

(1971) 02 MP CK 0011

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 59 of 1970

Rajendar Singh

APPELLANT

Vs

N.K. Shejwalker and Another

RESPONDENT

Date of Decision : 16-02-1971

Acts Referred:

Constitution of India, 1950 — Article 226

Madhya Pradesh Municipal Corporation Act, 1956 — Section 23(1), 23(4), 33

Citation : AIR 1971 MP 248 : (1976) ILR (MP) 836 : (1971) JLJ 361

Hon'ble Judges : Shiv Dayal Shrivastava, J; S.M.N. Raina, J

Bench : Division Bench

Advocate : A.B. Mishra, for the Appellant; M.A. Shah, for the Respondent

Final Decision : Partly Allowed

Judgement

Shiv Dayal, J.—This petition under Article 226 of the Constitution seeks a suitable writ and directions for removal of respondents Nos. 1 and 2 alleging that they have respectively assumed the office of the Mayor and that of the Deputy Mayor of the Municipal Corporation, Gwalior, in contravention of the provisions of the M. P. Municipal Corporation Act, 1956, (hereinafter called "the Act"). The petitioner is a taxpayer and resides within the Gwalior Municipal Corporation.

2. On March 22, 1969, respondent No. 1 was elected the Mayor of the Corporation, after the general election held in the month of January 1969. He was not an elected or selected councillor. By virtue of Section 23 of the Act his term of office was from the date of election until the first meeting in the next following year. He was thus to continue as Mayor upto March 21, 1970.

3. The Corporation summoned a meeting to be held on March 20, 1970, for electing the Mayor and the Deputy Mayor "for the next ensuing year, i.e., March 22, 1970 to March 21, 1971." A notice to that effect was issued on March 9, 1970. The date and time for polling were fixed as March 20, 1970 at 12 mid-day. In this meeting which was held on the appointed date, i.e., March 20, 1970,

respondent No. 1 was elected as the Mayor for the ensuing year and respondent No. 2 was elected as the Deputy Mayor. At the said meeting of the Corporation in which the Mayor and the Deputy Mayor were elected as aforesaid, respondent No. 1 presided.

4. Four contentions have been raised in this petition, namely,

(i) The meeting was held premature, in contravention of the law. The elections were, therefore, null and void;

(ii) Respondent No. 1 was disqualified inasmuch as arrears of house-tax payable to the Corporation were due by him;

(iii) Respondent No. 1 was not competent to and could not preside at the meeting as he himself was a candidate for the election of the Mayor; and

(iv) Respondent No. 1 was not eligible for election to the office of the Mayor as he had not ceased to be the Mayor when the election was held.

5. Section 23 of the Act reads thus:--

"Section 23. Mayor and Deputy Mayor. (1) The Corporation shall in accordance with the rules framed by Government in this behalf at its first meeting each year elect-

(a) a Mayor from its councillors or from other persons residing within the limits of the Corporation possessing the qualifications for election as councillors u/s 16 and not disqualified under Sub-section (1) of Section 17 or any other provisions of this Act;

(b) a Deputy Mayor from among its councillors;

to hold office from the date of election until the first meeting in the next following year. -----Explanation-- The word "year" in this section means a period of twelve months commencing from the date of first meeting after the general election.

(2) If any vacancy occurs in the office of Mayor or Deputy Mayor, the Corporation shall as soon as may be after the occurrence of such vacancy elect a councillor or a person eligible to be Mayor or Deputy Mayor as the case may be to fill such vacancy, and the Mayor or Deputy Mayor so elected shall continue in office for the unexpired terms of his predecessor.

(3) Every election of the Mayor or a Deputy Mayor shall be notified by the Government in the Gazette.

(4) Any councillor or a person, as the case may be, who ceases to be Mayor or Deputy Mayor shall be eligible for further election to either office.

(5) The Deputy Mayor may resign his office at any time by notice in writing to the Mayor and the Mayor may resign his office at any time by notice, in writing to

the Corporation.

(6) The Mayor who is not a councillor shall, unless otherwise expressly provided, be deemed to be a councillor for all purposes of this Act during the period he holds the office of Mayor."

In Sub-section (1) of this Section the terms of office of the Mayor and that of the Deputy Mayor are fixed. The Mayor and the Deputy Mayor each holds office from the date of his election to the respective office until the first meeting in the next following year. As made clear in the Explanation the word "year" does not mean a calendar year or any other known period of twelve months, but it means a period of 12 months commencing from the date of first meeting after the general election. Thus respondent No. 1 who was elected on March 22, 1969 was to hold that office upto March 21, 1970, and further until the first meeting held after March 21, 1970. A meeting had necessarily to be held after March 21, 1970, to elect the Mayor and the Deputy Mayor for the ensuing year and until that meeting respondent No. 1 was to continue to hold the office of Mayor and respondent No. 2 was to continue to hold the office of the Deputy Mayor. Sub-section (1) of Section 23 of the Act makes it abundantly clear that the meeting for the purposes of election will be the first meeting each year. But when read with the Explanation it means that the election of the Mayor and the Deputy Mayor must be held at the first meeting to be held after the expiry of twelve months computing from the date of the first meeting after the general election. Two things are clear in this Sub-section: --

(i) the election must be held every year the word "year" being defined as above

(ii) the election must be held at the first meeting every year.

In other words the election to the office of Mayor or to the office of Deputy Mayor cannot be held for the ensuing year at the last meeting or an earlier meeting of the year. It must therefore, be held that the meeting which was held on March 20, 1970, was premature. A meeting for the election of the Mayor and the Deputy Mayor had to be held after March 21, 1970, but not before that date.

6. Now the question is whether the elections of the Mayor and the Deputy Mayor which were held on March 20, 1970, i.e. two days earlier than they could be held, were a nullity. It has to be seen whether the provision is mandatory or directory. It is obvious enough that the object of fixing time for the election of the Mayor and the Deputy Mayor, as provided u/s 23 (1) of the Act, is that the Mayor and the Deputy Mayor will hold the respective offices for one year only, but, at the same time, there should be no gap between the expiry of the term of the outgoing Mayor and Deputy Mayor and the entering upon those offices by the new Mayor and Deputy Mayor elected for the next following year. To achieve this object it is provided that election must be held at the first meeting in the next following year and until then the outgoing Mayor and the Deputy Mayor shall continue to hold their respective offices. As stated in Maxwell on the Interpretation of Statutes quoted by their Lordships of the Supreme Court in

Seth Banarsi Das Vs. The Cane Commissioner and Another, no rule can be laid down for determining whether the command of the statute is imperative with an implied nullification for disobedience, or it is directory involving no invalidating consequence in its disregard. It is stated in Maxwell:--"It may, perhaps, be found generally correct to say that nullification is the natural and visual consequence of disobedience, but the question is in the main governed by considerations of convenience and justice, and when that result would involve general inconvenience or injustice to innocent persons or advantage of those guilty of the neglect, without promoting the real aim and object of the enactment, such an intention is not to be attributed to the legislature. The whole scope and purpose of the statute under consideration must be regarded. The general rule is, that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially." (p. 364).

7. In 82 Corpus Juris Secundum 876 it is stated as follows:--

"Statutory provisions fixing the time for performance of acts may be either mandatory or directory, in accordance with the legislative intent and will ordinarily be held directory where there are no negative words restraining the doing of the act after the time specified, and no penalty is imposed for delay. On the other hand, statutory provisions with respect to the time of performing an act are to be taken as mandatory where consequences attach to the failure to comply."

8. In State of U.P. Vs. Manbodhan Lal Srivastava, their Lordships quoted with approval a passage from Montreal Street Rly. Co. v. Normandin, 1917 AC 170 : AIR 1917 PC 142, where it was observed that on the question whether the provisions in a statute are directory or imperative:

"No general rule can be laid down, and that in every case the object of the statute must be looked at when the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the legislature, it has been the practice to hold such provisions to be directory only, the neglect of them though punishable, not affecting the validity of the acts done."

See also, Seth Bikhraj Jaipuria Vs. Union of India (UOI), where it has been laid down that the question whether a provision of law was mandatory or directory has to be adjudged in the light of the intention of the legislature as disclosed by the object, purpose and scope of that law. Their Lordships reiterated this proposition in Seth Banarsi Das Vs. The Cane Commissioner and Another, Again in Raza Buland Sugar Co. Ltd. Vs. Municipal Board, Rampur, their Lordships said as follows:--

"The question whether a particular provision of a statute which on the face of it appears mandatory inasmuch as it uses the word "shall" as in the present case

or is merely directory cannot be resolved by laying down any general rule and depends upon the facts of each case and for that purpose the object of the statute in making the provision is the determining factor. The purpose for which the provision has been made and its nature, the intention of the legislature in making the provision, the serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject and other considerations which may arise on the facts of a particular case including the language of the provisions, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory."

Judged by these tests we are clearly of the view that Section 23 (1) of the Act is directory and that there was substantial compliance with the provisions of that Section when the meeting was held on March 20, 1970. The reasons are: (i) The meeting was held only two days before it could be held according to the provisions of Sub-section (1) of Section 23 of the Act; (ii) The meeting was not held very much in advance and in fact it was intended to be the last meeting of the year; (iii) The notice of the meeting clearly specified that a Mayor and a Deputy Mayor would be elected for the ensuing year; (iv) It is nobody's case that in consequence of the election held on March 20, 1970, either the Mayor or the Deputy Mayor entered upon his office before the first meeting in the next following year and (v) Above all, it is not the petitioner's grievance that the elections were deliberately held two days premature with the object of depriving some one to participate in the elections. To put it differently, if the meeting were held after March 21, 1970, then also the Mayor and the Deputy Mayor would have assumed their respective offices after that date. Therefore, the assumption of office was not premature. A similar question arose in *Raghuvans Prasad v. Mahendrasingh*, 1968 mp LJ 125: 1967 MPLJ 941 in regard to the construction of Section 43 (2) (b) of the M.P. Municipalities Act, 1961, where it was held:--

"Even if the time-limit condition is regarded as imperative, its non-compliance can be excused when the authority competent to convene a meeting for the purpose of electing new President and Vice-President does not convene the meeting within the prescribed time."

In that case the meeting was not called within the prescribed time, but was called after the expiry of such time Another Division Bench in *Bir Govind Singh v. Chief Municipal Officer*, 1968 mpLJ 1100 agreeing with the conclusion in *Raghuvans Prasad's* case, 1968 mpLJ 125 : 1967 MPLJ 941 (supra) added:--

"We think the true reason to be, not that the performance of a mandatory provision is excusable, but that the provision as to time is, as we have shown directory."

9. As shown above, in the present case although the meeting was held at least two days before it could have been held, nullification will not be the consequence of disobedience. For the reason we have already stated, the first contention is

rejected.

10. Shri M.A. Shah, learned counsel for the respondents further relied on Section 51 of the Act which reads thus:--

"Section 51-- Vacancies etc. not to invalidate proceedings:--

No act or proceeding of the Corporation or of any Committee appointed under this Act, shall be questioned on account of any vacancy in the membership or any defect in the election or qualification of the Mayor, Deputy Mayor, presiding authority, any councillor or member thereof, or any defect or irregularity, in any such act or proceeding not affecting the merits of the case."

In our opinion that Section is enacted for the protection of "acts" and "proceedings" of the Corporation when there is any vacancy in the membership or any defect in the election or qualification of the Mayor, Deputy Mayor, presiding authority etc. in any such act or proceeding which defect does not affect the merits of the case. The object and purpose of this Section primarily is that an act or proceeding of the Corporation will not be held as invalid merely because it can be shown subsequently that there was any vacancy in the membership or that there had been some defect in the election of the Mayor or the Deputy Mayor etc. In the present case what the petitioner challenges is not merely any act or proceeding of the Corporation but the very election of the Mayor and the Deputy Mayor. In our opinion, it is not necessary to probe deeper into this question, so far as the present case is concerned.

11. We shall now advert to the second contention. According to the petitioner, there were arrears of property tax due by the respondent No. 1. He was, therefore, disqualified u/s 17 (1) (i) which reads as follows:--

"Section 17-- General disqualifications for becoming a councillor-

(1) No person shall be a Councillor, who

(a)

(i) has any tax or dues, payable to the Corporation, standing against his name for a period exceeding one year." The petitioner filed a certified copy of the bill of arrears of property tax and house-tax (Annexure "A") and also demand notices (Annexures "B" & "C"). In the return filed by respondent No. 1 he has stated that he had already obtained a "no dues certificate" from the Corporation. Moreover, the objection to his nomination was not made within the prescribed time. A copy of the minutes of the meeting has been filed. It seems to us that these are disputed questions of fact which are involved and on them will depend the decision of this contention. Those questions can be properly tried in an election petition. We do not propose to go into the question whether objection to the nomination filed by respondent No. 1 was taken within the prescribed time. That again is a question of fact and it is not necessary to enter into that question for the purposes of this writ petition. So also the question whether the

respondent No. 1 had really any tax or dues payable to the Corporation standing against his name for the period exceeding one year, is a contested question of fact. It is not necessary to go into that question for the purposes of the present case.

12. The third contention must also be rejected. The provisions of law are clear and unqualified. Section 33 of the Act reads as follows:--

Section 33-- Chairman of the meeting-

(1) At the meeting of the Corporation the Mayor, if present, shall preside.

(2) If the Mayor is absent from a meeting of the Corporation, the Deputy Mayor shall preside.

(3) If both the Mayor and Deputy Mayor are absent from the meeting of the Corporation, the members present shall choose one of their members to preside.

(4) In the case of an equality of votes the person presiding at the meeting shall have a casting vote.

Now since respondent No. 1 who was the Mayor on March 20, 1970, when the impugned meeting was held, it was he alone who could preside and no other person could preside when the Mayor was present. There is no other provision apart from Section 33. It was strenuously argued that when the respondent No. 1 was to preside and he had also to decide all objections to the nomination papers raised, it was contrary to the principles of natural justice as respondent No. 1 could not be the judge of his own cause. There can be no doubt that the principles of natural justice required that the presiding officer if he himself was "the candidate to the election" could not decide objections raised to his own nomination. The legal maxim is *nemo debet esse iudex in propria causa*. But as pointed out above it was not permissible for any one else to preside without violating the statutory provisions. The aim of the principles of natural justice is as to secure justice or to prevent miscarriage of justice, but the rules of natural justice cannot override the statutory provisions; they can only operate in areas not covered by any law validly made. Mr. Justice Hegde succinctly said in *Union of India (UOI) Vs. Col. J.N. Sinha and Another*, following the observations in *A.K. Kraipak and Others Vs. Union of India (UOI) and Others*, as follows:--

"The aim of rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law but supplement it."

It was further observed:--

"It is true that if a statutory provision can be read consistently with the principles of natural justice, the Courts should do so because it must be presumed that the legislature and the statutory authorities intend to act in accordance with the principles of natural justice. But if on the other hand, a statutory provision either

specifically or by necessary implication excludes the application of any or all the rules of principles of natural justice then the Court cannot ignore the mandate of the legislature of the statutory authority and read into the concerned provision the principles of natural justice."

13. Before we leave this point we must observe that the rule of natural justice invoked by the petitioner and the statutory provisions are not in conflict with each other. The reason will become clear when we deal with the fourth contention, where we are going to hold that a person who is the Mayor for the time being is not eligible for further election. Therefore, before the Mayor can be eligible for further election he has to cease to be the Mayor, and as soon as he ceases to be the Mayor he cannot preside by virtue of Section 33 of the Act; he cannot then scrutinise the nomination papers nor decide the objections to such papers. Rule 6 of the Madhya Pradesh Corporation (Mayor and Deputy Mayor Election) Rules, 1962, reads thus:--

"6. Scrutiny of nominations-- (1) The presiding authority shall examine the nomination papers at the meeting before the time fixed for the election after giving the councillors present at the meeting all reasonable facilities for examining them and decide all objections which may be made to any nomination.

(2) The presiding authority may either on such objections or on his own motion, and after such summary inquiry, if any as he thinks necessary, reject a nomination paper on any of the following grounds, namely:--

(a) that the signature of the candidate, proposer or seconder is not genuine or has been obtained by fraud, or

(b) that the councillor has subscribed, whether as proposer or seconder, the nomination paper of more than one person for the same office.

(3) The presiding authority shall endorse on each nomination paper his decision either accepting or rejecting it and if the nomination paper is rejected he shall record in writing a brief statement of his reasons for rejecting.

(4) The decision of the presiding authority shall be final."

The expression "presiding authority" is defined in Rule 2 (d) of the Rules as under:--

"(d) "Presiding authority" means

(i) in the case of first meeting after the general election called under Sub-section (1) of Section 28, the Revenue Commissioner;

(ii) in the case of first meeting called after every subsequent election under Subsection (1) of Section 28 the outgoing Mayor."

The "outgoing Mayor" is one who continues to be the Mayor until the first meeting in the next following year. He ceases to be the Mayor immediately after the election of the new Mayor but not before it. But where the Mayor seeks to be

elected for the next ensuing year he has first to cease to be the Mayor before the election. Therefore, the situation of a conflict between the rules of natural justice and the provisions contained in Section 33 of the Act will not arise.

14. The petitioner's fourth contention is that respondent No. 1 without ceasing to be the Mayor became a candidate for further election to that office and this he could not do. He was not eligible as he had not ceased to be the Mayor. In our opinion, this contention must be accepted. As enacted in Sub-section (4) of Section 23 of the Act the Mayor, whether he is a councillor or is deemed to be a councillor by virtue of Sub-section (6), has to cease to be the Mayor so as to be eligible for further election to that office. So long as he continues in that office he is not eligible for further election to that office. In the present case respondent No. 1 sought further election to the office of Mayor on March 20, 1970, on which date he was admittedly the Mayor; he had not resigned. He was, therefore, ineligible for the election and his election must be nullified.

15. Learned counsel appearing for respondent No. 1 contended that the election of respondent No. 1 should not be nullified because he did not assume office of the Mayor before the expiry of his term i.e. before the first meeting in the next ensuing year. This contention can not be accepted. If the respondent No. 1 was not eligible on the date he was elected, the election is a nullity. See *Govinda Panicker v. K. Ralakrishna Marar*, AIR 1955 Trav-Co 42.

16. The election of respondent No. 1 was challenged on all the above four grounds, while the election of respondent No. 2 was challenged on the first ground, the other grounds are inapplicable to his case. Since we have rejected the first contention, the election of respondent No. 2 cannot be quashed.

17. It remains to deal with the objection raised by respondent No. 1 that this Court would not issue any writ when the petitioner has an alternative remedy by way of an election petition u/s 441 of the M.P. Municipal Corporation Act, 1956, as to this, the law may be recapitulated thus:--

(i) A writ of quo warranto is issued when a person usurps a public office or is otherwise unfit to hold it. The alleged usurper is called upon to show or prove his authority to hold the same. If he is unable to show or prove such an authority he can be ousted and restrained from functioning in the office, which he has unlawfully usurped and intruded into or is unlawfully holding. This writ is an old judicial remedy against an occupier or usurper of a substantive public office, franchise or liberty.

(ii) The essential conditions for issuance of a writ of quo warranto in respect of an office are:--

(a) the office must be public;

(b) the office must have been created by the Constitution or by Statute;

(c) the office must be of a substantive character; and

(d) the occupier of office must not be legally qualified to hold or to remain in that office or must not have been appointed in accordance with law.

(iii) The existence of an alternative, adequate or suitable remedy is per se not an absolute bar to a writ of quo warranto being issued. This Court is generally reluctant to issue that writ against the successful candidate in respect of an elective office. When there is such an alternative remedy to deal with the conduct of an election, a writ of quo warranto may be displaced, and the election may be challenged in the manner laid down by the statute. However, that is merely a material circumstance to be taken into account having regard to the facts of each case.

(iv) It is incontestable that this Court has, under Article 226 of the Constitution, power to determine the validity of an impugned election in a proceeding for a writ of quo warranto or other suitable writ or direction. Therefore, notwithstanding the provisions for an alternative remedy, i.e. by way of an election petition, this Court has the discretion to issue a writ of quo warranto.

(v) The existence of an alternative remedy does not bar the jurisdiction of this Court to issue a writ of quo warranto, although in appropriate cases quo warranto may be refused on the ground of existence of an alternative remedy.

(vi) The discretion whether to grant or to refuse a writ of quo warranto has to be exercised in accordance with sound judicial principles.

(vii) Where an election is held in breach of imperative provisions of the law so that the election is not an election in the eye of law, this Court would not refuse to issue a writ of quo warranto.

(viii) A quo warranto will not be issued in a case of mere irregularity which can be cured.

(ix) In proceedings for a writ of quo warranto the petitioner does not seek to enforce any right of his own as such, nor complains of any non-performance of any duty towards him. It is the right of the respondent to hold the office which is in question. The test to be applied is whether there has been a usurper of an office of a public nature and substantive in character.

These propositions find support in a number of reported decisions, some of which may be cited here. *The University of Mysore and Another Vs. C.D. Govinda Rao and Another*, ; *The King v. Speyer*, 1916 KB 595; *G.D. Karkare v. T.L. Shevde*, AIB 1952 Nag 330; AIR 1955 49 (Nagpur) ; and *Piara Singh v. The Punjab State*, ILR (1962) 2 P&h 583 : (AIR 1962 Punj 498). See also 11 Halsbury (Simonds) 145. As respondent No. 1 was not eligible for the election patently, we feel compelled to issue a writ of quo warranto.

18. It has to be mentioned that there was no inordinate delay in the filing of this petition although it came up for hearing after undue delay.

19. This petition is partly allowed. It is held that respondent No. 1 was not

eligible for election to the office of the Mayor on March 20, 1970, when he was so elected, and that his election was in breach of imperative provisions of law. His election is quashed as it was no election in the eye of law. His assumption of office of the Mayor for the next following year, in consequence of that election, amounted to usurpation of office. The respondent No. 1 is restrained from acting as the Mayor on the basis of his election held in the meeting of March 20, 1970. This petition is dismissed so far as respondent No. 2 is concerned. In the circumstances of the case we direct that the parties shall bear their own costs. Security amount shall be refunded to the petitioner.