

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE V.CHITAMBARESH

WEDNESDAY, THE 23RD DAY OF DECEMBER 2015/2ND POUSHA, 1937

WP(C).No. 34107 of 2015 (K)

PETITIONER:

ABDUL NASER A.M., AGED 43 YEARS,
S/O. MOHAMMED HAJI, KOTHARAYIL,
KARUVANTHIRUTHY P.O.,
FEROKE, KOHIKODE 673 631

BY ADVS.SRI.K. GOPALAKRISHNA KURUP
SRI.T.B.HOOD
SMT.M.ISHA
SRI.AMAL KASHA

RESPONDENTS:

1. KERALA STATE ELECTION COMMISSION,
CORPORATE OFFICE COMPLEX,
LMS JUNCTION, PALAYAM 695 033,
THIRUVANANTHAPURAM
REPRESENTED BY ITS SECRETARY .
2. DISTRICT ELECTION OFFICER,
CIVIL STATION, KOZHIKODE 673 020
3. RETURNING OFFICER
M-80, FEROKE MUNICIPALITY
WARD NOS.20-38, FEROKE MUNICIPAL OFFICE,
FEROKE, KOZHIKODE 673 631
4. FEROKE MUNICIPALITY
FEROKE, KOZHIKODE 673 631
REPRESENTED BY ITS SECRETARY
5. MOIDEEN KOYA K., KAZHUGUMTHODAN HOUSE,
NEAR T.U MADRASA, KARUVANTHIRUTHY P.O.,
FEROKE, KOZHIKODE 673 631
6. MOHAMMED SHAIJAL, MUNAMBATH HOUSE,
KARUVANTHIRUTHY P.O, FEROKE,
KOZHIKODE 673 631

WP(C) NO. 34107/2015

7. SYED AHAMMED JALALUDHEEN THANGAL,
THACHARAMBATH HOUSE, KARUVANTHIRUTHY P.O.,
FEROKE, KOZHIKODE 673 631.

R5 BY ADV. SRI.T.G.RAJENDRAN

R1 BY ADV. SRI.MURALI PURUSHOTHAMAN, SC,K.S.E.COMMISSION

R4 BY ADV. SRI.P.C.SASIDHARAN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 16-12-2015, THE
COURT ON 23.12.2015 DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER(S)' EXHIBITS

- EXHIBIT P1 TRUE COPY OF THE ACCOUNT OF THE VOTES RECORDED THROUGH ELECTRONIC VOTING MACHINE ISSUED BY THE PRESIDING OFFICER
- EXHIBIT P2 TRUE COPY OF THE RESULT OF COUNTING OF VOTES ISSUED BY THE 3RD RESPONDENT RETURNING OFFICER
- EXHIBIT P3 TRUE COPY OF THE NOTIFICATION DATED 07-11-2015 ISSUED BY 1ST RESPONDENT

RESPONDENT(S)' EXHIBITS

- ANNEXURE R1(A) THE PHOTOCOPY OF THE LETTER DATED 02.11.2015 OF THE PRESIDING OFFICER TO THE RETURNING OFFICER
- ANNEXURE R1(B) THE FORM FOR RECEIPT OF SUBSEQUENT ELECTRONIC VOTING MACHINE DURING POLL ISSUED BY THE 3RD RESPONDENT DATED 02.11.2015.
- ANNEXURE R1(C) THE PHOTOCOPY OF THE 3RD RESPONDENT'S REPORT DATED 02.11.2015 ON CHANGE OF EVM DURING POLL.
- ANNEXURE R1(D) THE PHOTOCOPY OF THE REPORT OF THE 3RD RESPONDENT DATED 07.11.2015.
- ANNEXURE R1(E) THE PHOTOCOPY OF THE LETTER NO. 201425295/11/E3 DATED 07.11.2015 OF THE 2ND RESPONDENT.

/TRUE COPY/

P.S. TO JUDGE.

ncd

'C.R.'

V.CHITAMBARESH, J.

W.P (C) No.34107 of 2015

Dated this the 23rd day of December, 2015

J U D G M E N T

The petitioner who contested the election from Ward No.35 of the newly constituted Feroke Municipality questions the notification issued by the Kerala State Election Commission for a re-poll. The Electronic Voting Machine (J.34139) installed in one of the booths developed a technical snag in the midst of poll on 2.11.2015 and refused to record votes. A Control Unit error was shown in the Electronic Voting Machine and about 135 voters had by then exercised their right in the polling booth in question. The Returning Officer summoned the technician deputed by the manufacturer of the Electronic Voting Machine who after inspection opined that the same is not fit for further use. Another Electronic Voting Machine (G.58307) was supplied and the polling resumed after 45 minutes as evident by Annexures R1(A) letter, R1(B) receipt and R1 (C) report of the Returning Officer.

2. It was found during the counting of votes on 7.11.2015 that the votes recorded by the Electronic Voting Machine (J.34139) since replaced could not be

retrieved despite best efforts. The engineers of the Electronics Corporation of India Limited who is the manufacturer of the Electronic voting Machine sought assistance over phone from their head office. The engineers confessed that the chances of retrieval from the Electronic Voting Machine (J.34139) was only 50% even if experts from the head office are brought. The Electronic Voting Machine was certified as faulty by the engineers and sealed in the presence of the candidates and the polling agents. The matter was reported to the State Election Commission through the District Election Officer and the Returning Officer recommended for a re-poll in the booth. The matters that transpired as above are reflected in Annexures R1 (D) report and R1(E) letter of the Returning Officer and the District Election Officer. This had prompted the State Election Commission to issue Ext.P3 notification directing a re-poll for the booth in question to be held on 9.11.2015.

3. The use of voting machine in elections has been specifically recognised in Section 130A of the Kerala Municipality Act, 1994 ['the Act' for short] inserted by Act 33 of 2005. The same reads as

follows:-

130A. Use of voting machine in elections:- Notwithstanding anything contained in this Act or rules made thereunder, the system of giving vote and recording of vote by using voting machine as may be prescribed may be adopted in every election decided by the State Election Commission considering the circumstances in each region.

Explanation:- For the purpose of this section "voting machine" means any electronic machine or any other machine used for giving or recording of votes and it shall also be construed that any reference as to ballot box or ballot paper in this Act or the rules made thereunder save as otherwise provided shall include the reference to a voting machine which is being used in any election. (emphasis supplied)

Thus a distinction has been drawn between the system of 'giving' of vote by the voters and the 'recording' of vote by the voting machines evident by the conscious use of the expressions in the Statute. A corresponding amendment has been made under Section 128(1)(aa) of the Act also inserted by Act 33 of 2005 as regards the conduct of fresh poll. The same reads as under:-

128. Fresh poll in the case of destruction, etc., of ballot boxes:-

(1) If at any election -

(a) any ballot boxes used at a polling station or at a place fixed for the polls is unlawfully taken out of the custody of the Presiding Officer or the Returning Officer, or is accidentally or intentionally destroyed or lost, or is damaged or tampered with, to such an extent, that the result of the poll at that polling station or place cannot be ascertained; or

(aa) any voting machine develops a mechanical failure during the course of recording votes; or

(b) any such error or irregularity in procedure as is likely to vitiate the poll is committed at a polling station or at a place fixed for the poll, 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) 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 day so appointed and the 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 or that the error or irregularity or the mechanical failure developed in the voting machine in procedure is not material, issue such directions to the Returning Officer as it may deem proper for the further conduct of and completion of the election.

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

4. The first contention of Mr.K.Gopalakrishna Kurup, Senior Advocate on behalf of the petitioner is that the voting machine developed a failure only during the retrieval of votes. It is his case that only if the voting machine develops a mechanical failure during the course of recording of votes can a fresh poll be ordered under Section 128(1)(aa) of the Act. Recording of votes gives the final data after retrieval which is quite distinct from giving of votes as is discernible

from Section 130A of the Act. The inability to retrieve the final data is nothing but a mechanical failure of the voting machine during the course of recording votes. This squarely falls under Section 128 (1)(aa) of the Act enabling the State Election Commission to declare the poll at the polling station to be void and notify a date for fresh poll. I do not think that the State Election Commission has acted ultra vires the provisions of the Act in directing a re-poll of the booth in question.

5. The other contention urged on behalf of the petitioner is that the 50% chance of retrieval of votes from the Electronic Voting Machine should have been exhausted before directing a re-poll. This plea is on the basis that the control unit of the Electronic Voting Machine can store the result in its memory for 10 years and even more. The petitioner relies on the questionnaire downloaded from the web site of the Election Commission of India as regards Electronic Voting Machines for this purpose. Mr.Murali Purushothaman, Standing Counsel on behalf of the State Election Commission points out that the election had to be completed on schedule. It is his case that the

chances of retrieval of votes from the Electronic Voting Machine were not only remote but also time consuming dependent on the expert. Mr.T.G.Rajendran, Advocate on behalf of the fifth respondent who was the successful candidate added that there was a larger turn out of voters on the date of re-poll. This was because many voters returned without exercising their right on the original date of poll due to the hiccup of the Electronic Voting Machine. The contention in short of the respondents is that the Returning Officer was justified in recommending a re-poll warranting Ext.P3 notification by the State Election Commission.

6. Whether there exists material circumstances to declare a poll to be void and take a fresh poll under Section 128(2)(a) of the Act is a question to be agitated in an Election Petition. The order for a fresh poll passed during the course of the process of election cannot be questioned except by an Election Petition under the Act. Each and every step in the electoral process and every order passed in the midst including the countermanding of the earlier poll is open to challenge in the Election Petition. I am fortified in this view by the decision in Mohinder

Singh Gill and Another v. The Chief Election Commissioner, New Delhi and Others [AIR 1978 SC 851].

It is held therein as follows:-

“122.If, therefore, during the process of election, at an intermediate or final stage, the entire poll has been wrongly cancelled and a fresh poll has been wrongly ordered, that is a matter which may be agitated after declaration of the result on the basis of the fresh poll, by questioning the election in the appropriate forum by means of an election petition in accordance with law. The appellants, then, will not be without a remedy to question every step in the electoral process and every order that has been passed in the process of the election including the countermanding of the earlier poll. In other words, when the appellants question the election after declaration of the result on the basis of the fresh poll, the election court will be able to entertain their objections with regard to the order of the Election Commission countermanding the earlier poll, and the whole matter will be at large. If, for example, the election court comes to the conclusion that the earlier poll has been wrongly cancelled, or the impugned order of the Election Commission is otherwise

invalid, it will be entitled to set aside the election on the basis of the fresh poll and will have power to breathe life into the countermanded poll and to make appropriate directions and orders in accordance with law.”

To the same effect is the decision in C.Subrahmanyam v. K.Ramanjaneyullu and others [(1998) 8 SCC 703] wherein the entertainment of a writ petition under Article 226 of the Constitution of India was frowned upon.

7. Non-compliance with the provisions of the Act or of any rules or orders made thereunder is a ground for declaring the election to be void under Section 178 (1)(d)(iv) of the Act. The same is very much applicable if the petitioner has a case that material circumstances did not exist for taking a fresh poll under Section 128(2)(a) of the Act. Any illegality in the exercise of the power under Section 128(2)(a) of the Act attracts Section 178(1)(d)(iv) of the Act for declaring the election to be void. It has been held in Mohinder Singh Gill's case (supra) as follows:-

“If exercise of a power is competent either under the provisions of the Constitution or under any other provision of law, any infirmity in the

exercise of that power is, in truth and substance, on account of non-compliance with the provisions of law, since law, demands of exercise of power by its repository, as in a faithful trust, in a proper, regular, fair and reasonable manner.”

Added to this is the supervening factor that the present writ petition under Article 226 of the Constitution of India is barred under Article 243-O(b) of the Constitution of India.

8. The last contention urged on behalf of the petitioner is that the period of pendency of this writ petition has to be excluded for filing an Election Petition as per Section 14 of the Limitation Act, 1963. The right to challenge an election is a special right created by the Statute and the same has necessarily to conform to the statutory requirements prescribed therein. Section 165 of the Act prescribes a period of 30 days from the date of election of the returned candidate to present an Election Petition in order to call in question the election on any grounds available. The scheme of the Act and the nature of the remedy provided therein are such that the legislature intended it to be a complete code and the provisions of the

Limitation Act are necessarily excluded. The benefits conferred under Section 14 of the Limitation Act, 1963 cannot be called in aid to supplement the provisions of the Act therefore. The following observations in K.Venkataswara Rao v. Bekkam Narasimha Reddy [AIR 1969 SC 872] approved in Hukumdev Narain Yadav v. Lalit Narain Mishra [AIR 1974 SC 480] are apposite:

“It is well settled that amendments to a petition in a civil proceeding and the addition of parties to such a proceeding are generally possible subject to the law of limitation. But an election petition stands on a different footing. The trial of such a petition and the powers of the Court in respect thereof are all circumscribed by the Act. The Indian Limitation Act of 1963 is an Act to consolidate and amend the law of limitation of suits and other proceedings and for purposes connected therewith. The provisions of this Act will apply to all civil proceedings and some special criminal proceedings which can be taken in a court of law unless the application thereof has been excluded by any enactment: the extent of such application is governed by Section 29 (2) of the Limitation Act. In our opinion however the Limitation Act

cannot apply to proceedings like an election petition in as much as the Representation of the People Act in a complete and self contained Code which does not admit of the introduction of the principles or the provisions of law contained in the Indian Limitation Act.”

The petitioner has to thank himself for not presenting an Election Petition in time and the benefit of exclusion of time under Section 14 of the Limitation Act, 1969 cannot be extended for that purpose.

The writ Petition is dismissed. No costs.

Sd/-
V.CHITAMBARESH,
Judge.

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