

(2004) 12 AP CK 0076

In the Andhra Pradesh High Court

Case No : Writ Petition No. 16402 of 2004

Sadhanapalli Bheemaraju and Others

APPELLANT

Vs

Secretary, A.P. Legislative Assembly and Others

RESPONDENT

Date of Decision : 31-12-2004

Acts Referred:

Constitution of India, 1950 — Article 190(3), 226, 329
Representation of the People Act, 1951 — Section 15, 30, 5, 82, 83

Citation : (2005) 3 ALD 253 : (2005) 3 ALT 578

Hon'ble Judges : T. Ch. surya rao, J;B. Sudershan Reddy, J

Bench : Division Bench

Advocate : K.S. Murthy, for the Appellant; Government Pleader, for Law and Legislative Affairs for Respondent Nos. 1 to 5 G. Ratna Sudhakar and C. Jayashree Sarathy, for the Respondent

Final Decision : Dismissed

Judgement

T. Ch. Surya Rao, J.—The petitioners seek a writ of mandamus, declaring that Respondent No. 6 is not qualified to sit as a Member of Legislative Assembly in Andhra Pradesh as he does not possess the basic qualification prescribed under Clause 3(a) of Article 190 of the Constitution of India read with Section 5 of the Representation of the People Act, 1951 and consequently No. 38 Yellavaram (ST) Assembly Constituency has fallen vacant. Alternatively, the petitioners also seek a writ of quo warranto directing the sixth respondent to show under what authority he is occupying the seat as Member of the A.P. Legislative Assembly representing the 38th Yellavaram (ST) Constituency and for a further direction to the first respondent not to permit the sixth Respondent to function as Member of the A.P. Legislative Assembly.

2. The facts lie in a narrow compass: The first petitioner claiming himself to be a tribal and resident of Mallavaram Mamilla Village which is a part of Yellavaram Assembly segment; the second petitioner claiming himself to be the voter of the said Assembly segment and political activist of the Indian National Congress; and

the third petitioner professing to be a Scheduled Tribe candidate, together filed the present writ petition. The third petitioner contested in the election to the A.P. State Legislative Assembly from Yellavaram Assembly Constituency and eventually lost the election qua the sixth respondent. Petitioners claim that they are interested in seeing that No. 38 Yellavaram Assembly Constituency is represented by Scheduled Tribe alone, filed the writ petition as aforesaid assailing the election of the sixth respondent.

3. By means of a notification dated 24.3.2004, notice of election in Form-I was issued. Pursuant thereto, nominations were filed and the Returning Officer received them upto 31.3.2004. The third petitioner filed his nomination on behalf of the Indian National Congress, whereas the sixth respondent filed his nomination as a candidate of Telugu Desam Party. Objections seem to have been filed against the nomination of sixth respondent on the premise that he does not belong to Scheduled Tribe and he belongs to Adi Andhra Mala Caste, which is a Scheduled Caste. Rejecting all objections, nomination of the sixth respondent was accepted by the Returning Officer. Election to the said Assembly Constituency was conducted on 26.4.2004, and counting of the votes took place on 11.5.2004. The sixth respondent was declared to have been duly elected at the culmination of counting process. Consequently the statutory notification dated 12.5.2004 of the Election Commission of India was published in the A.P. Gazette, containing the names of the Members who have been duly elected to the State Legislative Assembly.

4. That Valmiki community in Agency Tracks is a Scheduled Tribe notified as per the provisions of the Constitution. However, some persons from Mala Caste, which is a Scheduled Caste, claiming themselves to be the descendants of Valmiki, have been seeking Scheduled Tribe status. When several persons from Scheduled Caste sought to get a clearance from the Government to get the status of Valmiki and claimed the status of Scheduled Tribe, Courts came down heavily and set aside the orders in that regard. The father of the sixth respondent got elected to the A.P. State Legislative Assembly as a Scheduled Tribe candidate. However, his election was challenged in the Election Petition No. 12 of 1985. That Election Petition was allowed declaring that the father of the sixth respondent was Adi Andhra which is a Scheduled Caste and he did not belong to Scheduled Tribe community and consequently his election was set aside. The petitioners upon making enquiries which took a long time for securing the copy of judgment in Election Petition No. 12 of 1985 on the file of High Court of A.P., ultimately realized, that the certificate issued by the Revenue Authorities in favour of the sixth respondent was only a temporary one and valid for six months and that certificate would be issued usually for the purpose of admission into Educational Institutions. Such certificate ought not to have been accepted by the Returning Officer at all. Sixth respondent is thus not eligible to hold the Office of Member of Legislative Assembly i.e. from 38 Yellavaram Assembly Constituency (Scheduled Tribe). Petitioners made representations for the cancellation of the certificate but could not succeed. They were not even given a

copy of the said certificate when solicited by the Mandal Revenue Officer. Therefore, they have no effective alternative remedy except to file the present writ petition.

5. Rule Nisi was ordered and records were called for. Pursuant to the notices, the sixth respondent appeared through his Counsel. The petitioners got the seventh respondent impleaded. Seventh respondent filed a separate counter resisting the petition.

6. The case of the sixth respondent is that his mother is admittedly a Scheduled Tribe woman. He was recognized as a Scheduled Tribe person by the Scheduled Tribe community. After a thorough enquiry by the authorities, he was given Scheduled Tribe Community Certificate. He was also given all the benefits available to a Scheduled Tribe person during his educational career. The third petitioner did not raise any objection as regards the status of the sixth respondent at the time of scrutiny of the nominations as he was fully aware that the sixth respondent was a Scheduled Tribe person and that he could not produce any evidence to establish that he was not a Scheduled Tribe person. Having not done so, he has chosen to file the present writ petition on the sole ground that the father of the sixth respondent had been declared to be a Scheduled Caste person in Election Petition No. 12 of 1985 and the status of the sixth respondent cannot be declared as a Non-Scheduled Tribe person on that basis. When admittedly he was given certificate by the authorities after due enquiry and was recognised by the community of Scheduled Tribe, it was his further case that the writ petition itself is not maintainable. Since several disputable questions of fact and issues relating to the community cannot be decided in a writ petition, the petitioner should have chosen to avail the statutory remedies. The sixth respondent denied all the allegations made inter alia in the writ petition.

7. It is the case of the seventh respondent that since indirectly the petitioners are questioning the election of the sixth respondent, they cannot maintain the writ petition and the same is barred under Article 329(b) of the Constitution of India. The appropriate remedy for the petitioners is to file an Election Petition as per the provisions of Sections 82 - 86 of the Representation of the People Act, 1951. It is for the Election Tribunal to enquire and decide whether on the date of election, the elected candidate was not qualified to be chosen to fill the seat and that he is not the authority to enquire and decide about the status of the sixth respondent.

8. The petitioners seek to place reliance upon certain documents annexed to the writ petition. On the side of the sixth respondent, he too filed certain documents as material papers. For convenience sake it is expedient to assign exhibit numbers to those documents so that they can conveniently be referred to and discussed. They are marked as Exs.A1 to A11 and B1 to B11.

9. Sri K.S. Murthy, learned Counsel appearing for the petitioners represents that

the judgment of this Court in EP No. 12 of 1985 clearly shows that the father of the sixth respondent is a Scheduled Caste person and what more evidence is required than that. It is further represented that since it is a fraud played upon the Constitution, the writ petition can be maintained. Finally, he represents that in view of the judgment in EP No. 12 of 1985, it is no more disputed fact and can squarely be considered.

10. Per contra, Sri E. Manohar, learned Senior Counsel represents that the judgment in EP No. 12 of 1985 is not a judgment in rem and the sixth respondent not being a party to the same, the findings given therein will not bind him; that the contentious issues as regards caste of the sixth respondent and as a matter of fact any other issues pertaining to the election of the elected candidate shall have to be determined only in a properly constituted election petition and the present writ petition cannot be maintained; and that the documents filed along with the counter-affidavit clearly show that the caste of the sixth respondent as Scheduled Tribe and therefore sixth respondent is a Scheduled Tribe.

11. Before advertng to the respective contentions, it is expedient to state the undisputed facts at the outset. By means of a Notification dated 24.3.2004, elections to the A.P. State Legislative Assembly were notified. The third petitioner contested in the said election as a candidate of Indian National Congress from No. 38 Yellavaram Constituency. The said constituency was reserved for Scheduled Tribe. The sixth respondent contested in the said election as against the third petitioner as Telugu Desam party candidate. There has been no dispute that the third petitioner belongs to Konda Reddy Caste, which has been notified under the Presidential Order as Scheduled Tribe. Polling was conducted on 26.4.2004 and counting of the votes was made on 11.5.2004. Sixth respondent was declared to have been elected duly in the said election. The election of the sixth respondent is now being assailed not on any allegations except on the premise that he does not belong to Scheduled Tribe but belongs to Adi Andhra Mala Caste. Therefore, the case of the petitioners is that sixth respondent is ineligible to occupy the Office. In that view of the matter, the caste of sixth respondent becomes more significant. The trump-card upon which the petitioners seek to place reliance to buttress their contention is Ex.A1-xerox copy of the judgment in EP No. 12 of 1985, dated 23.3.1987. The first respondent therein is one Chinnam Jogarao, S/o Balosu and that he is the father of the sixth respondent is not controverted. Obviously, the sixth respondent is not a party thereto. Since it is a judgment rendered in an Election Petition, indubitably it is not a judgment in rem. Inasmuch as the father of the sixth respondent is a party thereto; Ex.A1 becomes relevant and has the evidentiary value like any other document. As can be seen from Ex.A1, the father of the sixth respondent asserted that he belonged to Valmiki Tribe of Rampachodavaram agency area. Overwhelming evidence was adduced in that case with reference to the Death and Birth Register extract, School Certificate, etc. to buttress the plea that the returned candidate belonged to Adi Andhra Caste. A learned Single Judge of this

Court eventually came to a conclusion that the father of the sixth respondent did belong to Adi Andhra Caste. However, in the instant case, the plea of the sixth respondent appears to be that since his mother is a tribal woman, he becomes a tribal and that he has been recognised by the community as a whole as a tribal and, therefore, he claims that he belongs to Scheduled Tribe, This plea taken by the sixth respondent is obviously not identical to the plea taken by his father inter alia in the counter filed in EP No. 12 of 1985. Even assuming that the father of the sixth respondent is a Scheduled Caste person, still the plea of the sixth respondent that he is a tribal on account of the fact that he was born to a Scheduled Tribe woman and, therefore, becomes a Tribal by virtue of the recognition received by him from the Scheduled Tribe community as a whole, is got to be appreciated and decided separately. The conclusions reached by this Court inter alia in the said judgment have obviously been reached with reference to the respective pleas taken by the parties and evidence adduced in support thereof. That by itself, therefore, cannot conclusively determine the contentious issue as to whether the sixth respondent belongs to Scheduled Tribe or Scheduled Caste. No other document has been filed on the side of the petitioner with reference to which it can decisively be said that the sixth respondent belongs to Scheduled Caste and is, therefore, a non-tribal. The sixth respondent seeks to place reliance upon Ex.B5-the Caste Certificate issued by the Mandal Revenue Officer in Ref.(C)129/04, dated 22.8.2004, Ex.B6-the certificate issued by the Head Master, T.W.A.U.P. School, Kundada, dated 12.10.2004, Ex.B7-another Caste Certificate" issued in Annexure-III in Ref.(C)2/04, dated 27.1.2004, Ex.B8-another certificate issued by the Mandal Revenue Officer in Ref. (C)30/ST/8/89, dated 20.1.1989, and Ex.B9-yet another Caste Certificate in Annexure-III in STR Dis.C/30/130/89, dated 14.8.1989 by the Mandal Revenue Officer. Of all these documents, Ex.B5 dated 22.8.2004 and Ex.B6 dated 12.10.2004 are obviously documents in the nature of post litem motem and, therefore, they lose every significance. However, the documents-Exs.B8 and B9 clearly pertain to the year 1989. It is obvious from Ex.B8 that the mother of the sixth respondent by name Smt. Koragani Anasuya belonged to Valmiki Community and she is no more and that the said certificate had been issued basing on the caste of his mother. Ex.B9 dated 14.8.1989 shows that the sixth respondent belongs to Valmiki Tribe. An endorsement in vernacular language has been made at the bottom of this document by the Village Assistant and the Mandal Revenue Inspector to the effect that as per the orders of the Sub-Collector in R.Dis.E.1951/89, dated 10.8.1989 the person by name Chinnam Babu Ramesh, S/o Chinnam Joga Rao has been declared as Valmiki Caste person. The proceeding of the Sub-Collector in R.Dis.E.1951/89, dated 10.8.1989 referred to in this Annexure-III has been filed separately which has not been assailed in this case shows that the Sub-Collector, Rampachodavaram directed the Mandal Revenue Officer to issue the necessary certificate declaring that the sixth respondent belongs to Valmiki Caste. In this connection, the sixth respondent also seeks to place reliance upon Exs.B1 to B3. They are in the nature of instructions issued by the Government of India and the State

Government respectively for deciding the status of children belonging to the couple one of whom belongs to Scheduled Caste/ Scheduled Tribe. As per the instructions that unlike in the case of Scheduled Caste, the members of Scheduled Tribes remained in homogenous groups and their social custom has a greater binding force in the day-to-day life. In the case of marriage between a tribal with a non-tribal, the main factor for consideration is whether the couple are accepted by the tribal society to which the tribal spouse belongs and if he or she, as the case may be, is accepted by the society, then their children shall be deemed to be Tribals. Placing reliance upon these documents, the learned Senior Counsel seeks to contend that the mother of the sixth respondent is obviously a Scheduled Tribe woman and the sixth respondent in that view of the matter shall have to be considered as a tribal.

12. In fact a Division Bench of this Court in *W.S.V. Satyanarayana Vs. Director of Tribal Welfare and others*, , quoted with approval G.O. Ms No. 371, Employment and Social Welfare (E2) Department, dated 13.4.1976 which is sought to be relied upon by the sixth respondent and marked in this case as Ex.B2. Placing reliance upon the said G.O., this Court held that the status or caste of a person would have to be determined upon the recognition received from the members of the community of either of the parents and the acceptance of the caste people.

13. The law appears to be fairly settled by now that the recognition of the community plays a vital role in deciding the caste or tribe of a particular person, which is in dispute. Suffice to quote the recent pronouncement of the Apex Court in *Punit Rai Vs. Dinesh Chaudhary*, . A three Judge bench having considered its earlier judgments held in Para 31 thus:

"If he is considered to be a member of the Scheduled Caste, he has to be accepted by the community."

According to the facts in that case for paucity of evidence that the respondent-Dinesh Chaudhary had ever been treated to be a member of the Scheduled Caste and that the respondent had been adopting and practising the customary traits and tenets of the community to which he claimed to have belonged to, more particularly when the evidence on record suggested that he had not been treated so, the Apex Court repelled the contention of the respondent that he belonged to Scheduled Caste community. It is no doubt true that making a false claim that one belonged to Scheduled Caste or Scheduled Tribe thereby depriving the genuine claims of the persons belonging to Scheduled Caste or Scheduled Tribe, as the case may be, is nothing but playing fraud on the Constitution. In Para 39 it was held thus:

"A person in fact not belonging to the Scheduled Caste, if claims himself to be a member thereof by procuring a bogus Caste Certificate, would be committing fraud on the Constitution. No Court of law can encourage commission of such fraud."

But, then such a conclusion that fraud has been played upon the Constitution

should invariably be preceded by a valid finding that the Caste Certificate produced by a person is nothing but a bogus Caste Certificate. That again depends upon the nature of evidence adduced on either side. Needless to observe that the conclusion that the Caste Certificate produced by the sixth respondent is either genuine or bogus, is a contentious question of fact which shall have to be decided by a competent Court. We are sure that such a process shall not be undertaken in this writ petition.

14. Furthermore, it is not a case where the point involved is ostensibly a point of law but is required to be substantiated by facts where the parties raising that point are entitled to plead and prove such facts by evidence. On the contrary, it is a pure question of fact when traversed by the opposite side becomes a contentious question of fact and such seriously disputed question of fact cannot be decided while exercising extraordinary jurisdiction under Article 226 of the Constitution.

15. In view of the rival contentions, the contentious issue in this case mainly depends upon the evidence as to whether the sixth respondent has been recognized by Valmiki Tribe people as belonging to the said tribe having accepted the marriage between a woman belonging to the tribe with another spouse belonging to Scheduled Caste and that the person claiming to be a member belonging to Scheduled Tribe has been following the basic traits and tenets of that community which requires the appreciation of both oral and documentary evidence to be adduced. It is a pure question of fact and in the absence of evidence adduced on either side cannot be effectively adjudicated as held by the Apex Court in Punit Rai's case (*supra*). Such an exercise cannot be undertaken in this writ petition. In our view, it can validly be done only in a properly constituted election petition where both parties will have an opportunity to adduce evidence in support of their respective claims. Therefore, it is not safe nay hazardous to decide the caste of sixth respondent placing reliance upon Ex.A1-xerox copy of the judgment in EP No. 12 of 1985 alone.

16. All these issues which are very much germane for consideration for arriving at a conclusion about the caste of a particular person have obviously not been arisen in the Election Petition No. 12 of 1985.

17. Apropos the maintainability of the present writ petition, strong reliance has been sought to be placed by the learned Counsel for the petitioners upon the judgment of the Apex Court in *K. Venkatachalam Vs. A Swamickan and Another*, . That was a case where the appellant and the respondents contested in the general elections to the Legislative Assembly of Tamil Nadu held in the month of December, 1994. A year after the declaration of the election, writ petition was filed assailing the election of the appellant on the premise that he was not qualified to be a Member of Tamil Nadu Legislative Assembly representing Lalgudi Assembly Constituency since he was not an elector in the electoral roll of Lalgudi Assembly Constituency. It was alleged that the appellant impersonated another having the same name in the electoral roll of Lalgudi Assembly Constituency and

thus had sworn a false affidavit that he was an elector of that constituency and therefore his act was fraudulent and a criminal act. Writ petition was dismissed by a learned Single Judge of the High Court of Madras and in appeal the Apex Court, having regard to the fact that there had been no dispute nay the finding of the High Court that the appellant being an elector in the electoral roll for Lalgudi Assembly Constituency having not been assailed he in a blatant and fraudulent manner represented to be an elector of that constituency while using similarity in the name of another person, was of the view that such an act on the part of the appellant would tantamount to a fraud on the Constitution. In that context, it was held by the Apex Court that Article 226 of the Constitution of India was couched in the widest possible terms and unless there had been a clear bar to the jurisdiction of the High Court its powers under Article 226 could be exercised when there has been any act against any provision of law or violative of the constitutional provisions and when recourse could not be had to the provisions of the Act for the appropriate relief. A Constitution Bench of the Apex Court in *N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others*, , held in Para 9 thus:

"The law of elections in India does not contemplate that there should be two attacks on matters connected with election proceedings, one while they are going on by invoking the extraordinary jurisdiction of the High Court under Article 226 of the Constitution (the ordinary jurisdiction of the Courts having been expressly excluded), and another after they have been completed by means of an election petition."

18. The view expressed by the Apex Court in *Ponnuswami*'s case has been quoted with approval by a subsequent judgment in *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, . However, the Court held that having regard to the non obstante clause in Article 329 of the Constitution of India, Article 226 stands pushed out where the dispute had taken the form of calling in question, except in special situations pointed out, but left unexplored in *Ponnuswami*'s case. While considering the unexplored situations in *Ponnuswami*'s case in the latter judgment the Apex Court sought to demarcate the area which is available for interference by the High Court in Para 34 thus:

"But what is banned is not anything whatsoever done or directed by the Commissioner but everything he does or directs in furtherance of the election, not contrary wise. For example, after the President notifies the nation on the holding of elections u/s 15 and the Commissioner publishes the calendar for the polls u/s 30, if the latter orders Returning Officers to accept only one nomination or only those which come from one party as distinguished from other parties or independents, is that order immune from immediate attack. We think not. Because the Commissioner is preventing an election, not promoting it and the Court's review of that order will facilitate the flow, not stop the stream. Election, wide or narrow be its connotation, means choice from a possible plurality, monolithic politics not being our genius or reality, and if that concept is crippled

by the Commissioner's act, he holds no election at all."

19. Thus, the Apex Court sought to carve out an area left untouched in Ponnuswami's case where the jurisdiction of the High Court under Article 226 of the Constitution of India can be clutched at.

20. Sri E. Manohar, learned Senior Counsel seeks to place reliance upon a recent judgment of the Apex Court in Manda Jaganath Vs. K.S. Rathnam and Others, . The Apex Court while considering its earlier judgments in Ponnuswami's case and M.S. Gill's case has sought to add a few more dimensions to the areas in respect whereof the jurisdiction of the High Courts under Article 226 of the Constitution of India could be availed. In Para 18, the Apex Court held thus:

"Of course, what is stated by this Court hereinabove is not exhaustive of a Returning Officer's possible erroneous actions which are amenable to correction in the writ jurisdiction of the Courts. But the fact remains that such errors should have the effect of interfering in the free flow of the scheduled election or hinder the progress of the election which is the paramount consideration. If by an erroneous order conduct of the election is not hindered then the Courts under Article 226 of the Constitution should not interfere with the orders of the Returning Officers, remedy for which lies in an election petition only."

That was a case where the nomination filed by the first respondent was beset with certain omissions and scoring off. The Form-B submitted by the first respondent was blank in Columns 2 to 7 and scratch line indicating scoring of the requirement of the columns was noticed. In view of the same, following the guidelines of the Election Commission of India, the Returning Officer rejected Form-B filed by the first respondent while accepting his nomination as an independent candidate and therefore he did not allot him the symbol reserved for the candidates of Telangana Rashtra Samithi of which party the first respondent claimed to be a candidate. Under those circumstances, the Apex Court was of the clear view that by not allotting a symbol claimed by the first respondent, the Returning Officer had not stalled or stopped the progress of the election and the first respondent was treated as an independent candidate and permitted to contest with the symbol assigned to him as an independent candidate and consequently there had been no question of stalling of the election. Therefore, his grievance as to such non-allotment of the symbol will have to be agitated in an election petition. Thus, from the conspectus of the judgments of the Apex Court referred to supra, it is obvious that if the process of election by omissions and commissions of the parties is prevented and not promoted in order to facilitate its flow, Article 226 of the Constitution of India can be invoked, inasmuch as such erroneous actions or omissions or errors should have the effect of interference with free flow of the scheduled election, which is the paramount consideration. If by such erroneous orders, the conduct of the election is not hindered, then the Courts under Article 226 of the Constitution of India should not interfere with the orders of the Returning Officers, remedy for which lies in an election petition only. Likewise, if it is a clear case of playing fraud on the

Constitution the jurisdiction of the High Court can be invoked. Thus, the jurisdiction under Article 226 of the Constitution of India has been carved out in respect of specified areas which cannot be illustrated in exhaustive manner but which have the effect of interfering with free flow of the scheduled election or hindering the progress of the election.

21. Turning to the facts in the instant case, by no stretch of the imagination, it can legitimately be contended before us that by accepting the nomination of the sixth respondent, albeit erroneously the process of election has not been stopped. Such an erroneous decision in the view of the petitioners shall have to be questioned only by means of a properly constituted election petition. In that view of the matter and for the reasons hereinabove discussed, the writ petition must fail.

22. For the foregoing reasons, the writ petition fails and is dismissed. However, we direct both parties to bear their respective costs.