

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.04.2019

CORAM

THE HONOURABLE Mr.JUSTICE S.MANIKUMAR
AND
THE HONOURABLE Mr.JUSTICE SUBRAMONIUM PRASAD

W.P. (MD) .No.9137 of 2019

V.Abdullah Sait

... Petitioner

v.

- 1.The Chief Election Commissioner of India,
Nirvachansadan,
Ashoka Road, New Delhi - 110 001.
- 2.The Chief Electoral Officer,
State of Tamil Nadu,
Public (Elections) Department,
Secretariat, Fort St.George,
Chennai - 600 009.
- 3.The Chief Secretary,
State of Tamil Nadu,
Secretariat, Fort St.George,
Chennai - 600 009.
- 4.The Home Secretary,
State of Tamil Nadu,
Secretariat, Fort St.George,
Chennai - 600 009.
- 5.The Director General of Police (DGP),
State of Tamil Nadu,
Dr.Radhakrishnan Salai,
Mylapore, Chennai - 600 004.
- 6.The District Collector,
Collectorate,
Tuticorin District.
- 7.The Superintendent of Police,
Office of Superintendent of Police,
Tuticorin District.

8.The District Collector,
Vellore District Collector Office,
Vellore, Tamil Nadu.

9.The Superintendent of Police,
Office of Superintendent of Police,
Vellore District.

10.Mrs.Kanimozhi Karunanidhi
Women's Wing Secretary,
Dravida Munnetra Kazhagam,
DMK Candidtate,
Tuticorin Constituency.

11.Mr.D.M.Kathir Anand,
S/o. Durai Murugan,
Vellore Constituency,
DMK Candidate, Vellore. Respondents

Prayer: The Writ Petition is filed under Article 226 of the Constitution of India, seeking for a Writ of Mandamus, directing the respondents 1 to 9 to take action against the respondents 10 and 11 for violation of model code of conduct, to disqualify them from the contesting polls, consider and pass orders on the basis of petitioner's representation dated 05.04.2019.

For Petitioner : Mr.A.K.Sriram
for Mr.K.Neelamegam

For Respondents : Mr.Niranjan Rajagopalan
for R1, R2, R5 to R9
Mr.E.Manoharan
Additional Government Pleader
for R3 and R4

O R D E R

(The Order of the Court was made by S.Manikumar, J.,)

Alleging that Ms.Kanimozhi, Women's Wing Secretary, Dravida Munnetra Kazhagam, DMK Candidate, Tuticorin Constituency, 10th respondent and Mr. D.M.Kathir Anand, S/o. Durai Murugan, Vellore Constituency, DMK Candidate, Vellore, 11th respondent are indulging in corrupt practices and that a sum of Rs.12 Crores, has been seized from one Mr.Poonsolai Srinivasan, Rs.19 Crores from Mr.Damodaran and Rs.5 Crores from Mr.Afsal Ali and totally Rs.36 Crores and all the above said persons are relatives and assistants of Durai Murugan, M.L.A., Ex.Minister and contending that despite representations have been made to the Chief Election Commissioner, Union of India, New Delhi - 1st

respondent, seeking for disqualification of respondents 10 and 11, no action has been taken and therefore, the petitioner has contended that left with no other opportunity, he has filed the instant Public Interest Litigation for a Writ of Mandamus, directing the respondents 1 to 9 to take action against respondents 10 and 11 for violation of model code of conduct, to disqualify by them from contesting polls, by considering the petitioner's representation dated 05.04.2019.

2. On the above averments, Mr.A.K.Sriram, learned counsel for the petitioner, made submissions and insisted for consideration of petitioner's representation, dated 05.04.2019, by the Chief Election Commissioner, New Delhi - 1st respondent.

3. Responding to the above, Mr.Niranjan Rajagopalan, learned counsel for Election Commission of India, submitted that prayer sought for, should not be granted, for the reason that FIRs have been registered, against respondents 10 and 11 respectively. Citing Sections 8 and 8-A of the Representation of the People Act, 1951, he submitted that mere registration of FIR does not attract disqualification.

4. Learned counsel for the respondent submitted that considering a similar prayer for disqualification of the contestants against whom, charge sheets were filed for heinous and grievous offences, the Hon'ble Supreme Court in Public Interest Foundation and others vs. Union of India, reported in 2019 (3) SCC 224, after considering the statutory provision and law, at Paragraph 25 held as follows :

"thus the prescription as regards disqualification is complete is in view of the language employed in Section 7(b) read with Sections 8 to 10-A of the Act. It is clear as noon day and there is no ambiguity. The legislature has very clearly enumerated the grounds for disqualification and the language of the said provision leaves no room for any new ground to be added or introduced."

It is further held that the legislature has very clearly enumerated the grounds for disqualification and the language of the said provision leaves no room for any new ground to be added or introduced.

5. Insofar as Mr.Kathir Anand, 11th respondent is concerned, on the complaint of one M.Siluppan, the Personnel Assistant, Accounts, Government Gazetted Official to the Collector of Vellore District, Collectorate, Vellore, a case in F.I.R.No.205 of 2019 has been registered on 10.04.2019 under Section 125A(i), 171(E) and 171(B) IPC on the file of the Katpadi Police Station.

6. As regards 10th respondent is concerned, on the complaint of the Flying Squad (FST-3) of Tiruchengode Constituency, the police has registered a case in Crime No.107/2019 under Section 171(H) r/w 171(E) and 143 IPC dated 28.03.2019 against DMK M.L.A M/s.Anitha Radhakrishnan and DMK M.P. Mrs.Kanimozhi and others, on the file of Tiruchengode Police Station.

7. Therefore, Mr.Niranjana Rajagopalan, learned counsel for the Election Commission of India submitted that for the alleged violation of model code of conduct, First Information Report has been registered against the respondents 10 and 11 respectively and therefore, he sought for dismissal of the writ petition.

Heard Mr.A.K.Sriram, learned counsel for the petitioner and Mr.Niranjana Rajagopalan learned counsel for respondents 1, 2, 5 to 9 and Mr.E.Manoharan, learned Additional Government Pleader for respondents 3 and 4 and perused the materials available on record.

8. On an earlier occasion in W.P.No.11744 of 2019, dated 15.04.2019, this Court considered, a similar prayer, as to whether, disqualification can be issued, when the contestant has not been convicted for any criminal case and taking note of the statutory provisions and decision of the Hon'ble Supreme Court in Public Interest Foundation and other V. Union of India and Another, reported in (2019) 3 SCC 224, we ordered as hereunder :

"Added further, Section 100 of the Representation of the People Act, 1951, deals with grounds for declaring election to be void. As per Section 100(1) (d) of the said Act, subject to the provisions of sub-section (2), if the High Court is of opinion, that the result of the election, insofar as it concerns a returned candidate, has been materially affected, (i) by the improper acceptance or any nomination, or (ii) by any corrupt practice committed in the interests of the returned candidate by an agent other than his election agent, or (iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or (iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act, then the High Court shall declare the election of the returned candidate to be void.

19. If Mr.Manzoor Alikhan, is elected, the petitioner is not remediless. In the light of Section 100(1)(d) of the Representation of the People Act, 1951, the petitioner can always approach this Court, by way of election petition for a declaration of the

election results of Mr. Manzoor Alikhan, to be void.

20. Section 8 of the Representation of the People Act, 1951, deals with disqualification on conviction for certain offences. Section 8-A of the said Act, deals with disqualification on the ground of corrupt practices. Sections 8 and 8(A) of the said Act, are extracted hereunder:-

"8. Disqualification on conviction for certain offences.-(1) A person convicted of an offence punishable under-

(a) Section 153-A (offence of promoting enmity between different groups on ground of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony) or Section 171-E (offence of bribery) or Section 171-E (offence of undue influence or personation at an election) or sub-section (1) or sub-section (2) of Section 376 or Section 376-A or Section 376-B or Section 376-C or Section 376-D (offences relating to rape) or Section 498-A (offence of cruelty towards a woman by husband or relative of a husband) or sub-section (2) or sub-section (3) of Section 505 (offence of making statement creating or promoting enmity, hatred or ill-will between classes or offence relating to such statement in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies) of the Indian Penal Code (45 of 1860); or

(b) the Protection of Civil Rights Act, 1955 (22 of 1955), which provides for punishment for the preaching and practice of "untouchability", and for the enforcement of any disability arising therefrom; or

(c) Section 11 (offence of importing or exporting prohibited goods) of the Customs Act, 1962 (52 of 1962); or

(d) Sections 10 to 12 (offence of being a member of an association declared unlawful, offence relating to dealing with funds of an unlawful association or offence relating to contravention of an order made in respect of a notified place) of the Unlawful Activities (Prevention) Act, 1967 (37 of 1967); or

(e) the Foreign Exchange (Regulation) Act, 1973 (46 of 1973); or

(f) the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985); or

(g) Section 3 (offence of committing terrorist acts) or Section 4 (offence of committing disruptive activities) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (28 of 1987); or

(h) Section 7 (offence of contravention of the provisions of Sections 3 to 6) of the Religious Institutions (Prevention of Misuse) Act, 1988 (41 of 1988); or

(i) Section 125 (offence of promoting enmity between classes in connection with the election) or Section 135 (offence of removal of ballot papers from polling stations) or Section 135-A (offence of booth capturing) or clause (a) of sub-section (2) of Section 136 (offence of fraudulently defacing or fraudulently destroying any nomination paper) of this Act; or

(j) Section 6 (offence of conversion of a place of worship) of the Places of Worship (Special Provisions) Act, 1991, or

(k) Section 2 (offence of insulting the Indian National Flag or the Constitution of India) or Section 3 (offence of preventing singing of National Anthem) of the Prevention of Insults to National Honour Act, 1971 (69 of 1971); or

(l) the Commission of Sati (Prevention) Act, 1987 (3 of 1988); or

(m) the Prevention of Corruption Act, 1988 (49 of 1988); or

(n) the Prevention of Terrorism Act, 2002 (15 of 2002);

shall be disqualified, where the convicted person is sentenced to—

(i) only fine, for a period of six years from the date of such conviction;

(ii) imprisonment, from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.

(2) A person convicted for the contravention of—

(a) any law providing for the prevention of hoarding or profiteering; or

(b) any law relating to the adulteration of food or drugs; or

(c) any provisions of the Dowry Prohibition Act, 1961 (28 of 1961);

and sentenced to imprisonment for not less than six months, 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.

(3) A person convicted of any offence and sentenced to imprisonment for not less than two years other than any offence referred to in sub-section (1) or sub-section (2) 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.

(4) Notwithstanding anything in sub-section (1), sub-

section (2) and sub-section (3) a disqualification under either sub-section shall not, in the case of a person who on the date of the conviction is a member of Parliament or the legislature of a State, take effect until three months have elapsed from that date or, if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court.

Explanation.—In this section—

(a) "law providing for the prevention of hoarding or profiteering" means any law, or any order, rule or notification having the force of law, providing for—

(i) the regulation of production or manufacture of any essential commodity;

(ii) the control of price at which any essential commodity may be brought or sold;

(iii) the regulation of acquisition, possession, storage, transport, distribution, disposal, use or consumption of any essential commodity;

(iv) the prohibition of the withholding from sale of any essential commodity ordinarily kept for sale;

(b) "drug" has the meaning assigned to it in the Drugs and Cosmetics Act, 1940 (23 of 1940);

(c) "essential commodity" has the meaning assigned to it in the Essential Commodities Act, 1955 (10 of 1955);

(d) "food" has the meaning assigned to it in the Prevention of Food Adulteration Act, 1954 (37 of 1954).

8-A. Disqualification on ground of corrupt practices.—(1) The case of every person found guilty of a corrupt practice by an order under Section 99 shall be submitted, as soon as may be within a period of three months from the date such order takes effect, by such authority as the Central Government may specify in this behalf, to the President for determination of the question as to whether such person shall be disqualified and if so, for what period:

Provided that the period for which any person may be disqualified under this sub-section shall in no case exceed six years from the date on which the order made in relation to him under Section 99 takes effect.

(2) Any person who stands disqualified under Section 8-A of this Act as it stood immediately before the commencement of the Election Laws (Amendment) Act, 1975 (40 of 1975), may, if the period of such disqualification has not expired, submit a petition to the President for the removal of such disqualification

for the unexpired portion of the said period.

(3) Before giving his decision on any question mentioned in sub-section (1) or on any petition submitted under sub-section (2), the President shall obtain the opinion of the Election Commission on such question or petition and shall act according to such opinion."

21. Reading of the above, makes it clear that disqualification is attracted only on conviction, as explained in the said Act. As rightly contended by Mr.Niranjan Rajagopalan, learned counsel for Election Commission of India, Mr.Manzoor Alikhan, has not been convicted for any of the offences, as stated in Section 8 of the Representation of the People Act, 1951 and therefore no disqualification is attracted. In the case on hand, even FIR in Crime No.2915 of 2017 on the file of the Inspector of Police, Choolaimedu Police Station, Chennai, for the alleged offences, under Section 482 of Cr.P.C., has been quashed by this Court in CrI.O.P.No.1125 of 2018.

22. Added further, on the issue, as to whether, pendency of criminal cases, where charge sheet has been filed for heinous and grievous offence, could be taken as disqualification to contest in a election for MP's and MLA's, the Hon'ble Supreme Court in Public Interest Foundation's case (cited supra) discussed the same and ultimately, at paragraph No.25, ordered that

"thus the prescription as regards disqualification is complete is in view of the language employed in Section 7(b) read with Sections 8 to 10-A of the Act. It is clear as noon day and there is no ambiguity. The legislature has very clearly enumerated the grounds for disqualification and the language of the said provision leaves no room for any new ground to be added or introduced."

23. It is also worthwhile to consider paragraph Nos.2 to 24 of the said judgment, which are reproduced hereunder:

"2. The constitutional functionaries, who have taken the pledge to uphold the constitutional principles, are charged with the responsibility to ensure that the existing political framework does not get tainted with the evil of corruption. However, despite this heavy mandate prescribed by our Constitution, our Indian democracy, which is the world's largest democracy, has seen a steady increase in the level of criminalisation that has been creeping into the Indian polity. This unsettlingly increasing trend of criminalisation of politics, to which our country has been a witness, tends to disrupt the

constitutional ethos and strikes at the very root of our democratic form of government by making our citizenry suffer at the hands of those who are nothing but a liability to our country.

3. The issue that emerges for consideration before this Bench is whether disqualification for membership can be laid down by the Court beyond Articles 102(a) to (d) and the law made by Parliament under Article 102(e). A three-Judge Bench hearing the matter was of the view [Public Interest Foundation v. Union of India, 2016 SCC OnLine SC 1731] that this question is required to be addressed by the Constitution Bench under Article 145(3) of the Constitution. Be it stated, a submission was advanced before the three-Judge Bench that the controversy was covered by the decision in Manoj Narula v. Union of India [Manoj Narula v. Union of India, (2014) 9 SCC 1]. The said submission was not accepted because of the view expressed by Madan B. Lokur, J. in his separate judgment.

4. In the course of hearing, the contour of the question was expanded with enormous concern to curb criminalisation of politics in a democratic body polity. The learned counsel for the petitioners submitted that having regard to the rise of persons with criminal antecedents, the fundamental concept of decriminalisation of politics should be viewed from a wider spectrum and this Court, taking into consideration the facet of interpretation, should assume the role of judicial statesmanship. Mr K.K. Venugopal, learned Attorney General for India and other learned counsel, per contra, would submit that there can be no denial that this Court is the final arbiter of the Constitution and the Constitution empowers this wing of the State to lay down the norms of interpretation and show judicial statesmanship but the said judicial statesmanship should not ignore the fundamental law relating to separation of powers, primary responsibility conferred on the authorities under the respective powers and the fact that no authority should do anything for which the power does not flow from the Constitution. In essence, the submission of Mr Venugopal is that the Court should not cross the "Lakshman Rekha". Resting on the fulcrum of constitutional foundation and on the fundamental principle that if the Court comes to hold that it cannot legislate but only recommend for bringing in a legislation, as envisaged under Article 102(1)(e) of the Constitution, it would not be appropriate to take recourse to any other method for the Simon pure reason

that what cannot be done directly, should not be done indirectly. We shall advert to the said submission at a later stage.

5. Article 102 reads as follows:

"102. Disqualifications for membership.—(1) A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament—

(a) if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder;

(b) if he is of unsound mind and stands so declared by a competent court;

(c) if he is an undischarged insolvent;

(d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State;

(e) if he is so disqualified by or under any law made by Parliament.

Explanation.—For the purposes of this clause a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State by reason only that he is a Minister either for the Union or for such State.

(2) A person shall be disqualified for being a member of either House of Parliament if he is so disqualified under the Tenth Schedule."

6. In this context, we may also refer to Article 191 of the Constitution that deals with disqualifications for membership. It is as follows:

"191. Disqualifications for membership.—(1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State—

(a) if he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder;

(b) if he is of unsound mind and stands so declared by a competent court;

(c) if he is an undischarged insolvent;

(d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State;

(e) if he is so disqualified by or under any law made by Parliament.

Explanation.—For the purposes of this clause, a person

shall not be deemed to hold an office of profit under the Government of India or the Government of any State specified in the First Schedule by reason only that he is a Minister either for the Union or for such State.

(2) A person shall be disqualified for being a member of the Legislative Assembly or Legislative Council of a State if he is so disqualified under the Tenth Schedule."

7. On a perusal of both the articles, it is clear as crystal that as regards disqualification for being chosen as a Member of either House of Parliament and similarly disqualification for being chosen or for being a Member of Legislative Assembly or Legislative Council of a State, the law has to be made by Parliament.

. In Lily Thomas v. Union of India [Lily Thomas v. Union of India, (2013) 7 SCC 653 : (2013) 3 SCC (Civ) 678 : (2013) 3 SCC (Cri) 641 : (2013) 2 SCC (L&S) 811], it has been held: (SCC p. 669, para 26) "26. Articles 102(1)(e) and 191(1)(e) of the Constitution, on the other hand, have conferred specific powers on Parliament to make law providing disqualifications for membership of either House of Parliament or Legislative Assembly or Legislative Council of the State other than those specified in sub-clauses (a), (b), (c) and (d) of clause (1) of Articles 102 and 191 of the Constitution. We may note that no power is vested in the State Legislature to make law laying down disqualifications of membership of the Legislative Assembly or Legislative Council of the State and power is vested in Parliament to make law laying down disqualifications also in respect of Members of the Legislative Assembly or Legislative Council of the State. For these reasons, we are of the considered opinion that the legislative power of Parliament to enact any law relating to disqualification for membership of either House of Parliament or Legislative Assembly or Legislative Council of the State can be located only in Articles 102(1)(e) and 191(1)(e) of the Constitution and not in Article 246(1) read with Schedule VII List I Entry 97 and Article 248 of the Constitution. We do not, therefore, accept the contention of Mr Luthra that the power to enact sub-section (4) of Section 8 of the Act is vested in Parliament under Article 246(1) read with Schedule VII List I Entry 97 and Article 248 of the Constitution, if not in Articles 102(1)(e) and 191(1)(e) of the Constitution."

We have no hesitation in saying that the view expressed above in Lily Thomas [Lily Thomas v. Union

of India, (2013) 7 SCC 653 : (2013) 3 SCC (Civ) 678 : (2013) 3 SCC (Cri) 641 : (2013) 2 SCC (L&S) 811] is correct, for Parliament has the exclusive legislative power to lay down disqualification for membership.

9. In *Manoj Narula v. Union of India*, (2014) 9 SCC 1, the question centred around the interpretation of Article 75 of the Constitution. The core issue pertained to the legality of persons with criminal background and/or charged with offences involving moral turpitude to be appointed as ministers in the Central and the State Governments. The majority referred to the constitutional provisions, namely, Articles 74, 75, 163 and 164, adverted to the doctrine of implied limitation and, in that context, opined thus: (SCC p. 45, para 64)

"64. On a studied scrutiny of the ratio of the aforesaid decisions, we are of the convinced opinion that when there is no disqualification for a person against whom charges have been framed in respect of heinous or serious offences or offences relating to corruption to contest the election, by interpretative process, it is difficult to read the prohibition into Article 75(1) or, for that matter, into Article 164(1) to the powers of the Prime Minister or the Chief Minister in such a manner. That would come within the criterion of eligibility and would amount to prescribing an eligibility qualification and adding a disqualification which has not been stipulated in the Constitution. In the absence of any constitutional prohibition or statutory embargo, such disqualification, in our considered opinion, cannot be read into Article 75(1) or Article 164(1) of the Constitution."

10. There has been advertence to the principle of constitutional silence or abeyance and, in that context, it has been ruled that it is not possible to accept that while interpreting the words "advice of the Prime Minister", it can legitimately be inferred that there is a prohibition to think of a person as a minister if charges have been framed against him in respect of heinous and serious offences including corruption cases under the criminal law. Thereafter, the majority addressed the concepts of "constitutional morality", "constitutional governance" and "constitutional trust" and analysed the term "advice" employed under Article 75(1) and stated that formation of an opinion by the Prime Minister in the context of Article 75(1) is expressed by the use of the said word because of the trust reposed in the Prime Minister under the Constitution and the said advice, to put it

differently, is a constitutional advice. Reference was made to the debate in the Constituent Assembly which had left it to the wisdom of the Prime Minister because of the intrinsic faith in him. Discussing further, it has been stated: (Manoj Narula case [Manoj Narula v. Union of India, (2014) 9 SCC 1] , SCC p. 54, para 96)

"96. ... At the time of framing of the Constitution, the debate pertained to conviction. With the change of time, the entire complexion in the political arena as well as in other areas has changed. This Court, on number of occasions, as pointed out hereinbefore, has taken note of the prevalence and continuous growth of criminalisation in politics and the entrenchment of corruption at many a level. In a democracy, the people never intend to be governed by persons who have criminal antecedents. This is not merely a hope and aspiration of citizenry but the idea is also engrained in apposite executive governance." And again: (SCC p. 55, para 98)

"98. ... That the Prime Minister would be giving apposite advice to the President is a legitimate constitutional expectation, for it is a paramount constitutional concern. In a controlled Constitution like ours, the Prime Minister is expected to act with constitutional responsibility as a consequence of which the cherished values of democracy and established norms of good governance get condignly fructified. The Framers of the Constitution left many a thing unwritten by reposing immense trust in the Prime Minister. The scheme of the Constitution suggests that there has to be an emergence of constitutional governance which would gradually grow to give rise to constitutional renaissance."

11. Lokur, J. opined: (Manoj Narula case [Manoj Narula v. Union of India, (2014) 9 SCC 1] , SCC pp. 70-71, para 132)

"132. While it may be necessary, due to the criminalisation of our polity and consequently of our politics, to ensure that certain persons do not become Ministers, this is not possible through guidelines issued by this Court. It is for the electorate to ensure that suitable (not merely eligible) persons are elected to the legislature and it is for the legislature to enact or not enact a more restrictive law."

Proceeding further, the learned Judge stated: (SCC p. 72, para 137)

"137. In this respect, the Prime Minister is, of course, answerable to Parliament and is under the gaze

of the watchful eye of the people of the country. Despite the fact that certain limitations can be read into the Constitution and have been read in the past, the issue of the appointment of a suitable person as a Minister is not one which enables this Court to read implied limitations in the Constitution."

12. Lokur, J. had also, in his opinion in Manoj Narula case [Manoj Narula v. Union of India, (2014) 9 SCC 1] , reproduced the words of Dr B.R. Ambedkar in the Constituent Assembly on 25-11-1949 and the sentiments echoed by Dr Rajendra Prasad on 26-11-1949. Dr Ambedkar had said: (SCC pp. 72-73, para 138)

"138. ... 'As much defence as could be offered to the Constitution has been offered by my friends Sir Alladi Krishnaswami Ayyar and Mr T.T. Krishnamachari. I shall not therefore enter into the merits of the Constitution. Because I feel, however good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot. The working of a Constitution does not depend wholly upon the nature of the Constitution. The Constitution can provide only the organs of State such as the Legislature, the Executive and the Judiciary. The factors on which the working of those organs of the State depend are the people and the political parties they will set up as their instruments to carry out their wishes and their politics. Who can say how the people of India and their parties will behave? Will they uphold constitutional methods of achieving their purposes or will they prefer revolutionary methods of achieving them? If they adopt the revolutionary methods, however good the Constitution may be, it requires no prophet to say that it will fail. It is, therefore, futile to pass any judgment upon the Constitution without reference to the part which the people and their parties are likely to play.' (CAD Vol. 11, p. 975)"

13. The learned Judge Lokur, J. in Manoj Narula case [Manoj Narula v. Union of India, (2014) 9 SCC 1] reproduced the words of Dr Rajendra Prasad, which ring till today: (Manoj Narula case [Manoj Narula v. Union of India, (2014) 9 SCC 1] , SCC p. 73, para 139)

"139. ... 'Whatever the Constitution may or may not provide, the welfare of the country will depend upon the way in which the country is administered. That will depend upon the men who administer it. It is a trite saying that a country can have only the Government it deserves. Our Constitution has

provisions in it which appear to some to be objectionable from one point or another. We must admit that the defects are inherent in the situation in the country and the people at large. If the people who are elected are capable and men of character and integrity, they would be able to make the best even of a defective Constitution. If they are lacking in these, the Constitution cannot help the country. After all, a Constitution like a machine is a lifeless thing. It acquires life because of the men who control it and operate it, and India needs today nothing more than a set of honest men who will have the interest of the country before them.' (CAD Vol. 11, p. 993)"

14. Kurian Joseph, J., in Manoj Narula case [Manoj Narula v. Union of India, (2014) 9 SCC 1] concurring with the opinion, has stated: (Manoj Narula case [Manoj Narula v. Union of India, (2014) 9 SCC 1] , SCC p. 76, para 152)

"152. No doubt, it is not for the Court to issue any direction to the Prime Minister or the Chief Minister, as the case may be, as to the manner in which they should exercise their power while selecting the colleagues in the Council of Ministers. That is the constitutional prerogative of those functionaries who are called upon to preserve, protect and defend the Constitution. But it is the prophetic duty of this Court to remind the key duty holders about their role in working the Constitution. Hence, I am of the firm view, that the Prime Minister and the Chief Minister of the State, who themselves have taken oath to bear true faith and allegiance to the Constitution of India and to discharge their duties faithfully and conscientiously, will be well advised to consider avoiding any person in the Council of Ministers, against whom charges have been framed by a criminal court in respect of offences involving moral turpitude and also offences specifically referred to in Chapter III of the Representation of the People Act, 1951."

15. The thrust of the matter is whether any disqualification can be read as regards disqualification for membership into the constitutional provisions. Article 102(1) specifies certain grounds and further provides that any disqualification can be added by or under any law made by Parliament. Article 191 has the same character.

16. Chapter III of the Representation of the People Act, 1951 (for brevity, "the Act") deals with disqualification for membership of Parliament and the State Legislatures. Section 7 deals with definitions. It is as follows:

"7. Definitions.—In this Chapter—

(a) "appropriate Government" means in relation to any disqualification for being chosen as or for being a member of either House of Parliament, the Central Government, and in relation to any disqualification for being chosen as or for being a member of the Legislative Assembly or Legislative Council of a State, the State Government;

(b) "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 under the provisions of this Chapter, and on no other ground."

17. The word "disqualified" clearly states that a person be disqualified from being a member under the provisions of the said chapter and/or on no other ground. The words "no other ground" are of immense significance. Apart from the grounds mentioned under Articles 102(1)(a) to 102(1)(d) and Articles 191(1)(a) to 191(1)(d), the other grounds are provided by Parliament and Parliament has provided under Sections 8, 8-A, 9, 9-A, 10 and 10-A which read thus:

"8. Disqualification on conviction for certain offences.—(1) A person convicted of an offence punishable under—

(a) Section 153-A (offence of promoting enmity between different groups on ground of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony) or Section 171-E (offence of bribery) or Section 171-E (offence of undue influence or personation at an election) or sub-section (1) or sub-section (2) of Section 376 or Section 376-A or Section 376-B or Section 376-C or Section 376-D (offences relating to rape) or Section 498-A (offence of cruelty towards a woman by husband or relative of a husband) or sub-section (2) or sub-section (3) of Section 505 (offence of making statement creating or promoting enmity, hatred or ill-will between classes or offence relating to such statement in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies) of the Indian Penal Code (45 of 1860); or

(b) the Protection of Civil Rights Act, 1955 (22 of 1955), which provides for punishment for the preaching and practice of "untouchability", and for the enforcement of any disability arising therefrom; or

(c) Section 11 (offence of importing or exporting prohibited goods) of the Customs Act, 1962 (52 of 1962); or

(d) Sections 10 to 12 (offence of being a member of an association declared unlawful, offence relating to dealing with funds of an unlawful association or offence relating to contravention of an order made in respect of a notified place) of the Unlawful Activities (Prevention) Act, 1967 (37 of 1967); or

(e) the Foreign Exchange (Regulation) Act, 1973 (46 of 1973); or

(f) the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985); or

(g) Section 3 (offence of committing terrorist acts) or Section 4 (offence of committing disruptive activities) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (28 of 1987); or

(h) Section 7 (offence of contravention of the provisions of Sections 3 to 6) of the Religious Institutions (Prevention of Misuse) Act, 1988 (41 of 1988); or

(i) Section 125 (offence of promoting enmity between classes in connection with the election) or Section 135 (offence of removal of ballot papers from polling stations) or Section 135-A (offence of booth capturing) or clause (a) of sub-section (2) of Section 136 (offence of fraudulently defacing or fraudulently destroying any nomination paper) of this Act; or

(j) Section 6 (offence of conversion of a place of worship) of the Places of Worship (Special Provisions) Act, 1991, or

(k) Section 2 (offence of insulting the Indian National Flag or the Constitution of India) or Section 3 (offence of preventing singing of National Anthem) of the Prevention of Insults to National Honour Act, 1971 (69 of 1971); or

(l) the Commission of Sati (Prevention) Act, 1987 (3 of 1988); or

(m) the Prevention of Corruption Act, 1988 (49 of 1988); or

(n) the Prevention of Terrorism Act, 2002 (15 of 2002);

shall be disqualified, where the convicted person is sentenced to—

(i) only fine, for a period of six years from the date of such conviction;

(ii) imprisonment, from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.

(2) A person convicted for the contravention of—

(a) any law providing for the prevention of hoarding or profiteering; or

(b) any law relating to the adulteration of food or

drugs; or

(c) any provisions of the Dowry Prohibition Act, 1961 (28 of 1961);

and sentenced to imprisonment for not less than six months, 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.

(3) A person convicted of any offence and sentenced to imprisonment for not less than two years other than any offence referred to in sub-section (1) or sub-section (2) 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.

(4) Notwithstanding anything in sub-section (1), sub-section (2) and sub-section (3) a disqualification under either sub-section shall not, in the case of a person who on the date of the conviction is a member of Parliament or the legislature of a State, take effect until three months have elapsed from that date or, if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court.

Explanation.—In this section—

(a) "law providing for the prevention of hoarding or profiteering" means any law, or any order, rule or notification having the force of law, providing for—

(i) the regulation of production or manufacture of any essential commodity;

(ii) the control of price at which any essential commodity may be brought or sold;

(iii) the regulation of acquisition, possession, storage, transport, distribution, disposal, use or consumption of any essential commodity;

(iv) the prohibition of the withholding from sale of any essential commodity ordinarily kept for sale;

(b) "drug" has the meaning assigned to it in the Drugs and Cosmetics Act, 1940 (23 of 1940);

(c) "essential commodity" has the meaning assigned to it in the Essential Commodities Act, 1955 (10 of 1955);

(d) "food" has the meaning assigned to it in the Prevention of Food Adulteration Act, 1954 (37 of 1954).

8-A. Disqualification on ground of corrupt practices.—

(1) The case of every person found guilty of a corrupt practice by an order under Section 99 shall be submitted, as soon as may be within a period of three months from the date such order takes effect, by such authority as the Central Government may specify in

this behalf, to the President for determination of the question as to whether such person shall be disqualified and if so, for what period:

Provided that the period for which any person may be disqualified under this sub-section shall in no case exceed six years from the date on which the order made in relation to him under Section 99 takes effect.

(2) Any person who stands disqualified under Section 8-A of this Act as it stood immediately before the commencement of the Election Laws (Amendment) Act, 1975 (40 of 1975), may, if the period of such disqualification has not expired, submit a petition to the President for the removal of such disqualification for the unexpired portion of the said period.

(3) Before giving his decision on any question mentioned in sub-section (1) or on any petition submitted under sub-section (2), the President shall obtain the opinion of the Election Commission on such question or petition and shall act according to such opinion.

9. Disqualification for dismissal for corruption or disloyalty.—(1) A person who having held an office under the Government of India or under the Government of any State has been dismissed for corruption or for disloyalty to the State shall be disqualified for a period of five years from the date of such dismissal.

(2) For the purposes of sub-section (1), a certificate issued by the Election Commission to the effect that a person having held office under the Government of India or under the Government of a State, has or has not been dismissed for corruption or for disloyalty to the State shall be conclusive proof of that fact:

Provided that no certificate to the effect that a person has been dismissed for corruption or for disloyalty to the State shall be issued unless an opportunity of being heard has been given to the said person.

9-A. Disqualification for Government contracts, etc.—A person shall be disqualified if, and for so long as, there subsists a contract entered into by him in the course of his trade or business with the appropriate Government for the supply of goods to, or for the execution of any works undertaken by, that Government.

Explanation.—For the purposes of this section, where a contract has been fully performed by the person by whom it has been entered into with the appropriate Government, the contract shall be deemed not to subsist by reason only of the fact that the Government has not performed its part of the contract either

wholly or in part.

10. Disqualification for office under Government company.—A person shall be disqualified if, and for so long as, he is a managing agent, manager or secretary of any company or corporation (other than a cooperative society) in the capital of which the appropriate Government has not less than twenty-five per cent share.

10-A. Disqualification for failure to lodge account of election expenses.—If the Election Commission is satisfied that a person—

(a) has failed to lodge an account of election expenses within the time and in the manner required by or under the Act, and

(b) has no good reason or justification for the failure,

the Election Commission shall, by order published in the Official Gazette, declare him to be disqualified and any such person shall be disqualified for a period of three years from the date of the order."

18. From the aforesaid, it is decipherable that Section 8 deals with disqualification on conviction for certain offences. Section 8-A provides for disqualification on ground of corrupt practices. Section 9 provides for the disqualification for dismissal for corruption or disloyalty. Section 9-A deals with the situation where there is subsisting contract between the person and the appropriate government. Section 10 lays down disqualification for office under government company and Section 10-A deals with disqualification for failure to lodge account of election expenses. Apart from these disqualifications, there are no other disqualifications and, as is noticeable, there can be no other ground. Thus, disqualifications are provided on certain and specific grounds by the legislature. In such a state, the legislature is absolutely specific.

19. The submission of the learned counsel appearing for the petitioners is that the law-breakers should not become law-makers and there cannot be a paradise for people with criminal antecedents in Parliament or the State Legislatures. Reference has been made to the recommendations of the Law Commission which has seriously commented on the prevalent political atmosphere being dominated by people with criminal records.

20. It has also been highlighted by the petitioners that criminalisation in politics is on the rise and the same is a documented fact and recorded by various committee reports. The petitioners also

highlight that the doctrine of fiduciary relationship has been extended to several constitutional posts and that if members of Public Service Commission, Chief Vigilance Commissioner and the Chief Secretary can undergo the test of integrity check and if "framing of charge" has been recognised as a disqualification for such posts, then there is no reason to not extend the said test of "framing of charge" to the posts of Members of Parliament and State Legislatures as well. To further accentuate this stand, the petitioners point out that such persons hold the posts in constitutional trust and can be made subject to rigours and fetters as the right to contest elections is not a fundamental right but a statutory right or a right which must confirm to the constitutional ethos and principles.

21. The petitioners are attuned to the principle of "presumption of innocence" under our criminal law. But they are of the opinion that the said principle is confined to criminal law and that any proceeding prior to conviction, such as framing of charge for instance, can become the basis to entail civil liability of penalty. The petitioners, therefore, take the stand that debarring a person facing charges of serious nature from contesting an election does not lead to creation of an offence and it is merely a restriction which is distinctively civil in nature.

22. The intervenor organisation has also made submissions on a similar note as that of the petitioners to the effect that persons charged for an offence punishable with imprisonment for five years or more are liable to be declared as disqualified for being elected or for being a Member of Parliament as a person charge-sheeted in a crime involving moral turpitude is undesirable for a job under the government and it is rather incongruous that such a person can become a law-maker who then control civil servants and other government machinery and, thus, treating legislators on a different footing amounts to a violation of Article 14 of the Constitution.

23. Mr Venugopal, learned Attorney General for India, refuting the aforesaid submission, would urge that Parliament may make law on the basis of the recommendations of the Law Commission but this Court, as a settled principle of law, should not issue a mandamus to Parliament to pass a legislation and can only recommend. That apart, submits Mr Venugopal, that when there are specific constitutional provisions and the statutory law, the Court should leave it to Parliament.

24. It is well settled in law that the court cannot legislate. Emphasis is laid on the issuance of guidelines and directions for rigorous implementation. With immense anxiety, it is canvassed that when a perilous condition emerges, the treatment has to be aggressive. The petitioners have suggested another path. But, as far as adding a disqualification is concerned, the constitutional provision states the disqualification, confers the power on the legislature, which has, in turn, legislated in the imperative."

24. In the light of the statutory provisions, and the orders passed by this Court in Crl.O.P.No.1125 of 2018 and Crl.O.P.Sr.No.6139 of 2019 respectively, extracted in the foregoing paragraphs, facts stated in the supporting affidavit to this writ petition, are nothing but repetition, the same cannot be considered, for issuance of Mandamus. Prayer sought for, is rejected."

10. The above decision in W.P.No.11744 of 2019, dated 15.04.2019, is squarely applicable to the facts of this case. The First Information Report has been registered against the respondents 10 and 11 respectively. Thereafter direction to take action on the representation dated 05.04.2019, cannot be granted. Disqualification cannot ordered when there is no conviction. Hence, writ petition is dismissed. No costs.

Sd/-

Assistant Registrar (CS-IV)

//True Copy//

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Sub Assistant Registrar

To

1. The Chief Election Commissioner of India,
Nirvachansadan, Ashoka Road, New Delhi - 110 001.
2. The Chief Electoral Officer,
State of Tamil Nadu,
Public (Elections) Department,
Secretariat, Fort St.George,
Chennai - 600 009.
3. The Chief Secretary,
State of Tamil Nadu,
Secretariat, Fort St.George,
Chennai - 600 009.

4.The Home Secretary,
State of Tamil Nadu,
Secretariat, Fort St.George,
Chennai - 600 009.

5.The Director General of Police (DGP),
State of Tamil Nadu,
Dr.Radhakrishnan Salai,
Mylapore, Chennai - 600 004.

6.The District Collector,
Collectorate,
Tuticorini District.

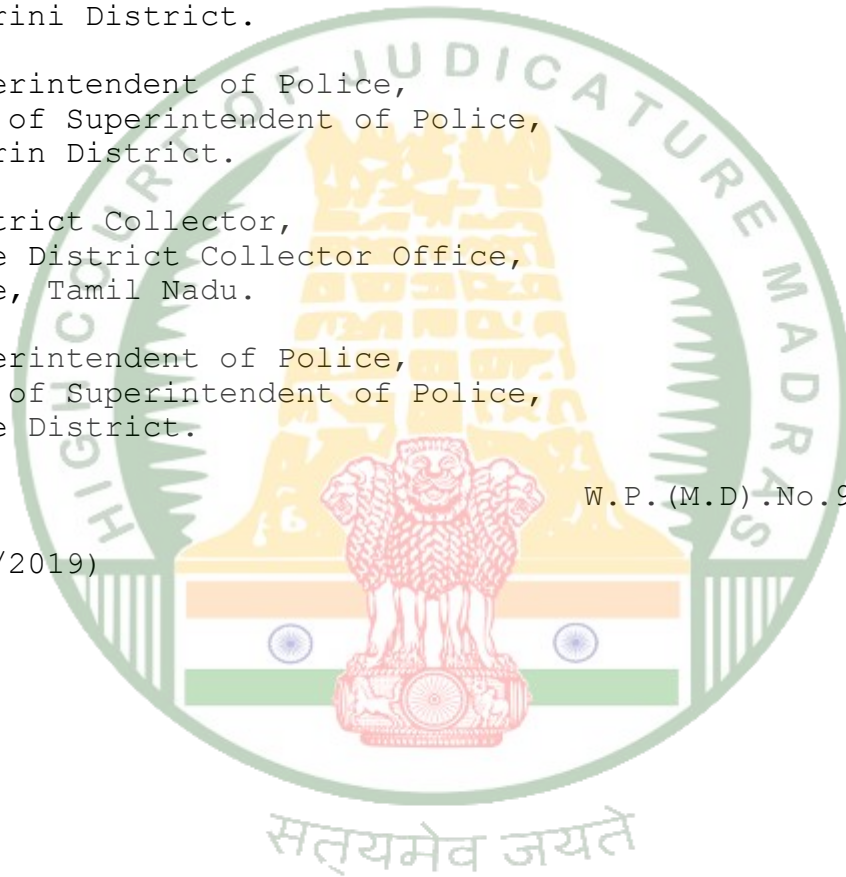
7.The Superintendent of Police,
Office of Superintendent of Police,
Tuticorin District.

8.The District Collector,
Vellore District Collector Office,
Vellore, Tamil Nadu.

9.The Superintendent of Police,
Office of Superintendent of Police,
Vellore District.

GJ(CO)
SSM(16/04/2019)

W.P.(M.D).No.9137 of 2019



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