

MOHAMED ISHAK
V.
MORAIS

COURT OF APPEAL.

WIGNESWARAN, J.

C. A. APPLICATION 812/95.

15 DECEMBER, 1995 AND 19 JANUARY, 1996.

Certiorari and Prohibition - Suspension of Kuchchaveli Pradeshiya Sabha - Pradeshiya Sabhas Act, No.15 of 1987, section 185 (2), (3) and section 185 (3) (a) (i), (ii) and (iii) read with section 2(1) of the Provincial Councils (Consequential Provisions) Act, No. 12 of 1989- Jurisdiction of Inquirer - Fair Trial - Venue - Language.

Kuchchaveli Pradeshiya Sabha (KPS) is situated in Nilaveli in the Trincomalee District within the North East Province. It was constituted under the provisions of the Pradeshiya Sabhas Act, No. 15 of 1987 and Petitioner was its Chairman at the relevant time. At the elections of March 1994 the United National Party secured 5 seats, the Sri Lanka Muslim Congress 3 seats and the Sri Lanka Freedom Party one seat. It commenced work on 4.4.1994. By a letter dated 10.5.95 written in Tamil the Commissioner of Local Government of the North East Provincial Council (2nd Respondent) called for explanation from the Petitioner (Chairman of KPS) on certain matters and why steps should not be taken under section 185(2), (3) of the Act No. 15 of 1987. The petitioner answered the queries by his letter dated 13.6.1995 to the 2nd Respondent. By letter written in English dated 9.6.95 said to bear the Trincomalee post mark 30.6.95 and received by the Petitioner only on 5.7.95 the Governor of the North East Provincial Council (3rd Respondent) directed the Petitioner to submit his explanation personally at an inquiry to be held on 24.7.1995 and show cause as to why the 3rd respondent should not take action against the Petitioner and all other members of the Sabha in terms of section 185(3) (a) (i), (ii) and (iii) of Act, No. 15 of 1987. However without responding to the reply sent by the Petitioner dated 13.6.1995 to the 2nd Respondent and before Petitioner could appear on 24.7.1995 as directed by the 3rd Respondent's letter dated 9.6.1995 the 3rd Respondent by letter dated 26.6.95 suspended the petitioner and other members of the KPS in terms of the provisions of section 185(3) (a) (i), (ii) and (iii) of Act, No. 15 of 1987 read with section 2(1) of the Provincial Councils (Consequential Provisions) Act, No. 12 of 1989. Even if the Petitioner's reply dated 13.6.1995 was found to be (as alleged) unsatisfactory no call was made on the petitioner to explain further.

Meanwhile on 30.4.95 (that is even before the 2nd respondent's letter of 10.5.95) the 2nd respondent had initiated steps to have a suitable retired judicial officer appointed to inquire into the alleged maladministration and by letter 26.6.95 the 1st respondent (a retired judicial officer) was appointed as the Inquiring Officer.

The petitioner and other elected members were notified by the 1st respondent by his letter dated 3.7.95 that he intended holding an inquiry in terms of section 185(2) of Act, No. 15 of 1987 on 24.7.95 at 2.30 p.m. in the Colombo office of the 3rd respondent. Proceedings appeared to have been on seven dates thereafter, the last date being 31.10.95.

Meanwhile on or about 27.7.95 the petitioner filed an application for writs of Certiorari and Prohibition and for a stay order in Provincial High Court of the North East Province holden at Trincomalee and the matter is still pending. The petitioner and four other members of the KPS had taken objection to the proceedings initiated by the 1st respondent and the 1st respondent had made order on 31.10.95 rejecting the preliminary objections and fixing inquiry for 21.11.95.

On 21.11.95 the present application was filed by the petitioner in the Court of Appeal for Certiorari quashing the order of 31.10.95 and for a writ of prohibition against the 1st respondent and for a stay order. No interim order was made but *mero motu* the 1st respondent postponed inquiry pending the determination of the application by the Court of Appeal.

The questions raised for determination of the Court of Appeal were:

1. The propriety of holding inquiries outside the limits of the North East Provincial Council.
2. The right of the petitioner to have the proceedings conducted in the Tamil Language which was his mother tongue.
3. Fear of political reprisals outside the territorial limits of the North East Provincial Council.
4. Inquiry in Colombo casts a shadow.
5. Should the inquiry have been laid by pending determination of petitioner's Application to the High Court?
6. Time Limit to conclude the inquiry.

Held:

1. It being admitted that the dispute between the parties arose within the territorial limits of the North East Provincial Council, the inquiry should have been held within the territorial limits of the North East Provincial Council unless parties consent or there were considerations outweighing the rule which should then have been brought to the notice of the 1st petitioner by the 1st and/or 3rd respondent, and the petitioner should then have been heard on any objections he may have. Further the 3rd respondent is the prosecutor who had caused the charges to be framed against the petitioner and therefore actively interested in the result. Holding of an inquiry in the prosecutor's office is likely to overawe the defence and to place the conduct of the defence at a disadvantage.
2. The party against whom the charges have been preferred had a right to have it heard in Tamil as it was their mother tongue. The conduct of the proceedings in English and not in Tamil deprived the petitioner of a fair trial. Further the conduct of proceedings in a language not known to the parties puts them at a disadvantage.
3. Witnesses in favour of the defence would not venture to travel to Colombo in view of political reprisals.
4. Although the location of the inquiry will not affect the impartiality of the inquirer still the location can adversely affect the psychology of the petitioner and his witnesses which in turn can affect the result of the inquiry and deprive the petitioner of a fair trial.
5. In deference to the High Court of the North East Province the inquiry must be laid by.
6. The requirement to deliver the order in 3 months in section 185 of the Act No. 15 of 1987 is directory and not mandatory. The petitioner having delayed the inquiry by taking various objections cannot complain of the transgression of the temporal span.

APPLICATION for writs of Certiorari and Prohibition and for stay of further proceedings by the 1st respondent.

S. Mahenthiran for Petitioner.

R. Manikkavasagar for 2nd and 3rd Respondents.

13 March, 1996.

WIGNESWARAN, J.

The Petitioner who is the elected Chairman of the Kuchchaveli Pradeshiya Sabha and a member of the United National Party has sought:

- (i) a mandate in the nature of a writ of Certiorari quashing the order dated 31.10.95 made by the 1st Respondent.
- (ii) a mandate in the nature of a writ of Prohibition on the 1st Respondent from proceeding to determine matters pertaining to the Kuchchaveli Pradeshiya Sabha in Colombo.
- (iii) an interim order staying further proceedings in respect of the matters before the 1st Respondent.

The facts briefly are as follows:-

Kuchchaveli Pradeshiya Sabha is situated in Nilaveli in the Trincomalee District within the North East Province.

It was constituted under the provisions of the Pradeshiya Sabhas Act No. 15 of 1987 (certified on 16.4.87).

The Petitioner was at the relevant and material time the elected Chairman of the Kuchchaveli Pradeshiya Sabha hereinafter referred to as "KPS".

Elections were held in March 1994 and the United National Party secured 5 seats, the Sri Lanka Muslim Congress 3 seats and the Sri Lanka Freedom Party 1 seat. "KPS" commenced work on 4.4.1994. The petitioner was Chairman, one A. Ameen was Vice Chairman and there were seven other elected members.

The second respondent is the Commissioner of Local Government of the North East Provincial Council.

The third respondent presently holds the office of Governor North East Provincial Council.

By letter dated 10.5.95 in the Tamil Language and marked as P2 by the petitioner, the 2nd respondent called for explanation from the Chairman, KPS, Nilaweli on certain matters. P2 queried as to why steps should not be taken in terms of section 185(2). (3) of Act No. 15 of 1987 abovesaid. By P3 dated 13.6.1995 the queries were answered and forwarded to 2nd respondent by the petitioner. The statement of objections filed by the 2nd and 3rd respondents confirm the receipt of P3 in reply to P2. (Note:- Contents of paragraphs 6 and 7 of the petition admitted in para 2 of the statement of objections).

By P4 dated 9.6.95 (said to bear Trincomalee Post mark 30.6.95 and said to have been received by petitioner only on 5.7.95) the 3rd respondent sent a letter similar to P2 to the petitioner but in the English language with the difference that the petitioner was directed to submit his explanation personally at an inquiry to be held on 24.7.1995 (and show cause) as to why the 3rd respondent should not take action against the petitioner and other members of the Sabha in terms of Section 185 (3) (a) (i), (ii) and (iii) of Act, No.15 of 1987.

Without responding to the reply (P3) dated 13.6.1995 sent to 2nd respondent and without waiting until 24.7.1995 for the personal appearance of the petitioner at the inquiry to respond to P4 (which though allegedly was received only on 5.7.95 by the petitioner) the 3rd respondent by P5(A) to (H) dated 26.6.95 suspended the petitioner and all other members of the Kuchchaveli Pradeshiya Sabha in terms of the provisions of section 185 (3) (a) (i), (ii) and (iii) of Act, No. 15 of 1987 read with Section 2(1) of the Provincial Councils (Consequential Provisions) Act, No. 12 of 1989. (Vide P10). Even though the learned Attorney-at-Law for the 2nd and 3rd respondents in his statement of objections dated 4.12.95 at para 4(e) has stated that P3 was found to be unsatisfactory there is no reference to P3 in P4. If P3 was found to be unsatisfactory and the petitioner was called upon to explain further, if necessary he may have been able to explain satisfactorily. Instead P4 similar to P2 was sent.

Meanwhile on 30.4.95 before P2 dated 10.5.95 was sent to the petitioner itself the 2nd respondent had written letters to the Assistant Commissioner of Local Government and others requesting them to contact a suitable retired judicial officer to be appointed as inquiring

officer "to inquire into the charges framed against the Chairman and members of the Kuchchaveli Pradeshiya Sabha and their mal-administration of Kuchchaveli Pradeshiya Sabha". (Vide P12 and paragraph 4(h) of the statement of objections dated 4.12.95). Thus even before P2 dated 10.5.95 went out asking for explanation, the 2nd respondent had looked around for a suitable retired Judicial Officer to inquire into the alleged mal-administration. By document dated 26.6.95 (P8(a)) the 1st Respondent to this application was appointed as Inquiring Officer to inquire into the charges preferred against the Chairman and members of the KPS in terms of section 185(2) of Act, No. 15 of 1987 by the 3rd Respondent. The appointment was made under section 2(1) of the Provincial Councils (Consequential Provisions) Act, No.12 of 1989.

The petitioner and other elected members were notified by the 1st respondent by letter dated 3.7.95 (P6) that he intended holding an inquiry in terms of section 185(2) of Act, No. 15 of 1987 on 24.7.95 at 2.30 p.m. in the Colombo office of the 3rd respondent.

Proceedings seem to have taken place before 1st respondent on 24.7.95, 4.8.95, 11.8.95, 28.8.95, 22.9.95, 9.10.95, 24.10.95 and 31.10.95.

Meanwhile on or about 27.7.95 the petitioner filed an application before the Provincial High Court of North East Province, holden at Trincomalee making the 3rd respondent in this case as 1st respondent thereto, the Pradeshiya Sabha Kuchchaveli (KPS) as the 2nd respondent thereto and the 2nd respondent in this case as 3rd respondent thereto moving for

(i) a writ of Certiorari quashing the order made by the 3rd respondent (in this case) suspending the petitioner and 8 other elected members;

(ii) a writ of Prohibition restraining the 3rd respondent (in this case) from enforcing the suspension, and

(iii) an interim order staying the operation of the order for suspension pending the final determination of the said application.

Apparently upto date the matter seems to be pending before the said High Court.

Meanwhile the petitioner and four other members of the "KPS" had taken preliminary objections to the proceedings being initiated and held by the 1st respondent. The objections were inquired into by the 1st respondent and order was made on 31.10.95 rejecting the preliminary objections, and inquiry into the substantive matters before him were fixed for 21.11.95.

On 21.11.95 the present application was filed before this Court by the petitioner seeking a writ of certiorari quashing the order made by the 1st respondent dated 31.10.95, seeking a writ of prohibition on the 1st respondent to prevent him from proceeding to determine matters pertaining to the "KPS" in Colombo and also seeking an interim order staying further proceedings before the 1st respondent regarding this matter.

Though no interim order was made by this Court, Counsel appearing for petitioner and respondents informed this Court that the 1st respondent had *ex mero motu* postponed inquiry pending determination of this application by this Court.

Written submissions from both sides were tendered. It appears that the 1st respondent had dealt with the following preliminary objections taken up by Counsel for petitioner (in this case) in his order dated 31.10.95:

(i) Since "KPS" is situated within the North East Province, inquiry under section 185(2) and (3) of Act, No.15 of 1987 should be held within the area covered by the North East Province. The Inquiry being held by the 1st respondent outside the said Province is not permitted by the provisions of the Constitution.

(ii) Language in the North East Province being Tamil the proceedings should be conducted in Tamil.

(iii) Holding the inquiry outside the province not only inconveniences but also makes it hazardous to the parties who fear political reprisals because they belong to the opposition United National Party.

(iv) The inquiry being held at the sub office of the 3rd respondent in Colombo “casts a shadow” over the petitioner and others.

(v) The suspension of the petitioner and others is the subject matter of an application before the High Court of the North East Province holden at Trincomalee.

(vi) Whether the inquiry by the 1st respondent should be completed within three months in terms of the law.

The 1st respondent has rejected preliminary objections (i), (ii), (iv), (v) and (vi) and not dealt with (iii). He has decided to go ahead with the inquiry for which he had been appointed.

This Court entertained doubts as to its competence to hear this application on the basis that it lacked jurisdiction with regard to matters arising within a Provincial Council. This Court therefore called upon Counsel on both sides to file written submissions on the question of jurisdiction vested in this Court to determine this application for writ of certiorari and Prohibition since it related to matters concerning the North East Provincial Council. Both Counsel have submitted that this Court is vested with such jurisdiction. Though their agreement does not confer jurisdiction since it is a question of law, yet this Court considers the matter merely academic in the context of their agreement and refrains from considering it.

Therefore the contents of the order dated 31.10.95 made by the 1st respondent only would now be examined.

(1) The propriety of holding inquiry outside the limits of the North East Provincial Council.

It is admitted by both parties that the dispute between the parties arose within the territorial limits of the North East Provincial Council.

The third respondent who is vested with the power to appoint a retired judicial officer to inquire into it has appointed 1st respondent to hold the inquiry. There can be no objection to his appointment as he is a retired judicial officer competent to hold such inquiry in terms of the

Act. There can also be no objection to his residing outside the territorial limits of the Provincial Council.

The objections are to the locus of the inquiry being outside the territorial limits of the North East Province.

Such an inquiry ordinarily should have been held within the territorial limits of the North East Provincial Council.

If there were considerations that outweighed such arrangement the 1st and/or 3rd respondent were obliged to bring it to the notice of the parties and ascertain whether there were any objections to holding the inquiry outside the North East Province. There was no such communication and the venue seems to have been fixed unilaterally. If such communications were directed to the parties then they may have objected to it and the matter would have been resolved before the inquiry. But the fixing of the locus seems to have been arbitrary and therefore not conducive to justice. Fixing of the venue was the responsibility of the 3rd respondent and holding the inquiry that of the 1st respondent. There may have been other retired judicial officers willing and prepared to hold the inquiry in the North East Province. Instead the 3rd respondent in this instance seems to have divested himself of the responsibility of fixing the venue and the 1st respondent had arbitrarily fixed the venue (by P6) in Colombo. The 3rd respondent should have fixed the forum for the inquiry within the North East Province before choosing the inquirer. Instead he had allowed the venue to be chosen and fixed by the 1st respondent to suit the latter's convenience rather than the convenience of the petitioner and others.

The Commissioner assumed that the administration from the Governor's sub office was right and legal. It is on that assumption he seemed to think that holding the inquiry in Colombo or elsewhere is right and legal. Whatever may be the merits in that assumption the problem is different. The ordinary civil administration from Colombo is different from the holding of an inquiry in the 3rd respondent's office in Colombo. The 3rd respondent is the prosecutor who had caused the charges to be framed against the petitioner and therefore actively interested in the result. Holding of an inquiry in the prosecutor's office is likely to overawe the defence.

This clearly has placed the petitioner and others at a disadvantage in the conduct of their defence.

(2) Language

The party against whom the charges have been preferred had a right to have it heard in Tamil as it was their mother tongue. The documents were mostly in Tamil and all the witnesses knew Tamil and hardly anyone knew English. The fact that the proceedings were to be conducted in English and not in Tamil deprived them of a fair trial.

In fact this principle is recognized in the Code of Criminal Procedure Act where statements of witnesses have to be taken down in their own language. (Vide Section 109 and 110 of the Code of Criminal Procedure Act). The very fact that the Constitution vouchsafes trial in one's own language gives it a constitutional authenticity. This apart the conduct of proceedings in a language not known to the parties puts them at a disadvantage.

(3) Fear of political reprisals outside the territorial limits of the North East Provincial Council.

Witnesses in favour of the defence would not venture to travel to Colombo in view of political reprisals. Further it has been stated that unidentified bodies were seen floating which can inspire fear in the minds of witnesses. Again in the present situation in the country where human lives are cheaply valued and deaths are a common occurrence any person unless it is very necessary will not want to venture outside the security of his own abode. Therefore the defence would well be hamstrung in the presentation of its case by the absence of its witnesses. This can affect the ultimate result.

(4) Inquiry in Colombo sub office casts a shadow.

In view of the matters dealt with earlier, this Court refrains from commenting elaborately on this.

The first respondent in his finding has observed that the situation of the building and its ambience is irrelevant and that it is unlikely to

affect the impartiality of the inquirer. No doubt the inquirer's impartiality, independence or integrity cannot be impugned. But the location is very likely to adversely affect the psychology of the petitioner and his witnesses which in turn can affect the result of the inquiry.

Factors urged above under items (1) - (4) by themselves and/or cumulatively can impair a fair trial. It has repeatedly been held by our courts that an accused is entitled to a full and fair trial and the failure to hold such trial can vitiate the entire proceedings. Our courts of justice have always been sensitive to the rights of an accused and any violation or even a transgression is frowned upon. One of the cardinal principles of natural justice is the *audi alteram partem* rule which means that both sides must be heard. They must not only be heard but heard fully. The inability to procure the attendance of witnesses favourable to the defence in Colombo precludes the defence being fully heard. This is a violation of the hallowed principles of natural justice.

Besides a fair trial has been ensured to the accused by Article 13(3) of the Constitution which reads as follows:-

“Any person charged with an offence shall be entitled to be heard in person or by an Attorney-at-Law, at a fair trial by a competent Court”. The lack of a fair trial would be a violation of the salutary principles enshrined in the Constitution.

(5) Application No. 147/95 before the High Court of North East Province holden at Trincomalee.

The matters that are being tried by the 1st respondent at the inquiry can only be decided after the order is made in Case No. 147/95 before the High Court of the North East Province.

This inquiry must in deference to the High Court of the North East Province be laid by pending determination by that Court as otherwise it would be a futile exercise if the High Court of the North East Province holds with the petitioner.

(6) Inquiry to be completed within 3 months.

This court is of the view that section 185 of Act, No. 15 of 1987 is directory and not mandatory and therefore the Inquirer is not bound to deliver the order within 3 months.

The petitioner having delayed the proceedings at the inquiry by taking various preliminary objections cannot be heard to say that there has been a transgression of the temporal span. This appears to be mischievous and the petitioner is estopped from taking up this objection.

In the light of the foregoing observations this Court annuls all orders made by the 1st respondent and stays further proceedings by the 1st respondent in this regard. The Court therefore grants the petitioner a mandate in the nature of a writ of Certiorari quashing the order dated 31.10.95 made by the 1st respondent and all proceedings conducted before him earlier. It also issues a writ of Prohibition on the 1st respondent from proceeding to hear and determine matters connected to the Kuchchaveli Pradeshiya Sabha. The parties shall bear their own costs.

Order of 1st respondent annulled. Further proceedings stayed. Writ of Prohibition on 1st respondent from proceeding to hear and determine matters connected to Kuchchaveli Pradeshiya Sabha.