
(2001) 03 KL CK 0023
In the High Court Of Kerala
Case No : W.A. No. 549 of 2001

Murali Vengath

APPELLANT

Vs

Kanakkari Grama Panchayat and Others

RESPONDENT

Date of Decision : 02-03-2001

Acts Referred:

Constitution of India, 1950 — Article 226, 32
Representation of the People Act, 1951 — Section 102, 104, 65, 79

Citation : (2001) 1 KLJ 693

Hon'ble Judges : Kurian Joseph, J; K.K. Usha, J

Bench : Division Bench

Advocate : P.K. Muraleedharan, for the Appellant; K. Sasikumar Govt. Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Kurian Joseph, J.—Appellant is the petitioner in O.P. No. 36291 of 2000. The main reliefs sought in the original petition as reflected in prayers (i) and (ii) read as follows :

"(i) issue a writ of certiorari or any other appropriate writ or order quashing Sections 79 and 104 of the Kerala Panchayat Raj Act, 1994 as ultravires of the Constitution and violative of the Citizenship Act, 1955 and violative of Secs. 2(xv), 2(xvi), 17, 18, 19, 20 and Sec. 76 of the Kerala Panchayat Raj Act itself.

(ii) issue a writ of certiorari or any other appropriate writ or order quashing Secs. 65 and 102 of the Representation of Peoples Act 1951 as ultravires of Constitution and violative of the Citizenship Act, 1955.

The third prayer is for quashing the proceedings for election conducted in Ward No. X of Kanakkari Grama Panchayat and for a consequential direction to conduct re-election. In the election conducted in Ward No. X of the said Panchayat the appellant and the 4th respondent secured equal number of votes and as contemplated by Sec. 79 of the Kerala Panchayat Raj Act the returning officer

resolved the tie on the basis of lot which fell in favour of the 4th respondent and he was declared to have secured one additional vote and thus elected as the successful candidate in Ward No. X. The learned single Judge following his earlier decision in Padmanabhan Vs. State of Kerala and Others, , repelled all those contentions and held that there has to be a rational approach in such matters and arithmetical precision of stiff logic was not required. Aggrieved by the dismissal of the writ petition this appeal is filed.

2. At the outset it has to be noticed that the original petition is liable to be rejected on the sole ground that a writ of certiorari will not lie for quashing a legislation. The whole purpose of that prerogative writ is for correcting mistakes committed by inferior courts or tribunals or authorities on scrutiny of records in the impugned proceedings. The legislature is not an inferior court or tribunal; it is a co-ordinate branch. But at the same time vested with constitutional powers, this court is certainly entitled to look into the constitutionality of a legislation. That is an exercise to be done on the perusal of the legislation and not by calling for the records leading to the legislation. If a piece of legislation does not conform to the constitutional mandate for the legislation or if a piece of legislation is offensive of Part III of the Constitution, certainly this court will be entitled to declare that the said legislation is ultravires the constitution and the court will be justified in issuing a writ of mandamus to the Government not to enforce the said legislation. The statute reflects the will of the people and the will of the people as reflected in the statute cannot be defeated except to the extent indicated above. It has also to be seen that the courts do not issue writ of mandamus to the legislature, since the legislature owes no duty to the suitor to legislate and hence there is no corresponding right to be enforced to compel the legislature to legislate. As mentioned above all the prayers made by the appellant are essentially for a writ of certiorari for quashing certain provisions under the Kerala Panchayat Raj Act as well as the Representation of Peoples Act. This court with its basic limitations has to act within its powers and is certainly not competent to issue the prerogative writ of certiorari for quashing a legislative provision. These are areas which call for a strict interpretation particularly when the appellant is assisted by a legal practitioner. We are also fortified in our view by many decisions of the apex court. We may refer to two of them which have elaborately dealt with the issue.

3. In Prabodh Verma and Others Vs. State of Uttar Pradesh and Others, the Apex Court held thus:

(3) A writ of certiorari or a writ in the nature of certiorari cannot be issued for declaring an Act or an Ordinance as unconstitutional or void. A writ of certiorari or a writ in the nature of certiorari can only be issued by the Supreme Court under Art. 32 of the Constitution and a High Court under Art. 226 of the Constitution to direct inferior courts, tribunals or authorities to transmit to the court the record of proceedings pending therein for scrutiny and, if necessary, for quashing the same.

(4) Where it is a petitioner's contention that an Act or Ordinance is unconstitutional or void, the proper relief for the petitioner to ask is a declaration to that effect and if it is necessary, or thought necessary to ask for a consequential relief, to ask for a writ of mandamus or a writ in the nature of mandamus or a direction, order or injunction restraining the concerned State and its officers from enforcing or giving effect to the provisions of that Act or Ordinance.

(5) Though a High Court ought not to dismiss a writ petition on a mere technicality or because a proper relief has not been asked for, it should not, therefore, condone every kind of laxity, particularly where the petitioner is represented by an advocate.

4. Referring to the observation in *T.C. Basappa Vs. T. Nagappa and Another*, , "we can make an order or issue a writ in the nature of "certiorari" in all appropriate cases and in appropriate manner, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law", the Supreme Court in *Union of India (UOI) and Others Vs. Upendra Singh*, stated as follows:

5. The said statement of law was expressly affirmed by a seven-Judge Bench in *Smt. Ujjam Bai Vs. State of Uttar Pradesh*, . The reason for this dictum is self evident. If we do not keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English Law, the exercise of jurisdiction becomes rudderless and unguided; it tends to become arbitrary and capricious. There will be no uniformity of approach and there will be the danger of the jurisdiction becoming personalised. The parameters of jurisdiction would vary from Judge to Judge and from Court to Court. (Some say, this has already happened). Law does advance. Jurisprudence does undoubtedly develop with the passage of time, but not by forgetting the fundamentals. You have to build upon the existing foundations and not by abandoning them. It leads to confusion; it does not assist in coherence in thought or action.

Thus on the basis of the law as laid down by the Supreme Court the writ appeal is only to be dismissed because all the prayers are for the issuance of a writ of certiorari for quashing certain provisions under the Kerala Panchayat Raj Act as well as the Representation of Peoples Act.

5. Despite the above legal position, we may also incidentally refer to the merits of the contentions; though it is now well settled that once election is conducted the remedy of any aggrieved person is not under Art. 226 of the Constitution of India. Sections 79 and 104 of the Kerala Panchayat Raj Act read as follows:

79. Equality of votes.- If, after the counting of the votes is completed, an equality of votes is found to exist between any candidates, and the addition of one vote will entitle any of those candidates to be declared elected, the returning officer shall forthwith decide between those candidates by lot, and proceed as if the candidate on whom the lot falls had received an additional vote.

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"104. Procedure in case of an equality of votes.- If during the trial of an election petition it appears that there is an equality of votes between any candidates at the election and that the addition of one vote would entitle any of those candidates to be declared elected, then-

(a) any decision made by the returning officer under the provisions of this Act, shall insofar as it determines the question between those candidates, be effective also for the purposes of the petition; and

(b) in so far as that question is not determined by such a decision the court shall decide between them by lot and proceed as if the one on whom the lot then falls had received an additional vote.

Thus it can be seen that the statute has incorporated provisions that in the event of equality of votes, for the purpose of declaring one candidate as successful, one of them has to be given an additional vote and that additional vote is decided on the basis of lot. It is interesting to note that in *Eyre v. Milton Proprietary Ltd.*, 1936 1 Ch. 244, the true meaning of the expression "shall be determined by ballot" was held to be "shall be determined by lot" while construing a provision under the Companies Act. According to Lord Wright, the Master of the Rolls, the expression "by ballot" means a secret vole and as the circumstances warranted a draw by lot.

6. The legislature thought it fit and reasonable to take recourse to such a mode in order to get over a situation of impasse. It is interesting to note that even on analysing the prayers of the appellant one has to adopt such a mode by lot at one stage. It is the suggestion of the appellant that in the event of securing equal number of votes the term should be divided equally between or among the candidates who secured equal number of votes. Obviously, if those candidates are not agreeable to decide as to their turn, the only mode available to decide the respective turn is to draw a lot. Thus it cannot be said that such a mode is unreasonable.

7. Yet another suggestion of the learned counsel for the appellant is to take recourse to Sec. 150 of the kerala Panchayat Raj Act which reads thus:

150. Special elections.- If at a general election or bye-election no person is elected to fill the vacancy a fresh election shall be held within three months after the general election or bye-election, as the case may be, for such vacancy on such day as the State Election Commission may fix.

It needs no explanation that it is a provision contemplated in the exigency of no one getting elected to fill up the vacancy. The situations dealt with under Secs. 79 and 104 of the Act are not the situations where none is elected. Those are situations where from among the candidates "voted" who is to be selected as elected in the event of candidates securing equal number of votes, by adding one vote. Certainly the returning officer cannot be given a casting vote which is an

accepted mode of taking decision by the Chairman of a Meeting exercising a second or casting vote in the event of equal number of votes between the contesting candidates or rival contentions. (Ref. Shackleton on The Law and Practice of Meetings, Sixth Edition, Part IV). Sections 65 and 102 of the Representation of Peoples Act, 1951 also deal with situations and procedures where the candidates securing equal number of votes. Therein also in unmistakable terms it is held that the candidate in whose favour the lot falls will be deemed to have secured an additional vote and that person would be declared as the winning candidate. It is not creation of an artificial vote as contended by the appellant. The legislature in its wisdom thought of averting the heavy burden on the exchequer in conducting re-election as far as possible and thought it fit to declare one among them as elected by giving them an additional vote which is to be determined on the basis of lot. We do not think that the said provision is in any way unreasonable. It does not in any way violate the provisions of the Citizenship Act either. The contention that the additional vote is not that of a citizen but that of an artificial person is too farfetched and wild. Obviously, it is not as if an artificial person casts a vote so as to tilt the ballot; but it is only a situation of breaking a tie which is a universally accepted practice in such situations. The learned counsel then contended based on N.E. Renton (1961, Sweet & Maxwell) "Guide for Meetings and Organisations" that in the event of securing equal number of votes it is common law principle that the motion should be taken as defeated and there is no casting vote. That was a situation dealing with adoption of resolution in a meeting. An election on the basis of expression of the will of people by ballots cannot be equated with such a situation. It has also to be noted that no citizen casts two votes so as to get over the impasse and for that matter the returning officer also does not decide the result of the election. On the basis of the statutory power which is already held by us as reasonable the returning officer only decides the result by drawing a lot. In that view of the matter also none of the contentions of the appellant has any merit.

We are in perfect agreement with the view taken by the learned single Judge regarding the validity of Secs. 79 and 104 of the Kerala Panchayat Raj Act. Decision by drawing lot in the event of securing equal number of votes is an age old practice and well accepted procedure in democracy and the same cannot in any way be held to be unfair or unreasonable or infringing the constitutional rights of the appellant. Accordingly we dismiss the writ appeal.