

(1978) 02 RAJ CK 0014

In the Rajasthan High Court

Case No : Civil Writ Petition No. 547 of 1977

Dr. Kailash Chandra Kotia

APPELLANT

Vs

University of Rajasthan and Others

RESPONDENT

Date of Decision : 22-02-1978

Acts Referred:

Constitution of India, 1950 — Article 226
Rajasthan University Act, 1946 — Section 21(2), 21(3)

Citation : AIR 1978 Raj 158 : (1978) RLW 215 : (1978) 11 WLN 61

Hon'ble Judges : M.L. Jain, J

Bench : Single Bench

Advocate : M.M. Kasliwal, for the Appellant; C.M. Mathur, for the Respondent

Final Decision : Allowed

Judgement

M.L. Jain, J.—The facts of this petition are that the petitioner Dr. Kailash Chandra Kotia, Professor of Medicine and Cardiology in the S. M. S. Medical College, Jaipur, was nominated by the Chancellor to the Syndicate of the University of Rajasthan in Dec. 1974. By an Ordinance that Syndicate was dissolved and Dr. Kotia remained member only from Dec. 1974 to June, 1975. When the new Syndicate was constituted, the petitioner was again nominated by the Chancellor but it was again dissolved by an Ordinance. This time Dr. Kotia remained a member of the Syndicate from Oct. 1975 to June, 1977. On 19th Aug. 1977, another Act was made amending the University of Rajasthan Act, 1946, by which the Syndicate was dissolved and a new provision for constitution of the Syndicate was enacted by substituting the existing Section 21. The Syndicate now comprised inter alia two teachers to be elected from amongst themselves by the teachers of the affiliated colleges. Sub-section (3) of Section 21 further provided as follows :

"(3)--no person referred to in Clauses (iii) to (x) of Sub-section (1) shall be eligible for election and/or nomination for more than two terms."

The Vice-Chancellor proceeded with the election of the two teachers as aforesaid. The petitioner filed nomination papers for contesting one of the seats on 26th Nov. 1977, and 28th Nov. 1977. The nomination papers were scrutinised on 30th Nov. 1977, and the candidature of the petitioner Dr. Kotia was rejected by the Scrutiny Committee on the ground that he had been a member of the Syndicate for two terms. Dr. Kotia challenges by this writ petition the rejection of his nomination papers on two grounds; namely (1) Sub-section (3) of Section 21 by which a new condition has been added cannot operate retrospectively, and (2) he had not been a member of the Syndicate for two terms within the meaning of the aforesaid sub-section; because in the first term he was member only for not more than 8 months and in the second term, he was member for about 21 months, while the full statutory term of a member of the Syndicate is three years. In both cases the Syndicate was dissolved on account of legislative intervention. It was not a case of conclusion of his terms by any volition on his part. The University opposes the petition.

2. What strikes to me to be most strange in the University of Rajasthan (Amendment) Act, 1977, (Act No. 8 of 1977) is that it does not in itself provide for the mode of election of the two teachers to be elected out of the teachers of the affiliated colleges, nor does it delegate the power to do so to any other authority. The Senate is empowered to make statutes, the scope of which is provided in Section 27. Syndicate is empowered to prescribe ordinances in respect of matters stated in Section 29 of the University Act. None of these sections delegate the powers to decide the mode of election to any of these two bodies. The Senate of course has the powers to make statutes with regard to constitution, powers and functions of the authorities, boards and committees of the University save 33 provided in the Act and residually with regard to the matter which by the Act are to be or may be prescribed by statutes or which are dealt with in the statutes set out in the schedule to the Act, The schedule does not contain any provision in respect of the mode of election nor has the Senate, even if it could, made any statute in this respect, The University in the absence of any such provision relies upon 0.40 which appears in Chapter XI entitled "Faculties." This ordinance is as follows :

"0.40-- In all cases where elections are held at a meeting of any of the authorities, except in cases of casual vacancies and in cases, where the term is for a period of one year or less, the notice of the meeting at which the election is to be held shall be sent to the members at least 30 clear days before the date of the meeting. Nominations shall be sent to the Registrar so as to reach him at least 15 clear days before the day of the meeting, and the Registrar shall send a list of such nominations to the members or the authority concerned at least 8 clear days before the day of the meeting. (In case an election is held by post, the procedure laid down in the case of the election of members from the registered graduates constituency, shall in so far as possible be followed at the discretion of the Vice-Chancellor):

Provided that where members are to be nominated/appointed or a particular body is to be constituted, nominations may at the discretion of the Vice-Chancellor be invited in the meeting itself and in that case notice of the meeting shall be sent to the members at least 15 clear days before the day of the meeting."

3. It will be seen without much effort that this ordinance was primarily meant to provide the mode of election which is required to be held at a meeting of any of the authorities, but not for providing a mode of election of persons, which bring about the existence of the authority. This Ordinance cannot be pressed into service for election of the members of the Syndicate as that matter is not within the scope of the Ordinance making power of the Syndicate. Faced with this difficulty, the learned counsel for the respondent University relied upon the powers of the Vice-Chancellor and the Syndicate on whom a duty is cast to carry out the administration of the University. Reference was made to Section 13 and Clause (10) of Section 29 of the Act. Clause (10) of Section 29 empowers the Syndicate to make Ordinances generally on all matters for which provision is, in the opinion of the Syndicate, necessary for the exercise of the powers conferred or the performance of the duties imposed upon the Syndicate by the Act or the Statutes. Now, no power has been conferred, nor is there any duty cast upon the Syndicate by the Act or any statute to provide for the mode of election, for the exercise or performance of which an Ordinance like 0.40 can be resorted to. Though, no doubt as per Section 13, the Vice-Chancellor is the principal executive of the University and it is his further duty to see that the Act, the Statutes and the Ordinances are faithfully observed and he shall have all powers necessary for this purpose, I have already indicated that the Act and the Statutes make no provision respecting how the election of the teacher members shall take place. I have also explained why 0.40 can have no application. In that state of affairs, there is nothing which the Vice-chancellor shall have faithfully observed. He has no powers where there is no provision.

4. I also noticed that in the matter of voting a distinction is made by the University between the teachers who are permanent and temporary teachers except those who are approved by the Public Service Commission. I wonder if the Act authorises any such distinction. But I will pronounce nothing in respect of these matters which are not directly involved in this petition. I leave it to the University authorities and the Rajasthan Legislature whether they would like to leave things open to challenge in future or to correct the anomalies which I have pointed out.

5. I must now dispose of one more argument advanced on behalf of the University. It was urged with reference to *Mani Subrat Jain and Others Vs. State of Haryana and Others*, that there must be a judicially enforceable right as well legally protected right before one suffering a legal grievance can ask for a mandamus. A person can be said to be aggrieved only when a person is denied a legal right by some one who has a legal duty to do something or abstain from

doing something. The petitioner cannot ask for mandamus as he has no legal right as was held in N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others, that to contest an election is neither a constitutional, nor a civil right but it is a creature of statute or special law and must be subject to limitations imposed by it. I do not think that this argument has any force. The enactment constituting the Syndicate clearly gives a right to a teacher to be elected to the Syndicate and if any of the limitations or bars imposed by it does not apply, then every teacher not suffering from any disability, will be entitled to seek election. It is therefore, necessary for a court, of law to determine whether the case of the petitioner is covered by the bar provided by Sub-section (3) of Section 21 which I have extracted above. If not, then he shall be entitled to the grant of mandamus. I therefore, proceed to examine the contentions of the petitioner in this respect.

6. There is a little doubt that the bar imposed upon the eligibility in Sub-section (3) will no doubt apply with effect from 19th Aug. 1977, on which date the amendment came into force. The contention of the petitioner is that this bar cannot apply to persons who have had more than two terms in the Syndicate previous to the coming into force of this Act. In respect of the law regarding retrospective operation of a provision of an enactment I summed up the legal position in *Nemichand v. State of Rajasthan* 1977 Raj LW 430 as follows :

" "Retrospective operations" is an inaccurate term causing confusion. The purest cases of retrospective laws are those in which the date of commencement is earlier than enactment, or which validate some invalid law, otherwise, every statute affects rights which would have been in existence but for the statute and a statute does not become a retrospective one because a part of the requisition for its action is drawn from a time antecedent to its passing. All what it means is that save in cases where the law creates a new offence or increases a penalty, a legislature is not prevented from enacting an ex post facto law but if any such law takes away or impairs any vested right acquired under existing law, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, it must so provide in express terms or such should be a necessary implication from the language employed. That is why where an act is in its nature procedural, declaratory or explanatory, or where a statute, is passed for the purpose of supplying an obvious omission in a former statute, it does unless otherwise provided operate retrospectively obviously because it does not affect vested rights. That is further why a law enacted for the benefit of the community and also of individuals, may relate to a time antecedent to its commencement."

7. In the light of these observations, the petitioner therefore, in order to succeed in his first contention must show that he had a vested right to fight the election, which cannot be impaired by imposing a disqualification based upon anterior antecedents and Sub-section (3) of Section 21 does not expressly or by implication purport to do so.

8. It is interesting to note the observations of Lord Esher M. R. in *Bourke v. Nutt* (1894) 1 QB 725 that "the important time was that at which it had to be considered whether the person was disqualified." In *re A Solicitor's Clerk* (1957) 3 All ER 617 the Solicitor's Act 1956 provided that no solicitor should employ any person who is convicted of larceny without the permission of the Law Society. The clerk in that case was convicted of larceny in 1953, while the ban was imposed in 1956. It was urged that the provisions of the 1956 Act cannot be applied to him because he was convicted before that Act came into operation. To do otherwise would be to make its operation retrospective. The Chief Justice in the Queen's Bench Division repelled the argument in these words :

"In my opinion, however, this Act is not in truth retrospective. It enables an order to be made disqualifying a person from acting as solicitor's clerk in the future and what happened in the past is the cause or reason for the making of the order. But the order has no retrospective effect. It would be retrospective if the Act provided that anything done before the Act came into force or before the order was made should be void "or voidable or if a penalty were inflicted for having acted in this or any other capacity before the Act came into force or before the order was made. This Act simply enables a disqualification to be imposed for the future which in no way affects anything done by the appellant in the past."

9. In *The State of Maharashtra Vs. Vishnu Ramchandra*, a somewhat similar question came to be examined. Section 57 of the Bombay Police Act provided that if a person has been convicted of certain offences in certain manner, he may be directed to remove himself outside the area within the local limits of the jurisdiction of the Commissioner etc. It was observed that an offender who "has been" punished, may be restrained in his acts and conduct by some legislation which takes note of his antecedents. But so long as the action taken against him is after the Act comes into force, the statute cannot be said to be applied retrospectively. Their Lordships also observed that the verb "has been" is in the present perfect tense and may mean either "shall have been" or "shall be". Looking to the scheme of the enactment as a whole and particularly the other portions of it, it is manifest that the former meaning is intended, and the verb "has been" describes past actions and is used to express a hypothesis without regard to time. Mr. Kasliwal urged that in the aforesaid Sub-section (3), the Legislature has not used the words "has been" or "shall have been" but has employed the words "shall be" and that clearly shows an intention that the ban shall not apply with respect to any number of terms held before the commencement of the amendment. Now every teacher no doubt has a statutory right to stand for election to the Syndicate but this right is subject to the provision of Sub-section (3) which when applied at the time of consideration of the nomination, it relates to a time after the passing of the Act, though it takes the past history, to be specific, past terms held by the candidate into consideration. I am, therefore, firmly of the view that the impugned provision does not operate retrospectively and operates only prospectively while taking the

past into account in order to determine eligibility. It could not be said that it was retrospective because it does not affect any right acquired in the past nor does it attach any new disability in respect to transactions or considerations already past. The right to contest election is not a vested right, the roughest test being that it will not survive if the Act were repealed. The disability now created attaches not to the past terms but to the future candidature. Even if it could be said that it was retrospective, the ordinary rule of construction need not be strictly applied as the provision as I see it has been enacted in larger public benefit. The words "no person shall be eligible for more than two terms" mean no more than this that a person shall be ineligible if he has been or shall have been a member for two terms. The first contention, therefore, fails but the petitioner succeeds on the other. Where any ineligibility is imposed it has to be strictly construed. It is for determination therefore, whether the petitioner has had two terms. In view of the periods for which he remained a member of the Syndicate, in one case it was only 7 months, while in the other it was 19 months, I am unable to hold that the petitioner had two terms. A term according to Sub-section (2) of Section 21 is nothing but membership held for a period of three years from the date of nomination or election as the case may be. The petitioner was no doubt nominated twice but each time the term of the Syndicate was cut short by legislative fiat and therefore, it does not appear to me to be the intention of the legislature that the word "term" occurring in Sub-section (3) means any period not exceeding three years, even where it is snapped by an enactment in the aforesaid manner. It would have been otherwise if the term was reduced by resignation of the petitioner.

10. I, therefore, accept this writ petition and direct as follows :--

(1) The cancellation of the nomination of the petitioner on the ground stated in the letter of the respondent Ex. 1 shall stand quashed.

(2) The petitioner is eligible for and shall be allowed to contest, the election as one of the teachers to be elected from amongst themselves by the teachers of the affiliated colleges for election as a member of the Syndicate within the meaning of Sub-clause (b) of Clause (iii) of Sub-section (1) of Section 21 of the University of Rajasthan Act as amended by the Rajasthan Act. No. 8 of 1977 and the bar of Sub-section (3) of Section 21 shall not apply to his case.

(3) No costs.