

(1999) 06 KL CK 0036
In the High Court Of Kerala
Case No : W.A. No. 714/96 B

Dr. M.K. Mukundan and Others

APPELLANT

Vs

The District Electoral Officer and Others

RESPONDENT

Date of Decision : 25-06-1999

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 16, 163(1), 19
Representation of the People Act, 1950 — Section 26, 27

Citation : (1999) 06 KL CK 0036

Hon'ble Judges : T.M. Hassan Pillai, J;K. Narayana Kurup, J

Bench : Division Bench

Advocate : K. Ramakumar, for the Appellant; Grecious Kuriakose, Govt. Pleader, for the Respondent

Judgement

K. Narayana Kurup, J.—This appeal is directed against the dismissal of O.P. No. 6868/96 in which the Appellants figure as Petitioners. The Appellants are employees of the Central Institute of Fisheries Technology which is functioning under an autonomus body known as Indian Council of Agricultural Research (I.C.A.R.), the status of the same as an "other authority" under Article 12 of the Constitution of India is covered by the decision of the Supreme Court reported in P.K. Ramachandra Iyer and Others Vs. Union of India (UOI) and Others, . The I.C.A.R., though amenable to the writ Jurisdiction as an "other authority", its employees are not Government servants in the strict sense of the term. According to the Appellants they do not fall in the category of "such staff" under the control of the President or the Governors of the States whose services can be requisitioned for election duty under Article 324(6) of the Constitution. In support of their contention they relied on the decision of the Supreme Court reported in Election Commission of India Vs. State Bank of India, Patna and others, wherein the apex Court held that the services of the Bank Employees and employees of the Life Insurance Corporation are not liable to be requisitioned under Article 324(6) of the Constitution since according to the Court they are not "such staff" as mentioned in the aforesaid Article. The Court held as follows:

For the conduct of elections, when the Election Commission makes a request to the President or the Governor to make available his staff they are obliged to provide the services. The expression "such staff" in Article 324(6) can only mean that staff which is under the control of the President or the concerned Governor and not any staff over which they do not exercise control. It could mean only that staff on which the President or the Governor, as the case may be, would be in a position to exercise disciplinary powers should they refuse the President's or Governor's directive. Although the Constitution-makers did not say the Union or the State Governments but only the President or the Governor, it is obvious they would have to act consistently with Articles 74(1) and 163(1), respectively. Therefore, on a request by the Election Commission the services of those Government servants who are appointed to public services and posts under the Central or State Government will have to be made available for the purpose of election. When the Constitution came into force the services of these officers were readily available. Of course, there were also local authorities and the services of the employees of the local authorities were also available. That is why Section 159 of the 1951 Act provides that on request from the Regional Commissioner, or the Chief Electoral Officer of the State, the local authority of the State shall make available to any Returning Officer such staff as may be necessary to carry out the duties in connection with an election.

Merely because of the provisions of the Representation of the People Act, 1950 and the Representation of the People Act, 1951 require that they must be officers of Government or local authority, unlike in the case of officers falling u/s 27 of the 1951 Act, it does not, follow that the services of the officers of the State Bank of India could be requisitioned. Section 26 of the 1951 Act is not a source of power at all. It does not, in any manner, enable the Election Commission to draft in the services of officers other than officers of Government and local authority. To draw inspiration from these sections to support an argument that the services of any person could be drafted for the purpose of election is untenable. May be, to conduct the elections many polling stations are set up. Consequently, the services of many persons may be required. May be, the Election Commission may draw the minimum staff from the banks to ensure that the banking business is not disrupted but the question here is of power and not discretion. If there is power it may be exercised with circumspection and minimum staff may be requisitioned but if there is no power the question of the mode of its exercise will not arise at all. It is a question of existence of power and not the manner of its exercise.

Article 324 does not enable the Election Commission to exercise untrammelled powers. The Election Commission must trace its power either to the Constitution or the law made under Article 327 or Article 328. Otherwise it would become an imperium in imperio which no one is under our constitutional order.

Exts. P-1 to P-16 are communications received by the Petitioners calling upon them to perform election duty in various places in the Mattancherry and

Niarakkal Assembly Constituencies and the Ernakulam Parliamentary Constituency. The challenge in the Original Petition was directed against Exts. P-1 to P-16 and for a declaration that compelling the Petitioners to perform election duty and to work under officers of the Government of Kerala who are inferior in ranks, status and pay scale is violative of Articles 14, 16 and 19 of the Constitution of India. A learned Single Judge as per the judgment under appeal dismissed the Original Petition mainly relying on Article 329(b) of the Constitution which is an express bar to interference by Courts in electoral matters. Right from *N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others*, -*N.P. Ponnuswamy v. The Returning Officer, Namakkal Constituency*) the consistent view taken by the Supreme Court is that normally all disputes relating to the election are to be resolved by filing an election petition and not otherwise. Interpreting Article 329(b) of the Constitution of India, the Supreme Court in the decision reported in *Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others*, held that "where an election under Article 329(b) is used in a comprehensive sense as including the entire process of election commencing with the issue of a notification and terminating with the declaration of election of a candidate, an application under Article 226 challenging the validity of any of the acts forming part of that process will be barred". The learned Single Judge, relying on the aforesaid observation and observations of like nature, held that the present writ petition is not maintainable under Article 226. We are afraid that the learned Single Judge erred in holding the view that Article 329(b) is a bar to the maintainability of the writ petition. It has to be noted that Article 329(b) covers only the actual election process and matters connected therewith and it has absolutely no relevance to performance of election duty by an individual. The duty performed by an individual in relation to election cannot be treated as part of election process. Article 329(b) only excludes the jurisdiction of the Courts to entertain any matter relating to "election" which can be questioned only by an election petition under the law prescribed by the appropriate Legislature. "Election" in this context means the entire process culminating in a candidate being declared elected. By reason of this clause, acceptance or rejection of a nomination paper by a Returning Officer cannot be challenged by a suit or an application under Article 226; the only remedy would be an election petition. Likewise any matter which arises while the elections are in progress, viz. at every stage from time of the issue of the notification appointing a date for nomination till the result is declared can be agitated only by an election petition and not otherwise. In the aforesaid view, none of the decisions relied on by the learned Single Judge is relevant to determine the scope and amplitude of Article 329(b) in the context of performance of election duty by an individual which is squarely covered by statutory provisions under the Representation of the People Act and Article 324(6) of the Constitution of India. Since the bar under Article 329(b) is not attracted to the facts of the present case, we are of the considered view that the writ petition is maintainable and the learned Single Judge went wrong in dismissing the Original Petition on that ground. The finding in that regard is

hereby vacated.

2. Since the Petitioners have already rendered duty pursuant to Exts. P-1 to P-16, the question as to whether their services are liable to be requisitioned in exercise of the powers conferred under Article 324(6) of the Constitution has become academic to be decided as and when their services are really requisitioned on a future occasion, in which event, it will be open for the Petitioners to raise all contentions especially the contention based on Article 324(6) of the Constitution as interpreted by the Supreme Court in Election Commission of India Vs. State Bank of India, Patna and others, . The appeal is disposed of as above.