

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No.27320 of 2017

Date of Decision: 11.1.2019

Wajida

...Petitioner

Versus

State of Haryana and others

...Respondents

**CORAM: HON'BLE MR.JUSTICE A.B.CHAUDHARI
HON'BLE MR.JUSTICE HARNARESH SINGH GILL**

Present: Mr.Farukh Abduillah, Advocate for the petitioner.

Mr.V.P.Sangwan, Advocate for respondents No.2 to 4.

Mr.Vivek Saini, DAG Haryana.

A.B.Chaudhary, J. (Oral)

Rule heard forthwith with the consent of the counsel of the rival parties.

In an election petition filed by Wajida in the matter of election to the post of member of Zila Parishad Ward No.23, Block Punhana District Mewat, the Election Tribunal rejected the election petition on the ground that the petition was presented by Advocate Habib Ahmed on 6.2.2016 and the petition was not presented by the petitioner in person as required by Section 176 (1) of Haryana Panchayati Raj Act, 1994. The Election Tribunal, therefore, recorded the following reasons in paragraph 6 of the order which read as under:

“In these circumstances, it is clear that the mandatory provisions required under section 176(1) Haryana Panchayati Raj Act, 1994 was not followed by the petitioner. Holding this I rely upon law in Raj Kumar Vs Mukhtyar Singh, Punjab & Haryana High Court and in 2011(3) RCR(Civil) 382

(Punjab and Haryana High Court) wherein it has been held that:-Election of Sarpanch-Election petition-Dismissal on the ground that the petitioner did not appear in person to present the election petition Provision of Section 176 of Act, 1994 pari materia to Section 81 of the Representation of Peoples Act which provides for presentation of petition in person and the same is mandatory in nature-Petition rightly dismissed since the petitioner did not appear in person for presenting the petition as required by provision of section 176 of the Act. Therefore, the present petition is hereby stands rejected.”

Petitioner Wajida filed Civil Appeal No.90 of 2017 before District Judge, Mewat at Nuh and the Appellate Court followed the same reasons as recorded by the trial Court i.e. with reference to the Raj Kumar's decision of this Court and in the case of **Rampal Versus State of Haryana and others** to hold that appearance of the election petitioner in person for filing the election petition was mandatory. The District Judge also held that appeal was not maintainable and therefore, dismissed the same.

At the outset at the hearing of the petition, counsel for the contesting respondents raised an objection that the present petitioner has alternate remedy by approaching this Court under Article 227 of the Constitution of India which is to be entertained by the learned Single Judge and therefore, the present writ petition in its extraordinary writ jurisdiction should not be entertained.

On the contrary, learned counsel for the petitioner relied upon a Supreme Court judgment on the same issue in the case of **Raj Kumar Versus Mukhtyar Singh and others 2017 (1) RCR (Civil) 392** in which this Court's judgment was over-ruled.

The counsel for the petitioner, therefore, contended that since the case of the petitioner is squarely covered by the decision of the Supreme

Court and the law laid down therein, this Court may entertain the present

writ petition.

We have heard learned counsel for the rival parties for quite some time and upon perusal of the record, we find that relying on this Court's decision in the case of **Raj Kumar Versus Mukhtyar Singh, Pb and Hr. High Court 2011(3) RCR (Civil) 382** the Election Tribunal held that presence of the election petitioner in person was mandatory. Since the petitioner did not present the petition in person but presented it through her Advocate without going into the merits of the election petition, the Election Tribunal dismissed the election petition. We, however, find that decision of this Court in the case of **Raj Kumar Versus Mukhtyar Singh** relied upon by the Election Tribunal was over-ruled by the Apex Court in Civil Appeal No.4839 of 2014 decided on 22.4.2014 reported in **2017(1) RCR(Civil) 392**. The Apex Court held as under in paragraph 9 of the judgment. We quote the said paragraph hereunder.

“We find substance in the submissions made by the learned counsel for the appellant. The provision contained in Section 176 of the Haryana Act, 1994 is not followed by a consequential section entailing dismissal of the Election Petition, if it is not presented by the Election Petitioner in person. On the other hand, in both Section 81 of the Representation of People Act and Section 80 of the Punjab Act, non presentation of the Election Petition by the Election petitioner by himself/herself would entail dismissal. Clearly, therefore, the Haryana Legislature had intended to make the provision in Section 176 procedural. Thereby making the defect in non presentation of the Election Petition by the Election Petitioner in person curable. A discretion has been vested in the Court to permit the Election petitioner to cure the defect by appearing before the Court on a later date, if so directed by the Court.”

The dicta of the Apex Court still holds the field and is the law of the land. Hence, the preliminary objection raised by the counsel for the contesting respondents No.2 to 4 will have to be over-ruled since the

extraordinary writ jurisdiction of the High Court can be invoked in a cast iron case like the present one where the issue is squarely covered by the Apex Court judgment on a pure question of law. As a matter of fact, in order to avoid any further delay i.e. to ask the petitioner to approach the learned Single Judge by filing a petition under Article 227 of the Constitution would be protracting the litigation, which is not desirable as the tenure of the body would end by 2021.

The Apex Court in the case of ***Whirlpool Corporation Versus Registrar of Trade Marks, Mumbai 1998 (8) SCC 1*** has held in paras 14 and 15 that existence of alternate remedy is no bar to entertain a writ petition under Article 226 of Constitution. It is a self imposed rule. We, therefore, over-rule the preliminary objection raised by the contesting respondents No.2 to 4. Paras 14 and 15 are reproduced as under:

“The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental rights contained in Part III of the Constitution but also for “any other purpose”.

Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in atleast three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the

constitutional law as they still hold the field.”

Now coming to the merits of the matter, we find that the Apex Court in aforesaid paragraph 9 of the judgment in **Raj Kumar's** case clearly held that election petition cannot be dismissed merely because it is not presented in person and by appearing on a later date, the defect can be cured. The Court has a discretion to permit so. But then the discretion is not whimsical or arbitrary but is judicious.

It is strange that Election Tribunal presided over by Ms.Reetu Yadav, Civil Judge (Jr.Divn.) Ferozpur Jhirka chose to rely upon the decision of this Court which was explicitly over-ruled as stated earlier and that too after three years. Litigants come to the Court with a great hope and trust that the Judges would apply the correct law and do them justice. In our opinion, it was not at all difficult for the Judge to find out whether decision in the case of **Raj Kumar** held the field or was over-ruled. Infact that was a matter of few minutes to find out. The High Court has provided C.D. and computers to the Judges. However, we find that though there was a gap of three years between decision of the High Court and the Apex Court, the learned Judge did not bother to take trouble to apply the extant law. We think this is a serious lapse on the part of learned Judge which must be deprecated. Learned Judge ought to tender an explanation as to why she did not find out the status regarding the said decision of the case.

In the result, we make the following order:

ORDER

- (i) Rule is partly made absolute, CWP No.27320 of 2017 is partly allowed.
- (ii) The impugned judgment and order dated 21.4.2017 of Election Tribunal as well as judgment and order dated 12.10.2017 of District

Judge, Mewat in Civil Appeal No.90 of 2017 both are set aside.

(iii) Election Petition No.20 of 2016 is remitted to the Election Tribunal for fresh hearing and disposal in accordance with law within a period of six months from the date of receipt of certified copy of this judgment.

(iv) Explanation be tendered by Ms.Reetu Yadav before 22nd February, 2019 and thereafter the entire matter be placed before The Registrar General for further action.

Disposed of. No order as to costs.

(A.B.Chaudhari)
Judge

January 11, 2019
Meenu

(Harnaresh Singh Gill)
Judge

Whether speaking / reasoned : Yes/No
Whether reportable : Yes/No