

(2001) 11 AP CK 0073

In the Andhra Pradesh High Court

Case No : Writ Petition No's. 18953 and 18954 of 2001

S. Jyothi

APPELLANT

Vs

Presiding Officer/Election Officer, Thottambedi Mandal,
Chittoor District and Others

RESPONDENT

Date of Decision : 28-11-2001

Acts Referred:

Andhra Pradesh Panchayat Raj Act, 1994 — Section 144X, 233, 73G
Constitution of India, 1950 — Article 226, 243, 329
Representation of the People Act, 1951 — Section 100

Citation : (2002) 2 ALD 170

Hon'ble Judges : G. Bikshapathy, J

Bench : Single Bench

Advocate : E. Manohar, for T. Rajendra Prasad, for the Appellant; Government Pleader, for P.R. and Addl. A.G., V.V. Prabhakar Rao, SC and D. Sudershan Reddy, for the Respondent

Final Decision : Dismissed

Judgement

G. Bikshapathy, J.—The issues involved in both the writ petitions are similar, hence they are being disposed of by this common judgment.

2. In these writ petitions, the petitioners are assailing the order dated 6-9-2001 passed by the 1st respondent-Presiding Officer/ Election Officer, Thottambedu Mandal, Chittoor district, declaring that the petitioners ceased to be the members of the Mandal Parishad Territorial Constituency (for short, MPTC") of Thottambedu and Bonnupalli respectively with immediate effect.

3. The events that led to the filing of these writ petitions are thus:

4. Smt S. Jyothi, the petitioner in WP No. 18953/2001 and Mr. K.Chandraiah Naidu, the petitioner in WP No. 18954 were elected as MPTC members of Thottambedu and Bonnupalli in the election held on 17-7-2001. They belonged to Telugu Desam Party, a recognised political party. Elections to the post of President and Vice-president of Thottambedu Mandal was held on 22-7-2001.

5. It is the case of the Smt S. Jyothi, petitioner in WP No. 18953/2001 that the District Telugu Desam Party President has appointed her as party Whip and he also issued a notice to the Presiding Officer, Thottambedu Mandal intimating her appointment as party Whip for the election to the posts of President and Vice-President. It is also her case that B-Form was issued in favour of Mr. K. Chandraiah Naidu, the petitioner in WP No. 18954/2001 for the post of President of Mandal Praja Parishad and according to her a copy appointing her as party Whip was presented to the Presiding Officer-1st respondent on 22-7-2001 at 9.15 a.m., but, however, after some time another person by name Mr. K. Dhananjeyulu presented another B-Form to the Presiding Officer alleged to have been issued by the District Telugu Desam Party President to the effect that one Mr. Y. Madhavaiah was appointed as party Whip and B-Form in favour of Mr. K. Dhananjeyulu for the post of President and Mr.K.Chandraiah Naidu for the post of Vice-President was issued on behalf of the Telugu Desam Party. The elections took place as scheduled, but it appears, Mr. Y.Madhavaiah made a complaint to the Presiding Officer-1st respondent requesting him to disqualify the petitioners as MPTC members on the ground that they disobeyed the orders of the party Whip in regard to the elections for the posts of President and Vice-President of Thottambedu Mandal. Pursuant to the said complaint, by order dated 22-7-2001, the petitioners were disqualified to be the members of MPTC. Aggrieved by the same, the petitioners filed WP Nos. 15301/2001 and 15302 of 2001. This Court, by order dated 6-8-2001 allowed the writ petition by directing the 1st respondent to issue fresh show cause notice to the petitioners and then to pass appropriate orders thereon. Consequent to the directions issued by this Court in the above writ petition, fresh show cause notices dated 11-8-2001 were issued to the petitioners to which the petitioners submitted their explanation dated 15-8-2001. Thereafter, the 1st respondent passed the impugned orders dated 6-9-2001 declaring that the petitioners ceased to be the members of the MPTC. The said orders are assailed in these writ petitions.

6. The un-official 4th respondent filed counter affidavit. In the counter it is stated that the writ petitions are not maintainable as there is an efficacious and alternative remedy of filing election petitions u/s 233 of the A.P. Panchayat Raj Act, 1994, (for brevity, "the Act") read with Clause (b) of Article 243 of the Constitution. It is also stated that the rules relating to election Tribunal in respect of Gram Panchayat, Mandal Parishads and Zilla Parishads were framed by the Government in G.O.Ms.No. 111, dated 3-3-1995 and the Sub-Court (now Senior Civil Judge's Court) is the election Tribunal and therefore the petitioners are required to file election petitions and that in that view of the matter, they cannot approach this Court under Article 226 of the Constitution. It is also stated that as disputed questions of fact are raised in these writ petitions as regards the mode and method of dealing with the Whip constituting the violation of the provisions of the Act and the Rules made thereunder, the same cannot be decided in these writ petitions and therefore the writ petitions on these grounds are not maintainable. It is also stated that the District Telugu Desam Party President of

Chittoor appointed him on 21-7-2001 as party Whip of the Telugu Desam Party for the elections of President and Vice-President of the Mandal that were to be held on 22-7-2001 and also issued B-Form in favour of Mr. K. Dhananjeyulu for the post of President and Mr. K. Chandraiah Naidu for the post of Vice-President. It is also stated that the letter appointing him as the party Whip was handed over to the Assistant Election Officer on 21-7-2001 itself and the B-Form issued by the District Party President in favour of Mr. K. Dhananjeyulu and Mr. K. Chandraiah Naidu for the posts of President and Vice-President respectively were handed over to the election officer on 22-7-2001. It is further stated that the writ petitioner Mrs. Jyothi secured a form of appointment of Whip and B-Form with the connivance of the local MLA who happens to be the Minister and made use of the same as if Smt S. Jyothi was the party Whip of the Telugu Desam Party and B-Form was also accordingly submitted as the official candidate on behalf of the Telugu Desam Party. After coming to know about this, the same was informed to the District President of the Telugu Desam Party who in turn sent fax message to the 1st respondent confirming the appointment of party Whip in favour of the 4th respondent (Mr. Madhaviah) and also issued B-Form in favour of Mr. K. Dhananjeyulu for the post of President and Mr. K. Chandraiah Naidu for the post of Vice-President.

7. The election Officer after verifying the appointment of 4th respondent as party Whip on 21-7-2001 itself and the confirmation as regards the issuance of B-Form by the District Telugu Desam Party in favour of Mr. K. Dhananjeyulu for the post of President accepted Mr. K. Dhananjeyulu as official candidate of Telugu Desam Party for the post of President and Mr. Chandraiah Naidu for the post of Vice-President. It is further stated that giving a go bye to the directions of the party Whip, the petitioner in WP No. 18954/2001 Sri Chandraiah Naidu contested as an independent candidate for the post of President and he was declared elected for the post of President of the Mandal. It is also stated that the petitioner in WP No. 18954/2001 was elected with the support of four MPTC members belonging to the Congress party and Smt S. Jyothi, the petitioner in WP No. 18953/2001 and thus they disobeyed the party Whip and therefore a report was made available to the party high Command to the effect that the petitioners disobeyed the party Whip and consequently on a complaint made to the Presiding Officer, and consequently the impugned orders came to be passed and that the impugned orders are legal, valid and unassailable. Thus, it is submitted that even on merits no case is made out to interfere with the impugned orders by this Court.

8. The 1st respondent has not filed any counter in spite of giving several opportunities nor the records were made available. The learned Counsel for the 1st respondent virtually expressed his inability to assist the Court.

9. Mr. E. Manohar, learned senior Counsel appearing for the petitioners submits that as the petitioners are alleging violation of statutory rules, it is not necessary for them to file election petitions. Learned Counsel further submits that under Rule 13(6) of A.P. Conduct of Election of Member (Co-opted) and President/Vice-

President of Mandal Parishad and Members (Co-opted) and Chairman and Vice-Chairman of Zilla Parishad Rules, (for brevity, "the Rules") issued in G.O.Ms.No. 756, dated 30-11-1994, intimation of appointment of a party Whip by every recognised political party should be sent to the Presiding Officer to reach him on or before 11.00 a.m., on the day preceding the day of election and in the instant case, it is the admitted case of the authorities that the Whip was received on 22-7-2001 and therefore there is infraction of Rule 13 (6) of the Rules and therefore the impugned orders are liable to be set aside. He also submits that in the circular dated 19-7-2001 issued by the State Election Commission the procedure is prescribed and the said procedure is to be followed by the concerned including the Presiding Officer and para 3 (a) of the said circular clearly stipulates that appointment of party Whip is valid only if the State President, or a person authorised by him, intimates the name of the Whip to the Presiding Officer before 11-00 a.m., on the day preceding the day of election. In the instant case, the Whip was issued in favour of Mr. Y. Madhavaiah on 21-7-2001 but the same was not received by the 1st respondent on or before 11-00 a.m., the day preceding the day of election and that the 1st respondent misconstrued the relevant rules and the circular dated 19-7-2001 issued by the State Election Commission and therefore the decision rendered is an erroneous. Learned Senior Counsel farther submits that para 3(c) of the said circular stipulates that even if more than one Whip is appointed, and if different persons appointed as Whips give contradicting directions to the members for voting, in such cases the members obeying the directions of any one of the said Whips cannot be subjected to any disqualification and it is contrary to the judgment of the Division Bench of this Court passed in VPNos.15631 and 15341 of 2001, dated 4-10-2001 and therefore on this ground also the impugned orders are liable to be set aside.

10. On the other hand, Mr. D. Sudershan Reddy, learned Counsel appearing for the unofficial respondent submits that when once the election process is complete it is not proper for any Court to interdict in the election process and it is only after the elections, it would be open for the aggrieved party to file an election petition and therefore the writ petitions are not maintainable. In support of his contention, he relied on the decision of the Apex Court in Election Commission of India Through Secretary Vs. Ashok Kumar and Others, , Shri Sant Sadguru Janardhan Swamy v. State of Maharastra 2001 (5) DT (SC) 287, and also on the decision of the Full Bench of this Court in Guttakonda Kanaka Durga Vs. State Election Commissioner, Govt. of A.P., and others, .

11. The issue that falls for consideration is whether the writ petition is maintainable. The Government, in G.O.Ms.No. 111, dated 3-3-1995 by virtue of the powers conferred under the provisions of the Act framed the rules relating to adjudication of election disputes and election offences in respect of Gram Panchayats and Mandal Parishads and Zilla Parishads. Under rules the election Tribunal can entertain the election petition filed by a member assailing his disqualification for non compliance of the provisions of the Act or for that matter

any rules or orders made thereunder. Hence, learned Counsel for the unofficial respondent submits that it is competent for the Tribunal even to go into the disputes relating to compliance or otherwise of the rules or any provisions of the Act in an election petition and therefore it is sought to be contended that the election petition is the only appropriate forum where the order of the authority can be assailed. u/s 233 of the Act it has been clearly stipulated that no election held under this Act shall be called in question except by an election petition presented to such authority and in accordance with such rules as may be made in this behalf. It is further contended that under Rule 13(6) of the Rules the Whip has to be issued by the competent authority and it should be forwarded to the Presiding Officer on or before 11-00 a.m., the day preceding the day of election and in the instant case, the said Whip was issued on 21-7-2001 and therefore the whip so received cannot be attacked.

12. In Shri Sant Sadguru Janardan Swami's case (supra) one of the contentions raised before the Apex Court was that as the electoral rolls were illegally prepared in breach of the rules, no election could be conducted on the basis of such illegal electoral rolls. The contention raised was that there was a breach of rule or a certain mandatory provision of the rules were not Complied with which prepared the electoral rolls the same could be challenged in writ petition.

13. In this regard the Apex Court in Shri Sant Sadguru Janardan Swami's case (supra) at paras 7, 8 and 9 observed thus:

"7. IN the light of the aforesaid provisions of Chapter XI-A of the Act and the Rules, we will examine as to whether preparation of electoral rolls is an intermediate stage in the process of election. The provisions referred to above shows that Chapter XI-A was enacted and the rules were framed specially to deal with the election of the specified societies u/s 73-G of the Act. Section 144-X Provides that various stages of election shall also include preparation of the list of voters. Once the statute provides that the preparation of the voters" list shall be part of the election process, there is no reason to hold that the preparation of the electoral roll is not an intermediate stage in the process of the election of a specified society. This matter can be examined from another angle. A perusal of the Rules discloses that the preparation of provisional list of voters, filing of objection against the provisional list of voters, consideration of the objection by the Collector and finalising the list of voters, all occur in the rules which cover the entire process of the election. The rules framed for election of specified societies are complete code in itself providing for the entire process of election beginning from the stage of preparation of the provisional voters list, decision on the objection by the Collector, finalisation of electoral rolls, holding of election and declaration of result of the election. In view of the scheme of the Act and Rules, the preparation of voters" list must be held to be part of the election process for constituting managing committee of a specified society. In Someshwar Sahakari Sakhar Karkhana Limited, Someshwarnagar v. Shriniwas Patil, Collector, Pune and Ors. 1992 Maharashtra Law Journal, 883, it was held that in the scheme of

the provisions of the Act and the Rules, the preparation of the list of voters for election to the managing committee of a specified society is an intermediate stage in the process of the election. Similar view was taken in *Shivnarayan Amarchand Paliwal v. Vasantrao Vithalrao Gurjar and Ors.* 1992 (30) M L J 1052. However, in *Karbhari Maruti Agawan and others v. State of Maharashtra and others* 1994 (2) M L J 1527, although it was held that the preparation of the list of voters is an intermediate stage in the process of election, but that does not debar the High Court to entertain a petition under Article 226 of the Constitution challenging the validity of the electoral roll. It appears that the consistent view of the Bombay High Court on the interpretation of Chapter XI-A of the Act and the Rules framed thereunder is that the preparation of electoral roll is an intermediate stage of the election process of the specified societies. This being the consistent view of the High Court on the interpretation of provisions of the State Act, the same is not required to be disturbed unless it is shown that such a view of High Court is palpably wrong or ceased to be good law in view of amendment in the Act or any subsequent declaration of law. We are, therefore, of the view that the preparation of the electoral roll for election of the specified society under Chapter XI-A and the rules framed thereunder, is an intermediate stage in the process of election for constituting managing committee of a specified society.

8. It was then urged that the tribunal constituted under the Act has no power to go behind the preparation of the electoral roll and, therefore, the writ petition is maintainable. Learned Counsel also strongly relied upon the decisions in the case of *Bar Council of Delhi and Others Vs. Surjeet Singh and Others*, and *Ramachandra Ganpat Shinde and another Vs. State of Maharashtra and others*, . Learned Counsel also referred to Section 100 of Representation of Peoples Act and a decision in the case of *Shreewant Kumar Choudhary v. Baidyanath Panjiar* 1973 (1) SCC, 1995. In sum and substance, the argument is that since the breach of rule in preparation of the electoral roll cannot be questioned in an election petition before the election tribunal, therefore, the writ petition challenging the preparation of the electoral roll could not have been dismissed on the ground that the appellant had an alternative remedy of filing an election petition. In this regard, it is relevant to notice Rule 81 of the rules which provides for grounds for declaring election to be void. The relevant portion of the Rule runs as under:

"81. Grounds for declaring election to be void, (d) (iv) by any non-compliance with the provisions of the Act or any rules made thereunder, the Commissioner shall declare the election of the returned candidate to be void."

9. If the contention of the appellant is that there was a breach of rule or certain mandatory provisions of the rules were not complied with which preparing of the electoral roll, the same could be challenged under Rule 81(d)(iv) of the rules by means of an election petition. In view that, the preparation of electoral roll is part of the election process and if there is any breach of the rules in preparing

the electoral roll, the same can be called in question after the declaration of the result of the election by means of an election petition before the tribunal."

14. In para 12, the Supreme Court observed thus:

"In view of the finding that preparation of the electoral roll is being an intermediate stage in the process of election of the Managing Committee of a specified society and the election process having been set in motion, it is well settled that the High court should not stay the continuation of the election process even though there may be some alleged illegality or breach of rules while preparing the electoral roll. It is not disputed that the election in question has already been held and the result thereof has been stayed by an order of this Court, and once the result of the election is declared, it would be open to the appellant to challenge the election to the returned candidate, if aggrieved, by means of an election petition before the election tribunal."

15. Same observations were made in G. Kanaka Durga's case (supra) by the Full Bench of this Court and also in Ashok Kumar's case (supra). The Supreme Court in Ashok Kumar's case (supra) at para 32 of the order recorded the following conclusions, which reads thus:

"32 For convenience sake we would now generally sum up our conclusions by partly restating what the two Constitution Benches have already said and then adding by clarifying what follows therefrom in view of the analysis made by us hereinabove:

(1) If an election, (the term election being widely interpreted so as to include all steps and entire proceedings commencing from the date of notification of election till the date of declaration of result) is to be called in question and which questioning may have the effect of interrupting, obstructing or protracting the election proceedings in any manner, the invoking of judicial remedy has to be postponed till after the completing of proceedings in elections.

(2) Any decision sought and rendered will not amount to "calling in question an election" if it subserves the progress of the election and facilitates the completion of the election. Anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the election.

(3) Subject to the above, the action taken or orders issued by Election Commission are open to judicial review on the well-settled parameters which enable judicial review of decisions of statutory bodies such as on a case of mala fide or arbitrary exercise of power being made out or the statutory body being shown to have acted in breach of law.

(4) Without interrupting, obstructing or delaying the progress of the election proceedings, judicial intervention is available if assistance of the court has been sought for merely to correct or smoothen the progress of the election proceedings, to remove the obstacles therein, or to preserve a vital piece of evidence if the same would be lost or destroyed or rendered irretrievable by the

time the results are declared and stage is set for invoking the jurisdiction of the Court.

(5) The court must be very circumspect and act with caution while entertaining any election dispute though not hit by the bar of Article 329(b) but brought to it during the pendency of election proceedings. The Court must guard against any attempt at retarding, interrupting, protracting or stalling of the election proceedings. Care has to be taken to see that there is no attempt to utilize the Court's indulgence by filing a petition outwardly innocuous but essentially a subterfuge or pretext for achieving an ulterior or hidden end. Needless to say that in the very nature of the things the Court would act with reluctance and shall not act, except on a clear and strong case for its intervention having been made out by raising the pleas with particulars and precision and supporting the same by necessary material."

16. Learned senior Counsel appearing for the petitioners would submit that the lis need not be raised through election petition as in the instant case the 1st respondent himself has accepted that the order was received on 22-7-2001 and thereby violated Rule 13(6) of the rules. Learned Counsel refers to para 7 of the impugned order, which reads thus:

"7. The whip issued in favour of Y. Madhavaiah, dated 21-7-2001 is a valid one since the date of issue of whip is one day prior to the date of election to the office of President and Vice-President scheduled to be held on 22-7-2001. The alleged Whip issued in favour of you dated 22-7-2001 i.e., on the date of election was also denied by Sri G.V. Srinadha Reddy, TDP President, Chittoor district is not a genuine. As per the directions issued by the State Election Commission that the political parties shall issue Whip one day prior to the date of election. In the present case the whip issued in favour of Y. Madhavaiah, dated 21-7-2001 is within the time not time barred one. The Telugu Desam Party President Sri G.V. Sreenadha Reddy the appointment of Whip of Y. Madhavaiah is a bona fide one and rejected the alleged Whip appointing you cannot to be taken into consideration and further informed that he issued "B" form to K. Dhananjeyulu for the post of the President and "B" form to K. Chandraiah Naidu for the post of Vice-President of Thottambedu Mandal."

17. While it is denied by the unofficial respondent that the whip was handed over in the office of 1st respondent on 22-7-2001, and it is stated that the Whip was handed over to the Assistant Election Officer on 21-7-2001 in the absence of the 1st respondent. This is being a disputed question of fact, it needs to be decided by the duly constituted election tribunal competent to decide the violation of provisions of the Act or the rules made thereunder. Further whether the Whip issued by the District President in favour of Smt Jyothi is genuine in the wake of clarification issued by the District President, is yet another formidable disputed question of fact which can only be resolved by the Tribunal. The election of a returned candidate is not challenged by any other person. The disqualification is recorded by the authority under the provisions of the Act and more especially the

disqualification is based on the report submitted by the District Telugu Desam Party President stating that they have violated the Whip which obligates the 1st respondent to declare their election as void.

18. Whether the Whip was issued within the time prescribed under Rule 13(6) of the rules and whether there is any violation of the provisions of the circular issued by the State Election Commission can be challenged in the election petition filed by the person who is disqualified more so when the procedure contained in the Rule is disputed. This not only applies for an election petition filed by the party challenging the election of an elected candidate, but it also can be filed by any candidate who is disqualified by the authorities for the violation of provisions of the Act or the rules made thereunder. As such, it cannot be said that for one type of disqualification a writ petition can be filed and for certain other disqualification, election petition can be filed. It leads to very anomalous situation. The Parliament never intended to create two separate for a for resolving such disputes. The Apex Court has very categorically held that any disqualification, either by the orders passed by the authorities for violation of the provisions of the Act at the instance of the 3rd parties, the election of the elected candidates can be adjudicated in an election petition. The learned senior Counsel for the petitioner would also submit that the Whip issued by the Telugu Desam Party was not served on all the elected members of the party and therefore the impugned orders are liable to be quashed as held by the division bench in WP No. 15631 of 2001, dated 4-10-2001. This contention was not specifically raised in the writ petition. Further, this aspect is also a question of fact, which can be decided in the election petition.

19. For the aforesaid reasons, I have to necessarily reject the contention of the learned senior Counsel for the petitioners. Since the subject matter involves questions of fact, which requires adjudication based on evidence available on record, it would not be proper for this Court to decide such questions of fact under Article 226 of the Constitution. Since the power is vested with the Tribunal, it is competent for the Tribunal to go into the aspect whether the whip was received within time or not and whether the Whips were issued to two different persons and further whether there was any violation of directions issued by the State Election Commission in the circular dated 19-7-2001.

20. Under these circumstances, I hold that the writ petitions are not maintainable and they are accordingly dismissed. However, it is left open for the petitioners to approach the Tribunal by filing election petitions, if they so choose. No order as to costs.