

(2015) 03 KL CK 0233

In the High Court Of Kerala

Case No : Writ Petition (C). No. 3111 of 2015 (L)

P. Rajesh Kumar

APPELLANT

Vs

The University of Kerala and Others

RESPONDENT

Date of Decision : 06-03-2015

Acts Referred:

Constitution of India, 1950 — Article 226, 329 (b)

Citation : (2015) 03 KL CK 0233

Hon'ble Judges : K. Vinod Chandran, J

Bench : Single Bench

Advocate : C.P. Sudhakara Prasad, Senior Advocate, S. Ramesh, Naveen T. and Pooja Surendran, for the Appellant; Bechu Kurian Thomas, SC and Biju Meenattoor, GP, Advocates for the Respondent

Final Decision : Allowed

Judgement

K. Vinod Chandran, J.—The petitioner was granted an interim order insofar as acceptance of his nomination for election to the Syndicate of the Kerala University in the Constituency of "Teacher of a Government College"; as provided under Section 21(a)(3) of the Kerala University Act, 1994. The rejection of the nomination made by the Assistant Returning Officer as per Ext.P6, was on the ground that the petitioner had stricken off both item Nos. 4 and 5 included in the "consent and affidavit of the candidate" in the nomination form which reads as under-

4. I am not already a member of the Syndicate

5. I am already a member of the Syndicate, but my term of office as such will expire before the membership for which I am seeking election, takes effect.

2. The aforesaid clauses were incorporated in the form since there was a disability on any member of the Syndicate; whose tenure extends beyond the publication of results; from contesting the election. Hence either of the items (4 or 5) had to be struck off when submitting a nomination paper. The petitioner

struck off both and hence, the Assistant Returning Officer rejected the nomination for reason of there being no declaration as such; that the petitioner is not a member of the Syndicate. There was hence, no declaration that the candidate did not have a disability.

3. The interim order was challenged by the additional 5th respondent herein in a Writ Appeal in which a Division Bench of this Court refused to interfere; however directed impleadment of the said appellant as additional respondent in the writ petition and specifically reserved the right of the said respondent to agitate all contentions in the writ petition. The learned counsel for the additional 5th respondent submits that, the error insofar as striking off both the clauses is not merely technical; when the Act stipulates that the election shall be held in accordance with the procedure prescribed by the Statutes (Section 14). The Statute 35 of the Kerala University First Statutes, 1974 also prescribes that a candidate shall make a statement to the effect that he/she is not already a member. The declaration thus mandated by the Act and Statute being one going to the root of the qualification of the candidate to stand for the election, it cannot be viewed to be technical.

4. The learned counsel relies on the oft quoted principle in *Taylor v. Taylor* [(1875) 1 Ch.D 426], that when there is a prescription of a particular thing to be done in a particular manner then it shall be done in that manner or not at all. It is argued that the rejection of the nomination has to be upheld. The further submission made is that the petitioner had not impleaded any of the other candidates and the election being one of proportional representation, necessarily the other candidates would be affected by a candidate, whose nomination was rejected, being directed to be included in the list of candidates. The petitioner contends that there being only one seat reserved in the Constituency of "Teachers of Government College" and the petitioner and the additional 5th respondent being the only candidates who stood for election to the said constituency, the petitioner is definitely prejudiced insofar as not being heard before an interim order was passed. The writ petition would not be maintainable at all without impleading the parties and hence, the same has to be dismissed is the compelling argument. Further when an alternate remedy by way of an Election Petition was available as per the Statutes, the writ petition itself should not have been entertained, is the concluding salvo.

5. The learned counsel would rely on *N.P. Ponnuswami v. The Returning Officer, Namakkal Constituency*, (AIR (39) 1952 SC (64)), *Babu Verghese and Others* (1993 (3) SCC 422) , *Sreekantan Nair Vs. Chancellor, University of Kerala and Others* , *Abraham P. Mathew (Prof.) Vs. Vice Chancellor and Others*, (2013) 2 ILR (Ker) 827 : (2013) 2 KHC 620 : (2013) 3 KLJ 45 : (2013) 2 KLT 892 and *Adv. Joice George Vs. The Election Commissioner of India Nirvachan Sadan and Others*, AIR 2014 Ker 107 : (2014) 2 ILR (Ker) 517 : (2014) 2 KHC 272 : (2014) 2 KLJ 530 : (2014) 2 KLT 230 , to buttress his contentions.

6. The learned senior counsel appearing for the petitioner would contend that the

issue is covered by the decision of the Honourable Supreme Court in Rangilal Choudhury Vs. Dahu Sao and Others, AIR 1962 SC 1248 : (1962) 2 SCR 402 . The situation herein is identical to that of Sreekanta Bhasi v. University of Kerala (1996 (1) KLT 626) and on facts the rejection of petitioner's nomination was an error which could be rectified under Article 226 of the Constitution of India. The learned senior counsel would also rely on the judgment in W.A. 529 of 2014 dated 21.08.2014, to contend that the Division Bench of this Court considered a case of rejection of nomination, in which the names were not mentioned, and found that the register numbers having been disclosed and the Returning Officer having verified the register, the mere fact that the names were not mentioned would be of no consequence. The names would be easily discernible on a cross verification of the register number in the register, was the finding.

7. At the outset, it has to be observed that the additional respondents' contention with respect to the maintainability of the writ petition for reason of the non-impleadment of the other candidates and the prejudice caused to the additional respondent are contentions which could be taken care of, at the time of hearing. This Court had exercised its discretion and granted interim order permitting the petitioner to stand for the election. However, no equity can be claimed by the petitioner, by virtue of the interim order. If the candidate, who was so admitted to the list of candidates, wins the election, even then it would be subject to the result of the writ petition. If this Court finds that the petitioner's nomination was not liable to be accepted, then definitely, the petitioner, despite being elected, would be declared as disqualified. Then going by the procedure of proportional representation, the votes obtained by the petitioner would be set at naught and the next preference in such ballot paper would be pushed up in favour of the other candidates. Hence hearing of the writ petition itself would efface the prejudice said to have been caused to the additional respondent.

8. Adv. Joice George Vs. The Election Commissioner of India Nirvachan Sadan and Others, AIR 2014 Ker 107 : (2014) 2 ILR (Ker) 517 : (2014) 2 KHC 272 : (2014) 2 KLJ 530 : (2014) 2 KLT 230 sought a re-alignment of the names in the list of nominated candidates, which was rejected for want of impleadment of the other candidates. The possibility of the model ballot papers being supplied to less educated voters was also noticed in the subject election to a parliamentary constituency. It would be gross to apply the same principle to the present election to a Syndicate of a University from the limited members of the Senate.

9. One other aspect which was highlighted to advance the prejudice caused, by the learned counsel appearing for the additional 5th respondent, was the fact that the additional 5th respondent rested contend in the belief that she was the only candidate in the Constituency and her election would be declared even without a voting. There is no reason for such an assumption especially when the election is one of proportional representation and the rejection of nomination paper of a contesting candidate would not by itself lead to a right being conferred

on the other contesting candidate to be declared elected.

10. N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others, AIR 1952 SC 64 : (1952) 1 SCR 218 was a case in which the Honourable Supreme Court considered the issue wherein the High Court had declined interference under Article 226 of the Constitution of India in an election matter on the ground of an alternate remedy in an Election Petition. That was a case in which the Honourable Supreme Court upheld the rejection on the finding that the jurisdiction of the High Court stood ousted by Article 329 (b) of the Constitution of India. Herein, there is no specific bar and the restriction is only one which is self-imposed; where the discretionary remedy is not ordinarily exercised, when an alternate remedy is available.

11. Sreekantan Nair (supra) was a case in which this Court found the objection of all the candidates being not impleaded in an election petition to be fatal, especially in an election held on the basis of proportional representation. That may not be applicable here since the election was not over when the interim order herein was passed and anyone who is aggrieved could have got themselves impleaded. The 5th additional respondent had also got herself impleaded.

12. Prof. Abraham P. Mathew (supra) is binding only to the extent of a candidate whose nomination is rejected, being eligible to assail the election in an election petition. By the time the writ petition was considered the election was over and the petitioner whose nomination was rejected, was relegated to the remedy of filing an Election Petition.

13. No application of the aforesaid decisions can be made to the instant case.

14. Babu Verghese (supra) was a case in which the election held to the State Bar Council was held to be bad since the term of the Bar Council, which convened the election, had expired. The issue which arose therein was whether the extension granted by the Bar Council of India was valid. The respondent Bar Council contended that under the emergent powers conferred by Rule 6 of the BCI Rules, the resolution to extend the term was communicated to the members and the response of the majority members agreeing to the extension was confirmed in the next meeting of the BCI. The Honourable Supreme Court found that though the resolution was communicated by circulation there was no response by the majority before the term expired. The decision taken by the BCI after the expiry of the term was found to be not one of confirmation, as provided under Rule 6. In the context of no retrospective extension being contemplated under the Rules, the election held was found to be bad since the decision taken by the BCI was one taken after the term expired.

15. In the present case, this Court, on facts, was of the opinion that discretion has to be exercised since the striking off of both the declarations was only a technical error. Sreekanta Bhasi (supra) was quoted in the interim order itself wherein the Division Bench had reiterated that there was no invariable rule that jurisdiction under Article 226 would not be exercised if there is an alternate

remedy. Patent illegality and obvious lack of jurisdiction would persuade this Court to invoke power under Article 226 of the Constitution of India. It is on this accepted proposition, this Court had extended its extraordinary jurisdiction under Article 226 to set aside the rejection of nomination of the petitioner.

16. The learned counsel for the additional 5th respondent would emphasize that in the said decision the said items were not at all stricken off; and both were retained in the nomination paper. In the present case, both having been stricken off, definitely there could be no declaration as stipulated and the only consequence is the rejection of the nomination. However, what assumes significance is the identical fact situation in *Sreekanta Bhasi* (supra) and in the present case, of there being no Syndicate in office. The declaration, essentially, is intended at, no Syndicate member eligible to be continued in office beyond the election date, being permitted to stand for the elections. In both the said instances, admittedly, there was no Syndicate in office. No candidate could have been disqualified for election to the Syndicate on that count, since there was no Syndicate at all, except for the five members nominated as per Ext.P5. Ext.P5 was an order of the Vice Chancellor, issued by the Registrar on his behalf, and the same could have been easily verified.

17. In the context of the present writ petition, *Rangilal Choudhury* (supra) is very relevant. The Honourable Supreme Court was concerned with a rejection of nomination wherein the proposal had, in the place indicated for showing the name of the Constituency, shown the name of the State to which Assembly the election was conducted. The election was a bye-election and not to the entire State Assembly as such. The Honourable Supreme Court held so in paragraph 4-

"Held that considered in the background that the election was a bye-election and not a general election and that the mistake occurred in the printing form, the mistake committed in filling the form by the proposer, was not of a substantial character and that it was quite clear that the nomination was for the Dhanbad Constituency. The rejection of the nomination paper on this ground by the returning officer was improper. *Dahu Sao Vs. Ranglal Chaudhary and Others*, AIR 1960 Patna 371, affirmed."

18. Going by the above dictum of the Honourable Supreme Court, one has to look at whether the defect noticed is of a substantial character. The declaration in the present case, in the fact situation arising at the time of rejection of nominations, was not very relevant. Since there was no Syndicate in existence the defect was not of a substantial character and was not one impossible of verification.

19. Pausing here for a moment, it is to be noticed that if the Syndicate was in existence and a disqualified candidate had made a false declaration that alone cannot lead to acceptance of the nomination. The Returning Officer definitely would and should verify the same. Hence the factum of declaration is not the essence of the prescription, but; the verification of the disqualification as such.

The principle in Taylor v. Taylor [(1875) 1 Ch.D 426] would also not be applicable, hence. In such circumstances, this Court is of the opinion that the rejection of the petitioner's nomination was not proper and the interference made under Article 226 of the Constitution of India cannot, at all, be said to be one overreaching the extraordinary powers of this Court.

The writ petition hence would stand allowed. The petitioner's election would stand affirmed as declared. Parties are left to suffer their respective costs.