

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

MONDAY, THE 9TH DAY OF FEBRUARY 2015/20TH MAGHA, 1936

WP(C).No. 3974 of 2015 (V)

PETITIONER(S):

ABDUL GAFOOR T.P., AGED 55 YEARS
S/O.HYDER, THEKKEPAINKAL HOUSE, PAIKANNUR P.O.
TIRUR TALUK, MALAPPURAM DISTRICT.

BY ADV. SRI.LATHEESH SEBASTIAN

RESPONDENT(S):

1. THE KERALA STATE ELECTION COMMISSION,
CORPORATION OFFICE ANNEX, L.M.S.JUNCTION
THIRUVANANTHAPURAM-695 033
REPRESENTED BY THE SECRETARY.
2. ABDU RAHIMAN, S/O.MUHAMMED, PALAKKAL HOUSE,
VALANCHERY P.O., TIRUR TALUK, MALAPPURAM DISTRICT, PIN-676 552.
3. VALANCHERY GRAMA PANCHAYAT, VALANCHERY P.O., VALANCHERY,
TIRUR TALUK, MALAPPURAM DISTRICT, PIN-676 552.
REPRESENTED BY ITSD SECRETARY.
4. THE VALANCHERY SERVICE CO-OPERATIVE BANK LTD.
NO.M 728, P.B.NO.3, H.O.VALANCHERY-676 552
MALAPPURAM DISTRICT.

R1 BY SRI.MURALI PURUSHOTHAMAN, STANDING COUNSEL, K.S.E.COMMISSION

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON
09-02-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER(S)' EXHIBITS

EXHIBIT P1: TRUE COPY OF THE PETITION IN O.P.NO.136/2014.

EXHIBIT P2: TRUE COPY OF THE CERTIFICATE OF THE 4TH RESPONDENT DATED 27.07.2011.

EXHIBIT P2(a): TRUE COPY OF THE CERTIFICATE OF THE 4TH RESPONDENT DATED
11.06.2013.

EXHIBIT P2(b): TRUE COPY OF THE CERTIFICATE OF THE 4TH RESPONDENT DATED
30.12.2013.

EXHIBIT P2(C): TRUE COPY OF THE CERTIFICATE OF THE 4TH RESPONDENT DATED
26.02.2014.

EXHIBIT P3: TRUE COPY OF THE OBJECTION FILED BY THE PETITIONER.

RESPONDENT(S)' EXHIBITS

NIL

// TRUE COPY //

P.A. TO JUDGE

sou.

C.R.

DAMA SESHADRI NAIDU, J.

W.P.(c) No. 3974 of 2015

Dated this the 09th day of February, 2015

JUDGMENT

The writ petitioner, being the President of the third respondent Grama Panchayat, seeks a direction in the nature of *certiorari* to the first respondent not to entertain any adjudication on Exhibit P1 petition filed by the second respondent on the premise that it is frivolous and malefic.

2. The facts, briefly stated, are that the petitioner, having contested the elections to the Panchayat Committee of the third respondent Panchayat in 2010, was declared elected against his main rival, the second respondent. According to the petitioner, after the petitioner has become the President of the Grama Panchayat, the second respondent, smarting under the defeat, has started maligning the petitioner's character by filing one frivolous complaint or another, ceaselessly. It is the specific grievance of the petitioner that the second respondent, in

his unabated efforts of character assassination, is said to have filed Exhibit P1 petition before the first respondent invoking Section 35 (1) (o) of the Kerala Panchayat Raj Act, 1994. Seeking, *inter alia*, quashing of Exhibit P1, the petitioner has approached this Court.

3. The learned counsel for the petitioner has strenuously contended that for disqualifying an elected member certain eventualities have to occur and that a mere allegation of disqualification is not sufficient in that regard. Expatiating on his submissions, the learned counsel would contend that in terms of Section 35 of the Act, a competent authority should have found adversely against an elected candidate before the spectre of disqualification could be raised. According to him, in the present instance, none of the authorities has found any issue against the petitioner, especially on the ground that he is liable for any loss to the Panchayat, or for wasting or misusing its resources.

4. The learned counsel has further contended that the first respondent, instead of straight away issuing summons to the petitioner, ought to have conducted a preliminary enquiry to form a *prima facie* opinion before subjecting the

petitioner to any adjudication in terms of Section 36 of the Act. The learned counsel has eventually submitted that the second respondent has taken recourse to sheer abuse of process and the first respondent has mechanically issued the summons proposing to conduct trial into the baseless allegations levelled by the second respondent.

5. Though the learned counsel has made very elaborate submissions on the merits of the issue, especially with reference to the allegations contained in Exhibit P1 petition filed by the second respondent, this Court does not propose to have any discussion on it, for it may prejudice the cause of either of the parties before the first respondent Commission.

6. The learned Standing Counsel for the first respondent has submitted that essentially the petitioner has raised two objections and that both the objections stand squarely answered by the judicial precedents of this Court. Concerning the objection that there ought to have been an initial adjudication by a competent authority, such as Ombudsman, into any of the allegations, the learned Standing Counsel would contend that the enquiry by the

learned Ombudsman, contemplated under Section 271J of the Act, for disqualifying a candidate applies prior to the election. In so far as Section 35 of the Act is concerned, it is with regard to subsequent disqualification after successful candidature — once elected. He has further submitted that even regarding the audit and fact finding concerning misuse or abuse of power in terms of Section 215, it has no application in the present instance. In support of his submissions, the learned Standing Counsel has drawn my attention to an unreported judgment dated 15.12.2014 of this Court in W.P. (C) No. 13657/2014.

7. Concerning the contention of the learned counsel for the petitioner that before issuing process the respondent Commission ought to have formed a *prima facie* opinion based on a preliminary enquiry, the learned Standing Counsel has drawn my attention to a judgment rendered by this Court in **Unni K.G. v. N. Abdul Rasheed and Another** [2010 (1) KHC 176]. He has submitted that the respondent Commission is a Civil Court having full adjudicatory powers and that it is open for the petitioner to raise all objections concerning the maintainability or the

merits of the matter. Summing up his submissions, the learned counsel has contended that, at this juncture, this Court cannot forestall the adjudication of the issue, more particularly when it is not the case of the petitioner that the first respondent Commission does not have the necessary powers to entertain Exhibit P1 petition of the second respondent. In other words, so long as it is not an issue of *vires*, there can be no prohibition or interdiction of hearing.

8. Heard the learned counsel for the petitioner and the learned Standing Counsel for the respondent Commission, apart from perusing the record.

9. This writ petition is being disposed of at the threshold without notice to respondents 2 to 4 for the reasons to be stated herein below.

10. In fact, the petitioner has raised two issues concerning the adjudication undertaken by the first respondent Commission on Exhibit P1 petition submitted by the second respondent. Firstly, the issue to be addressed is whether either in terms of Section 215 or in terms of Section 271J of the Act there needs to be any enquiry or fact finding as a precondition to attach any disqualification

to the petitioner in terms of Section 35 of the Act.

11. We need not look far to resolve this issue. In fact, this Court in an unreported judgment dated 30.01.2010 in W.P. (C) No. 2976/2010 has addressed the issue of the maintainability of a petition before the respondent Commission without there being any preliminary enquiry either under Section 215 of the Act or by exercise of powers under Section 271J by the learned Ombudsman. As has rightly been contended by the learned Standing Counsel, both Section 215 and exercise of powers by the learned Ombudsman under Section 271J are concerning the disqualification of a candidate prior to election. In fact, this Court in the unreported judgment referred to above has tellingly observed thus:

“[L]earned counsel contended that unless in an audit as contemplated in Section 215 is held and that the audit report has attained finality, no proceedings under Section 35(o) will lie against a member. On a reading of Section 35, I am not able to infer such a conclusion. Section 35 (o) only provides for subject to the provisions of Section 36, a member shall cease to hold office if he is liable for the loss caused to the Panchayat. Therefore, on an application

made under Section 36, if the petitioner is able to substantiate his case that a member has caused loss to the Panchayat, the Election Commission is perfectly within its rights to entertain a plea under Section 35 (o) of the Act. I also notice that under Section 34 providing for disqualification of candidates, Sub Section (p) requires that a person should have been found liable for loss to suffer disqualification as provided therein. Therefore, the terminologies in Section 34 and 35 being different, and in view of the only requirement of loss caused to the Panchayat as provided under Section 35 (o), I am not in a position to accept this plea either."

(emphasis added)

12. Further, in another unreported common judgment in W.P. (C) Nos.11637 and 11860/2008, this Court has reiterated the same principle of law. Eventually, a learned Single Judge of this Court in a very recent unreported judgment dated 15.12.2014 in W.P. (C) No. 13657/2014 has held thus:

"In short, the State Election Commission has no jurisdiction to entertain a petition with regard to a disqualification incurred by a member either under Section 30 or 35 of 'the Act' prior to the election. In this case, evidently, the second respondent

raised the contention that the petitioner has become disqualified on grounds under Section 35 (1) (o) of 'the Act' and therefore, in the light of the provisions under Section 36 of 'the Act' determination of such a dispute squarely falls within the jurisdiction of the State Election Commission. In the said circumstances, I do not find any reason to hold that the Commission has faulted in its finding with respect to its jurisdiction in considering the question of disqualification of a member based on a plea under Section 35(1)(o) of the Act, in a dispute raised in that behalf either through a competent petition or reference."

13. In the light of the authoritative pronouncement by this Court on more than one occasion, I do not have any manner of doubt that the petitioner can take advantage of neither Section 215 nor Section 271J of the Act, since he holds an office, having been elected.

14. Adverting to the contention that there ought to have been a preliminary enquiry to form a *prima facie* opinion concerning Exhibit P1 petition by the respondent Commission, I may have to hold that Section 35 (1) (o) speaks of liability of an office bearer for the loss, waste or misuse caused by him to the Panchayat. Section 36 provides for the procedure to determine the subsequent

disqualification of a member. It is profitable to extract

Section 36 of the Act, which reads thus:

"36. Determination of subsequent disqualification of a member – (1) Whenever a question arises as to whether a member has become disqualified under Section 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 1908) when

trying a suit.”

15. A perusal of the above makes it manifestly clear that the first respondent Commission has got plenary powers as if it were a Civil Court exercising all powers under the Code of Civil Procedure to adjudicate the issues based on the allegations contained in Exhibit P1 petition. In fact, this Court in **Unni's case** (supra) has held that the Commission's finding that there is a *prima facie* case against the writ petitioner of having caused loss to the Panchayat property is only a statement of allegation. It does not amount to a finding that the writ petitioner has committed such acts. It has further held that the Commission need not consider the issue of maintainability of the petition for disqualification as a preliminary one and that the person against whom the proceedings are taken is at liberty to take all possible pleas to negate the allegations contained in the petition.

16. Indisputably, it is not the case of the petitioner that the first respondent Commission lacks the necessary jurisdiction either territorial or inherent to enquire into Exhibit P1 petition.

17. Maintainability of a petition is one thing; its sustainability on merits is entirely another thing. Once a particular adjudicatory forum either acting as a Court or as a quasi-judicial authority has the necessary power to entertain an issue for adjudication, the alleged frivolity or the lack of merit of the matter does not detain it from adjudicating the issue. In the same breath it is to be added that once this Court comes to a conclusion that a Court or a quasi-judicial authority has the necessary power or jurisdiction to adjudicate, it cannot invoke Article 226 of the Constitution of India to interdict the said power of the Tribunal — in this instance, that of the first respondent Commission. Any such exercise of power, in fact, amounts to usurpation or abrogation of adjudicatory powers of a competent forum, which is impermissible under law.

18. In the absence of any challenge to the vires of the forum, or the maintainability of the proceedings, this Court restrains itself, as a matter of policy, from preempting the adjudication on a conjectural approach to the merits of the matter, which is for the Tribunal or the Commission to decide in the first place. Eventually, if any person is

aggrieved, it is for him to take appropriate remedial measures such as an appeal or revision therefrom.

In the facts and circumstances, this Court does not find any merit in the writ petition and accordingly it dismisses it. No order as to costs.

**DAMA SESHADRI NAIDU
JUDGE**

DMR/-