

CASE NO.:  
Appeal (civil) 2713 of 2008

PETITIONER:  
V.A. Shabeer

RESPONDENT:  
P.A. Niamathulla

DATE OF JUDGMENT: 10/04/2008

BENCH:  
P.P. Naolekar & V.S. Sirpurkar

JUDGMENT:  
J U D G M E N T  
Reportable

CIVIL APPEAL NO. 2713 OF 2008  
(Arising out of SLP (Civil) No.14248 of 2007)

V.S. SIRPURKAR, J.

1. Leave granted.
2. This appeal is directed against the judgment of the learned Single Judge of the Kerala High Court whereby the learned Single Judge allowed the appeal filed against the order of the Trial Court and declared the election of the appellant void.
3. The appellant and the respondent were the candidates who contested the election from Ward No.2 of Alangad Block Panchayat held on 24th September, 2005. The appellant was declared elected. The candidate who lost the election (respondent herein) challenged the election by way of an Election Petition before the Election Tribunal mainly on two grounds. It was first contended that the officer who accepted the nomination papers of the appellant had no authority to receive the same and secondly the appellant had not made or subscribed an oath or affirmation before the Returning Officer or any other person authorized by the State Election Commission and, therefore, he was not qualified to fill a seat.
4. The Election Petition was opposed on the ground that the election petition was not maintainable and that it was filed after the expiry of the period of limitation. It was contended that the appellant had signed the oath or affirmation according to the form set out for the purpose in the First Schedule of the Kerala Panchayat Raj Act, 1994 (hereinafter referred to as "the Act") and that the appellant was fully qualified to contest the election. It was also pointed out that the nomination papers were filed before the Assistant Returning Officer who was fully competent to verify the nomination papers and receive the same. Hence there was absolutely no ground to declare the election as void.
5. The Election Petitioner (respondent herein) examined five witness and marked 11 documents while the appellant did not adduce any evidence. The Election Tribunal (2nd Additional District Judge, Ernakulam) came to the conclusion that the oath or affirmation of the appellant was made before the Assistant Returning Officer and it did not matter that the Assistant Returning Officer had no authority. The Trial Court applying "de-facto doctrine" held that oath was before an appropriate authority and as per the Rules. The Election Tribunal also held that the officer who received the nomination papers was holding the charge of Block Development Officer and was an Assistant Returning Officer and as such he was competent to receive the same. The Election Petition was, therefore, dismissed. The appeal was filed against this order before the High Court on two grounds, they being:

i) The appellant had not made and subscribed the oath or affirmation before a person authorized by the State Election Commission and thereby he was not qualified for being chosen to fill the seat in the Panchayat.

ii) The appellant had not delivered the nomination papers to the Returning Officer or to the Assistant Returning Officer duly authorized by the Returning Officer who had authority to receive the same.

6. The High Court came to the conclusion that on both the counts the election was void. The elected candidate, the appellant herein now comes before us by way of the present appeal.

7. Shri C.S. Raja, Senior Advocate, appearing on behalf of the appellant, contends before us that the High Court has committed a grave error in holding that the appellant had not made and subscribed the oath or affirmation before the Returning Officer or any other person authorized by State Election Commission and thereby he was not qualified to be chosen to fill a seat in the Panchayat. Learned counsel also urged that the High Court was in grave error in holding that the officer before whom the nomination papers were tendered by the appellant had no authority to receive the same.

8. As against this, the respondent who appeared in person, supported the order of the High Court relying on the various provisions of the Act. It will be, therefore, for us to consider as to whether the High Court was right in declaring the election of the appellant as void.

9. It is an admitted fact that the State Election Commission had appointed Deputy Director of Fisheries (Zonal) as the Returning Officer for this election. It is also an admitted position that one Smt.P.C. Mary was working as Block Development Officer, Alangad and she retired from service on the Afternoon of 31.8.2005. There is an order on record (vide Exhibit X-9) passed by District Collector bearing No.RD.299/2005 dated 31.8.2005 to the following effect:

"Smt.P.C. Mary, Block Development Officer, Alangad retired from service on the A.N. of 31.8.2005. She is relieved of her duties as Block Development Officer on the A.N. of 31.8.2005. Shri O.G. Venugopal, Extension Officer (IRD) will hold full additional charge of the BDO, Alangad till further orders."

Thus it was Shri O.G. Venugopal who was holding the charge for Mrs.P.C. Mary. It was this Mr.O.G. Venugopal who was holding the additional charge of Block Development Officer, had accepted the nomination of the appellant and it was before him alone that the appellant had taken the oath. The High Court has found fault with both the aspects.

10. At this juncture it will be proper to see a few provisions of the Act on which the parties rely. Section 29 of the Act provides for the qualifications for Membership of a Panchayat. Section 29(e) is as under:

"29. Qualifications for membership of a Panchayat \026 A person shall not be qualified for chosen to fill a seat in a Panchayat at any level unless:

(a) xxx xxx

(b) xxx xxx

(c) xxx xxx

(d) xxx xxx

(e) he makes and subscribes before the returning officer or any other person authorized by the State Election Commission an oath or affirmation according to the form set out for the purpose in the first schedule."

Sections 40, 41, 42, 43 as are relevant for our purpose read as under:

"40. General duties of district election officer\027Subject to the superintendence, direction and control of the State Election Commission, the district election officer, shall coordinate and supervise all work, in the district in connection with the conduct of all elections to the Panchayats in the district.

41. Returning Officers \026 For every Panchayat, for every

election to fill a seat or seats in the Panchayat, the State Election Commission shall, in consultation with the Government, designate or nominate one or more returning officer who shall be an officer of the Government or of a local self Government Institutions.

Provided that nothing in this section shall prevent the State Election Commission from designating or nominating the same person to be the returning officer for more than one Panchayats lying adjacent.

42. Assistant Returning Officers \026 (1) The State Election Commission may appoint one or more persons as assistant returning officers to assist any returning officer in the performance of his functions.

(2) Every assistant returning officer shall, subject to the control of the returning officer, be competent to perform all or any of the functions of the returning officer.

Provided that no assistant returning officer shall perform any of the functions of the returning officer which relates to the scrutiny of nominations unless the returning officer is unavoidably prevented from performing the said function.

43. Returning officer to include assistant returning officers performing the functions of the returning officer \026 References in this Act to the returning officer shall, unless the context otherwise requires, be deemed to include an assistant returning officer performing any function which he is authorized to perform under sub-section (2) of Section 42."

The contention of the Election Petitioner (respondent herein) was that it was Smt.P.C. Mary alone who was authorized to accept the nomination papers and also to subscribe the oath to the appellant and since she had superannuated on 31.8.2005, and was replaced by Shri O.G. Venugopal, Extension Officer, IRD and since Shri O.G. Venugopal was not authorized specifically by the State Election Commission or the Returning Officer either to subscribe the oath or to accept the nomination papers, the appellant in effect had not taken oath before a properly authorized officer nor had he tendered his nomination papers before a properly authorized officer.

11. Admittedly, Shri O.G. Venugopal was holding a full additional charge as per the order of the Collector from 31.8.2008 upto 6.9.2005 when Smt. M.K. Padmavaty took charge in the forenoon. The High Court seems to have accepted the contention that since Shri Venugopal was not specifically authorized by the State Election Commission, or even by Returning Officer, he had no authority to either accept the nomination papers or subscribe oath to the candidates who were tendering the nomination papers. It cannot be disputed that every candidate has to subscribe an oath before the Returning Officer or any other person authorized by the State Election Commission. It has been held by the High Court that Smt.P.C. Mary was appointed as an Assistant Returning Officer by the State Election Commission and not by the District Collector. While she was a Block Development Officer, Shri O.G. Venugopal (PW5) was not even a Block Development Officer, he was merely discharging the functions of Block Development Officer as a stop gap arrangement by virtue of an order of District Collector. The High Court also held that the State Election Commission has not passed any order designating Shri Venugopal (PW5) as the Assistant Returning Officer. It was on this ground that the High Court found that Shri Venugopal did not have a proper authorization.

12. The High Court has dealt with Sections 39 to 43 of the Act and ultimately held that the combined reading of Sections 42 and 43 of the Act would make it clear that a Returning Officer can authorize the Assistant Returning Officer to perform all or any of the functions of the Returning Officer except the function of Returning Officer which relates to the scrutiny of nomination. The High Court further held that there was no material before the court to hold that Sairabhanu (PW2) who was the Returning Officer had authorized Shri O.G. Venugopal to discharge the function of

Returning Officer. The High Court held that only other evidence relied on by the respondent (appellant herein) was Exhibit X-8, a notification dated 29.8.2005 also could not empower Shri O.G. Venugopal to act as it could not be said as an authorized by the Returning Officer.

13. Learned counsel for the appellant invited our attention to the notification dated 29.8.2005 issued by the State Election Commission. The notification which is Exhibit X-8 before the Election Tribunal, reads as under:

"In exercise of the powers conferred under sub-section (1) of Section 42 of the Kerala Panchayat Raj Act, 1994 (Act 13 of 1994), the State Election Commission hereby appoints the Secretary of each block panchayat as the Assistant Returning Officer to assist the Returning Officers notified in Notification No.192/2005/SEC dated 18th August, 2005 and 191/2005/SEC dated 18.8.2005 of the State Election Commission."

Learned counsel also pointed out before us and it was not contradicted that the District Collector was designated by the State Election Commission as the District Election Officer. It will be seen from Section 40 that subject to superintendence, direction and control of the State Election Commission, the District Election Officer is duty bound to coordinate and supervise all the work in the whole District in connection with the conduct of all elections to the Panchayat in the District. Therefore, it is obvious that the Collector, Ernakulam, who was appointed as a District Election Officer was to coordinate and supervise all work.

14. It is also an admitted position that Shri O.G. Venugopal (PW5) was posted in place of Mrs.P.C. Mary, the erstwhile Block Development Officer and a Secretary of the concerned Block Panchayat and that atleast for that period Shri O.G. Venugopal was holding full additional charge of the BDO, Alangad Block Panchayat. It is, therefore, obvious that Shri O.G. Venugopal, who was an Extension Officer during the period from 31.8.2005 upto 6.9.2005, was acting as a Block Development Officer and the Secretary to the Block Panchayat for all practical purposes. Merely because Shri O.G. Venugopal was holding additional charge of the BDO, Alangad, it did not mean that he was not holding the full charge of the post of BDO. It was, therefore, obvious that he was, during that period, working as a Secretary of the Block Panchayat. This position could not be and cannot be contradicted. Now, reverting back to the aforementioned notification dated 29.8.2005, it is obvious that the said notification appointed "Secretary of each Block Panchayat" as the "Assistant Returning Officer" to assist the Returning Officer for that particular Block.

15. There is also no dispute that Sairabanu (PW2) was the Returning Officer under the notifications by the State Election Commission dated 18th August, 2005. Once this position is clear, the very look of the notification suggests that the Secretaries of each Block were not empowered, under the said notification, in their name. It was only the incumbent of the office of the Secretary of each Block Panchayat who was empowered to act as the Assistant Returning Officer. It, therefore, naturally follows that every incumbent who was working, at the relevant time, as the Secretary of the Block Panchayat was empowered to act as the Assistant Returning Officer. There is no reason to hold that Shri O.G. Venugopal was not working as the Secretary to the Block Panchayat, Alangad. The order, quoted by us, passed by the District Collector who was also the District Election Officer, specifically provided that Shri O.G. Venugopal was to hold full additional charge of BDO. Resultantly he was also the Secretary of the Block Panchayat and was acting as such. Once this position is clear, then it is obvious that he had all the powers, authority and the responsibilities of an Assistant Returning Officer. At this juncture it will be necessary to note the specific provision under Section 42(2) of the Act under which every Returning Officer, subject to the control of the Returning Officer, would be competent to perform all or any of the functions of the Returning Officer. Thus by necessary logic Shri O.G. Venugopal was competent to perform all or any of the functions of the Returning Officer including subscribing oath and/or accepting the nomination papers.

16. The proviso to sub-section (2) of Section 42, however, specifically

provides that the Assistant Returning Officer could not perform any of the functions which relate to the scrutiny of nominations unless the Returning Officer is unavoidably prevented from performing the said function. This proviso would mean that in an emergent situation where the Returning Officer is not able to function by some unforeseen event as a Returning Officer, the Assistant Returning Officer could also go ahead with the task of scrutinizing the nominations. That, however, would depend upon the evidence. In the present case this was not the situation. All that Shri O.G. Venugopal did was to act as the Assistant Returning Officer owing to his holding a full charge of the post of the Secretary to the Block Panchayat. It is also an admitted position and not contradicted before us that every such BDO for a Block Panchayat acts also as a Secretary to the Block Panchayat. If the language and spirit of Section 42(2) is realized, then there is no question of holding that Shri O.G. Venugopal did not have any authority to act as the Assistant Returning Officer.

17. In para 17 of its judgment, the High Court though had noticed Exhibit X-8, curiously observed that such authorization has to be given by the Returning Officer. We do not see, in the language of Section 42(2) any authorization by the Returning Officer for an Assistant Returning Officer to perform any function. Section 42(2) is merely an empowering section which declares that the Assistant Returning Officer is competent to perform all or any of the functions of the Returning Officer. However, his functions are subject to the control of Returning Officer, meaning thereby that he can be prohibited by the Returning Officer to do a particular function or his actions would be subject to the rigid control of the Returning Officer. However, in order to clothe him with the competence to act, he does not require any specific authorisation from the Returning Officer.

18. Indeed the observations of the High Court in its judgment, more particularly in para 17 are clearly in total derogation of the specific language of Sections 42(1) and 42(2) of the Act. It is to be noted that Assistant Returning Officers are to be appointed by the State Election Commission and not by the Returning Officer. The Assistant Returning Officers draw their powers directly from the State Election Commission. We have already pointed out that the State Election Commission, in the present case, had empowered all the Secretaries of the Block Panchayat as the Assistant Returning Officers. It is not necessary that a Returning Officer should be assisted only by one Assistant Returning Officer. Therefore, in cases where there are more than one person acting as the Secretaries (which is unlikely case), all such Assistant Returning Officers could assist the Returning Officer. The language of sub-section (1) of Section 42 is more than explicit to so suggest. The High Court demanded some evidence to show that the Assistant Returning Officer of Ward II, Alangad Block Panchayat was authorized by the Returning Officer to discharge the functions of Returning Officer. We do not see any such necessity from the language of Section 42 of the Act. The High Court has probably made the observations owing to the language of Section 43 of the Act which provides that wherever the Returning Officer is referred to in the Act, it would be deemed that the reference includes the Assistant Returning Officer performing any function which he/she is authorized to perform under sub-section (2) of Section 42. The words in Section 43 "any function which he is authorized to perform under sub-section 2 of Section 42" do not mean to suggest that there has to be an authorization, much less in writing by the Returning Officer in favour of the Assistant Returning Officer. The words refer only to the functions which the Assistant Returning Officer 'can' perform or is 'capable' of performing under sub-section (2) of Section 42. We do not see any necessity of specific authorization on behalf of the Returning Officer in favour of the Assistant Returning Officer. If we read Section 43 of the Act as rigidly as the High Court has done, then there may be a situation where the proviso to Section 42 would itself become otiose.

19. It will be seen that under the proviso during the emergent situation where the Returning Officer is unavoidably prevented to perform the functions of scrutiny of nominations, the Assistant Returning Officer can go ahead even with that function. Now, if there arises a situation that on the date fixed in the election programme for scrutiny of nominations, the

Returning Officer meets with an accident and is not able to communicate anything to the Assistant Returning Officer, under such emergent situation, the Assistant Returning Officer can and has to go ahead with the task of scrutinizing the nominations because the scrutiny must be held on that particular date as per the election programme. If we insist on any such so-called written authorization, the whole proviso would be rendered meaningless. This aspect has completely been missed by the High Court.

20. We are, therefore, of the clear opinion that Shri O.G. Venugopal who was, at the relevant time, working as a Secretary to the Block Panchayat and was holding a full additional charge of the Block Development Officer for Alangad Block Panchayat was quite competent to subscribe oath to the appellant. He was also quite competent to accept the nomination papers.

21. It is obvious that Shri Venugopal had to accept the nomination papers and subscribe oath on the day that he did introduce the oath to the appellant and also accepted his nomination papers due to the absence of the Returning Officer. It is unthinkable that during the period when the election programme is on, there would be nobody to accept the nomination form and also to introduce the oath to a person tendering his nomination form. Such situation can never be imagined. There could not be a void during the period when the election programme is on. It is unthinkable that for the Alangad constituency in the absence of returning officer, nobody could accept the nomination form or subscribe the oath during the period from 31.8.2005 to 6.9.2005. This is also one of the reasons why we are of the opinion that the judgment of the High Court has become erroneous.

22. Last but not the least, the acceptance of nomination papers of the appellant and the subscription of oath by Shri Venugopal (PW5) to the appellant was never objected to either by the Returning Officer or by the subsequent BDO who took the charge of that post from PW5 on 6.9.2005. Again all these objections were also not raised at the time when the scrutiny of the nomination papers was done. Ofcourse that may not be the only reason to throw out the election petition but that is certainly an additional factor to be taken into consideration.

23. Once this position is arrived at, there would be no necessity to even refer to the de facto doctrine as has been done by the Election Tribunal because we have considered that Shri Venugopal (PW5) was perfectly competent to accept the nomination papers as also to subscribe the oath.

24. The High Court in para 18 of its judgment has referred to Exhibit X-2, a notification and has held that since Shri Venugopal (PW5) could not come in the category of a Returning Officer, he could not have introduced oath. The observation is patently incorrect in view of what we have held above relying on Sections 42 and 43.

25. It has also been held that the District Collector was not competent to confer any powers of Returning Officer or Assistant Returning Officer to PW5. In our opinion this observation is also not correct in view of the fact that for a limited period between 31.8.2005 to 6.9.2005 Shri Venugopal (PW5) was actually acting as the Secretary to the Block Panchayat, since he was holding a full additional charge of the Block Panchayat. His very appointment to that post would clothe him by the powers under the State Election Commission vide notification Exhibit X-8. The other authorities referred to by the High Court in its judgment are not apposite to the controversy in question.

26. The respondent herein has tendered arguments in writing after the matter was closed. We have gone through the said written note of arguments carefully. In paras 1 and 2 again the same argument is repeated that PW5 did not have a proper authorization from the Returning Officer. An absurd statement has thereafter been made to the following effect:

"There was only Exhibit X-8(a) endorsement, which is also disputed as it was only the creation done just before producing it before the court for creating false evidence, of the returning officer which is quoted in para 17 of the impugned judgment."

We are surprised at such a statement being made without any basis, rhyme or reason. This question of Exhibit X-8(a) being false document was not even raised before the High Court. It is then expressed in the

same paragraph that document Exhibit X-7(a) was got proved before the trial court which contained the instructions from the State Election Commission, issued in exercise of powers under Article 243K(1) of the Constitution of India read with Sections 44 and 48A of the Act and that the said instructions included that there has to be a specific authorization of the Returning Officer in favour of the Assistant Returning Officer. Firstly this document was never referred to during the arguments before us and it is only now, after the case is closed and the judgment reserved that the point is being raised. Further, the said document was never produced before us by the respondent who chose to argue his case in person.

Lastly whatever may be the instructions from the State Election Commission, they cannot override the provisions of the Act which we have taken into consideration for holding that no such specific authorization was ever necessary. The contention is, therefore, rejected.

27. A question has been raised then that the appointment and control of the Secretaries of the Panchayats are governed by Sections 179 and 180 of the Act. It is, however, not clarified as to how there is any breach of Sections 179 and 180 of the Act. We have already explained that the District Collector had empowered PW5, with the full charge of Smt.P.C. Mary. If, Smt.P.C. Mary was acting as the Secretary of the Block Panchayat then automatically PW5 would get all those powers by his holding the full charge of Smt.P.C. Mary. The other contentions raised in paras 4 and 5 of the written arguments have already been considered and they are nothing but the repetition of the earlier arguments. Reference to Articles 243F(a) and 191(e) of the Constitution of India is wholly unnecessary.

28. In para 5 again the question regarding the oath has been raised. There can be no doubt that taking of the oath is a sine qua non for a proper candidature. Again an absurd statement is to be found to the following effect:

"If so that will hit directly the mandate of Article 243F, 173(a) and 191(e) of the Constitution of India read with Section 36(2)(a) of the Representation of the People Act, 1951 read with the decision of the Hon'ble Apex Court in Shaik Abdul Rahman v. Jagat Ram Aryan [AIR 1969 SC 1111].

The contentions raised in paras 5(a) and 5(b) on the basis of the reported decision in Shaik Abdul Rahman (supra) are completely meaningless. Further contentions raised in para 5(b) are nothing but the repetition of the earlier contentions. It has already been explained by us earlier that it was not necessary for PW5 to be in the rank of gazetted officer in the State service. The respondent has completely misread Exhibit X-2(a), the notification issued under Section 29(a) of the Act.

29. It is suggested in para 5(c) that by Exhibit X-9, the District Collector had provided the full additional charge only of the Block Development Officer, Alangad to PW5 and not that of the Secretary of Block Panchayat, Alangad. This is a complete misreading of the notification. What was authorized by the said notification was the full charge of Smt.P.C. Mary. Once it is an admitted position that the BDOs were acting as the Secretary, Block Panchayat and more particularly since Smt.P.C. Mary was acting as the Secretary, PW5 would enjoy the same powers. The contentions raised in para 5(c) has, therefore, to be rejected.

30. The contentions raised in para 5(d) regarding Section 52 of the Act read with Rule 6 of the Kerala Panchayat Raj (Conduct of Election) Rules, 1995 is totally irrelevant. Some other contentions have been raised at page 9 of the Note in para 5 which should in fact be para 6. The contentions are again in respect of the authorization under Section 43 of the Act and it is apprehended that in the absence of such authorization the election machinery will break down. We only say that since the Assistant Returning Officer has to act under the control and supervision of the Returning Officer, the apprehension is not only unfounded but absurd. We are not prepared to disbelieve in the State machinery.

31. In para 6(a) a further question is raised based on Sections 52(1) and Section 55(2)(b) of the Act and it is suggested that no other person or officer can perform all or any of the functions of the Returning Officer of

conducting the elections. We have already shown earlier the scope and the powers of the Assistant Returning Officer. The contention has, therefore, to be rejected.

32. Lastly it is suggested that the District Election Officer has no authority to appoint any person as Assistant Returning Officer without the concurrence of the State Election Commission. That may be so. In this case the District Election Officer has not appointed PW5 as Assistant Returning Officer. It is because of Notification Exhibit X-8(a) that PW5 could ipso facto take the authorization from the State Election Commission to act as the Assistant Returning Officer. We, therefore, find no merits in the arguments.

33. In view of the above, we allow this appeal, set aside the order of the High Court and hold that the Election Tribunal was right in upholding the election and dismissing the election petition. Counsel's fee fixed at Rs.10,000/-.