

(2018) 09 SC CK 0076

Supreme Court Of India

Case No: Writ Petition (Civil) No. 330 Of 2016

Lok Prahari, Through Its General
Secretary S.N. Shukla

APPELLANT

Vs

Election Commission Of India &
Ors

RESPONDENT

Date of Decision: Sept. 26, 2018

Acts Referred:

- Constitution of India 1950 - Article 32, 91, 101(3)(2), 102, 102(1)(e), 103, 190(3)(a), 191, 191(1)(e), 192
- Indian Penal Code, 1860 - Section 353, 366, 376, 504, 506
- Representation of the People Act 1951 - Section 8, 8(1), 8(2), 8(3), 8(4)
- Code of Criminal Procedure 1973 - Section 389, 389(1)

Citation: AIR 2018 SC 4675 : (2018) 14 Scale 107 : (2018) 4 RCR(Civil) 687 : (2018) SCR 169

Hon'ble Judges: Dipak Misra, CJ; A.M. Khanwilkar, J; D Y Chandrachud, J

Bench: Full Bench

Advocate: Mohit D. Ram

Final Decision: Disposed Off

Judgement

Dr Dhananjaya Y Chandrachud, J

1 The petitioner, Lok Prahari, is a society registered under the Societies™ Registration Act 1860 with objects pertaining to public governance and administration. It has invoked the jurisdiction of this Court under Article 32 of the Constitution, in the present Public Interest Litigation through its General Secretary, who appeared in person. The following amongst other reliefs have been sought:

1. Declare that since the law does not provide for stay of conviction, even in case of stay of conviction by the appellate court for an offence

attracting disqualification under Section 8 of RP Act, 1951, any such stay order does not have the effect of wiping out the disqualification and reviving

the membership with retrospective effect and consequently, the seat of the concerned member is deemed to have become vacant with effect from the date of conviction in terms of Article 101(3)(a) and 190(3)(a) of the Constitution.

2. Declare that as a consequence of the declaration as per 1 above, any member of Parliament or State legislature who becomes subject to

disqualification mentioned in Article 102(1)(e) or 190(1)(e) shall be liable to penalty under Article 104/193 notwithstanding any order of the appellate/

revisional court purporting to stay his conviction for an offence attracting disqualification mentioned in Section 8 of RP Act, 1951....

3. Issue a writ, order or direction in the nature of Mandamus to the respondent no. 1 to issue within 24 hours of receipt of certified copy of the

judgment and order regarding sentence the notification regarding disqualification and consequent vacancy of the seat of the concerned

MP/MLA/MLC with effect from the date of his/her conviction as a result of his/her disqualification for an offence under Section 8(1)(2) and (3) of

the Representation of the People Act, 1951.

4. Issue a writ, order or direction in the nature of Mandamus to the respondent no. 1 to ensure action for filing the vacancy of the seat of a member of

Parliament/State legislature as per Section 151 of the RP Act, 1951 disregarding any order of the appellate/ revisional court purporting to stay of

conviction for an offence attracting disqualification mentioned in Section 8 of RP Act, 1951....

2. An erstwhile member of the Legislative Assembly in the State of Uttar Pradesh was convicted of offences under Sections 353, 504 and 506 of the

Penal Code and was sentenced to imprisonment. In appeal, the District Court stayed the execution of the sentence and of the conviction.

3. The petitioner instituted a Public Interest Litigation before the Lucknow Bench of the High Court of Allahabad, seeking a declaration that the MLA stood disqualified notwithstanding the stay granted by the Sessions Judge. The PIL was dismissed by the High Court on the ground that since the

appellate court stayed the conviction, the disqualification, which would otherwise stand attracted, would not operate from the date on which the conviction has been stayed.

4 The petitioner urges that the seat held by a Member of Parliament or of the State legislature becomes vacant upon a disqualification being incurred

under Article 102 or Article 191, respectively. According to the petitioner, once the disqualification is incurred under Section 8 of the Representation

of the People Act 1951 read with Article 102(1)(e) or Article 191(1)(e), the seat becomes vacant effective from the date of conviction. Relying on the

decision of this Court in *B R Kapur v State of Tamil Nadu* (2001) 7 SCC 231, the petitioner contends that under Section 389 of Cr.P.C. the appellate

court does not have the power to stay conviction and can stay only the execution of sentence.

Article 102 of the Constitution provides thus:

â€œ102. (1) A person shall be disqualified for being chosen as, and for being, a member of either House of Parliamentâ€" (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.â€"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 [(2) A person shall be disqualified for being a

member of either House of Parliament if he is so disqualified under the Tenth Schedule.]â€

Article 191 of the Constitution provides a disqualification in similar terms for membership of a legislative assembly or legislative council of a state.

The relevant provision in Section 8 of the Representation of the People Act 1951 reads thus:

â€œ8. Disqualification on conviction for certain offences.â€

[(1) A person convicted of an offence punishable underâ€

(a) section 153A (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 171E (offence of bribery) or section 171F (offence of undue influence or personation at an

election) or sub-section (1) or sub-section (2) of section 376 or section 376A or section 376B or section 376C or section 376D (offences relating to

rape) or section 498A (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 â€œuntouchabilityâ€, 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 section 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 135A (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; 1 [or]

[(j) section 6 (offence of conversion of a place or 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) 4 [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 toâ€

(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 ofâ€

(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, 6 [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.]â€

5 It has been contended by the petitioner that there is no provision in the Constitution or in the Representation of the People Act 1951 to the effect that

upon a subsequent stay of conviction by the appellate or revisional court, the disqualification shall stand wiped out retrospectively and that the membership of a convicted Member of Parliament or of the Legislative Assembly or Council shall get revived despite the vacancy having occurred from the date of conviction. It has been urged that in the absence of any constitutional or statutory provision, stay of conviction can only operate prospectively to enable a person to contest an election again since membership of the legislature terminates instantly from the date of conviction.

6 In response to the present proceedings, a counter affidavit dated 10 April, 2015 has been filed on behalf of the Election Commission of India stating that:

- i) The Election Commission of India supports the first prayer in the present Public Interest Litigation;
- ii) The Election Commission of India has issued instructions on 13 October 2015 by which it has required the Chief Secretaries to issue appropriate instructions to the department dealing with prosecutions in States and Union Territories to ensure that cases of conviction of sitting Members of Parliament or of the State legislature are brought to the notice of the Speaker or Chairman of the House and the Chief Electoral Officer of the State along with the order of conviction within seven days of the order;
- iii) In the decision of this Court in *Lily Thomas v Union of India* (2013) 7 SCC 653 it was observed that there is an automatic disqualification upon conviction and there is no question of postponing the effect of the disqualification on the ground of giving the member of the legislature an opportunity to exhaust the remedy of appeal and a subsequent stay of conviction cannot retrospectively cure the disqualification; and
- iv) For the purpose of filling the seat which has fallen vacant, it would not be necessary to await the decision of the President or Governor under Articles 103 and 192. No decision by the President or Governor is required on the question of disqualification arising out of conviction. In view of the decision in *P V Narasimha Rao v State (CBI/SPE)* (1998) 4 SCC 626, only a "disputed" question of disqualification is to be referred to the President or Governor.

7 The Union government has opposed the petition. In the counter affidavit which has been filed on behalf of the Union of India through the Secretary in the Department of Justice, Ministry of Law and Justice, it has been submitted that the issues raised in the present petition have already been considered and decided in the decision of this Court in Lily Thomas (supra). Moreover, it has been submitted that no challenge has been addressed in the present petition to any provision of the Act or the Rules made under it. The petitioner has only relied on the provisions of law and on judicial pronouncements on the subject of disqualification on conviction.

8 In response to the Counter affidavit filed by the first Respondent, a Rejoinder dated 20 February 2017 has been filed by the petitioner stating that:

i) The role of the Election Commission commences immediately with the conviction of a sitting legislator. The EC need not await the receipt of a notification regarding the disqualification and of the vacancy in the seat by the Secretariat of the legislative body; and

ii) There exists no legal requirement of a notification regarding the vacancy in the seat in view of the categorical provision in Article 101(3)(2) and Article 190(3)(a) of the Constitution that the seat becomes vacant upon conviction.

9 In response to the Counter affidavit filed by the second Respondent, a Rejoinder dated 10 November 2017 has been filed by petitioner submitting that revival of membership retrospectively after a conviction is stayed, will open a floodgate with convicted MPs/ MLAs/ MLCs approaching the appellate/ revisional court to get a stay on conviction enabling them to continue even without the protection of Section 8(4) of the Representation of the People Act 1951.

10 Section 3894 of the Code of Criminal Procedure, 1973, empowers the appellate court, pending an appeal by a convicted person and for reasons to be recorded in writing to order that the execution of a sentence or order appealed against, be suspended. In the decision in Rama Narang v Ramesh Narang (1995) 2 SCC 513, a Bench of three judges of this Court examined the issue as to whether the court has the power to suspend a conviction under Section 389 (1). This Court held that an order of conviction by itself is not capable of execution under the Code of Criminal Procedure, 1973.

But in certain situations, it can become executable in a limited sense upon it resulting in a disqualification under other enactments. Hence, in such a case, it was permissible to invoke the power under Section 389 (1) to stay the conviction as well. This Court held:

4 Section 389 provides as follows :

â€œSuspension of sentence pending the appeal; release of appellant on bail.

(1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the 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.

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of an appeal by a convicted person to a Court subordinate thereto.

(3) Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall,-

(i) where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or

(ii) where the offence of which such person has been convicted is a bailable one, and he is on bail, order that the convicted person be released on bail,

unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the

Appellate Court under sub- section (1); and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

(4) When the appellant is ultimately sentenced to imprisonment for a term or to imprisonment for life, the time during which he is so released shall be excluded in computing the term for which he is so sentenced.â€

â€œ19. 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.â€

11 In Navjot Singh Sidhu v State of Punjab AIR 2007 SC 1003 a Bench of two learned judges of this Court held that a stay of the order of conviction

by an appellate court is an exception, to be resorted to in a rare case, after the attention of the appellate court is drawn to the consequences which

may ensue if the conviction is not stayed. The court held:

â€œThe legal position is, therefore, clear that an appellate Court can suspend or grant stay of order of conviction. But 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. Unless the

attention of the Court is drawn to the specific consequences that would follow on account of the conviction, the person convicted cannot obtain an

order of stay of conviction. Further, grant of stay of conviction can be resorted to in rare cases depending upon the special facts of the case.â€

12 The above position was reiterated by a Bench of three judges of this Court in Ravikant S Patil v Sarvabhouma S Bagali (2007) 1 SCC 673 , after

adverting to the earlier decisions on the issue, viz. Rama Narang v Ramesh Narang (supra), State of Tamil Nadu v A. Jaganathan (1996) 5 SCC 329 ,

K.C. Sareen v CBI, Chandigarh (2001) 6 SCC 584 , B.R. Kapur v State of T.N. (supra) and State of Maharashtra v Gajanan (2003) 12 SCC 432.

This Court concluded as follows:-

â€œIt 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. As 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.â€

13 In Lily Thomas (supra), it was urged that in the absence of Section 8(4), a Member of Parliament or of the State Legislature would be left without a remedy even if the conviction was â€œfrivolousâ€. Rejecting the submission, this Court held (relying on Ravi Kant Patil (supra)):

â€œIn the aforesaid case, a contention was raised by the respondents that the appellant was disqualified from contesting the election to the Legislative Assembly under subsection (3) of Section 8 of the Act as he had been convicted for an offence punishable under Sections 366 and 376 of the Penal Code and it was held by the three-Judge Bench that as the High Court for special reasons had passed an order staying the conviction, the disqualification arising out of the conviction ceased to operate after the stay of conviction. Therefore, the disqualification under sub-sections (1), (2) or (3) of Section 8 of the Act will not operate from the date of order of stay of conviction passed by the appellate court under Section 389 of the Code or the High Court under Section 482 of the Code.â€ Id at page 673

14 These decisions have settled the position on the effect of an order of an appellate court staying a conviction pending the appeal. Upon the stay of a conviction under Section 389 of the Cr.P.C., the disqualification under Section 8 will not operate. The decisions in Ravi Kant Patil and Lily Thomas conclude the issue. Since the decision in Rama Narang, it has been well-settled that the appellate court has the power, in an appropriate case, to stay the conviction under Section 389 besides suspending the sentence. The power to stay a conviction is by way of an exception. Before it is exercised,

the appellate court must be made aware of the consequence which will ensue if the conviction were not to be stayed. Once the conviction has been stayed by the appellate court, the disqualification under sub-sections 1, 2 and 3 of Section 8 of the Representation of the People Act 1951 will not operate. Under Article 102(1)(e) and Article 191(1)(e), the disqualification operates by or under any law made by Parliament. Disqualification under the above provisions of Section 8 follows upon a conviction for one of the listed offences.

Once the conviction has been stayed during the pendency of an appeal, the disqualification which operates as a consequence of the conviction cannot take or remain in effect. In view of the consistent statement of the legal position in Rama Narang and in decisions which followed, there is no merit in the submission that the power conferred on the appellate court under Section 389 does not include the power, in an appropriate case, to stay the conviction. Clearly, the appellate court does possess such a power. Moreover, it is untenable that the disqualification which ensues from a conviction will operate despite the appellate court having granted a stay of the conviction. The authority vested in the appellate court to stay a conviction ensures that a conviction on untenable or frivolous grounds does not operate to cause serious prejudice. As the decision in Lily Thomas has clarified, a stay of the conviction would relieve the individual from suffering the consequence inter alia of a disqualification relatable to the provisions of sub-sections 1, 2 and 3 of Section 8.

15 Finally, we may address the relief which has been sought in prayer clause 5 by which a direction has been sought to the Union Government through the Secretary in the Department of Justice, Ministry of Law and Justice, the second Respondent. Prayer clause 5 reads as follows :

“(i) issue a writ, order or direction in the nature of the Mandamus to the respondent no. 2 to-

(i) issue a circular to the Registrar General/Registrars of all High Courts to issue suitable instructions to all District and Sessions Judges to ensure that

2 certified copies of the judgments in cases attracting disqualification of a sitting MP/MLA/MLC under Article 102/191 of the Constitution are made

available to the state counsel within 24 hours from the delivery of order regarding sentence for submission to the concerned District Magistrate,

(ii) issue a circular to the Chief Secretaries of the States/Union Territories for issuing suitable instructions to District Magistrates and the District

Government Counsel to send by speed post/special messenger one certified copy of the judgment and order regarding sentence to the Chief Election

Officer of the state and the other certified copy to the Secretary General/Principal Secretary/Secretary of the concerned House (Lok Sabha/Rajya

Sabha/Legislative Assembly/Legislative Council.â€

16 No such direction can be issued by the Secretary in the Department of Justice to the Registrars General of the High Courts. Moreover, following

the implementation of the e-courts project, certified copies of judgments are made available across all courts in a streamlined manner. The affidavit

filed by the Election Commission of India indicates that the Commission has already issued instructions on 13 October 2015 to the Chief Secretaries of

all states to ensure that necessary steps are taken to bring to the notice of the Speaker or Chairman as the case may be of the House and the Chief

Electoral Officer of the state, an order of conviction within a period of seven days of the passing of the order. The Election Commission is sufficiently

empowered to take appropriate steps in accordance with law. No further directions are necessary in that regard.

17 The writ petition shall accordingly stand dismissed. Pending application, if any, is accordingly disposed of. There shall be no order as to costs.