

(2011) 07 KL CK 0213
In the High Court Of Kerala
Case No : CRP. No. 184 of 2011

Rasoja Haridas

APPELLANT

Vs

K.V. Balachandran, O.A. Dinamani and A.K. Girish

RESPONDENT

Date of Decision : 22-07-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 1
Kerala Municipalities Act, 1994 — Section 108(1A), 165, 169, 178(1), 191
Representation of the People Act, 1951 — Section 117(1), 118, 86

Citation : (2011) 3 KLJ 526

Hon'ble Judges : Thomas P. Joseph, J

Bench : Single Bench

Advocate : T.H. Abdul Azeez, for the Appellant; K.G. Balasubramanian, for the Respondent

Final Decision : Dismissed

Judgement

Thomas P. Joseph

1. The question which arises for a decision in this civil revision is:

Whether a payment made in short of the statutory security deposit to the Chief Ministerial Officer while challenging the election of a returned candidate under the provisions of the Kerala Municipality Act, 1994 (for short, "the Act") is a curable defect?

2. The above question is required to be decided in the matter of an election petition filed by the first respondent before learned Munsiff, Kodungallur challenging election of petitioner from Ward 22 of Kodungallur Municipality in the election held on October 25, 2010. First respondent challenged election of petitioner under Sec.165 of the Act on the ground that details regarding property owned by the petitioner furnished along with her nomination as required under Sec.108(1A) of the Act is incorrect and hence her election is void under Sec. 178(1)(a) of the said Act. Petitioner contended that the election petition is not

maintainable for reasons that provision regarding deposit of security amount at the time of filing the election petition is not complied, no affidavit is filed along with the election petition in support of the allegation regarding corrupt practice and that copy of petition given to the petitioner was not properly attested. Learned Munsiff considered the objections as a preliminary point as it related to the maintainability of the petition and overruled the objections as per the impugned order. Learned counsel on both sides submitted that the only issue that this Court is required to consider in this proceeding is maintainability of the election petition on the ground of nondeposit of entire sum of Rs. 1,000/- along with election petition as required under Sec.191 of the Act. As per the said provision a person challenging the election is to deposit at the time of presenting the petition in the court of Munsiff Rs. 1,000/- as security or enclose with the petition a Government treasury receipt showing that deposit of the said amount has been made by him in a Government treasury in favour of the Munsiff as security for costs of the petition. In this case, first respondent while presenting the petition deposited in court only Rs. 500/-. Later, on an application preferred by the first respondent he was allowed to make good the deficit by depositing the balance sum of Rs. 500/- also.

3. Learned counsel for petitioner has contended that compliance of Sec.191 of the Act is mandatory and that the said provision cannot be diluted in any way, whatever be the reason thereof. It is contended that learned Munsiff has taken the view that Sub-sec.(2) of Sec.191 of the Act enabled the court to direct election petitioner to produce "further" security and hence it is within the power of learned Munsiff to allow any deficit in the initial deposit to be made good by depositing the balance sum of Rs. .500/- after the election petition is received. It is pointed out by the learned counsel that when there is noncompliance of Sec.191 of the Act it should result in a dismissal of the election petition as provided under Sec.169 of the Act. Reliance, in support of the said argument is placed on the decisions of the Supreme Court in Charan Lal Sahu Vs. Nandkishore Bhatt and Others, , Aeltemesh Rein Vs. Chandulal Chandrakar and Others, and M.Y. Ghorpade Vs. Shivaji Rao M. Poal and Others, . It is contended by learned counsel that though, it is within the power of the learned Munsiff to direct the election petitioner to furnish "further" security (ie, security in addition to the security deposit which election petitioner is mandatorily required to deposit under Sec.191(1) of the Act), that did not enable the court allow the election petitioner to cure the fatal defect in not complying with the mandatory requirement of Sec.191(1) of the Act.

4. In response, it is argued by learned counsel for the first respondent that in the election petition though first respondent has stated that he is remitting Rs. 1,000/- as security (in compliance of Sec.191(1) of the Act), it happened that the said sum of Rs. 1,000/- was given to the Chief Ministerial Officer of the learned Munsiff (who was authorised to receive the election petition on behalf of learned Munsiff), but he refused to receive the entire sum of Rs. 1,000/- on the premises that only Rs. 500/- need be deposited while presenting the election

petition. It is also argued by learned counsel that under relevant rules of the Civil Rules of Practice for depositing the amount there must be lodgment schedule issued by the learned Munsiff, no such lodgment schedule was issued in this case and hence first respondent cannot be found fault with for not depositing Rs. 1,000/- along with the election petition. It was therefore not possible for the first respondent to deposit Rs. 1,000/-. It is argued that law does not compel any person to do what is impossible and that first respondent may not be punished for the wrong committed by the Chief Ministerial Officer of the court.

5. To appreciate the rival contentions, it is necessary to look at Sec.191(1) of the Act. It states:

At the time of presenting an election petition, the petitioner shall deposit in the Munsiff's Court a sum of one thousand rupees as security or enclose with the petition a Government treasury receipt showing that the deposit of the said amount has been made by him in a Government treasury in favour of the Munsiff as security for the costs of the petition.

Sub-sec.(2) of Sec.191 says:

During the course of the trial of an election petition, the court may, at any time, call upon the petitioner to give such further security for costs as it may direct and if the petitioner fails to do so dismiss the petition.

The next relevant provision is Sec.169 of the Act. That provisions reads:

(1) The Court shall dismiss an election petition which does not comply with the provisions of Section 165 or section 166 or section 191. Explanation.- An order of the court dismissing an election petition under this sub-section shall be deemed to be an order made under clause (a) of section 176.

(2) xxx

(3) xxxx

6. As per Sec.191(1) of the Act it is mandatory that the election petitioner (here, the first respondent) should deposit in the court of Munsiff a sum of Rs. 1,000/- as security or, enclose with the petition a Government treasury receipt showing deposit of such amount in the Government treasury and that should have been done at the time of presentation of the election petition itself. Sub-sec.(2) of Sec.191 of the Act, in my view does not empower the court to allow make good the deficiency if any, in the deposit to be made under Sub-sec. (1) of Sec.191 of the Act. Sub-sec.(2) of Sec.191 only empowers the court if it thinks fit, during the course of trial of an election petition to call upon the election petitioner to give such "further security" for costs. Thus the power given to the court is only to call upon the election petitioner to furnish further security, ie. security in addition to the security which election petitioner is mandatorily required to deposit under Sub-sec.(1) of Sec.191 of the Act. Sub-sec.(2) cannot be understood as empowering the Munsiff to permit election petitioner deposit the

whole or any portion of security of Rs. 1,000/- which he was bound to deposit at the time of presentation of the election petition, at a later stage. Sec.169 of the Act also makes the position clear that the court shall dismiss an election petition which does not comply with the provisions of Secs. 165, 166 or 191 of the Act. In other words, if the election petition is not accompanied by the statutory deposit of Rs. 1,000/- in cash or a receipt for deposit of that amount in the Government treasury, the only course open to the Munsiff is to dismiss the election petition under Sec.169 of the Act.

7. Reference can be made to the relevant provisions of the Representation of People Act, 1951 (for short, "the RP Act") in this regard, which are similar to the above said provisions of the Act. In the RP Act, Sec.117 deals with the mandatory requirement of deposit of Rs. 2,000/- as security along with presentation of election petition. Sub-sec.(2) of the said Section empowers the court to call upon the election petitioner to give such further security as the court may think fit. Consequence of non-compliance of the statutory deposit under Sub-sec.(1) of Sec.117 of the RP Act is contained in Sec.86 of the RP Act which says that the court "shall" dismiss the election petition which does not comply with (among other provisions) Sec.117 of the RP Act.

8. Referring to the said provisions in the RP Act, the Supreme Court in Charan Lal Sahu v. Nandkishore Bhatt and others (supra) held that the deposit contemplated under Sec.117(1) of the RP Act is mandatory. In that case appellant had presented the election petition on June 26, 1972 but, unaccompanied by the deposit of Rs. 2,000/- as security. It was contended before the High Court by appellant that trial had not started; Section 117 of the RP Act is only directory and not mandatory, that deposit of Rs. 2,000/- is to secure the costs in the course of trial of the election petition and as such dismissal of the petition for non-compliance with the said provision is a penalty which is not one of the penalties prescribed under Sec.118 of the RP Act. The High Court rejected the contentions and held that deposit of Rs. 2,000/- under Sec.117 of the RP Act was mandatory and since that mandatory requirement was not complied, the election petition is not maintainable. The Supreme Court in paragraph 1 of the decision referred supra observed:

..... We think the High Court was right in holding that it is not competent to reduce the amount of security deposit or to dispense with it.

In paragraph 3 of the decision it is observed:

..... The right (to challenge the election under the RP Act) conferred being a statutory right, the terms of that statute had to be complied with. There is no question of any common law right to challenge an election. Any discretion to condone the delay in presentation of the petition or to absolve the petitioner from payment of security for costs can only be provided under the statute governing election disputes. If no discretion is conferred in respect of any of these matters, none can be exercised under any general law or on any principle

of equity.....

In that case, an attempt was made to salvage the situation by resorting to the decision in *K. Kamaraja Nadar Vs. Kunju Thevar and Others*, .

That was a case where the deposit was not made to the Election Commission. The Supreme Court observed that it would be absurd to imagine that a deposit made either in a Government treasury or in the Reserve Bank of India in favour of the Election Commission itself would not be sufficient compliance with Sec.117 of the RP Act. The Supreme Court in *Charan Lal Sahu v. Nandkishore Bhatt and others* in paragraph 4 referring to the said decision observed:

This decision, therefore, cannot come to the rescue of a petitioner who has failed to deposit the security as required u/s 117 of the Act or has paid less than the amount specified therein.....

The other decision relied by the learned counsel for petitioner is *Aeltemesh Rein v. Chandulal chandrakar and others* (supra). There, reference was made to the decision in *Charan Lal Sahu v. Nandkishore Bhatt and others*. Consequence of non-compliance with Sec.117 of the Act (regarding the statutory deposit) was considered in that case also. The Supreme Court held that the question has been settled in *Charan Lal Sahu v. Nandkishore Bhatt and others* wherein it was held that the High Court had no option but to reject an election petition which is not accompanied by the payment of security amount as provided under Sec.117 of the RP Act and that under Sec.86(1) of the RP Act, the High Court was bound to dismiss the election petition which did not comply with the provisions of Sec.117 (among other provisions) of the RP Act. In *M.Y. Ghorpade v. Shivaji Rao M. Poal and others* (supra) also mandatory nature of deposit under Sec.117 of the RP Act was upheld. In paragraph 5, it was held, referring to the various decisions of the Apex Court on the matter:

.....it is crystal clear to us that the aforesaid provision requires deposit of Rs. 2000 as security for the cost has to be made at the time of presenting an election petition. The object of having the aforesaid provision could be to discourage entertaining frivolous election petitions and to make provision for cost in favour of the parties who ultimately succeed in the election petition. Sub-section (2) of Section 117 authorises the High Court to call upon an election petitioner during the course of the trial of an election petition, to give such further security which may be necessary, depending upon the facts and circumstances of the case. It would, therefore, be apparent that the requirement of making a security deposit of Rs.2000 is mandatory and the same has to be made while presenting an election petition, but the mode of deposit as well as the person who could make a deposit has to be complied with in accordance with the rules of the High Court in question and, as such has been held to be directory in several decisions of this Court.

9. I stated that the provisions of Secs.117 and 86 of the RP Act are similar to the provisions of Secs.191 and 169 of the Act. Therefore, the principle laid down in

the above said decisions should apply to the provisions of Secs.191 and 169 of the Act also and it must be held that the deposit of Rs. 1,000/- by way of security while election petition is presented under Sec.191(1) of the Act is mandatory and that the defect in not depositing the whole or any portion of the amount cannot be cured after presentation of the election petition even by an order of the court. Sub-sec.(2) of Sec.91 of the Act only empowers the court, in cases where the statutory deposit of Rs. 1,000/- has already been made under Sec.191(1) of the Act and the election petition is validly filed, to call upon the election petitioner in appropriate cases, during trial of the petition, to deposit further security as circumstances may warrant.

10. Then the next question is whether on the principles, *actus curiae neminem gravabit* and *Lex non cogit ad impossibilia* the election petition could be saved from a dismissal as required under Sec.169 of the Act in view of the subsequent deposit of the balance amount. In the election petition first respondent has stated that he is remitting Rs. 1,000/- as security (as required under Sec.191(1) of the Act) but according to him, the Chief Ministerial Officer of the court insisted that only Rs. 500/- need be deposited. It is also argued that in such a situation without a lodgment schedule issued by the court it was not possible for the first respondent to remit the balance amount in the Government treasury as provided under Sec.191(1) of the Act. It is in this connection that learned counsel has placed reliance on the decision in *R.N. Jadi and Brothers and Others Vs. Subhashchandra*, . There, the principles of "*actus curiae neminem gravabit* and *Lex non cogit ad impossibilia*" are considered.

11. I must remember that the said principles were applied in that case in the matter of reception of written statement beyond the period of 90 days as provided under Rule 1 of Order 8 of the CPC (for short, "the Code"). With reference to the various decisions the Supreme Court said that even beyond the prescribed time limit, it is within the power of court in appropriate cases to receive the written statement. The Supreme Court referred to the above principles to say that the court is not powerless to receive a written statement filed beyond the period prescribed by the Code. That decision cannot be applied to a case where the court had no power to condone the fatal defect in the non-deposit of the whole or portion of the security deposit in an election petition as provided under Sec.191(1) of the Act.

12. Assuming that the Chief Ministerial Officer (to whom power to receive election petition was delegated by learned Munsiff) had refused to receive the balance sum of Rs. 500/- to make the aggregate deposit of Rs. 1,000/- it is not as if the first respondent could not bring the matter to the notice of learned Munsiff. On the face of the statutory provision contained in Sec. 191(1) of the Act it is no answer to say that the Chief Ministerial Officer had refused to receive Rs. 500/-.

13. Nor am I impressed by the argument that it was not possible for first respondent to pay the balance sum of Rs. 500/- at the time of presentation of

the election petition. Rule 359 of the Civil Rules of Practice states that except as provided under Rules 357 and 368 payment of money out of court shall be made only upon the order of the Judge, made at the time of hearing of a suit, appeal or matter or upon a cheque application, supported by affidavit showing how the applicant is entitled to receive payment. Rule 361 of the Civil Rules of Practice refers to payment schedule and states that the person desirous of obtaining payment of money out of court (the payee) shall file a payment schedule. Rule 356 of the Civil Rules of Practice deals with cash payment for special reasons and states that for special reasons the money may, with leave of the Judge be paid to the Chief Ministerial Officer of the court and the payment shall forthwith be entered in the cash book (ie. the payment which the Chief Ministerial Officer is empowered to receive under Sec.191(1) of the Act). Sec. 191(1) of the Act enables first respondent either to pay the amount in cash in court at the time of filing election petition or deposit the amount or part of it in the Government treasury and produce a receipt along with election petition. Therefore, assuming that the Chief Ministerial Officer has declined to receive the sum of Rs. 500/- (out of the aggregate sum of Rs. 1,000/- which first respondent says he was willing to deposit) it was open to the first respondent to deposit the balance amount in the Government treasury and produce the receipt for such payment along with the election petition. Admittedly, that also did not happen. As such the contentions based on "actus curiae neminem gravabit and Lex non cogit ad impossibilia" cannot stand on the face of the mandatory requirements of Secs. 191(1) and 169 of the Act and the facts of this case. In the light of my above discussion I hold that the defect in non-deposit of the whole or any portion of the amount required to be deposited under Sec. 191(1) of the Act along with the election petition is not curable but, is fatal.

14. In the above view of mine, learned Munsiff was not correct in holding that in view of Sec.191(2) of the Act it was open to that court to permit first respondent cure the defect by depositing the balance sum of Rs. 500/- by way of security. It follows that the order passed by learned Munsiff is liable to be set aside. I do so. Resultantly civil revision is allowed. Order under challenge is set aside and consequently Election O.P.No.14 of 2010 of the court of learned Munsiff, Kodungallur will stand dismissed.

I.A. No. 900 of 2011 will stand dismissed.