e-ISSN 2582-4570

DISQUALIFICATION ATTACHING TO CONVICTION UNDER THE PROBATION OF OFFENDERS ACT, 1958

Debajit Kumar Sarmah[*]

Abstract

Different statutes in India have different standards of disqualification attaching to conviction. In relation to the Probation of Offenders Act, the standard of disqualification and the interpretation given by various decisions of the Supreme Court to it requires reconsideration. The necessity for the same arises out of the philosophical underpinning in which the law of probation was enacted way back in 1958. The present law is not sufficiently addressing the concerns of the young offenders below the age of 21 years though the mandate of law is to give maximum benefit to such offenders. The various Supreme Court's judgments are also not very categorical and explicit of such a concern. Whereas, the Juvenile Justice Act as amended from time to time, is a progressive legislation from that perspective. The paper elucidates different parameters to assess the present law and practice of disqualification attaching to conviction under the Probation of Offenders Act, 1958.

I. INTRODUCTION

During the 19th century the world witnessed a paradigm shift in the approach towards crime and punishment with the emergence of the Positive School of Criminology led by *Cesare Lombroso, Raffael Garofalo* and *Enrico Ferri*. The Positivists were influenced by the spirit of renaissance, applied scientific methods in the study of crime and established through empirical studies about various physiological, psychological, social and economic factors in crime causation. The entire philosophy changed from punishment fitting into the crime during the Classical School to punishment fitting into the criminal during the Positive School era. This understanding led to recognition of several non-punitive experiments grounded on individualized treatment of offenders and Probation is a classic example of such an experiment.

Considered as one of the most advanced reformative techniques of punishments, the idea of probation was for the first time developed by *John Augustus* in 1841 in the USA and was put into practice in the year 1878. The word 'Probation' has a latin origin in the word *'probatum'* meaning *'the act of proving'*. In common parlance, Probation means when a particular sentence is suspended by a court based on objective assessment of an offender and the offender is allowed to stay in community instead of prison for a particular duration of time with or without supervision under pre-determined conditions. In other words, the benefit of

[*] Assistant Professor, Tezpur University, Assam.

Probation can be given only when the guilt of an offender is established by the court, the offender is convicted and a sentence is to be imposed. The advantages of the system of Probation are twofold-it gives reformative opportunities to an offender in one hand and on the other hand, the offender personal liberties are adequately safeguarded which is not possible when someone imprisoned.

United States of America was the first country in the world to have a law on probation in 1878. In India, the Jails Committee Report of 1919-1920 (Mulla Committee), visit of UNO expert on Prison Reforms W.C. Reckless in 1951 and the All India Conference of Inspectors General of Prisons at Mumbai in 1952 were instrumental in defining the legislative history of Probation for the country. However, it must be mentioned here that the Code of Criminal Procedure, 1898 also contained a provision relating to release of offenders on Probation in section 562 of the Code and that was in fact the first statutory recognition of the idea of Probation in India.

II. SPECIFIC PROVISIONS DEALING WITH DISQUALIFICATION IN LAWS OF PROBATION

The Probation of Offenders Act, 1958has 19 sections and deals with the release of offenders on probation or after due admonition. The law is applicable throughout the territory of India. Removal of disqualification attaching to conviction is being dealt under section 12 of the Act, which provides as under:

> Notwithstanding anything contained in any other law, a person found guilty of an offence and dealt with under the provisions of section 3 or section 4 shall not suffer disqualification, if any, attaching to a conviction of an offence under such law: Provided that nothing in this section shall apply to a person who, after his release under section 4 is subsequently sentenced for the original offence.

The Code of Criminal Procedure, 1972whichalso provides for release of offenders less than twenty one years of age on probation of good conduct or after admonition in Section 360 of the Code, however, does not have similar benefit concomitant to it of the nature of removal of disqualification attaching to conviction.

III. ANALOGOUS PROVISIONS UNDER CHILDREN RELATED LAWS

Children laws in the country always have analogous provision dealing with removal of disqualifications attached to their wrong-doing. The word ‘conviction’, though being used in

some legislations, should ideally be not used in cases of children as because such terminologies are philosophically not appropriate to be used for children. Following are some of the provisions in law related with children in respect of disqualification:

Section 25 of the Children Act, 1960

Removal of disqualification attaching to conviction: Notwithstanding anything contained in any other law, a child who has committed an offence and has been dealt with under the provisions of this Act shall not suffer disqualification, if any, attaching to a conviction of an offence under such law.

Section 24 of the Juvenile Justice (Care and Protection of Children) Act, 2015

Removal of disqualification on the findings of an offence: (1) Notwithstanding anything contained in any other law for the time being in force, a child who has committed an offence and has been dealt with under the provisions of this Act shall not suffer disqualification, if any, attached to a conviction of an offence under such law:

Provided that in case of a child who has completed or is above the age of sixteen years and is found to be in conflict with law by the Children's Court under clause (i) of sub-section (1) of section 19, the provisions of sub-section (1) shall not apply.

(2) The Board shall make an order directing the Police, or by the Children's court to its own registry that the relevant records of such conviction shall be destroyed after the expiry of the period of appeal or, as the case may be, a reasonable period as may be prescribed:

Provided that in case of a heinous offence where the child is found to be in conflict with law under clause (i) of sub-section (1) of section 19, the relevant records of conviction of such child shall be retained by the Children's Court.

Earlier JJ Act

The similar provisions were also contained in the earlier Juvenile Justices Act of 1986 and 2010 and Rules made there under. Under the Juvenile Justice (Care and Protection of Children) Act, 2010 , section 19 (1) and (2) dealt with it , whereas, section 25 of the Juvenile Justice Act, 1986 dealt with the same.

IV. DIFFERENCE BETWEEN THE PROBATION OF OFFENDERS ACT AND JUVENILE JUSTICE ACT WITH REGARD TO DISQUALIFICATION PROVISION:

The difference which can be seen between the Probation of Offenders Act and the Juvenile Justice Act is that the law requires destruction of records of conviction in cases of children

found to have committed an offence and dealt with under the provisions of the JJ Act. This is contemplated in sub-section (2) of section 24 of the JJ Act. However, similar requirement is not to be fulfilled when an offender is released under the Probation of Offenders Act. Meaning thereby, records of persons granted the benefit of Probation under the Probation of Offenders Act can be retained by the police or the court for the future. The Children Act, applicable to the Union Territories, also does not require the police, board or the court to destroy records of conviction.

V. SUPREME COURT'S INTERPRETATION OF DISQUALIFICATION ATTACHING TO CONVICTION UNDER THE PROBATION OF OFFENDERS ACT:

In *Divisional Personnel Officer, Southern Railway and Another* v.*T.R.Chellappan,*[1] the point of law which came for consideration in this case was in relation to the meaning of 'removal of disqualification attaching to conviction' in section 12 of the Probation of Offenders Act, 1958 and whether an order of dismissal of an employee found guilty of a criminal offence under Rule 14 of the Railway Servants (Discipline and Appeal) Rules, 1968 would fall within the meaning of the same. It was held in this case that disqualification under section 12 only refers to such disqualifications which are explicitly mentioned in other statutes such as holding of offices, standing for elections etc and not an automatic disqualification attached to conviction in itself. Therefore, dismissal of an employee for misconduct under service rules cannot be washed away by virtue of section 12 of Act if such an employee is released on Probation. The Court further also held that the order of release on probation is merely in substitution of the sentence to be imposed by the court.

In the case of *Shanker Das* v. *Union of India,*[2]a government employee prosecuted for breach of trust in relation to an amount of Rs.500/- was convicted by the trial court but released on probation u/s 4 of the Act. Consequently, his services were terminated by the Government on the reason of his conviction by the impugned order. The appellant challenged his dismissal from service on the ground that he was released on probation and by virtue of *Section* 12 of the Probation of Offenders Act he could not suffer any disqualification such as dismissal from service. The court held that:

> Clause (a) of the second proviso to Article 311 (2) of the Constitution confers on the Government the power to dismiss a person from service "on the ground

[1] AIR 1975 SC 2216
[2]AIR 1985 SC 772.

> of conduct which has led to his conviction on a criminal charge". But, that power, like every other power has to be exercised fairly, justly and reasonably. The Constitution does not contemplate that a Government servant who is convicted for parking his scooter in a no-parking area should be dismissed from service. He may, perhaps not be entitled to be heard on the question of penalty since clause(a) of the second proviso to Article 311(2) makes the provisions of that. Article inapplicable when a penalty is to be imposed on a Government servant on the ground of conduct which has led to his conviction on a criminal charge. But the right to impose a penalty carries with it the duty to act justly.

On the reasons cited as above, the court finally reinstated the employee back to his service. However, the court did not agree with the appellant's contention that dismissal from service is immune by section 12 of the Act. In a way, the *Shankar Dass case*[3] also affirmed the earlier decision of *Challappan's case*.[4] In *Swarn Singh* v. *State Bank of India and Another*[5] also the rationale of Shankar Dass case decision was affirmed by the apex court.

Hari Chand v. *The Director of Education,*[6]was a case in which the appellant was convicted of an offence u/s 408 of the IPC and sentenced to undergo rigorous imprisonment for a term of two years with fine. Both the Sessions Court and the High Court upheld the conviction. Sessions court though upheld the conviction but set aside the sentence and directed that the appellant be released on Probation. By reason of the conviction, the respondent was dismissed him from service. The point of contention here before the apex court was that by virtue of section 12 of the Probation of Offenders Act, 1958 the appellant could not be dismissed from service. The apex court, however, ruled that release of a convicted employee on probation under the provisions of the Probation of Offenders Act, 1956 does not rescue from being dismissed from Government service on the basis of his conviction as provided in Article 311 of the Constitution. Where the law prescribes an offence and punishment along with disqualification thereto, section 12 would in such cases obliterate the disqualification attaching therewith the conviction, and not otherwise.

In *Trikha Ram* v. *V.K. Seth*[7], the Supreme Court gave a somewhat different interpretation to section 12 of the Act without being restrictive by merely converting an order of dismissal of

[3] *Ibid*.
[4] *Ibid.*
[5] SLP(Civil) No.7783 of 1986.
[6] Civil Appeal No. 1451 of 1987.
[7] AIR 1988 SC 285.

service to an order of removal from service so that same could help the petitioner to secure future employment in other establishment. In this case a government servant was convicted for a criminal offence but was released on probation by the court. The issue was whether such an employee could be terminated from service by virtue of the conviction or not. The court in the instant case followed the decision of the Challappan's [8]case and opined as under:

> Since it is statutorily provided that an offender who has been released on probation shall not suffer disqualification attaching to a conviction of the offence for which he has been convicted notwithstanding anything contained in any other law, instead of dismissing him from service he should have been removed from service so that the order of punishment did not operate as a bar and disqualification for future employment with the Government. Under the circumstances, the impugned order of dismissal is converted into an order of removal from service.

The important aspect of this case remains what the court said that the order of punishment in the light of section 12 of the Act should not be detrimental to the interest of the offender so far as future employment with the Government was concerned. And therefore, the appellant in the instant case, was removed from service rather than being dismissed from service.

In *Union of India* v. *Bakshi Ram*,[9] respondent Bakshi Ram in this case, a constable with the Central Reserve Police Force(CRPF), was convicted U/s 10 (n) of the CRPF Act, 1949 and was subsequently released on Probation u/s 4 of the Probation of Offenders Act by the Sessions Judge. The offence specified under the impugned Act was any act or omission which was prejudicial to good order and discipline. Bakshi Ram was dismissed from service and he contended that by virtue of section 12 of the Probation of Offenders Act he does not disqualify to continue in service as the said provision removes any disqualification attaching to conviction.

The Supreme Court, however, finally held in this case as under:

> Section 12 of the Probation of Offenders Act, 1958 only directs that the offender 'shall not suffer disqualification, if any, attaching to a conviction of

[8]*Supra* note 1.
[9]1990 SCR (1) 760.

> an offence under such law'. Such law in the context is the other law providing for disqualification on account of conviction e.g. if a law provides for disqualification of a person for being appointed in any office or for seeking election to any authority or body in view of his conviction, that disqualification by virtue of section 12 stands removed. But that is not the same thing to state that the person who has been dismissed from service in view of his conviction is entitled to reinstatement upon getting the benefit of probation of good conduct. Section 12 does not preclude the department from taking action for misconduct leading to the offence or to his conviction thereon as per law. It was not intended to exonerate the person from departmental punishment".

Another very important observation of the apex court in this case was that in release of an offender under the Probation of Offenders Act the sentence aspect only gets affected but the person's conviction does not in any way get obliterated. Any departmental proceeding is in a way is based on conduct of someone which has led to a conviction rather than sentence. Sentence is imposed based on conviction. Hence nothing can preclude any such proceeding under the existing law.

VI. COURT'S INTERPRETATION OF DISQUALIFICATION ATTACHING TO CONVICTION UNDER THE JJ ACT

There are indeed various decisions of courts in India in regard to removal of disqualification attaching to conviction of children in conflict with law. The definition of juvenile under the existing law i.e Juvenile Justice (Care and Protection of Children) Act, 2015 is a child below the age of 18 years. The upper age limit of 18 years was also the same in the Juvenile Justice (Care and Protection of Children) Act of 2010. Mentioned below are few relevant cases in this regard:

Nadeem Khan v. *State of Rajasthan*[10]*:* This is a recent case being decided by the Rajasthan High Court. The petitioner's candidature was rejected for a post of Constable (General) by the Government on the ground that he was acquitted in a case before the Juvenile Justice Board for lack of evidence, however, the allegations against him were serious in nature. What was contended in this case was that the Government's decision was incorrect by virtue of the

[10] Civil Writ Petition No. 4321/2019.

express provisions of Section 24 of the Juvenile Justice Act of 2015. The court finally held as under:

> A perusal of the above provision reveal that the same removes the disqualification on the findings of an offence recorded against a juvenile i.e. even if a child has been convicted of an offence, he would not suffer disqualification. In the present case, even the conviction has not taken place and the petitioner has been acquitted.

The court relied on an earlier decision in *Hanuman* v. *State of Rajasthan and Others*[11] wherein it was held as below:

> "This Court is of the firm opinion that not even for a moment can the respondents deny the petitioner (4 of 5) [CW-4321/2019] appointment in the questioned recruitment process on the ground of the criminal case registered against him at an earlier point of time. Indisputably the criminal case was registered against the petitioner while he was a juvenile. Section 24 of the Juvenile Justice (Care and Protection of Children) Act, 2000 which was in force at the relevant point of time provides that a child who has committed an offence and has been dealt with under the provisions of Juvenile Justice Act shall not suffer disqualification, if any, attached to a conviction for an offence under such law. Thus even if a juvenile is held guilty after trial under the Juvenile Justice Act, the conviction would not carry any disqualification. In the case at hand, the petitioner was admittedly a juvenile when the offence was committed was tried. He was exonerated of the charge by the Juvenile Justice Board vide judgment dated 21.10.2013. Thus, mere registration of the criminal case against the petitioner while he was a juvenile cannot be construed to be a disqualification so as to disentitle him from being appointed on the post of Constable despite being selected on his own merit after facing recruitment process."

In the instant case also the court upheld the ratio of the above mentioned decision and the respondents were directed to give appointment to the petitioner.

[11]Civil Writ No.11395/2015.

In *State Petitioner* v. *Jagtar and Others*[12], one of the issues to be settled by the Delhi High court was that of the power of an appellate court to order removal of disqualification attaching to conviction. The court held that an appellate court , be it the Sessions Court or the High, is empowered under section 6(2) of the JJ Act, 2000 to order removal of disqualification attaching to conviction if the statutory mandate is being overlooked by a Juvenile Justice Board. The Delhi High Court referred to two important judgments, namely, *Ranjeet Kumar Jha* v. *State of Bihar*[13]of Patna High Court and *Chand Pasha* v. *State of Karnataka*[14] of Karnataka High Court.

VII. A CRITIQUE OF LAW RELATED WITH DISQUALIFICATION ATTACHING TO CONVICTION UNDER THE PROBATION OF OFFENDERS ACT

i) The impugned provision in the Probation of Offenders Act does not differentiate between young offenders within the meaning of section 6 of the Act, i.e. under twenty-one years of age, with that of adult offenders.Section 6 imposes restrictions on imprisonment of offenders under twenty-one years of age and stipulates that such offenders be released either under section 3 or section 4 of the Act, unless reasons to be recorded in writing for exceptions.

ii) Judicial decisions have also not dealt with any differential criteria with regard to interpretation of disqualification attaching to conviction for young offenders of the age group of 18 years to 21 years. Barring one or two, almost all decisions cited above held that disqualification under section 12 only refers to such disqualifications which are explicitly mentioned in other statutes such as holding of offices, standing for elections etc and not an automatic disqualification attached to conviction in itself

iii) If the same interpretation to the provision is to be given for young offenders, perhaps, the same would go against the basic reformative doctrine behind the enactment of the law of probation. Probation is premised on reformation rather than on retribution of offenders.

iv) There would be many such offenders in the age group of 18 years to 21 years whose future may be adversely affected if they are removed from their workplaces

[12]Crl.A. No.979/2008.
[13](2012) Cri.L.J. 759.
[14]Criminal Appeal No.365/2010.

in the pretext of their conviction for a trivial offence. The Prison Statistics India[15] reveal that 2, 07,942 inmates, covering 43.3% of the total inmates in Indian jails, belonged to the age group of 18-30 years.

v) Many young offenders would also find it difficult to get employment opportunities if the records of their conviction, like under the JJ Act, are not destroyed, if found to have committed merciful offences of not serious in nature and subsequently released on probation. Such criminal records of offenders may preclude their chances of finding gainful employment for livelihood in future.

vi) Employment into any government job requires a mandatory police verification report and if criminal antecedents are found the person may be denied an opportunity to be employed into a government job. The cases under 21 years of age released on either under section 3 or under section 4 of the Probation of Offenders Act are important to be seen in that perspective also. The cases cited above also indicate that people are compelled to take up employment even before attaining the age of 21 years because of unsound economic condition of family.

vii) Section 6 of the PO Act would be meaningless without any differential treatment for offenders under 21 years of age who are released on probation. Because it is an established percept of Article 14 of the Constitution that like should be treated alike.

VIII. CONCLUSION

In conclusion it can be said that if both the laws *i.e.*, the Juvenile Justice Act and the Probation of Offenders Act are akin to the common philosophy of reformation of offenders, there is no reason why young offenders released on probation under the Probation of Offenders Act should not be given identical treatment like in cases of offenders who are found guilty under the Juvenile Justice Act. Pertinent to mention here that benefit of probation is never given to offenders found to have committed an offence punishable with death or life imprisonment. Meaning thereby, for less serious offences the probation may be given subject to the discretion of the courts. Looking in the same perspective, it appears to be reasonable to think of some amendment in the existing law of Probation in India in relation to disqualification provision under section 12 of the Act to accommodate the best interest of young offenders.

[15]Released by the NCRB, Ministry of Home Affairs, Govt. of India