

(2001) 10 KL CK 0088

In the High Court Of Kerala

Case No : O.P. No. 8724 and CRP. No. 1204 of 2001

Aisha Potty and Another

APPELLANT

Vs

Kollam District Panchayat and Others

RESPONDENT

Date of Decision : 18-10-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 107(2), 115, 141
Constitution of India, 1950 — Article 226, 227, 243K, 243O, 32
Criminal Procedure Code, 1973 (CrPC) — Section 146(1)
Representation of the People Act, 1951 — Section 80A

Citation : (2001) 2 KLJ 767

Hon'ble Judges : V.P. Mohan Kumar, J;K.K. Denesan, J

Bench : Division Bench

Advocate : B. Krishnamani and K. Ramakumar, for the Appellant; Murali Purushotham, V. Giri and S.V. Balakrishna Iyer, for the Respondent

Judgement

Mohan Kumar, J.—The question raised in the Revision Petition and the Writ Petition is as to whether the court trying an Election Petition under Sec. 88 of the Panchayat Raj Act, 1994 (hereinafter referred to as the Act) is a court subordinate to the High Court and whether the High Court can revise an interlocutory order passed by the authority constituted under the statute under Sec. 115 of the C.P.C. or it being a persona designata amenable to the supervisory jurisdiction vested in the High Court under the Arts. 226 and 227 of the Constitution. A learned Judge of this court has in *Leela v. Pushpam* 1996 (2) KLT 350) taken the view that the authority deciding the dispute being not a court subordinate to the High Court, such orders are not revisable under Sec. 115 of the CPC whereas yet another Judge has taken the view in *C.R.P. 287 of 2001* that the authority not being a persona designata and a civil court the order is amenable to the revisional jurisdiction of this court. Yet another learned Judge in *Saraswati v. Kamala* (1997 (1) KLT 855) has concurred with the view taken in *CRP. 287 of 2001*. The learned Judge who decided *CRP. 287 of 2001* has again reiterated that view in *Bindu Vijayakumaran Nair Vs. Bindu Rajappan* . In view of

the conflict, the Writ Petition as well as a batch of CRPs. have been placed before a Larger Bench by another learned Brother Justice Bhaskaran for resolving the question. We treat the present C.R.P. and Writ Petition as lead cases. We are called upon to interpret the provisions of the Panchayat Raj Act keeping in mind the constitutional mandate contained in Art. 243O of the Constitution. The said provision reads as under:

243-O. Bar to interference by courts in electoral matters:-Notwithstanding anything in this Constitution-

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies made or purporting to be made under Art. 243K, shall not be called in question in any court;

(b) no election to any Panchayat shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any Law made by the Legislature of a State.

It opens with a non-obstinate clause whereby it indicates that the constitutional power of juridical review guaranteed under Art. 322 or 226 or 227 of the Constitution is specifically excluded. It also provides that a State Legislature may frame a legislation providing for the manner in which an election dispute can be tried. It also empowers the State to constitute an authority in that behalf. That power was exercised by the State by enacting Chap. X in the Panchayat Raj Act. 1994.

2. Section 88 is the relevant provision in this Chapter dealing with the constitution of the authority. That section reads thus:

88. The court competent to try election petitions:- (1) The court having jurisdiction to try an election petition shall be-

(a) in the case of a village panchayat, the Munsiff's Court having jurisdiction over the place in which the headquarters of the panchayat is located; and

(b) in the case of a block panchayat or district panchayat the district court having jurisdiction over the place in which the headquarters of the panchayat concerned is located.

(2) The Government shall, in consultation with the High Court notify the appropriate courts in the Gazette.

By enacting Sec. 88, the law has provided that such authority shall be the Munsiff's Court having jurisdiction over the area where the headquarters of the panchayat is situate. The language employed is generic term of a class of official and the same Munsiff Court may exercise jurisdiction over seventh panchayats if its headquarter is located within the jurisdiction of a particular Munsiff Court. Thus the jurisdiction of the authority constituted to try the election dispute depended on the place where the headquarters is located and not on any notified Munsiff Court. If by delimitation of the areas of Panchayat, the headquarters of

the panchayat changes and falls within the jurisdiction of another Munsiff's Court, then automatically, without intervention of the executive, the authority to try the election dispute stood altered. The Statute do not contemplate any fresh notification or designation of the authority referred to in Art. 243O of the Constitution.

3. Art. 243-O has been enacted keeping Art. 329 of the Constitution in view. That provision deals with election to the parliament and Legislature. Art. 329 reads as follows:

Bar to interference by courts in electoral matters- Notwithstanding anything in this Constitution.

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Art. 327 or Art. 328 shall not be called in question in any court.

(2) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature.

The provision being similar to Art. 243O, the Parliament would have benefited from the construction placed on the said provision by the courts which were called upon to interpret the said provision. Therefore while interpreting Art. 243O, we would be profited by referring to judgments rendered under Art. 329 of the Constitution. We notice that the Constitution commands that the validity of an election in question be amenable to challenge invoking the designated mode in that behalf. One cannot urge that the non-obstinate clause in Art. 243O altogether excludes the power of this court for judicial review. The proper understanding would be that the said constitutional provision, to borrow the words of the judgments, only eclipses the remedy provided under the Constitution and relegates the adjudication of to act for the avowed purpose of not divorced from, pushing forward a free and fair election with expedition. Secondly, the Commission shall be responsible to the rule of law, act bona fide and be amenable to the norms of natural justice in so far as conformance to such canons can reasonable and realistically be required of it as fair play-in-action in a most important area of the constitutional order, viz, elections. Fairness does import an obligation to see that no wrong-doer candidate benefits by his own wrong. To put the matter beyond doubt, natural justice enlivens and applies to the specific case of order for total re-poll, although not in full panoply but in flexible practicability. Whether it has been complied with is left open for the Tribunal's adjudication.

3. The conspectus of provisions bearing on the subject of elections clearly expresses the rule that there is a remedy for every wrong done during the election in progress although it is postponed to the post election state and procedure as predicated in Art. 329(b) and the 1951 Act. The Election Tribunal

has, under the various provisions of the Act, large enough powers to give relief to an injured candidate if he makes out a case and such processual amplitude of power extends to directions to the Election Commission or other appropriate agency to hold a poll, to bring up the ballots or do other things necessary for fulfilment of the jurisdiction to undo illegality and injustice and do complete justice within the parameters set by the existing law.

4. It is one thing to say that the said review is forbidden by constitutional means and yet another thing to declare that judicial review can be only in the manner provided by the legislation enacted in that behalf invoking Art. 243O. The providing of legal remedy to review the election process saves the power of the courts to review the election process as also the criticism that judicial review is being excluded. As such it has to be held that an election coming within the ambit of Art. 243O of the constitution can be judicially reviewed in accordance with the legislation enacted in that behalf.

5. The Supreme Court had occasion to consider the character of the "Court" designated under Art. 329 of the Constitution. Under Sec. 80A of the Representative of People Act, the authority constituted to try an election dispute is the High Court. In *T. Deendaval v. High Court of Andhra Pradesh* (AIR 1997 (3) SCC 535) one of the parties to the proceeding was proceeded against under the Contempt of Courts Act. He raised a contention that the election dispute by the machinery constituted in that behalf. To put it differently, what Art. 243O contemplates is that an election to the Panchayat may be called in question only by means of an election petition provided under the law framed in that behalf. It is not permissible to trace the powers of the court under Art. 32 or Art. 226 of the Constitution while that is expressly injected by the Constitution itself. The negative expression in Art. 243O of the Constitution of India excludes the extraordinary jurisdiction conferred on the High Court under Art. 226 of the Constitution and operates as a constitutional injunction forbidding the court from exercising judicial review with respect to matters referred therein. This question came up for consideration in *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, and the Supreme Court stated thus:

Diffusion, even more elaborate discussion, tends to blur the precision of the conclusion in a judgment and so it is meet that the synopsise the formulations. Of course, the condensed statement we make is for convenience, not for exclusion of the relevance or attenuation of the binding impact of the detailed argumentation. For this limited purpose, we set down our holdings:

(a) Art. 329(b) is a blanket ban on litigative challenges to electoral steps taken by the Election Commission and its officers for carrying forward the process of election, to its culmination in the formal declaration of the result.

(b) Election, in this context, has a very wide connotation commencing from the Presidential notification calling upon the electorate to elect and culminating in the

final declaration of the returned candidate.

2(a) The Constitution contemplates a free and fair election and vests comprehensive responsibilities of superintendence, direction and control of the conduct of elections in the Election Commission. This responsibility may cover powers, duties and functions of many sorts, administrative or other depending on the circumstances.

(b) Two limitations at least are laid on its plenary character in the exercise thereof. Firstly, when Parliament or any State Legislature has made valid law relating to or in connection with elections, the Commission shall act in conformity with, not in violation of, such provisions but where such law is silent. Art. 324 is a reservoir of power Judge trying the election dispute being an authority constituted under Art. 329(b) of the Constitution, is not a court to which the Contempt of Court Act would apply. The High Court repelled the contention and the matter was taken up in appeal. The Supreme Court while approving the judgment statement thus:

12. The appellant then argued that under" Art. 329A of the Constitution, the disputes arising out of electoral matters are to be decided by an authority provided under any law made by the appropriate legislature. Therefore notwithstanding Sec. 80A of the Representation of People Act, 1951 investing the High Court within the jurisdiction to try an election petition functioning as an "authority" only and not as a court and, therefore, has no jurisdiction to issue suo motu notice under the Contempt of Courts Act. Here again, the High Court has dealt with this point in detail and expressed its opinion as under:-

80A. High Court to try election petitions:-

(1) The court having jurisdiction to try an election petition shall be the High Court.

(2) Such jurisdiction shall be exercised ordinarily by a single Judge of the High Court and the Chief Justice shall, from time to time, assign one or more Judges for that purpose;

Provided that where the High Court consists only of one Judge, he shall try all election petitions presented to that court.

(3) The High Court in its discretion may, in the interests of justice or convenience, try an election petition wholly or partly, at a place other than the place of seat of the High Court.

This section expressly says that "the court having jurisdiction to try an election petition shall be the High Court. It says further that such jurisdiction shall be exercised ordinarily by a single Judge of the High Court. The jurisdiction to try an election petition is thus given to a court viz., the High Court. In such a situation, the argument that the Judge trying the election petition should be deemed to be an authority and not a court is contrary to the express language in the

enactment. We see no substance in the contention that because clause (b) in Art. 329 employs the expression "authority", the Parliament was not competent to confer the said jurisdiction on a court, or that the court empowered by the Parliamentary enactment, should still be treated as an authority. We do not find any such limitation in Art. 329(b). It cannot be construed as precluding the Parliament from conferring the jurisdiction to try an election petition, upon a court or a High Court. The expression authority is not defined either in Art. 366 of the Constitution or in the General Clauses Act, 1897. Having regard to the context and the purpose underlying Art. 329(b), we are inclined to hold that it was permissible for the Parliament to designate a court viz, the High Court, to try election petitions. The first objection is, accordingly, rejected.

The wording in Sec. 88(1)(a) (omitting irrelevant words) reads thus:

88. The court competent to try election petitions:- (1) the court having jurisdiction to try an election petition shall be:-

(a").... The Munsiff's Court having jurisdiction over the place in which the headquarters of the panchayat is located; and....

There is practically no difference in the wording in Sec. 80A of the Representation of People Act, 1951 with that of Sec. 88. This would answer the question as to whether the court trying the election dispute under the Panchayat Raj Act, 1994 is a court subordinate to the High Court or not. This binding observation is sufficient to interpret the *pari materia* provision sec. 88 of the Panchayat Raj Act referred to *supra*.

6. An argument was feebly advanced by Mr. Krishnamani, learned counsel, placing reliance on several decisions, that since marginal notes to Art. 243O stated that the provision intends to oust the jurisdiction of the courts, it should be taken to mean that the jurisdiction of the civil court is totally ousted; we are of the view that this extreme argument merely deserves a reference inasmuch as the intention of the Article is clear from the wordings of the Article and do not admit of any ambiguity. The marginal note can be relied upon for the interpretation of a provision only if there is ambiguity in the wordings of the main provisions and if we do not notice any ambiguity, the words of the main provision itself lends key to its interpretation and the marginal note cannot control the same. The marginal note cannot affect the construction of the provision if the same is clear and unambiguous. As it cannot be derived from the wordings of either the constitutional provision nor from Sec. 88 of the Act, there is any express intention to oust of jurisdiction of the civil court. We are not prepared to infer the same to be solely relying on the marginal notes, as contended by the counsel.

7. Under the constitution the Legislature is given power to constitute an authority to deal with dispute relating to panchayat election. The Legislature has enacted Sec. 88 of the Act which provides that the "court" having jurisdiction to try an election dispute is the Munsiff's Court which is having jurisdiction over the

Panchayat. The statute carefully avoided conferring jurisdiction on any designated or notified Munsiff's Court with respect to any notified Panchayat which could have given rise to an argument that it is a person designated thus to try the election petition as a persona designata. When the Legislature in its wisdom designated the civil court to be the authority to exercise the jurisdiction to try the election dispute, by a process of interpretation, it cannot convert such a civil court into a Tribunal or a persona designata. In this context, the following observation of Justice Hidayathullah (as he then was) in *The Central Talkies Ltd., Kanpur Vs. Dwarka Prasad*, may also be adverted, to understand the scope of designating a persona designata. It was stated thus:

(9) The argument that the District Magistrate was persona designata cannot be accepted. Under the definition of "District Magistrate", the special authorisation by the District Magistrate had the effect of creating officers exercising the powers of a District Magistrate under the Eviction Act. To that extent, those officers would, on authorisation, be equated to the District Magistrate. A persona Designata is "a person who is pointed out or described as an individual, as opposed to a person ascertained as a member of a class, or as filling a particular character" (See Osborn's Concise Law Dictionary, 4th Edn. p. 253). In the words of Schwabe C.J., in *K. Parthasarathi Naidu Garu Vs. C. Koteswara Rao Garu and Another*, persona designata are "persons selected to act in their private capacity and not in their capacity as Judges". The same consideration applies also to a well-known officer like the District Magistrate named by virtue of his office and whose powers the Additional District Magistrate can also exercise and who can create other officers equal to himself for the purposes of the Eviction Act. The decision of Sapru, J., in the Allahabad case, with respect, was erroneous.

8. In this context we will profitably refer to the following passage in *Ramchandra Aggarwal and Another Vs. State of Uttar Pradesh and Another*, made referring to the above said *The Central Talkies Ltd., Kanpur Vs. Dwarka Prasad*, . The observation was made while interpreting Sec. 146(1) of the Cr.P.C. Their Lordships stated thus:

.....Sec. 146(1) Cr.P.C. empowers a Magistrate to refer the question as to whether any, and if so, which of the parties was in possession of the subject-matter of dispute at the relevant point of time to a civil court of competent jurisdiction. The power is not to refer the matter to the Presiding Judge of a particular civil court but to a court. When a special or local law provides for an adjudication to be made by a constituted court- that is by a court not created by a special or local law but to an existing court - it in fact enlarges the ordinary jurisdiction of such a court. Thus where a special or local statute refers to a constituted court as a court and does not refer to the presiding officer of that court, the reference can not be said to be to a persona designata. This question is well settled.

As long as a defined class is identified to exercise the power in contrast to a person identified to exercise such power, it cannot be held that the member of

that class thus identified is a persona designata.

9. Section 94(1) of the Panchayat Raj Act, 1994 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:

This section is *pari materia* similar to Sec. 141 of the C.P.C. In other words, the authority trying an election dispute under Sec. 88 of the Act, being the Munsiff, could exercise all the powers of that judicial functionary conferred under the C.P.C. There is yet another anomaly in holding that the decision of the "authority" is amenable to the jurisdiction of the High Court under Art. 226 of the Constitution. When Art. 243O, by express provision excludes the power of review of the election process by invoking the power under Art. 226 of the Constitution, we cannot by indirect means invoke the said power. Thus, the Legislature has conferred all the powers that of a civil court for the authority constituted under Sec. 88 of the Panchayat Raj Act, 1994. Hence for these reasons we hold that the decision rendered in *Leela v. Pushpan* (1996 (2) KLT 350), with great respect, was not correctly decided.

10. Before parting, we may now advert to one other aspect urged by the petitioner. In C.R.P. No. 287 of 2001 and in *Bindu Vijayakumaran Nair Vs. Bindu Rajappan*, it was held that the order of a Munsiff in an Election Petition is revisable under Sec. 115 of the C.P.C. In doing so, His Lordship has stated as under:

7. The above submission made by the counsel for the respondent is of no force. If the law is applicable to the appellate authority functioning under special statute nor under general law, the same law is applicable to the subordinate authority functioning under the same provisions of law. Therefore it is clear that the above order passed by the Munsiff's Court regarding the maintainability of the election petition is revisable by this court under Sec. 115 of the C.P.C. Therefore, the objection raised by the respondent against the maintainability of the revision petition is overruled.

With great respect, we do not think that this is the correct position of law. Perhaps, His Lordship had Section 107(2) of C.P.C. in mind; but thereunder the position is converse. Merely because the appellate authority is a court subordinate to the High Court, it would not follow that the original authority would be a court subordinate to the High Court. Likewise Sec. 113(1) of the Panchayat Raj Act, 1994 provides an appeal to the District Court, which is a subordinate to High Court. Similar situation arose in (*Thakur Das (Dead) by Lrs. Vs. State of Madhya Pradesh and Another*, . There the facts were under the Essential Commodities Act (1955). Against the order of the licensing authority constituted under Sec. 6A of the Act, an appeal is provided under Sec. 6C to the Sessions Court. When the said order was challenged in revision before the High

Court, a contention was raised that the order is not made by a court subordinate to the High Court. This contention was rejected by the High Court. That order was challenged before the Supreme Court. While upholding the said contention the Supreme Court stated thus:

.....While summing up its conclusions the court held that when a judicial authority like an officer who presides over a court is appointed to perform the functions, to judge and decide in accordance with law and as nothing has been mentioned about the finality or otherwise of the decisions made by that authority, it is an indication that the authority is to act as a court in which case it is not necessary to mention whether they are final or not as all the incidents of exercising jurisdiction as a court would necessarily follow. We are in broad agreement with this conclusion.

11. We are accordingly of the opinion that even though the State Government is authorised to appoint an appellate authority under Sec. 6C, the legislature clearly indicated that such appellate authority must of necessity be a judicial authority. Since under the Constitution the courts being the repository of the judicial power and the officers presiding over the court derives his designation from the nomenclature of the court, even if the appointment is made by the designation of the judicial officer the appellate authority indicated is the court over which he presides discharging functions under the relevant code and placed in the hierarchy of courts for the purposes of appeal and revision."

Likewise Sec. 113(1) of the Panchayat Raj Act, 1994 provides an appeal to the District Court, which is a court subordinate to High Court. The order is hence revisable and to hold that because a revision is provided against the appellate order, the trial order is also revisable may not be correct.

11. The petitioner in O.P. No. 8724 of 2001 is the contesting respondent in the Election Petition in that it is his election that is sought to be set aside by the Applicant. A preliminary contention was raised by the petitioner and he filed I.A. No. 2666 of 2000 to the effect that the Election Petition is liable to be dismissed for the non-compliance of Sec. 91(2) of the Act. That section reads as follows:

91. Contents of Petition:-.....

(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition."

The petitioner contend that the schedules and annexure supplied to him were not verified by the election petitioner. He further contends that the documents along with the petition have also not been served on the petitioner. Hence it was contended that the Election Petition is liable to be dismissed as not maintainable. The court below by the impugned order rejected the same. The said order is challenged in revision.

12. The writ petition is filed invoking Art. 226 of the Constitution. As we have already found that the order of the authority constituted under Art.243O being

not amenable to writ jurisdiction, this Writ Petition can be dismissed on the short ground. But, however, as Mr. Krishnamani, learned counsel has argued the case commendably well and hence we would exercise the suo motu power vested in this court under Sec. 115 of the C.P.C. and treat the same as a revision petition and deal with the contentions.

13. We are not satisfied that there is any material irregularity or failure to exercise jurisdiction committed by the court below while making the impugned order. The court below followed the dictum of the Supreme Court in 1999 (2) KLT 377 and held that there is substantial compliance of the requirement of the statute and the defect pointed out is a curable defect. It may be noticed that Sec. 93(1) of the Act makes the non-compliance either of Sec. 89 or Sec. 90 or Sec. 115 to be fatal in that it is provided that such an application shall liable to be dismissed. Even though it can be contended that non compliance of Sec. 91 does not result in any penal consequence and hence the said provision is only directory, but by virtue of Sec. 93 which provides that non compliance of Sec. 89 is fatal and verification as true copy s part of Sec. 89, one cannot proceed as if it is a directory provision. What is urged is that what is not verified is the annexure and schedule. The Annexure is the list of documents and list of witnesses. This document need not be verified as there is an affidavit which has referred to the Annexure and which affidavit has been signed and attested. Further, the schedule as well as the list of documents alone have been filed and as such the list need not be verified. We therefore uphold the order of the court below. The OP. is hence dismissed.

14. As regards CRP. 1204 of 2001 is concerned, the revision petitioner urged that the Election Petition is liable to be dismissed for the following grounds:

- (i) the copies served on the respondent have not been attested as true copies.
- (ii) that true copy of the documents have not been served on the respondents.
- (iii) Petition has not been verified as required under Sec. 91(2) of the Act.
- (iv) Pleadings of the case do not disclose a case to be tried on merits.

These points were tried as a preliminary issue. None of the contentions were upheld by the court below. Hence the revision.

15. As regards point No. (iv) is concerned the said issue can be tried after the adducing of the evidence at the final stage. The adjudication of the said issue involves adducing of the evidence as well. Therefore while we vacate the finding entered by the court below on merits on the point we relegate that point to be decided at the final stage.

16. As we have already held that non compliance of Sec. 91 of the Panchayat Raj Act is only curable defect, we do not propose to examine the contention raised at points (i) and (ii) at this stage. We find from the order of the court below that it verified the records and found that copy of the Election Petition furnished to the

revision petitioner was a true copy as required under Sec. 89(2) of the Act. Sec. 89(2) provides that every copy of the Election Petition filed "shall be attested by the petitioner under his own signature as true copy". Therefore the attestation contemplated is of the whole copy furnished to the respondent and not each page forming part of the copy. As from the wording of Sec. 93(1) we notice that non compliance of Sec. 89 is fatal, the court below factually verified the copy of the petition furnished to the respondent and satisfied itself that the document has been attested as true copy by the Election Petitioner as well. The court below noticed that there is compliance of Sec. 89(2) of the Act. The learned counsel placed reliance on *Kaveri Amma v. Devaki* (1996 (2) KLT 189) to contend that non compliance of section 89(2) is fatal. But the objection raised in that case was that the copies of the Election Petition were not attested at all by the petitioner under her own signature as true copies of the petition. This is not the objection in the case in hand, as factually noticed. In this case the copies have been attested as true copies. Therefore the dictum of that decision has no application to the present case. On the materials now available, we cannot dispute this factual finding. Perhaps the petitioners may be able to let in more evidence to substantiate their contention at a later stage. The learned counsel Mr. Ram Prasad Unni, strongly urged that the copy served not being the exact copy of the petition filed in the court, cannot be reckoned as a true copy. We cannot accept this contention. A true copy does not mean an absolutely exact copy, but it means that the copy shall be true, that nobody can by any possibility misunderstand it. The copy served on the petitioner satisfied this requirement and as such we reject this contention as well.

We dismiss this Revision Petition. We however make it clear that it is open to the petitioner in the Writ Petition as also in the Revision Petition to urge these contentions at the final stage after adducing of evidence and the court below may examine the same, untrammelled by what is stated above on the merits of the contentions, at the final stage. No costs.