

Santhosh George Vs. Mathai

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Court : Kerala

Decided On : Aug-11-2006

Reported in : 2006(4)KLT584

Judge : K. Padmanabhan Nair, J.

Acts : [Kerala Panchayat Raj Act, 1994](#) - Sections 30, 81, 83, 86 and 87, 93(5), 100 and 102; [Evidence Act, 1872](#) - Sections 40 to 44; [Companies Act, 1956](#) - Sections 617; Kerala Co-operative Societies Act, 1969; Kerala Municipality Act; Representation of People Act, 1951 - Sections 86(1); Code of Civil Procedure (CPC) - Order 6, Rules 11 and 16 - Order 7, Rule 11; [Constitution of India](#) - Articles 136, 226 and 227

Appeal No. : W.P. (C) No. 19259 of 2006

Appellant : Santhosh George

Respondent : Mathai

Advocate for Pet/Ap. : K. Ramakumar and; T. Ramprasad Unni, Advs.

Disposition : Petition dismissed

Judgement :

K. Padmanabhan Nair, J.

1. The first respondent in Election O.P. 12/2005 on the file of the Munsiff Court, Muvattupuzha, which is the designated court for conducting court for conducting trial of Election Petitions arising from the election to the local bodies, is the petitioner in this Writ Petition. The petitioner and the respondents were candidates for the election to Ward No. VI of Paingottur Grama Panchayat in Ernakulam District for which polling was held on 24.9.2005. The petitioner was declared elected. The petitioner secured 358 votes and the first respondent secured 327 votes. The second respondent got only five votes. 11 votes were declared invalid.

2. The first respondent filed O.P. No. 12/2005 to declare the election of the petitioner void on the ground that the petitioner is an employee working in Model Engineering College, Thrikkakara, run by the Institute of Human Resources Development for Electronics ('IHRDE' for short) which is a corporation fully controlled by the Government of Kerala and hence disqualified to contest the election for Grama Panchayat in view of the provisions contained in Section 30 of the Kerala Panchayat Raj Act. It was alleged that in spite of the objection raised by the first respondent the Returning Officer accepted the nomination of the petitioner. It is averred that the petitioner was a permanent employee of the Model Engineering College, Thrikkakara from 1.9.1998 and on the date of nomination as well as on the date of election he was working as such and he was not served with any relieving orders and hence his nomination was improperly accepted by the Returning Officer. It was further alleged that if the nomination of the petitioner was rejected the first respondent who secured the highest votes is eligible to be declared as elected. It was contended that even before the election the first respondent informed the voters of Ward No. VI about the disqualification of the petitioner and they casted their votes fully knowing that the petitioner was not qualified to contest the election. It was further contended that if the petitioner's nomination was rejected the majority of the votes would have been polled in favour of the first respondent/election petitioner.

3. The petitioner in this Writ Petition who is the first respondent in Election Petition filed a preliminary objection contending that the Election Petition filed preliminary objection contending that the Election Petition is not maintainable in law and it is not filed in conformity with the provisions of the Kerala Panchayat Raj Act in

relation to the presentation of the Election Petitions and pleadings mandatorily required to be made in such petitions. It is contended that the vague contention raised in the Election Petition is that the nomination of the first respondent has been improperly accepted under Section 102 of the Kerala Panchayat Raj Act. It is contended that to attract Section 102 the mere improper acceptance of the nomination is not sufficient. It is contended that there is no specific pleadings to the effect that the result of the election has been materially affected due to the improper acceptance of the nomination of the first respondent and hence the Election Petition ought to have been dismissed at the threshold. It is contended that the Apex Court has held that the preliminary issue of maintainability of the Election Petition is to be decided as a preliminary objection in the Election Petition. It is contended that the allegation that the petitioner is an employee of a corporation fully controlled by the State Government and hence he is not qualified to contest the election is a vague allegation. It is contended that it was held by the Apex Court that the vague pleadings entail dismissal of an Election Petition at the threshold. It is also contended that in C.R.P. No. 1326/2002 this Court held in favour of the petitioner which is suppressed in the Election Petition. It is averred that on remand by this Court the District Court in C.M.A. No. 372/2002 held that the employees of the I.H.R.D.E. are not employees in the service of the State Government and there is no disqualification under the provisions of the Kerala Panchayat Raj Act. It is contended that the contention of the respondent that the petitioner is not qualified to contest the election is not a statutory requirement and hence no triable case has been made out in the Election Petition and the same is to be dismissed. The petitioner prayed for a decision on the question of maintainability as preliminary issue.

4. The Election Tribunal considered the matter and held that the averment that the result of the election is not materially affected is not correct and there is proper averments to that effect. Regarding the other contention that whether a person working in a college run by the I.H.R.D.E is disqualified from contesting the election, the Election Tribunal held that that can be decided only after taking evidence and the Tribunal held that the petition is maintainable. Challenging that preliminary order this Writ Petition is filed.

5. The learned Counsel appearing for the petitioner has argued that the finding of the learned Munsiff that there is sufficient pleadings to the effect that the result of the election is materially affected is not correct. It is argued that such an averment is conspicuous by its absence. It is also contended that the other contention raised by the first respondent that since the petitioner is a teacher working in Model Engineering College, Thrikkakara run by the I.H.R.D.E. which is a corporation fully controlled by the State Government was raised in a former Election Petition also. Initially it was held that the teacher working in the Model Engineering College, Thrikkakara is disqualified from contesting in the election. Ultimately the matter reached this Court and this Court in C.R.P. No. 1326/2002 set aside those findings and remanded the matter for reconsideration to the District Court and the District Court in C.M.A. No. 372/2002 held that the I.H.R.D.E. and its employees are not employees in the service of the State. It is argued that in view of that decision the respondent/election petitioner is not entitled to raise such a contention in the Election Petition and those pleadings do not show any cause of action and hence the Election Petition is to be thrown out at the threshold.

6. It is argued that there is no averment in the Original Petition that the result of the election so far as the petitioner is concerned materially affected due to the improper acceptance of the nomination of the petitioner. It is true that the petitioner has not extracted Section 102 of the Kerala Panchayat Raj Act in the Original Petition. It is not necessary to repeat the exact words of the section in the pleadings. In this case the first respondent/election petitioner had specifically averred that overruling his objection the Returning Officer improperly accepted the nomination of the petitioner. It was also averred that if the petitioner's nomination was rejected the majority of the votes polled would have been polled in favour of the first respondent. In this case the allegation is that the nomination of the returned candidate was improperly accepted. If the contention of the respondent that the petitioner is disqualified to contest as candidate is upheld the only inference possible is that result of the election so far as it relates to the petitioner is materially affected. So the mere failure to repeat the exact words of the section is not material.

7. In paragraph 6 of the Election Petition the first respondent had averred that he informed the voters of the Ward No. VI that the nomination of the petitioner was improperly accepted and if the petitioner's nomination was rejected the majority of the votes polled would have been polled in his favour. There is sufficient pleadings in the Election Petition to hold that the contention of the first respondent was that the result of the election was materially affected due to the improper acceptance of the nomination of the petitioner. So, there is no merit in the contention raised by the petitioner that there is no pleading to the effect that the result of the election was materially affected due to the improper acceptance of nomination of the petitioner. The finding of the court below is correct and does not call for any interference and I confirm the same.

8. The next contention raised is that an employee working in a Model Engineering College run by IHRDE is not disqualified to contest for chosen to fill a seat in the Panchayat. It is averred that the petitioner is an employee working in the Model Engineering College, Thrikkakara run by the IHRDE which is a corporation fully controlled by the State Government for the purpose of Section 30 of the Kerala Panchayat Act. It was averred that the petitioner is a permanent employee of the Model Engineering College, Thrikkakara and since the petitioner is an employee working in the Model Engineering College, Thrikkakara run by IHRDE which is a corporation fully controlled by the State Government, he is disqualified from contesting the election and from holding the office of the Panchayat. It was averred that on the date of election itself he was disqualified for holding position as a member of the panchayat. It was also averred that the petitioner was working as a permanent employee from September, 1998 and on the date of nomination he was not served with any relieving order and hence his nomination was improperly accepted. The contention raised by petitioner is that such averments are unclear and vague. It is very pertinent to note that there was no specific denial of those averments in the preliminary objection filed by the petitioner. It was contended that C.R.P. No. 1326/2002 was decided in favour of the petitioner and that fact was suppressed in the O.P. Another contention raised was that on remand the District Court in C.M.A. No. 372/2002 held that the IHRDE and its employees are not employees in the service of the State.

9. The first respondent was not a party to the Election Petition from which C.R.P. No. 1326/2002 was filed. So he is not bound to state the details of that case in the present Election Petition. So there is no merit in the contention raised by the petitioner that the first respondent suppressed that fact in the present O.P. In the order passed in the CRP No. 1326/2002 there is no finding to the effect that the permanent employee working in the Model Engineering College, Thrikkakara run by the IHRDE is qualified to contest the election. This Court set aside the findings of the courts below and remanded the case to the District Court for reconsideration. The petitioner has produced a copy of the judgment rendered by the District Court in C.M.A. No. 372/2002 along with this Writ Petition. A reading of the judgment shows that the first respondent was not a party to that case. Except the petitioner no other person contested in this election were candidates in the previous election. So any decision rendered by a District Court will not operate as res. judicata.

10. Sections 40 to 44 of the Indian [Evidence Act, 1872](#) deal with the judgments of courts of justice when relevant. Section 40 of the Indian Evidence Act provides that the previous judgments relevant to bar a second suit or trial. It reads as follows:

Section 40. Previous judgments relevant to bar a second suit or trial.- The existence of any judgment, order or decree which by law prevents any courts from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such Court ought to make cognizance of such suit, or to hold such trial.

Section 41 deals with relevancy of certain judgments in probate, etc., jurisdiction. Section 41 consists of two parts -- the first part makes certain judgments relevant and the second part makes certain judgments conclusive evidence of certain matters. Section 42 deals with the relevancy and effect of judgments, order of decrees, other than those mentioned in Section 41. Section 43 provides that the judgments, etc., other than those mentioned in Sections 40 to 42, when relevant. It reads as follows:

Section 43. Judgments, etc. other than those mentioned in Sections 40 to 42, when relevant.-Judgments, orders or decrees, other than those mentioned in

Sections 40, 41 and 42,. are irrelevant unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provisions of this Act.

11. Since C.M.A. No. 372/2002 is not between the parties, it will not operate as res judicata. The judgment will not come within the purview of Sections 41, 42 or 43 of the Indian Evidence Act. So that judgment is not relevant and it can be relied on for one purpose that there was such a proceedings and that appeal was decided in favour of the petitioner and for no other purpose.

12. The contention raised by the petitioner that the matter was decided in his favour in C.M.A. No. 372/2002 is factually not correct also. The averment in the previous Election Petition was extracted in page No.4 of that judgment. It reads as follows:

The first respondent was a government employee, He was working as a government employee in Model Engineering College, Thrikkakara. At the time of scrutiny of nomination, the petitioner raised objections with respect to the employment of the 1st respondent in the Government service.

The learned District Judge considered the matter on merits and found that a person working in the IHRDE is not a Government servant. It was specifically found that-

Hence I find that the employees of Model Engineering college run by IHRDE are not employees in the service of the State.

13. In the present Election Petition the case put forward by the first respondent is entirely different. In paragraph 3 of the Election Petition it was contended that-

The 1st (first) respondent is an employee working in the Model Engineering College, Thrikkakara run by the Institute of Human Resources Development for Electronics (IHRDE in short), which is a Corporation fully controlled by the State Government for the purpose of Section 30 (Thirty) of the [Kerala Panchayat Raj Act, 1994](#).

Again it was reiterated as follows:

Since the 1st (First) respondent is an employee working in the Model Engineering College, Thrikkakara run by I.H.R.D.E., which is a Corporation fully controlled by the State Government, he is not qualified for election or for holding office as a member of a Panchayat at any level. On the date of 1st (First) respondent's election, he was disqualified for holding as a member of a Panchayat.

In this connection provision contained in Section 30 of the Kerala Panchayat Raj Act is very relevant. Section 30 of the Kerala Panchayat Raj Act reads as follows:

30. Disqualification of officers and employees of Government, local authorities, etc.-(1) No officer or employee in the service of the State or Central Government or of a local authority or a corporation controlled by the State or Central Government or of a local authority or any company in which the State or Central Government or a local authority not less than fifty one percent share or of a Statutory Board or of any University in the State shall be qualified for election or for holding office as a member of a Panchayat at any level.

Explanation.--For the purpose of this section, company means a Government company as defined in Section 617 of the [Companies Act, 1956](#) (Central Act 1 of 1956) and includes a co-operative society registered or deemed to be registered under the Kerala Co-operative Societies Act, 1969 (21 of 1969).

(2) Any officer or employee referred to in Sub-section (1) who has been dismissed for corruption or disloyalty shall be disqualified for a period of five years from the date of such dismissal for election or for holding office as a member of a Panchayat at any level.

Under Section 30 of the Kerala Panchayat Raj Act disqualification is attached not to employees in the service of the State or Central Government alone. It provides that in addition to the employees in the service of the State or Central Government an officer or employee working in local authority or a corporation controlled by the State or Central Government or the local authority or any company in which the State or Central Government or local authority not less than 51 % share or a

statutory board or any university are not qualified to contest for the election. In this case the specific contention put forward by the first respondent is that petitioner is a permanent employee of a corporation controlled by the State Government and as such he is not qualified to contest the election. So the question arising for consideration in this case is whether I.H.R.D.E. is a corporation controlled by the State Government. The issue arose for consideration in the previous Election Petition was entirely different. So the dismissal of C.M.A. No. 372/2002 filed by another person is not at all a ground to hold that the present Election Petition is not maintainable.

14. The learned Counsel appearing for the petitioner has argued that there is a vague averment regarding the employment of the petitioner in the Model Engineering College, Thrikkakara run by the I.H.R.D.E. and there is no clear averments. In addition to that there is no averment to the effect that the improper acceptance of the petitioner's nomination materially affected the result of the election. It is argued that there is no cause of action. The petitioner has relied on the decision reported in *Dhartipakar v. Rajiv Gandhi* : [1987]3SCR369 in which it was held that, if the pleading does not disclose any cause of action the same can be struck off under Order VI Rule 16 of Civil Procedure Code and if no triable issues remaining to be considered after striking out the pleadings, the court has power to reject petition under Order VI Rule 11 of Civil Procedure Code even before filing the written statement. The Apex Court held as follows:

On a combined reading of Sections 81, 83, 86 and 87 of the Act, it is apparent that those paras of a petition which do not disclose any cause of action, are liable to be struck off under Order VI, Rule 16, as the Court is empowered at any stage of the proceedings to strike out or delete pleading which is unnecessary, scandalous, frivolous or vexatious or which may tend to prejudice, embarrass or delay the fair trial of the petition or suit. It is the duty of the court to examine the plaint and it need not wait till the defendant files written statement and points out the defects. If the court on examination of the plaint or the election petition finds that it does not disclose any cause of action it would be justified in striking out the pleadings. Order VI, Rule 16 itself empowers the Court to strike out pleadings at any stage of the proceedings which may even be before the filing of the written statement by

the respondent or commencement of the trial. If the Court is satisfied that the election petition does not make out any cause of action and that the trial would prejudice, embarrass and delay the proceedings, the court need not wait for the filing of the written statement instead it can proceed to hear the preliminary objections and strike out the pleadings. If after striking out the pleadings the court finds that no triable issues remain to be considered, it has power to reject the election petition under Order VI, Rule 11.

The Apex Court also held as follows: the High Court while dealing with the election petition has power to strike out pleadings under Order VI, Rule 16 and to reject the election petition under Order VII Rule 11 if the petition does not disclose essential facts to clothe it with complete cause of action.

In *Shiv Charan Singh v. Chandra Bhan Singh* : [1988]2SCR713 the Apex Court held that the burden of proof is on the petitioner who alleges that due to the improper acceptance of the nomination the result of the election has been materially affected. It was held as follows:

The election of a returned candidate cannot be declared void on the ground of improper acceptance of nomination paper of a contesting candidate unless it is established by positive and reliable evidence that improper acceptance of the nomination of a candidate materially affected the result of the election of the returned candidate. The result of the election can be affected only on the proof that the votes polled by the candidate whose nomination paper had wrongly been accepted would have been distributed in such a manner amongst the remaining candidates that some other candidate (other than the returned candidate) would have polled the highest number of valid votes.

In *Hari Shanker Jain v. Sonia Gandhi* : AIR 2001 SC3689 the Apex Court has held that-

In *V.S. Achuthanandan v. P.J. Francis* this Court has held, on a conspectus of a series of decisions of this Court, that material facts are such preliminary facts which must be proved at the trial by a party to establish existence of a cause of action. Failure to plead 'material facts' is fatal to the election petition and no

amendment of the pleadings is permissible to introduce such material facts after the time-limit prescribed for filing the election petition.

In *Santosh Yadav v. Marender Singh* : AIR 2002 SC241 the Apex Court held as follows:

It is well settled by a catena of decisions that the success of a winning candidate at an election should not be lightly interfered with. This is all the more so when the election of a successful candidate is sought to be set aside for no fault of his but of someone else. That is why the scheme of Section 100 of the Act especially Clause (d) of Sub-section (1) thereof clearly prescribes that in spite of the availability of grounds contemplated by Sub-clauses (i) to (iv) of Clause (d), the election of a returned candidate shall not be avoided unless and until it was proved that the result of the election insofar as it concerns a returned candidate was materially affected.

15. There cannot be any dispute regarding the legal position stated by the learned Counsel appearing for the petitioner. The petitioner was declared elected for a margin of 31 votes. According to the respondent if the nomination of the petitioner was rejected, he would have been declared elected. In *Charan Singh's* case the Apex Court held that the improper acceptance of the nomination of a candidate other than the returned candidate is not a ground to hold that the votes polled in favour of that candidate would have been polled in favour of any particular candidate including the election petitioner. But an exception is carved out so far as it relates to the returned candidate. (Though the petitioner has not repeated the words of the Section 102 of the Act the averments necessary to attract the ingredients of the section are stated. Further in this case the allegation is that the nomination of the returned candidate was improperly accepted. So there is no merit in the contention raised by the petitioner that the averments in the petition do not disclose a cause of action.

16. It is true that in *Rajiv Gandhi's* case (*supra*) the Apex Court has taken a view that the maintainability of the Election Petition can be considered at the threshold even before the filing of the written statement and the petition can be dismissed on the ground of maintainability. The Apex Court in *Rajiv Gandhi's* case (*supra*) relied

on the principles laid down in *K. Kamaraja Nadar v. Kunju Thevar* : [1959]1SCR583 . In *Kamaraja Nadar's* case the Supreme Court held that the preliminary objection should be entertained and a decision reached there upon before further proceedings was taken in the Election Petition.

17. In *Rajiv Gandhi's* case (supra) it was held as follows:

These authorities have settled the legal position that an election petition is liable to be dismissed in limine at the initial stage if it does not disclose any cause of action.

18. In *Patangrao Kadam v. Prithviraj Sayajirao Yadav Deshmukh* : [2001]2SCR118 the Election Petition was dismissed on the ground that a validly nominated candidate had not been made a party to the election petition. The Apex Court held that Section 86(1) of the Representation of People Act, 1951 does not leave any option to the High Court but to dismiss an Election Petition for non-compliance of Sections 81, 82 and 117. Relying on the principles laid down in the above stated decision it is argued that a duty is cast upon every Election Tribunal to consider the maintainability of the Election Petition as a preliminary issue and reject the same at the threshold.

19. Election Petition is not filed before the ordinary civil court Election Petitions are filed before the courts designated by the Government for that special purpose. So the court which is trying an Election Petition under the Kerala Panchayat Raj Act or Municipality Act is not trying that petition as a civil court but as an Election Tribunal. Section 93(5) of the Kerala Panchayat Raj Act provides that every Election Petition shall be disposed of within six months from the date on which the Election Petition is presented to the court for trial. It is to be noted that the duration of a Panchayat Committee is only five years. The returned candidate can protract the proceedings by pressing for a decision on the question of maintainability as a preliminary point and get the main matter stayed indefinitely by filing a Writ Petition under Article 226 of the [Constitution of India](#) before this Court.

20. In *D.P. Maheshwari v. Delhi Administration* : (1983)1ILLJ425SC a Three Judge Bench of the Apex Court considered the desirability of the Tribunals raising preliminary issues and tendering decision on that point. It was held as follows:

There was a time when it was thought prudent and wise policy to decide preliminary issues first. But the time appears to have arrived for a reversal of that policy. We think it is better that tribunals, particularly those entrusted with the task of adjudicating labour disputes where delay may lead to misery and jeopardise industrial peace, should decide all issues in dispute at the same time without trying some of them as preliminary issues.... Neither the jurisdiction of the High Court under Article 226 of the Constitution nor the jurisdiction of this Court under Article 136 may be allowed to be exploited by those who can well afford to wait to the detriment of those who can well afford to wait by dragging the latter from court to court for adjudication of peripheral issues, avoiding decision on issues more vital to them.... Tribunals and courts who are requested to decide preliminary questions must therefore ask themselves whether such threshold part-adjudication is really necessary and whether it will not lead to other woeful consequences.

(emphasis supplied)

The principle laid down in D.P.Maheshwari's case was not brought to the notice of the Supreme Court in Rajiv Gandhi's case. D.P. Maheshwari's case was decided by a Three Judge Bench whereas Rajiv Gandhi's case was decided by a Two Judge Bench. So I respectfully follow the principles laid down in D.P. Maheshwari's case.

21. In D.P. Maheshwari's case it was further held that the High Court shall not interfere with such orders in exercise of jurisdiction conferred on it under Article 226 of the [Constitution of India](#). The principle laid down in Maheshwari's case (supra) was followed by this Court in Radhakrishnan v. Kerala Lok Ayukta 2006 (1) KLT 661. It was held as follows:

It is not a healthy practice to entertain the challenge against the proceedings pending before lower courts and tribunals, on preliminary objections and keep the main matter, pending for years without decision.

22. So the legal position is clear. The Election Tribunal has got power to decide the maintainability of the Election Petition as a preliminary issue. But it shall consider whether it is desirable to consider the maintainability as a preliminary

issue. If the defect pointed out is so patent and can be decided without any enquiry the court shall consider the same as a preliminary issue. Otherwise the Election Tribunal shall consider all issues together within the time limit fixed under the Statute. In the ordinary course this Court shall be very reluctant to entertain a Writ Petition filed against an order disposing a preliminary issue.

23. In this case the learned Munsiff held that it is not possible to dismiss the Election Petition as not maintainable. That decision cannot be interfered in a proceedings under Articles 226 and 227 of the [Constitution of India](#). So this Writ Petition is liable to be dismissed in limine.

In the result, the Writ Petition is dismissed.

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