

Shajilal Vs. Leena

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Court : Kerala

Decided On : Jan-15-2004

Reported in : 2004(1)KLT653

Judge : R. Rajendra Babu, J.

Acts : Kerala Panchayat Raj (Contuct of Election) Rules, 1995 - Rules 48, 50 and 51; [Kerala Panchayat Raj Act, 1994](#) - Sections 48, 48(1), 50 and 78

Appeal No. : M.F.A. No. 342 of 2003

Appellant : Shajilal

Respondent : Leena

Advocate for Def. : Aysha Youseff and; Molly Jacob, Adv.

Advocate for Pet/Ap. : S. Sundaresan (Thachodu) and; M.R. Rajesh, Adv.

Disposition : Appeal dismissed

Judgement :

R. Rajendra Babu, J.

1. This Appeal is at the instance of the petitioner in O.P. (Election) No. 24 of 2002 before the District Court, Thiruvananthapuram. The petitioner filed the above Election Petition for setting aside the bye-election conducted on 17.1.2002 to

Ward No. B-12 of Varkala Block Panchayat and to declare that the petitioner was the elected candidate. The above petition was dismissed by the District Judge, Thiruvananthapuram by Order dated 13.2.2003. The above order is under challenge in this Appeal.

2. The appellant and respondent were candidates in the bye-election held on 17.1.2002 to Ward No. B12 of Varkala Block Panchayat. The scrutiny of the nominations was conducted on 20.12.2001 and the appellant raised an objection that the first respondent was holding the post of Nodel Prereak in the Varkala Block Panchayat attached to the Kerala State Literacy Mission and thus he was disqualified to contest the election and though such a contention was raised, the authorities had not considered the above contention regarding the disqualification and permitted the first respondent to contest the election. The counting of votes was held on 18.1.2002. The total number of eligible voters in all the sixteen polling stations was 11097 and 5921 voters cast their votes including one tender vote by voter No. 612 Ammini, It was alleged that on counting of the votes held on 18.1.2002 the appellant and the first respondent got 2874 votes each and respondents 3 and 4 got 70 and 160 votes respectively and 39 votes were found invalid, and though the appellant wanted to declare the result by lot under Section 79 of the Kerala Panchayat Raj Act, the Returning Officer, made a re-counting of the ballots in polling station No. 12/73/VIII-1 and in the recounting, one vote was found missing and the above missing was caused by the removal of a vote by one Ratnakumar, the election agent of the first respondent. After completion of the counting, without declaring the result, the Returning Officer conducted a repoll for the area covered within the polling station No. 12/73/VIII-1 on 21.1.2002 without giving adequate prior intimation and in the second poll, 101 additional voters were permitted to cast their votes and the first respondent got a lead of 17 votes and he was declared as elected. The petitioner challenged the conduct of the repoll alleging that it was in violation of the provisions of law. Thus the petitioner appellant prayed for setting aside the election of the first respondent and for declaring the petitioner has been elected.

3. Heard the learned counsel for the appellant and the first respondent. One of the grounds raised in the election petition challenging the election was that the first

respondent was disqualified from contesting the election as he was holding the post of Nodel Prereak under the National Literacy Mission. Though such a ground was raised in the appeal memorandum also, the above ground was not at all canvassed at the time of argument.

4. The main argument advanced by the learned counsel for the petitioner was that the procedure adopted by the authorities in having conducted a re-polling in polling station No. 12/71/VIII-1 was illegal. Though it was alleged that on counting of votes held on 18.1.2000 both the appellant and the first respondent secured 2874 votes each, the evidence did not disclose the same. The evidence on record would show that the first respondent secured 2874 votes whereas the appellant secured 2873 votes. In polling booth No. 12/73/VIII-1 one vote was found missing though it was polled. There was one tender vote. In the above circumstances, the Returning Officer intimated the matter to the Election Commission and the Election Commission directed a repoll in booth 12/73/VIII-1.

5. Learned counsel for the petitioner submitted that when the Returning Officer had prepared the result sheet in Form No. 25, he should have considered the tender vote. Rule 48 of the Kerala Panchayat Raj (Conduct of Election) Rules deals with the counting of votes. It says that every ballot paper which is not rejected under Rule 47 shall be counted as one valid vote. The proviso to Rule 48(1) says that no cover containing tender ballot papers shall be opened and no such ballot paper shall be counted. In view of the above prohibition under R.48, the Returning Officer cannot open the cover containing the tender ballot and count. The Returning Officer intimated the matter regarding the missing of a vote and the existence of a tender vote before the Election Commission, as the margin of votes between the appellant and the first respondent was only one. The Election Commission invoking Section 78 of the Kerala Panchayat Raj Act declared the polling at booth No. 12/73/VIII-1 as void and declared a repolling, considering the peculiar circumstances of the case. The Election Commission held that the missing of one vote from the polling station No. 12/73/VIII-1 and in the presence of a tender vote would affect the result of the election, though the first respondent was holding one vote in excess of the votes secured by the appellant. The procedure adopted by the Election Commission in declaring a re-poll in Station

12/73/VIII-1 was in accordance with law and I do not think that there was any error committed by him in adopting to such a course. If the margin of the votes between the appellant and the respondent was more, naturally there was no necessity for making a repoll. But, as the margin was only one and there was a tender vote, it would be difficult for taking a decision regarding the result and as such the procedure adopted by the Election Commission declaring the polling as void in the above polling station and ordering a repoll was in accordance with law. Hence I find no reasons for interfering with the above procedure adopted by the Election Commissioner.

6. Another argument advanced by the learned counsel for the appellant was that when the votes secured by the parties had been entered in the result sheet in Form 25, there was no scope for the Returning Officer to report the matter to the Election Commission and the only option left with him was to declare the result. The above argument also cannot be accepted, in view of Section 78 of the Kerala Panchayat Raj Act and Rules 48 and 51 of the Kerala Panchayat Raj (Conduct of Election) Rules. Rule 48 deals with the counting of votes. Sub-rule (e) says that after the counting of all the ballot papers used in the polling station has been completed, the Returning Officer shall record the details regarding thereof in part 2 of Form 24 and in the result sheet in Form 25 and announce the particulars. Rule 51 deals with recounting of votes. Sub-rule (1) says that after completion of the counting of votes under Rules 48 and 50, the Returning Officer shall record in the result sheet in Form 25 the total number of votes recorded in respect of each candidate and announce the particulars. Sub-rule (2) says that after announcing all the particulars so made, a candidate in his absence, his election agent may apply in writing to the Returning Officer to recount the ballot papers either in full or in part stating the ground on which he demands recount. The Rule further states that if the Returning Officer is satisfied, he can order the recount. So, when the counting of votes has been recorded in the result sheet, it does not mean that the result should be announced, but what is recorded in Form 24 and Form 25 should be announced to the parties or to the agents. The result need not be announced solely on the ground that the counting particulars had been entered in the result sheet. A recount of ballots or whether the procedure under Section 78 need be adopted can be decided only after recording the counting particulars in the result

sheet. When there was one vote missing and the margin of votes secured by both the petitioner and first respondent was one and there was a tender vote, the only plausible alternative available with the Returning Officer was to report the matter to the Election Commission and the Election Commission had adopted the further course of conducting a repoll in the polling station where there was missing of one vote. Though the appellant raised a contention in the petition that a vote was removed by the agent of the first respondent, he could not substantiate the same by adducing any reliable piece of evidence. Hence the missing of the vote could not be properly explained by the petitioner. The trial court has considered the entire evidence and circumstances in the proper perspective and held that the petitioner failed on establishing the grounds urged in the petition and dismissed the petition. I find no reasons to interfere with the above order, and hence this appeal has only to be dismissed.

In the result, this appeal is dismissed.

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