

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 29.08.2022

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

WP(MD)No.17927 of 2022

and

WMP(MD)No.13109 of 2022

Mrs.K.Azhagu

... Petitioner

vs.

- 1.The District Collector/
The Inspector of Panchayats,
The District Election Officer,
Theni District, Theni.
- 2.The Assistant Director of Panchayats,
Theni District, Theni.
- 3.The Block Development Officer/
The Election Officer,
Periyakulam Union, Theni District.
- 4.The Executive Officer,
Thamaraikulam Town Panchayat,
Periyakulam Union, Theni District.

5.Mrs.Devaki @ Aneesh Fathima

... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Mandamus for directing the first respondent to disqualify the fifth respondent from holding the post of ward member of 13th Ward, Thamaraikulam Town Panchayat,

Periyakulam Union, Theni District by taking action for her corrupt practice, on the basis of the petitioner's representation dated 28.05.2022.

For Petitioner : Mr.R.Shankar Ganesh

For R1- to R-4 : Mr.Veerakathiravan,
Additional Advocate General,
Assisted by Mr.M.Sarangan,
Additional Government Pleader.

For R-5 : Mr.K.Gopalan

ORDER

Heard the learned counsel appearing for the writ petitioner and the learned Additional Advocate General assisted by the learned Additional Government Pleader appearing for the respondents R1 to R4 and the learned counsel appearing for the fifth respondent.

2.The writ petitioner is a resident of Tamaraikulam Village. She was a contestant for Ward No.13 of Tamaraikulam Town Panchayat in the recently concluded local body elections. The fifth respondent won the election. The said ward had been reserved for

Scheduled Caste (Woman). The writ petitioner belongs to Hindu Paraiyar Community. The fifth respondent also claimed that she belongs to the very same community and hence entitled to contest in the reserved ward. According to the petitioner, she subsequently came to know that the fifth respondent does not belong to Hindu Paraiyar Community. Hence, this writ petition came to be filed.

3.The learned Additional Advocate General raised a preliminary objection with regard to the maintainability of the writ petition in view of Article 243-O/Article 243-ZG of the Constitution of India. It is true that the aforesaid provisions erect an absolute bar against challenge to any election to a local body except by an election petition. It is equally true that the several decisions of the Hon'ble Supreme Court have held that the appropriate remedy open to the losing candidate is only to file an election petition and instituting a Writ Petition is misconceived [(2020) 12 SCC 186 (*Laxmi Bai v. Collector Nanded & and others*)].

4.Though the said preliminary objection is formidable, the facts starrng at me cannot be lost sight of. The primary question that calls

for consideration is whether the fifth respondent belongs to Hindu Paraiyar Community. The fifth respondent is represented by a counsel. I posed a direct question as to how the fifth respondent is claiming to belong to Hindu Paraiyar Community. Except the Community Certificate issued by the jurisdictional Tahsildar, Theni, there is absolutely no other material. Even this certificate was issued on 29.01.2022. The election notification itself came to be issued a day earlier. In other words, the Community Certificate was obtained after the election process was already set in motion. I called upon the fifth respondent to place before me the materials on which the jurisdictional Tahsildar was persuaded to issue the certificate.

5.The fifth respondent through her counsel frankly informed the Court that she was born to Muslim parents. They are no more. There is absolutely no material to show that they belonged to Scheduled Caste. The fifth respondent was brought up in a Christian orphanage. She fell in love with one Thennarasu and got married to him. The said Thennarasu belongs to Hindu Paraiyar Community. Born to Muslim parents, brought up in a Christian orphanage and marrying a Hindu undoubtedly manifests the pluralist spirit of India. Things would have

been fine if the matters had stopped there. The fifth respondent had thought that she can also claim the community status of her husband. Unfortunately, law does not recognize such a possibility.

6.In fact, no material has been placed to show that the fifth respondent got converted to Hinduism. In these circumstances, I fail to understand as to how the Tahsildar, Theni without even conducting a basic enquiry proceeded to issue a Community Certificate for the asking. The very status of the fifth respondent is under real cloud.

7.The writ petitioner had made a direct allegation that the fifth respondent had played fraud on the electoral process. When such serious allegations have been made, I would expect the fourth respondent to respond with all seriousness and earnestness. Instead, the fourth respondent has filed a counter calling upon the Court to dismiss the petition since the affidavit averments are frivolous, motivated and devoid of truth. I censure the fourth respondent for having filed such an affidavit before this Court. When an allegation has been made that a person who had fraudulently projected herself as belonging to Scheduled Caste Community got elected in a reserved

ward, then the matter calls for probe. Instead of assisting the Court to arrive at the truth, the fourth respondent had filed a reckless counter affidavit before this Court.

8.I am prima facie satisfied that the fifth respondent does not belong to Scheduled Caste. However, she is holding a community certificate to that effect. It is open to the jurisdictional Tahsildar to issue notice to the fifth respondent and recall the same. If the fifth respondent does not do so within a period of four weeks from the date of receipt of copy of this order, the first respondent shall immediately thereafter file a petition before the State Level Scrutiny Committee to go into the genuineness of the community certificate issued in favour of the fifth respondent on 29.01.2022. After due notice to the fifth respondent, the Committee shall take a call in the matter. The Scrutiny Committee shall finalize the matter within a period of eight weeks thereafter.

9.I am conscious that if the ancestors of the parents of the fifth respondent were Scheduled Castes, their conversion to Islam will only eclipse the community status which will revive upon re-conversion to

Hinduism [(2016) 11 SCC 617 (Mohd.Sadique v. Darbara Singh Guru), (1976) 3 SCC 411 (Guntur Medical College v. Y.Mohan Rao), (1984) 2 SCC 91 (Kailash Sonkar v. Maya) and (1984) 2 SCC 112 (S.Anbalagan v. B.Devarajan)]. In this case, in spite of my calling upon the fifth respondent to furnish the basic material based on which the certificate was obtained, nothing has been forthcoming. It is this that makes the allegation made by the petitioner indisputable. The Hon'ble Supreme Court in ***K.Venkatachalam v. A.Swamickan*** (1999) 4 SCC 526 held as follows :

“26.The question that arises for consideration is if in such circumstances High Court cannot exercise its jurisdiction under [Article 226](#) of the constitution declaring that the appellant is not qualified to be member of the Tamil Nadu Legislative Assembly from Lalgudi Assembly Constituency. On the finding recorded by the High Court it is clear that the appellant in his nomination form impersonated a person known as 'Venkatachalam s/o Pethu', taking advantage of the fact that such person bears his first name. Appellant would be even criminally liable as he filed his nomination on affidavit impersonating himself. If in such circumstances he is allowed to continue to sit and vote in the Assembly his action would be fraud to the constitution.

27. In view of the judgment of this Court in the case of [Election Commission of India v. Saka Varikata Rao](#), AIR (1953) SC 210 it may be that action under [Article 192](#) could not be taken as the disqualification which the appellant incurred was prior to his election. Various decisions of this Court, which have been referred to by the appellant that jurisdiction of the High Court under [Article 226](#) is barred challenging the election of a returned candidate and which we have noted above, do not appear to apply to the case of the appellant now before us. [Article 226](#) of the Constitution is couched in widest possible term and unless there is clear bar to jurisdiction of the High Court its powers under [Article 226](#) of the Constitution can be exercised when there is any act which is against any provision of law or violative of constitutional provisions and when recourse cannot be had to the provisions of the Act for the appropriate relief. In circumstances like the present one bar of [Article 329\(b\)](#) will not come into play when case falls under Articles 191 and 193 and whole of the election process is over. Consider the case where the person elected is not a citizen of India. Would the Court allow a foreign citizen to sit and vote in the Legislative Assembly and not exercise jurisdiction under [Article 226](#) of the Constitution?

28. We are, therefore, of the view that the High Court rightly exercised its jurisdiction in entertaining the writ petition under [Article 226](#) of the Constitution and

declared that the appellant was not entitled to sit in tamil Nadu Legislative Assembly with consequent restraint order on him from functioning as a member of the Legislative Assembly...”

I am conscious that this decision was distinguished in ***Kurapati Maria Das v. Dr.Ambedkar Seva Samajan (2009) 7 SCC 387*** and ***Bharati Reddy v. State of Karnataka (2018) 6 SCC 162***. Though Bharati Reddy decision is by a Three Judges Bench, K.Venkatachalam was not overruled. On the other hand, the said decision was referred to in the following terms :

“31.In K. Venkatachalam v. A. Swamickan AIR 1999 SC 1723 : (1999) 4 SCC 526, the challenge was to the election of the Appellant to the Legislative Assembly in Tamil Nadu by way of a writ Under Article 226 of the Constitution filed by the contesting candidate (Respondent therein) for a declaration that the Appellant was not qualified to be a Member of Tamil Nadu Legislative Assembly, since he was not enrolled as an elector in the electoral roll in the concerned constituency for the general elections in question. The Court analysed the factual matrix which pointed out that, admittedly, the incumbent was not an elector of the concerned constituency and that he blatantly and fraudulently impersonated himself as another elector in the

constituency. Accepting that indisputable position, the Court proceeded to conclude that the Appellant was not eligible to contest elections from the concerned constituency, not being a voter in that constituency. It thus held that the Appellant therein lacked the basic qualification under Clause (c) of Article 173 of the Constitution of India read with Section 5 of the 1951 Act, which was quintessential to be elected from the constituency. On such finding, the Court entertained the writ petition Under Article 226 and declared the Appellant to be occupying the public office without legal authority and issued a writ of quo warranto. In other words, the matter was decided on the basis of indisputable and established facts. This judgment will be of no avail to the writ Petitioners in the present case, so long as the Income and Caste Certificate issued to the Appellant is in force.”

There is a biblical saying “Ask, and it shall be given you”. The fifth respondent asked the jurisdictional Tahsildar and the community certificate was given to her. The allegations made by the petitioner have been established before me but I refrain from invalidating the fifth respondent's election because procedure and process will have to be adhered to. The makers of the Constitution provided for reservation in the educational sector, in the field of public employment and also in the electoral arena so that “the soul of a substantial

section of the society, long suppressed, finds utterance”. Ineligible persons cannot be allowed to steal the benefits meant for the reserved categories. The Hon'ble Apex Court in ***Kumari Madhuri Patil v. Additional Commissioner, Tribal Development and ors (1994) 6 SCC 241*** has made scathing observations on such persons. It is quite possible that there are many such instances. I expect the National Commission for Scheduled Castes to look into this issue.

10. With the above direction to the first respondent and request to the NCSC, this Writ Petition is disposed of. There shall be no order as to costs. Consequently, connected miscellaneous petition stands closed.

29.08.2022

Index : Yes / No
Internet : Yes/ No
Nsr/skm

Note : Registry to mark a copy of this order to the Hon'ble Chairman, NCSC and the Secretary, Adi Dravidar Welfare Department, Chennai.

To

- 1.The Hon'ble Chairman,
National Commission For Scheduled Castes,
5th Floor, Lok Nayak Bhawan, Khan Market,
New Delhi-110003.
- 2.The Secretary, State Level Scrutiny Committee,
Adi Dravidar Welfare Department,
Secretariat, Chennai – 9.
- 3.The District Collector/The Inspector of Panchayats,
The District Election Officer,
Theni District, Theni.
- 4.The Assistant Director of Panchayats, Theni District, Theni.
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G.R.SWAMINATHAN, J.

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