(1998) 09 AP CK 0003

Andhra Pradesh High Court

Case No: Writ Petition No. 23479 of 1998

K. Kataiah and Others		APPELLANT
	Vs	
Registrar of Co-operative Societies and Others		RESPONDENT

Date of Decision: Sept. 17, 1998

Acts Referred:

- Constitution of India, 1950 - Article 12, 226, 227, 32
- Industrial Disputes Act, 1947 - Section 10

Citation: (1998) 5 ALD 662 : (1998) 5 ALT 420 : (1998) 3 APLJ 234

Hon'ble Judges: S.R. Nayak, J

Bench: Single Bench

Advocate: M/s. M.R.K. Chowdary for Mummaneni Srinivasa Rao and M. Sudhirkumar, for the Appellant; Mr. M.S.N. Prasad and Government Pleader, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

1. In the writ petition, as originally presented, a writ of quo warranto was sought against the respondents 2, 3 and 4. In the election held on 2-4-1997 to elect the office bearers and Directors of the Committee of Management of the fifth respondent Co-operative Society, namely, Mutyalarao Co-operative Housing Society Limited, the respondents 3 and 4 were elected as Directors, whereas the respondent No.2 was elected as the President of the said Society. The petitioners are the members of the Society. According to the petitioners, the respondent 2, 3 and 4 on the date of filing of their nominations, were working as employees; the respondent No.2 was working as an employee of Hindustan Machine Tools, a Central Government Undertaking; the respondent No.3 was working as Upper Division Clerk in Defence Meteorological Research Laboratories (DMRL); and the respondent No.4 was working as an Attender in the Bank of Baroda, and therefore all of them were disqualified to be members of the society by force of the disqualification prescribed

under clause (i) of sub-section (1) of Section 21-A of the Andhra Pradesh Co-operative Societies Act, 1964, for short ''the Act'', as amended by the Andhra Pradesh Co-operative Societies (Amendment) Act 4 of 1995 which came into force with effect from 2-1-1995. Clause (i) of subsection (1) of Section 21 -A of the Act provides that no person shall be eligible for being chosen as, and for being, a member of the Committee, if he is a Village Administrative Officer or an employee of the State or Central Government or an employee of any institution receiving aid from the funds of the State or Central Government or an employee of any undertaking owned and controlled by the State or the Central Government. The petitioners claim that the disqualification incurred by the respondents 2, 3 and 4 to be members and office bearers of the Society was brought to the notice of the first respondent, the Registrar of Co-operative Societies, but the first respondent did not disqualify them, and on the other hand, it appears that he advised the second respondent to resign from the post which he held in Hindustan Machine Tools so that he can continue as the President of the Society. So alleging and contending that the respondents 2 to 4 were disqualified to be the members of the Society when they filed nominations, writ of quo warranto was sought against all of them. However, subsequently on 2-9-1998, Sri M.R.K. Chowdary learned senior Counsel who appeared for the petitioners sought permission of the Court to delete the names of respondents 3 and 4 from the array of respondents on the ground that they are already disqualified by the Registrar of the Cooperative Societies, and the permission was accordingly accorded by the Court by its order dated 2-9-1998, and the names of respondents 3 and 4 were deleted.

2. When this case was heard for admission on 26-8-1998, it was pointed out by the Court to the learned senior Counsel that since the petitioners can seek disqualification of respondents 2 to 4 by making an application to the Registrar of Co-operative Societies u/s 21(3) of the Andhra Pradesh Co-operative Societies Act, 1964, for short ''the Act'', read with Section 21-A of the Act, the Court, in its discretion, was not inclined to entertain the writ petition, but the learned senior Counsel contested the position that writ of quo warranto is a discretionary writ, and on the other hand, he maintained that once an applicant for the writ establishes that the respondent is disqualified to hold the office in question, it becomes the duty of the Court, in other words, becomes mandatory, to issue writ of quo warranto. But, the learned Counsel was not in a position to substantiate his contention with reference to any authority, and therefore, he sought adjournment to produce authorities before the Court in support of his contention. Accordingly, the case was adjourned to enable the learned senior Counsel to produce the authorities.

3. Sri M.R.K. Chowdary, the learned senior Counsel, at the resumed hearing for admission, cited two-Judge Bench decision of the Supreme Court in The State of Haryana Vs. The Haryana Cooperative Transport Ltd. and Others, , to which reference will be made little later, in support of his contention noted above.

4. The power of judicial review conferred on the High Court under Article 226 of the Constitution to issue directions, orders, or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by part III and for any other purpose, is repeatedly held to be extraordinary and discretionary power. It is well established that the remedy provided for under Article 226 of the Constitution is discretionary remedy and the High Courts have always the discretion to refuse to grant relief in certain circumstances even though a legal right might have been infringed, but this principle does not apply to the enforcement of fundamental rights either under Article 32 or under Article 226 of the Constitution. The Supreme Court in Mohammad Yasin Vs. The Town Area Committee, Jalalabad and Another, ; Kavalappara Kottarathil Kochunni Moopil Nayar Vs. The State of Madras and Others, ; Kharak Singh Vs. The State of U.P. and Others, ; Tata Iron and Steel Co., Limited, Bombay Vs. S.R. Sarkar and Others, ; held that when violation of a fundamental right is established, it becomes the duty of the High Court to enforce the fundamental right and it cannot refuse the writ in its discretion. This is the only exception. However, the Supreme Court in D.L.F. Housing Construction (P) Ltd. Vs. Delhi Municipal Corpn. and Others, ; and Arya Vyasa Sabha and Others Vs. The Commissioner of Hindu Charitable and Religious Institutions and Endowments, Hyderabad and Others, ; held that even where the infirgement of a fundamental right is alleged, the High Court would be justified in dismissing an application under Article 226 in limine where the determination of the Constitutional question depended upon the investigation of complicated questions of fact, on taking evidence. Further, the Supreme Court in Tilokchand and Motichand and Others Vs. H.B. Munshi and Another, ; Rabindranath Bose and Others Vs. The Union of India (UOI) and Others, and Rabindranath Bose and Others Vs. The Union of India (UOI) and Others, applied the doctrine of laches even to applications under Article 32 of the Constitution for enforcing fundamental rights. However, by and large, it is well settled that when an applicant establishes violation of fundamental right and if he is prompt in asserting his right, the High Courts cannot refuse to enforce the fundamental right in question and on the other hand it becomes the duty of the High Courts to enforce the fundamental rights. In all other cases where no fundamental right is involved, it has been ruled that the High Courts would not exercise their jurisdiction under Article 226 on certain permissible grounds, such as delay and laches, acquiescence, waiver, non-exhaustion of alternative remedies etc., in their discretion, even though a legal right might have been violated. Ordinarily, authorities need not be cited in support of the well established position, but since the senior Counsel is contesting the correctness of the well established position in relation to writ of quo warranto, the Court should state the authorities t in support of its opinion, and they are the decisions of the Supreme Court in Devilal Modi, Proprietor, M/s. Daluram Pannalal Modi Vs. Sales Tax Officer, Ratlam and Others, ;Tilokchand Molichand v. H.B. Munshi (supra); Ram Sukh and Others Vs. State of Rajasthan and Others, ; Kailash Chander Sharma Vs. State of Haryana and others, ;

to cite the few among hundreds of decisions of the Supreme Court and the High Courts.

5. The Supreme Court in The University of Mysore and Another Vs. C.D. Govinda Rao and Another, ; held that "quo warranto is the remedy or proceeding whereby the State inquires into the legality of the claim which a party asserts to an office or franchise, to oust him from its enjoyment if the claim be not well founded". Quo warranto is generally regarded as an appropriate and adequate remedy to delermine the right or title to a public office and to oust an incumbent who has unlawfully usurped or intruded into such office or is unlawfully holding the same. A proceeding in quo warranto against a public officer is for the purpose of determining whether he is entitled to hold the office and discharge its functions. Quo warranto, unless enlarged by statute to cover private offices, is confined to testing the right or title to public office of a civil character.

6. The power to issue a writ of quo warranto is not wider than that in England and the Courts in India have followed principles as well as limitations as have been well established in England. It is a writ of technical nature issued against an usurper of an office or, against a person who is entitled to make an appointment to that office. Originally a writ of quo warranto was only available for use by the king to protect the King against the encroachment of the Royal prerogative or of the rights, franchise or liberties of the Crown, and an information in the nature of quo warranto which proceeding has taken the place of the old writ of quo warranto, was equally limited in the availability as a remedy; It was a civil writ at the suit of the Crown. Originally the writ had to be returned before the King''s Justice at Westminister but afterwards only before the justices of the Eyre by virtue of the statute of quo warranto. 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, At a later period the King''s Coroner commenced the practice of exhibiting informations of quo warranto at the instance of private persons. 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. u/s 9 of the Administration of Justice (Miscellaneous) Provisions Act, 1938 (now replaced by the Supreme Court Act, 1981) informations in the nature of quo warranto were abolished and their place was taken by injunction restraining any person from acting in an office in which he is not entitled to act.

7. Now let me advert to the specific question arising in this case, i.e., whether quo warranto is not a discretionary remedy? Halsbury (Halsbury''s Laws of England, 3rd Edn., Vol.11 page 148) has observed thus:

"An information in the nature of a quo warranto was not issued and an injunction in lieu thereof will not be granted, as a matter of course. It is in the discretion of the Court to refuse or grant it according to the facts and circumstances of the case. The Court would inquire into the conduct and motives of the applicant, and the Court

might in its discretion decline to grant a quo warranto information where it would be vexatious to do so, or where an information would be futile in its results, or where there was an alternative remedy which was equally appropriate and effective. It is conceived that the Court will follow similar principles in determining whether to grant an injunction in lieu."

8. In Rex v. Stacey, (1785) 99 ER 938, it was held that a writ of quo warranto is not a motion of course and it is in the discretion of the Court to issue it considering the circumstances of the case. In the King ex rel Beudret v. Johnston, (1923) 2 DLR 278, it was held that before issuing a writ of quo warranto, the Court has to take into consideration public interest, the consequences to follow the issue of a writ of quo warranto and all the other circumstances of the case.

9. Prof. H.W.R. Wade, in his treatise, Administrative Law(6th Edition) at pages 591-592, observes:

"Since 1938 the injunction has been made available by statute to prohibit the usurpation of a public office, in place of the former proceedings known as quo warranto. Quo warranto was originally a prerogative writ which the Crown could use to inquire into the title to any office or franchise claimed by a subject. It fell out of use in the sixteenth century and was replaced by the information in the nature of quo warranto, which in form was a criminal proceeding instituted in the name of the Crown by the Attorney-General or by a private prosecutor. These informations were abolished by the Administration of Justice (Miscellaneous Provisions) Act, 1938 (now replaced by the Supreme Court Act, 1981) which provided that where any person acts in an office to which he is not entitled and an information would previously have lain against him, the High Court may restrain him by injunction and may declare the office to be vacant if need be; and that no such proceedings shall be taken by a person who would not previously have been entitled to apply for an information. Consequently the old law of quo warranto is still operative, but the remedy is now by injunction and declaration. The procedure is simitar to that for prerogative remedies and must now be by ''application for judicial review''. But there seems to be no record of its having been used.
The old procedure by information was available to private persons but subject to the discretion of the Court."

10. S.A.de Smith, in his book, Judicial Review of Administrative Action (IV Edition), dealing with the historical origin and characteristics of the principal prerogative writs, at pages 586 and 587, states that "(a) they (prerogative writs) are not writs of course; they cannot be had for tlie asking, but proper cause must be shown to the satisfaction of a Court why they should issue, and (b) the award of the writs usually lies within the discretion of the Court". Though according to him prohibition and habeas corpus ad subjiciendum issue as of right in certain cases. By and large, these principles have been followed by our Courts. The Supreme Court in University of

Mysore v. Govinda Rao, (supra) adopted these principles. The passage from the Halsbury''s Laws of England quoted above, was quoted with approval by the Supreme Court, and it observed thus:

"Broadly stated, the quo warranto proceeding affords a judicial enquiry in which any person holding an independent substantive public office, or franchise, or liberty, is called upon to show by what right he holds the said office, franchise or liberty; if the inquiry leads to the finding that the holder of the office has no valid title to it, the issue of writ of quo warranto ousts him from that office. In other words, the procedure of quo warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions; it also protects a citizen from being deprived of public office to which he may have a right. It would thus be seen that if these proceedings are adopted subject to the conditions recognised in that behalf, they tend to protect the public from usurpers of public office; in some cases, persons not entitled to public office may be allowed to occupy them and to continue to hold them as a result of the connivance of the executive or with its active help, and in such cases, if the jurisdiction of the Courts to issue writ of quo warranto is properly invoked, the usurper can be ousted and the person entitled to the post al lowed to occupy it. It is thus clear that before a citizen can claim a writ of quo warranto, he must satisfy the Court, inter alia, that the office in question is a public office and is held by usurper without legal authority, and that necessarily leads to the enquiry as to whether the appointment of the said alleged usurper has been made in accordance with law or not."

11. Discretionary nature of writ of quo warranto can be gathered from what is stated in Notes 5 and 10 of American Jurisprudence (Vol.65), Notes 5 and 10. Relevant passages read:

"Quo warranto is an extraordinary, prerogative, writ and as such is administered cautiously and in accordance with certain well defined principles. Although the ancient writ of quo warranto was an original one issuing out of Chancery, the remedy is now of legal, rather than of equitable, cognizance. Inquiry in quo warranto proceedings into the regularity of a judgment has been ordinarily, although not invariably, regarded as a collateral attack on the judgment."

"This approach has been justified on the ground that the writ, or a judgment of ouster thereunder, may have drastic consequences affecting the public welfare."

12. The position in English Law, American Law and Canadian Law noted above goes to show that quo warranto is a discretionary relief, and it cannot be claimed as a matter of course or of right, and that the Court has the discretion to refuse the writ under certain circumstances. Similar opinion is expressed by the Indian Courts also in number of pronouncements,

13. In Bhairulal Chunilal Vs. State of Bombay, , a Division Bench of Bombay High Court, speaking through Chief Justice Chagla, said:

""Now the writ of "quo warranto" is not issued as a matter of right. It is discretionary relief and the Court has always to ask itself whether under the circumstances of each case the petitioner should be given the relief in the nature of quo warranto which he seeks. In this particular case every factor which can be taken into consideration weighs against the petitioner being entitled to this relief."

14. In A.P. Kadirvelu Naiker Vs. K.M. Lakshmana Mudaliar and Another, ; Madras High Court observed in para 6 of the judgment thus:

"It seems to be clear that the relief of quo warranto is only a discretionary relief, and that it can be refused on the ground that the applicant can pursue other remedies particularly prescribed by the very statute under which he complains that a person has usurped a public office."

15. The power to issue writ of quo warranto is held to be discretionary power by Rajasthan High Court in Dr. Hemendra Shankar Andleegh v. State of Rajasthan, 1961 Raj.L.W. 326 and in Chaturvedi v. State of Rajasthan, (1969) 1 L.L.J. 169; by Delhi I ligh Court in P.L. Lakhanpal Vs. A.N. Ray and Others, by Calcutta High Court in S-B. Ray v. P.N. Banerjee, 1972 Cal WN 50; by Patna High Court in Ram Ballav Jalan v. State of Bihar, 1970 LJR169; and by Kerala High Court in K.J. Joseph Vs. Hon''ble Justice, K. Sukumaran and Others, . This Court in Bandi Naidu Vs. Pavuluri Ramanujiah and Others, , refused writ of quo warranto on the ground of availability of an alternative statutory remedy to assail the validity of the election of the respondent therein. Similarly Punjab High Court in Shiam Sunder and Another Vs. The State of Punjab and Others, and Rajasthan High Court in Purushottam Lal v. State of Rajasthan, AIR 1979 Raj. 23 refused to grant quo warranto on the ground of availability of alternative remedies. In Harisingh v. State of Punjab, 66 Punj LR 1000; the High Court held that acquiescence and delay may disentitle one to writ of quo warranto. Thus it is well established by several pronouncements of our Courts that the power to issue writ of quo warranto under Article 226 is a discretionary power vested in the High Courts, and that writ cannot be had for the asking. Sri M.R.K. Chowdary, learned senior Counsel contests the correctness of this settled position. The only arsenal in the argument armoury of the learned Counsel to shoot at the settled position is one sentence observation of the Supreme Court in para 14 of the judgment in Stale of Haryana v. Haryana Co-op. Transport, (supra). It reads thus:
"To strike down usurpation of office is the function and duty of High Courts in the exercise of their Constitutional powers under Articles 226 and 227."

In order to understand the purport of that observation of the Supreme Court, it is necessary to note what fell for consideration before the Supreme Court in that case. In that case, the first respondent was a Co-operative transport Society carrying on transport business. The Society terminated the services of respondents 3 and 4 who

were working with it as conductor and driver respectively. The State of Punjab referred the dispute arising out of the dismissal of respondents 3 and 4, u/s 10 of the Industrial Disputes Act, for the adjudication of the Labour Court, Rohtak. That Labour Court was then presided over by one Shri Jewala Dass. On Shri Dass''s retirement, one Shri Hans Raj Gupta was appointed asjhe Presiding Officer of the Court. The reference was thereafter heard by him and he passed an award directing reinstatement of respondents 3 and 4 with 50% back wages from the date of their dismissal until the date of reinstatement. Being aggrieved by the award, the first respondent filed writ petition in the High Court of Punjab and Haryana under Articles 226 and 227 of the Constitution, impleading Shri Hans Raj Gupta praying that the award passed by Shri Hems Raj Gupta be set aside, on the ground, inter alia that he was not qualified to hold the post of a Judge of the Labour Court, and, therefore, the award was without jurisdiction. The writ petition having been allowed by a Division Bench of the High Court, the State of Haryana had filed appeal by special leave before the Supreme Court. In that case, as could be seen from para 7 of the judgment, it was contended on behalf of the State of Haryana that the appointment of Shri Ham Raj Gupta as Presiding Officer of the Labour Court could not be questioned collaterally, basing on certain observations in Cooley''s "A Treatise on the Constitutional Limitations", and the judgment of the Ontario Supreme Court in Re Toronto R. Co. v. City of Toronto, 46 DLR 547. The Supreme Court while repelling that contention and affirming the decision of the Division Bench of the Punjab and Haryana High Court made the above noted observation.

16. In the first place, the above observation of the Supreme Court cannot be understood to be an answer to the question whether quo warranto is a discretionary writ or not. As could be seen from the judgment, that question did not arise at all for consideration and resolution in that case. Therefore, the Supreme Court had no occasion to deal with that question. In that case, the Supreme Court having found that Shri Hans Raj Gupta was unqualified to be appointed as Presiding Officer of the Labour Court and therefore his appointment had to be declared invalid, made the above observation, as a passing remark. From that observation, the Supreme Court cannot be understood to have declared that writ of quo warranto is a writ of course and not discretionary. Further, from this observation it cannot be said that the two-Judge Bench of the Supreme Court has opined contrary to the opinion of the Constitution Bench of the Supreme Court in University of Mysore v. Govinda, (supra) and contrary to the consistent opinions of the Courts, spreading over centuries, in our country, England and America without considering any of them. From that observation, at the most, it can be said that after entertaining a writ petition for a writ of quo warranto, if the Court finds that the respondents have occupied public office without authority of law and there are no grounds to refuse the writ, the Court must issue writ of qua warranto. Therefore, the contention of the learned senior Counsel that quo warranto is a writ of course is not well founded. On the other hand, undisputably, quo warranto has been

considered to be a discretionary prerogative writ, and it can be refused under certain circumstances stated above. Therefore, I hold that writ of quo warranto is not a writ of course; it is a discretionary writ, and the High Courts can refuse that writ on the grounds of delay and laches, acquiescence, waiver, availability of alternative remedies or where the usurper of the office ceased to hold the office by the time writ petition is filed.

17. Quo warranto means "by what warrant or authority". It is a judicial order by which any person who occupies or usurps an independent public office or franchise or liberty, is askeil to show by what right he claims it, so that the title to the office, franchise or liberty may be settled and any unauthorised person ousted. In order for the writ of quo warranto to lie, certain conditions should co-exist. The office in question must be a public office. A public office is one which is created by the Constitution or a statute and duties of which must be such in which public is interested. The chief characteristic of a public office seems to be that it is a post the occupation of which involves the discharge of duties towards the community or some section of it, and that usually those duties are connected with Government whether Central or local. In Sasibushan Roy v. Pramathnath Banerjee, 72 Cal WN 50, the Calcutta High Court held that in order for the writ of quo warranto to lie, the relevant office must be of public nature i.e., it involves a delegation of some of the sovereign functions of the Government, executive, legislative or judicial, to be exercised by him for public benefit. Such public office must be substantive in nature, not terminable at will. The official occupying the office must be independent and not merely one discharging the functions of a deputy or servant at the pleasure of another officer. The person must be in actual position of the office. Mere declaration that a person is elected to an office or mere appointment to a particular office is not sufficient. He must accept such office. The office must be held in contravention of taw and writ of quo warranto will not lie if there is a mere irregularity in the appointment. Quo warranto will also lie when a person validly occupies the office but acquires a disqualification later on. The conditions referred to above for issuing writ of quo warranto should co-exist.

18. In the back-drop of these principles governing the issuance of writ of quo warranto, let me now advert to the facts of this case to find out whether necessary conditions exist for issuing writ of quo warranto. The second respondent is holding the office of the President of a Co-operative Society. No where in the affidavit filed in support of the writ petition, it is claimed that the office held by the second respondent is a public office nor is it shown to be a public office by producing any material evidence. An office in a Co-operative Society may or may not be a public office. It depends upon the facts and circumstances of the case. For example, if a Co-operative Society can be considered to be a ''State'' within the meaning of Article 12 of the Constitution or an ''authority'' for the purpose of Article 226 of the Constitution and certain duties and functions in which the public at large are interested are entrusted to the occupier of the office, and if such office is an

independent, substantive office, writ of quo warranto can be sought. If a writ of quo warranto is sought against an occupier of a constitutional post or a statutory post or an independent post in Government, failure to plead the fact that the respondent is occupying a public office may not be fatal, and the Court can take judicial notice of the fact that the respondent is holding or occupying a public office. In all other cases, the pleading and proof of the fact that the respondent occupies or holds a public office is a necessary condition for invoking the power of High Court under Article 226 for a writ of quo warranto. The failure to plead that fact will be fatal. The Supreme Court in Bharat Singh and Others Vs. State of Haryana and Others, , held that a party raising a point in a writ petition must plead not only relevant facts but also state facts by way of evidence in proof of facts so pleaded. In the instant case there is neither pleading nor proof to establish that the office held by the second respondent is a public office.

19. Secondly, it can be noted that in the instant case, a writ of quo warranto is sought on the ground that the second respondent was an employee in the establishment of HMT at the relevant point of time. The question whether the second respondent was an employee in the establishment of the HMT at the relevant point of time or not is a pure question of fact. Till date, neither the Registrar of Co-operative Societies nor any quasi-judicial tribunal has recorded any finding on the allegation of the petitioner that the second respondent was an employee of HMT at the relevant point of time. That fact is yet to be established by proof. Thirdly, it is relevant to note that admittedly election was held for electing the office-bearers of the committee of the management of the fifth respondent Cooperative Society as far back as on 2-4-1997. If the election of the second respondent was invalid for incurring disqualification, the petitioners could have filed election petition to assail the validity of the election of the second respondent as the President of the Society, as provided under the Act. For the reasons best known to the petitioners, they did not resort to that remedy. After a lapse of more than 16 months, they have filed the writ petition for a writ of quo warranto. Therefore, the writ can be refused on the ground of laches also. Fourthly, even now the petitioners have an efficacious, alternative statutory remedy to seek disqualification of the second respondent. The Registrar of Co-operative Socicities is armed with necessary power to disqualify a member office bearer of a Co-operative Society u/s 21(3) of the Act, and the petitioners can make an application in that regard to the Registrar of Co-operative Societies. Although it is stated in the affidavit that a representation was already submitted to the Registrar of Cooperative Societies bringing it to his notice the disqualification incurred by the second respondent, Sri M.R.K. Chowdary, learned senior Counsel at the time of hearing submitted that no application is yet submitted u/s 21(3) of the Act. For all these reasons, I think that it is not appropriate to entertain the writ petition.

20. In the result, the writ petition is dismissed with no order as to costs.