

THE HON' BLE SRI JUSTICE C. PRAVEEN KUMAR

WRIT PETITION No.43047 of 2015

ORDER:

1) Assailing the order in O.P.No.6 of 2003 on the file of the Junior Civil Judge, Ramannapet, wherein the Election Petition filed Under Section 233 of the Andhra Pradesh Gram Panchayat Act (for short "the Act") was allowed, the present writ petition is filed.

2) The facts in issue are as under:

The petitioner as well as respondent No.1 contested for the post of Sarpanch of Aregudem Village. The petitioner was allotted the symbol of 'ring' whereas the first respondent was allotted the symbol of 'basket'. The elections were held on 23.07.2013 and 1671 votes were said to have been polled. It is said that out of 1671 votes, the petitioner secured 825 votes while the first respondent secured 823 votes. 23 votes were said to have been declared as invalid. Since the petitioner secured two votes more than the first respondent, he was declared elected for the post of Sarpanch of the said Gram Panchayat. Aggrieved by the same, the first respondent herein preferred O.P.No.6 of 2013 under Section 233 of the Act before the Junior Civil Judge-cum-Election Tribunal, Ramannapet, for the following reliefs:

1. Pass orders for recounting of votes poled for the post of Sarpanch, Aregudem Village of Chowtuppal Mandal.
2. Declare the election of the first respondent (petitioner herein) to the post of Sarpanch as void;
3. Declare the respondent herein as duly elected to the post of Sarpanch of Aregudem Village.
4. Award costs;
5. Grant such other relief or reliefs as the Court deem fit and proper.

3) After considering the oral and documentary evidence adduced on behalf of both the parties, the Tribunal allowed the O.P. declaring the election of first respondent for the post of Sarpanch of Aregudem Village. Assailing the same, the present writ petition is filed.

4) The learned counsel for the petitioner mainly submits that though the present O.P. is filed for re-counting of votes but neither in Exs.P3 and P4 ie. Protest petition filed before the Election Officer nor in the complaint made before the District Collector respectively, the first respondent herein demand for re-counting of votes, and also did not complain about the manner in which the counting was done. He further submits that though there is no irregularity or illegality in counting of votes, the exercise undertaken by the trial Court, which led to counting of votes, number of times, is illegal and improper. It is further urged that pending O.P.,

the first respondent herein filed I.A.No.516 of 2014 for production of ballot boxes from the custody of respondents 3 and 4 which was allowed on 14.12.2015. Aggrieved by the same, the petitioner herein filed C.R.P.No.5388 of 2015 which was closed on 14.12.2015. The relevant portion of the said order is as under:

“The revision petition is filed only on apprehension that too based on the discussion portion at paragraph-9 of the order the learned Junior Civil Judge may grant the relief which has not been pleaded in the relief portion. But in the final result the learned Junior Civil Judge only directed the parties to appear before the Court and issue notice to respondents 2 to 4 to produce the ballot boxes before the Court.

In view of the apprehension expressed by the petitioner, this Court is of the opinion that the interest of justice would be served, if it is made clear that the order shall be confined only for production of ballot boxes before the Court and for taking appropriate steps for preserving the same till the final orders are passed by the Election Tribunal.”

5) It is urged that, contrary to the orders passed by the Hon'ble High Court, the Tribunal ordered recount of the votes, which was not the request before this Court. He further submits that the Election Officer committed an error in picking up five votes from the bundle of rejected votes and adding them in favour of contested candidates. It is further urged that the Election Tribunal failed to assign reasons while

treating the two invalid votes, out of 23 votes declared as invalid, as valid without proper endorsement. Finally, it is urged that the evidence of RWs.1 to 3 was not considered in proper perspective.

6) On 04.01.2016, after hearing both sides, this Court passed the following order:

“Considering the fact that the petitioner herein was elected as Sarpanch of the Gram Panchayat and his election having been set aside, non-grant of interim order at this stage would lead to his seizing to be Sarpanch pending the writ petition. Hence, I find the elements of balance of convenience and irreparable injury in favour of the petitioner. Accordingly, pending further orders, there shall be interim suspension of judgment, dated 21.12.2015, in O.P.No.6 of 2013 on the file of the Junior Civil Judge, Ramannapet. The Election Tribunal is directed to send the ballot papers and the proceedings pertaining to recounting of votes by the next date of hearing.

7) A Counter along with a vacate stay petition came to be filed by the first respondent, raising various issues. One of the main ground urged in the counter is that though the first respondent won by a margin of 3 votes and when he was about to be declared as Sarpanch, the Returning Officer picked up five votes from the bundle of rejected votes and added those five votes in favour of the petitioner, which lead to his election. It is further said that immediately thereafter, he

filed a petition before the Returning Officer for recount of the votes but the same was turned down. He also claims to have lodged a complaint before the District Collector on the next day, who failed to act on it, on the ground that the election process is over. Hence, the first respondent filed the above O.P. It is further stated that the allegations made in para Nos.8 and 9 of the affidavit, filed in support of the writ petition, that the election tribunal treated two invalid votes as valid and declared the first respondent as elected by margin of two votes is untenable, for the reason that the Election Tribunal while dealing with the issue of recounting of votes, shown the ballot box to the parties to the election O.P., their counsel, A.G.P. and the election authorities and their staff and all of them expressed that the box is intact, then only the box was opened. It is further said that the election Tribunal after considering the entire oral and documentary evidence, after undertaking the process of recounting twice in the open Court and after the parties expressed their satisfaction over the process, came to a conclusion that the first respondent was successfully elected with a majority of two votes. In view of the above, it is urged that there is no illegality or impropriety in the entire process and as such the order under challenge warrants no interference.

8) Pending the writ petition, W.P.M.P.No.21679 of 2016 came to be filed seeking fixation for an early date of hearing for final adjudication, which is listed along with this writ petition. Now with the consent of both the parties, the main writ petition itself is being taken up for hearing.

9) Reiterating the averments made in the affidavit filed in support of the writ petition, learned counsel for the petitioner would submit that the procedure adopted by the Election Tribunal is improper and incorrect. However, the learned Senior Counsel Sri S.Pamachandar Rao, appearing for the first respondent would submit that a well-reasoned order of the Election Tribunal cannot be subject to alteration, on factual aspects, unless the same is perverse or mala fide. He further submits that filing of a writ petition, seeking issuance of writ of mandamus, itself is not maintainable. According to him, the proper remedy would be to seek a writ of Certiorari. Hence, it is urged that when the relief sought for cannot be executed by issuing a writ of mandamus, the entire fabric of the case collapses and no relief can be granted to the petitioner in this writ petition. He further submits that this Court cannot sit in appeal against the orders passed by a Tribunal unless it is shown that the said order suffers from lack of jurisdiction or that there was failure of justice or grave injustice has occasioned. He further submits that since

number of factual aspects were taken into consideration while dealing with the O.P. this Court in a writ petition filed under article 226 of the Constitution of India, cannot go into those factual aspects and re-appreciate the evidence on record. It is his case that findings on facts arrived at by the trial Court or Tribunals basing on evidence available on record, cannot be interfered with. Since no objection was raised to the process of counting and recounting and when the same was done to the satisfaction of all concerned, the writ petitioner cannot have any grievance over the said exercise. He further submits that the process of re-counting undertaken by this Court pending the writ petition is un-warranted and uncalled for. The same is strongly opposed by the learned counsel for the writ petitioner.

10) One of the objection raised by the learned counsel for the first respondent is that this Court ought not to have entertained a writ of mandamus for the relief sought for. According to the counsel, the appropriate remedy would be to ask for a writ of Certiorari.

11) In *K. Ramachandar Rao v. State of Andhra Pradesh*¹ a learned Single Judge of this Court while dealing with the said aspect referred to various judgments of the Apex Court and held as under:

¹ (2009) 6 ALD 142

“It is no doubt true that in stead of filing of a writ of certiorari, a writ of mandamus had been thought of, but however this Court is of the considered opinion that since such other appropriate orders or suitable reliefs can be granted by the writ Court, the writ petition need not be dismissed on such ground alone.

37. As already aforesaid, though the relief as couched ie. issuance of a writ of mandamus, may not be the proper remedy in the facts and circumstances, on this ground alone the writ petition cannot be thrown out. However, it is made clear that a writ of certiorari alone, in the facts and circumstances of the present case, would be the proper remedy.”

12) In the instant case, it is to be noted, that subsequently, the petitioner herein filed W.P.M.P.No.14291 of 2017 seeking amendment of the main prayer in the affidavit filed in support of the writ petition and sought for issuance of appropriate writ or direction more particularly one in the nature of writ of certiorari to call for the connected records including the order passed in O.P.No.6 fo 2013, dated 21.12.2015 passed by the Junior Civil Judge, Ramannapet, Nalgonda District and quash the same as being null and void, illegal, improper, unjust, arbitrary, contrary to law and also in violation of principles of natural justice and pass such other order or orders as this Court deems fit and proper in the circumstances of the case. No counter has been filed opposing the same. Of course, the said application came to be filed at a very belated stage but in the absence of any specific counter to the said M.P., this

Court is of the view that the request to amend the prayer can be accepted. Even otherwise, since the prayer in the main writ petition is for “issuance of writ of mandamus or any other appropriate writ or direction”, this Court is of the view that no prejudice would be caused if the said writ petition is entertained. Therefore, the plea of the first respondent that no relief can be granted to the petitioner in this writ petition as the same was filed for issuance of writ of mandamus, cannot be accepted.

13) The second main objection raised by the learned counsel for the first respondent is that this Court cannot go into factual aspects of the matter so as to upset the findings of the Tribunal. In support of his plea he relied upon the following judgments:

1. *Vanguri Mariamma v. Kandukuri Gangamma and others*²
2. *Burada Kanaka Ratnam v. Senior Superintendent of Posts, Bhimavaram Division*³
3. *Kagitha Bhanu v. Principal Junior Civil Judge-cum-Election Tribunal, Gudivada*⁴

14) There is no dispute with regard to the proposition of law laid down in the said judgments. A writ of Certiorari can be issued for correcting errors of jurisdiction committed by

² (2003) 3 ALD 427

³ (2005) 2 ALD 174 (DB)

⁴ (2011) 3 ALD 509

the inferior Courts or Tribunals ie. in cases where orders are passed by the inferior courts or Tribunals are without jurisdiction or in excess of it or as a result of failure to exercise jurisdiction: Further an error of law which is apparent on the face of record can be corrected by a writ but not an error of fact. (*Syed Yakub vs. Radha Krishnan*⁵, *Hari Vishnu Kamath v. Ahmed Ishak*⁶).

15) But the case on hand contains mixed questions of law and fact. Though various objections are sought to be raised by the learned counsel for the first respondent with regard to maintainability of the writ and also as to the jurisdiction of the Court in going into the factual aspects, it is to be noted that as against the interim order passed by this Court on 04.01.2016, a writ appeal was filed vide W.A.No.23 of 2016, which was disposed of on 21.01.2016 modifying the order of the learned Single Judge to the extent that the petitioner shall have no right to vote and shall not exercise cheque drawal power, pending the hearing of the writ petition. Aggrieved by the same, the petitioner preferred S.L.P. which was disposed of giving liberty to seek appropriate modification before the High Court. The issue of maintainability of the writ petition was never raised in any of the proceedings.

⁵ AIR 1964 SC 477

⁶ AIR 1995 SC 233

16) Later, on 08.07.2016, a learned Single Judge of this Court, with the consent of both the parties and their counsel, and with a view to give a quietus to the litigation, passed the following order:

“Taking into consideration the nature of dispute, which is to be resolved in the writ petition, on the suggestion of the Court, both the counsel appearing for both sides have agreed that the recounting of the votes hold in the election may be done and for this purpose, an Advocate of this Court may be appointed as a Commissioner in whose presence, the recounting can be done. Considering the respective submissions as the issue would get resolved with the simple act of counting the votes, Ms. Kalyani Ghayal, Advocate, Mobile No.7702173993, is appointed as an Advocate Commissioner. The Registry shall hand over all the ballot papers to her. The Advocate Commissioner shall issue notices to the respective counsel and the parties to be present on 12.07.2016 in the Court Hall No.30 of this Court at 4.30 p.m. Both the counsel shall assist the Advocate-commissioner in discharging her entrusted duties. Her fee is fixed at Rs.20,000/- (Rupees twenty thousand only). Post on 14.07.2016 for filing Advocate Commissioners Report.”

From the above, it is clear that in view of the consent given by all the parties, Ms.Kalyani Gayal, Advocate was appointed as an advocate-commissioner to take up the act of re-counting the votes. Pursuant thereto, the advocate-commissioner issued notices to the counsel and parties and undertook the task of counting the votes on 12.07.2016 at 4.30 p.m. in Court

Hall No.30. On 14.07.2016, the Commissioner submitted a report to the Court stating that the 'basket' symbol obtained 677 votes while the 'ring' symbol obtained 791 valid votes. However, 147 votes relating to 'basket' symbol and 35 votes of 'ring' symbol were treated as doubtful votes. It is to be noted here that counting of votes took place without looking into the circulars issued by State Election Commission. After taking into consideration the circulars issued by the State Election Commission, the said exercise was repeated in the month of August, 2016. The advocate-commissioner re-counted the segregated votes in the presence of counsel for both the sides and submitted a report showing the number of votes obtained. It appears that the learned Judge categorized the votes which are to be treated as valid, undisputed, invalid and also such of those votes whose validity needs to be heard. The details of which are as under:

	Petitioner (No. of votes)	Respondents (No. of votes)
Undisputed votes	677	791
Unanimously considered valid by both parties	14	5
Declared valid by His Lordship	28	16
Declared invalid and rejected by His Lordship	4	6
To hear the Counsels with respect to	103	8
TOTAL	826	826

17) From the table referred to above, it is clear that validity of 103 votes polled on behalf of basket symbol (petitioner) and 8 votes on behalf of first respondent still remained to be decided, as the stamp impression on those votes was smudged. Thereafter, the matter came up before this Court in the month of March, 2017. An objection as to the maintainability of the writ petition was also raised then but this Court negatived the same on the ground that having consented to participate in recounting so as to give a quietus to the litigation, the respondent cannot now turn back and raise the said ground. It is also to be noted here that on 31.03.2015, this Court while dealing with the objection with regard to the counting made earlier and the objections raised therein, observed as under:

“Sri S.Ramachandra Rao, learned Senior Counsel for Sri K.R.Prabhakar, learned counsel for respondents would submit that the writ petition itself cannot be entertained as the issue involves disputed questions of fact. He further submits that at the time of initial counting and also at the time of first counting which was made in the Court, no objection was raised and as such it may not be appropriate to rely on third recounting which took place on 05.08.2016. In any event, he submits that since the third counting is still in conclusive, it would be just and proper to direct the Registrar General, to look into the votes

which are separated as 'to hear the counsel' and then submit a report as to their validity."

18) Since there is a dispute with regard to 103 votes alleged to have been polled in favour of basket symbol and 8 votes in favour of ring symbol, this Court, with the consent of both the counsel and with a view to give quietus to the litigation, appointed the Registrar General to count the disputed votes referred to above, as per the circulars issued by the State Election Commission. The act of appointing Registrar General to count the votes gets support from the two judgments of the Apex Court in *I. Vikheshe Sema v. Hokishe Sema*⁷ and *M. Seshagiri Rao v. K. Prabhakara Rao and another*⁸. Though a comment has been made with regard to the table referred to above stating that the Hon'ble Judge could not have taken up the exercise of counting of votes in the absence of the parties, but for the reasons best known, the same was never challenged.

19) In view of the orders passed by this Court on 31.03.2017, directing the Registrar General of the High Court to undertake counting of 111 disputed votes, which was also with the consent of both the counsel, the Registrar General undertook the said exercise and submitted a detailed report showing the validity or otherwise of each individual vote.

⁷ (1996) 4 SCC 53

⁸ (1982) 2 SCC 78

After analyzing each vote, it was found that out of 103 votes said to have polled in favour of 'basket' symbol, the counsel for the first respondent agreed to treat 55 votes as valid votes and polled in favour of the petitioner but however disputed 48 votes. Out of 8 votes polled in favour of 'ring' symbol the learned counsel for the petitioner disputed all 8 votes, as not being valid. But however the validity or otherwise of the votes were analyzed by taking into consideration the objections raised by both the parties and found that except one vote, all the other votes ie. 102 votes were treated as valid and polled in favour of the writ petitioner. He categorically states that strict adherence was given to the guidelines laid down in the circular letter No.1052/ SCC/ D2-2013 dated 12.07.2013 issued by the State Election Commissioner, while subjecting the votes to scrutiny. Out of the eight disputed votes relating to 'ring' symbol it was found that none of the votes pertaining to 'ring' symbol were found to be valid, as per Rule 58 (1) (a) to (h) of the A.P.Gram Panchayat Conduct of Election Rules. Having regard to the said report, the petitioner herein is said to have won the election by one vote.

20) Copies of the said report was furnished to both the counsel. After seeing the report, the counsel of first respondent again raised an objection, with regard to the

maintainability of the writ petition and that factual aspects cannot be gone into even if the said writ is to be treated as a writ of certiorari. As stated earlier, on more than one occasion, both the counsel subjected themselves to the jurisdiction of this Court and also gave consent for counting of votes. They have participated in the entire process without raising their little finger as to the procedure that is followed. The order passed by this Court on 08.07.2016 and 31.03.2017 where recount was ordered, was never challenged before the higher forum. Hence, this Court is of the view that the first respondent is estopped from raising all such pleas at this stage.

21) Dealing with the issue of estoppel, the Apex Court in *Cauvery Coffee Traders, Mangalore v. Hornor Resources (International) Company Limited*⁹ held as under:

“The transaction stood concluded between the parties, not on account of any unintentional error, but after extensive and exhaustive bilateral deliberations with a clear intention to bring about a quietus to the dispute. These negotiations, therefore, are self-explanatory steps of the intent and conduct of the parties to end the dispute and not to carry it further.

25. In *R.N. Gosain v. Yashpal Dhir*, AIR 1993 SC 352, this Court has observed as under:-

"Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of

⁹ (2011) 10 SCC 420

election which postulates that no party can accept and reject the same instrument and that "a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage."

26. A party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience. (Vide: [Nagubai Ammal & Ors. v. B. Shama Rao & Ors.](#), AIR 1956 SC 593; [C.I.T. Vs. MR. P. Firm Maur](#), AIR 1965 SC 1216; [Maharashtra State Road Transport Corporation v. Balwant Regular Motor Service, Amravati & Ors.](#), AIR 1969 SC 329; [P.R. Deshpande v. Maruti Balaram Haibatti](#), AIR 1998 SC 2979; [Babu Ram v. Indrapal Singh](#), AIR 1998 SC 3021; [Chairman and MD, NTPC Ltd. v. Peshmi Constructions, Builders & Contractors](#), AIR 2004 SC 1330; [Ramesh Chandra Sankla & Ors. v. Vikram Cement & Ors.](#), AIR 2009 SC 713; and [Pradeep Oil Corporation v. Municipal Corporation of Delhi & Anr.](#), (2011) 5 SCC 270).

27. Thus, it is evident that the doctrine of election is based on the rule of estoppel- the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had."

22) The Madras High Court in C.R.P.No.2387 of 2013 dated 02.07.2014 went into the question of validity or otherwise of the votes and found that there was negligence and carelessness on the part of the election officer and his team officials in counting the votes and their act of declaring several valid votes, as invalid. Ergo, there is nothing wrong in this Court ordering recount of votes when there is variation in number of votes obtained, after the re-count done immediately after the polls, after deciding the O.P. and twice by an advocate-commissioner appointed by a learned Single Judge of this Court and more so when the counsel for the first respondent as well as the petitioner gave consent for the said exercise.

23) For the aforesaid reasons and in view of the judgments referred to above, the writ petition is allowed setting aside the order dated 21.12.2015 passed in O.P.No.6 of 2013 on the file of the Junior Civil Judge/ Election Tribunal, Ramannapet.

24) There shall be no order as to costs. Consequently, miscellaneous petitions, if any, pending shall stand closed.

JUSTICE C. PRAVEEN KUMAR

Dt:01.06.2017
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