

(2016) 08 KL CK 0078

In the High Court Of Kerala

Case No : O.P.(C). No. 1497 of 2016 (O)(ELE. OP. NO. 1 of 2015 of Munsiff Court, Pala)

Baby Augustian

APPELLANT

Vs

Alex Kozhikkottu

RESPONDENT

Date of Decision : 29-08-2016

Acts Referred:

Constitution of India, 1950 — Article 227
Kerala Panchayat Raj Act, 1994 — Section 34(1)(b)(i), Section 34(2)

Citation : (2016) 4 KerLJ 314

Hon'ble Judges : Mr. K. Ramakrishnan, J.

Bench : Single Bench

Advocate : Sri. M. Narendra Kumar and Smt. M.J. Sajitha, Advocates, for the Petitioner; Sri. Jawahar Jose, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Mr. K.Ramakrishnan, J. - This is an application filed by the petitioner challenging Ext. P3 order of Munsiff, Pala in Ele.O.P No.1 of 2015 under Article 227 of the Constitution of India.

2. It is alleged in the petition that the petitioner is the elected candidate belonging to Kerala Congress (M) from Ward 12 of Kadanad Panchayat. The respondent is an independent candidate supported by Left Democratic Front contested the election against the petitioner. The petitioner was declared elected in the election held on 05.11.2015 to the local self Government institutions and the results were declared on 07.11.2015. The petitioner challenged the election of the petitioner alleging that he had disqualified under Section 34(1)(b) (i) of the Kerala Panchayat Raj Act. Though the same question has been raised by him before the Returning Officer, he has rejected the same and accepted the nomination. Thereafter the election was conducted and he was declared elected in the election. There is bar under Section 34 (2) of the Kerala Panchayat Raj Act in this regard and as such, the petition is not maintainable. He had also

contended in the counter that the verification is not proper as required under the Rules and as such, the petition is not maintainable. He had also contended that the detention in civil prison is not coming under the disqualification provided under Section 34(1)(b)(i) as well. The court below rejected these contentions and found that the application is maintainable and defect in the verification is curable defect and permitted the petitioner to cure the defect within seven days. This is being challenged by the petitioner by filing this petition.

3. Heard. Sri. M.Narendra Kumar, counsel appearing for the petitioner and Sri. Jawahar Jose, counsel appearing for the respondent.

4. Counsel for the petitioner submitted that admittedly the petitioner was found violated the order of injunction by the Munsiff Court, which was confirmed in appeal and he was directed to be detained in civil prison for three months. But he filed Civil Revision Petition before this Court and implementation of the order has been stayed pending disposal of the revision petition. So under such circumstances, it cannot be treated as a disqualification. He had also contended that since the Returning Officer had rejected the objection raised regarding the disqualification and since the petitioner has not challenged the same before the State Election Commission, that has become final and as such, there is a bar under Section 34(2) of the Kerala Panchayat Raj Act to challenge the same before the election tribunal. He had also contended that since the verification has not been properly done, it is not a curable defect and the court below was not justified in coming to the conclusion that it is only a curable defect and permitting the respondent to cure the defect. Further no finding has been recorded regarding the objection that it is not a disqualification falling under Section 34 and it has not been considered by the court below.

5. On the other hand, counsel for the respondent submitted that since there is no order passed by the State Election Commission on this aspect, the bar provided under Section 34(2) is not applicable. Further, the defect in the verification is only a curable defect, the court below was perfectly justified in allowing the petitioner to cure the defect. The question as to whether the disqualification mentioned is a disqualification or not is a matter for evidence. So the court below was perfectly justified in holding that the petition is prima facie maintainable and all other things are to be considered on the basis of the evidence.

6. It is an admitted fact that the petitioner is the elected candidate from Ward No.12 of G-31 Kadanad Grama Panchayat in the election held on 05.11.2015 of which the results were declared on 07.11.2015. The respondent was the sole candidate who opposed the petitioner in that election and lost in the election. He had challenged the election of the petitioner by filing the above Ele. O.P No.1 of 2015 before Munsiff Court, Pala which is the designated court.

7. The allegation in the petition was that a suit was filed as O.S No.61 of 2010 before Munsiff Court, Pala against the petitioner herein and there was an interim injunction order passed as per Order in I.A No.381 of 2010. Since it was said to

have been violated, the plaintiff in that suit filed I.A No.1389 of 2010 for taking action against the petitioner for violation under Order 39, Rule 2A of the Code of Civil Procedure and as per order dated 24.11.2011, the Munsiff found that the petitioner had violated the injunction order and ordered to detain him in civil prison for three months. This was challenged by the petitioner by filing an appeal before the Sub Court, Pala and that was also dismissed. This was challenged by filing revision before this Court as C.R.P No.163 of 2013 and that is pending and according to the petitioner, the implementation of that order passed by the Munsiff has been stayed by this Court.

8. It is also alleged by the petitioner that the respondent had raised this disqualification before the Returning Officer and the Returning Officer rejected the objection and accepted his nomination as valid. Since this has not been challenged by referring the matter to State Election Commission, the order has become final and there is a bar under Section 34(2) of the Kerala Panchayat Raj Act. Section 34(2) of the Kerala Panchayat Raj Act reads as follows:

"If any question arises as to whether a candidate has become subject to any of the disqualifications mentioned in sub-section(1), the question shall be referred for the decision of the State Election Commission and the decision of the State Election Commission on such question shall be final."

9. In this case, admittedly, the disqualification raised by the petitioner before the Returning Officer has not been referred to State Election Commission for a decision. On the other hand, the Returning Officer himself has decided the same and rejected the objection and accepted the nomination which has been challenged by the respondent before the Election Tribunal. In the decision reported in Sukumara Kurup v. District Judge (1998(2) KLT 548), a Division Bench of this Court has held that when a question of disqualification has been referred to the State Election Commission for decision and if the State Election Commission has passed an order on that aspect, then, civil court is barred from reagitating the same in the election petition. That was a case where the question of disqualification was referred to the State Election Commission and the State Election Commission passed an order. Under such circumstances, the Division Bench has held that cannot be again challenged before a civil court or an election tribunal as a ground for challenging the election in view of the specific bar under Section 34(2) of the Kerala Panchayat Raj Act. A single bench of this Court in Anthappan v. Asokan (1999(3) KLT 754) had considered this aspect and came to the conclusion that there is no provision in the Act for reference to the State Election Commission when the question of pre-election disqualification is raised and that should be decided by the designated court. Since the bar under Section 34(2) will arise only in cases where the State Election Commission had considered that aspect and rendered its finding on that aspect. That is because when a statutory provision says that he is the ultimate authority to decide the question and that ultimate authority had taken a decision that cannot be questioned in an election petition in view of the specific bar provided under the

Kerala Panchayat Raj Act itself. In this case no such reference has been made by the Returning Officer and that was considered by the Returning Officer himself and rejected the objection and accepted the nomination. The question as to whether the acceptance of the nomination is proper or not is a question to be decided by the court in the election petition as that can be questioned by the petitioner only after the election results are published. So the court below was perfectly justified in rejecting the contention raised by the petitioner that it is barred under section 34(2) of the Act.

10. As regards the verification aspect is concerned, the court below had relied on the decision reported by a Constitution Bench in *Murukakar Syamkumar v. Roopsing Rathod* (AIR 1964 SC 1545) and come to the conclusion that any defect in the verification in the election petition is not fatal to the maintainability of the petition and an opportunity has to be given to the petitioner to cure the same. The same view has been reiterated in the decision reported in *K.K. Ramachandran Master v. M.V. Sreyamakumar* (2010 (7) SCC 428). In that case also the Supreme Court has held that any defect in the verification of the pleading is not a material defect warranting rejection of the election petition and it is a curable defect and that can be allowed to be cured. In those decisions it has been held that what is required to be considered is whether the averments in the petition are sufficient to give rise a cause action for the petitioner to file a petition. The same view has been reiterated in the decision reported in *Ashraf Kokkur v. K.V. Abdul Khader* (2015 (1) SCC 129) where in it has been held that if the facts as pleaded disclose a cause of action and not complete cause of action is not sufficient to attract a rejection under Order 7, Rule 11 (a). The limited enquiry is only to see whether the petition should be thrown out at the threshold i.e., whether the pleadings, if taken as a whole, clearly show they constitute a material facts so as to pose a triable issue. In an election petition the requirement under section 83 of the RP Act is to provide a precise and concise statement of material facts. The expression material facts plainly means facts pertaining to subject matter and which are relied on by the election petitioner. If the party fails to prove the same, then he fails in the trial. So from the decision it is clear that any defect in the verification of pleadings is not a material defect warranting rejection of the election petition at the threshold. So the court below was perfectly justified in coming to the conclusion that the defect in the verification is not a material defect and rightly held that it is a curable defect and right in permitting the petitioner to cure the same. To that extent, the order passed by the court below does not call for any interference under Article 227 of the Constitution of India.

11. Then the next question is as to whether the averments that the order of detention passed by the civil court against the respondents will amount to disqualification under section 34(1)(b)(i) of the Kerala Panchayat Raj Act or not is a matter to be considered by the court on the basis of evidence. If a question has to be decided on the basis of evidence, then such a question cannot be decided as a preliminary point and that can be relegated to the trial. So at this

stage, this court is not expressing any view regarding the fact as to whether detaining a person in civil prison for violation of the injunction order under Order 39, Rule 2 (a) will amount to disqualification provided under section 34(1)(b)(i) of the Kerala Panchayat Raj Act or not is a question to be decided on the basis of evidence and whether that will amount to involving moral turpitude is also a matter to be decided on the basis of evidence. Under such circumstances this court feels that there is no merit in the petition and warranting interference at the hands of this court under Article 227 of the Constitution of India in respect of the order passed by the court below holding that the election petition is prima facie maintainable and the defect in verification is only a curable defect and permitting the election petitioner to cure the defects is perfectly justifiable and that does not call for any interference.

So the petition is dismissed. The question as to whether all the contentions raised by the petitioner in the election petition regarding the maintainability of the petition and whether the particulars are sufficient to attract the disqualification are also directed to be considered by the court below at the time of trial as this court has not expressed any opinion on those aspects in this petition.

Registry is directed to communicate a copy of this judgment the court below at the earliest. Interim order of stay granted is hereby vacated.