

(2002) 11 KL CK 0053

In the High Court Of Kerala

Case No : O.P. No"s. 15863, 20575 etc. of 2002

Marykutty Mathew

APPELLANT

Vs

State Election Commission

RESPONDENT

Date of Decision : 08-11-2002

Acts Referred:

Constitution of India, 1950 — Article 243O
Panchayat Raj Act, 1994 — Section 30, 35, 36

Citation : (2003) 1 ILR (Ker) 221

Hon'ble Judges : Kurian Joseph, J

Bench : Single Bench

Advocate : K. Ramakumar, Joice George, Greeny, M.R. Rajendran Nair, R. Sreeraj, Hariraj, K.T. Sankaran, T.A. George Joseph, P.B. Suresh Kumar, T.V. George, Rajesh Mathew, Preethy Karunakaran, R. Rajesh Kormath and Bijimol Jose, for the Appellant; Murali Purushothaman, K.P. Dandapani, I. Sheela Devi, A.V. Thomas, Mathew B. Kurian, K.T. Thomas, Shyson P. Manguzha and Jacob Sebastian, for the Respondent

Final Decision : Allowed

Judgement

Kurian Joseph, J.—An employee of a co-operative society registered under the provisions of the Kerala Co-operative Societies Act, 1969 is elected as a member of the Panchayat. There is no election petition. Retaining employment he continues to hold office as a member of the Panchayat. Can the State Election Commission determine the disqualification u/s 36 of the Kerala Panchayat Raj Act?

2. Petitioners in these Original Petitions are employees of co-operative societies registered under the provisions of the Kerala Co-operative Societies Act, 1969. Retaining their employment in the respective societies they contested for election to the Grama Panchayats and they were elected. No election petition was filed on any of the grounds available u/s 102 or 103 of the Kerala Panchayat Raj Act, as provided under Sections 87 to 89 of the Kerala Panchayat Raj Act, 1994. Instead, the contesting respondents moved the State Election Commission u/s 36 of the

Kerala Panchayat Raj Act. The Commission entertained the petitions and in one case the issue was adjudicated. The Commission took the view that the member who is an employee of a co-operative society at the time of election is disqualified for holding the office of member of the Grama Panchayat and in the rest of the cases, the Commission is yet to pass orders. This, in nut shell, is the factual background of the cases.

3. Though the petitioners have taken various grounds and have made consequential prayers including the challenge on the validity of the statutory provision, Sri. K. Ramakumar, learned counsel leading the arguments submits that the essential question as to the jurisdiction of the State Election Commission is the issue to be first decided and the rest of the challenges need be gone into only if the Commission is found to have exercised jurisdiction not vested in it.

4. As already observed above there is no dispute as to the facts, namely all the petitioners were employees of the co-operative societies registered under the provisions of the Kerala Co-operative Societies Act, 1969 at the time they contested for election to the Grama Panchayat and they continue in employment.

5. Article 243-O of the Constitution of India providing for challenge on election matters reads as follows:-

""243-O. Bar to interference by courts in electoral matters - Notwithstanding anything in this Constitution,-

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 243-K, shall not be called in question in any court:

(b) no election to any Panchayat shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State".

So, in view of Clause (b) of Article 243-O an election to the Panchayat can be questioned only by an election petition as provided under the Kerala Panchayat Raj Act, 1994, being the law dealing with the subject.

6. Chapter VII of the Kerala Panchayat Raj Act comprising of Sections 29 to 38 deals with qualifications and disqualifications of candidates and members. Section 30 provides as follows:-

""30. Disqualification of officers and employees of Government, Local authorities, etc.- (1) No officer or employee in a service of the State or Central Government or of a local authority or a corporation controlled by the State or Central Government or of a local authority or any company in which the State or Central Government or a local authority (not less than fifty one percent share) or of a statutory Board or of any University in the State shall be qualified for election or for holding office as a member of a Panchayat at any level.

Explanation.- For the purpose of this section, company means a Government

company as defined in Section 617 of the Companies Act, 1956 (Central Act 1 of 1956) and includes a Co-operative Society registered or deemed to be registered under the Kerala Co-operative Societies Act, 1969 (21 of 1969).

(2) Any officer or employee referred to in Sub-section (1) who has been dismissed for corruption or disloyalty shall be disqualified for a period of five years from the date of such dismissal for election or for holding office as a member of a Panchayat at any level".

Section 34 provides for disqualification of candidates and Section 35 deals with disqualification of members on various grounds. Section 36 deals with determination of disqualification of a member. It reads as follows:-

"36. Determination of subsequent disqualification of a member.- (1) Whenever a question arises as to whether a member has become disqualified u/s 30 or Section 35 except Clause (n) thereof after having been elected as a member, any member of the Panchayat concerned or any other person entitled to vote at the election in which the member was elected, may file a petition before the State Election Commission, for decision.

Provided that the Secretary or the Officer authorised by the Government in this behalf may refer such a question to the State Election Commission for decisions.

(2) The State Election Commission, after making such enquiry as it considers necessary in the petition referred to in or the reference made thereunder in Sub-section (1) whether so however that the State Election Commission may pass an interim order as to whether a member may continue in office or not till a decision is taken on the petition or the matter

involved in the reference.

(3) A petition or reference referred to in Sub-section (1) shall be disposed of in accordance with the procedure applicable under the Code of Civil Procedure, 1908 (Central Act 5 of 1903) when trying a suit".

7. It is pertinent to note that Section 36 provides for "Determination of subsequent disqualification of a member" and it is clearly provided in the Section that only those questions regarding disqualification u/s 30 or Section 35 after having been elected as a member are referable to the State Election Commission. In other words, once a candidate is elected as a member, even assuming he had at the time of election, incurred disqualifications u/s 30 or Section 35 of the Kerala Panchayat Raj Act it is not for the State Election Commission to embark upon an enquiry, regarding such disqualification after the election. The jurisdiction of the State Election Commission is confined to disqualification incurred after having been elected as a member. Needless to say, in case a member accepts employment in a Co-operative Society, it is a matter for the Commission to consider, being a post election disqualification.

8. As far as the pre-election disqualification is concerned, the jurisdiction to

adjudicate such issues is as provided under Chapter X, comprising of Sections 87 to 119, Disputes Regarding Election, is on the designated courts. Section 87 dealing with election petitions provides that "No election shall be called in question except by an Election Petition presented in accordance with the provisions of this Chapter". Section 88 deals with designated Courts, - the Munsiff Court or the District Court, as the case may be. Section 102 deals with the grounds. Section 102(1)(a) is the ground on disqualification- "that on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under this Ad". Since all the petitioners are elected members, the questions pertaining to their qualification or disqualification as on the date of election, being a pre-election issue, can be decided only in an Election Petition by the designated court u/s 88 of the Act.

9. Ext. P3 in O.P. No. 15863/2002 is the order passed by the State Election Commission. According, to be Commission the petitioner is disqualified u/s 30 of the Kerala Panchayat Raj Act and hence she is disqualified to continue as a member of the Grama Panchayat. The Commission has elaborately dealt with the purport of the provision and has come to a conclusion that the employees of the Co-operative Societies are not qualified to contest the election and they are not eligible to continue as such. But the question is whether the Commission has jurisdiction to entertain a petition u/s 36 and determine the question. True the petitioner has not in so many words taken the ground of jurisdiction in Ext. P2 objections filed before the Commission against Ext. P1 complaint filed by the second respondent. But being a question of jurisdiction, going to the root of the issue, the Commission should have addressed itself as to its jurisdiction to entertain such a petition.

10. Sri. Murali Purushothaman, learned counsel appearing for the Commission, vehemently contends for the position that the Commission is within its jurisdiction to entertain such a petition since Section 30 provides for qualification both for contesting the election and for holding office as a member of the Panchayat. But as discussed above, the jurisdiction of the Commission u/s 36 is to determine questions in respect of disqualifications incurred after having been elected as a member. Only in a case where a member of the Grama Panchayat accepts employment in a Co-operative Society registered under the Kerala Co-operative Societies Act, 1969 and when the Commission is called upon to decide the question of such a disqualification, the Commission gets jurisdiction. The State Election Commission has no jurisdiction to entertain a petition with regard to a disqualification already incurred by a member u/s 30 or 35 of the Act prior to the election. Even in cases where such disqualification already incurred before the election continues to exist, the commission has no jurisdiction to consider the matter.

11. Relying on the decision of the Supreme Court in K. Venkatachalam Vs. A Swamickan and Another, , learned Standing Counsel for the Commission contends that in a situation where a returned candidate escaped an election

petition, it is not as if the question as to his qualification to be a member is beyond challenge. That was a case where election of the appellant Sri. Venkatachalam, as a member of the Legislative Assembly in Tamil Nadu from Lalgudi Constituency was challenged under Article 226 of the Constitution of India in the High Court of Madras on the ground that the member did not possess the basic qualifications prescribed in Clause (c) of Article 173 of the Constitution of India read with Section 5 of the Representation of the People Act, 1951 - he was not an elector in the electoral roll of the Lalgudi Assembly Constituency. The allegation was that he impersonated him for another person of the same name in the electoral roll of the Constituency. A Division Bench of the High Court took the view that Writ Petition under Article 226 was maintainable despite the bar contained in Clause (b) of Article 329 of the Constitution of India, Endorsing the view the Apex Court held that "Article 226 of the Constitution is couched in widest possible terms and unless there is clear bar to jurisdiction of the High Court its powers under Article 226 of the Constitution can be exercised when there is any act which is against any provision of law or violative of constitutional provisions and when recourse cannot be had to the provisions of the Act for the appropriate relief. I am afraid the said decision will not be of any avail to the State Election Commission. As noted above, it is a case where the extraordinary jurisdiction of the High Court under Article 226 of the Constitution of India was considered. There is no such extra-ordinary jurisdiction conferred on the State Election Commission under the Constitution. On the contrary, there is clear bar of jurisdiction in such circumstances as far as the statutory creature, namely the State Election Commission is concerned, both under the Constitution and under the Kerala Panchayat Raj Act.

12. In the result it is declared that the State Election Commission has no jurisdiction to entertain a petition u/s 36 of the Kerala Panchayat Raj Act to decide a question as to the disqualification before the election of a member of a Panchayat u/s 30 or 35 of the Act, even if such disqualification continues to exist. Consequently all the impugned orders and notices are set aside. In that view of the matter it is not necessary for the Court to consider all other questions including the validity of the impugned provision u/s 30. It is made clear that all those questions are left open and the decision is only to the extent of the declaration made above.

The Original Petitions are allowed as above.