

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present :-

The Hon'ble Justice Moushumi Bhattacharya

WPA 18735 of 2022

With

CAN 1 of 2022

Professor Syed Haider Hassan Kazimi & Ors.

vs

State of West Bengal & Anr.

For the petitioners	:	Mr. Rauf Rahim, Adv. Mr. Ali Azgar Rahim, Adv. Ms. Ankita Choudhury, Adv. Mr. Tanvir Hussain, Adv. Mr. Sattik Rout, Adv.
For the State	:	Mr. T.M. Siddiqui, Adv. Mr. Suddhadev Adak, Adv.
For the respondent no. 2	:	Mr. Abhrajit Mitra, Adv. Mr. Arif Ali, Adv. Mr. Yusuf Ali Mirza, Adv.
Last Heard on	:	18.05.2023.
Delivered on	:	14.06.2023.

Moushumi Bhattacharya, J.

1. The petitioners seek a writ or a direction in the nature of Certiorari for quashing a Notification dated 28.1.2022 and an order dated 27.7.2022 passed by the respondent no.1, State of West Bengal, Minority Affairs and Madrasah Educaion Department, nominating the private respondent no.2 as a member of Board of Waqf as a recognised Scholar of Islamic Theology belonging to the Shia Sect. The adjudication in this judgment is restricted to an application made by the petitioners for amendment of the writ petition for insertion of a prayer for a writ of Quo Warranto.

2. Learned counsel appearing for the respondent no.2 took an objection on the locus standi of the petitioners at the time of moving the writ petition on the ground that the petitioners are not persons aggrieved, whereupon learned counsel appearing for the petitioners prayed for leave to file an application for amendment of the prayers in the writ petition. Learned counsel appearing for the State supports the private respondent.

3. The application for amendment - CAN 1 of 2022 - seeks to insert a prayer seeking issuance of a writ or order/direction in the nature of Quo Warranto directing that the respondent no. 2 be removed as a member of Waqf Board, Kolkata since he fails to meet the eligibility criteria prescribed in section 14(1)(d) of The Waqf Act, 1995.

4. The parties before the Court have filed their respective affidavits to the application for amendment and have relied on case law in support of their contentions. The order dated 16.12.2022 records that the amendment application will be decided first.

5. The arguments urged on behalf of the petitioners, the State and the private respondent no.2 are briefly stated below.

6. The petitioners say that the amendment incorporating the prayer for Quo Warranto should be allowed since Article 226(1) of the Constitution empowers a High Court to issue writs for the enforcement of any of the rights conferred by Part III and "for any other purpose"; the contention being that the High Court should not take a hyper-technical approach while correcting the injustice brought to the Court.

7. The respondent no.1, State of West Bengal says that the writ petition is not maintainable since the petitioners, not being 'persons aggrieved', have failed to demonstrate their locus to file the writ petition. The private respondent no.2 urges that a writ of Certiorari, which was the prayer in the writ petition as filed, originally cannot co-exist with a writ of Quo Warranto since both the writs are mutually destructive. It is also argued that the scope of a writ of Certiorari is different from that of a writ of Quo Warranto and that the amendment is in abuse of process.

8. The decision which follows rests on whether a writ of Certiorari can co-exist -peacefully- with a writ of Quo Warranto and whether allowing the amendment would change the nature and character of the writ petition as originally filed.

9. The starting point of the controversy should be explained. The petitioners have come to the Court seeking the issuance of a Certiorari for quashing the impugned Notification and order passed by the State of West Bengal nominating the private respondent to function as a member of the Board of

Waqf. The objection raised was that the private respondent is not a recognised Scholar of Islamic Theology in Shia Sect as required under section 14(1)(d) of The Waqf Act, 1995. The respondents, on their part, objected to the maintainability of the writ petition on the ground that the petitioners are not persons aggrieved by the impugned Notification or the order under challenge. The petitioners hence filed for amending the prayers to include the writ of Quo Warranto to tide over the locus and maintainability objections.

Certiorari and Quo Warranto - Do they destroy each other?

Certiorari

10. One of the distinguishing features of a Writ of Certiorari is that the writ can be used to adjudicate on the validity of judicial acts. The other feature is that the Superior Court exercises control over judicial or quasi-judicial tribunals in a supervisory capacity and does not exercise the powers of an appellate tribunal in the sense of reviewing the evidence of the court or tribunal. The superior court demolishes the order which it considers to be without jurisdiction or palpably erroneous and the offending order is simply put out of the way (Ref: *T.C. Basappa v. T Nagappa*; AIR 1954 SC 440). The term “judicial acts” includes the exercise of quasi-judicial functions by administrative bodies or persons obliged to exercise such functions.

11. *Rex v. Electricity Commissioners; (1924) 1 KB 171* explained that if a body which has legal authority to determine questions affecting the rights of subjects and has the duty to act judicially, acts in excess of its legal authority, the acts will be subject to the controlling jurisdiction of the higher authority. *Province of*

Bombay v. Kusaldas S. Advani; AIR 1950 SC 222 clarified the position by laying down certain criteria under which Certiorari can be sought for including that the body must have legal authority and that the authority should be given to determine questions affecting rights of subjects. The duty to act judicially may arise in widely different circumstances where a straight-jacketed formula may not be feasible.

12. The consensus from case law leans towards the power of the High Court to remove and invalidate judicial acts including quasi-judicial acts by administrative bodies or other authorities where the Court or the Tribunal has acted without or in excess of jurisdiction. The absence of jurisdiction may arise not only from the nature of the subject-matter of the proceeding or from the absence of a mandatory / required preliminary proceeding but also where the Court is not legally constituted or suffers from a disability by extraneous considerations or collateral facts. Certiorari may also be issued where the Court or Tribunal has acted in stark disregard of the rules and procedures or in violation of the principles of natural justice. A manifest error apparent on the face of the proceeding will also attract a Writ of Certiorari. In *Rex v. Northumberland Compensation Appellate Tribunal*; (1952) 1 KB 338 at 357, Morris, L.J. summed up the position as:

“It exists to correct error of law when revealed on the face of an order or decision or irregularity or absence of or excess of jurisdiction when shown.”

Quo Warranto

13. A writ of Quo Warranto poses a question to the holder of a public office - "Where is your warrant of appointment by which you are holding this office?" In England, the Writ of Quo Warranto was issued on behalf of the Crown requiring a person to disclose the authority under which he was exercising his office, franchise or liberty. In essence, the person against whom the Writ was issued was an usurper of / a pretender to a public office, Court or public franchise.

14. The Writ of Quo Warranto affords a judicial inquiry in which any person holding an independent substantive body or office is called upon to show by what right he/she holds the said office. The Writ of Quo Warranto will oust him / her from that office if the inquiry leads to the finding that the holder of the office has no valid title. Quo Warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of appointments to public offices in violation of statutory provisions. The writ also protects citizens from being deprived of a public office to which he may have a right. (Ref: *University of Mysore v. C.D. Govinda Rao*; AIR 1965 SC 491). The case law on the subject also indicates that a citizen can claim a writ of Quo Warranto where he stands in the position of a relater and the person need not have any special or personal interest in the matter. *Rajesh Awasthi v. Nand Lal Jaiswal*; (2013) 1 SCC 501. In *Armed Forces Medical Association. v. Union of India*; (2006) 11 SCC 731, which was relied on in *Gambhirdan K. Gadhvi v. State of Gujarat*; (2022) 5

SCC 179, the rules of locus were relaxed in a Quo Warranto proceeding as a Quo Warranto is meant to protect the public from usurpers of public offices.

15. *University of Mysore* was relied upon in a Full Bench decision of the Delhi High Court in *P.L. Lakhanpal v. A.N. Ray*; *AIR 1975 Del 66* where relying upon *R v. Speyer (1916) 1 K.B. 595*, the Court opined that a Writ of Quo Warranto will not be issued if it is found that the issuance of such a writ will be futile and the alleged usurper could immediately be re-appointed to that very post. The Delhi High Court held that the question of mala fides of the appointing authority would not be relevant in a matter relating to a Writ of Quo Warranto. Halsbury's Laws of England 3rd Edition, Vol- II contains a summary of the decisions of English Courts with regard to the discretionary powers of a Court in issuing a Writ of Quo Warranto. In essence, a citizen must satisfy the Court that the office in question is a public office and is held by a usurper without legal authority which necessarily leads to the inquiry as to whether appointment of the said alleged usurper has been made in accordance with law or not.

There is no conflict between Certiorari and Quo Warranto

16. The law on the subject indicates that the Writs of Certiorari and Quo Warranto operate in independent fields. While Certiorari is for demolishing an order passed by an inferior (in the sense of hierarchy) Court or Tribunal for want of or in excess jurisdiction, a Quo Warranto authorises a citizen to question the legality of an appointment to a public office. The very nature of the right in Quo Warranto proceeding calls for relaxation of the locus of the relater

as held in *Gambhirdan K. Gadhvi*. The earlier decision of *Vinoy Kumar v. State of UP; (2001) 4 SCC 734* also notices the exception in a writ of Quo Warranto to the general rule that a person must have *locus standi* to file a writ as being personally affected by the impugned order or invasion of his / her fundamental rights. This principle was reiterated in *Ayaaubkhan Noorkhan Pathan v. State of Maharashtra; (2013) 4 SCC 465* and is being extracted below:

“Thus, from the above it is evident that under ordinary circumstances, a third person, having no concern with the case at hand, cannot claim to have any locus standi to raise any grievance whatsoever. However, in exceptional circumstances as referred to above, if the actual persons aggrieved, because of ignorance, illiteracy, inarticulation or poverty, are unable to approach the court, and a person, who has no personal agenda, or object, in relation to which, he can grind his own axe, approaches the court, then the court may examine the issue and in exceptional circumstances, even if his bona fides are doubted, but the issue raised by him, in the opinion of the court, requires consideration, the court may proceed suo moto, in such respect.”

17. This is precisely the reason why the petitioners sought to include the prayer for Quo Warranto in the amendment. To repeat, the Writ of Quo Warranto was brought in to neutralise the *locus* argument of the respondents.

18. Therefore, the question which is to be answered is whether the amendment would result in pitting Quo Warranto against Certiorari as irreconcilable actions and whether the nature and character of the writ petition would be irrevocably altered by allowing Quo Warranto to come in.

19. While a Quo Warranto points a questioning finger to an usurper of authority, a Certiorari demolishes the act of usurpation if it is found to be

without authority. Hence, both unleash their respective powers in uprooting the illegal act to start from a clean state. Both the writs provide recourse against the argument that Quo Warranto cannot question the authority of the private respondent since the private respondent was placed by a State-notification or had already taken charge of the office, deflects the issue and muddies the waters. The argument does not assist the respondents.

20. The emphatic conclusion is and must be that Certiorari and Quo Warranto may be independent, space-hugging bedfellows but are not warring or destructive of each other.

Locating the perceived conflict between Certiorari vs Quo Warranto in the present facts:

21. The petitioners are Shia Mohammedans and profess Islam. The petitioners claim to be actively associated with the welfare and upkeep of several Shia Imambaras/graveyards in the State of West Bengal. The petitioners hence claim to be persons interested in the Board of Waqf and particularly in the nomination of the private respondent as a Member of the said Board.

22. The petitioners say that the interest shown is covered under section 3(k) of the Waqf Act, 1995 which defines "*person interested in a Waqf*" to mean any person who is entitled to receive any pecuniary or other benefits from the Waqf and includes any person who has a right to offer prayer or to perform any religious rite in a mosque, idgah, imambara, dargah, maqbara, graveyard or any other religious institution connected with the Waqf or to participate in any

religious or charitable institution under the waqf - section 3(k)(i) of the Waqf Act.

23. The basis of the petitioners' objection to the nomination of the private respondent as the Member of the Board is under section 14(1)(d) which deals with the composition of the Board and includes the person to be nominated by the State Government from among the recognised scholars in Shia and Sunni Islamic Theology. The petitioners say that the respondent no. 2 does not have the requisite qualifications to be nominated as a Member of the Board and disputes the scholastic knowledge and abilities of the respondent no. 2. The petitioners have also placed reliance on section 101 of the Waqf Act and subsections (1) and (2) thereunder which provide inter alia that the Members of the Board, every officer and every other person duly appointed to discharge any duties imposed on him by the Act and every Mutawalli, every Member of the managing committee and every person holding any office in a waqf shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code, 1860.

24. As clarified at the beginning, the judgment is only restricted to deciding on the effect of the amendment; the legality and merits of the petitioners' contentions are hence not being gone into. The only purpose of the brief factual outline is to explain the presumable necessity for amending the writ petition.

25. The State of West Bengal and the nominated Member of the Board/ respondent no. 2 speak in one voice, namely, that the petitioners have failed to show that they are persons aggrieved by the impugned notification and order

nominating the private respondent as a Member of the Board. According to the respondents, the petitioners' fundamental rights have not been infringed by the impugned nomination which is the first basis for filing a writ petition under Article 226 of the Constitution.

26. Article 226(1) of the Constitution of India bestows the High Court with the power to issue 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 subject to the territorial jurisdiction of the High Court.

27. The generously-crafted language of Article 226(1) amplifies and unshackles the power to cover not only the five writs "*in the nature of...*" but also other directions or orders. Besides the mechanism of implementing the power, the purpose is also unrestricted in the sense that it includes issuance of directions "*... for any other purpose*" besides enforcement of any of the rights conferred by Part - III of the Constitution.

28. The widening of the coverage of the power to issue writs thus happens at two levels; the tools of implementation so to speak, namely, not only the five writs but also orders, directions or writs in the nature of the five writs and further for a limitless objective – "and for any other purpose" - for which the tools can be used. The words "in the nature of" clearly indicate that Article 226 was not framed to admit any technical argument of which a writ should be issued or for what purpose; or in other words, unnecessary clamouring on the nomenclature of the writs or making infringement of the fundamental rights as

sacrosanct for issuance of the writs. The message is clear; Article 226 is not meant to be hemmed-in by sidewinds of technicalities but should be directed to serve the object for which the provision was enacted - which is to reach injustice wherever it is found.

29. This was also the view of the Supreme Court in *T.C. Basappa and Dwarka Nath v. Income Tax Officer, Special Circle, D-Ward, Kanpur*; (1965) 3 SCR 536 where the Supreme Court reiterated that Article 226(1) is couched in comprehensive phraseology and confers a wide power on the High Courts to mould the reliefs to meet the unique and complicated requirements of the country. Besides the reach of Article 226 of the Constitution, in *State of Haryana v. Haryana Cooperative Transport Limited*; (1977) 1 SCC 271, the Supreme Court further held that the real task of the functions must be looked at, which in that case was the ineligibility of one Mr. Gupta to occupy the post of a Judge of the Labour Court and that although, the relief of Certiorari was appropriate, the High Court was empowered to issue any such suitable writ, order or direction as it deemed fit in the circumstances of the case. In that case, the first respondent had not specifically asked for a writ of Quo Warranto.

30. It is clear from the above decisions that the very language of Article 226(1) has made the name of the writ redundant. The High Court has been conferred with powers which cannot be curtailed by seeking an inappropriate writ. It matters little therefore that a party has asked for a writ of Certiorari instead of Quo Warranto at the time of filing of the writ petition as long as the

cause of action emanates from the pleading and directs the gaze of the Court where it should fall.

31. Notwithstanding the above, the petitioners in this case have also prayed for a writ in the nature of Prohibition for restraining the respondent no. 2 from becoming a Member of the Board of Waqf. The pleadings in support of the prayer can be found in paragraphs 5, 6, 7 and 8 of the writ petition, among others.

The requirement of petitioners being 'persons aggrieved' loses relevance in view of the above :

32. The accepted view is that the grievance of a person must correspond to the requirement of *locus standi* for judicial review. In *Vinoy Kumar*, the Supreme Court noted that a person would not have *locus standi* to file a writ petition if he is not personally affected by the impugned order or his fundamental rights have not been substantially affected. The presumption was that the relief under Article 226 of the Constitution is premised on a right in favour of the person invoking the jurisdiction. This view was also reiterated in *Ayaaubkhan Noorkhan Pathan*.

33. This view arises from the sub-text of Article 226(1) which contemplates an infringement, deprivation or violation of a fundamental right or enforcement of such right or for any other purpose. The Supreme Court however thought it fit to make an exception in the case of Quo Warranto since the person may come to the Court as a relater and an informant. Professor H.W.R Wade noted that Certiorari is not confined by a narrow concept of *locus standi* since it

contains an element of the *actio popularis*; looks beyond the personal rights of the applicant and is designed to keep the machinery of justice in proper working order by preventing inferior tribunals and public authorities from abusing their powers. [Referred to in *Bar Council of Maharashtra v. M.V. Dabholkar*; (1975) 2 SCC 702].

34. Therefore, besides the statutory support of section 3(k)(i) of Waqf Act, 1995, the petitioners' case for amendment cannot collapse by pitting Certiorari and Quo Warranto against each other as opposing forces or by saying that the nature and character of the writ petition would be irrevocably altered and would give rise to a new cause of action altogether. To borrow from The Code of Civil Procedure, 1908, the purpose of an amendment is to determine the real controversy between the parties. There is no doubt that the petitioners seek to challenge the appointment of the private respondent as a Member of the Board of Waqf on the statutory requirements under section 14(1)(d) of the Waqf Act. The petitioners have sought to react to the objection raised by the respondents on the absence of locus by bringing in the writ of Quo Warranto.

35. The decisions referred to above not only make such technicalities irrelevant but also focus on the broader objective of Article 226(1) of the Constitution which is to correct injustice. None of the decisions say that Certiorari and Quo Warranto are mutually destructive and cannot co-exist. In any event, by diluting the need to specify the writ, Article 226 negates the need for co-existence. Moreover, the argument that the appointment of the respondent no. 2 has been validated by the impugned notification also cannot

stop the amendment in its tracks since the very object of a writ of Quo Warranto is to question executive action in matters of appointment to public offices. *Steel Authority of India v. Union of India*; (2006) 12 SCC 233 involved combining two virtually different causes of action which cannot be equated with the facts of the present case.

36. The Supreme Court in *Common Cause, A Registered Society v. Union of India*; (1999) 6 SCC 667 held that judicial review lies not only against an inferior court or tribunal, but also against persons or bodies which perform public duties or functions.

37. The case law on the subject of the writs of Certiorari and Quo Warranto and the cause of action pleaded in the writ petition as filed persuade this Court to hold that the petitioner have made out a case for amendment. The amendment, if allowed, would neither change the nature and character of the writ petition nor introduce a discordant note in the form of the writ of Quo Warranto. The amendment is thus only formal in nature where the petitioners have sought to mend the constitutional loopholes even though this Court is of the view that the fabric of the original writ petition was resilient enough to hold the prayers of both Certiorari and Quo Warranto in its weave.

38. CAN 1 of 2020 is accordingly allowed and disposed of by permitting the writ petitioners to incorporate prayer (i) as stated in paragraph 7 of the application, namely, for a Writ, order or direction in the nature of Quo Warranto be issued directing that the respondent no. 2 be removed as a

Member of the Waqf Board since he fails to meet the eligibility criteria prescribed in section 14(1)(d) of the Waqf Act.

39. The writ petitioners shall amend the writ petition as indicated in the application and serve amended copies of the writ petition to the concerned respondents within 4 weeks from date. The petitioners shall be at liberty of mentioning the matter for hearing on merits before the appropriate Bench.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)