

FERNANDO AND ANOTHER
v.
THE MORATUWA MULTI - PURPOSE
CO - OPERATIVE SOCIETY LTD; AND OTHERS

COURT OF APPEAL.

W. N. D. PERERA J.

C.A. 453/92.

SEPTEMBER 16, OCTOBER 29 AND NOVEMBER 25, 1992.

Mandamus - Co-operative Societies Law No. 5 of 1972 - Rules made under the Co-operative Societies Law - Rules 5, 6 and 7 of the Co-operative Societies Rules - Nomination for election to the Branch Committee of the Uuru Moratuwella Branch of the Moratuwa Multi - Purpose Co-operative Society.

The scheme of the Rules made under the Co-operative Societies Law indicates two stages in deciding on the acceptability of a nomination for election to the Branch Committee of the Uuru Moratuwella Branch of the Moratuwa Multi - Purpose Co-operative Society Ltd. At the first stage the elections officer has on an examination of the documents when presented to him, to ascertain whether they are in conformity with Rule 5. It is only if he decides on such examination to accept them as being in conformity that he should proceed to consider the objections that are presented on the grounds laid down in Rule 7.

Rule 6(3) clearly states that if there has been non-compliance with Rules 5(1), 5(2) or 5(3) the nomination must be rejected. Under Rule 5(3), to the nomination must be attached the declarations of each proposer and seconder. As the declarations of the proposer and seconder had not been handed over together with the nomination papers within the stipulated time the impugned nomination papers should be rejected. Mandamus lies to compel such rejection.

APPLICATION for Writ of Mandamus.

Lalith Athulathmudali P.C. with Ranjan Gunaratne, Dr. Ranjith Fernando, Mahendra Ama.asekera, Ranjeni Morawaka, T. M. S. Nanayakkara, Nalin Dissanayake and Gamini Pieris for petitioners.

S. Mahenthiran for 1st and 5th to 13th respondents.

N. G. Amaratunga S.S.C. for 2nd to 4th respondents.

Cur. adv. vult.

March 03, 1993.

W. N. D. PERERA J.

This is an application for a writ of mandamus on the 2nd, 3rd and 4th respondents to this application directing them to give a decision on the objections raised by the petitioners to the nominations submitted by the 5th to the 13th respondents for the election of the Branch Committee of the Uтуру Moratuwella Branch of the 1st respondent Society on 30.5.92 and directing them to reject the nominations submitted by them on 30.5.92. The 14th to 20th respondents had also submitted their nominations but no relief is claimed against them.

The petitioners are members of the said Branch of the 1st respondent Society who had also submitted their nomination papers at this election.

Nominations had been called for in respect of this election in accordance with the Rules of the Society made by the Commissioner of Co-operative Development under the Co-operative Societies Law No. 5 of 1972. The 2nd and 3rd respondents are respectively the Assistant Elections Officer attached to the Uтуру Moratuwella Branch of the society and the Elections Officer of the Society. The 4th respondent is the senior government officer exercising the powers of the Registrar under the Law No. 5 of 1972.

It is not disputed that the aforesaid Rules which have been produced marked P1 in these proceedings govern the conduct of these elections. They have been published in the Government Gazette Extraordinary No. 297/7 of 28.12.77.

For the time fixed for the presentation of nominations which were received by the 2nd respondent, and during the time fixed therefor the petitioners had presented their objections to the nominations of the 5th to the 13th respondents. They fall in to two categories:

(a) In respect of all 5th to 13th respondents on the ground of non compliance with Rule 5(3) of these rules and

(b) In respect of the 5th respondent only, on the ground that he was not entitled to be a member of the Branch and was therefore disqualified from standing for this election, in view of By-law 10 of the Society. These By-laws have been produced marked P10.

Rule 5 which is set out in the section headed " Nominations " is as follows :

5.1. Nomination paper—Every candidate who stands for election to the branch committee shall be proposed by a member of the society and shall be seconded by another member of the society. Each candidate, his proposer and seconder shall be members of the society whose names appear in the voters list of the branch to which elections are to be held. The name of each candidate shall be in writing in the form specified in Shedule A of these rules.

Declaration by a candidate, proposer and seconder —

5.2 Each candidate shall attach to his nomination paper a declaration in the Form specified in Schedule B to these rules.

5.3 Each such proposer and seconder shall likewise make a declaration in the Form specified in Schedule B (1) of these rules.

It is the position of the petitioners that the declarations referred to in rule 5(3) had to be submitted by each candidate together with the nomination paper and if not so submitted, the elections officer receiving the nominations, had, by operation of Rule 6(3) to reject such nomination.

Rule 6(3) which occurs in the section headed " receiving of nominations " reads as follows:

6.3 On receipt of such nomination paper, the elections officer/ assistant elections officer shall verify that the candidate, the proposer and seconder are not disqualified under Rule 4.1 of these rules and shall reject the nomination of the candidate who is so disqualified or whose nomination is not in conformity with rule 5.1 or 5.2 or 5.3 of these rules.

The petitioners further contend that the declarations of the proposers and seconders of the 5th to the 13th respondents were not submitted together with their nomination papers within the time stipulated for the submission of nomination papers and that the 2nd respondent who admittedly received the nominations was under a legal duty to have rejected them. The 2nd respondent by his affidavit

filed in this application has taken up the position that the aforesaid declarations were handed over to him together with the nomination papers by the 5th to the 13th respondents.

On behalf of the 2nd to the 4th respondents learned Senior State Counsel further contended that, as a matter of law there was no public duty enforceable by a writ of mandamus cast on the 2nd respondent to have rejected the said nominations in terms of the said rules. He cited, in support of this contention Rule 7 which states as follows:

7.1.....

7.2 The objections to any nomination shall be only on the grounds specified below:

- (a) the candidate is disqualified under one or more provisions of rule 4.1 above
- (b) the candidate or the proposer or the seconder of the candidate is not a person whose name appears in the Voters List.

Rules 7(3), 7 (4) and 7 (5) provide in the case of (b) that where he upholds the objection he shall reject such nomination paper and in the case of (a) he shall proceed with the election on the basis of such nomination paper but shall forward such objection to the Commissioner whose decision thereon is final and conclusive.

The scheme of these rules indicates two stages in deciding on the acceptability of a nomination. At the first stage, the elections officer has, on an examination of the documents when presented to him, to ascertain whether they are in conformity with rule 5. It is only if he decides on such examination to accept them as being in conformity that he should proceed to consider the objections that are presented on the grounds laid down in Rule 7. This appears to be the only manner in which the rules could be understood. Rule 6(3) clearly states that if there has been non-compliance with Rule 5 (1), 5 (2) or 5 (3) the nomination must be rejected. In the instant case, therefore, if the declarations of the proposer or seconder had not been handed over together with the nomination papers within the stipulated time as required by Rule 6 (2), he should *ex mero motu* have rejected such nomination. I am therefore of the view that if the petitioner can establish, on the material placed before this

court that these declarations had not been so handed over, they would be entitled to the issue of a writ of mandamus compelling the 1st to the 4th respondents to reject the aforesaid impugned nominations. J. A. de Smith in *Judicial Review of Administrative Action* at page 540 (4th Edition) states as follows:

" Mandamus lies to secure the performance of a public duty, in the performance of which the applicant has a sufficient legal interest. The applicant must show that he has demanded performance of the duty and that performance has been refused by the authority obliged to discharge it." At page 556 (*ibid*) it is stated thus " Where the respondent has not refused compliance in express terms, it is a question of fact whether his conduct evinces a clear determination not to comply." In the instant case there is no doubt that both these conditions are satisfied in regard to the objections raised to the nominations, based on the ground that the aforesaid declarations were not submitted within the stipulated time.

The next question that has to be determined is whether the declarations of the proposers and seconders of these respondents were submitted together with their nomination papers as claimed by the 2nd respondent in his affidavit. He further states that having displayed them and having received the objections of the petitioners he handed over all these papers about 100 yards away from the place nominations were received. The 3rd respondent in his affidavit states that the 2nd respondent handed over to him the said documents on the said date, time and place. He further states that having accepted the said documents, he forwarded to the 4th respondent the originals of the said journal, objections, nominations and declarations except some of the declarations relating to the 5th to the 13th respondents which he handed over around 1.30 p.m. to the Secretary of the 1st respondent Society. No reason has been given in this affidavit as to the reason why " some of the declarations " were handed over to the Secretary after the other documents had been " forwarded " to the 4th respondent. The Secretary Aruna Pieris in his affidavit however states that declarations were handed over to him by the 3rd respondent together with the nomination papers etc. around 1.30 p. m. on this day.

The petitioners in their affidavits state that they were present at the time nominations were handed over and that the aforesaid declarations were not submitted by the 5th to the 13th respondents. They claim that this omission was brought to the notice of the 2nd respondent who however did not give a ruling thereon. They submitted their objections in writing at the appropriate time and the 2nd respondent had, at their request given an acknowledgement of the receipt of these objections. This is the document P2 which is admitted by the respondents.

There is thus a direct conflict between the testimony of the petitioners and that of the 2nd and 3rd respondents in regard to whether the declarations aforesaid were handed over at the time of receiving the nominations. This conflict could be resolved only by considering all the circumstances attending this incident. If the declarations had been in fact handed over there does not appear to be any reason why the petitioners were not so informed at the time these objections were received. P2 refers specifically to these objections and is a request that the nominations referred to, be rejected. The 2nd respondent does not state in his affidavit that the petitioners were informed that the declarations had been received, nor does his endorsement on P2, state so. He had not, admittedly, rejected this objection nor informed the petitioners that he was doing so. In this context the averment of the 3rd respondent in his affidavit that he forwarded the documents given to him by the 2nd respondent, except the declarations relating to the 5th to the 13th respondents is significant. There does not appear to be any reason, stated or otherwise why these declarations only were given to the secretary who claims to have received them together with the nomination papers etc. at 1.30 p.m. from the 3rd respondent. There is thus a conflict regarding these declarations in the affidavits submitted by the respondents themselves. Learned Presidents Counsel submitted that the failure of the 2nd respondent to give a ruling on this objection was an indication that the declarations in question had not been submitted at the relevant time and that the declarations now produced had been a subsequent introduction. When considering all the aforesaid circumstances I am of the view that the conclusion that the declarations required under Rule 5.3 from the proposers and seconders of the 5th to the 13th respondents had not been duly handed over is irresistible and that the 2nd respondent should have rejected their nominations under Rule 6.3. I therefore

allow this application and order that a Writ of Mandamus issue directing the 2nd, 3rd and 4th respondents to reject the nominations of the 5th to the 13th respondents in to the election to the Branch Committee of the Uturu Moratuwella Branch of the 1st respondent society received on 30.5.92. As regards the second ground urged by the petitioners I am of the view that under Rule 7(b) the question as to whether a candidate is disqualified to stand for election is a matter for determination by the Commissioner of Co-operative Development and therefore does not call for a ruling by this court at this stage. The 1st, 2nd and 3rd respondents and the 5th to the 13th respondents will pay the petitioners the costs of this application.

Writ of Mandamus issued.