

(2010) 04 KL CK 0019
In the High Court Of Kerala
Case No : C.R.P. No. 846 of 2006

Rajeena George

APPELLANT

Vs

Lissy Yacob

RESPONDENT

Date of Decision : 06-04-2010

Acts Referred:

Citation : (2010) 2 KLT 714

Hon'ble Judges : S.S. Satheesachandran, J

Bench : Single Bench

Advocate : Dinesh R. Shenoy, for the Appellant; Siraj Karoly, T.N. Arunkumar (Perumbavoor), M.V. Joy and Murali Purushothaman, for the Respondent

Final Decision : Dismissed

Judgement

S.S. Satheesachandran, J.—Concurrent decision rendered by the court below setting aside the election of the revision petitioner, the returned candidate from a Ward in Mazhuvannur Grama Panchayat is challenged in the revision. The revision petitioner and respondents 1 and 4 contested for election as a member from the 15th Ward in the above Panchayat in the general election to the Panchayats held on 24.9.2005. On counting of votes, the revision petitioner and the first respondent got equal number of votes and the 4th respondent got votes much less than both of them. One ballot paper cast in the polling was found missing in the counting. The Returning Officer conducted lots to determine the elected candidate from the two, the revision petitioner and also the 1st respondent, who had secured equal votes. The lot fell in favour of the revision petitioner and, accordingly, adding one additional vote in her favour, Smt. Rajeena, the revision petitioner was declared elected. Her election was impeached by the 1st respondent filing an Election Petition as O.P. (Election) No. 3/05 before the Munsiff's Court, Perumbavoor. Among other allegations impeaching the election of the revision petitioner, it was contended that the Returning Officer removed one ballot paper in which vote had been cast in favour of the petitioner (1st respondent) and that it was on account of collusion and

conspiracy with the 3rd respondent (revision petitioner) that respondent was declared elected after taking lots. It was further imputed that lots were taken after noticing of the missing of one ballot paper and discarding the mandatory provisions as to reporting of such missing of ballot paper before the Election Commission and awaiting further directions/orders in the matter for proceeding further with respect to the election held in that particular ward.

2. The revision petitioner, who was the 3rd respondent in the above Original Petition, filed a statement repudiating the allegations levelled in the petition impeaching her election. The 1st respondent in the petition, who was the Returning Officer also filed a statement traversing the allegations raised in the Writ Petition imputing partiality of favouring the 3rd respondent, the candidate who was declared elected. The learned Munsiff, after considering the materials produced and hearing the counsel on both sides, found merit in the case canvassed by the petitioner in the Election Petition that there was non-compliance of the mandatory procedural requirements covered by Section 78 of the Panchayat Raj Act (for short "the Act"), when a ballot paper was found missing during the counting of votes. In such a contingency on detection of missing of ballot paper and where equal votes had been obtained by two candidates in the election, according to the learned Munsiff, it was imperative for the Returning Officer to report the matter to the Election Commission and a wait for further directions as envisaged u/s 78 of the Act. In that view of the matter, the learned Munsiff concluded that there was violation of the mandatory procedural requirements by the Returning Officer in conducting the lots, which led to declaring of the revision petitioner as the returned candidate, and the election so held was declared to be void. Setting aside the election of the returned candidate, the learned Munsiff allowed the petition. Challenge raised by the returned candidate (revision petitioner) against the decision of the learned Munsiff preferring an appeal before the District Court was turned down by the learned District Judge concurring with the views taken by the inferior court. The revision petitioner has filed the present revision challenging the propriety and correctness of the concurrent decision rendered by the two courts below.

3. I heard the counsel on both sides. The one and only question that emerge for consideration in the present revision, in the given facts of the case, is whether the two courts below were justified in holding that there was flouting of the mandatory requirements u/s 78 of the Act by the Returning Officer in proceeding with the conducting of lot to determine which among the two candidates who have secured equal votes was to be declared as the returned candidate, when a ballot paper polled was found missing in the counting of the votes.

4. Section 78 of the Act reads thus:

78. Destruction, loss etc., of ballot papers at the time of counting:--(1) If at any time before the counting of votes is completed any ballot papers used at a polling station or at a place fixed for the poll are unlawfully taken out of the custody of the returning officer or are accidentally or intentionally destroyed or lost or are

damaged or tampered with, to such an extent that, the result of the poll at that polling station or place cannot be ascertained, the returning officer shall forthwith report the matter to the State Election Commission.

5. The vital question that emerge for consideration is whether immediately on detection of missing vote in the counting whatever be the reason for such missing, is the Returning Officer expected to inform the Election Commission of such missing and await for the direction to proceed with the further steps of the election. It is worthwhile to take note it is not in the case of every missing of vote in counting the filing of report to the Election Commission from the Returning Officer is called for. In cases where before counting of votes is completed "any ballot papers used at a polling station or at a place fixed for the poll are unlawfully taken out of the custody of the Returning Officer or are accidentally or intentionally destroyed or lost or are damaged or tampered with, to the extent the vote cast on such ballot paper cannot be ascertained" the Returning Officer has to report the matter to the Election Commission. A ballot paper was found missing when counting of votes was done, without anything more, would not be sufficient to bring such a case within the sweep of Section 78 of the Act. At the most the detection of the missing of a ballot paper during counting of votes would indicate that such ballot paper was "lost". Section 78 of the Act specifically states when the ballot paper or papers are unlawfully taken from the custody of the Returning Officer or accidentally or intentionally destroyed or lost or tampered with, a report from the Returning Officer to the Election Commission is necessary. Missing of a ballot paper detected during counting, that alone, is not enough to hold that such ballot paper was accidentally or intentionally destroyed or lost or tampered with. The word "lost" in the Section is not to be read in isolation but with reference to the other circumstances mentioned - destroyed or tampered with and that too caused accidentally or intentionally. Accident, no doubt, is the product of an unforeseen event. But a mere missing of a ballot paper at the time of counting with no circumstances presented as to how it happened does not cast an obligation, leave alone any mandatory requirement, on the Returning Officer to report the matter to Election Commission and await for further direction. The Returning Officer is the best judge to determine and analyse the situation whether the missing of such ballot paper comes within the ambit of "lost" u/s 78 of the Act. After counting of votes the contesting candidates got equal number of votes and that being so, the missing ballot paper had much value, could not be the criteria or guiding factor in interpreting the provisions of Section 78 of the Act, which is applicable only under the circumstances or situations presented thereunder. A ballot paper was found missing during counting, and that alone, even where the contesting candidates secured equal votes, is not sufficient to hold that the returning officer was bound to follow the procedure u/s 78 of the Act. Each and every situation mentioned in the Section is not to be read separately as if even where a ballot paper is found missing or lost during the counting, then it is incumbent upon the Returning Officer to send a report forthwith to the Election

Commission and await its further directions. Where the Returning Officer is satisfied from the situation presented that the missing of the ballot paper before the counting is completed is on account of such ballot paper being unlawfully taken out of the custody or accidentally or intentionally destroyed or lost or tampered with, then alone a report to the Election Commission is called for and not in a case whenever one or other ballot paper for an unknown reason is found to be missing from the total votes polled in the election.

6. The learned Counsel for the 1st respondent, petitioner in the election petition has relied on the decision by this Court in *Adv. Shajilal Vs. V. Leena and Others*, to canvass for the position that the procedural requirement u/s 78 of the Act is mandatory. It is seen that the very same decision was relied by the learned Munsiff also to form a conclusion that the Returning Officer in the present case in not complying with the procedure u/s 78 of the Act had flouted the mandatory procedural requirement in the counting of votes and, thus, to declare the election of the returned candidate, after taking of lots, is void. The facts involved in the reported decision would indicate that the challenge raised before this Court in that case was against re-polling ordered by the Election Commission in one booth, on the basis of a report received from the Returning Officer that on the counting of votes polled one vote was found missing, and another was a tendered vote, with two among the candidates securing the highest number, but, equal votes. The Returning Officer had made a recounting of the ballots on noticing that two candidates had secured equal number of votes and in that recounting one vote was found missing. The above missing of the vote was on account of the removal of a ballot paper by the election agent of one of the candidates present in the counting centre. It was in that background the Returning Officer reported the matter to the Election Commission and the Commission ordered for conducting repoll in one of the booths of the ward. The facts presented in the reported decision have no parallel with the present case. Undoubtedly, the facts in the reported decision would disclose that that was a case where there was an unlawful "removal of the ballot paper" from the custody of the Returning Officer by an election agent of a candidate and the Returning Officer was satisfied from the circumstances presented that the matter has to be reported to the Election Commission for further directions. In the present case, other than a bald allegation raised in the Election Petition that the Returning Officer had removed one of the ballot papers imputing that he did so as he was interested towards the revision petitioner, the returned candidate, no material was placed before the court that the missing of the ballot paper was on account of any of the circumstances covered by Section 78 of the Act. Further more, there was no objection from the petitioner in the Election Petition, the defeated candidate, or her agent, at the time of counting, objecting to the decision taken by the Returning Officer to proceed with the conducting of the lots when two candidates, the petitioner in the election and the revision petitioner, the returned candidate, were found to have secured equal number of votes polled in the election. It has also come out from the evidence that when lots were taken and

the revision petitioner was declared elected, the election agent of the first respondent/petitioner in the Election Petition subscribed his signature in the relevant form under the Rules prepared by the Returning Officer without any demur or objection. No objection whatsoever was raised by the petitioner in the Election Petition or her election agent at or during or after the counting at least till the revision petitioner was declared elected after taking of lots. The learned Counsel for the petitioner has submitted that the petitioner in the Election Petition has sent a complaint to the Election Commission five days after the declaration of the election. Such complaint sent to the Election Commissioner is of no assistance to her in canvassing a case that the election of the returned candidate is vitiated for the reasons impugned in her election petition.

7. Both the courts below, without considering the true scope and ambit of Section 78 of the Act have mis-appreciated the facts and circumstances and also the materials produced and that no doubt led to a wrong conclusion resulting in manifestation of injustice. A mere allegation raised by a defeated candidate in the election that one vote was found missing during counting, in the absence of any circumstances as covered u/s 78 of the Act, is hardly sufficient to unsettle the election of a candidate which had been duly declared as per the provisions of the Act. Election of a returned candidate is not liable to be interfered with in the absence of satisfactory grounds being made out as spelt out in Section 101 of the Act. Missing of a ballot paper in counting without anything more is not sufficient to declare the election of a returned candidate as void. Petitioner in the Election Petition has not established any of the situations covered u/s 78 of the Act to prove that a duty was cast upon the Returning Officer to report to the Election Commission on detection of the missing of the vote. The acts done by the Returning Officer in conducting the lots on finding that the revision petitioner and also the first respondent have got equal number of votes to determine the elected candidate in accordance with the Rules is found to be proper and correct, and the declaration of the revision petitioner as the elected candidate on the lot falling in her favour in the proved facts of the case is unassailable.

The order passed by the learned Munsiff, setting aside the election of the revision petitioner as confirmed by the learned District Judge is reversed. The Election Petition shall stand dismissed. Civil Revision Petition is allowed as above.