

Balasubramanian Vs. Chandradas

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Court : Kerala

Decided On : Mar-22-2006

Reported in : 2006(2)KLT467

Judge : K.S. Radhakrishnan and; K.T. Sankaran, JJ.

Acts : Municipality Act, 1994 - Sections 4, 5, 6, 9, 10(2), 10(4), 11(3), 12, 12(1), 12(5), 14, 29, 43(2), 64(1A), 143(1), 143(1A) and 143(2); Constitution (Seventy Fourth) Amendment Act 1992; [Constitution of India](#) - Articles 226, 243T and 334; Kerala Municipality (Election of Chairperson and Deputy Chairperson) Rules 1998; Kerala Municipality (Election of Chairperson and Deputy Chairperson) Rules 1995 - Rule 6(3)

Appeal No. : W.A. Nos. 2408 and 2531 of 2005 etc.

Appellant : Balasubramanian

Respondent : Chandradas

Advocate for Def. : Murali Purushothaman,; T.A. Shaji,; V.V. Nandagopal Namb

Advocate for Pet/Ap. : P.S. Sreedharan Pillai,; K.B. Sajeesh,; P. Gopinath,

Judgement :

K.S. Radhakrishnan, J.

1. The cardinal question that has come up for consideration before us is whether we should issue a writ of quo warranto against a duly elected Deputy Chairperson of a Municipality on the sole ground that he could not make and subscribe his oath of office before the Chairperson not due to his fault, but due to non election of the Chairperson.

2. Deputy Chairperson was duly elected by the elected councillors of the Municipality and was/is ready and willing to make and subscribe his oath before the Chairperson if elected. Can the mandate of the electorate be ignored for the sole reason of non availability of the Chairperson before whom the elected Deputy Chairperson has to make and subscribe his oath of office. Should the will of the electorate succumb to such man made situations thereby making the democratic process, a mockery. Whether the court should exercise its discretion by issuing a writ of quo warranto to unseat a duly elected Deputy Chairperson of the Municipality, defeating the democratic process especially when the elected Deputy Chairperson is not at fault. These are some of the issues that have come up for Consideration in these cases, for which we have to find solutions.

3. Third respondent in W.P.C. No 28913 of 2005 was elected as Deputy Chairperson of Palakkad Municipality in accordance with Section 12 of the Kerala Municipalities Act read with the Kerala Municipality (Election of Chairperson and Deputy Chairperson) Rules 1998. Election was held on 6.10.2005. Deputy Chairperson was expected to make and subscribe oath of office before the Chairperson of the Municipality as per Section 143 (2) of the Act. Chairperson was however not elected thereby Deputy Chairperson could not make and subscribe his oath though he was always ready and willing to make and subscribe his oath of office before the Chairperson. Section 43 (2) of the Act authorises the Government to nominate a person before whom Chairperson could make and subscribe his oath or affirmation. Government nominated the Returning Officer as the person before whom Chairperson has to make and subscribe his oath. Since Chairperson was not elected Deputy Chairperson was permitted by the Election Commission to make and subscribe bis oath or affirmation before the Returning Officer nominated by the Government, before whom Chairperson has to make and subscribe oath. Government did not object to the said course, nor the councillors. Deputy

Chairperson therefore made and subscribed his oath before the returning Officer and assumed office.

4. Elected councillors did not find any infirmity in the procedure followed by the Election Commission, nor the Government, but a voter in Ward No. 25 approached this Court by a writ petition under Article 226 of the [Constitution of India](#) seeking issuance of a writ of quo warranto commanding the third respondent to show cause under what authority he holds the office of Deputy Chairperson of Palakkad Municipality and also for a declaration that the election to the post of Deputy Chairperson of Palakkad Municipality held on 6.10.2005 as well as the taking of oath of office is illegal. Writ of prohibition was also sought restraining the third respondent from functioning as the Deputy Chairperson of Palakkad Municipality. Rest of the reliefs sought for in other writ petitions are only consequential. Learned single Judge held that third respondent was an usurper of the office of the Deputy Chairperson and issued a writ of quo warranto legality of which is under challenge in Writ Appeal No. 2408 of 005.

5. The Kerala Municipality Act, 1994 was enacted to replace the enactments relating to Municipalities and Municipal Corporations then in force by a comprehensive enactment in line with the Constitution (Seventy Fourth) Amendment Act 1992 for securing greater measure of participation of the people in planned development and in local governmental affairs and to endow such Municipalities with necessary powers and authority to enable them to function as institutions of self government. Municipalities have been entrusted with the functions of preparation of plans and implementation of schemes for economic development and social justice including the implementation of schemes in relation to matters listed in the Twelfth Schedule to the Constitution. In order to oversee certain situations Chapter IX A has been added to the Constitution by the Constitution (Seventy Fourth) Amendment Act, 1992.

6. Chapter III of the Kerala Municipalities Act deals with constitution of municipal authorities. Section 5 states that every Municipality shall be a body corporate by the name of the Municipality specified in the notification issued under Section 4 and shall have perpetual succession and a common seal, and shall, subject to any

restriction or alteration imposed by or under the Act or any other law, be vested with the capacity of suing or being sued in its corporate name, of acquiring, holding and transferring the property, movable or immovable, of entering into contracts, and of doing all things necessary, proper or expedient for the purpose for which it is so constituted. Section 6 of the Act deals with constitution of Council. Section 9 dealing with reservation states that it shall be subject to Article 334 of the Constitution and that notwithstanding anything contained in Section 6 and Section 10, reservation of seats in the Municipalities and in the office of Chairman or Mayor thereof, for Scheduled Castes or the Scheduled Tribes shall cease to have effect on the expiration of the period fixed in Article 334. Section 10 deals with election of Chairperson and Section 11 deals with election of Deputy Chairperson. Chapter VI deals with election to Municipalities. It states that the superintendence, direction and control of the preparation of electoral rolls, for, and the conduct of, all elections to the Municipalities shall vest in the State Election Commission. Chapter VII refers to notification of general elections and administrative machinery for the conduct of elections.

7. The State Election Commission following the above mentioned procedures conducted election to Palakkad Municipality. Fifty candidates were elected to the Municipal Council of whom 17 belong to Left Democratic Front and 17 to Bharatheeya Janatha Party while 16 were elected under the United Democratic Front. They have to make and subscribe oath and affirmation as provided under Section 143 (1) of the Act. Section 143 in its entirety is extracted hereunder for easy reference.

143. Oath or affirmation.-(1) The Government, after each general election shall nominate a member elected as Councillor for convening the first meeting of the Municipality and before convening such meeting he shall make and subscribe an oath or affirmation in the form specified in the Third Schedule for the purpose before the officer nominated by the Government in this behalf.

Provided that the member nominated by the Government shall, as far as possible, be the eldest among the Councillors elected in the Municipality.

(1A) All other Councillors shall before assuming charge of their office, make and subscribe an oath or affirmation, in the form set out for this purpose in the Third Schedule, before the Councillor nominated under Sub-section (1), on the date specified by the Government and before the date fixed by the State Election Commission for conducting the election of the Chairperson under Sub-section (1) of Section 12.

(1B) A Councillor who was not able to make an oath or affirmation under Sub-section (1 A) or a Councillor elected in the bye-election may make such oath or affirmation before the Chairperson.

(2) The Chairperson and the Deputy Chairperson shall also, before entering upon their offices, make and subscribe an oath or affirmation in the form set out in the said Schedule. The Chairperson shall make and subscribe such oath or affirmation before the Officer authorised by the Government in this behalf, and the Deputy Chairperson shall make and subscribe such oath or affirmation before the Chairperson after the Chairperson has been elected.

(3) No Councillor who has not taken an oath or affirmation under Sub-section(1A) or under Sub-section (1B) shall vote or take part in the proceedings of any meeting of the Municipality, nor shall be included as a member of any of the Committee constituted by the Municipality.

(4) The Government may by notification in the Gazette, declare the office of Councillor as vacated in his own motion where such a Councillor has not assumed charge of his office by making an oath or affirmation without sufficient cause within a maximum period of thirty days from the date by which he was elected as a Councillor.

Government as per Section 143(1) has to nominate a member elected as Councillor for convening the first meeting of the Municipality and before convening such meeting he has to make and subscribe an oath or affirmation in the form specified in the Third Schedule for the purpose before the officer nominated by the Government. Every councillor has to make and subscribe oath or affirmation under Sub-section (1A) of Section 143 in the form set out in the Third Schedule to the

Act before the Councillor nominated under Sub-section (1). Third Schedule is extracted hereunder for easy reference.

THE THIRD SCHEDULE

(See section 143(1))

FORM OF OATH OR AFFIRMATION

I...having been elected Councillor/Mayor/Deputy Mayor/Chairman/ Vice Chairman of.....Municipal Corporation/..... Municipal Council/.....Town Panchay at do swear in the name of God/solemnly affirm that I will bear true faith and allegiance and maintain sovereignty and integrity of India to the [Constitution of India](#) as by law established and I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour or affection or ill will.

Third respondent along with other councillors had made and subscribed his oath of office as Councillor in the form specified in the Third Schedule shown above and was fully eligible to stand for election as Deputy Chairperson.

8. Third respondent after making and subscribing his oath as Councillor submitted nomination for election to the post of Deputy Chairperson along with few others. State Election Commission then took steps to elect Chairperson and Deputy Chairperson. Meeting for the election of the Chairperson was held on 6.10.2005 at 10 AM and that of the Deputy Chairperson at 3 P.M. on the same day. Post of Chairperson, stood reserved for members of the Scheduled Caste community. There were five elected scheduled caste councillors who could submit nomination to the post of Chairperson, but due to various reasons nobody submitted nomination to the post of Chairperson. Returning Officer had to adjourn the meeting for filling up the post of Chairperson since nobody came forward with nomination to the post of Chairperson. As we have already indicated, meeting for electing the Deputy Chairperson was held as scheduled. Two candidates, third respondent as well as A.K. Chandrankutty had submitted their nominations to the post of Deputy Chairperson. Third respondent as well as Chandrankutty received

17 votes; two votes cast in favour of Chandrankutty turned out to be invalid. Consequently third respondent was declared elected. Since Chairperson, was not elected, third respondent could not make and subscribe his oath of office before him. Faced with the above situation, Election Commission permitted the Deputy Chairperson to make and subscribe his oath of office before the Returning Officer, the person before whom Chairperson has to make and subscribe his oath.

9. Election Commission then took steps to convene yet another meeting for electing the Chairperson and the meeting was convened on 24.10.2005 but nobody was willing to submit their nomination to the post of Chairperson. Election Commission then submitted a report dated 26.10.2005 to the State Government to examine the possibility of convening a meeting of the representatives of the political parties for electing the Chairperson. Alternatively Election Commission also requested the Government to . consider whether the Municipality has to be dissolved under Section 64(1A) of the Act W.P.C. Nos. 29965 and 29977 of 2005 were preferred by some of the councillors of the Municipality seeking a direction to the Government not to take any steps to dissolve the Municipality on the ground that it had failed to elect Chairperson and also for other consequential reliefs. In W.P.C.No 31145 of 2005 petitioners are seeking to issue a quo warranto directing respondents 6 to 10 therein to show cause under what authority they are continuing as members of the Municipality and for removing them from the membership of the Council of the Municipality. W.P.C. No 34433 of 2005 was filed by another elected councillor seeking a direction restraining the Election Commission from convening any meeting for the election of Chairperson in violation of Section 12 of the Kerala Municipality Act.

10. A Division Bench of this Court while dealing with the interim applications in the above mentioned cases examined the question as to whether Election Commission has got the power to conduct another meeting of the elected councillors to elect the Chairperson and whether such convening of the meeting would violate Section 12(5) of the Act. This Court found no illegality in conducting any meeting by the Election Commission to elect Chairperson of the Municipality and passed an interim order on 16th December 2005 directing the Election Commission to convene yet another meeting for filling up the post of Chairperson

for the Palakkad Municipality. State Election Commission then convened a meeting on 19.12.2005 to elect Chairperson of the Municipality. Sanctioned strength of the Palakkad Municipal Council is 50. Two members have resigned. There are 48 councillors in the Municipality. All of them participated in the meeting for electing the Chairperson. Nomination was submitted by one P. Vijayakumar, a scheduled caste councillor from ward No. 17 and also by another councillor A.K. Chandrankutty, who also belongs to scheduled caste community. Twenty nine votes were polled in favour of Chandrankutty and 18 votes were polled in favour of Vijayakumar. Chandrankutty got eleven votes more than Vijayakumar and hence he was declared elected as Chairperson by the Returning Officer. Chandrankutty had to make and subscribe oath or affirmation under Section 143 (2) of the Act before the Returning Officer, a person nominated by the Government for that purpose. Chandrankutty however refused to make oath or affirmation as Chairperson of the Municipality lest the Deputy Chairperson would make and subscribe his oath before him, and then resigned from the post of Chairperson. Letter of resignation was handed over to the Returning Officer who did not receive it stating that he is incompetent to receive the letter of resignation. The Deputy Chairperson though was willing to make and subscribe his oath before the Chairperson he could not since the Chairperson refused to make and subscribe his oath and assume the office of Chairperson.

11. Sri P. Gopinath Menon, counsel appearing for the third respondent submitted that third respondent was/is always ready and willing to make and subscribe oath before the Chairperson so as to uphold the democratic process but the same was effectively thwarted. Counsel submitted that third respondent has already subscribed oath or affirmation before the Returning Officer, nominated by the Government as the officer before whom Chairperson has to make and subscribe subscribe oath or affirmation. Counsel further submitted that the provision contained in Section 143 (2) of the Act to the extent it requires that the Deputy Chairperson shall make or subscribe oath or affirmation in the form set out in the schedule before the' Chairperson of the Municipality cannot be held to be a mandatory provision. Counsel made reference to the decision of the Supreme Court in *Virji Ram Sutaria v. Nathalal Premji Bhavandia* : [1969]2SCR627 , P.N. Vallarasu v. M.G. Ramachandran and Ors. 1983 ELR 378, C.K. Ramaswamy v. G.

Vasanthi Pai and Ors. ILR 1979 (1) Madras 180, Bhairulal Chunilal v. State of Bombay : AIR1954 Bom116 and State of Punjab v. Satya Pal Dang and Ors. : [1969]1SCR478 . Counsel submitted that learned single Judge was not justified in holding that the Deputy Chairperson could exercise the power of Chairperson only in the event of the office of the Chairperson is filled up. Section 11 (3) does not place any such restriction in exercising the power by the Deputy Chairperson. Counsel further submitted that learned single Judge has not properly appreciated the scope of Section 29 of the Act. Counsel submitted in a given case the Deputy Chairperson can even take oath before the Council since Council is empowered to exercise the functions expressly assigned under the Act to the Chairperson. Counsel submitted that learned single Judge was not justified in granting writ of quo warranto and that the petitioner has no locus standi to maintain such a writ petition so as to unseat a democratically elected person. Counsel further submitted election of Deputy Chairperson was a valid election. Even assuming that he could not take oath before the Chairperson due to the non election of Chairperson he cannot be ousted from the post of Deputy Chairperson.

12. Sri. Murali Purushothaman, counsel appearing for the State Election Commission submitted that the Returning Officer is a person before whom in exercise of the powers under Section 143 (2) of the Act the Chairperson has to make and subscribe his oath. In the absence of Chairperson Election Commission permitted the Deputy Chairperson to make and subscribe oath before the very same officer before whom the Chairperson has to make and subscribe his oath of office. Counsel submitted that there is no illegality in the procedure adopted by the Election Commission. Counsel for the State Election Commission relied on the decision of the Madras High Court in P.N. Vallarasu v. M.G. Ramachandran and C.K. Ramaswamy v. G. Vasanthi Pai and Ors. (supra). Counsel submitted that the decision of the Election Commission in permitting the Deputy Chairperson to make and subscribe his oath before the Returning Officer is valid. Sri Sajeevkumar K. Gopal, counsel appearing for the two elected councillors also submitted that in the absence of Chairperson, Deputy Chairperson is competent to exercise the powers for the smooth and proper functioning of the Municipality.

13. Sri K. Ramakumar, counsel appearing for the petitioner in W.P.C. No 34433 of 2005 submitted that third respondent is incompetent to hold the post of Deputy Chairperson since he has made and subscribed oath and affirmation before a person who has no authority to administer oath or affirmation. Counsel submitted that Sub-section(2) of Section 143 specifically says that Deputy Chairperson shall make and subscribe oath before the Chairperson after Chairperson is elected. Counsel submitted since Chairperson has not been elected the question of Deputy Chairperson making oath or affirmation does not arise. Counsel submitted that under Sub-section (2) of Section 143 Government is authorised to nominate a person before whom Chairperson can make and subscribe oath and not the Deputy Chairperson. Counsel also submitted Election Commission also has no power to give direction to the Returning Officer to make and subscribe oath or affirmation to the Deputy Chairperson for which he has no authority. Counsel also submitted, provisions of Section 143 (2) is mandatory which has to be scrupulously complied with. Counsel also submitted that Election Commission has no power to convene a meeting for the election of Chairperson even after 45 days. Counsel further submitted that the only alternative on the part of the Government is to dissolve the Municipality and hold fresh election. Counsel submitted, in any view of the matter, an Election Petition is now pending before the District Court, Palakkad challenging the election of the Deputy Chairperson and hence this writ court shall not express any opinion on the correctness or otherwise of the election conducted to the post of Deputy Chairperson. Counsel submitted that a mandatory duty is cast on the State to put an end to this stalemate and to conduct fresh election to the Municipality at the earliest. Counsel also referred to various provisions of the Constitution and compared the same with the oath or affirmation taken by the Deputy Chairperson.

Same is the stand taken by Sri T.A. Shaji counsel appearing for the petitioner in W.P.(C) No 28913 of 2005. Counsel submitted that when a statute ordains that a thing should be done in a particular manner it could be done only as enjoined in the statute and not in any other manner. Counsel referred to the decisions in *Nazir Ahamed v. King Emperor* AIR 1936 P.C. 253, *A.R. Antulay v. Ramdas Srinivas Nayak and Anr.* : [1984]2SCR564 , *Sheikh Abdul Rahman v. Jagat Ram Aryan* : [1969]3SCR597 and *Harijit Singh Mann v. S. Umrao Singh and Ors.* :

14. Sri N. Reghuraj, counsel appearing for the sixth respondent in W.RC.No 30262 of 2005 submitted that the Deputy Chairperson, elect, cannot function without the Chairperson in office. Even assuming that it is open to the Deputy Chairperson to exercise the powers of the Chairperson in a situation as the one in the present case, counsel submitted that, the Deputy Chairperson can only exercise the powers under Section 11(3) but cannot exercise the functions of the Chairperson. Counsel referred to Section 14 dealing with the functions of the Chairperson and convening of the meeting of the Council. Counsel also drew a distinction between the functions and powers of the Chairperson and Deputy Chairperson and contended that the Deputy Chairperson cannot exercise the powers of Chairperson and therefore unless and until Chairperson is elected Deputy Chairperson cannot function. Learned Government Pleader submitted that Government have not authorised any person before whom Deputy Chairperson could make and subscribe his oath.

15. We are confronted with an unparallel situation where a duly elected Chairperson is refusing to take oath after being elected thereby preventing the Deputy Chairperson to make and subscribe his oath before him. Post of Chairperson of Palakkad Municipality has been reserved to the members of scheduled caste/scheduled tribe community to uphold the social objective and constitutional principles. Election to the Palakkad Municipality was duly conducted by the Election Commission spending public money in accordance with the procedure laid down in the Kerala Municipality Act. Article 243-T of the Constitution states that seats shall be reserved for the scheduled castes and scheduled tribes in every Municipality and the number of seats so reserved shall bear as nearly as may be the same proportion to the total number of seats to be filled by direct election in the Municipality as the population of the scheduled castes in the Municipal area or the scheduled tribes in the Municipal area bears to the total population of that area. Part IX-A of the Constitution inserted by the Constitution (Seventy-Fourth) Amendment Act 1992 provides for adequate representation of scheduled castes/scheduled tribes in the municipal administration. Office of the Chairperson in the Municipality shall be reserved for

scheduled caste/scheduled tribe and for women in such manner as prescribed by law. Municipality Act accordingly has made provision for reservation of seats. Sub-sections (2) and (4) of Section 10 of the Municipality Act have authorised the State Election Commission to reserve offices of the Municipality to the members of scheduled caste/scheduled tribe to uphold the constitutional principles.

16. Section 143(1) of the Act states that the Government, after each general election shall nominate a member elected as councillor for convening the first meeting of the Municipality and before convening such meeting he shall make and subscribe an oath or affirmation in the form specified in the Third Schedule for the purpose before the officer nominated by the Government in that behalf. Sub-section (1A) of Section 143 states that all other councillors shall before assuming charge of their office, make and subscribe an oath or affirmation, in the form set out for this purpose in the Third schedule, before the councillor nominated under Sub-section (1), on the date specified by the Government and before the date fixed by the State Election Commission for conducting the election of the Chairperson under Sub-section (1) of Section 12. Consequences of not taking oath or affirmation by a councillor under Sub-section (1A) or (1B) have been stated in Sub-section (3) of Section 143 read with Sub-rule (3) of Rule 6 of the Kerala Municipality (Election of Chairperson and Deputy Chairperson) Rules 1995. Sub-section (3) of Section 143 states that that no councillor who has not taken an oath or affirmation under Sub-section (1A) or Sub-section (1B) of Section 143 shall vote or take part in the proceeding of any meeting of the Municipality, nor shall be included as a member of any committee constituted by the Municipality. Further Sub-section (4) of Section 143 enables the Government to make a declaration that the office of councillor as vacated in his own motion where such a councillor has not assumed charge of his office by making an oath or affirmation without sufficient cause within a maximum period of thirty days from the date by which he was elected as a councillor. Abovementioned provisions would clearly show that making and subscribing oath of office by a councillor is a mandatory requirement, since the consequences of not making and subscribing oath are provided in the statute itself. When there is failure to comply with a prescribed requirement provided by the statute itself, there can be no manner of doubt that such statutory requirement must be interpreted as mandatory. Reference may be made to the

decision of the apex court in *Rajasekhar Gogol v. State of Assam* : 2001(75)ECC704 . All the councillors in the present case have made and subscribed their oath of office, hence no consequences aforementioned would follow. It is trite law that provisions of statute in those peremptory terms could be construed as mandatory. Once the councillor fails to make or subscribe oath or affirmation as provided in Sub-section (1A) or (1B) of Section 143, consequence is that the councillor is disabled from casting vote or from taking part in any meeting of the Municipality and he shall not be included as a member of any committee constituted by the Municipality and the Government could declare the office of the councillor as vacated in his own motion unless sufficient cause is shown. Requirement of making and subscribing oath by a councillor is a mandatory requirement which the third respondent has already complied with.

17. We shall now examine whether the statute has provided any consequence on failure to take oath by the Chairperson or Deputy Chairperson. The only consequence provided is under Section 12 (8A) which is extracted below for easy reference.

(8A) The State Election Commission may declare the office of the Chairperson or Deputy Chairperson, as vacated on his own motion where the person has not entered upon his office, without sufficient cause, by taking oath or affirmation within a period of fifteen days from the date he was declared elected as such as Chairperson or Deputy Chairperson.

No restriction has been placed on the Chairperson or the Deputy Chairperson elected from taking part in any meeting of the Municipality and being a member of any committee, unlike the case of a councillor since they have already taken oath as councillors. True, under Section 12 (8A) the State Election Commission has been bestowed with power to declare the office of the Chairperson or Deputy Chairperson as vacated, when the person has not entered upon office without sufficient cause. Further, it is not obligatory on the part of the State Election Commission to issue such a declaration since the expression used is 'may' which implies a discretion on the authority. Further the Chairperson or the Deputy Chairperson also could show 'sufficient reasons' for not taking oath or affirmation,

in the event of which the State Election Commission cannot make a declaration under Section 12(8A). Provision, in our view, is only directory. Deputy Chairperson, the third respondent, has already made and subscribed oath as a councillor which is the same as the oath to be taken before the Chairperson and has shown 'sufficient cause' for not making and subscribing oath before the Chairperson and has also shown sufficient cause for making and subscribing oath before the Returning Officer as directed by the Election Commission. The third respondent has therefore substantially complied with the requirement of taking oath under Section 143(2). Further the State Election Commission has not exercised any power under Section 12(8A) to declare the office of the Deputy Chairperson as vacated, in our view rightly, since no grounds exist to invoke that provision as against the third respondent. Consequently, the third respondent in our view can legally hold the office of the Deputy Chairperson.

18. We are of the view, once the Chairperson or Deputy Chairperson was declared elected they can be removed under Section 19 through a no confidence motion or on the ground that they have entailed any other disqualification. The question of conducting fresh election under Sub-section(5) of Section 12 arises only if the Deputy Chairperson could not be elected. In the instant case Deputy Chairperson has already been elected and therefore the question of conducting fresh election to the post of Deputy Chairperson does not arise. Sub-section (6) of Section 12 states that where any dispute arises as to the validity of the election of the Chairperson or Deputy Chairperson of a Municipality any Councillor of that Municipality may file a petition before the District Court having jurisdiction over the area of the headquarters of that Municipality for decision and such decision shall be final. True, if there is any dispute regarding the Chairperson, election, petition can always be filed before the District Court and it is for that court to decide whether election was properly conducted. Present dispute is not relating to the election of Deputy Chairperson. Deputy Chairperson has already been elected and results have been declared and the only question to be considered by us is whether due to the mere fact that Deputy Chairperson could not make and subscribe oath or affirmation before the Chairperson, not due to his fault he is to be ousted from the post of Deputy Chairperson. We have already found that he has shown sufficient reasons for not making or subscribing oath before the

Chairperson and shown cause for taking oath before the Returning Officer and hence he cannot be ousted.

19. We find no legal infirmity in the third respondent, the Deputy Chairperson in making and subscribing his oath before the Returning Officer, the person before whom the Chairperson has to make and subscribe oath since the Chairperson was not elected. If the Chairperson could make and subscribe oath before the officer authorised by the Government we fail to see why the Deputy Chairperson cannot make and subscribe his oath before him, since the requirement is only directory and there is substantial compliance with the requirement. The Deputy Chairperson was/is always ready and willing to make and subscribe his oath before the Chairperson and that the Chairperson was not elected, not due to his fault. We have already found that the Deputy Chairperson cannot be ousted from that post by the Election Commission under Section 12 (8 A) since he has shown 'sufficient cause' for not making and subscribing oath, before the Chairperson. Further Election Commission itself has directed the Deputy Chairperson to make and subscribe oath before the Returning Officer, which he has promptly complied with and therefore there is no question of ousting him from the post of Deputy Chairperson under Section 12(8A).

20. The statute has not authorised any person to administer oath to the Deputy Chairperson. Deputy Chairperson is required to make and subscribe oath. Deputy Chairperson is only expected to swear that he would bear true faith and allegiance and maintain sovereignty and integrity of India to the [Constitution of India](#) as by law established and that he would duly and faithfully and to the best of his ability knowledge and judgment perform the duties of his office without fear or favour or affection or ill will. Deputy Chairperson openly subscribed that oath when he took office as councillor. Same oath was repeated by him before the Returning Officer. Apex Court in *Virji Ram Sutaria v. Nathalal Premji Bhanvadia* : [1969]2SCR627 held that non compliance with the conditions of the statute would not necessarily render a proceeding invalid if by considering its nature, its design and the consequences which follow from its non observance one is not led to the conclusion that the legislature or the Constitution makers intended that there should be no departure from the strict words used. Object and purpose of taking

oath could be achieved, once the person concerned, has openly expressed his mind especially nobody has been authorised to administer the oath to him. Endeavour of the court should be enable a person to hold the office rather than depriving him especially when the people's mandate is in his favour to hold the office. Declaration made by the third respondent to the whole world that he would bear true faith and allegiance and maintain sovereignty and integrity to the [Constitution of India](#), and would perform his duties faithfully without fear or favour would have the same sanctity whether it is made before the Chairperson or the Returning Officer or to the people at large. The object underlined in taking the oath or affirmation, in our view, has been achieved when the third respondent has unequivocally sworn to that effect before the Returning Officer. The Madras High Court in P.N. Vallarasu v. M.G. Rarwchandran & Ors. and in Ramaswamy v. Vasantlia Pai (supra) held that the distinction between administration of oath and the oath being taken by the party himself has to be borne in mind. Physical presence of the party before whom he has to take oath may not always be necessary. Principle of substantial compliance should be applied in such a situation which the third respondent has satisfied in the instant case thereby upholding the democratic process.

21. W.P.C.No. 31145 of 2005 was filed seeking a declaration that the recommendation made by the Election Commission to the Government to invoke Section 64 (1A) is illegal. We find force in the contention. We may extract Section 64 (1A) for easy reference.

64(1A). Where the Government are of opinion that a Municipality consistently makes default in performing the duties imposed on it by law or in carrying out the orders or directions issued in accordance with law by the Government or exceeds or abuses its powers, they may, by notification in the Gazette, dissolve: the said Municipality and shall forward a copy thereof to the State Election Commission.

Non availability of a Chairperson is not a ground to invoke the provisions of Section 64(1A). None of the grounds stipulated in Section 64(1A) exist for invoking the power under Section 64 (1A). Section 11 (3) of the Act states where the office of a Chairperson is vacant the Deputy Chairperson shall exercise the powers and

discharge the duties of the Chairperson until a newly elected Chairperson assumes office. No grounds have been made out for dissolution of the Municipality and to conduct a fresh election. Election is a luxury which cannot be expected to be indulged in frequently in a democracy. Public money cannot be wasted for meeting the political ends of few persons. If the Chairperson is not being elected, the remedy is not to dissolve the Municipality. Therefore the prayers made in W.P.C. Nos. 29977 and 29965 of 2005 are only to be allowed.

22. Post of Chairperson is earmarked for scheduled caste/scheduled tribe community so as to uphold the constitutional principles enunciated under our Constitution. Five members of the scheduled caste community were elected by the electorate of Palakkad Municipality so as to see that one of them would hold the post of Chairperson of that Municipality. Election of Chairperson was held on 6.10.2005 at 10 A.M. Nobody came forward to submit nomination to the post of Chairperson. However, on the same day third respondent was elected as Deputy Chairperson. This Court as per the interim order dated 16.12.2005 directed the Election Commission to conduct fresh election to the post of Chairperson. Election Commission convened a meeting on 19.12.2005 for electing the Chairperson. Election was held on that day and one Chandrankutty was declared elected as Chairperson. But he refused to make and subscribe oath as provided under Section 143(2) before the Returning Officer lest the Deputy Chairperson would make and subscribe oath before him. Conduct of Chandrankutty in not assuming office of Chairperson, making mockery of the democratic process and thereby undermining the constitutional principles of reservation and the mandate of the people cannot be appreciated. Councillors were elected to the office to carry out the functions and duties assigned to them by the Kerala Municipalities Act. No sufficient cause has been shown by him for not making and subscribing oath as Chairperson and therefore the State Election Commission has got the powers to declare that he has vacated the office under Section 12(8A) and explore the possibility of conducting election afresh to fill up the post of Chairperson from scheduled caste community and if nobody from the members of scheduled caste community is coming forward again to accept the post of Chairperson, the possibility of reserving the post to women can be thought of failing which the post be dereserved leaving it to general category.

23. Writ of quo warranto is a judicial remedy against occupier of independent substantive public office or franchise or liberty. Writ of habeas corpus and prohibition are issued *ex debito iustitiae*, but the issue of writ in the nature of quo warranto is in the discretion of court, and a person cannot claim this writ as of right. Court can always refuse the same if the alleged usurper is not at fault. Writ of quo warranto is normally issued to protect public from usurpers to public office.

24. Law is well settled that a writ in the nature of quo warranto should not be a granted as a matter of course, it is a discretionary remedy to be granted depending upon the facts and circumstances of the case. Court administering writ of quo warranto should proceed with utmost care and caution and a judicial inquiry is warranted in such a case to examine whether he is an usurper of a public office and whether he is at fault. Court should consider all circumstances of the case including the conduct of the party and the circumstances under which he is holding that office and whether he has the mandate of an electorate to hold that office and such other relevant factors. Writ of quo warranto can be issued only against an usurper to an office or against a person who holds office without any authority. We are of the considered view that this is not a fit case where we should issue a writ of quo warranto since the third respondent is not an usurper of the office of Deputy Chairperson especially when he was/is always ready and willing to comply with the statutory provision.

25. We are of the view, this is not a fit case where this Court should exercise extra-ordinary jurisdiction to issue writ of quo warranto so as to defeat the mandate of the people at the expense of a person who is unwilling to occupy the post of Chairperson preventing the third respondent from making and subscribing oath before him. We feel it would be the travesty of justice if we oust the duly elected Deputy Chairperson through writ of quo warranto ignoring the mandate of the electorate of Palakkad Municipality and also the councillors who elected third respondent as Deputy Chairperson. Prayer for writ of quo warranto is therefore declined.

26. We may in this connection also refer to the principles laid down by the apex court in the matter of Special Reference No. 1 of 2002 Gujarat Assembly Elections

: AIR 2003 SC87 . Justice Arijit Passayat in his Lordship's concurring judgment has stated as follows:

The maxim of law *impotentia excusat legem* is intimately connected with another maxim of law *lex non cogit ad impossibilia*. *Impotentia excusat legem* is that when there is a necessary or invincible disability to perform the mandatory part of the law that *impotentia* excuses. The law does not compel one to do that which one cannot possibly perform. 'Where the law creates a duty or charge and the party is disabled to perform it, without any default in him, and has no remedy over it, there the law will in general excuse him.' Therefore, when it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control like an act of God, the circumstances will be taken as a valid excuse. Where the act of God prevents the compliance with the words of a statute, the statutory provision is not denuded of its mandatory character because of supervening impossibility caused by the act of God. (See Broom's Legal Maxims 10th edn at pp 1962-63 and Craies on Statute Law, 6th edition p. 258). These aspects were highlighted by this Court in Special Reference No 1 of 1974. Situations may be created by interested persons to see that elections do not take place and the caretaker Government continues in office. This certainly would be against the scheme of the Constitution and the basic structure to that extent shall be corroded.

The above mentioned principle would come to the rescue of the third respondent. The performance of the formalities prescribed by the statute has been rendered impossible not due to the fault of Deputy Chairperson. The third respondent on the other hand is willing to make and subscribe oath of office before the Chairperson or any other person nominated by the Government and therefore the law will always excuse him because he stood for upholding the democratic process.

27. We therefore allow W.A 2408 of 2005 and dismiss W.P.C. No 28913 of 2005. We declare that the third respondent in W.P.C 28913 of 2005 is not an usurper to the office of the Deputy Chairperson and hence he can discharge duties of the Chairperson, till the Chairperson is elected W.P.C. Nos. 29977 of 2005 and 29965

of 2005 seeking a direction to the Government not to dissolve the Municipal Council stand allowed. W.A.No 2531 of 2005 stands allowed and Ext.PI in W.P.C.No. 30262 of 2005 stands quashed. Quo warranto sought for in WPC No.31145 of 2005 as against respondents 6 to 10 is refused. Ext. P6 in WPC No. 31145 of 2005 stands quashed. W.P.C. No 34433 of 2005 would stand dismissed in view of our order dated 16.12.2005. The writ appeals and writ petitions are disposed of with the above directions.

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