

(1993) 02 KL CK 0007
In the High Court Of Kerala
Case No : W.A. No. 74 of 1993 B

Abraham, K.M. and Others

APPELLANT

Vs

Returning Officer and Others

RESPONDENT

Date of Decision : 01-02-1993

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (1993) 1 KLJ 382

Hon'ble Judges : M. Jagannadha Rao, C.J;K. Sreedharan, J

Bench : Division Bench

Advocate : T.R. Raman Pillai and V.G. Arun, for the Appellant; V.N. Achutha Kurup, for Respondents 4, 8, 10, 11, 13, 15, 16, 18 and 21 and Lal George, Govt. Pleader for Respondents 1 and 2, for the Respondent

Judgement

M. Jagannadha Rao, C.J.—This appeal is preferred against the judgment of the learned Single Judge dismissing the writ petition, O.P. No. 16063 of 1992 by judgment dated 18th December 1992, on the ground that the Appellants-writ Petitioners have an effective alternative remedy u/s 69(2)(c) of the Kerala Co-operative Societies Act to question the rejection of the nomination papers of the Appellants. Though eight persons filed the writ petition, this writ appeal is pressed only by five among them, namely, writ Petitioners 1, 2, 4, 7 and 8.

2. The facts of the case are as follows. The election to the Board of Directors of the Naranganam Service Co-operative Bank Ltd., Naranganam, Pathanamthitta, was notified to be conducted as per Ext, P-I notification issued under Rule 35(3) (a) of the Kerala Co-operative Societies Rules, 1969. Out of nine wards, one is reserved for Scheduled Caste/Scheduled Tribe and Anr. is reserved for women. The last date for filing the nomination papers was 30th November 1992. The Appellants filed their nomination papers along with a declaration in the prescribed form. On the date of scrutiny, namely, 1st December 1992 the nomination papers of the Appellants were rejected by the Returning Officer on the ground that there was some mistake in the affidavits filed by the Appellants.

The date of election was notified as 21st December 1992. But instead of mentioning the said date, the Appellants mentioned the date of election as 30th November 1992, which was the last date for filing the nomination papers. It was never in dispute by anybody that election as it then notified as 21st December 1992 was within the knowledge of the Returning Officer. Nonetheless, he rejected the nomination papers of the Appellants on the ground that the affidavit which was to be filed along with the declaration mentioned the date of election as 30th November 1992 instead of 21st December 1992. Rule 35(3)(c)(2) specifies only a declaration signed by the candidate proposed for election is to be filed that he is willing to stand for election. That Rule reads as follows:

35(3)(c)(ii). Every nomination paper shall be signed by two members whose names are included in the list of members. One of the members shall sign the Form as proposer and the other as seconder for the nomination. The nomination paper shall also contain a declaration signed by the candidate proposed for election to the effect that he is willing to stand for election.

It will be noticed that the above said rule does not specifically require that the declaration should mention the date of election. In fact, the filing of the affidavit is not strictly prescribed by the Act or the Rules, but the same is required on the ground that the above said Rule, contemplates a "declaration" to be signed by the candidate proposed for the election. The Petitioners therefore contended that the rejection of their nomination papers was wholly untenable. Ext. P-2(b) is the pro forma of the affidavit, while Ext. P-2(a) is a copy of the nomination paper. The Returning Officer rejected the representations of the Appellants and passed Ext. P-3 order dated 2nd December 1992 stating that the nomination papers were rejected, that the date of election mentioned in the affidavit filed by the Appellants was wrong, and that it was not 30th November 1992, but was 21st December 1992. Questioning the rejection of the nomination papers of the Appellants-Petitioners by the Returning Officer by Ext. P-3 order, the Appellants approached this Court under Article 226 of the Constitution of India for the issuance of a writ of "Certiorari" for quashing Ext. P-3 order. Consequential direction is also sought to include the names of the Appellants in the final list of candidates for election to the committee of the second Respondent-society.

3. It may be noticed that in fact the election did not take place on 21st December 1992, but it stood adjourned for other reasons, and it is now scheduled to take place on 6th February 1993. This was because of various prohibitory orders in the area concerned, and also law and order problems.

4. The learned Single Judge dismissed the Writ Petition. The writ petition was filed on 4th December 1992. On 9th December 1992 the Government Pleader took notice, and second Respondent was served notice by special messenger. The case was posted to 14th December 1992. It was heard on 16th December 1992 and was dismissed by order dated 18th December 1992. The learned Single Judge pointed out that Ext. P-1 notification specifically directed the candidates to file an affidavit with factual details and also required them to mention the date of

election. The learned Single Judge held that there was an effective alternative remedy by way of election petition u/s 69(2)(c) of the Act and, therefore, dismissed the writ petition. It is against this judgment that this appeal is preferred.

5. The Petitioners filed C.M.P. No. 240 of 1993 in this appeal for impleading 19 persons whose nomination papers were accepted by the Returning Officer. This was done with a view to give them an opportunity to contest the appeal. The petition was allowed and the said parties were issued notice and served and some of them have filed a separate counter affidavit dated 27th January 1993.

6. The learned Counsel for the Appellants contends that the rejection of the nomination papers by the Returning Officer is on the face of it absurd, perverse and arbitrary. The date of election at that time was 21st December 1992. It is an accepted fact that the Appellants have wrongly mentioned the date of election as 30th November 1992, which is in fact the last date for filing the nomination papers. It is obvious that it is a clear mistake, and there being no dispute with regard to the date of election, the rejection of the nomination papers of the Appellants is wholly arbitrary. It is contended that for the issue of a writ of certiorari, it is sufficient if the error occurs on the face of the record, and if that is so, this Court can interfere under Article 226 of the Constitution of India in writ proceedings. The principles relating to alternative remedy are not strictly enforced in the case of writ of certiorari. The learned Counsel for the Petitioners relies upon a Division Bench decision of this Court, consisting of one of us (M. Jagannadha Rao, C.J.) in *Anthrayose v. Senior Inspector of Co-operative Societies* 1992 (2) KLT 489 wherein it is held that this Court can interfere in a matter where the nomination papers, are illegally rejected and the parties need not be relegated to the remedy u/s 69 of the Act.

7. However, learned Counsel for the Respondents would contend that the Appellants-Petitioners cannot be permitted to raise this question in writ jurisdiction, but should be directed to avail of alternative remedy under the Act. He strongly relies upon Anr. Division Bench decision of this Court in *Lakshmanan v. Roy Alexander* 1992 (2) KLT 634 wherein a contrary view has been taken. It is there held that when a learned Single Judge of this Court takes a view that the parties should avail of the alternative remedy, the Division Bench should not interfere with the said discretionary power, unless it came to the conclusion that the discretion exercised by the learned Single Judge was perverse. It is also contended for the Respondents that there is no error apparent on the face of the record, and that even on merits this is not a fit case for interference under Article 226 of the Constitution of India.

8. The points that arise for consideration in this case are:

(1) Whether, in the case of rejection of nomination papers by the Returning Officer in an election, the High Court could interfere and issue a writ of certiorari, if there, was an error apparent on the face of the record or if the rejection was

perverse or wholly arbitrary, and if the point did not involve any complicated questions of fact, requiring evidence to be taken?

(2) Where a learned Single Judge has refused to entertain the writ petition on the ground of existence of alternative remedy, whether the Division Bench is totally precluded from entertaining the appeal and granting relief, unless it comes to the conclusion that the judgment or order of the learned Single Judge was perverse?

9. Point No. 1. So far as the facts of the present case before us are concerned, we have noticed that the nomination papers were rejected only on the ground that the date of election as mentioned in the affidavit filed along with the nomination paper was wrong. In the affidavits, the Appellants mentioned the date of election as 30th November 1992, instead of 21st December 1992. The rejection of the nomination papers was on 1st December 1992. The representations of the Petitioners were rejected under Ext. P-3 on 2nd December 1992. That 21st December 1992 was the date of election was not a fact in dispute by anybody, much less the Returning Officer. In fact 30th November 1992 was the last date for filing the nomination and nomination papers were filed on that day itself. On these facts it is contended for the Appellants-Petitioners that the rejection of the nomination papers by the Returning Officer is wholly perverse and arbitrary. It is clearly vitiated by error apparent on the face of the record. To hold so does not require any elaborate investigation into facts, nor can it be said to be complicated questions of fact requiring inquiry and taking evidence in a regular election petition or in a proceeding u/s 69 of the Act. The question, is whether this Court could, in a writ appeal set aside the judgment of the learned Single Judge and issue a writ of certiorari quashing the rejection of nomination papers and also direct the nomination papers to be treated as valid.

10. It has been laid down by the Supreme Court and also by the various High Courts that in election matters, the High Court should not entertain writ petitions to solve the, various disputes. But, It is significant that, in the very same cases, it has also been laid down that, in exceptional cases, the High Court could interfere.

11. This is clear from the recent decision of the Supreme Court in Gujarat University Vs. N.U. Rajguru and Others, wherein it is stated:

It is well settled that where a statute provides for election to an Office, or an authority or institution and if it further provides a machinery or form for determination of dispute arising out of election, the aggrieved person should pursue his remedy before the forum provided by the statute.

Having said, the Supreme Court also pointed out that this is not an absolute rule. Their Lordships said:

Ordinarily the remedy provided by the statute must be followed before the authority designated therein. But there may be cases where exceptional or

extraordinary circumstances may exist to justify bypassing the alternative remedies.

The Supreme Court reiterated the observations made in an earlier case in *K.K. Shrivastava and Others Vs. Bhupendra Kumar Jain and Others*, wherein similar observations were made that while the normal rule is to go by the remedy prescribed under the Act, the High Court could interfere in exceptional and extraordinary circumstances. The above statement of law echoes similar views expressed by various High Courts. In *Nisar Ahmad Vs. Additional Commissioner, Jodhpur Division and Another*, *Wanehoo, C.J.*, (as he then was) and *Bapna, J.* observed in relation to rejection of nomination paper in a municipal election as follows:

It would not be right to leave the applicant to the remedy of an election petition against the order of what could be considered at the best busy bodies when the order of a properly constituted authority, namely, the officer-in-charge of the elections was in his favour. There was also an danger if the High Court were to follow the principle that it should not interfere in a case like the present because it was possible to get redress by an election petition. That danger was that if some authority decided to interfere with the decisions of the officer-in-charge of elections, or the Returning Officer and rejected all nomination papers accepted by him of candidates belonging to particular parties, the result would be that candidates of one particular party might get elected unopposed. It was possible to have a wholesale abuse of this kind and it was therefore necessary for the High Court to interfere at this stage so that no authority may ever be disposed to take the course mentioned above. Therefore, even though the applicant might be able to get his remedy in this case through an election petition, there was good reason why the High Court should grant him relief at this stage.

In *P.B.K. Raja Chidambaram Vs. R.P. Rathna Sarma and Others*, *Kailasam, J.* (as he then Was), referring to a case relating to improper rejection of nomination paper in an election under the Madras Co-operative Societies Act, observed as follows:

...But that does not mean that the legislature intended that the question cannot be agitated before a civil Court or under Article 226 of the Constitution of India.the wide power of the High Court under Article 226 cannot be curtailed unless by one or other of the Articles of the Constitution of India. The only question, therefore, that has to be considered whether it is desirable that High Court should interfere at the stage before the election result is declared. The answer to this question would depend upon the facts of the case. If the rejection of the nomination is without jurisdiction, and on the face of it unsupportable in law, and the denial of a remedy at this stage would cause considerable hardship to the Petitioner, the High Court will not hesitate to exercise the powers, conferred on it by the Constitution.

In *Ramchandra Prasad Vs. Sub-Divisional Magistrate and Others*, *N.L. Untwalia*,

J. (as he then was) observed as follows:

Where the nomination paper of the Petitioner for election to the office of a mukhiya under the Bihar Panchayat Raj Act was rejected on the ground that he was in the service of the State Government, within the meaning of Section 79(b) of the Panchayat Raj Act, being interested in the fair price shop run by his relative under a licence granted by the State Government, the relationship not being that of master and servant, the order is erroneous in law. The error being apparent on the face of the record, the High Court will in the exercise of its power under Article 226 of the Constitution, quash the order. The provisions of Section 84-B of the Act do not prevent such a course being taken.

12. Sarkaria, J. (as he then was) observed in *Nanak Singh v. Deputy Commissioner* (1968) 70 P.L.R. 1095, in a case relating to rejection of nomination papers in a municipal election observed:

There is abundant authority that, in such a situation, the Court would not refuse to exercise its extraordinary powers under Article 226, merely because a less speedy and less efficacious alternative remedy is available.

A Division Bench of the Karnataka High Court in *Siddappa v. Election Officer* AIR 1984 Kar. 104 consisting of Chandrasekhar, C.J. and Bopanna, J. took a similar view while dealing with panchayat elections and observed that the error being so manifest, it would be "an empty formality", to ask the Petitioner to go by the alternative remedy.

13. In *T. Sitaram v. Election Officer* 1985 (2) A.L.T. 88 (S.N.) one of us (Jagannadha Rao, C.J.) held in regard to an election in a co-operative society that if the rejection of the nomination paper was so patently absurd, the High Court could interfere under Article 226.

14. Paripoornan, J. in *K. Govindan Vs. Dy. Registrar of Co-op. Societies, Cannanore and Others*, also held that if the rejection of the nomination was patently bad, the High Court could interfere under Article 226.

In *Brij Behari v. L.L. Khare* AIR M.P. 156 G.P., Singh (as he then was) and Raina, JJ. of the Madhya Pradesh High Court, while dealing with the case of rejection of nomination paper in an election, governed by the Madhya Pradesh Co-operative Societies Act, observed as follows:

... It would not, therefore, be proper to throw it out now at this stage on the ground that the Petitioner can seek the remedy before the Registrar after the declaration of the result. We, therefore, proceed to consider the petition on merits.

The learned Judges allowed the writ petition. A Division Bench of the Bombay High Court, consisting of Chainani, C.J. and K.K. Desai, J. in *Suleman Fakruddin Ansari Vs. S.B. Kulkarni and Another*, , in a case relating to wrong acceptance of nomination paper in an election to municipal corporation, observed as follows:

Ordinarily the High Court will not stay an election or pass any order which will result in the election being postponed. Where, however, the matter is brought before the High Court sufficiently in advance and where the matter can be heard and disposed of before the polling is due to take place and where there is an error apparent on the face of the record, there is no reason why the High Court should not correct the error. If a Returning Officer accepts a nomination paper which has failed to comply with an essential requirement of the election rules, it would save public time and money, as well as expense, inconvenience and hardship to the parties, if the Returning Officer's action is corrected before the election takes place. In such a case relief cannot be refused merely because the Petitioner can pursue Anr. remedy by filing an election petition, after the election is held.

Though no hard and fast rule can be laid down in this matter, each case should be considered on its own facts and where without staying or postponing the election it is possible to set matters right before the election takes place, it would be appropriate and desirable to do so.

It is further observed:

Where, therefore, the decision of a Returning Officer in accepting the nomination paper is patently wrong being in express contravention of a statutory provision, the High Court has jurisdiction to correct it under Articles 226 and 227.

See also *Inder Chand Jain Vs. The Institute of Chartered Accountants of India* and another, . A Division Bench, consisting of Barman, C.J. and Patra, J. of the Orissa High Court in *Harihar Dasmohapatra v. The Collector, Balasore* (1969) 35 C.L.T. 650, concerning the rejection of nomination paper under the Orissa Panchayat Samiti and Zilla Parishad (Conduct of Election) Rules, interfered with the order of the election officer on the ground that the said officer had no jurisdiction to review the earlier order passed by him in relation to rejection of nomination paper. The learned Judges interfered, notwithstanding the existence of an alternative remedy. The Punjab High Court in *Des Raj v. S. Gurnam Singh* (1966) 68 PLR 224 observed as follows:

It is not correct to say that it is for the Presiding Officer to accept or reject a ballot paper and so long as he has the jurisdiction to do so it is not for the High Court in writ jurisdiction to interfere with his decision. But if it is found that the Presiding Officer rejected a ballot paper or declared it to be invalid on the ground on Which he has no jurisdiction to do so or if his decision is based on an error of law apparent on the face of the record, it is the duty of the High Court to set aside such an order.

That was a case where 25 members of the samithi were electing Chairman and Vice-chairman of the samithi and the dispute was in relation to one vote. In *Lambha S.S.M. v. D.R. Co-operative S. A''bad*, (S.P.C.A.) (1973) GLR 786, J.B. Mehta, J. observed as follows:

Even assuming that an appeal lay under the Election Rule 8 in Part III of the Bombay Co-operative Societies Rules, that would not be enough so as to bar the jurisdiction of the High Court when an order is alleged to be ultra virus, arbitrary and perverse and contrary to all principles of natural justice. Besides in this case, the Registrar has refused to exercise jurisdiction on the ground that he had no jurisdiction. In such election matters utmost expedition was required and so, the remedy of election petition being highly debatable, the existing alternative remedy could never be urged as a bar to the exercise of jurisdiction by the High Court under Articles 226 and 227 of the Constitution especially in such cases where the order is completely arbitrary and perverse and against all principles of natural justice.

A Division Bench of the Madhya Pradesh High Court, consisting of P.K. Tare, C.J. and M.L. Malik, J., who were dealing with rejection of nomination papers in an election to a municipality, observed in *Shio Dayal v. Rawat* 1975 M.P. L.J. 248 as follows:

...The question is as to under what circumstances the High Court might interfere on the assumption that such circumstances might be considered to be exceptional. By way of illustration we might observe that in case where the description of the ward is not given, but only the number of the ward is given the defect might be considered to be of a substantial character, as Rule 13(1)(i) of the Rules requires a nomination paper to be filed strictly according to the contents of the Form. For instance, if the description of the ward alone is given without its number, in that event also the defect might be considered to be of a substantial nature. For instance, if a candidate gives a number in the voters' list without mentioning the number of the ward, the defect, in our opinion, would certainly be of a substantial character. But the present case was not of that type. The Petitioner had mentioned the correct description and number of ward in three other columns, but in Column No. 1 only, although he gave the correct number of the ward, he did not mention, the full name of the ward, namely, Lal Bahadur Shastri Ward. Instead of that he merely wrote Lal Bahadur Ward. Therefore, we are of the opinion that the defect in the nomination paper was not of a substantial character and the supervising officer had no justification to reject the Petitioner's nomination paper, which would be covered by, Rule 13(1)(i) (vi) of the Rules...In view of this fact also we would be inclined to hold that this is an exceptional case where this Court ought to exercise its prerogative powers in order to enable the Petitioner to exercise his valuable civil right of contesting an election, which right was denied to him on altogether wrong premises.

15. The view which we have taken in *Anthrayose v. Senior Inspector of Co-operative Societies* 1992 (2) KLT 489 approving the decision of a learned Single Judge, Viswanatha Iyer, J. in *Damodaran v. Joint Registrar* (1989) 1 KLT 856 and Anr. learned Single Judge of this Court, K.A. Nayar, J. in *Velunni v. Returning Officer* 1990 (2) KLT 816 is, therefore, consistent with the above view taken by the Supreme Court and the various High Courts.

16. Further, we are here dealing with the case of issue of a writ of Certiorari where the existence of an alternative remedy is not normally treated as bar, if on facts, there is an error apparent on the face of the record see U.P. State v. Mohd. Nooh AIR 1958 S.C. 86.

17. For the aforesaid reasons, we hold in favour of the Appellants that if the rejection of nomination is patently bad, manifestly wrong, arbitrary or perverse, the High Court could interfere under Article 226 of the Constitution of India without asking the Petitioner to pursue the alternative remedy. We hold accordingly on Point No. 1.

18. Point No. 2.- This point relates to the scope of interference by the appellate Courts with the discretion exercised by the Judge whose judgment is under appeal.

19. As stated earlier, learned Counsel for the Respondent has placed reliance on Lakshmanan v. Roy Alexander 1992 (2) KLT 634 wherein it has been held that the appellate Court will not interfere with the discretion exercised by the Single Judge merely because the view taken by the Single Judge is "wrong" or Anr. view is possible. However, the Court could interfere if the decision of the Single Judge is "manifestly wrong" or "perverse" or "arbitrary". The Division Bench has relied on Rajalekshmi Motor Service, Kozhikode Vs. Govt. of Kerala and Others, Neelakanta Kartha v. Registrar 1978 K.L.T., Maya Devi v. Rajan 1985 KLT 370 and State of Kerala v. Balakrishnan 1992 (1) KLT 420.

20. We have no quarrel with the broad proposition laid down in Lakshmanan's case (supra) and as laid down in the cases referred to therein. Appellate Courts do not, as a matter of practice, normally interfere in appeal with discretionary orders except in exceptional circumstances. What could be the "exceptional circumstances" would obviously depend on the facts of each case and no straight-jacket formula could be laid down. Discretion exercised by the Judge whose order is under appeal, may relate to the final disposal of the writ petition or to an interlocutory order passed in the writ petition. The appellate Court does not ordinarily interfere with the discretion of the Judge in the Court of first instance, unless it be that the discretion has been exercised in a manner "manifestly wrong", or "perverse" or "arbitrary". In this context, we may add one other category of cases to this list, namely, where the exercise of discretion is in itself governed by binding authority of the Supreme Court or of the same High Court and the said principles have not at all been noticed by the learned Single Judge. We, however, agree that if the learned Judge has noticed the binding authority governing the principles relating to the exercise of discretion and has taken one view, the appellate Court will not interfere, merely because Anr. view is possible.

21. In the case before us, the learned Single Judge did not notice that in certain exceptional cases, the High Court could interfere with the rejection of nomination papers in an election. He merely observed that the Petitioners have an alternative remedy. It must, in our opinion, be held that the case is not one of

exercise of discretion after keeping in view, the binding authorities on the question. In such a situation when the appellate Court comes to the conclusion that the learned Single Judge's, order is based on a view that every case of rejection of nomination papers,- however obviously absurd or arbitrary,- should be relegated to the alternative remedy, and that in our view, is not a case of exercising any discretion at all. The case cannot be equated with a case where the learned Judge was conscious of the exceptions to the general principle and has taken one view.

22. We are, therefore, of the opinion that interference with the order of the learned Single Judge is necessary. As already stated there is no dispute about the date of election and the date given in the nomination paper is an obvious mistake." Even if the matter goes by way of alternative remedy, it is not capable, in our opinion, of any other view. Point No. 2 is answered accordingly.

In the result, the writ appeal is allowed in so far as the five Appellants (writ Petitioners 1, 2, 4, 7 and 8) are concerned. The rejection of their nomination is quashed. Ext. P-3 is also quashed as far as the five Appellants (writ Petitioners 1, 2, 4, 7 and 8) are concerned. We also direct that their nomination will be treated as valid. The election will then be conducted in accordance with law. No costs.