

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.691 of 2017

ORDER:

In this Civil Revision Petition, under Article 227 of the Constitution of India, by the 1st respondent in the OP/unsuccessful petitioner, the challenge is to the order, dated 29.12.2016, of the learned Senior Civil Judge, at Nalgonda, passed in I.A.No.1343 of 2015 in O.P.No.53 of 2014.

2. I have heard the submissions of *Sri K.Srinivas*, learned counsel appearing for the petitioner, and of *Sri P.S.P.Suresh Kumar*, learned counsel appearing for the 1st respondent. The respondents 2 to 7 are stated to be not necessary parties. I have perused the material record.

3. The facts, which are necessary to be stated as a preface to this order, in brief, are as follows:

The 1st respondent herein/ election petitioner (hereinafter, 'election petitioner') brought the OP under Rule 1 of A.P. Municipalities (Decision of Election Disputes) Rules, 1967, against the revision petitioner/ 1st respondent in the OP (hereinafter, '1st respondent') and others seeking a decree to declare the election of the 1st respondent/revision petitioner to the post of 7th ward councillor of Nalgonda Municipality as void and set aside her election by declaring it as void; and, award costs. The 1st respondent having entered appearance failed to file her counter. Therefore, she was set *ex parte*, on 22.08.2014. Thereafter, she filed the afore-stated I.A.1343 of 2015 under Order IX Rule 7 of the Code of Civil Procedure, 1908 ('the Code') requesting to set aside the *ex parte* order, dated 22.08.2014. The said

petition was resisted by the election petitioner. On merits and by the orders impugned in this revision, the trial Court/ Tribunal refused to set aside the *ex parte* order and dismissed the petition of the 1st respondent. Therefore, the 1st respondent in the election OP is before this Court.

4. The case of the 1st respondent is this:

The original petition is filed by the election petitioner challenging the election of the 1st respondent and to declare it as void. The 1st respondent, who is the returned candidate, entered appearance. The OP was posted to 22.08.2014 for filing counter in the OP. However, for non-availability of certain important information with regard to preparation of voters list, fixation of boundaries of the wards of the Division in Nalgonda Municipality and her inability to contact the advocate in time for preparation of the counter for want of the aforesaid information, she could not file her counter. Therefore, she was set *ex parte* on 22.08.2014. Hence, she filed petition to set aside the *ex parte* order and receive the counter on file, which is filed along with the petition.

4.1 The case of the election petitioner is this:

The allegations made in the affidavit filed in support of the petition of the 1st respondent are invented. An election petition is to be disposed of expeditiously. The petition under Order IX Rule 7 of the Code has no application to the case on hand. The Tribunal has no jurisdiction to set aside the *ex parte* order. Hence, the petition may be dismissed.

5. Learned counsel for the 1st respondent/ revision petitioner herein would submit as follows: 'The 1st respondent was set *ex parte* in the

election petition for non-filing of the counter, on 22.08.2014. She filed a petition to set aside the *ex parte* order without any delay; and, to show her *bona fides*, she also filed her counter along with the said petition. But the learned Senior Civil Judge, erroneously dismissed the petition and refused to set aside *ex parte* order and give an opportunity to the 1st respondent to file counter and contest the election petition.' In the impugned order, the learned Judge *inter alia* held that the election Tribunal has to follow the procedure under the Municipalities Act and that all the powers of the Civil Court under the Code are not available to the Election Tribunal and the powers are only confined for summoning the witnesses, issuance of interrogatory, discovery & inspection and production of documents and that its powers as an election Tribunal are limited and that it cannot travel beyond its powers & jurisdiction and, therefore, it cannot set aside the *ex parte* order.

6. Now, the only question is:

Whether the Election Tribunal is having power and jurisdiction to set aside the *ex parte* order passed against one of the respondents in the election petition? And, if so, whether sufficient cause was shown by the 1st respondent in the election petition to set aside the *ex parte* order and receive her counter on file?

7. Learned counsel for both the parties relied upon number of decisions on the limitations of the powers of the Election Tribunal and the application and non-application of the provisions of the Code to the inquiry proceedings before an Election Tribunal and the lack or otherwise of the power in the Election Tribunal to set aside the *ex parte* order passed against the respondent in the election petition.

(i) The decision in *C.Maniyamma v. Junior Civil Judge, Narayanpet, Mahabubnagar District*¹ is relied upon in support of the proposition that an election petition shall be inquired into by the Election Tribunal, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908, for trial of the suits. In the afore-stated decision, this Court held that amendment of pleadings can be permitted under Order VI Rule 17 of the Code. In this cited case, the Election Tribunal is dealing with a case under the provisions of A.P. Panchayat Raj Act, 1994, and the Rules framed there under.

(ii) *Smt. Madhu v. Smt. Bhanwari*² is a case where, while dealing with an election dispute, the High Court of Patna held that Section 97 of the Representation of People Act, 1951, (Act 43 of 1951), is not applicable to an election dispute, which is to be tried by the District Judge under the provision of Rule 80 of the Rules of 1994 under the Panchayat Raj Act (Act 13 of 1994).

(iii) The decision in *Ethopian Airlines v. Ganesh Narain Saboo*³ is relied upon in support of the proposition that the word 'Court' in the Code of Civil Procedure exclusively refers to civil Courts, but not to quasi judicial bodies like Consumer Disputes Redressal bodies and such redressal bodies fall outside the purview of the term 'Court' as defined in Section 2 of the CPC.

(iv) The decision in *Kummari Ramulu v. Gangaram Penta Reddy*⁴ is relied upon in support of the proposition that only certain powers of the Civil Court are conferred on the Election Tribunal, but not

¹ 1998(5) ALD 361

² 2003 A I H C 4064

³ (2011) 8 Supreme Court Cases 539

⁴ 2004(3) ALT 788 (D.B)

all powers and that the powers not mentioned in the Rules, cannot be exercised by the Election Tribunal. This is also a decision rendered in a case, where the proceedings are initiated under the A.P. Panchayat Raj Rules, 1995. In this cited decision, a Division Bench of this Court held that the power to permit addition of a party after the period of limitation is such a power that can be exercised only when it is specifically conferred on the Tribunal. And, accordingly the application filed seeking substitution of a party in place of the impleaded party was dismissed.

(v) The decision in *Jumbarthi Kasim @ Kashiram v. Bommidu Jagannatham*⁵ is relied upon in support of the proposition that when the provisions of the CPC are made applicable to certain limited aspects, and the A.P.Panchayat Rules, 1995, stipulated the procedure as regards the other matters, the contention that CPC in its entirety, applies to the proceedings initiated under the Panchayat Rules cannot be accepted. The facts of the cited case show that the election petition was filed challenging the election of the Sarpanch of a Gram Panchayat.

(vi) The decision in *M.Ganganna v. A.Chinna Guravaiah*⁶ is relied upon in support of the proposition that A.P.Panchayat Raj Rules, 1995, postulate that every election petition shall be enquired into by the Election Tribunal in accordance with the procedure applicable under the CPC and it is now well settled that all the subsequent amendments to CPC get incorporated into Rule 11 though the amendment to Order XVIII Rule 4 was not there when the Rules were made. While holding accordingly, this Court dismissed the writ petition challenging an order of rejection passed by the Election Tribunal whereby an interlocutory

⁵ 2008(2) ALT 22

⁶ 2003 (5) ALD 231

application filed under Section 151 of the Code praying the Election Tribunal to set aside the sworn affidavit of the 1st respondent was rejected.

(vii) In the decision in Smt. Lagudu Anuradha v. Smt. Gorrepotu Chellayamma⁷, this Court held that Order XIV of the Code is applicable to election petitions being tried by Election Tribunals and that settlement of issues or framing of points for consideration is an essential step in an enquiry of election petition for the reason that parties should know on what questions in controversy necessary evidence may have to be let in.

(viii) In the decision in Kailash v. Nanhku⁸, the facts disclose that election of the appellant to the Uttar Pradesh Legislative Council was under challenge as per Section 80 of the Representation of People Act, 1951. It was held that the power of the Court to extend time for filing of the written statement in an election petition is not circumscribed by Order VIII Rule 1 CPC and the proviso thereto, as amended. The High Court denied the prayer for extension of time as it felt that it had no power to do so as the High Court was bound by Order VIII Rule 1 of the Code and the proviso thereto as amended. The Supreme Court considered the fact that the written statement was already on record issued directions for its being taken on record, subject to payment of Rs.5,000/- as costs to the election petitioner. In that factual background, the Supreme Court summed up the conclusions. One of the conclusions reads as under:

“In case of conflict between the provisions of the Representation of People Act, 1951 and the rules framed there under or the Rules framed by the High Court in exercise of the power conferred by Article 225 of the

⁷ 2004 (4) ALT 197

⁸ (2005) 4 Supreme Court Cases 480

Constitution on the one hand, and the rules of procedure contained in CPC on the other hand, the former shall prevail over the latter.”

Reliance was also placed in an unreported decision in W.P.No.1145 of 1972 rendered by this Court on 19th October, 1973, wherein, this Court held that the Tribunal was justified in invoking Order IX Rule 9 of the Code and setting aside the order of dismissal of the election petition filed under the A.P. Municipalities Act, 1965, before the Election Tribunal.

8. I have gone through all the decisions and also the Rules for Decision of Election Disputes, 1967, (Rules for Decision of Election Disputes under the Andhra Pradesh Municipalities Act, 1965).

9. Learned counsel for the election petitioner contends as follows: ‘All the provisions of the Code are not made applicable by the Rules framed and that the Election Tribunal is vested with the limited powers. The Election Tribunal shall have the powers only in respect of the following matters: (i) discovery and inspection; (ii) enforcing the attendance of witness and requiring the deposit of their expenses; (iii) compelling production of documents; (iv) examination of witnesses on oath; (v) reception of evidence taken on affidavit; and (vi) issuing commissions for examination of witnesses; and summoning and examining *suo motu* any person whose evidence appears to the Tribunal to be material; and shall be deemed to be a civil Court within the meaning of Sections 480 and 482 of the Criminal Procedure Code. Hence, the Election Tribunal has no power to invoke Order IX Rule 7 of the Code and and set aside the *ex parte* order passed against the 1st respondent in the election petition and receive the counter on file.’ Whereas, the learned counsel contends that as per the settled legal

position in the decision of the Supreme Court in *Kailash* (8 supra), there is no rule, which is in conflict with the provisions of the Code, and therefore, the Election Tribunal can exercise the power conferred by the rules as well as the rules of the CPC in view of the absence of a conflict. He would also submit that in view of the decision of this Court in W.P.No.1145 of 1972, rendered under the A.P. Municipalities Act, wherein it was held that the provisions of Order IX Rule 9 of the Code can be invoked, it follows that the Tribunal can equally invoke Order IX Rule 7 of the Code to set aside the *ex parte* order passed against the 1st respondent in the election petition.

10. In the considered view of this Court, 'The Rules for Decision of Election Dispute (1967)' do not contain any rule, which is in conflict with the provisions of the CPC. Rule 6 of the Rules clearly provides as follows: 'Every election petition shall be inquired into by the Election Tribunal as nearly as may be in accordance with the procedure applicable under the Code of Civil Procedure, 1908, to the trial of suits.' The said Rule reads as under:

6. Every election petition shall be inquired into by the Election Tribunal as nearly as may be in accordance with the procedure applicable under the Code of Civil Procedure, 1908, to the trial of suits:

Provided that it shall only be necessary for the Election Tribunal to make a memorandum of the substances of the evidence of any witness examined by him.

Provided further that the Tribunal shall have the discretion to refuse, for reasons to be recorded in writing, to examine any witness if it is of the opinion that their evidence is not material for the decision of the petition or that the party tendering such evidence is doing so on frivolous grounds or with a view to delay the proceedings.

Provided also that no witness or other person shall be required to state for whom he has voted at an election.

Explanation:- The Election Tribunal shall have the powers which are vested in a Court under the Code of Civil Procedure, 1908, while trying a suit in respect of the following matters:--

- (a) discovery and inspection;
- (b) enforcing the attendance of witness and requiring the deposit of their expenses;
- (c) compelling the production of documents;
- (d) examining witness on oath;
- (e) reception of evidence taken on affidavit; and
- (f) issuing commissions for examination of witnesses and may summon and examine suo motu any person whose evidence appears to him to be material; and shall be deemed to be a civil Court within the meaning of Sections 480 and 482 of the Code of Criminal Procedure, 1898 (V of 1898).

The explanation deals with the powers vested in the Tribunals insofar as items specified in clauses (a) to (f) are concerned. Rule 6 provides for the procedure to be adopted for the enquiry of election petitions. While the explanation deals with exercise of powers in regard to items (a) to (f), the Rule deals with the applicability of CPC as nearly as possible. In the considered view of this Court, if it is open to the Tribunal to set a respondent *ex parte* for not filing a counter, the power to set aside the *ex parte* order also inheres in the Tribunal and, therefore, the Tribunal, which has power to set the respondent *ex parte*, will certainly have the power to entertain an application under Order IX Rule 7 of the Code.

11. On the above analysis, this Court holds that the Tribunal was not justified in not invoking Order IX Rule 7 of the Code and in refusing to set aside the *ex parte* order. It is not in dispute that the application seeking to set aside the *ex parte* order was filed within a reasonable time; further, this Court is of the considered view that the explanation

offered can be considered as a sufficient cause for setting aside the *ex parte* order.

12. Viewed thus, this Court finds that there is considerable merit in the revision petition and that the revision petition deserves to be allowed after setting aside the order impugned in the revision.

13. In the result, the Civil Revision Petition is allowed setting aside the order, dated 29.12.2016, of the learned Senior Civil Judge, Nalgonda, passed in I.A.No.1343 of 2015 in O.P.No.53 of 2014; and, as a sequel, I.A.No.1343 of 2015 stands allowed subject to condition that the 1st respondent in the election petition shall pay costs of Rs.5,000/- to the election petitioner or deposit the same to the credit of the OP within three weeks from the date of receipt of a copy of this order. On such deposit, the Tribunal shall proceed further in the matter and dispose of the OP in accordance with the procedure established by law. However, it is made clear that on failure of the 1st respondent in the election petition to pay or deposit the costs as directed in these orders, the subject interlocutory application of the 1st respondent shall stand dismissed and the order under revision shall stand revived.

Pending miscellaneous petitions, if any, shall stand closed.

M. SEETHARAMA MURTI, J

19th September, 2017

Note:-
Issue CC by 04-10-2017
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