

Anajamma Vs. S. Pushpamma and Another

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Court : Andhra Pradesh

Decided On : Nov-07-2000

Reported in : 2001(1)ALD77; 2001(1)ALT235

Judge : Motilal B. Naik and; A. Gopal Reddy, JJ.

Acts : Andhra Pradesh Panchayat Raj (Election Tribunals in respect of Gram Panchayats, Mandal Parishads and Zilla Parishads) Rules, 1995 - Rules 4 and 5; A.P. Panchayat Raj (Conduct of Election) Rules, 1994 - Rules 34 and 35; Representation of People Act, 1951 - Sections 81, 82, 83, 86(1) and 117; Jammu and Kashmir Representation of People Act, 1957 - Sections 94; High Court Rules - Rules 14 and 15; [Code of Civil Procedure \(CPC\), 1908](#) - Order 6, Rule 16 - Order 7, Rule 11; [Constitution of India](#) - Article 225

Appeal No. : WP No. 21988 of 1999

Appellant : Anajamma

Respondent : S. Pushpamma and Another

Advocate for Def. : Mr. M. Rama Rao, Government Pleader for ;Panchayat Raj, Advs.

Advocate for Pet/Ap. : Mr. K. Mahipathy Rao, Adv.

Judgement :

ORDER

A. GOPAL REDDY, J.

1. This writ petition is filed aggrieved by the order passed by the Junior Civil Judge, Jedcherla in OP No.1/96 dated 4-10-1999 in which the election of the petitioner as Sarpanch of Alwanpalli Grampanchayat, Jedcherla Mandal, Mahabubnagar District was set aside and the first respondent was declared elected as Sarpanch of the said village.

2. The writ petitioner, first respondent and another contested the election to the office of Sarpanch of Alwanpalli Grampanchayat held on 27-6-1995. The writ petitioner was declared elected as Sarpanch of the village by a margin of three votes by the Returning Officer on 21-10-1995. Questioning the declaration of election results, the first respondent herein filed OP No. 12/95 before the Principal Junior Civil Judge, Mahabubnagar on 2-11-1995 which was registered on 6-12-1995 and transferred to the Junior Civil Judge, Jedcherla and renumbered as OP No.1/96. The election petitioner stated that the recounting of votes undertaken by the Election Officer pursuant to the Circular No.E/1864/1995 dated 19-10-1995 issued by the Chief Election Commissioner and announcing results declaring the first respondent elected as Sarpanch is contrary to the Conduct of Election Rules. According to the first respondent-election petitioner, she secured 425 votes, whereas the writ petitioner secured 423 votes at the time of counting which took place on 27-6-1995 and at the request of the writ petitioner, re-counting was done second time and continued the figures and votes secured by the first respondent election petitioner. The Election Officer without any valid reason recounted the votes on 21-10-1995 and tampered the votes polled in favour of the election petitioner and declared some votes invalid and after doing so, he declared the writ petitioner elected as Sarpanch.

3. The said OP No.12 of 1995 was contested by the writ petitioner admitting the counting of votes which took place on 27-6-95 but she denied the election petitioner securing more votes than her and she stated that at the time counting it was raining heavily and the school building in which counting was in progress there was no electricity supply and that counting took place with the aid of candles. Neither the writ petitioner nor her agents were present at the time of counting,

hence she gave an application for recounting to the authorities after coming to know of the counting which had taken place on 27-6-1995. Neither the election petitioner nor other contested candidates were aware of the results and votes secured at the time of counting on 27-6-1995. Pursuant to the orders issued by the Chief Election Authority, counting was done on 21-10-1995. The election petitioner having participated in the recounting without any protest which was done in the presence of all the contested candidates and their agents and have signed the result sheet accepting counting, is estopped from challenging the recounting process as improper. She also denied about the irregularities committed at the time of recounting and with regard to invalid votes, etc. It is also stated in the counter the relief of declaring the election petitioner as duly elected Sarpanch, cannot be granted. The election petition filed by the petitioner herein barred by time.

4. In order to substantiate her case, the respondent No.1 who filed election petition examined herself as P.W.1 and two more witnesses were examined on her behalf and Ex.A1 Form No. 17 declaration was marked on her behalf. The writ petitioner herself examined as RW1 and one more witness was examined and Exs.R1 to R4 were marked on her behalf.

5. Basing upon pleadings of the parties, the Election Tribunal framed the following points for consideration :

1. Whether the recounting of votes on 21-10-1995 is valid?
2. Whether the petitioner herein secured the highest number of votes than the first respondent?
3. Whether the petition is liable to be dismissed summarily for not depositing the security amount of Rs.100-00 at the time of presentation of petition and depositing the same on 12-12-1995?
4. Whether there is any necessity in this petition that the second respondent shall be on record for a declaration in favour of the petitioner depending upon the finding on other points?

5. Whether the petitioner is entitled for the declaration as prayed for by her?

6. The Election Tribunal decided the issues 1 to 4 in favour of the election petitioner-first respondent and in view of the findings on issue Nos. 1 to 4, the Tribunal declared that the writ petitioner's election to the office of Sarpanch of Alwanpalli is void and declared that the first respondent is duly elected as Sarpanch of the village. Questioning the same, the present writ petition is filed.

7. Sri K. Mahipathi Rao, learned Counsel appearing for the petitioner raised the following two grounds :

The first respondent herein who filed the election petition on 2-11-1995 has not deposited the security amount of Rs.100/- at the time of presenting the petition which is mandatory and not depositing the same is fatal and the Election Tribunal should have dismissed the election petition on this ground alone without making any further enquiry. Secondly, Counsel pointed out that the first respondent submitted her election petition on 2-11-1995 and the same was returned on 6-11-1995 for complying with some objections. The objection No.4 being Court fee is not paid on the lodgment schedule. The election petition was again presented on 13-11-1995 but the amount was deposited only on 12-12-1995 much after the specified time of filing the election petition. Under Rule 5 (i) of A.P. Panchayat Raj (Election Tribunals in respect of Gram Panchayats, Mandal Parishads and Zilla Parishads) Rules, 1995 (hereinafter called as 'the Rules, 1995') issued in G.O. Ms. No.111 PR, RD & R (Elec. III Department, dated 3-3-1995 the petitioner shall deposit a sum of Rs.100/- in cash as security for the costs and if he/she fails to deposit the same, the Tribunal shall dismiss the election petition. Admittedly, the petitioner deposited the amount on 12-12-1995 but not on the date when the election petition was filed and also not within 30 days from the date of declaration of the result. The said rule is mandatory and the Tribunal cannot proceed with the election petition. The finding of the Tribunal on issue No.3 that the rule does not say deposit of amount on the date of presentation of the petition and even before the first appearance the amount deposited will amount to compliance of Rule 5(i) is erroneous and same is liable to be set aside. In support of his contentions, he placed reliance on the following decisions :

1. Aeltemesh Rein v. Chandulal, : [1981]3SCR142 .

2. Sharif-Ud-Din v. Abdul Gani, : [1980]1SCR1177 .

3. Rajendra Singh v. Usha Rai, : [1984]3SCR22 .

4. Satya Narain v. D Raja Ram, .

8. He nextly contended that as Rule 4(2) of the Rules, 1995 if the election petitioner seeks any further declaration that she should be declared as duly elected, she has to implead all necessary parties who have contested the election along with her. Once the first respondent is seeking a declaration that she should be declared as elected to the office of Sarpanch, in the absence of all necessary parties who have contested the election, such a declaration cannot be granted. Though the petitioner impleaded other contested respondent, namely, Vanithamma, later she withdrew the election petition against her. In view of the same, the Tribunal erred in setting aside the election of the writ petitioner and declaring the first respondent, elected as Sarpanch of Alwanpalli. In support of his contention, he relied on the following decisions :

1. R.D. Paranjpe v. Ram Jethmalani, : AIR1978 Bom356 .

2. Shipra v. Shantilal Khoiwal, AIR 1996 SC 1691.

9. Sri M. Rama Rao, learned counsel for the respondent No.1 supported the impugned judgment by contending that the election petition was presented on 2-11-1995 and the same was returned on 6-11-1995. Office has not raised any objection about deposit of Rs.100/- in cash. The Election Petitioner filed lodgment schedule along with the petition and the office returned the petition with an objection that Court fee is not paid on the lodgment schedule. After duly complying with the same, she resubmitted the election petition on 13-11-1995 by paying Court fee on lodgment scheduled. Office of the Court failed to issue lodgment schedule before 20-11-1995 and the same was issued on 11-12-1995 and immediately the next day 2001(1) FR-F-6 she deposited an amount of Rs.100/- on 12-12-1995. In view of the same, it cannot be said that the election petitioner had not complied with the Rule 5(i) of the Rules, 1995. According to him, unless the

office issues the lodgment schedule, the election petitioner cannot deposit the amount and the office has also not taken any objection with regard to the payment of the same, hence the lower Court rightly held that it is not a substantive defect.

10. Me nextly contended that recounting ordered by election authority is an illegal order and recounting made by the election officer pursuant to the order of the Chief Election Authority is illegal and setting aside the order passed by the election officer wilt amount to restoring the illegal order made by the election officer and in such circumstances, the Court shall not exercise the writ jurisdiction to quash the order which will have an effect of restoring an illegal order. In support of his contention, he placed reliance on the following decisions.

1. M.C. Mehta v. Union of India, : [1999]3SCR1173 .

11. According to him under sub-rule (7) of Rule 34 of A.P. Panchayat Raj (Conduct of Election) Rules, 1994, it is the duty of the Election Officer that after counting of all valid voles, he should make the entries in a result sheet in Form No.17 and announce the particulars. Though counting has taken place on 27-6-1995 the Election Officer violated the above rule, therefore, recounting made by the Election Officer cannot be sustainable and prayed for dismissal of the writ petition.

12. In view of the above rival contentions, the following points arise for our consideration viz.,

1. Whether Rule 5(ii) mandates the Election Tribunal to dismiss the election petition for not depositing a sum of Rs.100/- at the time of presentation of election petition?

2. Whether the election tribunal is justified in declaring the first respondent as duly elected in the absence of other contestants being made party to the petition?

Before examining the points at issue, it is appropriate to examine the relevant provisions of the Rule, 1995.

13. Sub-rules (i) and (ii) of Rule 5 of the Rules, 1995 read as follows:

'5(i) At the time of presentation of the petition, the petitioner shall deposit with it in cash Rs.100/- (Rupees one hundred only) as security for the costs of same.

Explanation :-Where the election of more than one returned candidate is called in question a separate deposit shall be made in respect of each such returned candidate.

(ii) If the provisions of sub-rule (i) are not complied with, the Election Tribunal shall dismiss the petition.'

14. It is not in dispute that the first respondent herein filed an election petition on 2-11-1995 and she has not deposited a sum of Rs.100/- at the time of presenting the same. The Court returned the same on 6-11-1995 with some objections. The objection No.4 is that she has to pay Court fee on lodgment schedule. After complying with the objections, the same was resubmitted by the first respondent on 11-11-1995. Thereafter, the office issued lodgment schedule on 11-12-1995 and she deposited the same on 12-12-1995. These are the finding of facts recorded by the Tribunal.

15. The Supreme Court in Aeltemesh Rein's case (supra), considering non deposit of the security deposit as required by Section 117 of the Representation of People Act, 1951 held as follows:

'The only question which survives is as to what is the consequence of non-compliance with Section 117 of the Act. That question has been settled by the decision of this Court in Charan Lal Sahu v. Nand Kishore Bhatt, : [1974]1SCR294 , wherein it was held that the High Court has no option but to reject an election petition which is not accompanied by the payment of security amount as provided in Section 117 of the Act Section 86(1) of the Act provides that the High Court shall dismiss an election petition which does not comply with the provisions of Section 81, 82 or 117. In that view of the matter, the High Court was right in dismissing the election petition summarily.' (Para 3)

16. The Supreme Court in the case of Sharif-Uddin (supra) while considering the effect of non-compliance of the requirement contemplated under Jammu and

Kashmir Representation of People Act, 1957 held that non-compliance of mandatory provision will result in dismissal of the petition as provided under Section 94 of that Act. While considering the above section, the Supreme Court observed as follows:

'The difference between a mandatory rule and a directory rule is that while the former must be strictly observed, in the case of the latter, substantial compliance may be sufficient to achieve the object regarding which the rule is enacted. Certain broad propositions which can be deduced from several decisions of Courts regarding the rules of construction that should be followed in determining whether a provision of law is directory or mandatory may be summarised thus: The fact that the statute uses the word 'shall' while laying down a duty is not conclusive on the question whether it is a mandatory or directory provision. In order to find out the true character of the Legislation, the Court has to ascertain the object which the provision of law in question is to subserve and its design and the context in which it is enacted. If the object of a law is to be defeated by non-compliance with it, it has to be regarded as mandatory. But when a provision of law relates to the performance of any public duty and the invalidation of any act done in disregard of that provision causes serious prejudice to those for whose benefit it is enacted and at the same time who have no control over the performance of the duty, such provision should be treated as a directory one. Where however, a provision of law prescribes that a certain act has to be done in a particular manner by a person in order to acquire a right and it is coupled with another provision which confers an immunity on another when such act is not done in that manner, the former has to be regarded as a mandatory one. A procedural rule ordinarily should not be construed as mandatory if the defect in the act done in pursuance of it can be cured by permitting appropriate rectification to be carried out at a subsequent stage unless by according such permission to rectify the error later on, another rule would be contravened. Whenever a statute prescribes that a particular act is to be done in a particular manner and also lays down that a failure to comply with the said requirement leads to specific consequent, it would be difficult to hold that the requirement is not mandatory and the specified consequence should not follow.' (Para 9)

17. The Punjab and Haryana High Court in Satya Narain's case (supra) held that an election petition must comply with the requirement of Sections 81, 82, 117 of the Representation of the People Act, 1951 at the time when it is originally presented to the authorised officer of the High Court and no such defect can be permitted to be rectified at any time thereafter even within the period of limitation. It is further held that the High Court has neither conferred nor can confer on the Registrar or any authority under Rule 14 or 15 of High Court Rules to permit the rectification of such a defect even within the period of limitation for filing the election petition. Therefore, permission by the Deputy Registrar for removal of the factual defect is without jurisdiction.

18. Recently, the Apex Court in Narayanaswamy v. C.P. Thirunavukkarasu, : [2000]1SCR292 , held that an election petition based on the rights which are purely the creature of a statute, and if the statute renders any particular requirement mandatory, the Court cannot exercise dispensing powers to waive non-compliance and non-compliance with the provisions of Section 83 of Representation of the People Act, 1951 may lead to dismissal of the petition if the matter falls within the scope of Order 6, Rule 16 and Order 7, Rule 11 of the Code of Civil Procedure.

19. The Supreme Court in M. Karunanidhi v. H.V. Hands, : [1983]2SCR629 , considering Section 117(1) of the Representation of People Act, 1951 and the rules framed by the Madras High Court under Article 225 of the [Constitution of India](#) held that the requirement regarding making of a security deposit of Rs.2000/- in the High Court is mandatory, the non-compliance of which must entail dismissal of election petition in limine under sub-section (1) of Section 86 of the Representation of People Act. In the above case, the deposit was made as per Section 17 within the period of limitation for filing the election petition but the controversy was whether the deposit made on the strength of pre receipted challis issued by Accounts/Department of the High Court in the Reserve Bank of India to the credit of Registrar of High Court, Madras was substantial compliance or not. The Supreme Court held that the same amount to substantial compliance. But in the case on hand, the deposit was made much beyond the period of limitation for filing the election petition.

20. Rule 5(i) of the Rules, 1995 as extracted above clearly mandates that the petitioner shall deposit with it in cash a sum of Rs.100/- as security for the costs. Rule 5(ii) specifically says that if the provisions of Sub-rule (i) are not complied with, the Election Tribunal shall dismiss the petition. Therefore, a combined reading of Rule 5(i) and (ii) mandate that whenever an election petition is presented, the petitioner shall deposit a sum of Rs.100/- with it. If the petitioner fails to comply with the same, the Election Tribunal shall reject the same for non-compliance. Even as per the finding of the Tribunal, though it was returned for compliance, the same was not complied with within the period prescribed i.e., before expiry of 30 days for presentation of election petition, it is only after expiry of thirty days, the amount was deposited by the petitioner. Once the mandatory provision is not complied with, the Tribunal has to only dismiss the petition. The finding of the tribunal that if the deposit is made before the first appearance of the respondent amounts to compliance, is erroneous and cannot be sustained in view of the law laid down by the Supreme Court in the case of Sharpe (supra). In view of the above discussion, we are of the view that the election petition filed by the respondent No. 1 is liable to be dismissed in limine and point No.1 is accordingly answered in favour of the petitioner.

21. It is not in dispute that the election petitioner not only prayed for setting aside the election of the writ petitioner but also sought a declaration that she should be declared elected as Sarpanch and alternatively for re-election.

22. Learned Counsel for the petitioner strenuously contended that unless all the contesting parties are impleaded and are on record, the first respondent is not entitled for any declaration as such to declare her as duly elected as Sarpanch of Alwanpali village and the Lower Court though framed point No.4 for consideration, erroneously held that mere withdrawal of the petition against respondent No.2 subsequently, will not amount to non-compliance of Rule 4.

23. In order to appreciate the contention advanced by the learned Counsel, it is necessary to refer to Rule 4 of the Rule, 1995 which reads as follows:

4. (i) If the irregularities alleged in the petition are likely to affect the validity of the election of more than one returned candidate, the petitioner shall join as

respondents to his petition all such returned candidates.

(ii) The petitioner may, if he so desires, in addition to calling in question the election of the returned candidates or of all or any of the returned candidates, as the case may be, claim a declaration that he himself or any other candidate has been duly elected in which case he shall join as respondents to his petition all other candidates who were nominated for the election but who had not withdrawn before the polling.

24. Though the election petitioner impleaded both contested candidates, namely, the writ petitioner as R1 and Smt. Vanithamma as R2, process was not deposited as per the docket order dated 15-2-1996, relating to R2 in the election petition. When the matter is taken up for hearing on 8-3-1996, the counsel for the election petitioner filed a memo withdrawing the case against R2 with a prayer to delete her from the array of respondents and the same was recorded by the Court.

25. The Bombay High Court in the case of Paranjpe (supra) considered the question whether the candidate who withdrew the nomination subsequently is a necessary party or not. Bombay High Court relying upon the judgment of the Apex Court in Mohan Raj v. Surendra Kumar, : [1969]1SCR630 , held that when the said Act requires a person to be a necessary party and not impleading the necessary party enjoins the penalty of dismissal of the petition for non-joinder of a party, the provisions of the Code of Civil Procedure cannot be used as curative means to save the petition and amendment cannot be allowed to cure the defect.

26. The Apex Court in Ram Pratap Chandel v. Chaudhary Lajja Ram, : (1998)8SCC564 , considering the question of non-impleadment of contesting candidate as per sub-section (a) of Section 82 of Representation of People Act held that a candidate who was duly nominated continued to be a candidate for the purposes of Section 82(b) inspite of withdrawal and affirmed the dismissal of the election petition by the High Court for non-joinder of necessary parties. While dismissing the same, the Supreme Court held that even inaction, laches or delay on the part of the respondent in pointing out the defect of non-joinder cannot relieve the Court of its statutory obligation of dismissing such an election petition. This is so even where non-impleadment is shown to be because of an advocate's

default.

27. Rule 4(ii) of the Rules, 3995 as extracted above, clearly postulates that, the election petitioner if so desires in addition to calling in question the election of the returned candidates and claim a declaration that he himself or any other candidate has been duly elected in which case he shall join as respondents to his petition all other candidates. The said rule specifically says unless the election petitioner impleaded all the candidates who contested the election he cannot be declared as elected in the absence of such parties. Significantly though when the respondent impleaded other contesting candidates to the election petition but the advocate who representing her filed a memo withdrawing the election petition against the other contested candidate, in view of the infirmity, the first respondent is not entitled to any declaration to declare her elected as Sarpanch of Alwanpalli village. The Tribunal below committed an illegality in declaring the first respondent as duly elected candidate.

28. The submission by the learned Counsel for. the respondent that ordering of recounting of votes by the election authority is illegal and when once the Election Tribunal sets aside that illegal order, upsetting the order passed by the Election Tribunal will amount to restoring the illegal order passed by the election authority is untenable and the same cannot be accepted for the reason that under Rule 35 of the A.P. Panchayat Raj (Conduct of Election) Rules, 1994, if an announcement was made under sub-rule (7) of Rule 34, a candidate or in his absence his election agent or any of his counting agents may apply in writing to the Officer for recounting of the votes either wholly or any part stating the grounds on which he demands such recounting. As per sub-rule (7) of Rule 34 after counting of all ballot papers contained in all ballot boxes, the Election Officer shall make the entries in a result sheet contained in Form No. 17 and announce the particulars and only after announcing the particulars a candidate can ask for recounting in writing. The Election Officer, who is the third respondent in election petition, in the counter, admitted that he has not announced the particulars by making entries in Form No. 17 in view of the instructions of the election authorities. In fact in the recounting, which took place on 21-10-1995 the writ petitioner secured more votes than the first respondent and Form No. 17 was also signed by the first respondent without

any protest. The first respondent has not pointed out any defect in the counting of votes nor any irregularities in the invalidation of the votes polled in her favour. If the argument of the learned Counsel is accepted, it would amount to allowing the first respondent as Sarpanch by virtue of order passed by the Tribunal, who admittedly secured less number of votes than the writ petitioner.

29. It is held by the Apex Court in catena of decisions that the right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it and the Act and Rules framed thereunder. The Election Law being a complete code, any challenge to the elections must be in the manner provided. Any deviation entitles the dismissal of the election petition summarily without making any further enquiry.

30. Having regard to our above discussion, we hold both the points against the first respondent.

31. In the result, the writ petition is allowed and the impugned order passed by the Election Tribunal in OP No. 1/96 dated 4-10-1999 is quashed. Consequently, OP No. 1/96 on the file of Junior Civil Judge, Jedcherla stands dismissed. No costs.