

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

THURSDAY, THE 19TH DAY OF MARCH 2015/28TH PHALGUNA, 1936

WP(C).No. 8481 of 2015 (I)

PETITIONER:

N.K.MOHANAN, MAKKOLLIL,
PAMPASUMPARA P.O.,
IDUKKI DISTRICT.

BY ADV. SRI.GEORGE POONTHOTTAM

RESPONDENT:

THE KERALA STATE ELECTION COMMISSION,
THIRUVANANTHAPURAM - 695 003 REP. BY
ITS SECRETARY.

BY ADV. SRI.MURALI PURUSHOTHAMAN

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON
19-03-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX IN WPC 8481/2015

PETITIONER'S EXHIBITS:

EXT.P1 TRUE COPY OF THE NOTIFICATION NO.9983/B/2014/SEC DATED 3.2.2015

EXT. P1(a) ENGLISH TRANSLATION OF EXT. P1

EXT.P2 TRUE COPY OF THE NOTIFICATION NO.57/2015/SEC DATED 13.3.2015

EXT.P2(a) ENGLISH TRANSLATION OF EXT. P2

EXT.P3 TRUE COPY OF THE NOTIFICATION NO.56/2015/SEC DATED 13.3.2015

EXT.P3(a) ENGLISH TRANSLATION OF EXT. P3

EXT. P4 TRUE COPY OF THE NOTICE DATED 13.3.2015

EXT.P4(a) ENGLISH TRANSLATION OF EXT. P4

EXT. P5 TRUE COPY OF THE NOTICE DATED 13.3.2015

EXT.P5(a) ENGLISH TRANSLATION OF EXT. P5

EXT. P6 TRUE COPY OF THE NOICE DATED 13.3.2015

EXT.P6(a) ENGLISH TRANSLATION OF EXT. P6

EXT. P7 TRUE COPY OF THE NOTICE DATED 13.3.2015

EXT.P7(a) ENGLISH TRANSLATION OF EXT. P7

EXT. P8 TRUE COPY OF THE NOTICE DATED 13.3.2015

EXT.P8(a) ENGLISH TRANSLATION OF EXT. P8

/TRUE COPY/

P.S. TO JUDGE

Dama Seshadri Naidu, J.

W.P.(C)No.8481 of 2015 I

Dated this the 19th day of March, 2015

JUDGMENT

The petitioner, being the member of Ward No.II of Pampadumpara Grama Panchayat, has a grievance that though five vacancies of ward members have been in existence since 09.11.2011 owing to the disqualification of the incumbents, the respondent Election Commission has chosen to conduct the bye elections hardly six months before the general elections are due. Seeking judicial intervention on that count, the petitioner has filed the present writ petition.

2. The learned counsel for the petitioner, taking me through the entire record, has submitted that on 09.11.2011 the respondent Election Commission, in a batch of election petitions, declared five ward members of the Grama Panchayat as disqualified. Soon thereafter, the aggrieved

persons filed W.P.(C)No.30341/2011 and batch, but without much success. Even W.A.No.406/2012 and batch filed against the common judgments were dismissed by a learned Division Bench of this Court on 13.10.2014. The learned counsel has stressed that throughout, either in the writ petitions or in the writ appeals, there had been no stay against the orders of the respondent Election Commission.

3. In elaboration of his submissions, the learned counsel for the petitioner has submitted that the term of the present elected body of the Grama Panchayat is to expire by 31.10.2015, i.e. hardly seven months hereafter. Having waited for about four years, the respondent Election Commission now issued Exhibit P3 election notification calling for bye elections to be held on 08.04.2015. According to the learned counsel, the respondent Election Commission ought to wait for the next six or seven months, so that the general elections will be held and spending of public money on bye elections will become evitable.

4. The learned counsel has also submitted that once the notification is issued the modal code of conduct comes into force, thereby putting on hold all developmental activities, apart from affecting the fund flow as well.

5. In sum and substance, the singular contention of the learned counsel for the petitioner is that holding bye elections a few months before the general elections are actually due is neither in the interest of the Grama Panchayat nor that of the general public. Eventually, the learned counsel, to his credit, has submitted that the statutory position is, however, otherwise. According to him, this Court under Article 226 of the Constitution of India could as well transcend the statutory limits to sub-serve the public interest. The paramount consideration of a public law remedy in the hands of a constitutional court, contends the learned counsel, is the welfare of the people rather than a mechanical adherence to the statutory provisions.

6. Per contra, the learned Standing Counsel for the respondent Election Commission has strenuously opposed the claims and contentions of the petitioner. Without further ado, he has brought to my notice Section 149 of the Kerala Panchayat Raj Act ('the Act' for brevity) to contend, with specific reference to sub-sections (3) and (4) thereof, that a casual vacancy can be filled within six months before the ordinary date of retirement by efflux of time. In support of his submissions, the learned Standing Counsel has placed reliance on an unreported judgment dated 11.03.2010 in W.P.(C)No.7696/2010 rendered by a learned Single Judge of this Court.

7. In expatiation of his submissions, the learned Standing Counsel has taken me through the unreported judgment to lay emphasis that the said judgment was rendered almost under identical factual circumstances. The learned counsel has eventually contended that on 13.03.2015 Exhibit P3 notification was issued; as such, in

terms of Article 243-O(b) of the Constitution of India, no judicial intervention could be made thereafter.

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

9. On appreciation of the rival submissions, I find Section 149 to be the fulcrum. Accordingly, it is profitable to extract the said provision, which is as follows:

“149. Term of office of members.-- (1) The term of office of members of a village Panchayat, a Block Panchayat or a District Panchayat shall be five years from the date fixed for convening the first meeting of that Panchayat.

(2) Ordinary vacancies in the office of members of Panchayat at any level shall be filled at general elections which shall be fixed by the Government to take place on such day or days within three months before the occurrence of the vacancies as they think fit.

(3) A casual vacancy in the office of a member of Panchayat any any level shall be filled by the State Election Commission, within [six months] after the occurrence of the vacancy, through a bye-election.

(4) No bye-election shall be held to fill a vacancy occurring within six months before the ordinary date of retirement by efflux of time.

[(4a) A casual vacancy of a member of the Panchayat at any level shall be reported directly by the Secretary concerned, to the State Election Commission within seven days of the occurrence of such vacancy and the Secretary who defaults in reporting the vacancy to the Commission within the said period without reasonable cause, shall be punishable with fine which may extend to one thousand rupees and for this purpose the State Election Commission shall have the power to initiate prosecution proceedings.]

(5) A member of a Panchayat at any level elected at a bye-election shall enter upon office forthwith, but shall hold office only so long as the member in whose place he is elected would have been entitled to hold office, if the vacancy had not occurred.”
(emphasis added)

10. As could be seen, sub-section (3) of Section 149 of the Act mandates that a casual vacancy in the office of a member of Panchayat at any level shall be filled by the State Election Commission within six months after the occurrence of the vacancy, through a bye-election. Further, sub-section (4) fixes the upper limit of six months for bye-elections before the term of the elected body comes to an end.

11. In the present instance, it is not in dispute that the vacancies arose on 09.11.2011, owing to the disqualification of five ward members in the wake of the order rendered by the respondent Election Commission in election petitions. It is further not in dispute that, soon thereafter, the aggrieved persons filed W.P.(C)No. 30341/2011 and batch and later W.A.No.406/2012 and batch, but without any success. In fact, the writ petitions were dismissed on 08.12.2012; the writ appeals, on 13.10.2014. It is pertinent to observe that all through, the petitioners or the appellants in those proceedings, as the case may be, could not obtain any interim order in their favour having the effect of suspending the operation of the order of disqualification passed by the respondent Election Commission.

12. In that context, the learned counsel for the petitioner has strenuously contended that the respondent Election Commission has remained inactive for about four

years; later, belatedly it chose to conduct the bye elections, when hardly seven months is left for the general elections.

13. Appealing as the submission may be, on a closer scrutiny, it fails to pass the judicial muster. It is without cavil that for whatever delay that has occurred in the disposal of either the writ petitions or the writ appeals, the respondent Election Commission can hardly be blamed. The learned Standing Counsel has pertinently brought to the notice of this Court that at the very inception when the writ petitions were filed, judicial consideration of the interim application was obviated on the understanding that both parties would make every endeavour to have the writ petitions disposed of early. Beyond the control of the respondent Election Commission was the delay in disposing of both the writ petitions and the writ appeals. On that count, I do not see any justification to find fault with the respondent Election Commission.

14. Now essentially in question is the legislative wisdom of fixing six months' time as the maximum gap for bye-elections before the general elections are due.

15. In **Karuna Society for Animals & Nature v. Union of India** ((2015) 2 SCC 355), the Hon'ble Supreme Court has held thus:

"92. It is furthermore a well-settled principle of law that the superior court in exercise of their power of judicial review of legislation would not ordinarily determine the merit of the legislation by entering into a broad question as to whether materials placed before the legislature were sufficient for bringing out the legislation in question or not. Such inquisitorial inquiry on the part of the court, in our opinion, is beyond the province of the court."

16. Judicial invalidation is a ratified field of extreme constriction, especially in the face of interpretative presumption of statutory validity. The legislation can be invalidated only on two grounds: (1) Ultra vires or lack of legislative competence and (2) Violation of fundamental rights. The desirability of legislation or the operational

dynamics there of are out of bounds for the judicial scrutiny. Legislative wisdom deserves judicial deference. Governance does not run in any predictable patterns; it is a voyage in uncharted waters, with only common good as the pole star to reach the destination of policy fruition. Policy making is experimental, replete with trials and errors. The collective wisdom of the legislature always chooses one of out of many options; it does not mean that it has foreclosed every other option. It constantly makes adjustments, called amendments, to find out the best possible path to reach the goal of growth. The wheel for common weal constantly rolls on.

17. It is, nay ought, to be presumed that the legislature in its wisdom has considered all the options at its disposal and decided to fix six-month period as the upper limit for bye-elections to be held before the general elections are due. Why not three months? Why not one year? But why alone six months? The questions always

linger. It can be any of them. The legislature, on an evaluation of all options, consensually arrived at an approximation. Policy, I may say, does not involve immutable mathematical theorems; it is the subjective summation of options available for the legislature. Veering back to the issue, I may observe that for some, conducting elections six months prior to general elections appears to be an exercise in futility; for some other three months; still for some other, it is one year. The ultimate arbiter is the legislature.

18. However laudable an objective may be, it still has to pass the statutory muster. Once the legislature in its wisdom has statutorily chosen to fix an upper time limit of six months to have the bye elections before the general elections are due, the very delay on earlier occasions before the bye elections could be conducted, essentially within six months from the due date of the general elections, cannot be a ground to invalidate Exhibit P3 election notification.

Prima facie, it may sound logical that just about seven months prior to the general elections the bye elections are evitable. I hasten, however, to add that it has been aphoristically declared by Oliver Wendell Holmes Jr., before he could adorn the judicial robes, in the context of common law though, thus: 'The life of the law has not been logic; it has been experience'.

19. In my considered view, unless there is any effort on the part of the petitioner for judicial invalidation of Section 149, even on its assumption of its sustainability, the respondent Election Commission compliance thereof and issuance of Exhibit P3 notification cannot be found fault with.

20. In the unreported judgment dated 11.03.2010 in W.P.(C)No.7696/2010 this Court has elaborately considered the issue and has held thus:

"In so far as the contention that since the ordinary date of retirement by efflux of time is to take place in September, 2010, election should not be held at this stage is concerned, the only interdiction in Section 149(4) is that

no bye-election shall be held to fill up a vacancy occurring within six months before the ordinary date of retirement by efflux of time. In this case, admittedly, the vacancies have occurred long before six months before the date of retirement and if that be so, the Election Commission is statutorily empowered to hold bye-election any time before the date of retirement by efflux of time. The desirability or otherwise of the election at this stage cannot be a matter of concern for this Court, so long as the Election Commission is statutorily authorised to hold election.”

In the light of the above emphatic declaration of law and the reasons stated above, I do not find any merit in the writ petition and it is accordingly dismissed. No order as to costs.

Dama Seshadri Naidu, Judge

tkv