

Jagram Vs. State of Rajasthan and ors.

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Court : Rajasthan

Decided On : Aug-31-2001

Reported in : 2002(2)WLN149

Judge : V.S. Kokje, J.

Acts : Rajasthan Panchayati Raj Act, 1994 - Sections 39, 39(1), 39(2) and 40

Appeal No. : S.B. Civil Writ Petition No. 972 of 2001

Appellant : Jagram

Respondent : State of Rajasthan and ors.

Advocate for Def. : Naina Saraf, Adv.

Advocate for Pet/Ap. : Praveen Balwada, Adv.

Disposition : Petition allowed

Judgement :

Kokje, J.

1.The petitioner was Reeled as Sarpanch, Village Panchayat Karoda, Tehsil Sehror, District Alwar. A complaint was filed against him that he was disqualified for being elected as Sarpanch and to continue as Sarpanch as he had more than two children. The matter was enquired into by the Additional Chief Executive

Officer, Zila Parishad, Alwar, who made a report that the petitioner had an additional 5th children on 4.4.1998 and this child was given in adoption on 24.4.1999 to one Shri Rakesh Kumar. On the basis of the aforesaid enquiry report, the respondent No.2, the Divisional Commissioner, Jaipur Division, Jaipur after seeking approval of the State Government passed an order removing the petitioner from the post of Sarpanch in exercise of powers under Section 39 of the Rajasthan Panchayati Raj Act, 1994 (hereinafter referred as the Act of 1994). The petitioner has challenged this order in this petition.

2. The contention of the petitioner is that Article 243-0 of the Constitution of India creates a bar against challenging an election in any other manner than by way of an election petition. The said Article reads as under:

'Article 243-0. Bar to interference by courts in electoral matter-notwithstanding anything in this Constitution.'

(a) ',.....'

(b) 'no election to any Panchayat shall be called in question except by an election petition presented to such authority and in such manner as it provided for by or under any law made by the Legislature of a State.'

3. According to the learned counsel, the declaration that the petitioner was disqualified to hold the post of Sarpanch amounts to setting aside his election on the ground of that disqualification and therefore, it is hit by Article 243-0 of the Constitution of India.

4. The contention of the respondent on the contrary is that taking action under other provisions of the Rajasthan Panchayati Raj Act, 1994 for removal of a Sarpanch does not amount to setting aside his election and even if an election petition could have been filed on the same ground, there is no bar for taking action under such provisions. The provisions of the Act of 1994 in exercise of which the impugned order has been passed are Section 39 (1)(a) and Section 39(2). They read as under:

Section 39. Cessation of Membership:-

1 Subject to the provisions of Section 40. A Member of a Panchayati Raj Institution shall not be eligible to continue to be such member if he:-

(a) is or becomes subject to any of the disqualifications specified in Section 19; or

(b) '.....'

(c) '.....'

(d) '.....'

(e) '.....'

(f) '.....'

2 Whenever it is made to appear to the competent authority that a member has become ineligible to continue to be a member for any of the reasons specified in Sub-section (1), the competent authority may, after giving him an opportunity of being heard, declare him to have become so ineligible and thereupon he shall vacate his office as such member;

Provided that until a declaration under this sub-section is made he shall continue to hold his office.'

5. The first question to be decided is as to whether taking action under Section 39 of the Act of 1994 amounts to challenging the election of the successful candidates. In cases where the disqualification is alleged to be incurred after the election, the election is clearly not being called in question. It is only in cases where the person concerned was disqualified even on the date of his election and his election could have been set aside in an election petition on the ground, that the question would arise as to whether against such a person action under Section 39 of the Act of 1994 can be taken or not. A close scrutiny of Section 39 (1) of the Act of 1994 shows that it declares that a member of the Panchayati Raj Institutions shall not be eligible to continue to be such member if he 'is or becomes' subject to any of the disqualifications specified in Section 19. The use of words 'is or becomes subject to any of the disqualification.' clearly covers both the cases. The cases in which the person was disqualified ab-initio and the person who

incurs disqualification after his election. The provision declares that such a person shall not be eligible to continue to be a member of the Panchayati Raj Institution. This means even if a disqualified person is elected, he has no right to continue in the post. A reading of Section 39(2) of the Act of 1994 shows that that section is applicable only to cases in which the member has become ineligible to continue to be a member. In Sub-section (2) of Section 39 of the Act of 1994, the word 'is' which finds place in Sub-section (1) has been excluded. It is therefore, clear that no action under Section 39(2) can be taken against the person who was ineligible or disqualified right from the beginning. It is only when a duly elected person becomes ineligible to continue to be a member for any of the reasons specified in Sub-section (1) of Section 39 of the Act of 1994, that the competent authority has jurisdiction to declare him to have become so ineligible. The cases which are not covered by Section 39(2) of the Act of 1994 i.e. the cases in which the disqualification has not been incurred after the election but even at the time of the election the person was disqualified could be dealt with under Section 40 of the Act of 1994 before its repeal and not under Section 39(2) of the Act of 1994. Repealed Section 40 of the Act of 1994 clearly provided that whenever it was alleged that the member of the Panchayati Raj Institution 'is or has become' disqualified or where there was a doubt as to whether the member was disqualified or not, such member or the competent authority or any other member of the Panchayati Raj Institution concerned could apply to the District Judge having jurisdiction for a decision on the allegation or doubt. Under the scheme of the Act of 1994 before deletion of Section 40, Section 39 and Section 40 of the Act of 1994 were independent provisions for dealing with cases of disqualifications incurred before the election and after the election. The reliefs which could be sought under these provisions or the orders which could be made under the provisions did not amount to challenging an election or setting aside an election and therefore, these provisions were not contrary to the provisions of Article 243-0 of the Constitution of India. Any other interpretation would lead to absurd results. Article 243-0 of the Constitution of India does not grant any immunity to a disqualified person to continue in office only because his election was not challenged by anyone and he was successful in getting elected though disqualified under the law. In the scheme of the Act of 1994 cessation of membership is clearly

distinguishable from quashing or setting aside of an election. As the remedies of the election petition and remedy of cessation of membership can stand on different and independent footings, they can be allowed to stand together. There are two ways in which a member who was not eligible to become a member of a Panchayati Raj Institute could lose his right to hold the post and to continue to be the member. One, by setting aside of his election in an election petition and two, on a declaration of his ineligibility to continue as such member under Section 39 (or Section 40 before its repeal) of the Act of 1994. There is no conflict in these two provisions as declaration of ineligibility to hold the post is not the same thing as setting aside the election of a person, even though in both cases the person loses his right to continue in the post.

6. In the present case, the action has been taken under Section 39(2) of the Act of 1994 by the respondents for a disqualification which was in existence before the election and it is not a case where the petitioner was alleged to have become ineligible after he was elected. This case is, therefore, not covered by Section 39(2) of the Act of 1994 as he had not become ineligible to continue to be a member and was already a disqualified person at the time of election. The order under Section 39 (2) of the Act of 1994 therefore, is clearly without authority of law. The competent authority could have referred the matter to the district judge under Section 40 of the Act of 1994 before its repeal. As already seen, that section covered the cases of those who are disqualified ab initio as also who became ineligible after election. Unfortunately, the provision has been repealed without providing any other remedy for cessation of membership of a person who was disqualified even at the time of election. While repealing Section 40 of the Act of 1994, the word 'is' could have been inserted in the first sentence of Subsection (2) of Section 39 of the Act of 1994 between the words 'member' and the word 'has' and between the words 'declare him' and words 'to have become so ineligible', words 'to be or' could have been inserted to cover the cases of persons who were disqualified even on the date of their election conferring thereby authority on the competent authority to make a declaration about their ineligibility. But as this has not been done there is a lacuna left by the Legislature which can not be filled by the Courts resorting to hyperactive interpretative exercises. Defect is a defect and the Courts have to recognise it. The law as it stands today does not provide for

any procedure for effective cessation of membership of a member of a Panchayati Raj Institution, who was ineligible to hold the office even at the time of his election even though such a person is declared to be ineligible for continuing to be such member under Section 39(1) of the Act of 1994.

7. The petition is, therefore allowed, the impugned order dated 27.2.2001 is quashed.

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