NAGPUR HIGH COURT

G.D. Karkare

Vs

T.L. Shevde

Misc. Petn. No. 76 of 1950

(R. Kaushalendra Rao and Deo, JJ.)

27.11.1950

JUDGMENT

R. Kaushalendra Rao,J.

1. This is an application under Article 226 of the Constitution for the issue of a writ of 'quo warranto' against non-applicant No. 1 (hereinafter called the non-applicant) who is the Advocate-General of the State of Madhya Pradesh. The applicant made His Excellency the Governor of the State as well as the State Government as non-applicants Nos. 2 and 3 to the application.

2. The non-applicant was appointed the Advocate-General for Madhya Pradesh by His Excellency the Governor under Clause (1) of Article 165 of the Constitution ('vide' notification No. 180-3910-XX, dated the 26th January 1950). The non-applicant had to relinquish his office as High Court Judge on account of his age. Clause (1) of Article 165 requires that the Governor of each State shall appoint a person who is qualified to be appointed a Judge of a High Court to be Advocate-General for the State. According to the applicant, the non-applicant who retired as a Judge on attaining the age of 60 years could not be appointed as the Advocate-General or act as such. The non-applicant is thus guilty of intrusion into the office of the Advocate-General and non-applicant No. 2 is guilty of usurpation of powers under Article 165(1), and hence both are liable for their respective actions.

3. At first the applicant desired issue of notice to non-applicants 1 and 3 only. The question of issuing notice to non-applicant No. 2 was deferred at the applicant's own instance for consideration at the hearing. At the hearing the applicant desired issue of notice to His Excellency the Governor as well. In view of Article 381(1) of the Constitution, the Governor is not answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties. The learned counsel for the applicant, however, contended that as the action impugned in the present case, namely, the appointment of the non-applicant as the Advocate-General, is in contravention of the Constitution, Clause (1) of Article 361 cannot afford any immunity.
This argument ignores that the immunity afforded by the clause is also in respect of any act

purporting to be done by the Governor in the exercise and performance of the powers and duties of his office. The expression "purporting to be done" postulates that any act, though not done in pursuance of the Constitution may nevertheless be accorded this protection if the act professes or purports to be done in pursuance of the Constitution : see '*Commissioners For Port Of Calcutta V. Corporation Op Calcutta*[1]'. In view of the notification appointing the non-applicant as the Advocate-General, it cannot be disputed that the appointment, at any rate, purports to be in exercise of the powers conferred on the Governor by Clause (1) of Article 165 of the Constitution. That being so, we are clear that His Excellency the Governor is not amenable to the process of this Court for the act in question.

4. The learned Advocate-General raised a preliminary objection to the maintainability of the application based upon five grounds. Firstly, he contended that the office of the Advocate-General is a very high office under the Constitution and the validity of an appointment to such a high office is not a justiciable question. Secondly, it was argued that as His Excellency the Governor is not amenable to the process of the Court, the appointment cannot be declared invalid in the absence of His Excellency the Governor who is the authority making the appointment. Thirdly, it was contended that any grant of the writ in the absence of the Governor would be futile in its result as the Governor not being a party to these proceedings would not be bound by the decision of this Court and he would ignore it. Fourthly, it was contended that the office of the Advocate-General being one held during the pleasure of the Governor, no writ of 'quo warranto' can issue. Lastly it was submitted that the applicant has no 'locus standi' merely as a private individual to move for a writ of 'quo warranto' against the Crown which is here symbolized by the Governor under the Constitution as the applicant is seeking neither any enforcement of any of his fundamental rights under Part III nor any enforcement of any of his legal right nor any performance of legal duty towards him within the meaning of the expression "for any other purpose" under Article 226(1) of the Constitution.

5. We will consider the grounds of objection seriatim.

6. It is true that the office of the Advocate-General is a very high office held by virtue of an appointment made under the Constitution. But that does not and cannot mean that the validity of such an appointment is placed beyond challenge. Whenever the Constitution desires the exclusion of certain matters from the jurisdiction of the Courts, it has taken care to say so in express terms as for example in Arts. 122, 212, 262 and 329(a). But there is no provision in the Constitution prohibiting this Court from enquiring into the legality of the appointment of the Advocate-General. We decline to imply any such prohibition. In the absence of any prohibition express or implied, the Court is bound to consider the question of the legality of any appointment purporting to be made under the law if such a question is properly raised before it. The Court cannot refuse to inquire into the legality of an appointment merely because the appointment in Question is to a very high office. In the year 1894 the Allahabad High Court had to consider the validity of the appointment of one of its own Judges, Mr. Justice Burkitt : see '*Queen-Empress V. Ganga Ram*[2]',

So we see no force in the first ground.

7. Before we consider grounds Nos. 2, 3 and 4, it is necessary to consider the nature of the writ 'quo warranto'. We cannot do better than quote from the judgment of Lord Reading, C.J., in *Rex*

V. Speyer[3]',

> "In early times the writ of quo warranto was in the nature of a writ of right for the King against any subject who claimed or usurped any office, franchise, or liberty, to inquire by what authority he supported his claim in order to determine the right: Blackstone's Commentaries, 8th Edn., vol. 3, p. 262. It was a civil writ at the suit of the Crown: *'Rex V. Marsden[4]',* Originally the writ had to be returned before the King's justices at Westminster, but afterwards only before the justices in Iyre by virtue of the statutes of Quo Warranto, 6 Edw. 1 (Statute of Gloucester) and 18 Edw. 1, Statute 2."
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> "The writ of quo warranto, however, fell into disuse and led to the substitution of proceedings by way of information in the nature of quo warranto. Whatever the immediate cause of the change or whenever it was brought about is not ascertainable : Tancred on Quo Warranto, p. 2; but the practice of filing informations by the Attorney-General in lieu of these writs is very ancient: *'Darley V. Queen[5]',* At a later period the King's coroner commenced the practice of exhibiting information of quo warranto at the instance of private persons, but this power of the King's coroner was much restrained by the Statute 4 and 5 Will. and Mar. c. 18, which was passed to prevent malicious informations at the suit of private persons being filed by the King's coroner.

In *'Rex V. Hertford Corporation[6]',* it was decided that informations in the nature of quo warranto were within the purview of this statute, and thereafter the King's coroner did not file informations without the order of the Court. Subsequently the statute of 9 anne, c. 20, was passed to render informations in the nature of quo warranto more speedy and effectual and for the more easy trial of the rights of offices and franchises in corporations and boroughs. Since that time there has been a tendency to extend the remedy, subject to the discretion of the Court to grant or refuse informations to private prosecutors according to the facts and circumstances of the case, and hence it is that it becomes so difficult to reconcile many of the decisions as was pointed out by Lord Brougham in, *'Darley V. The Queen[7]*." It is necessary to add that since the decision in '*Rex V. Speyer', (1916) 1 Kb 595* ('supra') the remedy against usurpation of office has been further simplified in England. Under section 9 of the Administration of Justice (Miscellaneous Provisions) Act, 1938 (1-2 Geo. VI, Ch. 63) informations in the nature of 'quo warranto' have been abolished. The High Court now grants an injunction restraining any person from acting in an office in which he is not entitled to act.

8. In '*Darley V. The Queen[8]',* the
Judges were summoned to the House of Lords to give their opinion. The House of Lords accepted the opinion given by Tindall, C.J., The conclusion of Tindall, C.J., is expressed in the following words :

> "After the consideration of all the cases and dicta on this subject, the result appears to be that this proceeding by information in the nature of quo warranto will lie for usurping any office, whether created by charter alone or by the Crown, with the consent of Parliament, provided the office be of a public nature, and a substantive office, not merely the function or employment of a deputy or servant held at the will and pleasure of others."

So what the Court has to consider in an application for a writ of 'quo warranto' is whether there has been usurpation of an office of a public nature and an office substantive in character i.e. an office independent of title. If the office be of a very small nature like that of petit-constable, as in Anonymus' 94 ER 190, the Court may refuse to grant the information.

9. We can now proceed to deal with the second, third and the fourth grounds of the objection. We cannot accede to the contention that because His Excellency the Governor is not amenable to the process of the Court, this Court cannot examine his action in appointing the non-applicant and pronounce upon its legality. The immunity afforded by Article 361 is personal to the Governor. That Article does not place the actions of the Governor purporting to be done in pursuance of the Constitution beyond the scrutiny of the Courts. What the Constitution establishes is supremacy of law and not of men, however high-placed they might be. Unless there be a provision excluding a particular matter from the purview of the Courts, it is for the Courts to examine how far any act done in pursuance of the Constitution is in conformity with it .....

10. If a question about the validity of an enactment assented to by the Governor can be considered and decided in the absence of the Governor, we see no force in the objection that an appointment made by the Governor cannot be questioned in his absence. It is not the rule that relief cannot be granted in proceedings for a writ of 'quo warranto' in the absence of the authority making the appointment. *'Rex V. Speyer', (1916) 1 Kb 595* ('supra') leaves no room for doubt on that point. In *'Ashgar Ally V. Birendra Nath[9]',* in a proceeding for a writ of 'quo warranto' Gentle, J., held the appointment of the Chief Engineer of the Calcutta Corporation, made by the Corporation and approved by the Provincial Government under the Calcutta Municipal Act (see pp. 250 and 259), invalid in the absence of both, the Government and the Corporation.

11. The third ground proceeds on a misconception of the nature of the order that is made in proceedings for a writ of 'quo warranto'. Whatever order the Court makes would be an order binding on the incumbent of the office in question The judgment of the Court would be a judgment of ouster affecting the person holding the office. If the non-applicant disobeys any order made by this Court, this Court is not powerless to enforce it against him. The duty enjoined on us by the Constitution is to uphold the
Constitution and the laws (see Article 219 and form of oath or affirmation VIII in the Third Schedule). It is the function and duty of the Court to interpret the Constitution and declare the law. The argument of the learned Advocate-General that His Excellency the Governor might ignore the declaration of law by a competent judicial authority is in our opinion much too conjectural in view of the oath or affirmation which is imposed upon the Governor by the Constitution to "preserve, protect and defend the Constitution and the law". (Article 159).

12. The Constitution contains in itself sanctions for its own enforcement. The people having given to themselves the Constitution have also made provision for dealing with any violation of the Constitution. In view of the argument advanced by the learned Advocate-General it is our duty to refer in all respect to Article 56(1) (b) under which the President is liable to be impeached for violating the Constitution. True, there is no similar provision with respect to a violation of the Constitution by a Governor. But a Governor holds his office only during the pleasure of the President (Article 156(1)). So it is not to be expected that the President, if we may say with due respect, would countenance the continuance in office of a Governor who contrary to his duty

disregards, the Constitution and the law. It is needless to dilate any further on this matter. At this stage it is but right and proper for the Court at any rate to assume, whatever be the suggestion to the contrary, that the head of the State who on solemn affirmation or oath has taken on himself the sacred duty of preserving, protecting and defending the Constitution and the law would not himself violate the Constitution and break the law.

13. The fourth ground is untenable. There is no precedent for refusal by the Court of an information where the reappointment to an office held during pleasure would be illegal. By refusing remedy in such a case the Court would be perpetuating the illegality. As Lord Reading observed if the irregularity in the appointment of an office held at pleasure could be cured by immediate reappointment, the Court in the exercise of its discretion would doubtless refuse the information, but if as in this case, any reappointment would be illegal, there is no sound reason why the Court should not permit the matter to be brought before it.

14. The last point for consideration is whether the applicant can invoke the power of this Court under Article 226(1) of the Constitution when there is no question of any fundamental right involved and the applicant himself has no complaint to make of any infringement of his personal right. The power under Article 226 is given not only for the enforcement of the fundamental rights conferred by Part III of the Constitution but also for any other purpose. The learned Advocate-General relied upon the decision of the Full Bench of the Patna High Court reported in *'Bagaram V. State Op Bihar[10]'* in support of the interpretation that the words "for any other purpose" mean only the enforcement of any legal right and the performance of any legal duty. According to their Lordships the words must be read 'ejusdem generis' which is the ordinary principle of construction. In our view, we state it with due respect to their Lordships, the enforcement of legal right and the performance of legal duty cannot be exhaustive of the purposes for which the Court may issue any order, direction or writ under Article 226.

15. "Nothing can well be plainer", observed Lord Esher M.R.

> "than that to shew that prima facie general words are to be taken in their larger sense, unless you can find that in the particular case the true construction of the instrument requires you to conclude that they are intended to be used in a sense limited to things 'ejusdem generis' with those which have been specially mentioned before." : see *'Anderson V. Anderson[11],*

Even the principle of 'ejusdem generis' is only a rule of construction which is not of universal application. Reference may be made to the observations of Lord Justice Bowen in *'Skinner And Co. V. Shew And Co[12].',*

> "There is no doubt of the existence of the rule 'ejusdem generis'; it cannot be denied that the general words ought to be construed with reference to the words which are immediately around them. But there is an exception to that rule - if it be a rule and not a maxim of common sense - which is, that although the words immediately around and before the general words are words which are 'prima facie' confined to a class, if you can see from a wider inspection of the scope of the legislation that the general words,

> notwithstanding that they follow particular words, are nevertheless to be construed generally, you must give effect to the intention of the Legislature as gathered from the entire section; ....."

To quote Maxwell, Of course, the restricted meaning which primarily attaches to the general word in such circumstances is rejected when there are adequate grounds to show that it has not been used in the limited order of ideas to which its predecessors belong." (Maxwell on Interpretation of Statutes, 9th edition, p. 342). As observed by Beaumont, C.J., the rule of 'ejusdem generis' should never be invoked where its application appears to defeat the general intent of the instrument to be construed : see *'Commissioner of Income Tax V. Laxmidas Devidas[13]',*

16. Here we are dealing with a provision in the Constitution. Though the interpretation of the Constitution is subject to the ordinary principles applicable to the construction of statutes, it cannot be forgotten that we have to construe an organic instrument which must be interpreted not in any narrow and pedantic sense but in a broad and liberal spirit : see 'CENTRAL PROVINCES and BERAR SALES OF MOTOR, SPIRIT AND LUBRICANTS TAXATION ACT, 1938' IN THE MATTER OF' (1939) FCR 18 at p. 37. We have to remember that in a Constitution large powers are usually conferred in a very few words.

17. An applicant invoking the power of the Court under Article 226 is not entitled to any order, direction or writ as a matter of course. Whether the Court should exercise the power in a particular case would necessarily depend upon the question whether the circumstances of the case call for the grant of any of the special speedy remedies under Article 226. But that consideration can have no bearing on the scope of the power which is conferred upon the Court.

18. The words "for any other purpose" must receive their plain and natural meaning, namely, for any other object which the Court considers appropriate and calls for the exercise of the powers conferred upon it. Though the power of this Court under Article 226 is ordinarily exercisable for enforcement of right or performance of duty, it cannot necessarily be limited to only such cases. Such a limitation cannot be reconciled with the power to issue a writ in the nature of 'quo warranto' which power has been expressly conferred on the Court. In proceedings for a writ of 'quo warranto' the applicant does not seek to enforce any right of his as such, nor does he complain of, any non-performance of duty towards him. What is in question is the right of the non-applicant to hold the office and an order that is passed is an order ousting him from that office. Shri Karkare is only invoking what in the words of Lush, J., in '*Rex V. Speyer', (1916) 1 Kb 595* ('supra') is

> "the process by which persons who claim to exercise public functions of an important and substantive character by whomsoever appointed, can be called to account if they are not legally authorised to exercise them." (p. 627).

19. In '*Rex V. Speyer', (1916) 1 Kb 595* ('supra') Sir F. E. Smith (later Lord Birkenhead) contended that the remedy could only be sought at the instance of the Attorney-General by an information 'ex officio' and the order should be discharged because it had been made at the instance of a private person. What was in question there was the appointment to the Privy

Council. The contention was negatived on the ground that the application concerned public government and there was no ground for impugning the motives of the relator. Nor have the motives of the applicant been questioned in the instant case. Sir George Makgill had no private interest to serve in questioning the appointment of Sir Edgar Speyer to the Privy Council. He brought the matter before the Court purely on public grounds. If under a monarchical system, the first principle of which is that the King can do no wrong, an appointment made by the King can under circumstances present in this case be questioned by any of his subjects without showing any personal interest in the matter, we see no reason to refuse a citizen under a democratic republican constitution to move for a writ of 'quo warranto' for testing the validity of a high appointment under the Constitution.

20. The very fact that the appointment in question is to an office for which provision has been made in the Constitution renders any question about the validity of such an appointment a question of paramount importance concerning the way in which the Constitution is being worked. Under Clause (2) of Article 165 the Advocate-General is the legal adviser of the Government. Under Article 177 he has also a right to speak and take part in the proceedings of the Legislature and thus influence the course of discussion and decision there. The present application thus concerns public government.

21. That the office of the Advocate-General is of a public nature admits of no doubt. The incumbent of that office performs duties under various statutes, not the least important of which relate to public charities and public nuisances : see Sections 91 and 92 of the Code of Civil Procedure and also Order 27-A Civil Procedure Code. Sections 194 and 333 of the Code of Criminal Procedure, and Sections 141-A and 237 of the Indian Companies Act. As Lush, J., observed in '*Rex V. Speyer', (1916) 1 Kb 595 At P. 628* ('supra') every subject has an interest in securing that public duties shall be exercised only by those competent to exercise them. So from every point of view it is a matter of grave public concern that the legality of the appointment to a high office under the Constitution is not left in doubt.

22. The preliminary objection fails. We hold the application is maintainable.

23. So we turn to the principal question in the case whether the appointment of the non-applicant is vitiated because he was past sixty years on the date of the appointment or because he retired as a Judge of the High Court.

24. According to the contention of the learned counsel for the applicant, the first clause of Article 217 has to be read with the first clause of Article 165 and so reading the person is not qualified to be appointed Advocate-General after he attains the age of sixty years. This contention requires a close examination of Articles 165 and 217, the relevant portions of which are reproduced below :

> "Article 165(1) The Governor of each State shall appoint a person who is qualified to be appointed a Judge of a High Court to be Advocate-General for the State. * * * *
> Article 165(3) The Advocate-General shall hold office during the pleasure of the Governor, and shall receive such remuneration as the Governor may determine.
> Article 217(1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the

Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court, and shall hold office until he attains the age of 60 years : * * * * Article 217(2) A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and

(a) has for at least ten years held a judicial office in the territory of India; or

(b) has for at least ten years been an advocate of a High Court in any State specified in the First Schedule or of two or more such Courts in succession.

* * * *"

25. It is obvious that all the provisions relating to a Judge of a High Court cannot be made applicable to the Advocate-General. The provisions about remuneration are different for the two offices. A Judge of the High Court is governed by Article 221. The Advocate-General is governed by clause (3) of Article 165 and receives such remuneration as the Governor may determine.

26. What the first clause of Article 165 insists is that the Governor shall appoint a person who is qualified to be appointed a Judge of a High Court to be Advocate-General for the State. The qualifications for the appointment of a Judge of a High Court are prescribed in the second clause of Article 217. It is true that the first clause of Article 217 says that a Judge of a High Court "shall hold office until he attains the age of 60 years." The real question then is whether this provision is to be construed as one prescribing a qualification or as one prescribing the duration of the appointment of a Judge of a High Court. As the provision does not occur in the second clause, it can only be construed as one prescribing the duration of the appointment of a Judge of a High Court.

27. The provision about duration in the first clause of Article 217 cannot be made applicable to the Advocate-General because the Constitution contains a specific provision about the duration of the appointment of the Advocate-General in the third clause of Article 165 which says that the Advocate-General shall hold office during the pleasure of the Governor. As this provision does not limit the duration of the appointment by reference to any particular age, as in the case of a Judge, it is not permissible to import into it the words "until he attains the age of sixty years". The specific provision in the Constitution must therefore be given effect to without any limitation. If a person is appointed Advocate-General, say at the age of fifty-five, there is no warrant for holding that he must cease to hold his office on his attaining sixty years because it is so stated about a Judge of a High Court in the first clause of Article 217. If that be the true position, as we hold it is, then the appointment is not bad because the person is past sixty years, so long as he has the qualifications prescribed in the second clause of Article 217. It was not suggested that the non-applicant does not possess the qualifications prescribed in that clause.

28. The provision that every Judge of a High Court "shall hold office until he attains the age of sixty years" has two aspects to it. While in one aspect it can be viewed as a guarantee of tenure during good behaviour to a person appointed as a Judge of a High Court until he attains the age of sixty, in another aspect it can be viewed as a disability in that a Judge cannot hold his office as of right after he attains the age of sixty years.

29. We say as of right because under Article 224 a person who has retired as a Judge of a High Court may be requested to sit and act as a Judge of a High Court. The attainment of the age of sixty by a person cannot therefore be regarded as a disqualification for performing the functions of a Judge. But the learned counsel for the applicant tried to distinguish between the case of a person qualified to be appointed a Judge of a High Court under Article 217 and the case of a person requested to sit and act as a Judge under Article 224. The distinction between the case of a person qualified to be appointed a Judge of a High Court under Article 217 and the case of a person requested to sit and act under Article 224 is not with respect to the qualifications for performing the functions of a Judge, but with respect to the matters provided by Articles 221, 222, 223, etc. In the language of the Constitution a Judge does not lose the qualifications prescribed in the second clause of Article 217 on the attainment of the age of sixty years. A person who attains that age cannot be appointed as a Judge not because he is not qualified to be so appointed within the meaning of the second clause of Article 217, but because the first clause of that Article expressly provides that a Judge shall hold office until he attains the age of sixty years.

30. If the provision in the first clause of Article 217 viewed as a guarantee of tenure of office until the age of sixty is not available to the Advocate-General because he holds office during the pleasure of the Governor, we see no compelling reason why the same provision construed as a disability should be made applicable to him. We, are, therefore, of the view that the first clause of Article 217 cannot be read with the first clause of Article 166 so us to disqualify a person from being appointed Advocate-General after the age of sixty years. We have no doubt on the point. Even if the question be considered as not free from doubt, as the applicant desires to construe the first clause of Article 217 as a disabling provision against the non-applicant, we cannot forget that provisions entailing disabilities have to be construed strictly : "*Parameshwaram Pillai Bhaskara Pillai V. State*[14]*',* The canon of construction approved by their Lordships of the Privy Council is that if there be any ambiguity as to the meaning of a disabling provision, the construction which is in favour of the freedom of the individual should be given effect to : *'David V. De'silva'*[15]*,*

31. There is no force in the contention that the non-applicant could not have been appointed Advocate-General because he had retired as a Judge of the High Court. The learned counsel referred us to Clause (4) (a) of Article 22 of the Constitution and submitted that the Constitution makes a distinction between a person who has been a Judge and one who is qualified to be appointed as a Judge of a High Court. The provision in our view only makes an exhaustive enumeration of the classes of persons who can constitute an Advisory Board. Such persons must either be or must have been or must be qualified to be appointed as Judges of a High Court. The provision has therefore no bearing on the question whether the first clause of Article 165 has to be read with the first clause of Article 217, which question we have already answered in the negative. The case of the non-applicant is unique. Article 220 is not applicable to him because he did not hold office as a Judge of the High Court after the commencement of the Constitution. So the bar contained in that Article also does not come in his way.

32. The application is rejected. The applicant shall pay the costs of these proceedings including the costs of the paper-book. Counsel's fee Rs. 200.
Leave to appeal granted under Article 132 (1) of the Constitution.
Application rejected.

Cases Referred.

[1] I.L.R (1938) 1 Cal 440 At P. 443 (Pc)
[2] 16 All 136(Fb)
[3] (1916) 1 Kb 595
[4] (1765) 3 Bur 1812
[5] (1846) 12 Cl And F 520 At P. 537
[6] 1 Ld. Raym. 426
[7] (1846) 12 Cl And F 520 : 8 Er 1513
[8] (1846) 12 Cl And F 520 At P. 537 : 8 Er 1513
[9] AIR 1945 Cal 249
[10] AIR 1950 Pat 387(Fb)
[11] (1895) 1 Qb 749 At P. 753
[12] (1893) 62 Lj Ch 196 At P. 204
[13] I.L.R (1937) Bom 830
[14] 1950-5 Dom L R (Trav) 382
[15] (1934) Ac 106 At P. 114