

Padmakumar Vs. Unnikrishnan

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Court : Kerala

Decided On : Feb-16-2004

Reported in : 2004(1)KLT1097

Judge : P.R. Raman, J.

Acts : [Kerala Panchayat Raj Act, 1994](#) - Sections 100, 101, 107, 113 and 114;
[Code of Civil Procedure \(CPC\) , 1908](#)

Appeal No. : W.P. (C) No. 38508 of 2003

Appellant : Padmakumar

Respondent : Unnikrishnan

Advocate for Def. : Murali Purushothaman, Adv.

Advocate for Pet/Ap. : V. Chitambaresh,; T.C. Suresh Menon,; M.R. Valsa,;

Judgement :

P.R. Raman, J.

1. Petitioner herein was a candidate who challenged the election of the first respondent herein by filing an election petition before the Munsiff's Court, Karunagappally, Election held was under the Kerala Panchayat Raj Act (in short 'the Act'). The first respondent herein was declared elected from Ward No. 7 of

Clappanna Grama Panchayat. The Munsiff's Court declared the election as void under Section 100 of the Act. The first respondent herein has preferred an appeal before the District Court, Kollam as R.F.A. (Ele) No. 61/2003, which is pending consideration. Hence, the merits of the contention regarding the validity of election is not a matter presently arising for consideration within writ proceedings.

2. The limited question raised in this Writ Petition is regarding the power of the Appellate Court to grant a stay in election matters under the Act. As per Ext.P3 order dated 8.5.2003 in I.A.No. 572/2003 passed by the District Judge, Kollam, which reads 'Objection filed. Interim stay and notice to respondent 1 to 3 by 9.6.2003'. The order obviously does not refer to any of the objection raised. Challenging the said order the petitioner has filed this Writ Petition.

3. Learned counsel appearing for the petitioner raised mainly two contentions: (1) that the order is non speaking and without considering the objections raised, (2) that the order passed by the Munsiff's Court declaring the election as void cannot be stayed by the Appellate Court. He also placed reliance on some of the provisions in the Act in support of his contentions. Learned counsel appearing for the respondents on the other hand contended that the power of the Appellate Court is very wide and no limitation can be placed on the power of the appellate authority in the matter of granting the interim order. It is his further case that granting any interim order is incidental to the appellate power. Learned standing counsel appearing for the Election Commission submitted that there is difference on the appellate power under the Act and the Representation of Peoples Act. According to him, a blanket stay of operation of the order cannot be granted by the Appellate Court, but however, contended that there is no embargo in staying the bye election. The Election Commission is bound to notify fresh bye election unless the same is stayed in which event appeal itself become infructuous.

4. Before advertng to the contentions raised by the petitioner and respondents, it is necessary to refer to some of the provisions in the Act, which are relevant for the purpose of this case. Section 88 of the Act confers jurisdiction on the civil court to try an election petition and in the case of a Village Panchayat, the appropriate Munsiff's Court is conferred with the jurisdiction. Section 89 of the Act deals with

the presentation of petitions. Section 90 deals with parties to the petition and as per Section 100 of the Act after the trial of the election petition, the Munsiff's Court shall make an order either (a) dismiss the election petition, (b) declare the election of the returned candidate to be void and the petitioner or any other candidate to have been duly elected. Section 101 of the Act further obliges the Court as to what are the other orders to be passed. In this case, the election was declared as void under Section 102 read with Section 34(j) of the Act. As per Section 107 of the Act, an order under Section 100 or Section 101 shall take effect as soon as it is pronounced by the Court. Section 113 deals with appeals and any person aggrieved by an order shall prefer an appeal on any question of law or of fact before the District Court on the decision of the Munsiff's Court and the time for preferring the appeal is given under Section 113(2) of the Act. The power to condone the delay in entertaining the appeal is conferred on the appellate court.

5. The first submission of the learned counsel appearing for the petitioner is that there is no specific provision to grant stay of the order passed by the Munsiff's Court while dealing with an election petition. He referred to similar provisions contained in the Representation of People Act, more particularly Section 116B(2), as per which where an appeal preferred against an order made under Section 98 or Section 99, the Supreme Court may on sufficient cause being shown and on such terms and conditions as it may think fit, stay the operation of the order appealed from. Section 116B(1) itself provides for grant of stay by the High Court itself while trying an election petition. It is, therefore, contended that while the Representation of People Act have conferred specific power on the appellate court to grant a stay and in the absence of any such enabling provisions, the District Court to which an appeal lies against the order of the Munsiff's Court in an election matter under the Act cannot grant any interim order of stay. The learned counsel appearing for the respondents on the other hand submitted that in the matter of procedure by the appellate court all the provisions of Code of Civil Procedure are applicable vide Section 114 of the Act and according to him even the Munsiff's Court is not a special Tribunal and as per Section 88 the Legislature has conferred the power to try an election petition on the civil court. He has also referred to a bench decision of this Court in *Aisha Potty v. The Returning officer*, ILR 2001 (3) Kerala Series 538.

6. It is settled law that granting of an interim order by the appellate court is incidental to the appellate power and therefore in the absence of any restriction imposed by the statute itself the power can be exercised on settled principles of balance of convenience and to sub serve the main relief sought for and to preserve the right of parties until final decision is rendered.

7. In this connection, the learned counsel appearing for the respondents also referred to a decision of the Supreme Court in *Income Tax Officer, Cannanore v. M.K. Mohammed Kunhi*, AIR 1969 SC 430. The Apex Court while dealing with the powers of the appellate authority under the Act against the penalty imposed held 'right of appeal is a substantive right and the questions of fact and law are at large and are open to review by the Appellate Tribunal. Indeed the Tribunal has been given very wide powers under Section 254(1) for it may pass such orders as it thinks fit after giving full hearing to both the parties to the appeal. If the Income Tax Officer and the Appellate Assistant Commissioner have made assessments or imposed penalties raising very large demands and if the Appellate Tribunal is entirely helpless in the matter of stay of recovery the entire purpose of the appeal can be defeated if ultimately the orders of the departmental authorities are set aside. It is difficult to conceive that the legislature should have left the entire matter to the administrative authorities to make such orders as they choose to pass in exercise of unfettered discretion'. In the present case as already noticed, as per Section 113 of the Act, any person aggrieved by an order is entitled to prefer an appeal before the District Court and such an appeal could be on any question of law or of fact and as per Section 114 of the Act, the District Court may dispose of the appeal in accordance with the procedure laid down in the Code of Civil Procedure, 1908 for the hearing of appeals and the decision of the court in the appeal shall be final. In such circumstances, it cannot be contended that the appellate authority has no power to grant a stay merely because the statute does not specifically confer any such power. However, the nature of the orders to be passed by the appellate authority will depend upon the limitation if any placed under the statute itself. Section 114 opens with the expression subject to the provisions of this Act and of the rules if any made thereunder the District Court or the High Court may dispose of the appeal in accordance with the procedure laid down in the Code of Civil Procedure 1908. When an appeal is preferred under the

provisions of the statute itself, the power of the appellate authority being a statutory conferment, while passing an interim order, regard shall be had to the provisions of the Act. In this connection, Section 107 of the Act specifically provides that an order under Section 100 or Section 101 shall take effect as soon as it is pronounced by the court. Therefore, the moment a order is passed by the Munsiff's Court declaring the election as void, the order has come into effect on the day the order is being pronounced by that court. Once an order has come into effect, then the question of staying the order of the Munsiff's Court does not arise, since such stay will be contrary to Section 107 of the Act. At the same time, in order to preserve the right of parties, until a final decision is rendered in the appeal, it will be open to the appellate authority to pass such orders as it thinks fit, at the same time not in violation of Section 107 of the Act. In the present case, the appellate court has given a blanket stay of operation of the order, which is clearly in violation of Section 107 of the Act. Further, stay of operation of an order can be passed only before it comes into operation and not afterwards.

8. However, it will be open to the appellate authority to pass such orders as it deem fit and appropriate in the facts and circumstances of each case so as to preserve right of the parties. It is also necessary in this connection to take into consideration the stand of the Election Commission, that in the absence of any order passed, the Election Commission will be bound to issue a notification for conducting a bye-election. So, if the Election Commission issues notification for bye-election that will virtually render the appeal itself infructuous. It will be open to an appellate court to consider all such aspects and can even impose restrictions on the right of the elected candidate and also to consider whether he could be permitted to participate in the meetings of the Panchayat. These are only general guidelines to be followed while considering the petition seeking interim relief in an election dispute under appeal.

9. In the facts and circumstances of the case, there will be a direction that the first respondent can participate in the meetings and proceedings of the Panchayat, but, he cannot exercise any voting right in any such meetings. The Election Commission shall not proceed to issue any fresh notification pursuant to the judgment of the Munsiff's Court until the disposal of the appeal by the appellate

court. The interim order passed by the District Court is modified to the above extent.

The Writ Petition is disposed of as above. The appellate court also may dispose of the appeal as early as possible, at any rate, within a period of three months from the date of receipt of a copy of this judgment.

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