

Jayanthi Vs. Raji

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Court : Kerala

Decided On : Nov-29-2002

Reported in : 2003(1)KLT514

Judge : K. Padmanabhan Nair, J.

Acts : [Panchayat Raj Act, 1994](#) - Sections 89, 89(1), 94, 113 and 114; Code of Civil Procedure (CPC) - Order 41, Rule 1

Appeal No. : C.R.P. No. 1004 of 2002

Appellant : Jayanthi

Respondent : Raji

Advocate for Def. : K.B. Pradeep, Adv.

Advocate for Pet/Ap. : V. Chithambaresh,; T.C. Suresh Menon,; Shamier Marickar

Disposition : Petition dismissed

Judgement :

ORDER

K. Padmanabhan Nair, J.

1. The petitioner in O.P. (Election) 3 of 2000, who is the respondent in Appeal (Election) 8 of 2001 before the District Court is the revision petitioner.

2. The revision petitioner filed O.P. (Election) 3 of 2000 to declare the election of the respondent, who is the appellant in Appeal (Election) 8 of 2001, null and void. A further prayer was also sought to declare the revision petitioner as duly elected. The Original Petition was allowed. The respondent, whose election was set aside, filed an appeal before the District Court as provided under Section 113 of the Kerala Panchayat Raj Act. The same was presented by the Advocate appearing for the respondent in accordance with the provisions contained in Rule 1 of Order XLI of the Code of Civil Procedure. The learned District Judge after hearing the counsel for the appellant as provided under Order XLIRule 11 of the Code, admitted the appeal and issued notice to the revision petitioner who is the respondent in the appeal. The revision petitioner entered appearance and raised a preliminary objection regarding the maintainability of the appeal. After hearing both sides, the learned District Judge found that the appeal is maintainable and posted the same for argument. That preliminary finding is under challenge in this Civil Revision Petition.

3. The only ground on which the maintainability was attacked is that there is no proper presentation of the appeal. According to the counsel for the revision petitioner, Appeal (Election) 8 of 2001 was presented by the Advocate appearing for the respondent and filed before the Chief Ministerial Officer of the Court and that procedure is not legal. According to the revision petitioner, just like presentation of the Original Petition by the candidate or voter, the appeal memorandum also ought to have been presented before the District Judge by the party in person as he is the only person aggrieved.

4. The learned counsel appearing for the revision petitioner has vehemently argued that the appeal is nothing but a continuation and rehearing of the Original Petition and hence the procedure which is applicable to the presentation of the Original Petition is to be followed in filing and presenting the appeal memorandum also. In support of the argument that the appeal is a continuation of the Original Petition, the learned counsel for the revision petitioner relied on a decision

reported in *Dilip v. Mohd. Azizul Haq* ((2000) 3 SCC 607) in which it was held as follows:-

'Once a decree passed by a court has been appealed against the matter becomes sub-judice again and thereafter the appellate court acquires seisin of the whole case. A court of appeal shall have the same powers and shall perform as nearly as may be the same duties as conferred and imposed on courts of original jurisdiction. The hearing of an appeal under the processual law of the country being in the nature of a rehearing The legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unit and one to be regarded as one legal proceeding'.

The counsel for the revision petitioner also relied on a decision of this Court reported in *Anandavally v. Ajitha* (2001 (1) KLT 211) and argued that since the Panchayat Raj Act is a complete Code in itself, the provisions contained in the Code of Civil Procedure or other enactments are not applicable in filing and presentation of an appeal. In *Anandavally*'s case (supra) it was held as follows:-

'On an examination of the Kerala Panchayat Raj Act, it is seen that Chapter 10 exclusively deals with the disputes relating to elections. Section 89 prescribes the method of filing of an election petition and there is provision for an appeal. It may also be relevant to note that in a matter of appeal it has been stated that even though such an appeal has to be filed within a period of 30 days of the date of the order, there is provision to condone the delay in filing the appeal at the discretion of the Court. Here also there is no reference to the impact of the Limitation Act, but the jurisdiction has been conferred by the statutory provision itself. When the Kerala Panchayat Raj Act is a complete code in itself, import of the Limitation Act on the strength of the above decision is not warranted'.

In *Hukumdev v. Lalit Narain* (AIR 1974 SC 480) the Apex Court has held that the scope of examination is whether the scheme of the special law or the nature of the remedy provided therein are such that the Legislature intended it to be a complete code. In *Charan Lal Sahu v. Nandkishore Bhatt* (AIR 1973 SC 2464) it was held that there was no question of any common law right to challenge an election as such. It is true that the Panchayat Raj Act is a complete Code in itself. But, the

question is whether there is any specific provision regarding the procedure to be followed while presenting an appeal. It is also true that the suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and one to be regarded as one legal proceeding.

5. Chapter X of Panchayat Raj Act deals with disputes regarding election. Section 87 deals with election petitions and Section 88 provides the Courts competent to try election petitions. Section 89 provides the mode of presentation of petitions. Section 89(1) reads as follows:-

'89. Presentation of petitions.- (1) An election petition calling in question any election may be presented on one or more of the grounds specified in Ss. 102 and 103, to the appropriate court as specified in Section 88, by any candidate at such election or by any elector within thirty days from, but not earlier than, the date on which the returned candidate was declared elected'.

xxxxx (2)xxxxx'

Sub-section (1) of Section 89 is relevant. Section 89(1) enjoins that the election petition is to be presented by the candidate or by the elector and presentation by counsel is not sufficient. There is a specific purpose of insisting that the election petition shall be presented by the candidate or voter. In *Saraswathi v. Kamala* (1997 (1) KLT 855) it is held as follows:-

'The requirement that the Election Petitioner should take the full responsibility for what is averred in the Election Petition and consequently has also to attest each of the copies of the Election Petition to be served on the opposite side also emphasises the importance given by the Election Law to the participation of the Election Petitioner in the filing of the Election Petition. Normally in our usual procedure, it would be sufficient if counsel attest the copies of the Election Petition as true copies. This also supports the approach that an Election Petition should be presented by the election petitioner in person. An Election Petition under Section 89 of the Act has to be presented in person by a candidate at the election or by an elector'.

Section 90 deals with the parties to the petition. Section 91 deals with the contents of the petition. Section 93 deals with the trial of election petitions and Section 94 provides the procedure to be followed by the Court trying the election petitions. Section 94(1) of the Act is relevant, which reads as follows:-

'94. Procedure before the Court.- (1) Subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the Court, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 (Central Act 5 of 1908) to the trial of suits.'

When there is a proper presentation of an Election Petition by a candidate or voter, the same is tried in accordance with the provisions of Civil Procedure Code. Of course, if any provision is made in the Act or Rule the application of the provisions of Code of Civil Procedure is subject to the provisions in the Act and Rules.

6. Section 113 of the Act provides for filing of an appeal. It reads as follows:-

'113. Appeals.- (1) Any person aggrieved by an order made by the court under Section 100 or Section 101, may prefer an appeal, on any question of law or of fact,-

(a) before the District Court on the decision of the Munsiff's Court; and

(b) before the High Court on the decision of the District Court;

(c) The Government shall, in consultation with the High Court, notify the appropriate Courts in the Gazette. (2) Every appeal under this section shall be preferred within a period of thirty days from the date of the order of the court under Section 100 or 104: Provided that the Appellate Court may entertain an appeal after the expiry of the said period of thirty days, if it is satisfied that the appellant had sufficient cause for not preferring the appeal within such a period'.

7. Unlike Section 89(1) which provides that the petition is to be presented by the candidate or the elector, Section 113 enjoins that the appeal can be preferred by 'any person aggrieved'. Under Section 89(1), an Election Petition can be

presented only by the candidate or elector. The word 'elector' for the purpose of Section 89(1) is defined as can be seen from the Explanation to Section 89(1). In Sarawasthi's case (supra) this Court has held that presentation of an Election Petition by the counsel is not sufficient and is to be presented by the candidate at the election or by an elector. But, there is no such restriction regarding the filing of the appeal. The words 'candidate', 'voter' and 'present' are conspicuously absent in Section 113 of the Act. The right to challenge is given to any person aggrieved. The meaning of the words 'present' and 'prefer' is also very relevant. In 'The New Oxford Dictionary of English' (First Indian Edition 2000) the meaning given for these words are the following: -

present - to give something to (someone) formally or ceremonially

prefer - submit (a charge or a piece of information) for consideration.

The meaning of the words stated above would show that these two words are not having the identical meaning.

8. Section 114 of the Panchayat Raj Act deals with the procedure to be followed in appeal. It reads as follows: -

114. Procedure in appeal. - (1) 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 (Central Act 5 of 1908) for the hearing of appeals and the decision of the Court in the appeal shall be final:

Provided that such appeals shall be disposed of, as far as possible within six months from the date of filing of such appeals.

(2) As soon as an appeal is decided, the Appellate Court shall intimate the substance of the decision to the State Election Commission and the President of the Panchayat concerned and as soon as may be, thereafter shall send to the State Election Commission an authenticated copy of the decision; and upon its receipt, the State Election Commission shall-

(a) forward copies thereof to the authorities to which copies of the order of the court were forwarded under Section 106; and

(b) cause the decision to be published in such manner as the State Election Commission may deem fit'.

So, power is conferred on the District Court to dispose of the appeal in accordance with the procedure laid down in the Code of Civil Procedure. But that power is subject to the provisions of the Panchayat Raj Act and Rules. Panchayat Raj Act do not contain any provision to the effect that the appeal is to be presented by the party himself before the District Judge. The District Judge is not functioning as a *persona designata* also.

9. The Panchayat Raj Act do not contain any provision as to how an appeal under that Act is to be preferred. The principle laid down in *Anandavally's case* (*supra*) is not of much help to decide that question. Infact Section 113 itself confers power to the appellate Court to condone the delay. On the otherhand, Section 114 of the Kerala Panchayat Raj Act provides that subject to the provisions made under the Act and Rules, the District Court or High Court may dispose of the appeal in accordance with the provisions of Order XLI of the Code of Civil Procedure, Order XLI Rule 1 of the Code of Civil Procedure gives power to the advocate to present the appeal memorandum for and on behalf of his client. In view of the provisions contained in Order XLI Rule 1 and also in view of no statutory provision in the Act or Rules which insist that the appeal shall also be presented by the appellant in person it cannot be insisted that the appeal shall be presented by the candidate or voter. That will amount to adding some words to Section 113 of the Act which the legislature has not intended or wanted. It is well settled position of law that the Court cannot add or mend and, by construction make up deficiencies which are left there. The Court shall not read words in to a Section or to proceed by substituting some other words for the words of the Statute. The plain meaning of the words contained in Section 113 of the Act make it clear that the appeal need not be presented by the appellant himself.

10. In view of the provisions contained in Ss. 113 and 114 of the Act, the finding of the District Judge that there is proper presentation of the appeal when an appeal is

presented by the counsel for the party to the Election Petition is perfectly correct and does not call for any interference. As rightly pointed out by the learned District Judge when the Act makes Order XLI applicable to the disposal of the appeal, that can be presented as provided under Order XLI Rule 1. So, there is absolutely no merit in the objection raised by the revision petitioner regarding the maintainability of the appeal. There is no merit in the Civil Revision Petition and it is only to be dismissed.

In the result, the Civil Revision Petition is dismissed with costs. C.M.P. 2605 of 2002 also shall stand dismissed.

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