

Radhakrishnan Vs. the Electoral Registration Officer

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Court : Kerala

Decided On : Dec-11-2008

Reported in : 2009(1)KLT38

Judge : S. Siri Jagan, J.

Acts : Kerala Municipality Act - Sections 80(3); Kerala Municipality (Registration of Electors) Rules - Rules 18, 19, 20, 21 and 22

Appeal No. : WP (C) No. 35863 of 2008 (T)

Appellant : Radhakrishnan

Respondent : The Electoral Registration Officer

Advocate for Def. : Murali Purushothaman, SC, K.S.E.Comm

Advocate for Pet/Ap. : G. Sreekumar (Chelur), Adv.

Judgement :

S. Siri Jagan, J.

1. A very difficult question relating to preparation of electoral roll in a Panchayat bye - election arises in this case. The petitioners claim to be persons residing in the address given in the writ petition. Going by the same, they are persons, who are entitled to be included in the electoral roll for Ward No. 19 of the Shornur

Municipality. Election notification for bye - election to that Ward was notified on 14.11.2008. The names of the petitioners were included in the draft electoral roll . Against inclusion of the names of the petitioners in the draft electoral roll, the 5th respondent filed complaint contending that the petitioners are not ordinarily resident in that ward of the Municipality and therefore not entitled to be included in the electoral roll. Based on the complaint of the 5th respondent, Exts.P6 to P9 notices were issued to the petitioners for an enquiry by the Registration Officer. At the time of enquiry, the 5th respondent did not appear. Thereafter, the objection raised by the 5th respondent was rejected and final electoral roll was prepared and published on 7.10.2008, including the petitioners also therein, by Ext.P11. Going by Rule 22 of the Kerala Municipality (Registration of Electors) Rules, an appeal against the decision of the Registration Officer in the matter of publication of electoral roll lies with the appellate authority. However, there are two conditions attached to the invocation of the right of appeal. One is that the appeal shall not lie where the person desiring to appeal has not availed himself of his right to be heard by or to make representations to the Registration Officer on the matter which is the subject matter of the appeal. Second is that the appeal should have been filed within 15 days from the date of announcement of the decision.

2. The 5th respondent filed an appeal against the order of the Registration Officer refusing to delete the names of the petitioners from the draft electoral roll. Although the appeal suffered from the two vices mentioned above, for the reasons best known to him, the appellate authority chose to entertain the appeal. Thereafter, by Ext.P12 notification issued on 20.11.2008, the names of the petitioners were deleted from the electoral roll, purportedly, on the basis of an order passed on 14.11.2008 in the appeal filed by the 5th respondent, which order was not communicated to the petitioners. The petitioners are now challenging Ext.P12 order seeking the following reliefs:

- i) Call for the records leading to Ext.P12 and may be pleased to quash the same.
- ii) Issue an appropriate writ, order or direction commanding the second respondent to consider Ext.P13 and to decide the same within such time as may be fixed by this Hon'ble Court.

3. A counter affidavit has been filed by the 5th respondent and the 6th respondent - Election Commission has filed a statement . The 5th respondent does not dispute the fact that he did not avail of his right to be heard by the Registration Officer at the time of consideration of his objections against inclusion of the names of the petitioners in the electoral roll. He also does not dispute the fact that the appeal was filed beyond the time stipulated in Rule 22. The said facts are endorsed by the Election Commission also in their statement. However, the contention now raised before me is that notwithstanding the fact that the appellate authority could not have entertained the appeal under Rule 22 pursuant to the order passed by him, the names of the petitioners have been deleted from the electoral roll and the last date for submitting nominations in the bye election was on 21.11.2008. Therefore, going by the prohibition in Sub-section 3 of Section 80 of the Kerala Municipality Act, the names of the petitioners cannot now be included in the electoral roll.

4. In answer to the above contentions, the petitioners would contend that the question of addition of the petitioners in the electoral roll does not arise. According to them, the action of the appellate authority in entertaining the appeal itself was without jurisdiction and therefore orders passed on the appeal filed by the 5th respondent itself and all further steps pursuant thereto are nullities and non-est. Therefore the purpose of the bye - election notified on 14.11.2008, the only electoral roll validly prepared is only the electoral roll in existence prior to the order of the appellate authority and therefore the bar of Section 80(3) is not attracted at all. In support of their contention that the entertainment of the appeal by the appellate authority is without jurisdiction, the petitioners rely on the decisions of *Premerajan v. State of Kerala* 2008(1) KLT 873, *Simon v. State of Kerala* 2008(1) KLT 658 and *Muhammed Kunju M.A. v. Biju and Ors.* ILR 2008 Ker 290

5. The learned Counsel for the Election Commission, while frankly admitting that the order of the appellate authority was without jurisdiction, submits that the Election Commission and the Returning Officer are helpless in the matter, in view of the various decisions of the Supreme Court and this Court on the subject which are *Baidyanath Panjira v. Ram Mahto and Ors.* : 1970 CriLJ843 , *Mohinder Singh Gill and Anr. v. The Chief Election Commissioner, New Delhi and Ors.* : [1978]2SCR272 , *Narendra Madivalapa Kheni v. Manikrao Patil and Ors.* :

[1978]1SCR193 , Anugrah Narain Singh and Anr. v. State of U.P. and Ors. (1996) SC 303, Lakshmi Charan Sen and Ors. v. A.K.M. Hassan Uzzaman AIR 1985 SC 1233, Rajan v. Sahir 2003(3) KLT 1081 , State Election Commission v. Krishnan 2001(1) KLT 285 and Muhammed Ali v. State Election Commission : 2006(3)KLT496 .

6. I have considered the rival contentions in detail.

7. Rule 22 of the Kerala Municipality (Registration Electors) Rules reads thus:

22. Appeals from orders deciding claims and objections.- (1) An appeal shall lie from any decision of the Registration Officer under Rule 18, Rule 19 or Rule 20 to such officer of Government as the State Election Commission may designate in this behalf (hereinafter referred to as the Appellate Officer):

Provided that an appeal shall not lie where the person desiring to appeal has not availed himself of his right to be heard by, or to make representations to, the Registration Officer on the matter which is the subject of appeal.

(2) Every appeal under Sub-rule (1) shall be:

(a) in the form of a memorandum signed by the appellant, and accompanied by a copy of the order appealed against and a fee of Rs. 2/- (Rupees two) to be paid:

(i) by means of non-judicial stamps, or

(ii) in such other manner as may be directed by the State Election commission, and

(b) presented to the Appellate Officer within a period of fifteen days from the date of announcement of the decision or sent to that officer by registered post so as to reach him within that period.

(3) The presentation of an appeal under this rule shall not have the effect of staying or postponing any action to be taken by the Registration Officer under Rule 21.

(4) Every decision of the Appellate Officer shall be final, but in so far as it reverses or modifies a decision of the Registration Officer, shall take effect only from the date of the decision in appeal.

(5) The Registration Officer shall cause such amendments to be made in the roll as may be necessary to give effect to the decisions of the Appellate Officer under this rule.

Therefore, the first thing before entertaining the appeal what the appellate authority should consider is whether the appellant can validly file an appeal. If the appellant cannot file the appeal then the consideration of the appeal on merits is without jurisdiction. Secondly, the appellate authority can validly entertain the appeal only if the appeal is filed within the period of limitation prescribed in Rule 22. If it has been filed beyond the period of limitation prescribed, then also consideration of the appeal on merits would be without jurisdiction in so far as the appellate authority has not been vested with the power to condone the delay in filing the appeal under that rule. The decisions cited by the petitioners support this view. Therefore, applying the ratio of those decisions, I have no hesitation to hold that the decision of the appellate authority in the appeal filed by the 5th respondent is totally lacking in jurisdiction. That being so, his order on the appeal is a total nullity and non-est in law. The order of the appellate authority being non-est Ext.P12 passed based on that order stated to have been passed on 14.11.2008 by the appellate authority and all further steps taken pursuant to the same are also nullities.

8. The very conduct of the appellate authority in the matter is also suspect. It is not disputed before me that the order dated 14.11.2008 has not been neither communicated nor made known to the petitioners. The learned Counsel for the 3rd respondent would submit that the order dated 14.11.2008 was received by the Registration Officer on 15.11.2008 and it was forwarded to the press for printing. But he also does not dispute the fact that it was not served on the petitioners at any time. The petitioners were appraised only of Ext.P12. That was admittedly on 20.11.2008. It is pertinent to note here that the last date for submitting nominations for the bye election was 21.11.2008. Therefore, by not intimating the petitioners

about the order dated 14.11.2008, the appellate authority and the Registration Officer had effectively prevented the petitioners from resorting to their legal remedies available to them before the last date for submitting nominations. The question now before me is as to whether in such situation, relying on the decision of the Supreme Court cited by the learned Counsel for the Election Commission, relief should be denied to the petitioners. In this connection I note that the Supreme Court has in the decision of Election Commission of India v. Ashok Kumar and Ors. : AIR 2000 SC2979 held that judicial review is not totally barred against the action taken or orders issued by the Election Commission. Apex court held that if there is a case of malafide action of the election commission or arbitrary exercise of power or if it has acted in breach of law, judicial review will be maintainable and without interrupting, obstructing or delaying progress of the election proceedings, judicial intervention is available, if assistance of the Court has been sought for merely to correct or smoothen the progress of the election proceedings to remove obstacles therein or to preserve vital piece of evidence, if the same would be lost or destroyed or rendered irretrievable by the time the results are declared and the stage is set for invoking the jurisdiction of the Court. Of course, the learned Counsel for Election Commission would contend that, that decision cannot be taken as the law on the subject, in so far as it is a three bench decision and the constitution bench of the Supreme Court had in the decision of N.P. Ponnuswami v. The Returning Officer : [1952]1SCR218 held to the contrary and therefore, the decision in Ashok Kumar's Case (Supra) cannot be applied to the facts of this case.

9. From a reading of the decisions cited by the learned counsel for the Election Commission and the facts of this case noted above, it is very clear to me that it is to prevent the mischief the sort of which has been committed in this case that the Supreme Court has taken the precaution of excluding the jurisdiction of the Court in interfering with electoral rolls after the last date of submitting nominations. That being so, I am of opinion that appropriate interpretation is called for to avoid that mischief in this case, especially when the situation was brought about by the apparently malafide action of the appellate authority in entertaining an appeal without jurisdiction and keeping the decision in that appeal away from the petitioners till the last date preventing them from approaching this Court for

appropriate remedies before the last date for submitting nominations. In such circumstances a wronged citizen should not be left without a remedy. In any event, I am of opinion that in so far as the order of the appellate authority is clearly and admittedly without jurisdiction, a nullity and non-est in law. On declaring it to be so, the only electoral roll existing as on the last date for submitting nominations would be the electoral roll which was in existence prior to the order of the appellate authority in which admittedly the petitioners' names were included. Therefore, I am satisfied that the returning officer and the election commission can be directed to conduct the election on the basis of the electoral roll which was in existence prior to Ext.P12 and the order referred to therein, which was the only valid electoral roll in existence in the matter of bye election to Ward No. 19 of the Shornur Municipality pursuant to notification dated 14.11.2008. Accordingly, the petitioners are entitled to succeed in this writ petition. Ext.P12 and the order referred to therein are quashed. It is directed that the election to ward No. 19 of the Shornur Municipality scheduled to be held on 1.12.2008 shall be conducted on the basis of electoral roll, which was in existence prior to the impugned orders.

I further direct the 6th respondent to conduct an enquiry into the conduct of the appellate authority, which prime facie appears to be motivated, and if the appellate authority is found to have misconducted himself, to take disciplinary action against him.

The writ petition is disposed of as above.