Election Commission, India

Vs

Saka Venkata Subba Rao Union of India - Intervener

Civil Appeal No. 205

(CJI M. Patanjali Sastri, B. K. Mukherjea, Vivian Bose, Ghulam Hasan, N. H. Bhagwati JJ)

27.02.1953

JUDGMENT

PATANJALI SASTRI C.J. -

This is an appeal from an order of a Single Judge of the High Court of Judicature at Madras issuing a writ of prohibition restraining the Election Commission, a statutory authority constituted by the President and having its offices permanently located at New Delhi, from enquiring into the alleged disqualification of the respondent for membership of the Madras Legislative Assembly.

The respondent was convicted by the Sessions Judge of East Godavari and sentenced to a term of seven years' rigorous imprisonment in 1942, and he was released on the occasion of the celebration of the Independence Day on 15th August, 1947. In June, 1952, there was to be a by-election to a reserved seat in the Kakinada constituency of the Madras Legislative Assembly, and the respondent, desiring to offer himself as a candidate but finding himself disqualified under under section 7(b) of the Representation of the People Act, 1951, as five years had not elapsed from his release, applied to the Commission on 2nd April, 1952, for exemption so as to enable him to contest the election. No reply to the application having been received till 5th May, 1952, the last day for filing nominations, the respondent filed his nomination on that day, but no exception was taken to it either by the Returning Officer or any other candidate at the scrutiny of the nomination papers. The election was held on 14th June, 1952, and the respondent, who secured the largest number of votes, was declared elected on 16th June, 1952. The result of the election was published in the Fort St. George Gazette (Extraordinary) on 19th June, 1952, and the respondent took his seat as a member of the Assembly on 27th June, 1952. Meanwhile, the Commission rejected the respondent's application for exemption and communicated such rejection to the respondent by its letter dated 13th May, 1952, which however was not received by him. On 3rd July, 1952, the Speaker of the Assembly read out to the House a communication received from the Commission bringing to his notice "for such action as he may think fit to take", the fact that the respondent's application for exemption had been rejected. A question as to the respondent's disqualification having thus been raised, the Speaker referred the question to the Governor of Madras who forwarded the case to the Commission for its "opinion" as required by article 192 of the Constitution. The respondent having thereupon challenged the competency of the reference and the action taken thereon by the Governor, the Commission notified the respondent that his case would be heard on 21st August, 1952. Accordingly, the Chief Election Commissioner (who was the sole Member of the Commission for the time being) went down to Madras and heard the respondent's counsel and the Advocate-General of Madras on 21st August, 1952, when it was agreed that, in case the petitioner's counsel desired to put forward any further representations or arguments, the same should be sent in writing so as to reach the Commission in Delhi by 28th August, 1952, and the Commission should take them into consideration before giving

its opinion to the Governor.

On the same day (21st August, 1952) the respondent applied to the High Court under article 226 of the Constitution contending that article 192 thereof was applicable only where a member became subject to a disqualification after he was elected but not where, as here, the disqualification arose long before the election, in which case the only remedy was to challenge the validity of the election before an Election Tribunal. He accordingly prayed for the issue of a writ of mandamus or of prohibition directing the Commission to forbear from proceeding with the reference made by the Governor of Madras who was not, however, made a party to the proceeding. On receipt of the rule nisi issued by the High Court, the Commission demurred to the jurisdiction of the court to issue the writs asked for, on the ground that the Commission was not "within the territory in relation to which the High Court exercised jurisdiction". A further objection to the maintainability of the application was also raised to the effect that the action of the Governor in seeking the opinion of the Commission could not be challenged in view of the immunity provided under article 361(1), and that the Commission itself, which had not to "decide" the question of disqualification, but had merely to give its "opinion", could not be proceeded against under article 226. On the merits, the Commission contended that article 192 was, on its true construction, applicable to cases of disqualification arising both before and after the election and that both the reference of the question as to the respondent's disqualification to the Governor of Madras and the latter's reference of the same to the Commission for its opinion were competent and valid.

The application was heard by Subba Rao J. who overruled the preliminary objections and held that article 192 on its true construction applied only to cases of supervening disqualifications and that the Commission had, therefore, no jurisdiction to deal with the respondent's disqualification which arose long before the election took place. He accordingly issued a writ prohibiting the Commission from proceeding with the enquiry in regard to the question referred to it by the Governor under article 192. The learned Judge, however, granted a certificate under article 132 that the case involved substantial questions of law as to the interpretation of the Constitution, and the Commission has accordingly preferred this appeal.

A preliminary objection was raised by Mr. Mohan Kumaramangalam, who argued the case for the respondent with marked ability, that the appeal brought from the judgment of a single Judge was barred under article 133(3) of the Constitution despite the certificate granted by the learned Judge overruling the same objection which was also raised before him. It has been urged that, so far as civil matters are concerned, the more comprehensive provisions in article 133(1)(c) for the grant of a certificate of fitness for appeal to the Supreme Court completely overlap article 132(1) which relates only to one specific ground, namely, a substantial question of law being involved as to the interpretation of the Constitution, and that the court's power, therefore, to grant a certificate of fitness on any ground including the ground referred to above, must be deemed to arise under article 133(1)(c), with the result that the exercise of such power is excluded by the opening words of clause (3) of that article which bars an appeal from the judgment, decree or final order of one Judge of a High Court. The argument was sought to be reinforced by reference to clause (2) of that article and the proviso to article 145(3) both of which contemplate appeals involving substantial questions of law as to the interpretation of the Constitution being brought without a certificate having been obtained under article 132. The argument has no force. While it is true that constitutional questions could be raised in appeals filed without a certificate under article 132, the terms of that article make it clear that an appeal is allowed from "any judgment, decree or final order of a High Court" provided, of course, the requisite certificate is given, and no restriction is placed on the right of appeal having reference to the number of Judges by whom such judgment, decree or final order was

passed. Had it been intended to exclude the right of appeal in the case of a judgment etc., by one Judge, it would have been easy to include a reference to article 132 also in the opening words of article 133(3), as in the immediately preceding clause. If the respondent's contention were accepted, not only would article 132 become redundant so far as it relates to civil proceedings, but the object of the Explanation to that article, which was designed to supersede the decision of the Federal Court in S. Kuppuswami Rao v. The King [[1947] F.C.R. 180.] and thus to secure a speedy determination of constitutional issues going to the root of a case, would be defeated, as the Explanation is not made applicable to the same expression "final order" used in article 133(1). The whole scheme of the appellate jurisdiction of the Supreme Court clearly indicates that questions relating to the interpretation of the Constitution are placed in a special category irrespective of the nature of the proceedings in which they may arise, and a right of appeal of the widest amplitude is allowed in cases involving such questions. We accordingly overrule the preliminary objection and hold that the appeal is maintainable.

Turning now to the question as to the powers of a High Court under article 226, it will be noticed that article 225 continues to the existing High Courts the same jurisdiction and powers as they possessed immediately before the commencement of the Constitution. Though there had been some conflict of judicial opinion on the point, it was authoritatively decided by the Privy Council in the Parlakimedi case [70 I.A. 129.] that the High Court of Madras - the High Courts of Bombay and Calcutta were in the same position - had no power to issue what were known as high prerogative writs beyond the local limits of its original civil jurisdiction, and the power to issue such writs within those limits was derived by the court as successor of the Supreme Court which had been exercising jurisdiction over the Presidency Town of Madras and was replaced by the High Court established in pursuance of the Charter Act of 1861. The other High Courts in India had no power to issue such writs at all. In that situation, the makers of the Constitution, having decided to provide for certain basic safeguards for the people in the new set up, which they called fundamental rights, evidently thought it necessary to provide also a quick and inexpensive remedy for the enforcement of such rights and, finding that the prerogative writs which the Courts in England had developed and used whenever urgent necessity demanded immediate and decisive interposition, were peculiarly suited for the purpose, they conferred, in the States' sphere, new and wide powers on the High Courts of issuing directions, orders, or writs primarily for the enforcement of fundamental rights, the power to issue such directions, etc., "for any other purpose" being also included with a view apparently to place all the High Courts in this country in somewhat the same position as the Court of King's Bench in England. But wide as were the powers thus conferred, a two-fold limitation was placed upon their exercise. In the first place, the power is to be exercised "throughout the territories in relation to which it exercises jurisdiction", that is to say, the writs issued by the court cannot run beyond the territories subject to its jurisdiction. Secondly, the person or authority to whom the High Court is empowered to issue such writs must be "within those territories", which clearly implies that they must be amenable to its jurisdiction either by residence or location within those territories.

Such limitation is indeed a logical consequence of the origin and development of the power to issue prerogative writs as a special remedy in England. Such power formed no part of the original or the appellate jurisdiction of the Court of King's Bench. As pointed out by Prof. Holdsworth (History of English Law, Vol. I, p. 212 et seq.) these writs had their origin in the exercise of the King's prerogative power of superintendence over the due observance of the law by his officials and tribunals, and were issued by the Court of King's Bench - habeas corpus, that the King may know whether his subjects were lawfully imprisoned or not; certiorari, that he may know whether any proceedings commenced against them are conformable to the law; mandamus, to ensure that his

officials did such acts as they were bound to do under the law, and prohibition, to oblige the inferior tribunals in his realm to function within the limits of their respective jurisdiction. See also the introductory remarks in the judgment in the Parlakimedi case [70 I.A. 129, 140.]. These writs were thus specifically directed to the persons or authorities against whom redress was sought and were made returnable in the court issuing them and, in case of disobedience, were enforceable by attachment for contempt. These characteristics of the special form of remedy rendered it necessary for its effective use that the persons or authorities to whom the court was asked to issue these writs should be within the limits of its territorial jurisdiction. We are unable to agree with the learned Judge below that if a tribunal or authority permanently located and normally carrying on its activities elsewhere exercises jurisdiction within those territorial limits so as to affect the rights of parties therein, such tribunal or authority must be regarded as "functioning" within the territorial limits of the High Court and being therefore amenable to its jurisdiction under article 226.

It was, however, urged by the respondent's counsel that the High Court had jurisdiction to issue a writ to the Commission at New Delhi because the question referred to it for decision related to the respondent's right to sit and vote in the Legislative Assembly at Madras and the parties to the dispute also resided in the State of Madras. The position, it was claimed, was analogous to the court exercising jurisdiction over persons outside the limits of its jurisdiction, provided the cause of action arose within those limits. Reliance was placed upon the following observations of the Privy Council in the Parlakimedi case [70 I.A. 129.] : "The question of jurisdiction must be regarded as one of substance and that it would not have been within the competence of the Supreme Court to claim jurisdiction over such a matter as the present of issuing certiorari to the Board of Revenue on the strength of its location in the town. Such a view would give jurisdiction to the Supreme Court in the matter of the settlement of rents of ryoti holdings in Ganjam between parties not otherwise subject to its jurisdiction, which it would not have had over the Revenue Officer who dealt with the matter at first instance." We cannot accede to this argument. The rule that cause of action attracts jurisdiction in suits is based on statutory enactment and cannot apply to writs issuable under article 226 which makes no reference to any cause of action or where it arises but insists on the presence of the person or authority "within the territories" in r_lation to which the High Court exercises jurisdiction. Nor is much assistance to be derived from the observations quoted above. That case arose out of proceedings before a special Revenue Officer for settlement of fair rent for certain holdings within the zemindary estate of Parlakimedi situated beyond the local limits of the original civil jurisdiction of the Madras High Court. Dissatisfied with the settlement made by the Revenue Officer, the ryots appealed to the Board of Revenue which had its offices a Madras. The appeal was accepted by a single member of the Board who reduced the rent as desired by the ryots. The zemindar appealed by way of revision to the Collective Boards which sanctioned an enhancement. Thereupon the ryots applied to the High Court for the issue of a writ of certiorari to bring up and quash the proceedings of the Collective Board which passed the order complained of in the town of Madras. The Privy Council considered the question of jurisdiction from two separate standpoints :-

> "(a) independently of the local civil jurisdiction which the High Court exercises over the Presidency town; or
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> (b) solely by reason thereof, as an incident of the location of the Board of Revenue within the town."

On question (a), they examined the powers of the Supreme Court at Madras to issue certiorari beyond the Presidency Town under clause 8 of the Charter of 1800, as it was suggested that the High Court succeeded to the jurisdiction and powers of the Supreme Court which had been granted

the same powers of issuing prerogative writs as the Court of King's Bench in England throughout the Province, they recorded their conclusion thus :

> "Their Lordships are not of opinion that the Supreme Court would have had any jurisdiction to correct or control a country court of the company deciding a dispute between Indian inhabitants of Ganjam about the rent payable for land in that district."

Then, dealing with question (b) and referring to their decision in Besant's case [46 I.A. 176.] that the High Courts of Calcutta, Madras and Bombay had power to issue certiorari in the exercise of their local jurisdiction, they held that the principle could not be applied

> "to the settlement of rent for land in Ganjam merely on the basis of the location of the Board of Revenue as a body which is ordinarily resident or located within the town of Madras, or on the basis that the order complained of was made within the town. If so, it would seem to follow that the jurisdiction of the High Court would be avoided by the removal of the Board of Revenue beyond the outskrits of the town and that it would never attach but for the circumstance that an appeal is brought to, or proceedings in revision taken by, the Board of Revenue."

Then followed the passage already quoted on which the respondent's counsel laid special stress. It will thus be seen that the decision is no authority for dispensing with the necessity of the presence or location, within the local limits of the court's jurisdiction, of the person or authority to whom the writ is to be issued, as the basis of its power to issue it. Their Lordships considered, in the peculiar situation they were dealing with, that the mere location of the appellate authority alone in the town of Madras was not a sufficient basis for the exercise of jurisdiction whereas both the subject-matter, viz., the settlement of rent for lands in Ganjam, and the Revenue Officer authorised to make the settlement at first instance were outside the local limits of the jurisdiction of the High Court. If the court in Madras were recognised as having jurisdiction to issue the writ of certiorari to the appellate authority in Madras, it would practically be recognising the court's jurisdiction over the Revenue Officer in Ganjam and the settlement of rents for lands there, which their Lordships held it never had. That was the "substance" of the matter they were looking at, and their observations lend no support to the view that if the subject-matter or the cause of action and the parties concerned were within the territorial limits of the jurisdiction, the High Court could issue prerogative writs to persons or authorities who are not within those limits. In any case, the decision did not turn on the construction of a statutory provision similar in scope, purpose or wording to article 226 of the Constitution, and is not of much assistance in the construction of that article.

It was said that it could not have been contemplated that an inhabitant of the State of Madras, feeling aggrieved by a threatened interference with the exercise of his rights in that State by an authority located in Delhi and acting without jurisdiction, should seek his remedy under article 226 in the Punjab High Court. It is a sufficient answer to this argument of inconvenience to say that, the language of the article being reasonably plain, it is idle to speculate as to what was or was not contemplated.

Our attention has been called to certain decisions of High Courts dealing with the situation where the authority claiming to exercise jurisdiction over a matter at first instance is located in one State and the appellate authority is located in another State. It is not necessary for the purposes of this appeal to decide which High Court would have jurisdiction in such circumstances to issue

prerogative writs under article 226.

In the view we have expressed above as to the applicability of article 226 to the present case, it is unnecessary to enter upon a discussion of the question whether article 192(1) applies only to members who, having been already elected, have become subject to a disqualification by reason of events happening after their election; but having heard the point fully argued before us, we think it right to express our opinion thereon, especially as both sides have invited us to do so in view of its general importance.

The relevant provisions of the Constitution on which the determination of the question turns are as follows :

> 190. (3) If a member of a House of the Legislature of a State -
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> (a) becomes subject to any of the disqualifications mentioned in clause (1) of article 191; or
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> (b) resigns his seat by writing under his hand addressed to the Speaker or the Chairman, as the case may be, his seat shall thereupon become vacant,
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> 191. (1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State -
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> (a) if he holds any office of profit under the Government of India or the Government of any State, specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder;
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> (b) if he is of unsound mind and stands so declared by a competent court;
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> (c) if he is an undischarged insolvent;
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> (d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State;
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> (e) if he is so disqualified by or under any law made may Parliament.
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> 192. (1) If any question arises as to whether a member of a House of the Legislature of a State has become subject to any of the disqualifications mentioned in clause(1) of article 191, the question shall be referred for the decision of the Governor and his decision shall be final.
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> (2) Before giving any decision on any such question, the Governor shall obtain the opinion of the Election Commission and shall act according to such opinion.
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> 193. If a person sits or votes as a member of the Legislative Assembly or the Legislative Council of a State ..... when he knows that he is not qualified or that he is disqualified for membership thereof, or that he is prohibited from so doing by the provisions of any law made by Parliament or the Legislative of the State, he shall be liable in respect of each day on which he so sits or votes to a penalty of five hundred

rupees to be recovered as a debt due to the State.

As has been stated already, the respondent's conviction and sentence in 1942 disqualified him both for being chosen as, and for being, a member of the Legislative Assembly under article 191(1)(e) read with section 7 of the Representation of the People Act, 1951, passed by Parliament, the period of five years since his release on 15th August, 1947, not having elapsed before the date of the election. The respondent having thus been under a disqualification since before his nomination on 15th March, 1952, could he be said to have "become" subject to that disqualification within the meaning of article 192 ? The rival contentions of the parties centred round the true interpretation to be placed on that word in the context of the provisions quoted above.

The Attorney-General argued that the whole fasciculus of the provisions dealing with "disqualifications of members", viz., articles 190 to 193, should be read together, and as articles 191 to 193 clearly cover both pre-existing and supervening disqualifications, articles 190 to 192 should also be similarly understood as relating to both kinds of disqualification. According to him all these provisions together constitute an integral scheme whereby disqualifications are laid down and machinery for determining questions arising in regard to them is also provided. The use of the word "become" in articles 190(3) and 192(1) is not inapt, in the context, to include within its scope pre-existing disqualifications also, as becomimg subject to a disqualification is predicated of "a member of a House of Legislative", and a person who, being already disqualified, gets elected, can, not inappropriately, be said to "become" subject to the disqualification as a member as soon as he is elected. The argument is more ingenious than sound. Article 191, which lays down the same set of disqualifications for election as well as for continuing as a member, and article 193 which prescribes the penalty for sitting and voting when disqualified, are naturally phrased in terms wide enough to cover bothpre-existing and supervening disqualifications; but it does not necessarily follow that articles 190(3) and 192(1) must also be taken to cover both. Their meaning must depend on the language used which, we think, is reasonably plain. In our opinion these two articles go together and provide a remedy when a member incurs a disqualification after he is elected as a member. Not only do the words "becomes subject" in article 190(3) and "has become subject" in article 192(1) indicate a change in the position of the member after he was elected, but the provision that his seat is to become thereupon vacant, that is to say, the seat which the member was filling theretofore becomes vacant on his becoming disqualified, further reinforces the view that the article contemplates only a sitting member incurring the disability while so sitting. The suggestion that the language used in article 190(3) can equally be applied to a pre-existing disqualification as a member can be supposed to vacate his seat the moment he is elected is a strained and farfetched construction and cannot be accepted. The Attorney-General admitted that if the word "is" were substituted for "becomes" or "has become", it would more appropriately convey the the meaning contended for by him, but he was unable to say why it was not used.

It was said that on the view that articles 190(3) and 192(1) deal with disqualifications incurred after election as a member, there would be no way of unseating a member who became subject to a disqualification after his nomination and before his election, for, such a disqualification is no ground for challenging the election by an election petition under article 329 of the Constitution read with section 100 of the Representation of the People Act, 1951. If this is an anomaly, it arises out of a lacuna in the latter enactment which could easily have provided for such a contingency, and it cannot be pressed as an argument against the respondent's construction of the constitutional provisions. On the other hand, the Attorney-General's contention might, if accepted, lead to conflicting decisions by the Governor dealing with a reference under article 192 and by the Election Tribunal inquiring into an election petition under section 100 of the Parliamentary statute referred to

above.

For the reasons indicated we agree with the learned Judge below in holding that articles 190(3) and 192(1) are applicable only to disqualifications to which a member becomes subject after he is elected as such, and that neither the Governor not the Commission has jurisdiction to enquire into the respondent's disqualification which arose long before his election.

As, however, we have held that the High Court was not competent under article 226 to issue any prerogative writ to the appellant Commission, the appeal is allowed and the writ of prohibition issued by the learned Judge is quashed. We make no order as to costs.

Appeal allowed.

Agent for the appellant and the Intervener : G. H. Rajadhyaksha.

Agent for the respondent : S. Subramaniam.

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