

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.T.SANKARAN

TUESDAY, THE 9TH DAY OF JUNE 2015/19TH JYAISHTA, 1937

CRP.No. 527 of 2012 ()

AGAINST THE JUDGMENT IN AS 227/2011 OF DISTRICT COURT, KOTTAYAM
DATED 30-05-2012

AGAINST THE ORDER IN ELECTION O.P. 2/2010 OF MUNSIF COURT, VAIKOM
DATED 20-09-2011

REVISION PETITIONER(S): 1ST RESPONDENT/PETITIONER

SISILY MATHEW, AGED 42 YEARS
W/O.MATHEW, ADDHAPPALLIL HOUSE, VELLASSERY KARA
KADUTHURUTHY VILLAGE, VAIKOM TALUK
KOTTAYAM DISTRICT.

BY ADV. SRI.LIJI.J.VADAKEDOM

RESPONDENT(S): APPELLANT & RESPONDENTS 2 & 3/
----- COUNTER PETITIONERS

- 1.SANTHAMMA REMESAN, AGED 40 YEARS
W/O.REMESAN, MUTHAMKUZHY HOUSE
KADUTHURUTHY KARA
KADUTHURUTHY VILLAGE, VAIKOM TALUK,
KOTTAYAM DISTRICT 686 604.
2. USHA SARASAKUMAR, AGED 42 YEARS
W/O.SARASAKUMAR, AALUMMAL HOUSE, KADUTHURUTHY KARA
KADUTHURUTHY VILLAGE, VAIKOM TALUK
KOTTAYAM DISTRICT, PIN 686 604.
3. RETURNING OFFICER
KADUTHURUTHY GRAMA PANCHAYATH, WARD NO.18
(CHILD DEVELOPMENT PROJECT OFFICER KADUTHURUTHY)
KOTTAYAM DISTRICT 686 604.

R1 BY ADV. SRI.R.S.KALKURA
R1 BY ADV. SRI.M.S.KALESH
R1 BY ADV. SRI.P.K.CHITHRABHANU

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON
09-06-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K.T.SANKARAN, J.

C.R.P.No.527 of 2012

Dated this the 9th day of June, 2015

ORDER

Sisily Mathew, the petitioner in the revision, was a candidate who contested in the election held on 25.10.2010 at ward No.18 of Kaduthurthy Grama Panchayat. The other candidates who contested in the election were Santhamma Remesan and Usha Sarasakumar. Counting of votes was on 27.10.2010. The third respondent was the Returning Officer. Sisily Mathew got 423 votes including three postal votes, while Santhamma Remesan secured 426 votes including 8 postal votes. The total number of ballot papers issued were 954. At the time of counting, it was revealed that four ballot papers were missing.

2. Sisily Mathew filed Election O.P.No.2 of 2010 before the Munsiff's Court, Vaikom, to set aside the election held on 25.10.2010 at ward No.18 of Kaduthuruthy Grama Panchayat. The trial court on a consideration of the oral and documentary evidence in the case allowed the Election O.P. and declared that the declaration of Santhamma Remesan as the Panchayat member of ward No.18 of Kaduthuruthy Grama Panchayat is void and accordingly, the same was cancelled. Santhamma Remesan challenged the order of the trial court in A.S.No.227 of 2011, on the file of the District Court, Kottayam. The lower appellate court reversed the finding of the trial court and dismissed the Election O.P., which is under challenge in this revision filed by Sisily Mathew.

3. The petitioner in the Election O.P. contended that at the time of counting, several outsiders intervened and the ballot

papers must have been lost as a result of the same. The trial court did not accept that contention.

4. It was contended before the trial court that the missing of ballot papers should have been detected even before the actual counting and the loss of ballot papers should have been noticed immediately after the sorting of ballot papers. It was contended by the petitioner in the Election O.P. that when the loss of ballot papers was noticed by the Returning Officer, without declaring the results of the poll, the Returning Officer ought to have referred the matter to the Election Commission as provided under Section 78 of the Panchayat Raj Act. The trial court held that the loss of ballot papers was noticed after the counting was over and after knowing about the votes secured by each candidate. The lower appellate court held that the loss of ballot papers was known to the candidates even before

counting the votes after sorting the ballot papers. The appellate court held that the Returning Officer and the candidates were aware of the loss of four ballot papers even before counting of votes secured by each candidate was made and nobody raised any objection against counting of votes. The appellate court also took note of the admission made by PWs 1 and 2 that they were vigilant at the time of counting and they have understood after sorting the votes that there was a shortage of four ballot papers and even thereafter, they allowed the Returning Officer to proceed to the next step of counting of votes.

5. The trial court held that since the Returning Officer did not inform the State Election Commission about the loss of ballot papers as provided under Section 78 of the Kerala Panchayat Raj Act, the declaration was vitiated. The Appellate Court did not agree with that finding. Section 78 of the Kerala

Panchayat Raj Act reads as follows :

“78. Destruction, loss etc., of ballot papers at the time of counting :- (1) If at any time before the counting of votes is completed any ballot papers used at a polling station or at a place fixed for the poll are unlawfully taken out of the custody of the returning officer or are accidentally or intentionally destroyed or lost or are damaged or tampered with, to such an extent that, the result of the poll at that polling station or place cannot be ascertained, the returning officer shall forthwith report the matter to the State Election Commission.

(2) Thereupon, the State Election Commission shall, after taking all material circumstances into account, either-

(a) direct that the counting of votes shall be stopped, declare the poll at that polling station or place to be void, appoint a day, and fix the hours, for taking a fresh poll at that polling station or place and notify the date so appointed and hours so fixed in such manner as it may deem fit, or

(b) if satisfied that the result of a fresh poll at that polling station or place will not, in any way, affect the result of the election, issue such directions to the

returning officer as it may deem proper for the resumption and completion of the counting and for the further conduct and completion of the election in relation to which the votes have been counted.

(3) The provisions of this Act and of any rules or orders made thereunder shall apply to every such fresh poll as they apply to the original poll.”

6. In **Rajeena George v. Lissy Yacob** (2010 (2) KLT 714), the scope and ambit of Section 78 of the Kerala Panchayat Raj Act was considered and it was held as follows :

“5. The vital question that emerge for consideration is whether immediately on detection of missing vote in the counting whatever be the reason for such missing, is the Returning Officer expected to inform the Election Commission of such missing and await for the direction to proceed with the further steps of the election. It is worthwhile to take note it is not in the case of every missing of vote in counting the filing of the report to the Election Commission from the Returning Officer is called for. In cases where before counting of votes is completed “any

ballot papers used at a polling station or at a place fixed for the poll are unlawfully taken out of the custody of the Returning Officer or are accidentally or intentionally destroyed or lost or are damaged or tampered with, to the extent the vote cast on such ballot paper cannot be ascertained” the Returning Officer has to report the matter to the Election Commission. A ballot paper was found missing when counting of votes was done, without anything more, would not be sufficient to bring such a case within the sweep of Section 78 of the Act. At the most the detection of the missing of a ballot paper during counting of votes would indicate that such ballot paper was 'lost'. Section 78 of the Act specifically states when the ballot paper or papers are unlawfully taken from the custody of the Returning Officer or accidentally or intentionally destroyed or lost or tampered with, a report from the Returning Officer to the Election Commission is necessary. Missing of a ballot paper detected during counting, that alone, is not enough to hold that such ballot paper was accidentally or intentionally destroyed or lost or tampered with. The word 'lost' in the section is not to be read in isolation but with reference to the other

circumstances mentioned-destroyed or tampered with and that too caused accidentally or intentionally. Accident, no doubt, is the product of an unforeseen event. But a mere missing of a ballot paper at the time of counting with no circumstances presented as to how it happened does not cast an obligation, leave alone any mandatory requirement, on the Returning Officer to report the matter to Election Commission and await for further direction. The Returning Officer is the best judge to determine and analyse the situation whether the missing of such ballot paper comes within the ambit of 'lost' under Section 78 of the Act..... Each and every situation mentioned in the Section is not to be read separately as if even where a ballot paper is found missing or lost during the counting, then it is incumbent upon the Returning Officer to send a report forthwith to the Election Commission and await its further directions. Where the Returning Officer is satisfied from the situation presented that the missing of the ballot paper before the counting is completed is on account of such ballot paper being unlawfully taken out of the custody or accidentally or intentionally destroyed or lost or tampered with, then

alone a report to the Election Commission is called for and not in a case whenever one or other ballot paper for an unknown reason is found to be missing from the total votes polled in the election.”

7. The appellate court considered the facts and circumstances of the case and rightly held that the judgment passed by the trial court was erroneous. Accordingly, the appellate court allowed the appeal and dismissed the Election O.P.. I am of the view that the court below was right in holding that the declaration of result and the election in question did not suffer from any infirmity and the Election O.P. was liable to be dismissed. The law laid down by this Court in *Rajeena George v. Lissy Yacob* (2010 (2) KLT 714) justifies the conclusion arrived at by the court below. I do not find any ground to interfere with the well considered judgment passed by the court below.

For the aforesaid reasons, the Civil Revision Petition is dismissed. No order as to costs.

K.T.SANKARAN
JUDGE

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