

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.R.RAMACHANDRA MENON

MONDAY, THE 23RD DAY OF FEBRUARY 2015/4TH PHALGUNA, 1936

WP(C).NO. 33826 OF 2014 (C)

PETITIONER(S):

**ROY ROBERT, S/O. ROBERT ANTONY,
AGED 37 YEARS, HOUSE NO. 106B, VURANACHERRY,
CANNANORE CANTONMENT, KANNUR-670 017.**

**BY ADVS.SRI.B.VINOD,
SRI.I.V.PRAMOD.**

RESPONDENT(S):

- 1. THE RETURNING OFFICER,
CANNANORE CANTONMENT BOARD ELECTION,
HUZUR SIRESTHEDAR, REVENUE DEPARTMENT,
COLLECTORATE, KANNUR-670 001.**
- 2. COL. (RETD). P. PADMANABHAN,
S/O. RAMAN, WARD NO.1, HOUSE NO.29,
CANNANORE CANTONMENT BOARD, KANNUR-670 001.**
- 3. PRINCIPAL DIRECTOR,
DEFENCE ESTATES, DIRECTORATE OF DEFENCE ESTATE,
GOVERNMENT OF INDIA, MINISTRY OF DEFENCE,
SOUTHERN COMMAND, PUNE CANTONMENT,
MAHARASHTRA, PIN-411 001.**
- 4. CHIEF EXECUTIVE OFFICER,
CANNANORE CANTONMENT BOARD, KANNUR-670 017.**

R1 BY GOVT. PLEADER SRI.K.C. VINCENT.

**R2 BY ADVS. SRI.V.R.KESAVA KAIMAL,
SMT.C.DEVIKA RANI KAIMAL.**

R3 BY ADV. SRI.N.NAGARESH, ASSIST. S.G OF INDIA.

R4 BY ADV. SRI.V.RAMKUMAR NAMBIAR.

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 12-02-2015, THE COURT ON 23/02/2015 DELIVERED THE
FOLLOWING:**

rs.

APPENDIX

PETITIONER'S EXHIBITS:-

- P1. A TRUE COPY OF THE SRO NO. 09(E) MINISTRY OF DEFENCE DATED 03-11-2014.
- P2. A TRUE COPY OF THE PROGRAM OF ORDINARY ELECTION TO THE CANTONMENT BOARD TO BE CONDUCTED ON 11-01-2015.
- P3. A TRUE COPY OF THE ORDER DATED 06-12-2014 OF THE RETURNING OFFICER ACCEPTING THE NOMINATION AFTER DENYING TIME FOR PRODUCTION OF EVIDENCE TO SUSTAIN THE PETITIONER'S OBJECTION.
- P4. A TRUE COPY OF THE LETTER OF THE PETITIONER DATED 06-12-2014.
- P5. A TRUE COPY OF THE LETTER NO. 1530/ELECTION/VARIED BOARDS/III/2014/DE DATED 27-08-2014 TO THE CHIEF EXECUTIVE OFFICER, CANTONMENT BOARD.
- P6. A TRUE COPY OF THE LETTER NO.II/1/2014 DATED 24-09-2014 ISSUED TO THE PRESIDENT OF THE CONNANORE CANTONMENT BOARD.
- P7. A TRUE COPY OF THE LETTER NO.II/1/2014 DATED 24-09-2014 ISSUED TO THE PRINCIPAL DIRECTOR, DEFENCE ESTATES BY THE CHIEF EXECUTIVE OFFICER.

RESPONDENT'S EXHIBITS:-

- EXT.R2A COPY OF THE CERTIFICATE DATED 17/12/2014 ISSUED BY THE COMMANDANT OF THE DEFENCE SECURITY CORPS CENTRE.
- EXT.R2B COPY OF THE NEWS ITEM PUBLISHED IN DESABHIMANI DAILY, KANNUR EDITION DATED 10/01/2015.
- EXT.R2C COPY OF THE CERTIFICATE DATED 30/01/2015 ISSUED BY STATION COMMANDER.
- EXT.R4A COPY OF THE COMMUNICATION ISSUED BY THE 2ND RESPONDENT CLEARLY DESCRIBING HIMSELF AS OFFICER-INC-CHARGE OF LAND AND COURT CASES DATED 19/09/2014.
- EXT.R4B COPY OF THE COMMUNICATION DATED 23/12/2014 ISSUED BY THE SECOND RESPONDENT TO THIS RESPONDENT DESCRIBING HIMSELF AS OFFICER-INC-CHARGE OF LAND AND COURT CASES FOR STATION COMMANDER.
- EXT.R4C COPY OF THE COMMUNICATION ISSUED BY THIS RESPONDENT DATED 22/01/2015 TO THE COMMANDANT, DSC CENTRE, KANNUR.

//TRUE COPY//

P.S. TO JUDGE

P.R. RAMACHANDRA MENON, J.

.....
W.P.(C)No. 33826 OF 2014
.....

Dated this the 23rd February, 2015

J U D G M E N T

Acceptance of nomination of the second respondent/Col. (retd.) P. Padmanabhan for election from Ward No.5 of the Cantonment Board, Kannur is under challenge in this writ petition preferred by a rival candidate.

2. The main ground of challenge is that the second respondent is holding an 'office of profit' under the Government by virtue of his employment, being a salaried employee of the canteen run by the **Defence Security Corps**, which casts a disqualification under Section 29(1) of the Cantonments Act, 2006 (hereinafter referred to as the Act). It is also pointed out that his nomination to the **Varied Cantonment Board** has already been found as improper, finding him ineligible under Section 13(2)(c) of the Act, as evident from Exts.P5 to P7. The disqualification pointed out in this regard at the time of scrutiny of the nomination paper has been simply turned down by the first respondent/Returning Officer. Hence the challenge, attributing bias and malafides as well.

3. The sequence of events reveals that election to the

W.P.(C)No. 33826 OF 2014

2

Cantonment Board in terms of Section 15(1) of the Act was notified by the Central Government as per Ext.P1 Notification dated 03.11.2014 scheduling the election to be held on 11.01.2015. Ext.P2 is the detailed programme of the election stipulating 01.12.2014 as the date of publication of final Electoral Roll, 05.12.2014 as the date of submission of nomination paper, 06.12.2014 as the date of scrutiny and 11.01.2015 as the date of polling, with such other relevant aspects in this regard.

4. Pursuant to the above Notification, the petitioner submitted his nomination on 05.12.2014 from Ward No.5. The only other contestant from the said Ward is the second respondent/Col.(Retd.) P.Padmanabhan, who has also submitted his nomination. Referring to the fact that the second respondent was not qualified to be elected and as to the rejection of nomination as a Member, with reference to Section 13(2)(c) of the Act held few months back, the petitioner preferred Ext.P4 objection at the time of scrutiny on 06.12.2014. But, observing that no material/proof was produced by the petitioner at the time of scrutiny to substantiate the allegation and that no extension

of time could be granted in this regard, a decision was taken on the basis of available materials on record and accordingly, the objection raised was overruled, whereby the nomination preferred by the second respondent was ordered to be accepted, as per Ext.P3 dated 06.12.2014 itself. This made the petitioner to approach this Court challenging Ext.P3 and seeking to reject the nomination of the second respondent.

5. A counter affidavit has been filed by the second respondent pointing out that the writ petition is not maintainable either in facts or in law; more so in view of alternate remedy available by way of Election Petition under Rule 54 of the Cantonment Electoral Rules, 2007(hereinafter referred to as Rules). It is also pointed out that Rule 59(ii) of the Cantonment Electoral Rules 2007 clearly stipulates that an improper acceptance or refusal of a nomination paper can be taken as a ground in an Election Petition and as such, the writ petition is liable to be dismissed on this score alone. With regard to the merits, the averment of the petitioner that the second respondent is holding an 'office of profit' is denied and Ext.R2(a) certificate dated 17.12.2014 issued by the Commandant of the

Defence Security Corps Centre has been produced to show that the second respondent was employed only as 'Officer-in-charge' (temporary) at the Unit Run Canteen (URC). It is pointed out that, by virtue of the law declared by the Apex Court in **R.R.Pillai (dead) through Lrs vs. Commanding Officer (AIR 2010 SC 188)** holding that Unit Run Canteens are not Government concerns, the petitioner was not holding any 'office of profit' under the Government to attract the bar of disqualification. It is also contented that Section 13(2)(c) of the Act only says that a person 'in service of the Government' is not eligible to contest the election and in so far as Section 29(1) of the Act is concerned, only those persons who are holding an 'office of profit under the Government' are not eligible to contest the election. The second respondent points out that he has already taken steps to cause withdrawal of Exts.P5 to P7, being not correct or sustainable .

6. With reference to the law declared by a Division Bench of this Court in **1993 (2) KLT 641**, it is stated by the petitioner that alternate remedy is not a bar in cases involving election as well. The petitioner has filed a reply affidavit reiterating the

contentions in the writ petition and asserting that the Defence Security Corps is an extension of the Executive arm of the Government. According to the petitioner, temporary employees hold the office at the mercy of the Defence Security Corps Centre; by virtue of which, such persons will not be in a position to discharge their duties effectively, without compromising the position with the executive.

7. An additional contention has been taken in the reply affidavit, to the effect that the second respondent, apart from functioning as **'Officer-in-charge of the URC'** is also functioning as **'Officer-in-charge of Land and Court cases'** of the Defence Security Corps Centre and that he is being paid by the Defence Security Corps Centre on a contract basis. It is pointed out that the Union Government represented by Principal Director of Defence Estate has already held in Ext.P5, that the second respondent is holding an office of profit under DSC Centre and further that, by virtue of Section 34 of the Act, the Central Government may remove any member, for the circumstances mentioned therein, if he is disqualified in any manner. It is alleged that no breathing time was given to the

petitioner to substantiate the facts and figures by the first respondent/Returning Officer before accepting the second respondent's nomination, which made the petitioner to approach this Court, by filing this writ petition.

8. The 4th respondent/Chief Executive Officer has filed a counter affidavit seeking to rebut the averments and allegations raised from the part of the petitioner and asserting that the petitioner is having an alternative and efficacious remedy under Rule 54/59 of the Rules by approaching the District Court having jurisdiction over the area. The said respondent has reiterated the stand as reflected from Exts.P6 and P7, to the effect that the second respondent is ineligible for being nominated as Member of the Cantonment Board, Kannur under Section 13(2)(c) of the Cantonment Act. It is also stated in paragraph 4 of the said affidavit that, apart from holding the post of 'Officer-in-charge' (temporary) at the Unit Run Canteen of the DSC Centre, Kannur, the second respondent is also holding the post of 'Officer-in-charge' of Land and Court cases for Station Commander, DSC Centre, Kannur. To substantiate this aspect, the communications sent by the second respondent in such capacity, have been

produced as Exts. R4(a) and R4(b). The 4th respondent concedes that the first respondent/Returning Officer had not demanded, directed or requested the fourth respondent for any details regarding the qualification of the second respondent and hence it was not provided to the first respondent/Returning Officer. However, in order to have clarity on the subject, with regard to the issue of disqualification of the second respondent with reference to Section 29 of the Act, Ext.R4(c) communication dated 22.01.2015 was issued to the Commandant, DSC Centre, Kannur , but reply is still to be obtained.

9. The second respondent has produced an additional document as Ext.R2(c) along with I.A. 1650 of 2015, which is to the effect that, engagement of the second respondent as 'Officer in charge of Land and Court cases' by the Station Commander , is an ad hoc employment, purely temporary and is on a consultancy basis and hence that he is not a Government employee and is not getting any benefit from the Government, but being compensated from the Station Welfare Fund, which is made available from the Unit Run Canteen (URC) profit.

10. A further affidavit dated 05.02.2015 has been filed by

the 4th respondent, specifically denying the alleged hostile and partisan attitude to anybody, and also rebutting the contention that the said respondent was present when nomination of the second respondent was accepted by the first respondent/Returning Officer. It is stated that all the proceedings took place in the Board Room of the Cantonment Office, Kannur, whereas the 4th respondent was present in his Cabin.

11. During the course of hearing Mr. N. Nagaresh, the learned Asst. Solicitor General submits that in view of the specific mandate under the statute, providing an effective alternative remedy, writ petition is not maintainable. It is also pointed out that the facts and figures have to be considered in the light of evidence to be tendered, which exercise can be pursued only by availing the statutory remedy and not through a writ petition under Article 226 of the Constitution of India. There is no dispute with regard to the factual position that the second respondent was held as disqualified from being nominated to the **Varied Board** of the Cantonment with reference to Section 13 (2)(c) of the Act, as evident from Exts.P5 to P7 .

12. Qualification for being a member of the Board is

governed by Section 29 of Act. Two prime questions arise to be considered; the first one is whether the second respondent is holding any 'office of profit' and the second one is, whether such office of profit is under the Government. The learned Counsel for the petitioner seeks to rely on the verdicts passed by the Apex Court in **Shibu Soren vs. Dayanand Sahay and others** [(2001) 7 SCC 425] and in **U.C. Raman vs. P.T.A. Rahim and others** [(2014) 8 SCC 934) to explain the meaning of the term - 'Office of profit'. The Apex Court has held in the former case that a realistic approach, neither too narrow nor too wide, having substantial and realistic nexus with the object is to be sought to be achieved. The Court held that the term "Profit" connotes an idea of pecuniary gain other than "compensation"; further observing that, neither the quantum of the amount paid nor the label under which the payment is made, may always be material to determine whether the office is one of profit. It has also been observed that, merely by using the term "honorarium" cannot by itself take the payment out of the purview of profit, if there is some pecuniary gain for the recipient.

13. Similary, with reference to the term holding office of

profit 'under the Government', it was felt necessary to examine whether the State/Government was having power to remove or dismiss the holder of office, controlling the functioning of the Council (there, the Chairman of Interim Jharkhand Area Autonomous Council set up under Jharkhand Area Autonomous Council Act) and providing funds to the Council, out of which, the Council was paying remuneration to the party. After detailed discussion, it was held that, receipt of 'honorarium' at the rate of Rs.1750/- per month from the said Council, apart from the daily allowance as mentioned, clearly amounted to 'office of profit under the Government '.

14. The Apex Court held that the stipulation was incorporated with a view to eliminate or in any event reduce the risk of conflict between duty and interest amongst members of the legislature so as to ensure that the legislator concerned does not come under an obligation to the executive, on account of receiving pecuniary gain or profit from it, which may render him amenable to influence of the executive , while discharging his obligations as a legislator.

15. Coming to the other case, i.e. **U.C. Raman vs. P.T.A.**

Rahim and others [(2014) 8SCC 934], the Apex Cour held that the 'office of profit' is an 'office' which is capable of yielding a profit or pecuniary gain. The word "profit" has always been treated as equivalent to or a substitute for the term 'pecuniary gain ; and that the very context in which the word 'profit' has been used after the words "office of" shows that, not all the offices are disqualified, but only those which yield pecuniary gains as profit, other than mere compensatory allowance to the holder of the office. It is made clear that, if the 'pecuniary gain' is 'receivable' in connection with the office, then it becomes an office of profit, irrespective of whether such pecuniary gain is actually received or not . After narrating the principles and considering the facts, it was however observed that the office of Chairperson of 'Haj Committee' was entitled only to have travelling allowance and daily allowance and not any pay, salary, emoluments, remuneration, commission etc in connection with the office and hence such office was not covered by the expression 'office of profit'

16. It is true that in ***R.R.Pillai's case***, (AIR 2010 SC 188), the Apex Court has held that civilian employees of the Air

Force Unit Run Canteen, paid out of Non Public funds, are not government employees . There is no dispute with regard to that aspect in so far as the position has been certified in the matter of engagement of the second respondent as well, that he has been engaged with the affairs of Unit Run Canteen. But the question with reference to the eligibility of the person to be elected as a Member of the Cantonment Board under the Cantonments Act read with the relevant Rules may stand on a different footing, in relation to the nature and scope of probe/scrutiny, as made clear by the Apex Court in R.R.Pillai's case.

17. The 4th respondent has already written Ext.R4(c) letter to the Commandant, DSC Centre, Kannur in this regard, seeking for clarification on the following aspects, as given below :

- " (a) Appointment letter issued to Retd Col Padmanabhan for the post of Officer-in-Charge Land & Court cases and others, if any.*
- (b) List of posts he held/holding since his retirement from army service.*
- (c) The procedure followed to make his appointment to various posts.*
- (d) The appointing authority and the controlling officer of Retd Col Padmanabhan along with their designation.*

(e)The source of his payment for the post of Officer-in-Charge Land & Court cases and other posts, if any.

(f) The budget head under which the aforesaid payment is made.

18. The clarification sought for as above, may be relevant in so far as the second respondent, admittedly is functioning also as 'Officer-in-charge' of Land and Court cases, apart from functioning as an employee of the Unit Run Canteen. Exts. R4 (a) and R4(b) produced by the 4th respondent along with the counter affidavit dated 30.01.2015 clearly show that the communications issued by the second respondent describing himself in the said capacity and to the effect that the said proceedings have been issued 'for Station Commander. The scope of such engagement requires to be examined, to solve the dispute in an effective manner.

19. Coming back to the scope of the writ petition, as mentioned already, it was against the acceptance of nomination of the second respondent . The main contention of the respondents is that there is an effective alternative remedy by virtue of Rule 54, read with Rule 59 of the Rules. The only point

to be considered is whether any mistake has been committed by the first respondent/Returning Officer in accepting the nomination paper of the second respondent. As disclosed from the materials on record, it is seen that nomination was to be preferred on 05.12.2014 and scrutiny of the nomination paper was to be conducted on the next date, ie. on 06.12.2014. It is also seen that an objection was raised by the petitioner as to the alleged disqualification of the second respondent at the time of scrutiny, as evident from Exts.P3 and P4. But the fact remains that no material was produced to substantiate the disqualification. It is true that the petitioner had sought for time to produce materials. But the election schedule was already notified by the Central Government as per Exts.P1/P2 and scrutiny was to be held on the specified dates and the nomination was liable to be accepted , if otherwise proper in all respects.

20. Coming to the scope of scrutiny to be conducted by the first respondent/Returning Officer; reference to Rules 24, 25 and 26 of the Cantonment Electoral Rules, 2007 will be beneficial, which are extracted below.:

"24. Preliminary examination of nomination

papers- When a nomination paper is presented, the Returning Officer shall examine it and inform the person presenting it, of any points in which the nomination paper appears defective , but no failure on the part of Returning Officer to give such information and no defect or error in the information shall affect the validity of the proceedings.

25. Valid nomination and time and place for scrutiny of nomination papers- Immediately after the hour for receipt of nomination papers is past, the Returning Officer shall draw up in form VII , a list of candidates, excluding anyone whose nomination papers have been rejected under the sub-rules (2) and (5) of rule 23 , and post it at the notice Board of the Office of Cantonment Board, with notice of time and place fixed for scrutiny of nomination papers.

26. Scrutiny of and objections to nomination papers- (1) On the date and at the time appointed , the Returning Officer shall undertake scrutiny of the nomination papers.

(2) No person other than the candidates, their election agents and proposers shall be permitted to be present and they shall be given all reasonable facilities for the

examination of nomination papers.

(3) Objections to a nomination paper may be oral or in writing and may relate not only to the form of the nomination but also to the violation or non-observance of any provision of the Act or the rules made thereunder relating to such nomination , including objections to the eligibility of the candidate to stand for election or of the proposer to nominate :

Provided that no objection to the candidate or the proposer which relates to his registration in the electoral roll and anything referred to in rule 13 shall be considered:

Provided further that any objection raised merely in regard to failure to complete, or defect in completing the declaration as to symbols in a nomination paper shall not be considered, as a ground for rejecting the nomination paper and when any such objection being raised the Returning Officer shall cause the nomination paper to be completed or defect rectified by the candidate who has filed or on whose behalf the nomination paper has been filed.

(4) The decision taken on each objection shall be endorsed on the nomination paper, and if any nomination paper is rejected, a brief statement of the reasons for rejection

shall be recorded thereon and signed by the Returning Officer.

(5) If the returning officer is unable to undertake the scrutiny of nomination papers, it shall be undertaken by a person other than the Chief Executive Officer, an elected member or a servant of the Board, nominated by the Returning Officer :

Provided that the aggrieved party may appeal to the President against the decision of such nominee within two days of such decision"

21. From the above, it is clear that the scrutiny has to be conducted by the first respondent/Returning Officer on the basis of the materials on record and after considering the nature of objections , if any. Admittedly, no material was produced from the side of the petitioner as on 06.12.2014, to substantiate the alleged disqualification of the second respondent. As such, there was no other alternative for the first respondent/Returning Officer, but to accept the nomination, which was done accordingly.

22. Coming to the further course of action, this Court finds that the Returning officer has made available the outcome of the election held on 11.01.2015 in a sealed cover, pursuant to the

order passed by this Court, though the result is still to be declared officially. Since improper acceptance of nomination,(if it be so), is a valid ground for challenging the election as per Rule 59 of the Rules and further since such a proceeding can be preferred within '*one week*' from the date of declaration of election, no prejudice will be caused to the petitioner in any manner, if the petitioner is relegated to pursue the remedy under Rule 54 of the Rules. This is more so, since there is no illegality or impropriety or irregularity on the part of the first respondent/Returning Officer for having accepted the nomination of the second respondent, which was done on the basis of available materials on record and hence quite within the four walls of law .

23. In the above circumstance, the petitioner is set at liberty to pursue the matter by preferring an appeal before the concerned District Court/Forum in terms of Rule 54 of the Rules, within the prescribed time, once the result of the election is officially declared. It shall be for the said Court/Forum to consider the same and pass a verdict on merits, after hearing both the sides, based on the pleadings and evidence to be let in

and also in the light of the binding judicial precedents. If any such proceedings are filed before the concerned Court/Forum within the prescribed time, it shall be considered and finalised in accordance with law, as expeditiously as possible, at any rate, within 'three months' from the date of receipt of the said proceedings.

24. The sealed cover placed before this Court is opened, perused and returned through the concerned Counsel in a sealed cover of this Court, to be dealt with in appropriate manner by the first respondent/Returning Officer.

With the above observations , the writ petition stands disposed of.

P.R.RAMACHANDRA MENON
JUDGE

/k