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Court : Mumbai Aurangabad

Decided On : Jan-31-2013

Judge : A.H. JOSHI & SUNIL P. DESHMUKH

Appeal No. : Letters Patent Appeal St. No.19855 of 2011 In Writ Petition No.1898 of 2011

Appellant : Anand

Respondent : Shivbhusan and Others

Judgement :

A.H. Joshi, J.

Taken up for final hearing by consent of the parties.

2. The learned Single Judge had admitted Writ Petition No.1898 of 2011, by order dated 7th April, 2011. The learned Single Judge did not grant interim relief. It is the submission of Appellant that result of refusal of stay is that the seat as a Councillor in Village Panchayat held by the Petitioner has to fall vacant, the election would be held and the Appellant will lose the opportunity as Councillor forever, though the Court may on merits eventually be satisfied about merit of the claim of the Appellant.

3. Considering the question that had fallen for consideration, we have noticed that it would be impossible to rule in either way without observing and commenting on merits of the question of law involved in the matter. Now since the Petitioner's Writ Petition is pending and is yet to be heard by the learned Single Judge, and if we rule on the point of law one can easily visualize that such pronouncement would result in sealing the fate of both parties, atleast one who would lose, since the learned Single Judge may be required to follow the pronouncement of law as may be made while deciding this appeal.

4. Therefore, we gave option to the parties before us to elect to invite Judgment and thereby become fait accompli to the consequences or have a Judgment on merits in the Writ Petition in due course.

5. Learned Advocate Mr. V.D. Salunke as well Mr. Jadhav for respective parties have taken instructions, and informed us that it would be better to choose to have a pronouncement from this Court and be a fait accompli to whatever may be the outcome and effect thereon on the right and claim of the respective party.

6. We have therefore, taken up the appeal for final hearing.

7. The back-ground of the case, in brief, is as follows:-

(a) The Appellant is an elected member of Village Panchayat, Patoda. Challenge to the election of the Appellant by way of Election Petition under the provisions of Bombay Village Panchayat Act, 1958, was not raised.

(b) Respondent No.1 filed a complaint under Section 16 of the Bombay Village Panchayat Act.

(c) He claimed that Appellant herein has incurred disqualification under Section 14(j-1) of the Bombay Village Panchayat Act.

(d) On facts, it was alleged that the Appellant has furnished false information regarding the number of children begotten to him. On the date of election the Appellant already had three children, and third child was born on 16th July, 2002.

(e) The evidence relied upon by the present Respondent No.1, is certificate of Anganwadi Sevika, certifying that the date of birth of third child of the Appellant, on the basis of record maintained by her in the course of process of vaccination of said third child.

(f) The Appellant was served with a notice. He contested the objection of begetting a third child after amendment of Law.

(g) Appellant's defence was that the date of birth of third child was 16th May, 2001, at village Ieet, Taluka-Bhoom, District-Osmanabad, and not on 16th July, 2002, as alleged by the complainant.

(h) Appellant placed reliance on birth certificate issued by Gram Panchayat, and certificate issued by school authorities which concur as to the date of birth to be 16th May, 2001.

(i) After hearing the parties, the Collector disqualified the Appellant. The order disqualifying the Appellant was upheld in appeal by Divisional Commissioner.

(j) Appellant approached this Court and learned Single Judge admitted the Writ Petition, however, refused the interim relief.

8. The point of law addressed before us is very brief. It is formulated as follows:-

"Election to a public office under Village Panchayat can be challenged only by filing election petition. No such election petition was filed. The remedy of election petition being lost, a ground which was available for challenge of election cannot be agitated or brought in use by filing a claim for disqualification since the disqualification alleged was pre-existing."

9. Reliance is placed on following reported Judgments:-

- 1) Election Commission of India vs. Saka Venkata Rao, A.I.R. 1953 Supreme Court 210,
- 2) Brundaban Nayak vs. Election Commission of India and another, A.I.R. 1965 Supreme Court 1892,
- 3) State of H.P. and others vs. Surinder Singh Banolta, A.I.R. 2007 Supreme Court 903.

10. The proposition is opposed by the Respondent No.1 by relying on following Judgments:-

- 1) Narayan Maruti Mohakar vs. District Judge, Kolaba, 1952 The Bombay Law Reporter 314,
- 2) Ravanna Subanna vs. G.S. Kaggeerappa, A.I.R. 1954 Supreme Court 653 (Vol.41, C.N. 152)
- 3) Harpal Singh and another vs. State of Himachal Pradesh, A.I.R. 1981 Supreme Court 361,
- 4) Suvarna Prakash Patil vs. Anil Hindurao Powar and others, 2003 (Supp.2) Bom.C.R. 19,
- 5) Gangadhar s/o Gonduram Tadme vs. Trimbak s/o Govindrao Akingire and others, 2005(1) All M.R. 749,
- 6) Vijay vs. State of Maharashtra and others, 2005(5) Bom.C.R. 541,
- 7) Bhaurao Dagdu Paralkar vs. State of Maharashtra and others, 2006(1) Bom.C.R. 770,

8) Deochand Shankar Bhajankar vs. Divisional Commissioner, Nagpur and others, 2007(0) B.C.I. 133,

9) Namdeo Yeduba Pandhare and another vs. State of Maharashtra, 2008(0) B.C.I. 44,

10) Smt. Taibai w/o Tulshiram Damle vs. The Additional Commissioner, Amravati and others, 2008(6) ALL M.R. 772,

11) Dhananjay Rambhau Raut vs. State of Maharashtra and others, 2008(Supp.) Bom.C.R. 679,

12) Ravikiran Abasaheb Deshmukh and another vs. Additional Commissioner and others, 2010(4) Bom.C.R. 249,

13) Shri. Ajitsingh Bhimsingh Deore vs. Sahebrao Bhata Wagh and others, 2010 All M.R. (Supp.) 227.

11. We have considered rival submissions and considered respective challenges.

12. As we have grasped, the law as laid down by the Hon'ble Supreme Court in a case of Election Commission of India vs. Saka Venkata Rao, A.I.R. 1953 Supreme Court 210, a Judgment of Constitution Bench, lays down the law by considering and interpreting the provisions of Constitution of India, that:-

"If a disqualification is incurred subsequent to election, it can be a ground for invoking the jurisdiction of the Governor to disqualify the Member of State Legislature, however, a ground which was in existence prior to election, and was liable to be agitated by way of election petition, is not available for re-agitation for seeking a declaration that the legislator is disqualified."

13. Now the question to be considered in present case is whether the said doctrine will govern the situation in relation to Panchayat in the back ground of amendment as it stands in Section 14(j-1) of the Bombay Village Panchayat Act.

14. This Court will have to see as to whether Section 14(j-1) of the Bombay Village Panchayat Act is a barely procedural disqualification or is of substantive in nature, and as to whether emanates from a policy legislation and is of the nature of public Law.

15. The increased population is the biggest known challenge of the present situation. The awareness has to begin from lawmakers and the executive. The cognizance of compelling need is taken by competent Legislature.

16. Legislature has, in its wisdom, enacted the amendment and have created a statutory barrier both, for election as well as continuation as a member in the office of Panchayat if the person has or gets third child after commencement of the Amending Act, which event does not fall in the bracket of the exceptions carved out by the said clause.

17. Now the question that arises is as to whether the scheme of the Policy Legislation which assumes shape of public law should be honoured in preference to the right created in favour of a relater to challenge the election or have it lost forever, if it is not resorted to, by any one including himself. Further whether this statutory disqualification which has come up as a policy legislation and as a policy Public Law should be given a go-bye by submitting to might-of procedural law which is otherwise to be a maid servant of substantive law.

18. The thrust of argument that the question of disqualification cannot be agitated in respect of a person who gets elected, has third child born after the commencement of the Amendment Act, and per chance the election is not challenged, should such person by resorting to the decision of Honourable Supreme Court, be deemed to have a license to continue in the office in spite of being in the tooth of the disqualification and be permitted openly to sit in a democratic and elective executive office opposed to a policy legislation and public law.

19. The question has many fold facets and has to be seen from various angles.
20. Whether the Policy Legislation is the Principal Law of land or whether a right of challenge by way of election petition is the Principal Law of land.
21. Distinction will have to be made as regards membership of Parliament and State Legislature together on one hand and local self government bodies on the other, particularly where the regime of law which govern each amongst the respheres are suigeneris in their own way.
22. The matter of disqualification and procedure and limitations on right to challenge as are carved out for seats in Parliament and State Legislature are with regard to legal or constitutional rights and remedies operating on a separate plane. The function and role of Parliament or State Legislature is in constitutional governance and law making for the Union or the State. By restricting recurrent or alternate challenge to the elective office in the house, by precedent, certain-ness and immunity from alternate challenges is afforded.
23. The point is whether such immunity is the aim and is warranted with same rigour for elected offices in the executive bodies at the level of local self Government. We are at loss to trace any rationale to apply same immunity to the members of Panchayat, particularly with new policy law in public domain.
24. The Policy Law and Public Law will have be given over-riding effect over an individual rights to challenge. Giving go-bye to the statutory enactment of attaching disqualification to a person who has more than two children when the third is begotten after the commencement of the Amendment Act, would mean openly compounding the act and defeating the said provision.
25. The amended Village Panchayat Act, therefore, will have to be given over-riding effect over the right of challenge left at the sweet will of a relater.
26. Therefore, as and when and through whichever channel the challenge would surface will have to be gone into.
27. We, therefore, hold that the law as it governs the provisions of Constitution of India may not be able to hold the field in the background of specific policy legislation i.e. the provisions of the Bombay Village Panchayat Act which are not declared unconstitutional and rather are enacted as a policy legislation due to warrant of need of existence and for larger good of masses.
28. Section 14(j-1) of Bombay Village Panchayat Act is a doctrinal amendment and all efforts ought to be made to uphold its enforcement. Individual rights and procedural matters should take a back seat in the context of procedural and personal rights on one hand, opposed to the policy of State, Policy Law and Public Law on the other hand.
29. We are, therefore, satisfied that the remedy of election petition which was not resorted, does not confer upon the Appellant the legitimacy which inherently lacks in the regime of policy legislation.
30. We therefore, dismiss the Appeal. Parties are directed to bear own costs.