Brundaban Nayak

Vs

Election Commission of India and Another

Civil Appeal No. 50 of 1965

(CJI P. B. Gajendragadkar, M. Hidyatullah, J. C. Shah, S. M. Sikri, V. Ramaswami – I JJ)

12.02.1965

JUDGMENT

GAJENDRAGADKAR, C.J.-

The principal question which this appeal by special leave raises for our decision relates to the construction of Article 192 of the Constitution. The said question arises in this way. The appellant Brundaban Nayak was elected to the Legislative Assembly of Orissa from the Hinjili Constituency in Ganjam district in 1961, and was appointed one of the Ministers of the Council of Ministers in the said State. On August 18, 1964, respondent No. 2, P. Biswal, applied to the Governor of Orissa alleging that the appellant had incurred a disqualification subsequent to his election under Art. 191(1)(e) of the Constitution read with section 7 of the Representation of the People Act, 1951 (No. 43 of 1951) (hereinafter called the Act). In his application, respondent No. 2 made several allegations in support of his contention that the appellant had become disqualified to be a member of the Orissa Legislative Assembly. On September 10, 1964, the Chief Secretary to the Government of Orissa forwarded the said complaint to respondent No. 1, the Election Commission of India, under the instructions of the Governor. In this communication, the Chief Secretary stated that a question had arisen under Article 191(1) of the Constitution whether the member in question had been subject to the disqualification alleged by respondent No. 2 and so, he requested respondent No. 1 in the name of the Governor to make such enquiries as it thinks fit and give its opinion for communication to the Governor to enable him to give a decision on the question raised.

On November 17, 1964, respondent No. 1 served a notice on the appellant forwarding to him a copy of the letter received by it from respondent No. 2 dated the 4th November, 1964. The notice intimated to the appellant that respondent No. 1 proposed to enquire in the matter before giving its opinion on the Governor's reference, and, therefore, called upon him to submit on or before the 5th December, 1964, his reply with supporting affidavits and documents, if any. The appellant was also told that the parties would be heard in person or through authorised counsel at 10-30 A.M. on the 8th December, 1964, in the office of respondent No. 1 in New Delhi.

On December 1, 1964, the appellant sent a telegram to respondent No. 1 requesting it to adjourn the hearing of the matter. On the same day, he also addressed a registered letter to respondent No. 1 making the same request. Respondent No. 2 objected to the request made by the appellant for adjourning the hearing of the complaint. On December 8, 1964, respondent No. 1 took up this matter for consideration. Respondent No. 2 appeared by his counsel Mr. Chatterjee, but the appellant was absent. Respondent No. 1 took the view that an enquiry of the nature contemplated by Art. 192(2) must be conducted as expedtiously as possible, and so, it was necessary that whatever his other commitments may be, the appellant should arrange to submit at least his statement in reply

to the allegations made by respondent No. 2, even if he required some more time for filing affidavits and/or documents in support of his statement. Even so, respondent No. 1 gave the appellant time until the 2nd January, 1965, 10-30 A.M. when it ordered that the matter would be heard.

On January 2, 1965, the appellant appeared by his counsel Mr. Patnaik and respondent No. 2 by his counsel Mr. Chatterjee. On this occasion, Mr. Patnaik raised the question about the maintainability of the proceedings before respondent No. 1 and its competence to hold the enquiry. Mr. Chatterjee repelled Mr. Patnaik's contention. Respondent No. 1 over-ruled Mr. Patnaik's contention and recorded its conclusion that it was competent to hold the enquiry under Art. 192(2). Mr. Patnaik then asked for adjournment and made it clear that he was making the motion for adjournment without submitting to the jurisdiction of respondent No. 1. In view of the attitude adopted by Mr. Patnaik, respondent No. 1 took the view that it would be pointless to adjourn the proceedings, and so, it heard Mr. Chatterjee in support of the case of respondent No. 2. After hearing Mr. Chatterjee, respondent No. 1 reserved its orders on the enquiry and noted that its opinion would be communicated to the Governor as early as possible.

When matters had reached this stage before respondent No. 1, the appellant moved the Punjab High Court under Art. 226 of the Constitution praying that the enquiry which respondent No. 1 was holding, should be quashed on the ground that it was incompetent and without jurisdiction. This writ petition was summarily dismissed by the said High Court on January 6, 1965. Thereafter, the appellant applied to this Court for special leave on January 8, 1965, and special leave was granted to him on January 14, 1965. The appellant then moved this Court for stay of further proceedings before respondent No. 1, and the said prayer was granted. When special leave was granted to the appellant, this Court had made an order that the preparation of the record and the filing of statements of the case should be dispensed with and the appeal should be heard on the paper-book filed along with the special leave petition and must be placed for hearing within three weeks. That is how the matter has come before us for final disposal.

Since the Punjab High Court had dismissed the writ petition filed by the appellant in limine, neither of the two respondents had an opportunity to file their replies to the allegation made by the appellant in his writ petition. That is why both respondent No. 1 and respondent No. 2 have filed counter-affidavits in the present appeal setting out all the relevant facts on which they wish to rely. The appellant has filed an affidavit-in-reply. All these documents have been taken on the record at the time of the hearing of this appeal. It appears from the affidavit filed by Mr. Prakash Narain, Secretary to respondent No. 1, that when notice issued by respondent No. 1 on the 17th November, 1964, was served on the appellant, through oversight the original complaint filed by respondent No. 2 before the Governor of Orissa and the reference made by the Governor to respondent No. 1 were not forwarded to the appellant. At the hearing before us, it is not disputed by the appellant that a complaint was in fact made by respondent No. 2 before the Governor of Orissa and that the Governor had then referred the matter to respondent No. 1 for its opinion.

Let us then refer to Article 192 which falls to be construed in the present appeal. Before reading this article, it is relevant to refer to Art. 191. Article 191(1) provides that a person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State if, inter alia, he is so disqualified by or under any law made by Parliament. There are four other disqualifications prescribed by clauses (a) to (d) with which we are not concerned in the present appeal. It is the disqualification prescribed by clause (e) on which respondent No. 2 relies in support of the complaint made by him to the Governor. As we have already indicated, respondent No. 2's case is that the appellant has incurred the disqualification under Art. 191(1)(e) read with s.

7(d) of the Act, and this disqualification has been incurred by him subsequent to his election. It is well-settled that the disqualification to which Art. 191(1) refers, must be incurred subsequent to the election of the member. This conclusion follows from the provisions of Art. 190(3)(a). This Article refers to the vacation of seats by members duly elected. Sub-Article (3)(a) provides that if a member of a House of the Legislature of a State becomes subject to any of the disqualifications mentioned in clause (1) of Art. 191, his seat shall thereupon become vacant. Incidentally, we may add that corresponding provisions with regard to the disqualification of members of both Houses of Parliament are prescribed by Articles 101, 102 and 103 of the Constitution. It has been held by this Court in Election Commission, India v. Saka Venkata Subba Rao and Union of India - Intervener/that Articles 190(3) and 192(1) are applicable only to disqualifications to which a member becomes subject after being elected as such. There is no doubt that the allegations made by respondent No. 2 in his complaint before the Governor, prima facie, indicate that the disqualification on which respondent No. 2 relies has arisen subsequent to the election of the appellant in 1961.

Reverting then to Art. 192, the question which we have to decide in the present appeal is whether respondent No. 1 is entitled to hold an enquiry before giving its opinion to the Governor as required by Art. 192(2). Let us read Art. 192 :-

> "(1) If any question arises as to whether a member of a House of the Legislature of a State has become subject to any of the disqualifications mentioned in clause (1) of Article 191, the question shall be referred for the decision of the Governor and his decision shall be final.
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> (2) Before giving any decision on any such question, the Governor shall obtain the opinion of the Election Commission and shall act according to such opinion".

Mr. Setalvad for the appellant contends that in the present case, no question can be said to have arisen as to whether the appellant has become subject to any of the disqualifications mentioned in clause (1) of Art. 191, because his case is that such a question can be raised only on the floor of the Legislative Assembly and can be raised by members of the Assembly and not by an ordinary citizen or voter in the form of a complaint to the Governor. Mr. Setalvad did not dispute the fact that this contention has not been taken by the appellant either in his writ petition before the High Court or even in his application for special leave before this Court. In fact, the case sought to be made out by the appellant in the present proceedings appears to be that though a question may have arisen about his disqualification, it is the Governor alone who can hold the enquiry and not respondent No. 1. Even so, we have allowed Mr. Setalvad to raise this point, because it is purely a question of law depending upon the construction of Art. 192(1).

In support of his argument, Mr. Setalvad refers to the fact that Art. 192 occurs in Chapter III of Part VI which deals with the State Legislature, and he invited our attention to the fact that under Art. 199(3) which deals with a question as to whether a Bill introduced in the Legislature of a State which has a Legislative Council is a Money Bill or not, the decision of the Speaker of the Legislative Assembly of such State thereon shall be final. He urges that just as the question contemplated by Art. 199(3) can be raised only on the floor of the House, so can the question about a subsequent disqualification of a member of a Legislative Assembly be raised on the floor of the House and nowhere else. He concedes that whereas the question contemplated by Art. 199(3) has to be decided by the Speaker and his decision is final, the authority to decide the question under Art. 192(1) is not vested in the Speaker, but is vested in the Governor. In other words, the context in

which Art. 192(1) occurs is pressed into service by Mr. Setalvad in support of his argument.

Mr. Setalvad also relies on the fact that Art. 192(1) provides that if any question arises, it shall be referred for the decision of the Governor and this clause, says Mr. Setalvad, suggests that there should be some referring authority which makes a reference of the question to the Governor for his decision. According to him, this referring authority, by necessary implication, is the Speaker of the Legislative Assembly. There is another argument which he has advanced before us in support of this construction. Article 192(2) requires that whenever a question is referred to the Governor, he shall obtain the opinion of the Election Commission and Mr. Setalvad suggests that it could not have been the intention of the Constitution to require the Governor to refer to the Election Commission every question which is raised about an alleged disqualification of a member of a Legislative Assembly even though such a question may be patently frivolous or unsustainable.

We are not impressed by these arguments. It is significant that the first clause of Art. 192(1) does not permit of any limitations such as Mr. Setalvad suggests. What the said clause requires is that a question should arise; how it arises, by whom it is raised, in what circumstances it is raised, are not relevant for the purpose of the application of this clause. All that is relevant is that a question of the type mentioned by the clause should arise; and so, the limitation which Mr. Setalvad seeks to introduce in the construction of the first part of Art. 192(1) is plainly inconsistent with the words used in the said clause.

Then as to the argument based on the words "the question shall be referred for the decision of the Governor", these words do not import the assumption that any other authority has to receive the complaint and after a prima facie and initial investigation about the complaint, send it on or refer it to the Governor for his decision. These words merely emphasise that any question of the type contemplated by clause (1) of Art. 192 shall be decided by the Governor and Governor alone; no other authority can decide it, nor can the decision of the said question as such fall within the jurisdiction of the Courts. That is the significance of the words "shall be referred for the decision of the Governor". If the intention was that the question must be raised first in the Legislative Assembly and after a prima facie examination by the Speaker it should be referred by him to the Governor, Art. 192(1) would have been worded in an entirely different manner. We do not think there is any justification for reading such serious limitations in Art. 192(1) merely by implication.

It is true that Art. 192(2) requires that whenever a question arises as to the subsequent disqualification of a member of the Legislative Assembly, it has to be forwarded by the Governor to the Election Commission for its opinion. It is conceivable that in some cases, complaints made to the Governor may be frivolous or fantastic; but if they are of such a character, the Election Commission will find no difficulty in expressing its opinion that they should be rejected straightaway. The object of Art. 192 is plain. No person who has incurred any of the disqualifications specified by Art. 191(1), is entitled to continue to be a member of the Legislative Assembly of a State, and since the obligation to vacate his seat as a result of his subsequent disqualification has been imposed by the Constitution itself by Art. 190(3)(a), there should be no difficulty in holding that any citizen is entitled to make a complaint to the Governor alleging that any member of the Legislative Assembly has incurred one of the disqualifications mentioned in Art. 191(1) and should, therefore, vacate his seat. The whole object of democratic elections is to constitute legislative chambers composed of members who are entitled to that status, and if any member forfeits that status by reason of a subsequent disqualification, it is in the interest of the constituency which such a member represents that the matter should be brought to the notice of the Governor and decided by him in accordance with the provisions of Art. 192(2). Therefore, we must

reject Mr. Setalvad's argument that a question has not arisen in the present proceedings as required by Art. 192(1).

The next point which Mr. Setalvad has raised is that even if a question is held to have arisen under Art. 192(1), it is for the Governor to hold the enquiry and not for the Election Commission. He contends that Art. 192(1) requires the question to be referred to the Governor for his decision and provides that his decision shall be final. It is a normal requirement of the rule of law that a person who decides should be empowered to hold the enquiry which would enable him to reach him decision, and since the Governor decides the question, he must hold the enquiry and not the Election Commission. That, in substance, is Mr. Setalvad's case. He concedes that Art. 192(2) requires that the Governor has to pronounce his decision in accordance with the opinion given by the Election Commission; that is a Constitutional obligation imposed on the Governor. He, however, argues that the Election Commission which has to give an opinion, is not competent to hold the enquiry, but it is the Governor who should hold the enquiry and then forward to the Election Commission all the material collected in such an enquiry to enable it to form its opinion and communicate the same to the Governor.

We are satisfied that this contention also is not well-founded. The scheme of Article 192(1) and (2) is absolutely clear. The decision on the question raised under Art. 192(1) has no doubt to be pronounced by the Governor, but that decision has to be in accordance with the opinion of the Election Commission. The object of this provision clearly is to leave it to the Election Commission to decide the matter, though the decision as such would formally be pronounced in the name of the Governor. When the Governor pronounces his decision under Art. 192(1), he is not required to consult his Council of Ministers; he is not even required to consider and decide the matter himself; he has merely to forward the question to the Election Commission for its opinion, and as soon as the opinion is received, "he shall act according to such opinion". In regard to complaints made against the election of members to the Legislative Assembly, the jurisdiction to decide such complaints is left with the Election Tribunal under the relevant provisions of the Act. That means that all allegations made challenging the validity of the election of any member, have to be tried by the Election Tribunals constituted by the Election Commission. Similarly, all complaints in respect of disqualifications subsequently incurred by members who have been validly elected, have, in substance, to be tried by the Election Commission, though the decision in form has to be pronounced by the Governor. If this scheme of Art. 192(1) and (2) is borne in mind, there would be no difficulty in rejecting Mr. Setalvad's contention that the enquiry must be held by the Governor. It is the opinion of the Election Commission which is in substance decisive and it is legitimate to assume that when the complaint is received by the Governor, and he forwards it to the Election Commission, the Election Commission should proceed to try the complaint before it gives its opinion. Therefore, we are satisfied that respondent No. 1 acted within its jurisdiction when it served a notice on the appellant calling upon him to file his statement and produce his evidence in support thereof.

Mr. Setalvad faintly attempted to argue that the failure of respondent No. 1 to furnish the appellant with a copy of the complaint made by respondent No. 2 before the Governor and of the order of reference passed by the Governor forwarding the said complaint to respondent No. 1, rendered the proceedings before respondent No. 1 illegal. This contention is plainly misconceived. As soon as respondent No. 1 received the complaint and the order of reference which was communicated to it by the Chief Secretary to the Government of Orissa, it was seized of the matter and it was plainly acting within its jurisdiction under Art. 192(2) when it served the notice on the appellant. As we have already indicated, it was through oversight that the two documents were not forwarded to the

appellant along with the notice, but that cannot in any sense affect the jurisdiction of respondent No. 1 to hold the enquiry. In fact, as respondent No. 2 has pointed out in his affidavit, the fact that a reference had been made by the Governor to respondent No. 1 was known all over the State, and it is futile for the appellant to suggest that when he received the notice from respondent No. 1, he did not know that a complaint had been made against him to the Governor alleging that subsequent to his election, he had incurred a disqualification as contemplated by Art. 191(1)(e) of the Constitution read with s. 7(d) of the Act. It would have been better if the appellant had not raised such a plea in the present proceedings.

In this connection, we ought to point out that so far the practice followed in respect of such complaints has consistently recognised that the enquiry is to be held by the Election Commission both under Art. 192(2) and Art. 103(2). In fact, the learned Attorney-General for respondent No. 1 stated before us that though on several occasions, the Election Commission has held enquiries before communicating its opinion either to the President under Art. 103(2) or to the Governor under Art. 192(2), no one ever thought of raising the contention that the enquiry must be held by the President or the Governor respectively under Art. 103(1) and Art. 192(1). He suggested that the main object of the appellant in taking such a plea was to prolong the proceedings before respondent No. 1. In the first instance, the appellant asked for a long adjournment and when that request was refused by respondent No. 1, he adopted the present proceedings solely with the object of avoiding an early decision by the Governor on the complaint made against the appellant by respondent No. 2. We cannot say that there is no substance in this suggestion.

There is one more point to which we may refer before we part with this appeal. Our attention was drawn by the learned Attorney-General to the observations made by the Chief Election Commissioner when he rendered his opinion to the Governor on May 30, 1964, on a similar question under Art. 192(2) in respect of the alleged disqualification of Mr. Biren Mitra, a member of the Orissa Legislative Assembly, "Where, as in the present case", observed the Chief Election Commissioner, "the relevant facts are in dispute and can only by ascertained after a proper enquiry, the Commission finds itself in the unsatisfactory position of having to give a decisive opinion on the basis of such affidavits and documents as may be produced before it by interested parties. It is desirable that the Election Commission should be vested with the powers of a commission under the Commissions of Enquiry Act, 1952, such as the power to summon witnesses and examine them on oath, the power to compel the production of documents, and the power to issue commissions for the examination of witnesses". We would like to invite the attention of Parliament to these observations, because we think that the difficulty experienced by the Election Commission in rendering its opinion under Art. 103(2) or Art. 192(2) appears to be genuine, and so Parliament may well consider whether the suggestion made by the Chief Election Commissioner should not be accepted and appropriate legislation adopted in that behalf.

The result is, the appeal fails and is dismissed with costs. In view of the fact that the present proceedings have unnecessarily protracted the enquiry before respondent No. 1, we suggest that respondent No. 1 should proceed to consider the matter and forward its opinion to the Governor as early as possible. It is hardly necessary to point out that in case the allegations made against the appellant are found to be valid, and the opinion of respondent No. 1 is in favour of the case set out by respondent No. 2, complications may arise by reason of the Constitutional provision prescribed by Art. 190(3). In view of the said provision, it is of utmost importance that complaints made under Art. 192(1) must be disposed of as expeditiously as possible.

Appeal dismissed.

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