
(2003) 03 AP CK 0063

In the Andhra Pradesh High Court

Case No : Writ Petition No. 22211 of 2002

Vanguri Mariamma

APPELLANT

Vs

Kandukuri Gangamma and Others

RESPONDENT

Date of Decision : 12-03-2003

Acts Referred:

Andhra Pradesh Panchayat Raj (Conduct of Election of Members and Sarpanch of Gram Panchayat, Members of Mandal Parishad and Members of Zilla Parishad) Rules, 1994 — Rule 12, 34
Constitution of India, 1950 — Article 226

Citation : (2003) 3 ALD 427 : (2004) 4 ALT 185

Hon'ble Judges : Ghulam Mohammed, J

Bench : Single Bench

Advocate : P. Pratap Reddy, for the Appellant; A. Satya Prasad and Government Pleader for Panchayat Raj for Respondent Nos. 3 to 5, for the Respondent

Final Decision : Dismissed

Judgement

Ghulam Mohammed, J.—This writ petition is filed seeking a writ of certiorari to quash the order of the Election Tribunal-cum-Junior Civil Judge, Nakrekal, Nalgonda District, in O.P. No. 7 of 2001 dated 29-10-2002 by which the Election Tribunal declared the election of the petitioner to the post of Sarpanch of Kondakindigudem Gram Panchayat, Kethepally Mandal, Nalgonda District as invalid and further declared the 1st respondent herein as having been elected to the post of Sarpanch of Kondakindigudem Gram Panchayat, Kethepally Mandal, Nalgonda District.

2. The brief facts of the case may be noticed thus: Pursuant to the notification dated 1-8-2001 issued by the State Election Commission, elections were held on 17-8-2001 to the post of Sarpanch and members of Kondakindigudem Gram Panchayat, Kethepally Mandal, Nalgonda District. The petitioner herein, 1st respondent and the 2nd respondent herein had contested the election to the post of Sarpanch. The petitioner herein was declared to have been elected by securing 301 votes as against the 1st respondent who had secured 300 votes. The 3rd

respondent -Stage I Election Authority, ordered repoll on the alleged ground that the supporters of the 1st respondent damaged the ballot bundles and ballot papers when the 1st respondent was declared to have been defeated by one vote. Thereupon repolling was conducted on 20-8-2001 and again the petitioner herein was declared to have won the election by one vote as against the 1st respondent. At that stage, the petitioner requested for recounting. The Election Authority recounted the votes and finally the petitioner was declared to have won the election by a margin of one vote against the 1st respondent. In this regard the Election Authority had also issued Form No. 17 declaring the election of the petitioner as Sarpanch.

3. Aggrieved by the election of the petitioner, the 1st respondent herein filed O.P.No. 7 of 2001 on the file of the Election Tribunal-cum-Junior Civil Judge, Nakrekal.

4. In the said election petition, the 1st respondent herein alleged that respondent Nos. 3 to 5 who were the election authorities committed certain irregularities in the conduct of election in connivance with the petitioner herein. It was alleged that the petitioner herein had distributed bottu billalu among the voters requiring them to mark the ballot papers with those bottu billalu with a view to ensure that the electors could be identified. Some of the voters were alleged to have marked the ballot papers with such bottu billalu. The 1st respondent herein alleged in the election petition that the 3rd respondent - Stage I Election Authority and the 4th respondent -Stage II Election Officer had counted 50 votes which contained bottu billalu, in favour of the petitioner though they should be declared as invalid and thus the 3rd and 4th respondents committed illegality in the conduct of election. It was also pleaded that though the 1st respondent protested at the time of counting of such 50 votes and also latter made appeals to the 3rd and 4th respondents in this regard they paid a deaf ear.

5. The petitioner herein filed counter denying all the allegations made in the election petition. She specifically denied the allegation of marking of the ballot papers with bottu billalu. She also denied the allegation of collusion with the 3rd and 4th respondents in order to get her elected. The 4th respondent - Stage II Election Officer filed counter specifically denying all the allegations. The 3rd respondent - Stage I Election Authority and the 5th respondent -District Collector had adopted the counter filed by the 4th respondent. The 2nd respondent who was also one of the contestants for the post of Sarpanch remained ex parte.

6. Before the Election Tribunal, the election petitioner - 1st respondent herein was examined as P.W.1 and her counting agent was examined as P.W.2. On her behalf Exs.A1 to A6 were marked. The petitioner herein was examined as R.W.1 and on her behalf R.Ws.2 and 3 were examined.

7. After appreciating the evidence adduced by both the parties the Tribunal held that 30 votes polled in favour of the petitioner herein were to be rejected on the ground that they contained the marks of bottu billalu and that 2 postal votes

allegedly polled in favour of the petitioner were not found in the ballot papers at the time of counting ordered by the Tribunal during the course of the trial. If these 32 votes which were liable to be rejected, were taken into consideration the number of votes polled in favour of the petitioner would come to 269 whereas the 1st respondent herein -election petitioner was polled 300 votes. Therefore, the Tribunal declared the election of the petitioner herein as invalid and consequently declared the 1st respondent herein as having been elected as Sarpanch. Aggrieved by the said order of the Tribunal the present writ petition is filed.

8. Heard the learned Counsel for the petitioner and the learned Counsel for the 1st respondent.

9. The learned Counsel for the petitioner Sri P. Pratap Reddy submitted that the Tribunal failed to appreciate the provisions of Rule 34 of the Andhra Pradesh Panchayat Raj (Conduct of Elections of Members and Sarpanch of Gram Panchayat, Members of Mandal Parishad and Members of Zilla Parishad) Rules, 1994 (hereinafter referred to as "the Rules") in proper perspective. The 1st respondent has not examined any voters to prove the allegation that some voters affixed bottu billalu on the ballot papers at the instance of the petitioner. Even otherwise, by mere affixture of such bottu billalu on the ballot papers it cannot be held that such votes were invalid. In this regard it is argued that it is probable to presume that such illegal acts could be resorted to by only a losing candidate to get the votes polled in favour of the winning candidate invalidated by rejection so as to affect her winning chances. The factum of polling of two postal votes in favour of the petitioner has never been disputed by the first respondent nor by her agents. It is next contended that at the time of issuing declaration in Form No. 17 the 1st respondent herein never raised any objection. It is vehemently contended by the learned Counsel for the petitioner that the Tribunal could not have ordered for recounting in the absence of any application in this regard by the 1st respondent and, thus, the Tribunal has exceeded its jurisdiction. In support of this contention the learned Counsel has drawn my attention to the judgment of a Division Bench of this Court in Shaik Khasim Bi Vs. The Principal Magistrate (Election Tribunal), Guntur and others, , wherein it was held at paragraph 7 as follows:

"One vital factor which has to be noticed is that while in the first count on 27-6-1995, the total votes polled were 1072, in the recounting held later, the total votes counted were 1065, as 7 votes were found to be missing. The cause for the missing of 7 votes and the person/s responsible for the same are not known. That was the reason for the Election Tribunal to hold that the election was materially affected because of the 7 missing votes and as such, directed the conduct of fresh elections after setting aside the election of the 1st respondent".

10. On the other hand, the learned Counsel for the 1st respondent herein submitted that the contention of the learned Counsel for the petitioner that the 1st respondent having not raised any objection at the time of issuance of

declaration in Form No. 17 and in the absence of any request for recounting, the Tribunal has committed an error in ordering recounting of the votes during the course of the trial cannot be countenanced in view of the judgment of the Supreme Court in Syed Yakoob Vs. K.S. Radhakrishnan and Others, . The learned Counsel further submitted that inasmuch as there is no error of law or jurisdiction and perversity in the finding of the Tribunal, this Court while exercising certiorari jurisdiction cannot sit as an appellate authority to assess the correctness of the finding on factual aspects. Mr. Satya Prasad, learned Counsel has drawn my attention to Rule 12 of the Rules and contended that if there is any improper reception, refusal or rejection of any votes, the Tribunal is empowered to decide the same. The Tribunal has ordered for recounting of the votes during the course of the trial exercising its jurisdiction to verify the truth or otherwise of the allegations made by the election petitioner.

11. In view of the above rival contentions, the point that arises for consideration is whether the Tribunal has committed any error in declaring the election of the petitioner as invalid warranting interference by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India and to issue a writ of certiorari.

12. The main grievance of the 1st respondent herein is that some votes which were to be rejected for the reason of their containing marks of bottu billalu were counted in favour of the petitioner herein which occasioned illegality in the conduct of the election. This is purely a factual aspect. Unless and until the votes are again checked and recounted, no adjudication could be made. In Sohan Lal Vs. Babu Gandhi and Others, , the Supreme Court held at paragraphs 12, 13 and 14 as follows:

"12. Thus after declaration of results, the Returning Officer has no power either to direct recount or to change the results of the election. Once the result is declared, the only remedy of an aggrieved party is an election petition u/s 122.

13. In this case, as stated above, the appellant had been orally told that he had won. He only came to know that respondent No. 1 had been declared elected after the result was declared. At this stage, he could not have approached the Returning Officer for recount. The only remedy, therefore, available to the appellant was to file an election petition.

14. In view of Section 122 and the Rules, we are unable to agree with the ratio laid down in Ram Rati case. It is not correct to hold that, in an election petition, after the declaration of the result, the Court or Tribunal cannot direct recounting of votes unless the party has first applied in writing for recounting of votes. There is no prohibition in the Act or under the Rules prohibiting the Court or Tribunal to direct a recounting of the votes. Even otherwise, a party may not know that the recounting is necessary till after the result is declared. At this stage, it would not be possible for him to apply for re-counting to the Returning Officer. His only remedy would be to file an election petition u/s 122. In such a

case, the Court or the Tribunal is bound to consider the plea and where as case is made out, it may direct recount depending upon the evidence led by the parties. In the present case, there was obvious error in declaring the result. We, therefore, hold that the ratio laid down in Ram Rati case is not correct".

13. In view of the above it cannot be said that the Tribunal has committed any error in ordering recounting of the votes during the course of the trial.

14. The Tribunal has found as of fact that 30 votes polled in favour of the petitioner herein were containing the marks of bottu billalu and therefore they are liable to be rejected. However, the petitioner contends that she had not asked any voter to affix such bottu billalu and, on the other hand, it is submitted that only a candidate who lost in the election would allege that it was at the instance of the elected candidate to see that the election of the elected candidate is set aside. In this connection it is relevant to notice Rule 34 of the Rules which speaks of the circumstances when a vote can be rejected. It reads thus:

Rejection of Ballot Papers :--(1) Subject to such general or special directions, if any, given by the State Election Commissioner in this behalf, the ballot papers shall be counted after the votes ward-wise/Gram Panchayat-wise, Mandal Territorial Constituency-wise/ Zilla Parishad Territorial Constituency-wise as these may be, arranged in the same hall. (Sub. By G.O. Ms. No. 124, P.R.R.D., dated 8-3-1994).

(2) The Election Officer shall reject a ballot paper-

(a) if it bears any mark or writing by which the elector can be identified; or

(b) if it bears no mark at all to indicate the vote, it bears a mark elsewhere thereon or near the symbol of one of the candidates on the face of the ballot paper or, it bears a mark made otherwise than with the instrument supplied for the purpose; or

(c) if votes are given on it in favour of more than one candidate; or

(d) if the mark indicating the vote thereon is placed in such manner as to make it doubtful as to which candidate the vote has been given; or

(e) if it is spurious ballot paper; or

(f) if it is so damaged or mutilated that its identity as a genuine ballot paper cannot be established; or

(g) if it bears a serial number or is of a design, different from the serial numbers, or, as the case may be design, of the ballot papers authorized for use at the particular polling station; or

(h) if it does not bear both the distinguishing mark and the signature which it should have borne under the provisions of Sub-rule (2) of Rule 20:

Provided that where the Election Officer is satisfied that any such defect as is

mentioned in Clause (g) or Clause (h) has been caused by any mistake or failure on the part of a Polling Officer or Polling Clerk the ballot paper shall not be rejected merely by the reason of such defect;

Provided further that a ballot paper shall not be rejected merely on the ground that the mark indicating the vote is indistinct or made more than once, if the intention that the vote shall be for a particular candidate clearly appears from the way the paper is marked.

(3) Before rejecting any ballot paper under Sub-rule (1), the Election Officer shall allow each counting agent present a reasonable opportunity to inspect the ballot paper but shall not allow him to handle it or any other ballot paper.

(4) The Election Officer shall endorse on every ballot paper which he rejects, the word "Rejected" and the grounds of rejection in abbreviated form either in his own hand or by means of a rubber stamp and shall initial such endorsement.

(5) All ballot papers rejected under this rule shall be bundled together.

(6) Every ballot paper which is not rejected under this rule shall be counted as one valid vote:

Provided that no cover containing tendered ballot papers shall be opened and no such paper shall be counted.

(7) After counting of all ballot papers contained in all the ballot boxes used in a Gram Panchayat, Mandal Parishad and Zilla Parishad have been completed, the Election Officer shall make the entries in a result sheet in Form 17 and announce the particulars.

(8) The decision of the Election Officer as to the validity of a ballot paper shall be final subject to scrutiny only and if necessary reversal on an election petition".

15. The learned Counsel for the 1st respondent herein has drawn my attention to the decision of the Supreme Court in *Shradha Devi Vs. K.C. Pant and Others*, , wherein at paragraph 14 it has been held as follows:

The mark or writing which would invalidate the ballot paper must be such as to itself unerringly point in the direction of or reasonably give indication of the identity of the voter. There must be some casual connection between the mark and the identity of the voter that looking at one the other becomes revealed. In the absence of such suggested mark or writing the ballot paper cannot be rejected merely because there is some mark or writing. Any mark or writing of an innocuous nature or meaningless import cannot be raised to the level of such suggestive mark or writing as to reveal the identity of the voter.

16. The learned Counsel for the respondent has also drawn my attention to the decision of the Supreme Court in *Anup Singh Vs. Shri Abdul Ghani and Another*, , which arose under the Representation of the People Act, 1951 and the Representation of the People (Conduct of Elections and Election Petitions) Rules,

1951 it was held at paragraphs 9,10 and 11 as follows:

Rule 73(2)(d) lays down as follows:

"(2) A ballot paper shall be invalid on which-

(a) x x x x

(b) x x x x

(c) x x x x

(d) there is any mark or writing by which the elector can be identified.

The contention of the appellant is that before any ballot paper can be declared invalid under Rule 73(2)(d) because of the existence of any mark or writing on it other than that permitted by Rule 37-A, it has to be shown that the elector is actually identified because of the mark or writing. No what Rule 73(2)(d) requires is (i) that there should be a mark or writing on the ballot paper other than what is permitted under Rule 37-A and (ii) that this mark or writing should be such that the elector can be identified because of it. There is no dispute in this case that there are both a mark and a writing other than the figure permitted by Rule 37-A on this ballot paper. The question is whether the mark and the writing (other than that permitted by Rule 37-A) which are both present on the ballot paper are such that the elector can be identified because of them.

10. This raises the question as to what the words "by which the elector can be identified" appearing in Rule 73(2)(d) mean. The contention of the appellant is that these words mean that the mark or writing should be such that the elector is actually identified because of them. On the other hand the contention of the respondents is that it is not necessary that the elector is actually identified by the presence of the mark or writing. It is urged that it is enough if the elector might possibly be identified by such mark or writing, or at any rate the mark or writing should be such as would make it reasonable and probable that the elector can be identified thereby. Thus there are three possible interpretations of the words "by which the elector can be identified" appearing in Rule 73(2)(d) namely (i) any mark or writing which might possibly lead to the identification of the elector, (ii) such mark or writing as can reasonably and probably lead to the identification of the elector, and (iii) the mark or writing should be connected by evidence aliunde with an elector and it should be shown that the elector is actually identified by such mark or writing. The appellant presses for the third of these alternative constructions both in respect of the mark and the writing while the respondents press the first construction, and in any case it is urged that the words do not go beyond the second construction.

11. We are of the opinion that the words cannot bear the first constructions, namely, that any mark or writing other than that permitted by Rule 37-A which might possibly lead to the identification of the elector would be covered thereby. When the legislature provided that the mark or writing should be such that the

elector can be identified thereby it was not providing for a mere possibility of identification. On this construction almost every additional mark or writing would fall within the mischief of the provisions. If that was the intention the words would have been different, if a mere possibility of identification had been enough to invalidate the ballot paper, Clause (d) of Rule 73(2) would have read something like this; "that there is any mark or writing other than that permitted by Rule 37-A". But the words used by the Legislature are "any mark or writing by which the elector can be identified", and this in our opinion implies that there should be something more than a mere possibility of identification, before a vote can be invalidated. This may happen when some pre-arrangement is either proved or the marks are so many and of such a nature that an inference of pre-arrangement may be safely drawn without further evidence".

The Tribunal has categorically held thus:

There cannot, therefore, be any ambiguity with these 30 votes which were appended with sectarian mark stickers (bottu billalu) which can definitely be held as rejected. By such marks, a particular election can be identified with reference to the counterfoil.

... In this case Stage-II Officer is examined as RW3 by the Asst. Govt. Pleader. It is stated that RW3 who is working as a Deputy M.R.O., Tripuraram Mandal, feigned ignorance that he do not know if any stickers of sectarian marks were appended to ballots and no stickers as such were appended to any of the ballots and no one has objected to it. This is nothing but a patent lie and one cannot expect an officer like RW3 who is entrusted with an important assignment, cannot be so ositent and oblivious that he did not find any sectarian mark stickers on any of the ballot papers, when in fact, it is clear to a naked eye. I am sorry to observe that RW3 had the audacity to say that he did not find any stickers on the ballot papers.

17. The Tribunal has further found that the Stage-II Election Officer has not produced the two votes allegedly sent by post. Only two empty covers were produced. Adverting to this the Tribunal observed thus:

As noticed earlier, votes were counted in the presence of both the parties and their Counsel. It is significant to note that RW3, State - II Officer, who issued Form No. 17 (Ex. A3 certificate) though has stated that two ballot votes were counted in favour of the first respondent, did not make them available to Court at the time of recounting. Moreover, only empty covers were sent as if they contained ballot votes when in fact it was not so. It is, therefore, doubtful as to how those two votes which were not kept in the bundles were counted in favour of the first respondent. In the absence of making available those two postal votes and in the absence of any explanation by RW3, officer, the necessary inference that has to be drawn is that those two postal votes which remained mystique were illegally and surreptitiously counted in favour of the first respondent to which the Stage-II Officer is responsible.

18. The learned Counsel contended that inasmuch as there is no error of law or jurisdiction and perversity in the finding of the Tribunal, this Court while exercising certiorari jurisdiction cannot sit as an appellate authority to assess the correctness of the finding on factual aspects. To substantiate the same, he has relied upon Syed Yakoob's case (supra) wherein it was held that a writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior Courts or tribunals: These are cases where orders are passed by inferior Courts or Tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can, similarly, be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice.

19. The parameters laid down by the Apex Court are that the jurisdiction of High Court to issue a writ of Certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an Appellate Court. This limitation necessarily means that findings of fact reached by the inferior Court or Tribunal basing on the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to take into consideration the relevant evidence, or had erroneously taken into consideration irrelevant evidence, which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of Certiorari. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding being within the exclusive jurisdiction of the Tribunal, cannot be re-appreciated by this Court exercising jurisdiction under Article 226 of the Constitution of India.

20. In Pioneer Traders and Others Vs. Chief Controller of Imports and Exports Pondicherry, , the Supreme Court held at paragraph 19 as follows:

"This matter can therefore be looked at in two ways. If it is held that the petitioners rested their case on only the ground that they had placed, the orders for import before August 15, 1954 and were thus entitled to the benefit of the press communique, the finding of the Collector to the effect that he was not prepared to believe that case for three reasons given by him cannot be said to justify a prayer for a writ because it is a finding of fact; and a writ cannot issue even if the said finding is erroneous. If, therefore, that was all that was raised by the petitioners before the authorities concerned, and the authorities concerned have found against the petitioners on the main question of fact involved in their contentions before them, it cannot be said that the authorities were wrong in the view they took for the reasons given by them and there would therefore be no

question of any interference under Article 32. Further, if a petition under Article 32 is not maintainable when a provision of law is misconstrued, it would be much less maintainable when there is a mistake of fact though as we have indicated already, it cannot be said in this case that the Collector was wrong in his conclusion on the facts".

21. The above decision is cited by the learned Counsel for the 1st respondent herein to show that the finding of fact reached by the Tribunal even if it is erroneous a writ of Certiorari cannot be maintained.

22. Following the judgments of the Apex Court in Shradha Devi's case (supra) and Syed Yakoob's case (supra) I do not find any illegality or infirmity in the order of the Tribunal. Therefore, the writ petition fails and it is accordingly dismissed. No costs.