

Ravikant S. Patil vs Sarvabhuma S. Bagali on 14 November, 2006

Equivalent citations: 2007 (2) AIR KAR R 152

Bench: Chief Justice, C.K. Thakker, R.V. Raveendran

CASE NO.:

Appeal (civil) 5034 of 2005

PETITIONER:

Ravikant S. Patil

RESPONDENT:

Sarvabhuma S. Bagali

DATE OF JUDGMENT: 14/11/2006

BENCH:

Y.K. Sabharwal, CJ. & C.K. Thakker & R.V. Raveendran

JUDGMENT:

JUDGMENT ORDER This appeal under Section 116A of the Representation of the People Act, 1951 (for short, the Act) has been preferred by the elected candidate. The facts are brief and few. The appellant was an elected member of the Karnataka Legislative Assembly which was dissolved in February 2004. By judgment and order dated 28th July 2000, the appellant was convicted and sentenced to undergo imprisonment for a period of seven years by the VI Addl. Sessions Judge, Solapur, in S.C.No.203/1999. Immediately thereafter, Criminal Appeal No.658 of 2000 was preferred by the appellant challenging the judgment of conviction and order of sentence. Pending the appeal, the Bombay High Court granted stay of the execution of the sentence.

(2) The fresh elections to Karnataka Legislative Assembly were notified. The election programme notified was as under:

Last date of nomination : 31.03.2004 Date of scrutiny of nomination : 02.04.2004
Last date for withdrawal : 05.04.2004 Date of polling : 20.04.2004 Date of
declaration of result : 13.05.2004 The appellant moved an application in the pending
appeal, for stay of the order of conviction dated 28th July, 2000, so that he can
contest the election. The Bombay High Court, by order dated 26th March, 2004,
stayed the conviction pending appeal. Thereafter, the appellant filed his nomination
on 29th March 2004. The respondent raised an objection to the acceptance of
appellant's nomination, contending that the appellant was disqualified under Section
8(1) and (3) of the Act. The said objection raised by the respondent was rejected by
the Returning Officer. The appellant was declared elected on 13th May 2004.

(3) The election of the appellant was challenged by the respondent before the Karnataka High Court on the ground that the appellant was not qualified to contest the election. In the Election Petition, the case set up by the respondent was that on the date of filing of nominations and on the date of declaration of the results, the elected candidate was disqualified for being chosen as a member of the Legislative Assembly, in view of Section 8(1)(3)(4) of the Act, as he had been convicted for an offence punishable under Sections 366 and 376 of the Indian Penal Code and sentenced to imprisonment for more than two years.

(4) During the pendency of the election petition, the appellant's appeal against conviction was allowed by the Bombay High Court by judgment dated 10th September, 2004 and he was acquitted.

(5) By the judgment under appeal, the High Court, relying upon the decision of this Court in *K. Prabhakaran v. P. Jayarajan*, [2005] 1 SCC 754, came to the conclusion that the appellant was disqualified to contest the election, in view of the fact that as on the date of nomination, there was a conviction against the appellant which had not been set aside by a higher court. The High Court has opined that the decisive dates are the date of election and the date of scrutiny of nomination and not the date of judgment in an election petition or in appeal against it. Accordingly, the election petition was allowed and it was declared that the election and declaration of result of the appellant to the Indi Assembly Constituency were null and void.

(6) Article 191 of the Constitution of India provides for disqualification for being chosen as, and for being, a member of the Legislative Assembly of a State, if a person is disqualified by or under any law made by the Parliament. The Representation of People Act, 1951 is the law contemplated by Article 191 (1)(e) of the Constitution. Section 7(b) of the Act defines the expression "disqualified" as under:

"disqualified" means disqualified for being chosen as, and for being a member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State."

Section 8 of the Act provides for disqualification on conviction for certain offences. Section 8(1), inter alia, provides that a person convicted of an offence punishable under clauses (a) to (n) thereof shall be disqualified where the affected person is sentenced to imprisonment, from the date of such conviction and shall continue to be disqualified for a further period of six years since his release. The offence punishable under Section 376(1) or (2) is one of the offences enumerated in clause (a) of Sub-section (1) of Section 8. Sub-Section (3) of Section 8 provides that a person convicted of any offence and sentenced to imprisonment for not less than two years shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release. If the nomination of a person is improperly accepted under the Act, it is a ground for seeking declaration that the election of such disqualified candidate be void. The qualification or disqualification is to be determined with reference to the date fixed for scrutiny of the nomination.

The subsequent acquittal is not relevant to remove the disqualification as on the date of the scrutiny of the nomination.

(7) In Prabhakaran's case (supra), one of the questions examined by the Constitution Bench was as under:

"Whether an appellate judgment of a date subsequent to the date of election and having a bearing on conviction of a candidate and sentence of imprisonment passed on him would have the effect of wiping out disqualification from a back date if a person consequent upon his conviction of any offence and sentenced to imprisonment for not less than 2 years was disqualified from filing nomination and contesting the election on the dates of nomination and election?"

As the formation of the aforesaid question itself shows the relevant date for ascertaining disqualification is the date of nomination and election. The Constitution Bench, while answering the aforesaid question, has held that under clause (a) of sub-Section (1) of Section 100 of the Act, the High Court is called upon to decide whether on the date of election a returned candidate was not qualified or was disqualified to be chosen to fill the seat and, if the answer being in the affirmative, the High Court is mandated to declare the election of the returned candidate to be void. It is further held that the focal point by reference to which the question of disqualification shall be determined is the date of election. The Constitution Bench overruled the decisions in the cases of Manni Lal v. Parmai Lal, [1970] 2 SCC 462, and Vidya Charan Shukla v. Purshottam Lal Kaushik, [1981] 2 SCC 84, which had taken the view that the opinion on the question of disqualification, had to be formed by the High Court at the time it proceeds to pronounce the judgment in the election petition and that an acquittal subsequent to nomination and election, had retrospective effect of making the disqualification non-existent even at the time of scrutiny of the nomination. The Constitution Bench observed that the correctness or otherwise of the decision of the Returning Officer, on the question of qualification or disqualification of a candidate, could not be left to be determined by any event which may have happened between the date of scrutiny and date of pronouncement of the judgment by the High Court. The uncertainty, anomaly, confusion or practical difficulties in accepting the view that the acquittal would relate back to the date of scrutiny of nomination, insofar as the election laws were concerned, were examined by the Constitution Bench, and it was held thus:

"The correct position of law is that nomination of a person disqualified within the meaning of sub-section (3) of Section 8 of RPA on the date of scrutiny of nominations under Section 36(2)(a) shall be liable to be rejected as invalid and such decision of the returning officer cannot be held to be illegal or ignored merely because the conviction is set aside or so altered as to go out of the ambit of Section 8(3) of RP Act consequent upon a decision of a subsequent date in a criminal appeal or revision."

(8) In the present case, however, the appellant's stand of being qualified to contest the election was not either on the basis of subsequent acquittal or on the basis of stay of execution of sentence, but based on the stay of the conviction. It is evident that before the last date of filing nomination, the appellant had filed an application (Criminal Application No.487 of 2004) in his pending Criminal

Appeal No.658 of 2000 praying therein that his conviction be stayed pending appeal since he had to contest the ensuing election, and that if his conviction was not stayed, he would not be able to contest the election resulting in deprivation of his right to so contest. The Bombay High Court by order dated 26th March, 2004, considering the facts and circumstances of the case, inter alia noticing that there was a voluntary marriage between the victim girl and the accused-appellant, and other relevant facts for the purpose of deciding that application, granted the order of stay of conviction of the appellant, in addition to the order of stay of execution of sentence which was already operative when the appellant filed the application for stay of conviction. The question, under these circumstances, is as to the effect of stay of conviction even before nomination, insofar as the disqualification provided under Section 8 of the Act.

(9) Section 374 of the Code of Criminal Procedure (for short, the Code) provides for a remedy of filing appeal by any person convicted for trial by Sessions Judge. Section 389 of the Code, inter alia, provides that pending any appeal by a convicted person, the appellate court may, for reasons recorded by it in writing, order that the execution of sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail or on his own bond.

(10) The question whether an order of conviction can be stayed, in the absence of a specific provision for such stay in the Code, came up for consideration before this Court in the case of *Rama Narang v. Ramesh Narang & Ors.*, [1995] 2 SCC 513. In the said case, the order that had been passed, while admitting the appeal, by the High Court purporting to be one under Section 389(1) of the Code was to the following effect:-

"Accused be released on bail on his furnishing a personal bond in the sum of Rs.10,000 with one surety in the like amount to the satisfaction of the trial Judge. The operation of the impugned order shall remain stayed."

One of the questions that was examined in that case was whether the power under Section 389(1) of the Code could be invoked to stay the conviction. This Court held that an order of conviction by itself is not capable of execution under the Code of Criminal Procedure, but in certain situations, the order of conviction can become executable in a limited sense, inasmuch as it may result in incurring of some disqualification under other enactments; and that in such cases, it was permissible to invoke the power under Section 389(1) of the Code for staying the conviction also. We extract below the reasoning for such a conclusion, given by this Court:

"That takes us to the question whether the scope of Section 389(1) of the Code extends to conferring power on the Appellate Court to stay the operation of the order of conviction. As stated earlier, if the order of conviction is to result in some disqualification of the type mentioned in Section 267 of the Companies Act, we see no reason why we should give a narrow meaning to Section 389(1) of the Code to debar the court from granting an order to that effect in a fit case. The appeal under Section 374 is essentially against the order of conviction because the order of sentence is merely consequential thereto; albeit even the order of sentence can be independently challenged if it is harsh and disproportionate to the established guilt. Therefore,

when an appeal is preferred under Section 374 of the Code the appeal is against both the conviction and sentence and therefore, we see no reason to place a narrow interpretation on Section 389(1) of the Code not to extend it to an order of conviction, although that issue in the instant case recedes to the background because High Courts can exercise inherent jurisdiction under Section 482 of the Code if the power was not to be found in Section 389(1) of the Code."

This Court, however, clarified that the person seeking stay of conviction should specifically draw the attention of the appellate court to the consequences that may arise if the conviction is not stayed; and that unless the attention of the court to the specific consequences that are likely to fall upon conviction, the person convicted cannot obtain an order of stay of conviction. In fact, if such specific consequences are not brought to its notice, the court cannot be expected to grant stay of conviction or assign reasons relevant for staying the conviction itself, instead of merely suspending the execution of the sentence. In that case, it was found on facts that the appellant therein had not specified the disqualification he was likely to incur under Section 267 of the Companies Act, if his conviction was not stayed. Therefore, this Court refused to infer that the High Court had applied its mind to this specific aspect of the matter and had thereafter granted stay of conviction or the operation of the impugned judgment. Consequently, the order of stay was not construed as a stay of conviction.

(11) It deserves to be clarified that an order granting stay of conviction is not the rule but is an exception to be resorted to in rare cases depending upon the facts of a case. Where the execution of the sentence is stayed, the conviction continues to operate. But where the conviction itself is stayed, the effect is that the conviction will not be operative from the date of stay. An order of stay, of course, does not render the conviction non-existent, but only non-operative. Be that as it may. Insofar as the present case is concerned, an application was filed specifically seeking stay of the order of conviction specifying that consequences if conviction was not stayed, that is, the appellant would incur disqualification to contest the election. The High Court after considering the special reason, granted the order staying the conviction. As the conviction itself is stayed in contrast to a stay of execution of the sentence, it is not possible to accept the contention of the respondent that the disqualification arising out of conviction continues to operate even after stay of conviction.

(12) We may now refer to the several other decisions of this Court, cited by the parties.

(12.1) The decision in *B.R.Kapur v. State of Tamil Nadu*, [2001] 7 SCC 231, will have no application as it was not a case of stay of conviction. In that case, only an order of suspension of sentence was made under Section 389 of the Code. In fact, the petitions seeking stay of the operation of the judgment in the criminal cases were dismissed by the High Court.

(12.2.) In *State of Tamil Nadu v. A.Jaganathan*, [1996] 5 SCC 329, the State challenged the order of the High Court which had granted suspension of the conviction as also the sentence, relying on *Rama Narang* (supra). This Court held that the principle laid down in *Ram Narang* (supra) was that conviction and sentence can both be suspended only if non-grant of suspension of conviction would result in damage which could not be undone if ultimately the appeal/revision was allowed. On facts,

it was found that even if stay of conviction was not granted, no prejudice would be caused to the convicted person, having regard to the fact that when the revisions against the conviction and sentences were ultimately allowed, the damage, if any, caused to the respondents therein with regard to payment of stipends etc. could well be revived and made good to the them. This Court noted that if such trifling matters involving slight disadvantage to the convicted person were to be taken into consideration, every conviction would have to be suspended pending appeal or revision. It was further noted that the High Court did not consider at all the moral conduct of the respondents inasmuch as the respondent Jaganathan who was a Police Inspector had been convicted under Sections 392, 218 and 466 IPC, while the other respondents who were also public servants had been convicted under the provision of Prevention of Corruption Act. Under those circumstances, the discretion exercised by the High Court in suspending the conviction was reversed.

(12.3.) In *K.C.Sareen v. CBI, Chandigarh*, [2001] 6 SCC 584, it was held that though the power to suspend an order of conviction, apart from the order of sentence, is not alien to Section 389(1) of the Code, its exercise should be limited to very exceptional cases. It was further held that merely because the convicted person files an appeal to challenge his conviction, the court should not suspend the operation of the conviction and the court has a duty to look at all aspects including the ramifications of keeping such conviction in abeyance. The Bench also noted that the evil of corruption has reached a monstrous dimension. While declining the prayer of the appellant for grant of an order of stay of conviction, the Bench observed that when conviction is on a corruption charge against a public servant, the appellate court should not suspend the order of conviction during the pendency of the appeal, even if the sentence of imprisonment is suspended. The Bench further observed that it would be a sublime public policy that the convicted public servant is kept under disability of the conviction in spite of keeping the sentence of imprisonment in abeyance till the disposal of the appeal or revision. These observations would equally apply when a prayer for stay of order of conviction is made so as to remove the disability to contest an election except, as already noted, in a very exceptional and rare case.

(12.4.) Lastly, reference may also be made to the decision of this Court in *State of Maharashtra v. Gajanan & Anr.*, [2003] 12 SCC 432. In the said case, relying on the case of *K.C.Sareen* (supra), it was reiterated that only in exceptional cases, the court should exercise the power of stay of conviction. Since the High Court in the said case had not pointed out any exceptional fact or looked into the ramification of keeping such conviction in abeyance, the order of the High Court staying the conviction was set aside. In the cited case of *Union of India v. Atar Singh*, [2003] 12 SCC 434, it was noted that the High Court had mechanically passed the order by suspending the conviction and the discretion ought not to have been exercised by the High Court by passing such an order suspending the conviction.

(12.5.) All these decisions, while recognising the power to stay conviction, have cautioned and clarified that such power should be exercised only in exceptional circumstances where failure to stay the conviction, would lead to injustice and irreversible consequences.

(13) Reverting to the present case, we are not called upon to decide the correctness of the order of stay of conviction dated 26th March, 2004. All that requires to be noticed is that on the dates of

nomination and election, in view of the said order staying conviction, the appellant was not disqualified. The question whether subsequently the conviction was set aside in appeal or whether the matter is in further challenge before this Court is of no relevance for deciding the point in issue.

(14) In view of the above, the decision of the High Court that the appellant was disqualified as on the date of nomination and that his nomination was improperly accepted cannot be sustained. Resultantly, we allow the civil appeal and set aside the impugned judgment of the High Court and dismiss the Election Petition. Since the election petitioner- respondent No.1 has not appeared in this appeal and we were assisted by learned counsel appearing for another contestant in the same election, we leave the parties to bear their own costs.