KERALA HIGH COURT

Gopala Kurup

Vs.

Samuel Arulappan Paul

Election Appeal No. 1 of 1960, Quilon, E.P. No. 11 of 1960

(M.A. Ansari, C.J. and T.C. Raghavan, J.)

24.01.1961

JUDGMENT

Ansari, C.J.

1. This appeal is against the decision by the Election Tribunal, Quilon, in Election Petition No. 11 of 1960. Four persons had contested the double member constituency of Mavelikara in the elections to the State Legislature held on February 1, 1960. Two out of the four contestants were on behalf of the Communist Party, and the remaining for the United Front. The result showed contestant to have secured the following number votes :

1. Gopala Kurup 54,340
2. Kujanchan 54,042
3. Chellappan Pillai 50,662
4. Ramachandra Das 50,170

2. As the first two, who had contested for the Communist Party, had obtained the majority of the votes, both were declared elected. But on March 12, 1960, one Samuel Arulappan Paul filed the petition in which this appeal arises, seeking declaration of the aforesaid elections being void, and praying the two contestants on behalf of the United Front to be declared elected. One of the grounds taken in the petition for the aforesaid declarations is that Gopala Kurup was disqualified under Article 191 of the Constitution from standing for the election, because of his being a teacher in an institution covered by the definition of 'aided School' in the Kerala Education Act, VI of 1959, and therefore holding an office of profit under the Government.

3. The next is that both the successful persons were guilty of corrupt practice under Section 123(5) of the Representation of the People Act, 1951, having brought voters to polling booths in a car and in jeep, more particularly described in the schedule to the election petition. The third ground is that the Returning Officer of the District, where the constituency was situated, as well as other persons entrusted with supervising the election, had committed irregularities due to the District Officer being favorably disposed towards the Communist Party, because of his

relationship to the Secretary of the Communist Party. These allegations were denied, and an objection was raised that the prayers for the two declarations of avoiding elections of those successful, and securing the election of those unsuccessful, could not be joined, having regard to Section 84 of the Representation of the People Act 1951.

> (3) At the trial, evidence was led to show that Gopala Kurup had brought three voters on two occasions in a car bearing number KLK 1365 to booth No. 73 at a place called Vettiyar. The car used for the conveyance of the voters was, how ever, described in the schedule to the election petition as bearing No. KLR. 1365, and the petition for amending the aforesaid misdescription, was not filed before the Tribunal till August 27, 1960, when the trial had reached the concluding stages.

In the affidavit accompanying the petition for the amendment, it was averred that the mistake in the schedule was due to the typist, and in support a draft prepared by the junior counsel showing the car's number to be KLK. 1365, was produced. Objections to the amendment being then allowed were taken, send the Tribunal allowed the amendment petition when giving the main judgment in the case. One of the conclusions in the final decision is that Gopala Kurup brought P.Ws. 4, 5 and 6 in the car KLK. 1365 to the polling booth, and other evidence supports these persons being carried, with the result that he was guilty of the corrupt practice of conveying the aforesaid voters to the polling booth, which act was covered by the definition of 'porrupt practice' under Section 123(5) of the Representation of the People Act, 1951, and on that ground his election was void under Section 98(b) read with Section 100(1)(b) of the 1951 Act. The Tribunal did not accept the objection of Gopala Kurup being disqualified due to being a teacher under Article 191 from seeking election to the State Legislature, and held the election of the other successful candidate not to be void, as no satisfactory evidence of his being guilty of corrupt practice having been adduced. The Tribunal further disallowed the declaration regarding unsuccessful persons being validly elected.

4. Gopala Kurup has filed the appeal against the aforesaid decision, and the election petitioner had also filed a cross-objection. The arguments urged by the appellant's learned advocate at the first hearing before the Division Bench of which one of us was a party, were that :

> (1) The election petition, - having asked more than one person being declared elected, went beyond what was permitted by Section 84 of the Representation of the People Act, 1951; and on that ground it ought to be rejected; that
> (2) The amendment had been granted on insufficient grounds and without affording the appellant sufficient opportunity of leading evidence in rebuttal; that
> (3) The evidence in support of the alleged corrupt practice was unreliable and has been incorrectly accepted; that
> (4) To set aside election under Section 123(5) of the Representation of the People Act, there should be established hiring or procuring of vehicle for conveyance of voters to the booth, but the Tribunal has found only conveyance, without any finding about the appellant having hired or procured the car, and the aforesaid conclusion alone would not be sufficient to allow the election petition and that

(5) The cross-objection having been filed, without furnishing the deposit necessary for filing the appeal, was bad, and should be rejected.

5. By our order of November 22, 1960, we had held that the Election Tribunal had erred in failing to afford the appellant a fair opportunity of adducing evidence to meet the amended schedule, and it ought to record such oral evidence as the appellant be desirous of adducing. We had further directed the election petitioner to furnish security as required under the Act for filing appeal, and the cross-objection would stand dismissed should he fail to do so within one month. No security having been furnished within the time allowed, the cross-objection stands dismissed; and, the election petitioner therefore, cannot claim any substantial relief not given to him by the Tribunal, though he would be at liberty to support the final order in his favour on grounds taken in the election petition, notwithstanding such grounds having been rejected by the Tribunal.

6. In accordance with our direction the Tribunal has now recorded the depositions of three persons on behalf of the appellant, who are Kunhappan, Rw. 3, Maheswaran Nair, Rw. 4, and Risheeswaran, Rw. 5; and has returned the record. During the fresh hearing of the appeal before us, we found a further entry regarding the voters being brought in the car to the booth in the pocket book of the Constable, P.W. 23, which book contains the entry Ext. P7(a), and the entry did not tally in all details with Ext. P-7 which had been proved before the Tribunal. We asked the election petitioner's learned advocate whether he could explain the two entries on the same matter in the same book and both being not identical, but he expressed his inability; and we felt it necessary to call the Constable, P.W. 23, who appeared before us yesterday and had explained an entry in ink we found in the pocket book. There is, therefore, the additional evidence before us, which the Tribunal had not considered when the order appealed against was passed and such material must be taken into consideration in determining how far the appellant has been rightly found guilty of corrupt practice. On this point the election petitioner's case very briefly is that :

(1) One Raghavan Pilial, P.W. 36, who runs a Grocery Shop at Thiruvella, owns the car bearing number KLK 1365, Thiruvella is a different constituency from Mavelikara though in the same district, that car was hired for the election at Mavelikara by the Communist Party at the request of one Rishiswamy the manager of Uduppi Hotel at Thiruvella, and the car was driven by P.W. 35.

(2) On February 1, 1960, at 3 P.M. the appellant brought Thankamma and Karutha Kunju, P.Ws. 4 and 5, who are related as sinter and brother, to the polling station at Vettiyar North School, in the car, lie himself was in the car, they voted; Premanandan P.W. 11, who had done propaganda work for the United Front, saw and objected to the Presiding Officer P.W. 34, Narayana Pillai P.W. 12 who was an election agent for the candidate of the United Front, also saw and protested, and the Constable P.W. 23, on duty at the aforesaid polling station, saw and noted in his pocket book, which is Ext. P7(a).

(3) Later the appellant again brought in the same car another woman voter called Parvathi, who voted, the act was witnessed by P.W. 11, and P.W. 12 but the woman is dead.

(4) Lastly, the appellant went to the Government Hospital, Mavelikara and brought Kali, P.W. 6 who was in patient there due to a bad toe, to the same booth, where he had brought

the other voters earlier, and the sick man voted. This act of the voters being brought was seen by P.W. 11, P.W. 12, P.W. 23 and P.W. 24 who was the polling officer at the booth. Kunjamma, the nurse Pw, 21 saw a car moving from the hospital that day at 3 P.M.

7. It is not disputed that the evidence adduced in support of the aforesaid case and the rebuttal, should be sifted by us as a Court authorized to form its own conclusions on facts, and that the proper approach towards the evidence in the case should be similar to where charges of crimes are sought to be brought home to the persons put for ward as guilty. In support of such an approach the appellant's learned advocate has relied on *Jamuna Prasad v. Shri Ramnivas*[1], where Hidayatullah, C.J., observes as follows :

> "The burden has to be discharged by the petitioner and no adverse inference can be drawn against the returned candidate charged with corrupt practice for failure to bring a material witness who would have thrown light upon the transaction. That burden must remain on the petitioner, and if lie does not bring the witness, it does not lie in his mouth to say that that witness ought to have been examined in rebuttal by the returned candidate or that an adverse inference be drawn."

The same view of the burden being on the person alleging the corrupt practice has been taken in *Ram Dial v. Sant Lal*[2], where Dua, J., has observed as follows :

> "In this connection it has also to be borne in mind that a charge of corrupt practice in election petitions, according to the well recognised rule laid down in decided cases, has to be treated just like a quasi-criminal charge and if the language of Section 123(3) in terms is not attracted, the benefit should like all criminal trials be given to the person charged with the commission of the alleged corrupt practice."

The view is further supported by the following observation in *Harish Chandra v. Triloki Singh*[3]

> "It should not be forgotten that charges of corrupt practice are quasi-criminal in character, and that the allegations relating thereto must be sufficiently clear and precise to bring home the charges to the candidates; and judged by that standard, the allegation in para 7(c) is thoroughly worthless. The contention of the respondent that the appellants understood the allegations as meaning that they had committed corrupt practices, is not borne out by the record."

Such appears to us to be the inevitable result of the disputes concerning elections being entrusted we judicial tribunals; for, courts having well settled rules of procedure in cases involving penal consequences to the parties proceeded against, would but follow those rules whenever their decisions entail such consequences to the persons

[1] AIR 1959 Mad Pra 226 at p. 231 [3] AIR 1957 SC 444 at p. 456

[2] AIR 1959 Pun 240 at p. 247

complained against. We would, therefore, sift the evidence in support of the corrupt practice in the appeal according to that standard i.e. that the burden is on the election petitioner and the

complaint should be proved beyond reasonable disputes. It further follows should reasonable doubts arise after the evidence has been scrutinized, the appellant should get the benefit of the doubt.

8. Taking seriatim the four parts of the case stated, above the election petitioner's evidence in support of the car KLK 1365 from Thiruvella being got for the election purposes in other constituency consists of the owner P.W. 36 and of the driver P.W. 35. (His Lordship considered the evidence and proceeded :) In these circumstances it would not be fair to hold, that the witness was telling a lie in favor of the appellant and trying to shield him from undesirable, consequences. Even on the assumption of the witness telling a lie, the burden of procuring the car, or hiring it for the purposes of conveying voters, is not discharged by the election petitioner.

9-14. This brings us to the remaining parts of the case, and before dealing with the evidence one cannot help observing on their improbability for the evidence if believed would establish that the appellant hired or procured the car to convey only three persons to one booth alone in a constituency where the number of voters exceed a lakh. It was urged that the appellant might have used the car elsewhere, but due to no reliable evidence being available such, instances would not be mentioned in the petition. It is obvious that had the use been larger more reliable evidence would be forthcoming. As regards the evidence on the second part of the corrupt practice averred against the appellant. It comprises of P.Ws. 4, 5, 11, 12, 23 and 34. (His Lordship considered the evidence of these witnesses and rejecting them proceeded :) The respondent's learned advocate argues that the Tribunal having had the opportunity to observe the demeanour of witnesses, the Tribunal's opinion concerning their being credible should not be brushed away by the Appellate Tribunal, and m support of the argument he relies on *Sarju Pershad v. Jwaleshwari*[4], where Mr. Justice B.K. Mukherjea (as he then was) has held that the appellate court has got to bear in mind that it had not the advantage which the trial Judge had in having the witnesses before him and of observing the manner in which they deposed in Court. The learned Judge further observed that this certainly did not mean that when an appeal lay on facts, the appellate Court was not competent to reverse a finding of fact and the rule was that when there was conflict of. oral evidence of the parties on any matter in issue and the decision hinged upon the credibility of witnesses, then unless there was some special feature about the evidence of a particular witness, which had escaped the trial Judge's notice or there was a sufficient balance of improbability to displace his opinion as to where the credibility lay, the appellate court should not interfere with the finding of the trial Judge on a question of fact. Gajendragadkar, J., has in *Baru Ram v. Smti Prasanni*[5], held that in appeal under Section 116(A) of Representation of the People Act the High Courts should normally attach importance to the findings of fact recorded by the tribunal when the said findings rested solely on the appreciation of oral evidence. In reversing the finding on corrupt practice by lower tribunal in this case we had not overlooked the aforesaid rule as it is obvious that special features in the depositions of the witnesses had escaped the Tribunal.

[4] AIR 1951 SC 120

[5] AIR 1959 SC 93

In dealing with the evidence of P.W. 23 the Tribunal has overlooked the other entry in the pocket book. In dealing with the evidence of P.W. 11 the paper which the witness was carrying with relevant numbers was not considered. The Election Tribunal has further erred in not considering that two election officers in the same room do not corroborate each other. P.W. 34 does not speak about P.W. 6 being brought by the car, and any such, incident being reported to him. Nor does he

mention the appellant's name in the complaint about bringing the first batch of voters. The Tribunal has further omitted to note inconsistency in the deposition of P.W. 4 and P.W. 5 about the brother's going to bring the bus. It is also not clear why P.W. 5 did not vote earlier and it is hardly probable that the appellant would procure the car to bring three voters to the polling booth. In these circumstances we hold the Tribunal's conclusions cannot be allowed the weight it would otherwise be entitled to and the appellant's election is not vitiated by corrupt practice under Section 123(5).

15. We now come to the legal argument arged by the respondent's learned advocate for the appellant being disqualified to stand for the Legislature. It is not disputed that under Article 191(1)(a) a person holding office of profit under the Government other than an office declared by the Legislature of the State by law not to disqualify its holder, would be sufficient disqualification for being chosen as a member of the Legislature. It is further not disputed that certain exemptions have been allowed by the Legislative Assembly (Removal of Disqualification) Act, 1951 and Section 2(iv) of the aforesaid enactment, provides that a person shall not be disqualified for being chosen as a member of the Legislative Assembly by reason only of his holding an office in any educational institution other than a Government institution. The respondent's learned advocate has, however, argued that having regard to the later provisions of the Kerala Education Act, the appellant holds office under the Government or in any case is a Government educational institution and he is therefore disqualified. The learned advocate has argued that the exemption relied on covers employments in such educational non-Government institutions as would not be 'aided schools' the later Kerala Education Act, for the exemption under the earlier enactment cannot extend to those institutions that did not exist when the law was enacted. In this connection it is well to remember that the office of profit for the purpose of the disqualification must be under the Government; with the result that should the office be under some personality Juristieally distinct from the Government such an office would not attract the disqualification. The proposition appears to be settled by *Abdul Sbakur v. Rikhab Chand*[6], to which the appellant's learned advocate has correctly drawn one attention. In that case the Supreme Court has held that appointment under a Committee, which is statutory body cannot be called an appointment by or under the control of the Government of India, where the salary paid be out of the funds of the Endowment Committee. Therefore, should the 'aided schools' under the Kerala Education Act still maintain their separate personalities, their employees would hardly be holding office of profit under the Government. The respondent's learned advocate has taken us through the several provisions of the Kerala Education Act, as well as through the rules framed thereunder. We feel there is substance in his argument that the control over the appointment, dismissal, and election of teachers under the Act are far greater to what were allowed earlier. Moreover other powers are conferred on the Director of Public Instruction under the Act, which were not

[6] AIR 1958 SC 52

available when the enactment of 1951 was operative. Yet it is conceded that the 'aided schools' do have properties of their own that are conveyed in their names, and the amounts paid are treated as those of the institutions. It follows that with distinct personalities and funds the employees of such institutions would not be treated as holding offices of profit under the Government. But even assuming that they do hold, the point would still have to be considered whether the legislative relaxation of the rule of disqualification in favor of employees of non-Governmental educational institution still covers teachers in aided school. At this stage it would be of advantage to quote the relevant part of the exemption.

"2. Removal of certain disqualifications for membership. - A person shall not be disqualified for being chosen as, and for being, a member of the Legislative Assembly of the State of Kerala by reason only,-
(i) x x x
(ii) x x x
(iii) x x x
(iv) that he holds an office in any educational institution other than a Government institution, or
(v) x x x
(vi) x x x"

It is clear that should the aided schools notwithstanding the restrictions, control, limitation and supervision, still retain individuality they would not be treated as Government institutions. In other words the aided schools with their own properties, their own funds and their separate personalities cannot be treated as Government Institution and in absence of such merger the employees of such institutions would still enjoy the benefits allowed to any educational institution other than a Government institution. But the respondent's learned advocate has urged that when the provision allowing the exemptions was enacted, the Kerala Education Act had not been enacted and, therefore, the completion under it cannot extend to employees of institutions governed by the later Act. The appellant's learned advocate has properly drawn our attention to the following passage in Maxwell. (Interpretation of Statutes, Tenth Edition, page 79 :)

"Except in some cases where the principle of excessively strict construction has been applied, the language of a statute is generally extended to new things which were not known and could not have been contemplated by the Legislature when it was passed. This occurs when the Act deals with a genus, and the thing which afterwards comes into existence is a species of it."

Therefore if the exemption be concerning a genus those under the new Act, if part of the genus, would enjoy the exemption. Now it cannot be disputed that the educational institutions other than Government institutions form a genus, and the aided schools would be covered should they be preserving their juristic individuality under the enactment. We have already held these schools not to have been merged, and the result is that the benefits allowed to the teachers of the educational institutions other than of the Government can still be enjoyed by the appellant.
16. We would not, having taken the aforesaid view, deal in detail with the other arguments urged on behalf of the appellant that the Director of Public Instruction, being a statutory authority, his acts would not be acts of control by the Government. We leave that question open, as any decision on it would be obiter. As we have decided the two main arguments in favour of the appellant, we allow this appeal and reverse the decision of the Election Tribunal on the ground that reason on which the appellant's election was set aside is incorrect. The election petition is accordingly dismissed with costs. The office will comply with the requirements of the provisions in Section 116-A(6) of the Representation of the People Act, 1951.
Appeal allowed.