

OP(C) NO. 1311 OF 2022

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.S.DIAS

THURSDAY, THE 11TH DAY OF AUGUST 2022 / 20TH
SRAVANA, 1944

OP(C) NO. 1311 OF 2022

AGAINST THE ORDER IN I.A NO.8/2021 IN O.P (ELECTION)2/2021
OF MUNSIF COURT, PERUMBAVOOR

PETITIONER/PETITIONER IN I.A NO.8/2021 IN O.P (ELECTION)
NO.2/2021:

BASIL GEORGE,
AGED 33 YEARS
S/O. GEORGE,
THROBRKUDIL HOUSE, KADUVAL, PERUMBAVOOR,
ERNAKULAM DISTRICT
, PIN - 683542.

BY ADVS.
KAROL MATHEWS SEBASTIAN ALENCHERRY
D.G.VIPIN
DANIEL A.J.

RESPONDENTS/RESPONDENTS IN I.A NO.8/2021 IN O.P(ELECTION)
NO.2/2021:

1 SHAJI SALIM @ SHAJI
S/O.P.M.SALIM,
PALATHINKAL HOUSE, KADUVAL KARA,
PERUMBAVOOR VILLAGE, KUNNATHUNADU TALUK,
PERUMBAVOOR.P.O., ERNAKULAM DISTRICT
PIN - 683542.

2 ABHILASH
S/O.SULAIMAN,
CHALIL HOUSE, KADUVAL KARA,
PERUMBAVOOR VILLAGE, KUNNATHUNADU TALUK,
PERUMBAVOOR.P.O., ERNAKULAM DISTRICT,
PIN - 683542

3 SHABU GOPALAN @ SHABU
S/O.GOPALAN,
VALIYAPURAKKAL HOUSE, KADUVAL KARA,
PERUMBAVOOR VILLAGE, KUNNATHUNADU TALUK,
PERUMBAVOOR.P.O., ERNAKULAM DISTRICT
PIN - 683542.

4 ADV.SAJEEV.P.MENON @ SAJEEV,
S/O.N.PARAMESWARA MENON,
UTHRATTATHI, RAYONPURAM.P.O.,
PERUMBAVOOR VILLAGE, KUNNATHUNADU TALUK,
PERUMBAVOOR.P.O., ERNAKULAM DISTRICT
PIN - 683543.

5 GREENISH KUMAR.P.S.
S/O.SHIVAN,
PERUMKULAM, KANJIRAKKAD KARA,
PERUMBAVOOR VILLAGE, KUNNATHUNADU TALUK,
PERUMBAVOOR.P.O., ERNAKULAM DISTRICT
PIN - 683542.

THIS OP (CIVIL) HAVING COME UP FOR ADMISSION ON
05.08.2022, THE COURT ON 11.08.2022 DELIVERED THE
FOLLOWING:

“C.R”

C.S DIAS,J.

O.P(C) No.1311 of 2022

Dated this the 11th day of August, 2022.

JUDGMENT

Can an elector seek impleadment in an election petition is the question that arises for consideration?

2. The petitioner had exercised his franchise in the election in Ward No.23 of the Perumbavoor Municipality. The 1st respondent, a contesting candidate, has filed O.P. (Election) No.2 of 2021 before the Court of the Munsiff, Perumbavoor, to set aside the election of the returned candidate and to declare him as the returned candidate. The petitioner has learnt through his friend that the 1st respondent has also indulged in corrupt practices, by including voters list who are not permanent residents of the ward and double voting; therefore, he is not entitled to be

declared the returned candidate. Hence, the petitioner filed I.A.No.8 of 2021 to get himself impleaded as the additional 5th respondent in the election petition, as provided under Section 175 of the Kerala Municipality Act, 1994 (for brevity referred to as 'Act'). The 1st respondent has objected to the above application. The court below has, by the impugned Ext.P3 order, dismissed Ext.P2 application, holding that Section 165 of the Act permits only contesting candidates to be made parties in an election petition. As the petitioner is not a contesting candidate, Order I Rule 10 (2) of the Code of Civil Procedure, 1908, has no application. A co-joint reading of Sections 165 and 175 of the Act enables a third party to be impleaded, when any candidate other than the returned candidate seeks to get declared elected. The impugned Ext.P3 order is passed without a proper understanding of the provisions of the Act. Hence the original petition.

3. Heard; Sri.Karol Mathews Sebastian, the learned counsel appearing for the petitioner.

4. The 1st respondent has filed O.P (Election) 2 of 2021 to set aside the election of the returned candidate and declare him as the returned candidate.

5. Chapter X of the Kerala Municipality Act, 1994, deals with disputes regarding elections. The relevant provisions in Chapter X of the Act for deciding the case at hand are Sections 163, 165, 166, 168, 169, 175 and 188, which are extracted below for convenience.

“163. Election petitions. — No election shall be called in question except by an election petition presented in accordance with the provisions of this chapter.

165. Presentation of petitions.— (1) An election petition calling in question any election may be presented on one or more of the grounds specified in section 178 and section 179, to the Munsiff's Court by any candidate at such election or any elector within thirty days from, but not earlier than, the date of election of the returned candidate.

Explanation.— In this sub-section, “elector” means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.

(2) Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition”.

165. Presentation of petitions.— (1) An election petition calling in question any election may be presented on one or more of the grounds specified in section 178 and section 179, to the Munsiff's Court by any candidate at such election or any elector within thirty days from, but not earlier than, the date of election of the returned candidate.

Explanation.— In this sub-section, "elector" means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.

(2) Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition.

166. Parties to the petition.— A petitioner shall join as respondents to his petition,-

(a) where the petitioner, in addition to claiming a declaration that the election of the returned candidate is void, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, the returned candidate; and

(b) any other candidate against whom allegations of any corrupt practice are made in the petition.

168. Relief that may be claimed by the petitioner.— A petitioner may, in addition to claiming a declaration that the election of the returned candidate is void, claim a further declaration that he himself or any other candidate has been duly elected.

169. Trial of election petitions.— (1) The Court shall dismiss an election petition which does not comply with the provisions of section 165 or section 166 or section 191.

Explanation.— An order of the court dismissing an election petition under this subsection shall be deemed to be an order made under clause (a) of section 176.

(2) Where more election petitions than one are presented to the court in respect of the same election, the court may, in its discretion, try them separately or in one or more groups.

(3) Any candidate not already a respondent shall, upon application made by him to the court within fourteen days from the date of commencement of the trial and subject to any order as to security for costs which may be made by the court, be entitled to be joined as a respondent.

Explanation.— For the purposes of this sub-section and section 176 the trial of a petition shall be deemed to commence on the date fixed for the respondents to appear before the court and answer the claim or claims made in the petition.

(4) The court may upon such terms as to cause and otherwise as it may deem fit, allow the particulars of any corrupt practice alleged in the petition to be amended or

amplified in such manner, as may, in its opinion, be necessary for ensuring a fair and effective trial of the petition, but shall not allow any amendment of the petition which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition.

(5) Every election petition shall be tried as expeditiously as possible and endeavour shall be made to conclude the trial within six months from the date on which the election petition is presented to the court for trial.

175. Recrimination when seat claimed. — (1) **Where in an election petition a declaration that any candidate other than the returned candidate has been duly elected is claimed, the returned candidate or any other party may give evidence to prove that the election of such candidate would have been void if he had been the returned candidate and a petition had been presented calling in question his election:**

Provided that the returned candidate or such other party, as aforesaid shall not be entitled to give such evidence unless he has, within fourteen days from the date of commencement of the trial, given notice to the court of his intention to do so and has also given the security and the further security referred to in sections 191 and 192 respectively.

(2) Every notice referred to in sub-section (1) shall be accompanied by the statement and particulars required by section 167 in the case of an election petition and shall be signed and verified in like manner.

188. Abatement or substitution on death of respondent.— Where, before the conclusion of the trial of an election petition, the sole respondent dies or gives notice that he does not intend to oppose the petition or any of the respondents dies or gives such notice and there is no other respondent who is opposing the petition, the court shall cause notice of such event to be published in the office of the court, in the office of the State Election Commission and in the office of the Municipality concerned and thereupon any person who might have been a petitioner may, within fourteen days of such publication, apply to be substituted in place of such respondent to oppose the petition, and shall be entitled to continue the proceedings upon such terms as the court may think fit.

6. On an analysis of the above provisions, the following steps have to be followed for challenging an election, recrimination and substitution of a respondent, i.e.:

(i) An election shall be called in question by presenting an election petition.

(ii) An election petition can be filed by any candidate or an elector within thirty days from the date of election of the returned candidate.

(iii) When a candidate, in addition to claiming the election of the returned candidate to be void, claims a

further declaration that he himself or any other candidate has been duly elected, all the contesting candidates have to be impleaded.

(iv) Trial shall be deemed to commence on the date fixed for the respondent(s) to appear before the court and answer the claim in the petition.

(v) Where a declaration that any candidate other than the returned candidate has been duly elected is claimed, the **returned candidate or any other party may give evidence to prove that the election of such candidate would have been void if he had been the returned candidate and a petition had been presented calling in question his election, provided that the returned candidate or such other party, as aforesaid, shall not be entitled to give such evidence unless he has, within fourteen days from the date of commencement of the trial, given notice to the court of his intention to do so.**

(vi) Before the conclusion of the trial, if the sole respondent dies or gives notice that he does not intend to oppose the petition or any of the respondents dies or gives such notice and there is no other respondent who is opposing the petition, the court shall cause notice of such event to be published in the office of the court

and thereupon any person who might have been a petitioner may, within fourteen days of such publication, apply to be substituted in place of such respondent to oppose the petition, and shall be entitled to continue the proceedings upon such terms as the court may think fit.

7. In the present case, the petitioner has not filed an election petition challenging the election. Whereas, the 1st respondent has in Ext.P1 election petition, after impleading all the contesting candidates, specifically sought to set aside the election of the returned candidate and to declare him as the returned candidate. The trial has commenced, and the returned candidate or the other contesting candidates have not given notice to the court to give evidence to prove that the election of the 1st respondent would be void if he is to be declared the returned candidate. Further, none of the respondents has given notice that they do not propose to oppose the petition, giving rise to a right for substitution.

8. In the above situation, when the returned candidate and the contesting candidates have not exercised their right to give evidence, as provided under Section 175 of the Act, the petitioner — who has not opted to file an election petition as contemplated under Section 165 of the Act — can have little right to file an application to give evidence against the 1st respondent.

9. In **Jyoti Basu v. Debi Ghosal and others** [(1982) 1 SCC 691], the Hon'ble Supreme Court, while deciding a case similar to the one at hand and interpreting substantially analogous provisions of the Representation of the People Act, 1951, held thus:

“ 8. A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a Common Law Right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. An election petition is not an action at Common Law, nor

in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters, as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, Court is put in a straight jacket. Thus the entire election process commencing from the issuance of the notification calling upon a constituency to elect a member or members right up to the final resolution of the dispute, if any, concerning the election is regulated by the Representation of the People Act, 1951, different stages of the process being dealt with by different provisions of the Act. There can be no election to Parliament or the State Legislature except as provided by the Representation of the People Act, 1951 and again, no such election may be questioned except in the manner provided by the Representation of the People Act. **So the Representation of the People Act has been held to be a complete and self-contained code within which must be found any right claimed in relation to an election or an election dispute. We are concerned with an election dispute. The question is who are parties to an election dispute and who may be impleaded as parties to an election petition. We have already referred to the Scheme of the Act.** We have noticed the necessity to rid ourselves of

notions based on Common Law or Equity. We see that we must seek an answer to the question within the four corners of the statute. What does the Act says?

9. Section 81 prescribes who may present an election petition. It may be any candidate at such election; it may be any elector of the constituency, it may be non else. Sec. 82 is headed "Parties to the petition" and clause (a) provides that the petitioner shall join as respondents to the petition the returned candidates if the relief claimed is confined to a declaration that the election of all or any of the returned candidates is void and all the contesting candidates if a further declaration is sought that he himself or any other candidate has been duly elected. Clause (b) of S. 82 requires the petitioner to join as respondent any other candidate against whom allegations of any corrupt practice are made in the petition. Section 86(4) enables any candidate not already a respondent to be joined as a respondent. There is no other provision dealing with the question as to who may be joined as respondents. It is significant that while cl. (b) of S. 82 obliges the petitioner to join as a respondent any candidate against whom allegations of any corrupt practice are made in the petition, it does not oblige the petitioner to join as a respondent any other person against whom allegations of any corrupt practice are made. **It is equally significant that while any candidate not already a respondent may seek and, if he so seeks, is entitled to be joined as a respondent under S 86 (4) any other person cannot, under that provision seek to be joined as a respondent, even if allegations of any corrupt practice are made against him. It is clear that the**

contest of the election petition is designed to be confined to the candidates at the election. All others are excluded. The ring is closed to all except the petitioner and the candidates at the election. If such is the design of the statute, how can the notion of 'proper parties' enter the picture at all? We think that the concept of 'proper parties' is and must remain alien to an election dispute under the Representation of the People Act, 1951. Only those may be joined as respondents to an election petition who are mentioned in S. 82 and S. 86 (4) and no others. However, desirable and expedient it may appear to be, none else shall be joined as respondents.

10. It is said, the Civil Procedure Code applies to the trial of election petitions and so proper parties whose presence may be necessary in order to enable the Court 'effectually and completely to adjudicate upon and settle all questions involved' may be joined as respondents to the petitions. The question is not whether the Civil Procedure Code applies because it undoubtedly does, but only 'as far as may be' and subject to the provisions of the Representation of the People Act, 1951 and the rules made thereunder. Section 87(1) expressly says so. The question is whether the provisions of the Civil Procedure Code can be invoked to permit that which the Representation of the People Act does not. Quite obviously the provisions of the Code cannot be so invoked. In *Mohan Raj v. Surendra Kumar Taparia* (AIR 1969 SC 677), this Court held that the undoubted power of the Court (i.e. the Election Court) to permit an amendment of the petition cannot be used to strike out allegations against a candidate not joined as a respondent so as to save the election

petition from dismissal for non-joinder of necessary parties. It was said:

“The Court can order an amendment and even strike out a party who is not necessary. But where the Act makes a person a necessary party and provides that the petition shall be dismissed if such a party is not joined, the power of amendment or to strike out parties cannot be used at all. The Civil Procedure Code applies subject to the provisions of the Representation of the People Act and any rules made thereunder. When the Act enjoins the penalty of dismissal of the petition for non-joinder of a party the provisions of the Civil Procedure Code cannot be used as a curative means to save the petition”.

Again, in *K. Venkatesara Rao v. Bekkam Naramsimha Reddi*, (1969) 1 SCR 679 : (AIR 1969 SC 872 at p. 877), it was observed:-

“With regard to the addition of parties which is possible in the case of a suit under the provisions of O.1, R. 10 subject to the added party’s right to contend that the suit as against him was barred by limitation when he was impleaded, no addition of parties is possible in the case of an election petition except under the provisions of sub-sec. (4) of S. 86”

11. The matter may be looked at from another angle. The Parliament has expressly provided that an opportunity should be given to a person who is not a candidate to show cause

against being 'named' as one guilty of a corrupt practice. Parliament, however, has not thought fit to expressly provide for his being joined as a party to the election petition either by the election petitioner or at the instance of the very person against whom the allegations of a corrupt practice are made. The right given to the latter is limited to show cause against being 'named' and that right opens up for exercise when, at the end of the trial of the election petition notice is given to him to show cause why he should not be 'named'. The right does not extend to participation at all states and in all matter, a right which he would have if he is joined as a party at the commencement. Conversely the election petitioner cannot by joining as a respondent a person who is not a candidate at the election subject him to a prolonged trial of an election petition with all its intricacies and ramifications. One may well imagine how mischievous minded persons may harass public personages like the Prime Minister of the country, the Chief Minister of a State or a political leader of a national dimension by impleading him as a party to election petitions, all the country over. All that would be necessary is a seemingly plausible allegation, casually or spitefully made, with but a facade of truth. Everyone is familiar with such allegations. To permit such a public personage to be impleaded as a party to an election petition on the basis of a mere allegation, without even prima facie proof, an allegation which may ultimately be found to be unfounded, can cause needless vexation to such personage and prevent him from the effective discharge of his public duties. It would be against the public interest to do so. The ultimate award of costs would be no penance in such cases,

since the public mischief cannot be repaired. That is why Public Policy and legislative wisdom both seem to point an interpretation of the provisions of the Representation of the People Act which does not permit the joining, as parties, of persons other than those mentioned in Sections 82 and 86 (4). It is not as if a person guilty of a corrupt practice can get away with it. Where at the concluding stage of the trial of an election petition, after evidence has been given, the Court finds that there is sufficient material to hold a person guilty of a corrupt practice, the Court may then issue a notice to him to show cause under Section 99 and proceed with further action. In our view the legislative provision contained in Sec. 99 which enables the Court, towards the end of the trial of an election petition, to issue a notice to a person not a party to the proceeding to show cause why he should not be 'named' is sufficient clarification of the legislative intent that such person may not be permitted to be joined as a party to the election petition.

12. There is yet another viewpoint. When in an election petition in addition to the declaration that the election of the returned candidate is void a further declaration is sought that any candidate other than the returned candidate has been duly elected, Sec. 97 enables the returned candidate or any other party to 'recriminate' i.e. to give evidence to prove that the election of such candidate would have been void if he had been a returned candidate and a petition had been presented to question his election. If a person who is not a candidate but against whom allegations of any corrupt practice are made is joined as a party to the petition then, by virtue of his position as

a party, he would also be entitled to 'recriminate' under Sec. 97. Surely such a construction of the statute would throw the doors of an election petition wide open and convert the petition into a 'free for all' fight. A necessary consequence would be an unending, disorderly election dispute with no hope of achieving the goal contemplated by Sec. 86 (6) of the Act that the trial of the election petition should be concluded in six months. It is just as well to remember that 'corrupt practice' as at present defined by Sec. 123 of the Act is not confined to the giving of a bribe but extends to the taking of a bribe too and, therefore, the number of persons who may be alleged to be guilty of a corrupt practice may indeed be very large, with the consequence that all of them may possibly be joined as respondents.

13. In view of the foregoing discussion we are of the opinion that no one may be joined as a party to an election petition otherwise than as provided by Sections 82 and 86 (4) of the Act. It follows that a person who is not a candidate may not be joined as a respondent to the election petition. The appeal is therefore, allowed with costs and the names of the appellants and the seventh respondent in the appeal are directed to be struck out from the array of parties in the election petition. We may mention that in arriving at our conclusion we have also considered the following decisions cited before us: S.B. Adityan v. S. Kandasami, AIR 1958 Mad 171. Dwijendra Lal Sen Gupta v. Harekrishna Konar, AIR 1963 Cal 218, H.R. Gokhale v. Bharucha Noshir C. AIR 1969 Bom 177 and S. Iqbal Singh v. S. Gurdas Singh Badal, AIR 1973 Punj & Har 163 (FB)".

9. On an appreciation of the pleadings and materials on record, the analysis of the provisions of the Municipality Act, the emphatic declaration of law by the Honourable Supreme Court and the findings rendered above, this Court is of the definite view, that the ring is closed for the petitioner, a ranked outsider, to get himself impleaded in O.P (Election) No.2/2021, as his aspiration is beyond the scheme of the Kerala Municipality Act. The challenge against Ext.P3 is meritless, and it fails. Consequently, the original petition is dismissed.

ma/08.08.2022

Sd/-C.S.DIAS, JUDGE

/True copy/

APPENDIX OF OP(C) 1311/2022

PETITIONER EXHIBITS

Exhibit TRUE COPY OF O.P. (ELECTION) NO.2/2021 DATED
P1 15.01.2021 FILED BY THE 1ST RESPONDENT HEREIN
BEFORE THE MUNSIFF COURT, PERUMBAVOOR

Exhibit TRUE COPY OF I.A.NO.8/2021 IN O.P. (ELECTION)
P2 NO.2/2021 DATED 09.12.2021 FILED BY THE PETITIONER
BEFORE THE MUNSIFF COURT, PERUMBAVOOR

Exhibit TRUE COPY OF THE ORDER IN I.A.NO.8/2021 IN O.P.
P3 (ELECTION) NO.2/2021 PASSED BY THE MUNSIFF COURT,
PERUMBAVOOR DATED 11.02.2022