) was already brought into force on 10.04.2015. As per this Amendment act of 2015, period of disqualification of four years as provided earlier was substituted by 6 years. The show cause notice issued was after the Amendment Act, 2015 for proposed disqualification for six years as per the existing provision for disqualification. It is required to note that there is no change in the text of provision of Section 76B(1) (2) by Amendment Act of 2015. Thus text of subsection (2) of Section 76B for disqualification which existed when order of disqualification was passed against the petitioner continued to be the same when show cause notice dated 03.10.2015 and order of disqualification were passed. What is done by the Amendment Act, 2015 is to raise the limit of disqualification from 4 years to 6 years. Though substitution would mean repeal of the existing provision, however, if small amendment in the existing provision is to be incorporated by amending act, it may not amount to defacing or repealing existing provisions. By amending act, existing provision is neither explained nor clarified. In the existing provision for disqualification, what is done is extension of limit from 4 years to 6 years for exercising of powers for disqualification. Such enhancement in powers of Registrar has in fact not wiped out the provision for 4 years" disqualification provided before amendment act of 2015 but in such 4 years more 2 years are added.

9. It therefore, cannot be said that action for disqualification cannot be taken under section 76B(2) of the Act after the amendment act of 2015 in respect of delinquency for which the petitioner was removed before amendment act of 2015. In the case of Zile Singh v. State of Haryana and Ors. reported in (2004) 8 SCC 1, the Hon"ble Supreme Court has held and observed in paragraph nos.13, 14, 15 and 22 as under :-

"13. It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the

intention of the Legislature to affect existing rights, it is deemed to be prospective only "nova constitutio futuris formam imponere debet non praeteritis" - a new law ought to regulate what is to follow, not the past. (See: Principles of Statutory Interpretation by Justice G.P. Singh, Ninth Edition, 2004 at p.438). It is not necessary that an express provision be made to make a statute retrospective and the presumption against retrospectivity may be rebutted by necessary implication especially in a case where the new law is made to cure an acknowledged evil for the benefit of the community as a whole (ibid, p.440).

14. The presumption against retrospective operation is not applicable to declaratory statutes. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is "to explain" an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended.....An amending Act may be purely declaratory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect.

15. Though retrospectivity is not to be presumed and rather there is presumption against retrospectivity, according to Craies (Statute Law, Seventh Edition), it is open for the legislature to enact laws having retrospective operation. This can be achieved by express enactment or by necessary implication from the language employed. If it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the Courts will give it such an operation. In the absence of a retrospective operation having been expressly given, the Courts may be called upon to construe the provisions and answer the question whether the legislature had sufficiently expressed that intention giving the Statute retrospectivity. Four factors are suggested as relevant: (i) general scope and purview of the statute; (ii) the remedy sought to be applied; (iii) the former state of the law; and (iv) what it was the legislature contemplated (p.388). The rule against retrospectivity does not extend to protect from the effect of a repeal a privilege which did not amount to accrued right (p.392).

22. The State Legislature of Haryana intended to impose a disqualification with effect from 5-4-1994 and that was done. Any person having more than two living children was disqualified on and from that day for being a member of municipality. However, while enacting a proviso by way of an exception carving out a fact-situation from the operation of the newly introduced disqualification the draftsman's folly caused the creation of trouble. A simplistic reading of the text of the proviso spelled out a consequence which the Legislature had never intended and could not have intended. It is true that the Second Amendment does not expressly give the amendment a retrospective operation. The absence of a provision expressly giving a retrospective operation to the legislation is not

determinative of its prospectivity or retrospectivity. Intrinsic evidence may be available to show that the amendment was necessarily intended to have the retrospective effect and if the Court can unhesitatingly conclude in favour of retrospectivity, the Court would not hesitate in giving the Act that operation unless prevented from doing so by any mandate contained in law or an established principle of interpretation of statutes."

10 Therefore, what is intended by legislation by amendment is relevant. It appears that by adding two years more in the period of disqualification, the legislature intended that the concerned authority has power for imposing long period of disqualification if such is required and to apply to all officers removed. At the best a question may arise in the facts of the case as to whether six years for disqualification could be imposed to the petitioner. Therefore, other judgments cited on the question of retrospective or retroactive application of the provision are not required to be considered.

11. Reliance placed by Mr. Shelat in the case of *Pyare Lal Sharma v. Managing Director, Jammu and Kashmir Industries Ltd.* reported in AIR 1989 SC 1854 will have no application to the facts of the present case. As in the said case, it was found that notice served to the delinquent under the service jurisprudence were for the grounds which were subsequently added as per the amended regulations and it was held that when prior to amending provision, service of the person could not be terminated on the ground of unauthorized absence from duty, the action of termination was wholly legal.

12. Mr. Jani would rely on the decision in the case of *State of Bombay v. Vishnu Ramchandra* reported in AIR 1961 SC 307 to point out that if the statute is to cure existing evil for the benefit of the people, a particular statute even brought subsequently or amendment in the existing provision could be read to have retrospective application. In the said case, though man was convicted prior to Bombay Police Act 1951 was brought into force where under section 57 provides for externment of the convict person, Hon"ble Supreme Court held that such provision for externment could be applied to the person convicted prior to coming into force of such provision for externment. However, this judgment may not apply as in the case on hand question as to whether provisions for disqualification could be applied retrospectively really does not arise.

13. On the question of legal malice, what is required to be considered is whether impugned action of disqualification is deliberate and in disregard of the rights of the petitioner or with oblique motive or with ill feeling or spite. It is required to note that the petitioner was removed from the office of Chairman on finding that serious charges were proved against him. Such order of removal is confirmed by this Court in the petition preferred by the petitioner and in LPA filed by the petitioner. This order of removal is not stayed by the Hon"ble Supreme Court in the pending SLP which was lastly filed after other proceedings were preferred before the Hon"ble Supreme Court.

14. Section 76B(2) of the Act enables the Registrar to disqualify the officer removed under section 76B(1) of the Act. As per Section 76B(1) any officer could be removed if he is found to have committed persistent default or is negligent in performance of the duties or does anything which is prejudicial to the interest of the society or where he stands disqualified by or under the Act. Sub-section (2) of Section 76B does not distinguish the officer who is removed on the ground of persistent default from the officer who is removed on the ground of negligence in performance of duties imposed on him by the Act or Rule or Bye-laws or doing act prejudicial to the interest of the society. What is provided by Sub-section (2) of Section 76B is that Registrar may direct that the officer so removed shall be disqualified to hold or to contest the election for any office in the society for a period not exceeding as provided therein. Therefore, in the nature of charges proved, the Registrar may resort to subsection (2) of section 76B for disqualifying the officer removed under sub-section (1) of section 76B. Such action cannot be said to be deliberate act in disregard of right of any person. When in exercise of such powers available with the concerned authority, impugned order is passed, no legal malice can be attributed. In the case of Ravi Yashwant Bhoir v. District Collector reported in AIR 2012 SC 1339, the Hon"ble Supreme Court has explained word legal malice in paragraph no.37 as under :-

"37. This Court has consistently held that the State is under an obligation to act fairly without ill-will or malice - in fact or in law. Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. "Legal malice" or "malice in law" means something done without lawful excuse. It is a deliberate act in disregard to the rights of others. It is an act which is taken with an oblique or indirect object. It is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill-feeling and spite. Mala fide exercise of power does not imply any moral turpitude. It means exercise of statutory power for "purposes foreign to those for which it is in law intended." It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, where intent is manifested by its injurious acts. Passing an order for unauthorized purpose constitutes malice in law.(See: Addl. Distt. Magistrate, Jabalpur v. Shivakant Shukla, AIR 1976 SC 1207; Union of India thr. Govt. of Pondicherry and Anr. v. V. Ramakrishnan and Ors., (2005) 8 SCC 394 : AIR (2005) SC 4295 : (2005) AIR SCW 5147; and Kalabharati Advertising v. Hemant Vimalnath Narichania and Ors., AIR 2010 SC 3745)."

15. Simply because, the concerned authority has issued show cause notice for six years disqualification relying on the amended provisions, same could not be said to be done with any malice. Mr. Shelat would however, submit that in a democratic way, officer elected cannot be removed at the whims of the executive ignoring nature of delinquency proved against the petitioner. Mr. Shelat submitted that delinquency proved was of negligence and as regards the act prejudiced to the interest of the society. The petitioner was functioning as Chairman and was not individually responsible for all acts and the elected

Chairman of the society since is on higher pedestal than Government servant, he cannot be removed lightly as it would defy the mandate of the people who elect him.

16. Mr. Shelat has also relied on the observations made by the Hon''ble Supreme Court in the case of Ravi Yashwant Bhoir (supra) and also in the case of Sharda Kailash Mittal v. State of M.P. and Ors. reported in 2010 (1) GLH 744. It is true that as observed by the Hon''ble Supreme Court in the said decision, in a democracy governed by rule of law, once elected to an office in a democratic institution, the incumbent is entitled to hold the office for the term for which he has been elected unless his election is set aside by a prescribed procedure known to law. Removal from such an office is a serious matter. It is also true that provisions for such removal have to be construed in strict manner because the holder of office occupies it by election and he is deprived of the office by an executive order in which the electorate has no chance of participation.

17. Mr. Shelat would also rely on the judgment in the case of very petitioner (Vipulbhai M. Chaudhary v. Gujarat Cooperative Milk Marketing Federation Limited and ors.) reported in AIR 2015 SC 1960. The Hon''ble Supreme Court therein has examined the issue about removal of the officer by no confidence motion. In the context of Article 243ZJ, 243ZH and 243ZT and while considering the provisions of the Act, it is observed that a cooperative society is registered on cooperative principles of democracy, equity, equality and solidarity. Democratic accountability, mutual trust, fairness, impartiality, unity or agreement, cooperativeness etc., are some of the cardinal dimensions of the cooperative principles. A body built on such principles cannot be led by a captain in whom the co-sailors have no confidence. It is further observed that the cooperative society registered under the Central or the State Act is bound to function as a democratic institution and conduct its affairs based on democratic principles. Democratic functioning on democratic principles is to be reflected in the respective Acts or Rules or Bye-laws both on the principles and procedure. If not, it is for the Court to read the democratic principles into the Act or Rules or Bye-laws. Such observations are made while examining the question about passing no confidence motion against the office bearers of the society. Such observations by the Hon''ble Supreme Court could not be relied to urge that elected officer, if found liable for action of the removal under the statutory provisions of the Act cannot be either removed or disqualified by the Executive Officer.

18. Legislature in its wisdom has made provisions for removal and disqualification of such elected officer in furtherance of strengthening democratic principles and to enhance cooperative movement for the interest of people connected with such cooperative movement through cooperative societies registered under the Act. By exercise of powers under such provisions, State and its officers cannot be alleged to have interfered with democratic functioning of the cooperative society. In fact such provisions would ensure that officer who is

found not to have acted in furtherance of the cooperative movement and for the best interest of the people connected with such cooperative movement may not be permitted to take part in functioning of the society.

19. It is no ground to say that since the petitioner was removed on the charge of negligence and act prejudiced to the interest of the society, such were not grave enough to order his disqualification. In the impugned order it is discussed that removal of the petitioner was on proof of serious charges of financial irregularities. Reasons are also provided in the impugned order for taking action of disqualification. Based on the order of removal and on the basis of charges proved against the petitioner, concerned authority has exercised its discretion to impose disqualification on the petitioner. Therefore, it cannot be said that disqualification of the petitioner was not called for.

20. Mr.Shelat however, would argue that aspect of proportionality has not been considered by the concerned authority while passing the impugned order for disqualification. Mr.Shelat submitted that this Court is a primary reviewing authority to find out whether action is meeting with the test of reasonableness and in violation of Article 14 of the Constitution of India and is also secondary reviewing authority in as much as it can always examine proportionality of action in exercise of powers under Article 226 of the Constitution of India. In the case of Om Kumar and ors. v. Union of India reported in AIR 2000 SC 3689, the Hon"ble Supreme Court has observed in para 24 to 28, 37, 39, 41, 52, 54, 55,56 and 59 as under :-

"24. We agree that the question of the quantum of punishment in disciplinary matters is primarily for the Disciplinary Authority and the jurisdiction of the High Courts under Article 226 of the Constitution or of the Administrative Tribunals is limited and is confined to the applicability of one or other of the well known principles known as Wednesbury principles. (See Associated Provincial Picture Houses v. Wednesbury Corporation, (1948) 1 KB 223. This Court had occasion to lay down the narrow scope of the jurisdiction in several cases. The applicability of the principle of "proportionality" in Administrative Law was considered exhaustively in Union of India v. Ganayutham, (1997) 7 SCC 463 : (1997) AIR SCW 3464 : AIR 1997 SC 3387 : 1997 Lab IC 3341, where the primary role of the Administrator and the secondary role of the Courts in matters not involving fundamental freedoms, was explained.

25. We shall, therefore, have to examine the cases of Sri Om Kumar and of Sri Virendra Nath from the standpoint of basic principles applicable under Administrative Law, namely Wednesbury principles and the doctrine of proportionality. It has, therefore, become necessary to make reference to these principles and trace certain recent developments in the law.

(a) Wednesbury principles :

26. Lord Greene said in 1948 in the Wednesbury case that when a statute gave discretion to an Administrator to take a decision, the scope of judicial review

would remain limited. He said that interference was not permissible unless one or other of the following conditions were satisfied - namely the order was contrary to law, or relevant factors were not considered, or irrelevant factors were considered; or the decision was one which no reasonable person could have taken. These principles were consistently followed in UK and in India to judge the validity of administrative action. It is equally well known that in 1983, Lord Diplock in *Council for Civil Services Union v. Minister of Civil Service*, (1983) 1 AC 768 (called the GCHQ case) summarised the principles of judicial review of administrative action as based upon one or other of the following - viz. illegality, procedural irregularity and irrationality. He, however, opined that "proportionality" was a "future possibility."

(b) Proportionality :

27. The principle originated in Prussia in the nineteenth century and has since been adopted in Germany, France and other European countries. The European Court of Justice at Luxembourg and the European Court of Human Rights at Strasbourg have applied the principle while judging the validity of administrative action. But even long before that, the Indian Supreme Court has applied the principles of "proportionality" to legislative action since 1950, as stated in detail below.

28. By "proportionality," we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the Legislature or the Administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the Court will see that the Legislature and the administrative authority "maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve." The Legislature and the administrative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the Court. That is what is meant by proportionality.

37. The development of the principle of "strict scrutiny" or "proportionality" in Administrative Law in England is however recent. Administrative action was traditionally being tested on *Wednesbury* grounds. But in the last few years, administrative action affecting the freedom of expression or liberty has been declared invalid in several cases applying the principle of "strict scrutiny." In the case of these freedoms, *Wednesbury* principles are no longer applied. The Courts in England could not expressly apply proportionality in the absence of the Convention but tried to safeguard the rights zealously by treating the said rights as basic to the Common Law and the Courts then applied the strict scrutiny test. In the *Spycatcher* case *Att. General v. Guardian Newspapers Ltd. (No. 2)*, (1990) 1 AC 109 (at Pp. 283-284), Lord Goff stated that there was no inconsistency between the Convention and the Common Law. In *Derbyshire County Council v.*

Times Newspapers Ltd., 1993 AC 534, Lord Keith treated freedom of expression as part of Common Law. Recently, in *R. v. Secretary of State for Home Department, Ex. p. Simms*, (1999) 3 All ER 400 (HL), the right of a prisoner to grant an interview to a journalist was upheld treating the right as part of the Common Law. Lord Hobhouse held the policy of the Administrator was disproportionate. The need for a more intense and anxious judicial scrutiny in administrative decisions which engage fundamental human rights was re-emphasised in *R. v. Lord Saville Ex pt.*, (1999 (4) All ER 860 (870-872) CCA). In all these cases, the English Courts applied the "strict scrutiny" test rather than describe the test as one of "proportionality." But, in any event, in respect of these rights "Wednesbury" rule has ceased to apply.

(ii) Brind and Proportionality; Primary and Secondary review :

39. In a famous passage, the seeds of the principle of primary and secondary review by Courts were planted in the Administrative Law by Lord Bridge in the *Brind* case, (1991 (1) AC 696). Where Convention rights were in question the Courts could exercise a right of primary review. However, the Courts would exercise a right of secondary review based only on *Wednesbury* principles in cases not affecting the rights under the Convention. Adverting to cases where fundamental freedoms were not invoked and where administrative action was questioned, it was said that the Courts were then confined only to a secondary review while the primary decision would be with the Administrator. Lord Bridge explained the primary and secondary review as follows :

"The primary judgment as to whether the particular competing public interest justifying the particular restriction imposed falls to be made by the Secretary of State to whom Parliament has entrusted the discretion. But, we are entitled to exercise a secondary judgment by asking whether a reasonable Secretary of State, on the material before him, could reasonably make the primary judgment."

(iii) Smith explains proportionality further; Primary and Secondary roles of the Court :

41. On appeal, the above principles were affirmed in the same case in *R. v. Ministry of Defence Ex. p. Smith* (1996) 1 All ER 257 (CA). In the Court of appeal, Lord Bingham M.R. said the Court, in the absence of the Convention was not thrown into the position of the decision-maker. Henry, LJ (p. 272) stated as follows :

"If the Convention were part of our law, then as Simon Brown, LJ said in the Divisional Court, the primary judgment on this issue would be for the Judges. But Parliament has not given us the primary jurisdiction on this issue. Our present constitutional role was correctly identified by Simon Brown, LJ as exercising a secondary or reviewing judgment, as it is, in relation to the Convention, the only primary judicial role lies with the Europe Court at Strasbourg."

Thus, the principle of primary review and proportionality on the one hand and

the principle of secondary review and *Wednesbury* reasonableness on the other hand gave a new dimension to Administrative Law, the former applying in the case of fundamental freedoms and the latter, in other cases.

(iv) Area of discretion of Administrator-varies in different situations :

52. In the Indian scene the existence of a charter of fundamental freedoms from 1950 distinguishes our law and has placed our Courts in a more advantageous position than in England so far as judging the validity of legislative as well as administrative action. We have already dealt with proportionality and legislation. Now, we shall deal with administrative decisions and proportionality.

54. Administrative action in India affecting fundamental freedoms has always been tested on the anvil of "proportionality" in the last fifty years even though it has not been expressly stated that the principle that is applied is the "proportionality" principle. For example, a condition in a licence issued to a cinema house to exhibit, at every show, a certain minimum length of "approved films" was questioned. The restriction was held reasonable (See *R.M. Seshadri v. Dist. Magistrate Tanjore*, AIR (1954) SC 747; *Union of India v. Motion Picture Association*, (1999) 6 SCC 150 : (1999 AIR SCW 2432 : AIR 1999 SC 2334) also related, inter alia, to validity of licensing conditions. In another case, an order refusing permission to exhibit a film relating to the alleged obnoxious or unjust aspects of reservation policy was held violative of freedom of expression under Article 19(1)(a). (*S. Rangarajan v. P. Jagjivan Ram*, (1989) 2 SCC 574). Cases of surveillance by police came up for consideration in *Malak Singh v. State of P. and H.*, (1981) 1 SCC 420 : (AIR 1981 SC 760). Cases of orders relating to movement of goods came up in *Bishambhar Dayal Chandra Mohan v. State of U.P.*, (1982) 1 SCC 39 : (AIR 1982 SC 33). There are hundreds of such cases dealt with by our Courts. In all these matters, the proportionality of administrative action affecting the freedoms under Article 19(1) or Article 21 has been tested by the Courts as a primary reviewing authority and not on the basis of *Wednesbury* principles. It may be that the Courts did not call this proportionality but it really was.

55. In *Ganayutham*, (1997) AIR SCW 3464 : AIR 1997 SC 3387, the above aspect was left for further discussion. However, we are now pointing out that in administrative action affecting fundamental freedoms, proportionality has always been applied in our country though the word "proportionality" has not been specifically used.

56. We may point out that in Israel, the Supreme Court of Israel has now recognised "proportionality" as a separate ground in Administrative Law - different from unreasonableness. It is stated that it consists of three elements. First, the means adopted by the authority in exercising its power should rationally fit the legislative purpose. Secondly, the authority should adopt such means that do not injure the individual more than necessary. And third, the injury caused to the individual by the exercise of the power should not be

disproportional to the benefit which accrues to the general public. Under this test, the Court recently invalidated several administrative actions (See De Smith, Woolf, Jowell, first Cumulative Supplement to Judicial Review of Administrative Action, 1998, p. 114).

(ii) Article 14 and Administrative Action - Discriminative classification and arbitrariness :

59. But, in *E. P. Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3 : (AIR 1974 SC 555), Bhagwati, J. laid down another test for purposes of Article 14. It was stated that if the administrative action was "arbitrary," it could be struck down under Article 14. This principle is now uniformly followed in all Courts more rigorously than the one based on classification. Arbitrary action by the Administrator is described as one that is irrational and not based on sound reason. It is also described as one that is unreasonable.

(b) If, under Article 14, administrative action is to be struck down as discriminative, proportionality applies and it is primary review. If it is held arbitrary. *Wednesbury* applies and it is secondary review :"

21. Mr. Jani placed reliance on some judgments of the Hon'ble Supreme Court to urge that this Court would not substitute the punishment unless it is found to be shockingly disproportionate. Mr. Jani submitted that in the nature of charges proved against the petitioner, impugned order of maximum disqualification under the provisions of Section 76B(2) of the Act cannot be said to disproportionate and therefore, this Court would not like to substitute the period of disqualification imposed by the impugned order upon the petitioner in exercise of powers under Article 226 of the Constitution of India.

22. The Court finds that, in fact, the question of proportionality in the facts of the case is linked with question as regards applicability of increased period of disqualification as per the amended provision of section 76B(2) of the Act to the case of the petitioner. In a way it is not a question of applying increase penalty but the question is whether for the misconduct proved on which the order of removal was passed, maximum period of disqualification as per the amended provision could be resorted. It is not that by amending act a new and fresh disqualification for the officer removed is created or is sought to be extended to the existing provision which was never intended. Therefore, what needs to be considered is whether concerned authority is justified in taking action for disqualification against the petitioner as per existing provision or not. The legislature when originally inserted the provision for disqualification intended that Registrar may, in the nature of charges proved against the officer, resort to take action for disqualification. Such provision for disqualification was in existence when the petitioner was removed and the amendment to enhance period of disqualification was also in proximity to the order of such removal. However, if on the same delinquency concerned authority had already resorted to taking action for disqualification, and such action when was not found sustainable on the

ground that legal procedure was not followed, while taking fresh action, concerned authority is to be mindful about the consideration entered in its mind at the time when such action of disqualification was taken earlier. It is not in dispute that at the time when first action for disqualification was taken, disqualification not exceeding four years was provided in section 76B(2) of the Act. Within such powers available, concerned authority had deemed it proper to disqualify the petitioner for a period of 3 years. Now for the same delinquency of the petitioner for which he suffered removal under section 76B(1) of the Act and disqualification by first order, when fresh action is initiated for disqualification under the amended provisions of section 76B(2) of the Act, the consideration for length of disqualification cannot be different.

23. Learned advocates appearing for both the sides relied on different authorities on the question of power with the Court to interfere with the quantum of punishment. Having considered such authorities without making reference thereof, it could be seen that what is held is that the power of the Court to interfere with the quantum of punishment is extremely limited and only when relevant factors are not considered, the Court may direct reconsideration of the question about quantum of punishment. Such consideration for exercise of powers by the Court may also be on finding that decision for imposing punishment is vitiated by extraneous consideration or by arbitrary or capricious action which no reasonable person could have arrived at in the facts of the case. In ordinary circumstances, the Court is not to interfere with the punishment imposed by the concerned authority in exercise of powers under Article 226 of the Constitution of India and sympathy would not be a ground to interfere with the punishment even if harsh, if concerned authority has well considered seriousness of the charges proved while imposing punishment.

24. As stated above for the same delinquency for which removal was inflicted upon the petitioner, disqualification for 3 years was considered appropriate and proportionate against maximum period of 4 years" disqualification provided in unamended provisions of section 76B(2) of the Act. It appears that consideration of such aspects has not entered in the minds of concerned authority while passing the impugned order. If above such aspects are lost sight of by the concerned authority while passing impugned order, it could be said that it is not rational exercise of powers by the Registrar for imposing disqualification for the period beyond 3 years. The Court would therefore, in exercise of its powers under Article 226 of the Constitution of India interfere with impugned order to the extent concerned authority has found to have acted unreasonably.

25. In ordinary circumstances, when the Court finds that case needs to be reconsidered on the aspect of imposition of punishment, it would direct the concerned authority to reconsider the punishment and while issuing such direction the Court might also indicate the extent of punishment to be imposed. However, in the given fact situation, if the Court itself decides to modify the punishment, it would not exceed its powers under Article 226 of the Constitution

of India. In the present case, the Court finds that such powers need to be exercised and the period of disqualification could be restricted to 3 years in the facts of the case.

26. For the reasons stated above, the impugned order dated 16.12.2015 is quashed only to the extent it imposes period of disqualification beyond 3 years. Disqualification of the petitioner under section 76B(2) of the Act for a period of 3 years is not disturbed. The petitioner, thus will have to suffer disqualification under section 76B(2) of the Act for a period of 3 years from the date of the impugned order. To the extent disqualification is imposed beyond 3 years, the petition succeeds. The petition thus finally stands disposed of accordingly.

27. At this stage, learned senior advocate Mr. Shelat requests to direct the concerned authority not to implement the order of disqualification for further period of 2 weeks. Such request is strongly opposed by learned Additional Advocate General Mr. Jani with learned AGP Mr. Ashar. As such the period for which the order of disqualification was not to be implemented i.e. 4 weeks as per the order of the Hon"ble Supreme Court was to expire on 15.01.2016, however, since on the that day the Court was in the midst of the hearing of the petition, the Court orally asked Mr. Jani to instruct concerned authority not to implement the order till the Court pronounced the judgment/order in the present matter. It is pointed out that as per instructions, order of disqualification is not implemented till date. In ordinary circumstances, the Court would not have accepted the request not to implement the order of disqualification. However, in the present case, the Court finds that since the Hon"ble Supreme Court had ordered not to implement the order of disqualification for a period of 4 weeks, it would be appropriate if the order of disqualification is not permitted to be implemented for further period of 10 days from today to enable the petitioner to take the matter before higher forum.