

IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P. (C) 8784/2008 with CMs 16869-70/2008

Reserved on: March 28, 2011

Decision on: April 25, 2011

SUNDER

..... Petitioner

Through: Mr. Laliet Kumar with
Mr. Hari Om Gupta, Advocates.

Versus

RAMESH DUTTA & ORS.

..... Respondents

Through: Mr. Rakesh Kumar Khanna,
Senior Advocate with Mr. Baldev Singh,
Mr. Gajraj Singh, Mr. Sanjay Kumar and
Ms. Seema Rao, Advocates.

CORAM: JUSTICE S. MURALIDHAR

1. Whether Reporters of local papers may be
allowed to see the judgment? No
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes

JUDGMENT
25.04.2011

1. The Petitioner was declared elected to Municipal Ward No. 153, Darya Ganj in the elections held on 5th April 2007. The said election was challenged by Respondent No. 1, Ramesh Dutta, on the ground that the Petitioner had suppressed material information regarding his holding of a licence for a kerosene oil depot ('KOD') at the time of filing of his nomination papers. By the judgment dated 3rd December

2008, the learned Additional District Judge (‘ADJ’) while allowing Election Petition No. 49 of 2007 filed by Respondent No. 1, also declared him elected to Ward No. 153 on the basis of having secured the next highest number of votes. This petition has been filed challenging the said judgment. By an order dated 18th December 2008, this Court stayed the operation of the impugned judgment.

Factual background

2. It may be mentioned at the outset that the election to Ward No. 153, Darya Ganj was a multi-cornered one. Twelve candidates contested the elections. The Petitioner was the official candidate of Bhartiya Janta Party (‘BJP’). Ramesh Dutta, Respondent No. 1, was the official candidate of the Indian National Congress (‘INC’). The total number of votes cast was 8367. The Petitioner got the highest number of votes, i.e., 3853 votes. The next highest number was secured by Respondent No. 1 who got 2526 votes.

3. There were as many as eleven issues framed by the learned ADJ. The four issues which were decided in favour of the election Petitioner, i.e. Respondent No. 1 herein, and on the basis of which the election of the Petitioner was set aside were the following:

(x) Whether the Respondent no. 1 has suppressed the

material information regarding owning of oil depot at the time of filing of his nomination papers before the Election Office? If yes its effect.

(xi) Whether the election has not been conducted fairly by the officials of the election Commissioner and the procedure prescribed under the Act and Rules have not been followed? If yes its effect.

(xii) Whether the petitioner is entitled to the relief of declaration and the election of the Respondent no. 1 is liable to be declared as null and void?

(xiii) Whether in case if the Issue No. 12 is decided in affirmative the petitioner is entitled to be declared as a returned candidate?

4. The learned ADJ clubbed issue Nos. x and xi and concluded that the election of the Petitioner had been materially affected on account of non-declaration of his running a KOD under licence No. 3740 of 1994 in the premises at 86/1, Sarai Kale Khan under the name of Vashisth Kerosene Oil Depot of which he was the sole proprietor.

5. Issue Nos. xii and xiii were again clubbed together and Respondent No. 1 who secured the next highest number of votes after the Petitioner was, in view of Section 17(1)(d)(iv) of the Delhi Municipal Corporation Act, 1957 ('DMC Act'), declared as the duly elected candidate to Ward No. 153 of Darya Ganj.

Submissions of counsel

6. Mr. Laliet Kumar, learned counsel appearing for the Petitioner, submitted that under Sections 17(1)(d)(i) and 17(1)(d)(iv) of the DMC Act, it has to be shown that the result of the election had been materially affected either by improper acceptance of the Petitioner's nomination papers or on account of non-compliance with the provisions of the Act or of any rules or orders thereunder. Mr. Laliet Kumar submitted that the election petition itself did not contain an averment that the election had been materially affected on account of non-disclosure of the holding of a KOD licence. Further it was not specifically pleaded that this resulted in an improper acceptance of the Petitioner's nomination papers in terms of Section 17(1)(d)(i) and (iv) of the DMC Act. Reliance was placed by Mr. Laliet Kumar on the decision of the Supreme Court in ***Kalyan Singh Chouhan v. CP Joshi 2011 (1) SCALE 718***. It is submitted that no objection was raised by Respondent No. 1 at the time of submitting of the nomination papers. Even otherwise the Petitioner had, by a letter dated 6th March 2007, surrendered the licence for running the KOD. He further wrote a letter on 29th March 2007 to the Assistant Commissioner of Department of Food and Civil Supplies. Mr. Laliet Kumar sought to place reliance upon the decision of the Supreme

2002 SC 2112 (‘the **ADR** case’) to urge that the circular issued by the State Election Commission did not have the force of law. In any event, the non-disclosure did not materially affect the result of the election. When ultimately the Petitioner’s surrender of the licence was accepted by the MCD on 10th May 2007, it related back to the date on which it was surrendered which was prior to the date of the election, i.e., 5th April 2007. Finally, referring to the decision of the Division Bench of this Court in **Satish Kumar v. Vikas 177 (2011) DLT 1** it was submitted that the learned ADJ erred in declaring Respondent No. 1 to be elected.

7. Mr. Rakesh Khanna, learned Senior counsel appearing for Respondent No. 1 submitted that the nomination papers of the Petitioner were liable to be rejected in terms of Section 17(1)(d)(i) and 17(1)(d)(iv) of the DMC Act. He referred to Rule 15 of the Delhi Municipal Corporation (Election of Councillors) Rules, 1970 (‘DMC Rules’). He submitted that in light of the decision of the Supreme Court in the **ADR** case, there was no question that the election of the Petitioner was materially affected on account of non-disclosure of the KOD as part of his assets. Mr. Rakesh Khanna sought to distinguish the decision in **Satish Kumar v. Vikas** on the ground that the nomination paper of the Petitioner herein was liable to be rejected at

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the stage of scrutiny whereas the failure to furnish Forms A and B would have resulted in the nomination being liable to be rejected at a later stage. In the circumstances, with the Petitioner not being in the fray at all, Respondent No. 1 would have in any event been declared elected.

Effect of non-disclosure of KOD

8. The first plea to be considered is whether there was sufficient pleading in the election petition on the issue of non-disclosure of the KOD licence as part of the assets of the Petitioner. A perusal of the election petition shows that in para 8 it has been pleaded as under:

“8. That the respondent No. 1 has intentionally suppressed material information when filing his nomination relating to the fact that he has not disclosed among his assets, the kerosene oil depot, the respondent No. 1 is running in shop No. 86/1, Sarai Kale Khan, New Delhi against licence No. 3740/44. That he has further not even the correct valuation of his assets and properties.”

9. In reply to the said para 8, the Petitioner stated as under:

“8. Para 8 of the petition is absolutely wrong, incorrect and hence denied. It is denied that the replying respondent had failed to furnish details about his financial interests or holdings. It is also wrong on the part

of the petitioner to allege or to expect that any person participating in such elections should be a parasite in the society and that such participants ought to have no such business interests. The petitioner is seeking to interpret the law in that behalf only to suit his requirements. While denying all those allegations, the replying respondent submits that the law merely requires that all such participants should not hold any office of profit. It is vehemently denied that the replying respondent had furnished any misleading, incorrect or incomplete information while filing the information papers for election to the Municipal Corporation of Delhi. The answering defendant had already surrendered oil depot on 6.3.07 to the appropriate authority.”

10. The genesis of the requirement for disclosure of assets of candidates at the time of filing nomination papers is in the decision of the Supreme Court in the *ADR* case. The Election Commission of India issued an order dated 28th June 2002 requiring every candidate either of the Parliament or a Legislative Assembly to furnish full and complete information in a format which was enclosed as Annexure-I to the said order. The candidate was also required to file an affidavit of the truth of the disclosure. The order of the Election Commission dated 28th June 2002 made it clear that furnishing of wrong and incomplete information may result in rejection of the nomination

papers, where the suppression of material information is considered by the returning officer to be a defect of substantial character.

11. After the decision of the Supreme Court dated 13th March 2003 in *Peoples Union for Civil Liberties v. Union of India (2003) 4 SCC 399*, by which Section 33B of the Representation of Peoples Act, 1951 was declared as unconstitutional, the Election Commission revised its earlier instructions and issued fresh instructions on 28th March 2003. It required the affidavit to be furnished by each candidate along with nomination papers to be sworn before a Magistrate of First Class or a Notary Public and further stated that non-furnishing of the affidavit shall be liable to result in rejection of the nomination papers. Verification of assets and liabilities by means of summary inquiry by the Returning Officer was dispensed with.

12. Consequent to the above orders on 22nd July 2003, the State Election Commission, by virtue of powers conferred under Section 7 of the DMC Act issued directions making all the directions issued by the Supreme Court applicable to the elections to the Municipal Corporation of Delhi (MCD). *Inter alia*, every candidate was required to furnish “the assets (immovable, movable, bank balances etc.) of a candidate and of his/her spouse and that of deponents.” It

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was further mandated that the affidavit shall be delivered along with the nomination paper, as part of the nomination paper, at all future elections to the MCD. The prescribed proforma of the affidavit was enclosed with the said order.

13. There can be no doubt that the KOD licence held by the Petitioner was part of the assets required to be disclosed by way of an affidavit by the Petitioner with his nomination paper. It made little difference that on 6th March 2007 the Petitioner had written to the Assistant Commissioner, Food and Civil Supplies to surrender his licence. Admittedly, the surrender was not accepted by the time the nomination papers were scrutinised.

14. The Petitioner was admittedly the sole proprietor of M/s Vashisth KOD which continued even on the date of filing of the nomination papers. The Petitioner sought to surrender the KOD licence on 29th March 2007. However the licence was cancelled only on 10th May 2007. The evidence of the witness from the Food and Civil Supplies Department shows that the Petitioner was lifting stocks and selling kerosene oil to the consumers till May 2007, i.e., even after the declaration of the result of the election. This Court in **GNCTD v.**

August 2010] has held that holding of a KOD licence by a Municipal Councillor amounted to holding an office of profit and was therefore a disqualification to continuing as a Councillor.

Conclusions

15. This Court is unable to find any legal infirmity in finding of the learned ADJ that the nomination papers of the Petitioner were, in the above circumstances, improperly accepted. This Court also concurs with the view of the learned ADJ that the election of the Petitioner was materially affected on account of such non-declaration since it deprived the voters of their fundamental right to information and proper exercise of right of choice. Further, the non provision of correct information in the affidavit of the Petitioner was also punishable under Sections 176 and 181 of the Indian Penal Code, particularly since the Petitioner verified an affidavit stating that “nothing material has been concealed therefrom.”

16. Consequently, this Court finds that no ground is made out for interference with the finding of the learned ADJ on issue Nos. x and xi.

17. As regards the directions issued by the learned ADJ declaring

Respondent No. 1 elected on the basis that he holds the next highest number of votes, this Court rejects the submission of Mr. Rakesh Khanna that Respondent No. 1 was correctly declared as elected. This Court has already held in *Vikas v. Satish Kumar 2010 (117) DRJ 305* that merely because the election of the returned candidate is set aside, it will not in terms of Section 19(1)(c) of the DMC Act result in the candidate with the second highest number of votes getting declared as elected. Affirming the aforementioned decision of this Court, the Division Bench in *Satish Kumar v. Vikas* (supra) has further elaborated on this point.

18. In the instant case, it was a multi-cornered contest. It was therefore not possible to determine how the electorate would have voted if it knew that the Petitioner was not in the fray. Consequently, the direction issued by the learned ADJ declaring Respondent No. 1 as the elected candidate is unsustainable in law and is hereby set aside.

19. The writ petition is accordingly disposed of by upholding the finding of the learned ADJ on issue Nos. x and xi but setting aside the finding on issue Nos. xii and xiii. As a result, the seat to municipal Ward No. 153, Darya Ganj is vacant and fresh elections

will be held to fill up the said vacancy in accordance with law.

20. The writ petition and the application are disposed of in the above terms.

S. MURALIDHAR, J

APRIL 25, 2011
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