
(1954) 09 KL CK 0003
In the High Court Of Kerala
Case No : Original Petition No. 57 of 1954

Govinda Panicker

APPELLANT

Vs

K. Balakrishna Marar and another

RESPONDENT

Date of Decision : 07-09-1954

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : AIR 1954 Ker 42

Hon'ble Judges : Subramonia Iyer, J; Menon, J

Bench : Division Bench

Advocate : V. Sankara Menon and T.C.N. Menon, for the Appellant; P. Govinda Menon and P.K. Krishnan Kutty Menon for Respondent No. 1 and Govt. Pleader, C.P. Sankara Pillai and S. Prabhakaran Nair, for the Respondent

Final Decision : Allowed

Judgement

Menon, J.—This petition challenges the election of the first respondent to the Cochin Devaswom Board constituted under the Travancore-Cochin Hindu Religious Institutions Act, 1950, (hereinafter referred to as the H.R.I. Act, 1950) on the ground that he was not eligible for election as a member of the Board under S. 66(iii) of that enactment. The first prayer in the petition is:

to issue a writ of quo warranto calling upon the respondent to furnish information as to the authority under which the respondent is functioning as a member of the Cochin Devaswom Board at present and also to declare that the respondent is not authorised to fill in that office as he has not been legally and properly elected.

2. S. 66(iii) provides that a person shall not be eligible for election if he is an office-holder of a local authority and the 1st respondent was, it is admitted, the Chairman of the Trichur Municipality on 4-6-1954, the date of his nomination and election under the rules in Schedule II to the Act and till 12-6-1954 when his resignation by his letter dated 8-6-1954 was accepted by the Municipality. The term "local authority" is defined in S. 2(20), Travancore-Cochin Interpretation

and General Clauses Act, 1125, as meaning:

A Municipal Corporation or Council, a Town Council, or other authority legally entitled to or entrusted by the Government with the control or management of a municipal or local fund.

And it was not disputed before us that the Trichur Municipality, a Municipality constituted under the Cochin Municipal Act, XVIII of 1113, is a local authority whose "office-holders" are disqualified for membership of the Board under S. 66(iii), H.R.I. Act, 1950.

3. The 1st respondent's contention was not that "office-holders" were not disqualified but that the term "office-holder" in S. 66(iii), H.R.I. Act, 1950, means only an "officer" and as the Chairman is not an officer of a Municipality under the Cochin Municipal Act, XVIII of 1113-the term "office holder" does not occur in that enactment-but one of the Municipal Authorities specified in S. 6 of that Act he cannot be considered as disqualified under S. 66(iii), H.R.I. Act, 1950. As to what exactly is meant by the term "office-holder" in S. 66(iii), H.R.I. Act, 1950, has to be resolved with reference to the provisions of that Act itself.

Section 87(i) of the Act refers not merely to office-holders but also officers and servants and on going through the various sections of the Act where the terms occur we are satisfied that though the words "officer" and "servant" have been created as inter-changeable or as denoting two gradations in the official hierarchy, the word "office-holder", has been kept distinct and separate by the legislature as denoting something superior to the officers and servants of the Board and of the institutions under its control or management; something quite different from an employee serving under a contract of employment.

4. A further contention of the 1st respondent on this aspect of the case was that nothing should be termed an "office" unless there is a remuneration attached to it and as the chairmanship of the Trichur Municipality carried no remuneration but only a conveyance allowance he cannot be deemed to be a holder of an office within the meaning of the H.R.I. Act, 1950. We see no warrant for this contention. An office without fees or perquisites will nonetheless be an office and in cases like the present the only test will be whether the particular office-honorary or lucrative-is the creature of a statute and is of a public nature.

5. The only conditions which under English Law an office should satisfy for an information in the nature of a "quo warranto" to lie are:

(i) that it must be held under the Crown or have been created by Charter or Statute;

(ii) that its duties are of a public nature; and

(iii) that it must be substantive in character or independent in title-whether permanent or at pleasure-and not merely that of a deputy or servant functioning at the will and pleasure of others.

6. Under S. 70(1), H.R.I. Act, 1950, every elected member of the Board shall be entitled to hold office for a period of four years from the date of his election and the date on which the sitting members vacated their office was 15-6-1954, that is, subsequent to the acceptance of the 1st respondent's resignation by the Municipality on 12-6-1954. On the basis of this sub-section the 1st respondent next contended that even if we find -as we have done-that he was an office-holder of a local authority and thus within the mischief of S. 66(iii), H.R.I. Act, 1950, the disqualification can operate only if it was present on the date he assumed office as a member of the Board and as it had been removed some three days prior to that date he is still entitled to succeed. We are not prepared to agree. The crucial date under the Act is not the date on which the 1st respondent assumed office as a member of the Board but the date of his nomination and election under the rules in Schedule II to the H.R.I. Act, 1950.

7. Section 63, H.R.I. Act, 1950, provides that one of the three members of the Cochin Devaswom Board shall be "elected by the Hindus among the members of the Legislative Assembly of the State of Travancore-Cochin" and S. 64 reads:

A. meeting of the Hindus among the members of the Legislative Assembly of the State of Travancore-Cochin shall be summoned under the authority of his Highness the Raj Pramukh by any person authorised in this behalf by the Raj Pramukh to meet at such time and place and on such date as may be fixed by him in this behalf for the election of a member to the Board. The election shall be held in accordance with the rules specified in Schedule II by the person commissioned by the Raj Pramukh to preside over the meeting.

The 2nd respondent-who was impleaded subsequent to the presentation of the petition-was the person commissioned by His Highness the Raj Pramukh to preside over the meeting at which the 1st respondent was "elected by the Hindus among the members of the Legislative Assembly of the State of Travancore-Cochin" as a member of the Board. The 1st respondent was nominated according to the provisions of R. 3 of Schedule II on 4-6-1954 and as the petitioner, the only other candidate so nominated, secured only a lesser number of votes, the 1st respondent was declared elected on the same date by the 2nd respondent as provided in R. 7 of that Schedule:

Where only two candidates are nominated for election as the member to the Board, the candidate who obtains at the ballot the larger number of votes shall be declared elected by the Chairman.

What S. 66, H.R.I. Act, 1950, stipulates is that no person shall be eligible for election as a member of the Board if such person is an office-holder of a local authority and it is impossible to say that the material date with reference to which the existence or otherwise of the disqualification should be considered is not the date of the election but some date subsequent to it.

8. In support of the 1st respondent's contention strong reliance was placed on a decision of Sundaram Chetty, J., in - (Vadamalai Tiruvanatha) Sevuga Pandia

Thevar Avergal Vs. C. Srirama Desikam Aiyangar and Others, , a case under the Madras Local Boards Act, XIV of 1920. The election in that case was held on 5-3-1925 and the date on which that election would take effect under the provisions of the Act was 1-4-1925 and the only question that arose for consideration was whether 5-3-1925 or 1-4-1925 was the material date in respect of the disqualification specified in S. 55(2)(v) of the Act. The full text of the Act as it stood at that time is available in the statute volume of the Indian Cases for 1920 and the relevant portion of S. 55 is:

(2) A person shall be disqualified for election or appointment as a member of a local Board if such person is at the date of nomination, election or appointment-

(v) already a member of the Local Board whose term of office will not expire before his fresh election or appointment can take effect.

And all that was decided by Sundaram Chetty, J. was:

The fresh election of the present petitioner took effect only from 1-4-1925, by which date the term of his office as a member of the Taluk Board had expired, and, therefore, his nomination for the fresh election is not obnoxious to S. 55, Cl. (2), Sub-cl. (v) of the Act. In my opinion, the present petitioner was a duly qualified candidate for the election held on 5-3-1925.

9. A further argument on the basis of S. 70(1), H.R.I. Act, 1950, was that it will entail an overlapping membership of the Board whenever an election is held prior to the vacancy, the sitting member as well as the newly elected member being entitled to hold office for a period of four years from the date of their respective elections. In the Madras case cited above also a similar anomaly was suggested but it was resolved by the Judge by reading together the provisions of Ss. 11, 17 and 55, Madras Local Boards Act, XIV of 1920. It may be that it will be possible to resolve the difficulty in this case too by a proper construction of the various Sections of the H.R.I. Act, 1950. Even if it is not, the remedy must be in the hands of his Highness the Raj Pramukh by ensuring that the elections are held only subsequent to the arising of the vacancy by the efflux of four years from the date of the prior election or the legislature which can introduce suitable amendments to the enactment itself. The necessity to hold the elections subsequent to the arising of the vacancy by efflux of time and allowing the sitting member in every case to continue in office under the provisions of S. 70(3), H.R.I. Act, 1950:

A member of the Board, shall on the expiration of his term of office continue in office until the vacancy caused by the expiration of his term of office is filled up.

or for legislative intervention, however, cannot and should not compel us to depart from the plain mandate of the statute that the material date for appraising the existence or otherwise of a disqualification is the date of the election itself and not any other, prior or subsequent to it.

10. The next contention of the 1st respondent was based on S. 67(4), H.R.I. Act,

1950:

Until an application has been made under sub-s. (2) and final orders are passed thereon, the member who is alleged to be subject to the disabilities stated in Cls. (i), (ii), (iii), (iv), (v) and (vi) of S. 66 shall be entitled to act as if he were not disqualified.

which according to him provides an effective answer to this petition under Art. 226 of the Constitution. Sub-sections (1), (2) and (3) of that section read as follows:

(1) If a person elected or nominated as a member of the Board is or subsequently becomes subject to any of the disabilities stated in Cls. (i), (ii), (iv) and (v) of S. 66, and is declared by a court to be under such disability as hereinafter provided or becomes subject to the disability mentioned in Cl. (iii) or (v) of S. 66, or ceases to profess the Hindu religion, he shall cease to be a member.

(2) Any person interested may apply to the District Court, Trichur for an order that a member of the Board has become subject to any of the disabilities stated in Cls. (i), (ii), (iii), (iv) and (vi) of S. 66 and the Court may, after making such enquiry as it deems fit, by order determine whether or not such member is disqualified.

(3) An appeal shall lie to the High Court against an order under sub-s. (2) and such appeal shall be heard and disposed of by a Division Bench.

The relevant portion of sub-s. (1) which applies to this case is only that portion which provides that a person elected "shall cease to be a member" if he "becomes subject to the disability mentioned in Cl. (iii) or (vi) of S. 66". The use of the word "becomes" is clearly indicative of the fact that the sub-section is dealing not with a disqualification under S. 66(iii) which existed at the time of the election but which arose subsequent thereto. The marginal heading of S. 65 is "Qualification for membership in the Board", of S. 66 "Disqualification for membership" and of S. 67 "Supervening disqualification" and we take the view that these marginal headings correctly describe the ambit of those three sections.

11. Sub-section (2) is badly worded. According; to sub-s. (1) in the case of the disqualifications enumerated in sub-ss. (i), (ii), (iv) and (v) of S. 66 a declaration under sub-s. (2) subsequent to the election is necessary whether those disqualifications existed at the time of the election or arose subsequently, and sub-s. (2) curiously does not provide for the obtaining of the declaration in those cases where those disqualifications existed at the time of the election but confines the declaration possible to those cases where those disabilities arose subsequent to the election. That such is the position is clear from the use of the words "has become subject to any of the disabilities stated in Cls. (i), (ii), (iv) and (vi) of S. 66".

It has also to be noted that the disqualification enumerated in sub-s. (v) of S. 66-

conviction by a criminal court of any offence involving moral turpitude-has been completely omitted from sub-section (2), even though that disqualification also is mentioned in S. 8(2) of the Act which deals with the Devaswom Board constituted for the Travancore portion of this State. Whatever may be the defect in the wording of sub-s. (2), however, we are definitely of the opinion that S. 67 has nothing to do with the disqualification enumerated in S. 66(iii) if it did not supervene after the election but existed at the time of the election itself and that the petitioner's remedy in this case is not by an application under S. 67-2. of the Act but in proceedings like these for an appropriate writ or direction under Art. 226 of the Constitution.

12. The last contention of the 1st respondent was that we should not issue a writ or direction which is essentially discretionary as his disqualification ceased to exist prior to his assumption of office on 15-6-1954. This argument was sought to be supported by - Hari Shankar Prasad Gupta Vs. Sukhdeo Prasad and Another, . The prayer in that case was for a writ of quo warranto in respect of a member of an Election Tribunal constituted under the Representation of the People Act, 1951 on the ground that he had not ten years" standing as an Advocate of the High Court on the date of his appointment. All the Judges were agreed that on a proper construction of S. 86(2)(b), Representation of the People Act, 1951, It is enough if the person concerned was an Advocate of the High Court and had practised as a lawyer-not necessarily as an Advocate of the High Court-for a period of not less than ten years and that on the basis of such a construction he was fully qualified to be a member of the Tribunal on the date of appointment.

The two passages from the judgment which were relied upon can hence be considered only as "obiter dicta". Those passages are:

Even if Sri Sukhdeo Prasad was not qualified on the date of his appointment, there can be no doubt that he is qualified today and there is nothing to bar his appointment now" (paragraph 4 from the judgment of the Chief Justice); and

I should also like to point out that admittedly Sri Sukhdeo Prasad is now qualified to be appointed as a member of the Tribunal, even on the assumption that the word "practice" means practice as an Advocate. It is a well recognised principle that the Court will not grant a "quo warranto" in a case where a mere irregularity can be cured. For this proposition I would rely on - "Bradley v. Sylvester", (1872) 25 LT 458 (C). This was a case in which the court refused an application for a writ of "quo warranto" against a clerk to a school board on the ground that he was improperly elected according to the provisions of a certain statute, considering that the majority of the board might, without assistance, remedy the impropriety themselves, the office being held during the pleasure of the board. Cockburn C.J. observed:

Here the ground upon which we are asked to Interfere is an impropriety in the election, and as the office is held at the pleasure of the Board, it is competent for

the Board to do what might be accomplished by our interference.

On this ground too in my opinion, this application must fail. This case is referred to with approval in - "Rex v. Speyer", (1916) 1 KB 595 (D). At page 609 Lord Reading C.J. emphasises that:

Whereas formerly a quo warranto was held to lie only where there was an usurpation of prerogative of the Crown or of a right of franchise, a proceeding by information in the nature of quo warranto has long since been extended beyond that limit and is a remedy available to private persons within the limits stated by Tindal C.J., and subject always to the discretion of the court to refuse or grant it (paragraph 16 from the judgment of Sapru J.)

The learned Chief Justice did not draw any inference from his statement in the sentence extracted above and the third Judge, Chathurvedi, J., only agreed with the judgment delivered by the Chief Justice. If the observations of Sapru J., are meant to convey the idea that even though the disqualification to appointment existed at the time when the appointment was made no writ should issue if the disqualification ceased to exist by the time the writ was sought, we must say with all respect, that we are not prepared to agree.

Sapru J.'s observations are apparently based on his interpretation of " (1872) 25 LT 459 (C)" which seems to be no authority for the proposition that the removal of a disqualification after the crucial date will in any way preclude the issue of a writ. That was a case where the writ was refused not on any such ground but because interference by the court was unnecessary to secure the desired objective. What was sought was the vacation of an office held at the will and pleasure of the employers and what the court said was that it will not interfere as the vacation of the office could be brought about by the employers themselves without the intervention of the court.

13. The summary of the case as given in the Empire Digest (Volume XVI, 356, 1868) is:

Upon an application for a writ of quo warranto against the clerk to a school board, on the ground that he was improperly elected according to the provisions of Elementary Education Act, 1870 (a 75) S. 35, Held: a rule would be refused as the majority of the board might without assistance, remedy the impropriety themselves the office being held during the pleasure of the board.

14. The writ of "quo warranto" is a common law process of great antiquity, a writ of right for the King against one who claimed or usurped any office, franchise, or liberty, to inquire by what authority he asserted a right thereto in order that it might be determined. An information in the nature of quo warranto is its modern form and there is no doubt that it is a remedy given by law at the discretion of the court and not issued as a matter of course.

15. As regards "office" English Law originally confined it to cases of usurpation upon the Crown directly. The turning point was - "Darley v. The Queen", (1846)

12 CI & F 520 (E) in which Tindal C.J., whose opinion was adopted by the House of Lords, said:

After consideration of all the cases and dicta on this subject, the result appears to be, that this proceeding by information in the nature of "quo warranto" will lie for usurping any office, whether created by charter alone, or by the Crown, with the consent of Parliament provided the office be of a public nature and a substantive office, not merely the function or employment of a deputy or servant held at the will and pleasure of others.

What Lord Reading did in the case cited by Sapru J., was only to emphasise the importance of "Darley v. The Queen (E)" in the history of the law relating to quo warranto, lay down the correct test as:

Whether there has been usurpation of an office of a public nature and an office substantive in character, that is, an office independent in title.....

and say:

I have found it difficult to understand why in principle an office held at pleasure should not equally, with an office of a permanent character, be the subject of this remedy, provided the office be of a public and substantive character, particularly as an office held at pleasure, is often in effect of a permanent character. After considering the authorities since "Darley v. The Queen (E)" it appears to me that they rest upon the principle formulated in that case and are only the application of it to the particular facts. Tindal C.J., when using the language under consideration was contrasting the substantive office, that is, the office of an independent character, with the employment of a deputy or mere servant.

16. In the light of what is stated above the election of the 1st respondent has to be declared void on the ground that he was disqualified at the crucial date, namely, the date of his nomination and election on 4-6-1954, as he was on that date the Chairman of the Trichur Municipality, that is, an office-holder of a local authority, within the meaning of sub-s. (iii) of S. 66.

17. The second prayer in the petition is:

It is also prayed that this court be pleased to declare that the petitioner is the properly authorised person to fill in the office of the member of the Cochin Devaswom Board.

The principles of law governing such a prayer for declaration has long been settled and it can certainly be taken as clearly established that where the returned candidate is found wanting in a qualification but his voters had no notice or knowledge of his want of qualification the candidate next on the poll is not entitled to be seated and there will merely be a fresh election. As laid down in - S. Gopala Ayyangar and Another Vs. M.K. Mahomed Ebrahim Rowther, V.N. Sessa Iyengar and Another, no such declaration should ever be made unless the court can come to the conclusion which is impossible in this case-the petitioner's

affidavit contains no such assertion and he states that he himself was unaware of the infirmity - that the electors were conscious of the disqualification and still voted for the 1st respondent. The basis of the decision is that the votes given after notice or knowledge must be treated as having been given perversely by the voters and should hence be considered, as having been deliberately thrown away by them.

18. The petition is allowed as indicated above but in the circumstances of the case without any order as to costs.