

(2013) 01 GUJ CK 0013

In the Gujarat High Court

Case No : Special Civil Application No. 866 of 2013

Yunus Khan Hajikhan Khan

APPELLANT

Vs

Deputy Collector/Returning Officer, Valsad Municipality and
Another

RESPONDENT

Date of Decision : 30-01-2013

Acts Referred:

Citation : (2013) 3 GLR 2619

Hon'ble Judges : S.H. Vora, J; M.R. Shah, J

Bench : Division Bench

Advocate : Adil R. Mirza, for the Appellant; Roopal R. Patel for Respondent Nos. 1 and 2, for the Respondent

Judgement

S.H. Vora, J.—By way of this petition under Art. 226 of the Constitution of India, petitioner has prayed for an appropriate writ, direction or order quashing and setting aside the impugned decision/order dated 28-1-2013 passed by the respondent No. 1—Returning Officer rejecting the nomination form of the petitioner considering Sec. 11(1)(A) of the Gujarat Municipalities Act, 1963 (hereinafter referred to as "Act") and on the ground that as per the aforesaid provision the petitioner is disqualified to become a Councillor/Member of the Valsad Municipality. Facts leading to the present Special Civil Application in nut-shell are as under:

1.1. That the petitioner is the resident of Valsad City and filled up the nomination form for contesting the election for the post of Councillor of Ward No. 6 of Valsad Municipality. That at the time of scrutiny, it was found that the petitioner has been convicted for the offences under Secs. 452, 352, 323, 506 and 114 of the Indian Penal Code, 1860 (hereinafter referred to as "I.P.C.") and sentenced to undergo imprisonment for one year and fine of Rs. 2,500/- by judgment and order of conviction and sentence dated 3-6-1992 passed by the learned J.M.F.C., Valsad in Criminal Case No. 4082 of 1986, and therefore, considering Sec. 11(1) (A) of the Act, nomination form of the petitioner has been rejected.

1.2. Feeling aggrieved and dissatisfied with the impugned decision/order dated 28-1-2013 rejecting the nomination form of the petitioner, the petitioner herein has preferred the present Special Civil Application under Art. 226 of the Constitution of India.

2. Shri Mirza, learned Advocate appearing on behalf of the petitioner has vehemently submitted that as such against the judgment and order of conviction and sentence dated 3-6-1992 passed by the learned J.M.F.C., Valsad in Criminal Case No. 4082 of 2006, the petitioner had preferred an appeal before the learned Sessions Court, Valsad and the learned Sessions Judge, Valsad, at Navsari vide order dated 9-6-1992 passed in bail application in Criminal Appeal No. 15 of 1992 has suspended the implementation and operation of the sentence and imprisonment and the petitioner is ordered to be released on bail, and therefore, the Returning Officer has materially erred in rejecting the nomination form of the petitioner. It is submitted that once the sentence and the imprisonment is suspended, it would mean that the petitioner is competent to file his nomination and contest the election as the sentence as on date is not in force.

2.1. It is further submitted that in fact the petitioner had also contested the election from Ward No. 6 in the year 2008 and at that point of time the petitioner was permitted to contest the election. It is submitted that however, this time the Returning Officer has rejected the nomination form of the petitioner on misinterpretation of Sec. 11(1)(A) of the Act.

2.2. It is further submitted by Shri Mirza, learned Advocate appearing on behalf of the petitioner that even otherwise the Returning Officer has erred in rejecting the nomination form of the petitioner. It is submitted that as such the Returning Officer has misinterpreted Sec. 11(1)(A) of the Act. It is further submitted (though there are no specific pleadings and/or averments in the petition) that as the conviction and sentence imposed by the learned J.M.F.C., Valsad is dated 3-6-1992, considering even Sec. 11(1)(A) of the Act, the petitioner can be held to be disqualified for a period of four years from the date of conviction and sentence. Therefore, it is submitted that for the conviction and sentence which was imposed in the year 1992, the petitioner cannot be held disqualified to become the Councillor of the Municipality in the year 2012-2013. It is submitted that considering Sec. 11(1)(A) of the Act no person who has been convicted, by a Court in India, of any other offence and sentenced to undergo imprisonment for not less than six months unless a period of four years has elapsed since his conviction, is qualified to become a Councillor. It is submitted that the disqualification of the petitioner would continue for a period of four years since his conviction i.e. in the present case 3-6-1996. It is submitted that therefore the impugned decision of the Returning Officer rejecting the nomination form of the petitioner is absolutely on misinterpretation of Sec. 11(1)(A) of the Act which deserves to be quashed and set aside.

3. Present petition is opposed by Shri Prakash Jani, learned Government Pleader, who has appeared as amicus curiae to assist the Court, with Shri Jasvant K.

Shah, learned Assistant Government Pleader and Ms. Roopal Patel, learned Advocate appearing on behalf of the respondent Nos. 1 and 2.

3.1. Shri Prakash Jani, learned G.P. has submitted that as such the aforesaid controversy raised with respect to interpretation of Sec. 11(1)(A) of the Act is now not res integra and is squarely covered by the decision of the Hon''ble Supreme Court in the case of Raghbir Singh Vs. Surjit Singh, It is submitted that pari materia provision in the Representation of the People Act, 1951 - Sec. 8(3) of the aforesaid Act was challenged before the Hon''ble Supreme Court on the ground of discrimination that it provides a longer period of disqualification than the one provided under sub-sec. (1) of the said Act and the said provision has been held to be intra vires by the Hon''ble Supreme Court.

3.2. Shri Jani, learned G.P. has further submitted that as such Sec. 11(1)(A) of the Act is required to be divided in three parts. It is submitted that first part would be that the concerned person has been convicted by a Court in India; second part would that he is sentenced to imprisonment for not less than six months and third part would be that four years'' period is elapsed since his release from imprisonment. It is submitted therefore, the disqualification of four years should be counted not from the date of actual conviction only, but from the date of actual release from imprisonment on the basis of the conviction and imprisonment for not less than six months. It is submitted that if Sec. 11(1)(A) of the Act is interpreted in such a manner it would be in furtherance of object and purpose of Sec. 11(1)(A) of the Act.

3.3. It is further submitted by Shri Jani, learned G.P. that as observed by the Hon''ble Supreme Court in the case of P. Prabhakaran Vs. P. Jayarajan, , intention of Parliament while enacting Sec. 8(3) of the Representation of the People Act, 1951 (which is pari materia to Sec. 11(1) of the Gujarat Municipalities Act), is in the interest of purity and probity in public life and to prevent criminalization of politics.

3.4. It is further submitted that therefore, the said provision has to be meaningfully construed so as to prevent the mischief sought to be prevented. In support of above submission, Shri Jani, learned G.P. has relied upon the decision of the Division Bench of this Court in the case of Nitinkumar M. Brahmhatt v. State of Gujarat, reported in 2006 (3) GLR 2615.

3.5. Now, so far as the contention on behalf of the petitioner that as his conviction has been challenged in the Appellate Court and the sentence is suspended, the petitioner cannot be held to be disqualified under Sec. 11 of the Act is concerned, Shri Jani, learned G.P. has heavily relied upon the following decisions of the Hon''ble Supreme Court as well as this Court.

(1) Sanjay Dutt Vs. State of Maharashtra Tr. CBI, Bombay,

(2) Lalsai Khunte Vs. Nirmal Sinha and Others,

(3) Decision of this Court reported in 2000 (1) GLR 355 (Paras. 19, 20 and 21)

Sumerchand Jain v. State of Gujarat.

Ms. Roopal Patel, learned Advocate appearing on behalf of respondent Nos. 1 and 2 has adopted the submissions made by Shri Prakash Jani, learned G.P. recorded hereinabove and has also relied upon the aforesaid decisions which are cited by Shri Prakash Jani, learned G.P.

4. Heard learned Advocates appearing on behalf of respective parties at length. At the outset, it is required to be noted that the nomination form of the petitioner has been rejected by the Returning Officer considering Sec. 11(1)(A) of the Act on the ground that as the petitioner has been convicted by the learned J.M.F.C., Valsad for the offences under Secs. 452, 352, 323, 506 and 114 of the I.P.C. and is sentenced to undergo imprisonment for one year (which is not less than six months) and fine of Rs. 2,500/-. However, it is the case on behalf of the petitioner that as the petitioner has challenged the order of conviction before the learned Appellate Court and the sentence imposed by the learned J.M.F.C. has been suspended and he is released on bail, he cannot be held disqualified to become the Councillor of the Municipality as the sentence is suspended. It is also the case on behalf of the petitioner that as the conviction and sentence imposed by the learned J.M.F.C., Valsad is of the year 1992, more particularly on 3-6-1992, he can be held disqualified only for a period of four years from the date of conviction and sentence imposed by the Court i.e. upto 3-6-1996 only. It is also the case on behalf of the petitioner that as in the year 2008 earlier he was permitted to contest the election, this time his nomination cannot be rejected.

4.1. Now, so far as the contention on behalf of the petitioner that as against the judgment and order of conviction imposed by the learned J.M.F.C., he has preferred the Criminal Appeal before the learned Appellate Court and his sentence and imprisonment is suspended, and therefore, he cannot be held disqualified to become the Councillor is concerned, the same cannot be accepted. It is required to be noted that there is a distinction between suspending the conviction and suspending the sentence and the imprisonment. Even if the sentence and the imprisonment is suspended by the Appellate Court and a person is released on bail, still conviction stands. Therefore, merely because the sentence and imprisonment is suspended, it cannot be said that such a person cannot be held disqualified.

4.2. Identical question came to be considered by the Hon''ble Supreme Court in the case of Lalsai Khunte (supra). In the said decision it is held by the Hon''ble Supreme Court that where a person seeking to contest the election to legislative assembly or Parliament, having incurred disqualification, Sec. 8(3) of the Representation of the People Act, 1951 due to order of conviction of an offence and sentence passed against him by trial Court, prefers appeal there against and the Appellate Court only suspends the order of trial Court and grants him bail, it would not amount to temporarily wiping out the conviction as to remove the disqualification. In the said decision, the Hon''ble Supreme Court has considered the earlier decision in the case of P. Prabhakaran Vs. P. Jayarajan, as well as in

the case *Ravikant S. Patil Vs. Sarvabhouma S. Bagali*, Even the learned single Judge of this Court in the case of *Sumerchand Jain (supra)* has held that action for disqualification under Sec. 11 of the Act can be taken even during pendency of Appeal against the Order of conviction and sentence passed by the learned trial Court since the order of conviction is not suspended.

4.3. Now, so far as another contention on behalf of the petitioner that as the conviction and sentence imposed by the learned J.M.F.C. was in the year 1992 i.e. on 3-6-1992, and therefore, at the most he can be held disqualified to be a Councillor for a period of four years from the date of conviction i.e. 3-6-1992, and therefore, he cannot be held disqualified to become the Councillor in the year 2012-2013 is concerned, same also cannot be accepted. As such the aforesaid controversy is now not *res Integra* in view of the decision of the Hon'ble Supreme Court in the case of *Raghubir Singh (supra)*. A *pari materia* provision in the Representation of the People Act, 1951 i.e. Sec. 8(3) was challenged before the Hon'ble Supreme Court on the ground that the same is discriminatory as it provides longer period of disqualification than the one provided under sub-sec. (1) of the said provision and the Hon'ble Supreme Court has held that such a provision is not discriminatory. In the said decision the Hon'ble Supreme Court has held Sec. 8(3) of the Representation of the People Act, 1951, which provides the disqualification extending to "six years since his release" (which *pari materia* to Sec. 11(1)(A) of the Act), as constitutional and not discriminatory.

4.4. In the case of *Sanjay Dutt (supra)* while considering Sec. 8(3) of the Representation of the People Act, 1951, it is observed and held that law prohibits any person who has been convicted of any offence and sentence to imprisonment for not less than two years from contesting the election and such person shall be disqualified for a further period of six years since his release.

4.5. Even otherwise on fair reading of Sec. 11(1)(A) of the Act it is to be held that a person who has been convicted by a Court in India and is sentenced to imprisonment for not less than six months, renders disqualification for a period of four years since his release from imprisonment. Sec. 11(1)(A) provides three eventualities viz. (i) a person has been convicted by a Court in India; (ii) he is sentenced to imprisonment for not less than six months; and (iii) he is sentenced to imprisonment, four years period should elapse since his release from imprisonment. If the aforesaid provision is construed in such a manner it would be giving effect to the provisions contained in Sec. 11(1)(A) of the Act.

4.6. Therefore, considering the facts and circumstances of the case narrated hereinabove the petitioner renders disqualification to become the Councillor of the Municipality for a period of four years from the date of actual imprisonment, and thereafter, since his release. Under the circumstances, as such no illegality has been committed by the Returning Officer in canceling the nomination form of the petitioner.

4.7. Now, so far as the contention on behalf of the petitioner that in the year 2008 election, the petitioner was permitted to contest the election, and therefore, for this year's election he cannot be held disqualified, and therefore, his nomination form could not have been rejected is concerned, the same also cannot be accepted. Merely because in past the petitioner might have been permitted to contest the election (though not entitled to), the said illegality cannot be permitted to be perpetuated. As such in the earlier election also, the petitioner ought to have been held disqualified to become the Councillor and his nomination form was required to be rejected. For whatever reason earlier his nomination paper was not rejected and he was permitted to contest the election, is no ground to permit the petitioner to contest the election this time, though not entitled to.

In view of the above and for the reasons stated above, there is no substance in the present petition which deserves to be dismissed and is, accordingly, dismissed.