

(2009) 07 GUJ CK 0081
In the Gujarat High Court
Case No : S.C.A. No. 7846 of 2009

Yogeshkumar Becharbhai Upadhyay	Vs	APPELLANT
State Election Commission and Others		RESPONDENT

Date of Decision : 29-07-2009

Acts Referred:

Constitution of India, 1950 — Article 226
Gujarat Municipalities Act, 1963 — Section 11, 11(1), 11(2), 11(3), 11(4)

Citation : AIR 2009 Guj 168 : (2009) 90 GLH 3 : (2009) 3 GLH 90 : (2009) 3 GLR 2519 : (2010) 8 RCR(Civil) 2584

Hon'ble Judges : M.S. Shah, J;K.M. Thaker, J

Bench : Division Bench

Advocate : Dilip B. Rana, for the Appellant; Nikunt Raval, Asstt. Govt. Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Mohit S. Shah, J.—In this petition, under Article 226 of the Constitution, the petitioner has challenged the order dated 24th July, 2009 of Collector, Anand holding that the petitioner having already been disqualified under the Gujarat Provision for Disqualification of Members of Local Authorities for Defection Act, 1986 [hereinafter referred to as the Anti-Defection Act], has ceased to hold office as Councillor of Khambhat Municipality, more particularly, upon dismissal of the petition by the learned single Judge on 2nd April, 2009 and dismissal of the Letters Patent Appeal on 24th July, 2009.

2. The petitioner was a Councillor in Khambhat Municipality against whom the order dated 27th March, 2009 was passed by the designated authority under the Anti-Defection Act. The writ petition filed by the petitioner came to be dismissed by the learned single Judge on 2nd April, 2009 and the Letters Patent Appeal came to be dismissed on 24th July, 2009.

The meeting of the Khambhat Municipality is now scheduled to be held on 30th July, 2009. The petitioner has made a grievance that although no final order of

petitioner's removal from the office of Councillor is passed by the Collector u/s 38(2) of the Gujarat Municipalities Act, 1963, the petitioner has not been served with the notice of such meeting.

3. Mr. Rana has vehemently submitted that even when a Councillor is disqualified under the Anti-Defection Act, the Collector is required to take a decision u/s 38(2) of the Municipalities Act as to whether a vacancy has arisen. Such a question is to be decided by the Collector on an application made to him by any person or on his own and after giving the concerned Councillor reasonable opportunity of being heard. It is submitted that the petitioner made such an application on 22nd July, 2009 that in view of absence of any such order u/s 38(2), the petitioner cannot be disabled to continue as Councillor and his office cannot be treated as vacant. The petitioner also contended that in absence of any such decision u/s 38(2) of the Municipalities Act, the State Election Commission could not have issued the communication dated 17th July, 2009 for filling up the vacancy in the concerned constituency of Khambhat Municipality from where the petitioner was elected as a Councillor.

4. The relevant statutory provisions of the Municipalities Act read as under:

Section 11 General disqualifications for becoming a councillor. - Vacation of seat Decision of State Government in case of disputes.

(1) No person may be a councillor -

(a) Who -

(i) has been convicted of specified offences.

(ii) has been removed from the office u/s 37 and four years have not lapsed from the date of such removal

(b) is an uncertificated bankrupt or undischarged insolvent.

(c) is of unsound mind as declared by a competent court.

(d) who is not a citizen of India.

(e) who is a Judge.

(f) who is a salaried servant of Government or Municipality.

(g) who is disqualified by or under any law for the time being in force for the purpose of elections to the Legislature of the State.

(h) who has more than two children Sub-section (2) of Section 11 specifies the persons who are disqualified on the ground of being a part time officer/servant of the Municipality or who are in arrears of dues to the Municipality or who have a direct or indirect share or Interest in any work done by order of a Municipality or in any contract or employment or under the municipality loan transaction with or under the Municipality.

Sub-section (3) of Section 11 specifies when a person shall be deemed to have incurred disqualification under sub-section (2).

Sub-section (4) of Section 11 reads as under:-

A person who at any time during the term of his office is disqualified under the Gujarat Provision for Disqualification of Members of Local Authorities for Defection Act, 1986 for being a Councillor shall cease to hold office as such Councillor.

Section 38 reads as under:

(1) If any councillor during the term for which he has been elected or nominated-

(a) becomes subject to any disqualification specified in Section 11, or

(b) acts as a councillor in any matter -

(i) In which he has directly or indirectly, by himself or his partner, any such share or interest as is described in clause (i), (ii), (iii), (v) or (vii) of Sub-section (3) of Section 11, whatever may be the value of such share or interest, or

(ii) in which he is professionally interested on behalf of a principal or other person, or

(c) is professionally interested or engaged in any case for or against the municipality, or

(d) departs beyond the limits of the State with the declared or known intention of absenting himself continuously for a period exceeding six months.

he shall be subject to the provisions of Sub-section (2) be disabled from continuing to be a councillor and his office shall become vacant.

(2) In every case, the authority competent to decide whether a vacancy has arisen shall be the Collector. The Collector may give his decision either on an application made to him by any person or on his own motion after giving the councillor a reasonable opportunity of being heard.

(3) Until the Collector decides under Sub-section (2) that the vacancy has arisen, the councillor shall not be disabled under Sub-section (1) from continuing to be a councillor.

(4) Any person aggrieved by the decision of the Collector may, within a period of fifteen days from date of such decision, appeal to the State Government and the orders passed by the State Government in such appeal shall be final.

5. A perusal of the above statutory provisions would indicate that the question whether a vacancy has arisen is likely to crop up in a number of situations. There may be a dispute on the question as to whether a person has failed to pay any arrears or any kind of dues by him to the Municipality or whether a person has any direct or indirect, by himself or by his partner, any such share or interest in

any work, contract, employment or loan transaction with or under a Municipality. In such situations, a Councillor may not admit that he has incurred any such disqualification. Therefore, the question whether the Councillor has incurred such disqualification will have to be decided by some authority. It is for this limited purpose that the power has been conferred upon the Collector to decide whether a vacancy has arisen by virtue of any disqualification specified in Section 11 or whether a person is professionally interested or engaged in any case for or against the municipality or whether a person has gone beyond the limits of the State with the declared or known intention of absenting himself continuously for a period exceeding six months. Since various clauses in sub-Sections (1), (2) and (3) of Section 11 contemplate different situations in which such a question may arise, the Legislature had to specify some authority as competent authority to decide such questions and therefore, such power has been conferred upon the Collector. However, when a person is convicted of any offence specified in Section 11(1)(a)(i) or when a person is declared by a competent authority to be of unsound mind or when the designated officer under the Anti-Defection Act has passed an order disqualifying a Councillor under the provisions of the said Act, there can be no question of the Collector being required to decide any such question. The moment a councillor is convicted by a Court in India of the offence specified in Section 11(1)(a)(i), or the moment a competent Court passes an order declaring a Councillor as of unsound mind or a designated officer under the Anti-Defection Act passes any order disqualifying a Councillor under the said Act, the concerned Councillor ceases to hold office as such Councillor and no further declaration or order is required to be made by the Collector under Sub-sections (2) and (3) of Section 38 of the Municipalities Act.

6. In view of the above statutory Scheme, we see no merit in this petition. The petition is, therefore, summarily rejected.