
(1962) 02 MAD CK 0042
In the Madras High Court

Vadivelu Padayachi

APPELLANT

Vs

Sanjeevi Padayachi and Another

RESPONDENT

Date of Decision : 20-02-1962

Acts Referred:

Tamil Nadu Panchayats Act, 1958 — Section 34(1)

Citation : (1962) ILR (Mad) 1117 : (1962) 75 LW 395 : (1962) 2 MLJ 358

Hon'ble Judges : S. Ramachandra Iyer, C.J.; S. Ramachandra Aiyar, C.J

Bench : Division Bench

Judgement

S. Ramachandra Iyer, C.J.—This appeal which arises from the judgment of Srinivasan J., in W.P. No. 286 of 1961 relates to the validity of the election of the appellant as Chairman of the Panruti Panchayat Union Council. The election was held on 12th October, 1960. The Madras Panchayat Act of 1958 (Act XXXV of 1958) which will be referred to hereafter as the Act, provides for the establishment of two representative corporate bodies for the administration of villages : (1) the Panchayat . which is the local authority for the village for which it is established. (2) The Panchayat Union comprising several villages grouped together under the National Extension Service Programme with a view to facilitate community development under an organized block system. The former is administered by an elected Panchayat. The statute provides for a President and a Vice-President. The latter, namely, the Panchayat Union Council is to consist of persons who are indirectly elected to it, that is, by constituent Panchayats sending representatives to it. Under the Act there should be a Chairman and Vice-Chairman for the Panchayat Union Council. The Panchayat Union Councils came into existence for the first time on 2nd October, 1960. As it might take some little time before the constituent Panchayats could send their elected representatives in the prescribed manner to the Union Council, the Legislature passed Act XVII of 1960 to enable the Panchayat Union Councils to function forthwith. Section 2 of that enactment states:

Notwithstanding anything contained in the Madras Panchayats Act, 1958 (Madras

Act XXXV of 1958) hereafter referred to as the said Act, but subject to Sub-section (2) (a), a Panchayat Union Council constituted for any Panchayat Union for the first time under the said Act shall consist of the Presidents of the Panchayats in the Panchayat Union who on the date specified in the notification issued under Sub-section (1) of Section 11 of the said Act constituting the Panchayat Union Council, are holding office as such Presidents...." (rest of the section omitted as not necessary).

This provision has been amended later by Section 5 of Act XXVII of 1961 (the enactment itself not yet having come into force) which provides that the Union Council shall consist of the Presidents for the time being of the Panchayat and Township committees. There is, however, nothing in that provision which can usefully be relied on as a legislative interpretation of Section 2 of Act XVII of 1960.

2. It is clear from the terms of the statute that the member of the Union Council should be the President of the Panchayat which lies within the area or block for which the Union is constituted.

3. One of the villages within the Panruti Panchayat Union is Sirugramam. It has a Panchayat; its President died a few days before the date fixed for the first meeting of the Union Council and Chinnathambi Padayachi its Vice-President was from that time doing the duties of the President by virtue of Section 34 (1) of the Act. He attended the meeting of the Panchayat Union Council on 12th October, 1960 which was convened for the purpose of electing a Chairman to the body. There was no objection raised to his participating in the election. Two candidates were proposed for the chairmanship the appellant and the first respondent. 38 votes were polled and among those that voted was Chinnathambi Padayachi. Both the candidates secured an equal number of votes, i.e., 19 each. Acting under Rule 17 of the Rules relating to the Election of Chairman of Panchayat Union Councils the officer who presided over that day's meeting of the Council cast lots; the appellant who won the toss became entitled to the addition of one vote thereby and he was declared elected.

4. This declaration was impugned in an election petition filed by the respondent before the Election Court (the District Munsif) at Cuddalore. The main ground of objection related to the vote of Chinnathambi Padayachi which was challenged as having been improperly received. The Election Court upheld the objection holding that Chinnathambi Padayachi had no right to be a member of the Union Council and that, therefore, his vote was improperly received. It was, however, not possible to find out on scrutiny in whose favour the impugned vote was cast; the voting paper had nothing to indicate on its face which would enable the tracing of the voter. The Election Court, therefore, considered the other evidence in the case which showed that Chinnathambi Padayachi was a partisan of the appellant and came to the conclusion, a conjecture no doubt, that he must have voted for the latter. If that vote was deleted, the respondent would have secured one vote over and above the appellant and there would be no need to abide by the toss.

The Court, therefore, set aside the election and directed a fresh election.

5. The appellant thereupon filed an application to this Court under Article 226 of the Constitution to quash the order. Srinivasan, J. concurred with the view taken by the Election Court that there was an improper reception of a vote (namely, that of Chinnathambi Padayachi). The learned Judge further held that as such improper reception had placed the chances of the candidate for election at the hazard of casting of lots, the result of the election must be held to have been materially affected. In that view that rule nisi was discharged. Hence this appeal.

6. We are in agreement with Srinivasan, J. that a Vice-President of a Panchayat who is performing the duties of the President during a vacancy will not be entitled to be a member of the Panchayat Union Council by virtue of Section 2 of Act XVII of 1960. That section is, no doubt, not very happily worded; while, the first part of it, denotes that the first members of the Council will be the Presidents of the Panchayats the latter part of it says " who are holding office as such Presidents " . This has given rise to a contention that the latter clause which governs the former must only mean " who are functioning as Presidents " . It is argued that as u/s 34 (1), the Vice-President would be performing the functions of the President, he should be deemed to hold office as such President. This interpretation is sought to be supported by an argument of inconvenience, namely, that if the provision is not so construed, all those Panchayats in which the office of the President is vacant will go unrepresented in the Union Council. We cannot, however, agree that a Vice-President who is only exercising the functions of the President can be said to be holding office as such President. The term Vice-President itself implies that he is to function in the place of the President and not qua President. The functions that he is authorised to perform, are by virtue of his office itself and not because he takes the place of the President. Section 34 (1) of the Act only enables the Vice-President to perform the functions of the President till one is elected. Both u/s 29 of the Act as well as under Rule 8 of Schedule IV, the latter being the transitory provision which applies to this case, the two offices of President and Vice-President in a Panchayat are distinct. Therefore the mere exercise by the Vice-President of the duties of his office, i.e., of assuming the powers of a President temporarily till either the President comes back where he is absent, or pending the filling up of the vacancy in that office, cannot amount to " holding office as such President " but only be one of exercising the functions of that office.

7. In *O'Grady v. Wilmot* L.R. (1916) 2 A.C 231 the terms of a statute to be construed ran "the property which does not pass to the Executor as such " . Lord Buckmaster said:

I do not think that property which passes to the executor as such is necessarily the same as the property received by the executor or which he might, but for his wilful default, have received. Section 9, Sub-section (1) deals with the actual transaction of the estate and the words " as such " in my opinion are equivalent to the phrase " qua executor " or " virtue officii " and in neither of these

capacities does personal property subject to an exercised power by will pass to the executor, if it passes at all.

8. The words " holding office as such Presidents " in Section 2 of Act XVII of 1960 as observed by Srinivasan, J., emphasise the character of the office held and not of the mere functions that happen to be discharged by a person. The argument that this interpretation would render certain Panchayats where the President thereof is dead, go without representation is not of much weight having regard to the fact that the statute, Act XVII of 1960 is a temporary one enacted with a view to put the Union Councils on their feet pending election by the constituent Panchayats. We are therefore of opinion that Chinnathambi Padayachi who was then only a Vice-President (but who we are told had subsequently become the President) of Sirugramam Panchayat was not entitled to be a member of the Union Council at the time of the election of its Chairman and that his vote was invalid.

9. It has next to be considered whether the improper reception of the vote has materially affected the result of the election, for then alone the election can be set aside. If it were possible for the Election Court to open the ballot box, scrutinise the votes, eliminate the improper vote and count afresh, the question will be capable of easy solution. But the form of ballot paper prescribed under Rule 11 of Madras Panchayat Union Councils (Election of Chairman and Vice-Chairman) Rules, 1960, makes such scrutiny impossible. Unless therefore, Chinnathambi Padayachi comes and swears as to whom he voted and that evidence we are believed, it will be nothing less than speculation to say as to whom he voted. The mere fact that outward expressions of his loyalty were in favour of the appellant will hardly justify a safe conclusion on that question. It is not an uncommon feature in elections for a person to outwardly show and even demonstrate that his sympathies were with a particular candidate or his ideologies, but secretly cast his vote in favour of another or one standing for a different ideal. The Election Court has relied on the evidence of the antecedent partisanship of Chinnathambi Padayachi with the appellant to conclude that he must have cast his vote for the latter. Srinivasan, J., did not accept this, on the ground that it was not possible on that evidence to come to any definite conclusion as to how Chinnathambi Padayachi had exercised his vote. We agree with the learned Judge.

10. Nevertheless the learned Judge was of the view that the improper vote, the reception of which resulted in the candidates being exposed to the risk of taking a chance in the casting of lots, should for that reason be held to have materially affected the result of the election. The question whether the result of the election has been materially affected has to be decided with reference to the outcome of the election and not on a consideration that a particular process, i.e., the casting of lots, was adopted which would not have been done but for the reception of the improper vote. The casting of lots is a process fixed by the rules to ascertain the result of the election. It cannot itself be regarded as the result of the election,

being an intergral part of the process of counting of votes in the event of two competing candidates obtaining an equal number of votes. Rule 17 itself makes this clear when it says that the candidate who wins in the cast of lots is deemed to have obtained an additional vote in his favour. An election is a creature of the statute; if the statute or the rules prescribe for a casting of lots in a particular contingency, the adoption of that procedure cannot by itself amount to the result of the election. Let us give an example to make this dear :--Suppose in the present case where the appellant and the first respondent each got 19 votes, the improper vote having been cast in favour of the first respondent, the position will be that the appellant would have a majority out of the 38 votes polled. The result of the election which was based on the casting of lots would not have been altered at all.

11. What has to be considered is what the result of the voting will be if the improper vote had been excluded and not merely whether the procedure followed on assumption of there being an equality of votes, is right or not. There is no presumption that an improper vote which had been received was cast in favour of the successful candidate. The matter is one for evidence and proof, the onus being on the person who challenges the election. Where there are means of tracing the improper vote, and ascertaining on scrutiny for whom it was cast, there is no difficulty at all. But where, as in the present case, such a course is not possible, nobody but the voter himself would know for whom he voted; even if he were to give evidence on that point, it will be extremely unsafe in most circumstances to act upon it. The question then will be whether the person challenging the election has proved that the irregularity affected the result. In *Vashit Narain Sharma Vs. Dev Chandra and Others*, the nomination of a person (X) who was not entitled to be a candidate was accepted. Certain votes were cast in his favour at the election. But the votes were less than what the first three competitors got. The election of Vasishta Narain Sharma who secured the largest number of votes was challenged on the ground that all the votes. cast in favour X (which were wasted because his nomination paper had been improperly received) had gone to Vasishta Narain's next rival the result of the election would have been affected, as the difference between them was less than the number of wasted votes. Rejecting this contention as based on a speculation as to whom the voters who gave votes to X would have voted had he not been a candidate, the Supreme Court held that the election petitioners had not discharged their burden. In an almost converse case this Court applied the same principle in *Palaniappa Pillai Vs. Sellappa Gounder and Others*, . There two candidates who withdrew from the contest did not do so in time; nevertheless their names were excluded from the ballot paper although under the rules it should not have been done. It was argued that if they had remained, the votes polled would have been divided and thereby the result of the election would be affected. This argument was rejected as one based on conjecture.

12. In the case before us there is no proof that Chinnathambi Padayachi's vote went in favour of the appellant. The inevitable conclusion is that the respondent

has failed to prove that the election result had been materially affected by the reception of his vote. The election of the appellant as Chairman will therefore, have to stand. The appeal is allowed with costs.