1963

La Mar Peay v. Board of Education of Provo City School District et al : Appellant's Answer to Petition for Rehearing and Brief in Support

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

LA MAR PEAY,
Plaintiff and Appellant,

vs.

BOARD OF EDUCATION OF PROVO CITY SCHOOL DISTRICT, a body corporate and politic, and MERRILL CHRISTOPHERSON, RAY MURDOCK, SHIRLEY PAXMAN, WILFORD E. SMITH, and LAMAR EMPEY, members of said Board,
Defendants and Respondents.

Case No.
9722

APPELLANT'S ANSWER TO PETITION FOR REHEARING AND BRIEF IN SUPPORT OF ANSWER TO PETITION FOR REHEARING

Appeal From Judgment of the Fourth District Court for Utah County

HONORABLE R. L. TUCKETT, JUDGE

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Case No. 9722

APPELLANT'S ANSWER TO PETITION FOR REHEARING

Plaintiff and Appellant respectfully answers the Defendants'-Respondents' Petition for Rehearing in the above entitled case as follows:

POINT I

The Supreme Court is not bound by the "executive" and "administrative" interpretation that has occurred regarding Section 11, Chapter 104, Laws of Utah, 1961 in the definition of the word "electors."

POINT II

The Supreme Court's construction of Section 11, Chapter 104, Laws of Utah was proper in holding that electors must meet certain property requirements.

POINT III

The Court should not consider in a Petition for Rehearing points that could have been brought up in the original hearing or were expressly abandoned in the original hearing.

POINT IV

The Court correctly decided that the notice given by the School Board as required by the statute was ambiguous and insufficient to appraise the voting public of the issues of the election.

DATED this 8th day of April, 1963.

NIELSEN, CONDER & HANSEN
ARTHUR H. NIELSEN
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BRIEF IN SUPPORT OF ANSWER TO PETITION FOR REHEARING

POINT I

THE SUPREME COURT IS NOT BOUND BY THE "EXECUTIVE" AND "ADMINISTRATIVE" INTERPRETATION THAT HAS OCCURRED REGARDING SECTION 11, CHAPER 104, LAWS OF UTAH, 1961 IN THE DEFINITION OF THE WORD "ELECTORS."

The Petitioners-Respondents agree that the Supreme Court is *not necessarily* bound by executive or administrative interpretation of statutes (See Petitioners' Brief for Rehearing, p. 4), but they divine in the present case that the Court gave *no* consideration to the executive and administrative interpretation. We are at a loss to determine how this conclusion was reached, unless the assumption was made that because the Supreme Court's decision was different than the school boards' and the Attorney General's the Court disregarded their decisions completely. The refusal to adopt a position does not mean that the position received no consideration. The fact that the present case was argued before the Court and a brief submitted thereon by the school board must at least implicitly mean that the Supreme Court considered their interpretation.

The Supreme Court is not bound by the previous decision of these bodies in the interpretation of the present statute. Justice Frankfurter in "Some Reflections on the Meanings of Statutes." 47 Col. L. Rev. 527, 536-37 (1947) presents an interesting dichotomy in the proper approach to the interpretation of statutes. He says:

> ". . . If a statute is written for ordinary folk, it would be arbitrary not to assume that Congress

intended its words to be read with the minds of ordinary men. If they are addressed to specalists, they must be read by judges with the minds of specialists."

In the statute before the Court the word that is in need of clarification is "electors." It seems absurd to think that the school boards are in a better position to interpret this word than the courts. The expertise of a school board is of little value in interpreting a word of such legal and historical meaning. In fact it would seem that the school boards have a built-in bias in interpreting the word "electors." They would logically choose an interpretation that would tend to favor their own position in a leeway election. And it follows that an "elector" with no property qualifications would be more prone to vote for an increase in property taxes than an "elector" with property. It is fair to let the school boards raise their interpretation to the Court for its consideration, which the Court has done, but then the Court must decide which interpretation is to stand. Judge Learned Hand in *Fishgold v. Sullivan Drydock & Repair Co.*, 154 F.2d 785 (2d Cir. 1946) aff'd. 328 U. S. 275 (1946) said this regarding the possible bias of administrative agencies:

> "We do not forget that the cannon which the plaintiff invokes is not confined to decisions inter partes, like those of the Federal Trade Commission, the Interstate Commerce Commission, the Labor Board, or the Tax Court; it extends also to the interpretations of officials charged with the duty of enforcing statutes. Skidmore v. Swift & Co., 323 U. S. 134, 65 S.Ct. 161; Great Northern R. Co. v. United States, 315 U S. 262, 62 S.Ct.

529, 86 L.Ed. 836. Whether the weight to be given to such rulings is less than to regulations for the conduct of, or decisions in, contested cases, has never been expressly decided, though it was intimated in Skidmore v. Swift, supra, 323 U.S. at page 139, 65 S.Ct. at page 164; and see Judge Frank's dissent in Duquesne Warehouse v. Railroad Retirement Board, 2 Cir., 148 F.2d 473, 485-487. There is indeed a basis for making such a distinction because the position of a public officer charged with the enforcement of a law is different from one who must decide a dispute. If there is a fair doubt, his duty is to present the case for the side which he represents, and leave decision to the court, or the administrative tribunal, upon which lies the responsibility of decision. If he surrenders a plausible construction, it will, at least it may, be surrendered forever; and yet it may be right. Since such rulings need not have the detachment of a judicial or semi-judicial decision, and may properly carry a bias, it would seem that they should not be as authoritative; and of this sort were the rulings of the Director and the Attorney General in the case at bar, unlike the decisions of the War Labor Board and the direction of the Solicitor of the Labor Department."

Another factor not considered by the Petitioners is the inaction of the Utah State Legislature to correct the interpretations made by the Supreme Court. The decision now under consideration was published expeditiously by the Court in time for consideration by the recent session of the Utah Legislature, and the Legislature did nothing to correct what the Petitioners feel is an obvious error. The inaction of the Legislature would tend to confirm the Court's decision as to the intent

of the statute, especially in light of the fact that the case has aroused the interest of no less than four other school boards who have filed amici curiae briefs.

POINT II

THE SUPREME COURT'S CONSTRUCTION OF SECTION 11, CHAPTER 104, LAWS OF UTAH WAS PROPER IN HOLDING THAT ELECTORS MUST MEET CERTAIN PROPERY REQUIREMENTS.

The Supreme Court has repeatedly held that where a Petition for Rehearing presents nothing new and important it will be refused. See *Ducheneau* v. *House,* 4 U. 483, 11 P. 618 (1886),*Jones* v. *House,* 4 U. 484, 11 P. 619 (1886). And also where the Court has not misconstrued or overlooked some material facts and not overlooked some statute or decision nor applied an improper principle of law that caused the Court to reach an improper decision, the Court will deny a Petition for Rehearing. *Cummings* v. *Nielsen,* 42 U. 157, 129 P. 619 (1913). The Petitioners have not presented any proper new or overlooked matters, nor have they presented any decisions or improper consideration of the Court that would entitle this case to be reheard.

In light of the above, and the fact that we could add nothing to what has already been presented to the Court on this point, we feel it would be redundant to offer further cases to substantiate the present position of the Court.

POINT III

THE COURT SHOULD NOT CONSIDER IN A PETITION FOR REHEARING POINTS THAT COULD HAVE BEEN BROUGHT UP IN THE ORIGINAL HEARING OR

WERE EXPRESSLY ABANDONED IN THE ORIGINAL HEARING.

Petitioner on page 4 of his original brief before the Supreme Court stated:

> "Issue number (2) above, is the questioned statute unconstitutional because it requires no property qualification of electors voting on the proposition, was argued extensively before the trial court. It is not cited by appellant here as a ground for reversal, nor is this point argued. We, therefore, take it to be abandoned on this appeal and shall not belabor the question further."

The Supreme Court has repeatedly ruled that points cannot be raised on rehearing that could have been raised in the original hearing by the briefs and oral argument. *In re Lowe's Estate,* 68 U. 49, 249 P. 128 (1926). In this particular case the Petitioners-Respondents and the Appellant expressly abandoned this constitutional issue, and it is not proper to let it be raised at this time in the Petition for Rehearing. The Petitioner has not raised this constitutional issue in his petition, but the Amici Curiae's Petition raises it in Point I.B of their petition and argues it extensively. The Amici Curiae should not be entitled to a privilege that is denied the original parties to the litigation, and therefore the Court should not consider their newly raised issue of constitutionality on this point. See *Barnes v. Lehi City,* 74 U. 321, 279 P. 878 (1929) wherein the Court held that the Amicus Curiae was not entitled to a rehearing when all parties to the dispute accepted the decision as final.

The Petitioners-Respondents and the Amici Curiae argue extensively that the Court should have required a showing that sufficient invalid votes were cast to change the election results before invalidating the election. See Petitioners' Brief, page 8, and Amici Curiae's Brief, page 23. This point was not presented at the original hearing nor was it even presented in the trial court, and therefore cannot be relied upon in the Petition for Rehearing as ground for reversal. See *In Re Lowe's Estate, supra; Harrison v. Harber,* 44 U. 541, 142 P. 716 (1914); *Swanson* v. *Sims,* 51 U. 485, 170 P. 774 (1918); *Dahlquist* v. *Denver and R.G.R. Co.* 52 U. 438, 174 P. 833 (1918).

The reason for the above rule is obvious, and its application in the present case is essential. The parties concerned were aware of this argument, and could have brought up the issues they now wish to present to the Court at the original hearing. They have had their day, and should not be allowed to string out the litigation ad infinitum by holding back points that could easily have been presented in the original hearing.

POINT IV

THE COURT CORRECTLY DECIDED THAT THE NOTICE GIVEN BY THE SCHOOL BOARD AS REQUIRED BY THE STATUTE WAS AMBIGUOUS AND INSUFFICIENT TO APPRAISE THE VOTING PUBLIC OF THE ISSUES OF THE ELECTION.

This point has already been argued extensively, and we do not wish to raise any new authorities or argument than what we have already presented. We would like, however, to call to the attention of the Court the

fact that not only was the notice given to the public defective, but that the final authorization of the school board to act upon the affirmative vote of the people was tied to the ambiguous term "minimum basic program." Both the Petitioners-Respondents and the Amici Curiae give the public powers of comprehension not possessed by the school board itself in framing the actual issues of the election. Amici Curiae's Brief p. 33, Petitioner's Brief, p. 15.

Perhaps it is true that the public is not easily misled, but it is at least entitled to the protection of having the essential facts placed before it so that an educated decision might be made. It is too much for them to have to rely on the idea that right will be done—they should be allowed to know exactly for what they are asked to vote.

CONCLUSION

It is regrettable that a law that affects so many people suffers such obvious defects, and that it requires the necessity of such extensive clarification by the Supreme Court. It is also regrettable that the election held by the Board of Education of the Provo City School District did not meet the requirements of the act. But such acts and interpretations are within the purview of the judiciary, and the Court has properly undertaken the task of shedding light on what is admittedly a very clouded problem. The very fact, however, that the question under decision affects so many makes the decision, whichever way it is decided, important. Defendants-Respondents infer the Court is placing catastrophe before the school boards and inviting a "plethora of liti-

gation," and perhaps this is true. The Courts, however, also owe a duty to the public at large and to the legislature to interpret the statute before it and to rectify any improper acts in its administration. The fact that it is inconvenient to the school boards perhaps makes the Court's decision less pleasurefull but it makes it none the less necessary.

We respectfully submit that the Court has already decided the present case, and that no compelling reason has been presented for it to change its position, and therefore we ask the Court to deny the Petition for Rehearing.

Respectfully submitted,

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