

(2009) 03 KL CK 0050
In the High Court Of Kerala
Case No : W.A. No. 961 of 2008

M.V. Raghavan and Others

APPELLANT

Vs

The Returning Officer and Others

RESPONDENT

Date of Decision : 13-03-2009

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Kerala Police Act, 1960 — Section 38, 52

Penal Code, 1860 (IPC) — Section 143, 147, 148, 341, 506(1)

Citation : (2009) 1 ILR (Ker) 886 : (2009) 1 KLJ 801

Hon'ble Judges : K. Surendra Mohan, J;K. Balakrishnan Nair, J

Bench : Division Bench

Advocate : B.S. Swathy Kumar, for the Appellant; C.P. Sudhakara Prasad, A.G., A.G. Anitha, G.P., M.K. Damodaran P.V. Surendranath, K.K. Ravidranath, A.D.G.P., T.P. Kelu Nambiar M. Sasindran and P.A. Anitha, for the Respondent

Final Decision : Dismissed

Judgement

K. Balakrishnan Nair, J.—These Writ Appeals are filed against the common judgment in W.P. (C) Nos. 28311,28769,28863 & 29510/2007. The Writ Petitions were filed, challenging the election to the Managing Committee of the Kerala State Co-operative Hospital Complex and Centre for Advanced Medical Services Ltd. No. 4386, Pariyaram, Kannur, which is a Co-operative Society registered under the Kerala Co-operative Societies Act (hereinafter referred to as "the Society"). The Society has individual members and institutional members. W.P. (C) No. 28311/2007 was filed by four candidates, who contested the election W.P. (C) No. 28769/2007 was filed by four other candidates at the election. W.P. (C) No. 28863/2007 was filed by individual members of the Society. W.P. (C) No. 29510/2007 was filed by three institutional members of the Society through their delegates. All the Writ Petitions were heard and dismissed by the learned Single Judge, by a common judgment dated 11-4-2008. Hence these Writ Appeals by the writ petitioners.

W.A. No. 961/2008:

2. This Writ Appeal is treated as the main case for the purpose of referring to the facts and exhibits. This appeal arises from W.P. (C) No. 28311/2007. The writ petitioners in that Writ Petition are the appellants. The respondents herein were the respective respondents therein.

3. The brief facts stated by the appellants are the following: All the four appellants were candidates at the election to the Managing Committee of the Society held on 23-9-2007 at Government Town Higher Secondary School, Kannur. The appellants point out that the election was finally scheduled to be held, after a long drawn out legal battle, which went upto the Supreme Court. Apprehending violence, affecting fair and proper conduct of the election, this Court was moved for police protection. The said Writ Petition was disposed of, noticing the arrangements made by the police for the smooth conduct of the election and also asking the Inspector General of Police, Northern Range to render necessary protection for the conduct of election. Even the fixation of the venue of the polling was the subject-matter of a writ petition before this Court. Finally, the election was held on 23 -9-2007 at Government Town Higher Secondary School from 9 a.m. to 4 p.m.

4. The appellants submits, when a large number of voters under the leadership of the 1st appellant reached the venue of the polling at 8 a.m., they were shocked to see a queue of more than 1000 persons and a large contingent of police force. They submit the persons who formed the queue were not the real voters, but goondas of the ruling political party with bogus identity cards. The 1st appellant demanded that a separate queue should be formed for the 300 genuine voters, who had come with him and who were having the identity cards issued by the Society as well as the Election Commission of India. They were not even permitted to enter the venue. The 1st appellant and others were arrested and taken to the Police Station. They were released only at 1 p.m., on self bond. Exts. P1 to P4 are the arrest memos relating to appellants 1 to 4. In fact, the police, present there, were providing protection to those, who were having bogus identity cards. From the early hours of 23-9-2007, the goondas of the ruling political party formed themselves into a queue in front of the polling station. The initial strength of such persons was more than 1000. But, their strength increased minute by minute. The appellants, their polling agents and the real voters, who came along with them were not allowed to enter the venue of the polling station. If they were to stand at the end of the queue, they would never be able to vote. The bogus voters were allowed to enter and stand in front of the queue by those already standing in the queue. Therefore, the queue was never moving. Appellants 1 and 2 were former Ministers of the State and the 3rd appellant was a former Member of Parliament. Those appellants, who were candidates at the election, were not even allowed to enter the venue of the polling booth. In fact, what transpired was State sponsored terrorism. The Inspector General of Police, Northern Range, who was stated to be in the polling

booth, did not take any effective action to prevent the illegal actions of the goondas. The appellants submit they filed a written representation before respondents 1 and 2, requesting to stop the election. But, the said respondents were not willing to act as requested by them. The 1st respondent allowed persons with forged identity cards to vote. After the polling, the said respondent counted the votes and declared the results. Pursuant to the declaration of results, respondents 5 to 18, the elected members took charge. The election was held without even allowing the candidates to enter the polling booth. What took place was not an election. The ruling party members captured the polling booth, kept the genuine voters at bay and allowed persons with fake identity cards to vote. The Returning Officer and the police officers colluded with them. On 21-09-2007, two days before the polling, a request was made before the 2nd respondent to issue attested copy of Form 6B registered and also to direct the voters to bring identity cards issued by the Election Commission of India. This was intended to prevent fake voters committing impersonation. But, the Convenor of the Administrative Committee issued Ext. P5 communication, rejecting the said request. Three hundred individual members, who were included in the voters' list, filed written complaints before respondents 1 to 4 regarding the above incidents. But, no action was taken on them. According to the appellants, for challenging the election, the alternative remedy provided under the Kerala Co-operative Societies Act is not efficacious. The Presiding Officer of the Co-operative Arbitration Court is holding office during the pleasure of the Government and therefore, he has to act according to the dictates of the political party leading the Government. So, they will not get justice. Further, the alternative remedy is not a bar to invoke the writ jurisdiction. Therefore, the appellants prayed for entertaining the Writ Petition and allowing the following reliefs:

i) issue a writ of certiorari or other appropriate writ order or direction calling for the records leading to the declaration of the election to the Managing Committee of the 3rd respondent held on 23-09-2007 and set aside the same.

ii) to declare that what transpired at the Government Town Higher Secondary School, Kannur on 23-9-2007 cannot be considered as election and hold the same as null and void.

iii) to declare that the respondents 5 to 18 have no manner of right or authority to function as the Managing Committee of the 3rd respondent and direct them not to enroll any member, not to make any appointment or terminate the service of any employee in the 3rd respondent.

iv) to declare that the act of the 1st respondent in declaring that respondents 5 to 18 are elected to the Managing Committee of the 3rd respondent is null and void.

v) to issue a writ of mandamus or other appropriate writ order or direction appointing an Advocate of this Honourable Court as the Returning Officer and

conduct a fresh election to the Managing Committee of the 3rd respondent under the supervision of this Honourable Court.

According to the appellants, no election had taken place. The genuine voters were not allowed to enter the polling booth and all the votes polled were by persons impersonating genuine voters.

5. The 1st respondent Returning Officer filed a detailed counter affidavit, dealing with the averments in the writ petition and denying the allegations against him. According to him, the appellants have an alternative efficacious remedy to redress their grievances under Sections 69 and 70A of the Kerala Co-operative Societies Act. Therefore, the writ petition is not maintainable. He submitted that the election to the Managing Committee of the Society was held, following the due procedure, as contemplated under Rule 35 of the Kerala Co-operative Societies Rules. Pursuant to the election notification, 34 valid nominations were received. Out of them, eight candidates withdrew from the contest. Of the remaining 26 candidates, two were elected unopposed, leaving 24 candidates in the fray. Request was made to the police sufficiently early, to deploy sufficient police force for the smooth conduct of the election. The Inspector General of Police, Kannur Range, deployed about 700 police personnel at the polling booth for the smooth conduct of the election. The police erected barricades at a distance of 100 meters from the southern side of the school gate, from where entry was provided to the school compound, where the polling booths were situated. Voters were admitted to the school compound, after examining their identity cards with reference to Form 6B register and also the delegation forms concerning institutional members. The institutional members and individual members formed separate queues beyond the barricade. After satisfying the identify of the voters, they were permitted entry beyond the barricade point into the school compound. Before issuing the ballot papers, the identity cards of the voters were again checked by the Polling Officer. Only thereafter ballot paper was issued. In view of the above precautions taken, there was no possibility of any impersonation. Out of the total 484 individual members, 376 were issued with identity cards. Out of them, 240 came and voted. Among the institutional members, 514 societies had nominated their delegates. Out of 514 delegates, 248 voted. Thus, out of the 890 persons who could have voted, 488 exercised their franchise. The Returning Officer further submitted that he had issued passes to the candidates and their agents on 22-9-2007 itself. Nobody was closed at 4 p.m. From the individual constituency, nine candidates and from the institutional constituency, three candidates were declared elected, by about 5.05 p.m. Thereafter, the results were published on the notice board of the Society also. All the records in connection with the election, including the unused ballot papers were sealed and entrusted by the Returning Officer to the Managing Director of the Society, as per Ext. R1(a). The Returning Officer specifically dealt with all the averments in the Writ Petition and denied such of them dealing with the alleged irregularities in the conduct of the election.

6. The 1st appellant/1st petitioner filed a reply affidavit, dealing with the counter affidavit of the 1st respondent. The claim of the 1st respondent that the election was held smoothly and no one was prevented from voting, was denied and the averments in the writ petition were reiterated by the 1st appellant in the said affidavit.

7. On behalf of the 4th respondent, the Superintendent of Police, Kannur, filed a detailed counter affidavit, dealing with the steps taken by the police for the smooth conduct of the election. He denied all the allegations against the police and in fact, he pointed an accusing finger against the appellants/writ petitioners. It is stated that at about 7.45 a.m., the appellants along with Sri. K. Sudhakaran, M.L.A., came to the venue. They wanted formation of a separate queue for their supporters. The 1st appellant, the M.L.As with him, the candidates and their agents were permitted to enter through the barricade. The agents and the candidates who were proceeding to the polling booth were called back by Sri. K. Sudhakaran, M.L.A. Thereafter, they blocked the entry at the barricade. They prevented entry of other voters to the school. Though the Superintendent of Police pleaded with them to go to the polling booth, they were adamant and they obstructed the polling process and disobeyed the lawful instructions issued by the S.P. of Police. They threatened the Polling Officers and the police officials and therefore, under the instructions of the S.P. of Police, they were arrested at 8.25 a.m. and taken into the Kannur Police Station. Against them, the police registered Crime No. 475/2007 under Sections 143, 147, 341 and 506(1) read with Section 148 of the I.P.C. and Section 38 read with Section 52 of the Kerala Police Act. The accused persons were released thereafter, on self bond at 12 noon. Ext. R4(d) is the F.I.R. On the arrest of the M.L.As, their supporters took out a procession to the Town Police Station, shouting slogans. They held processions through the streets of Kannur Town and pelted stones at several Government offices and K.S.R.T.C. buses. Therefore, six crimes were registered against them, relating to such incidents. At about 2 p.m., Sri. K. Sudhakaran, M.L.A. contacted the I.G. of Police over the phone. The said officer requested the M.L.A. and his supporters to cast their votes at the election. But, he declined that request. According to the 4th respondent, it would appear that Sri. K. Sudhakaran, M.L.A. and his supporters boycotted the poll and courted arrest with the intention to create a tense situation. He asserted that no complaint regarding impersonation in voting was received by the police. The 4th respondent also denied all the allegations made in the writ petition and prayed for its dismissal.

8. The 1st appellant filed a detailed reply affidavit, disputing the submissions in the counter affidavit of the 4th respondent and also reintegrating the averments in the writ petition.

9. The respondents 5,6,9,16 and 18 filed a detailed counter affidavit, denying the averments and allegations in the writ petition concerning the conduct of the polling.

10. The 1st appellant filed a reply affidavit, dealing with the averments in the

said counter affidavit also. He denied the claim made therein regarding the genuineness of the election and reiterated that no election in accordance with law was held.

11. The learned Single Judge heard the above writ petition along with other connected writ petitions and dismissed them. The learned Judge, after examining the pleadings and the materials on record, held that the contention of the writ petitioners that no election at all was held cannot be accepted. The learned Judge found that based on the materials on record, it cannot be held that no valid election was held by the Returning Officer. The learned Judge also noted that even according to the writ petitioners, only 19 persons were arrested and they were released at 1 p.m. The polling continued upto 4 p.m. But, the writ petitioners or their supporters did not go to the polling booth after 1 p.m. and they do not have a case that they were prevented from going to the polling station between 1 p.m. and 4 p.m. There was no material on record to show that they have preferred any complaint before the superior officials of the Department of Co-operation or before the higher police officers or before the District Magistrate. Regarding the alleged obstruction for entry into the polling booth, the learned Judge found that even after seeing the video CD produced, it is not possible to conclude who was the real wrong doer. The learned Judge noted that this is not a fit case where interference could be made with the election, invoking the power of judicial review. Based on the above view taken by the learned Judge, the writ petitions were dismissed.

12. We heard the learned Counsel for the appellants Mr. B Section Swathi Kumar. We also had the benefit of hearing Mr. K. Ramakumar, Senior counsel for the appellants in W.A. No. 968/2008 and Mr. George Poonthottam, learned Counsel for the appellants in W.A. No. 964/2008. On behalf of the respondents, we heard Mr. T.P. Kelu Nambiar, Senior counsel, Mr. M.K. Damodaran, senior counsel and also Mr. M. Sasindran, Mr. P.V. Surendranath, Smt. A.G. Anitha and Smt. P.A. Anitha, learned Counsel appearing for the respondents. We also heard Sri. K.K. Ravindranath, Additional Director General of Prosecution, who appeared for the 4th respondent I.G. of Police.

13. The learned Counsel for the appellants, in support of their submissions, mainly, relied on the decision of the Madras High Court in *AIADMK v. State Election Commissioner* (2007) 2 MLJ 129. It was a case concerning election to the Municipal Corporation of Chennai. There were allegations of wide-spread violence from the part of the workers of D.M.K., the ruling party. A.I.A.D.M.K., the main opposition party was the writ petitioner. The petitioner contended that no election in the eye of law was held and therefore, it is not necessary to invoke the alternative remedy available under the Statute, to impugn the election. Further, the inconvenience in challenging the election in all the divisions of the Municipal Corporation was also pointed out. The majority of the Full Bench of the Madras High Court overruled the objections raised by the respondents regarding the alternative remedy available to the petitioner and interfered with the election

in some divisions, on finding that no election, as contemplated with the election in some divisions, on finding that no election, as contemplated under the law, was held. The learned Counsel for the appellants submitted that the facts of this case are identical and this Court should interfere, notwithstanding the alternative remedy available in this case.

14. We notice that this is not a case where no election at all was held. In fact, an election was held. But, according to the appellants, it is vitiated on two grounds. The genuine votes were not allowed to enter the polling booth or exercise their franchise. Persons with forged identity cards were allowed to enter the polling booth and cast votes on behalf of the members of the Co-operative Society. If the allegations of the appellants are correct, it is not an election held in accordance with the Co-operative Societies Act, the Rules framed thereunder and the bye-laws of the Co-operative Society. If election to a Society is held, there may be minor infringement of the provisions of the Act, the Rules or the bye-laws. The same will not vitiate the election. Normally, it should be shown that such violations of the Act, the Rules or the bye-laws have materially affected the results of the election. In other words, if a single person is shown to have voted using fake identity card and if the margin of votes between the defeated candidate and the successful candidate is more than one, then the said irregularity will not affect the results of the election. For that, the election need not be set aside. Unlike in A.I.A.D.M.K's case (supra), where election petitions were to be filed in every division, in this case, one election petition would have been sufficient. In that election petition, evidence could have been adduced, to show how many members were prevented from voting, how many fake members have voted and how the above illegalities have affected the results of the election. In this case, we notice that all the allegations of the appellants regarding the irregularity in the conduct of the election are denied by the respondents. They say, everything was done promptly and no complaints, whatsoever, were received by the authorities, alleging irregularities on the date of election. We notice that in one of the writ petitions, namely, W.P. (C) No. 28390/2007, all the members, who were prevented from voting, have filed individual affidavits. Even then, the facts pleaded are disputed questions of fact. Unless witnesses are examined and they withstand the cross-examination of the other side, their version cannot be acted upon. We have seen the video CD furnished by the police. Going by it, we noticed that there was unusual preparation from both side for the election. We noted that some persons started standing in the queue, long before the scheduled time for the commencement of the polling. The appellants also came along with a large group of their supporters to the polling station. They started arguing with the police vociferously. They appear to have caused obstruction at the barricade. The appellants along with some of their supporters were arrested by the police at about 8.25 a.m. We also notice that the entire queue disappeared at about 10.20 a.m. Going by the strength of membership of the Society and the strength of eligible voters, so much preparation and show of strength would appear to be unnecessary. The

total number of eligible voters with identity cards was only 890. Out of that, only 488 voted at the election. Normally, such an election need not generated any tension. But, in this case, with the materials on record, it cannot be decided whether the allegations of the appellants are correct or not. Even assuming the appellants' version is correct, the same has to be established by tendering evidence by examination of witnesses, etc. A writ petition is quite suited for such proceedings. For that, the appellants should have invoked the alternative remedy available to them. The Co-operative Arbitration Court is a judicial Tribunal, which should decide, based on the evidence and the arguments placed before it. If its decision is wrong, the appellants have a right of appeal to the Kerala Co-operative Tribunal, which is manned by a District Judge and thereafter, they could have approached they are aggrieved, under Articles 226 and 227 of the Constitution of India. So, we think that the contention of the appellants that the remedy available to them under the Kerala Co-operative Societies Act was not efficacious, cannot be accepted. The involvement of very important persons from both sides in the election process is not a ground to carry this matter directly to this Court. Though we do not lay down any absolute proposition that this Court cannot or should not interfere with the election process under Article 226 of the Constitution of India, we are of the view that having regard to the facts of this case, this was a case, where the appellants should have invoked the alternative remedy available to them. This is a case involving serious factual disputes as to whether genuine voters were prevented from voting and fake voters were allowed to vote. The said question, as mentioned earlier, can only be decided after taking evidence. Therefore, we are of the view that the writ petition was rightly dismissed by the learned Single Judge. So, the Writ Appeal fails and it is, accordingly, dismissed,

W.A. Nos. 964.968 & 1059/2008:

15. In view of our judgment in W.A. No. 961/2008, these Writ Appeals are also dismissed.