(1990) 02 KL CK 0055

High Court Of Kerala

Case No: O.P. 1410 of 1989

Walter D. Paul		APPELLANT
	Vs	
K.S. Ummer and Others		RESPONDENT

Date of Decision: Feb. 19, 1990

Acts Referred:

- Kerala Panchayat Act, 1960 - Section 24(1)

Citation: (1990) KLJ 693

Hon'ble Judges: V.S. Malimath, C.J; T.L. Viswanatha Iyer, J

Bench: Division Bench

Advocate: K.S. Rajamony, for the Appellant; Gopalakrishnan Nair, P. and M.N. Sukumaran Nair, for Respondents 2 to 8 and S. Subashchand, for Respondent 12, for the Respondent

Judgement

V.S. Malimath, C.J.

This writ petition is presented by Sri Walter D. Paul, who was elected as the President of the Mangalapuram Panchayat, challenging the decision of the Munsiff, Attingal, dated 24th January, 1989 setting aside his election and declaring elected in his place Respondent No. 1, Sri K.S. Ummer, as the President of the said Panchayat. Before we examine the principal legal contentions we shall address ourselves to the relevant facts and the findings.

2. Mangalapuram Panchayat consists of 11 elected members. Elections were held on the 23rd January, 1988. at which the Petitioner, the first Respondent and others were declared elected. On the 8th of February, 1988, election to the office of the President was held. The Petitioner and the first Respondent were the only two candidates. The Block Development Officer, the 2nd Respondent, presided over the meeting and conducted the election. After the election, he counted the votes. He found that there are 9 valid votes out of which six are in favour of the Petitioner and three in favour of the first Respondent. On the ground that the Petitioner has

secured the majority of the valid votes cast, he declared the Petitioner as duly elected as the President. The Petitioner has been functioning as the President of the Panchayat in pursuance of the said election. The first Respondent challenged the election of the Petitioner u/s 24(1)(d) of the Kerala Panchayats Act, 1960 (hereinafter referred to as the Act), read with the relevant rules. The principal contention of the first Respondent in the said election petition was that the six votes counted in favour of the Petitioner are all invalid and were therefore liable to be rejected under Rule 8 of the Kerala Panchayats (Election of President and Vice-President) Rules, 1963. His case is that the six members of the Panchayat having put tick mark against the name of the Petitioner in the ballot papers and not ''x'' mark as required by Rule 7 the said six ballot papers were required to be rejected as invalid votes. As the three members of the Panchayat have put ''x'' mark in the ballot papers against the name of the first Respondent, it was contended, that all those ballot papers were valid. Thus, it is the case of the first Respondent that there were only three valid votes all of which showed that the votes were exercised in favour of the first Respondent. As the first Respondent has thus secured all the valid votes cast in the election, he should have been duly declared elected as President in the election.

3. The stand taken on behalf of the Petitioner before the Munsiff was that the Block Development Officer before conducting the election instructed all the members of the Panchayat in regard to the manner in which they should exercise their votes in respect of the election of the President. He instructed all the members of the Panchayat that they could either affix the tick mark or cross mark in the ballot papers against the name of the candidate in whose favour they desire to exercise their vote. It is following these instructions that the members of the Panchayat exercised their votes, six among them preferring to use the tick mark for indicating their choice of the candidate in whose favour they exercised their votes and the three others using the alternative mark ''x'' to show their preference in favour of the candidate of their choice, namely, the first Respondent. As the six members of the Panchayat affixed tick marks in accordance with the instructions given by the Block Development Officer, who was the Presiding Officer of the meeting, it was contended by the Petitioner before the Munsiff that the ballot papers containing the tick marks are not liable to be rejected as invalid votes. If those six votes are taken into account as valid votes, it was contended that the Petitioner has secured six valid votes in his favour as against three valid votes in favour of the first Respondent, thus justifying the declaration of the Petitioner as having been elected as the President. The learned Munsiff on a consideration of the evidence produced before him came to the conclusion that the Block Development Officer had instructed all the members of the Panchayat to choose either the tick mark or the ''x'' mark for indicating their preference in the ballot papers. The learned Munsiff however came to the conclusion that under the relevant rules it is only the cross mark that is required to be affixed for indicating the preference and that therefore the instruction given by the Block Development Officer is contrary to the rules. He also

held that it is only those ballot papers which bear ''x'' mark that can be regarded as containing valid votes and other ballot papers which contained any other mark are liable to be rejected as invalid votes in accordance with Rule 8 of the Kerala Panchayats (Election of President and Vice-President) Rules, 1963. He therefore held that all the three ballot papers signifying the preference in favour of the first Respondent bearing cross mark are valid, whereas the six ballot papers signifying the preference in favour of the Petitioner, which contained tick marks, are invalid. As there are only three valid ballot papers, all in favour of the first Respondent, the learned Munsiff held that the election of the Petitioner is liable to be set aside and the first Respondent is entitled to be declared as elected as the President of the Panchayat, as the first Respondent has also, in addition to challenging the election of the Petitioner, sought a further declaration that he should be declared as elected. Accordingly, the learned Munsiff granted the prayer of the first Respondent as prayed for and declared the first Respondent as having been duly elected as the President of the Panchayat, after setting aside the election of the Petitioner. It is the said decision that is challenged in this writ petition.

4. Whereas Sri Rajmony, the learned Counsel for the Petitioner, maintains that we should proceed on the basis that the Block Development Officer had issued instructions to all the members of the Panchayat to choose either the tick mark or the cross mark for exercising their votes and following the instructions the members of the Panchayat had exercised their votes, Sri Gopalakrishnan Nair, appearing for the first Respondent, maintains that though there is a finding to that effect recorded by the learned Munsiff, that finding is not in accordance with law and is therefore liable to be set aside. We shall first examine the relevant materials on record to examine the correctness of the findings of the Munsiff in this behalf.

5. In support of the case of the Petitioner in this behalf the Block Development Officer has been examined as C.P.W. 2. He has in categorical terms stated in his evidence that he had instructed all the members of the Panchayat, before the election, that they are free to choose either the tick mark or the ''x'' mark to exercise their preference in the ballot papers. He has stated that the real purpose of putting a mark on the ballot papers is to signify the preference of the candidate. He therefore proceeds to state that it does not matter as to what mark is chosen for signifying one''s preference. He has stated that he thought that there is nothing wrong to instruct the members of the Panchayat that they can choose either put tick mark or cross mark in the ballot papers. Though the Block Development Officer has been cross-examined, we do not find anything worthwhile to shake the testimony of the Block Development Officer in regard to this aspect of the matter is concerned. There is contemporaneous official record maintained by the Block Development Officer wherein the summary of the proceedings has been recorded in Ext. P-2, and the relevant statement in the same reads:

The Chairman informed the members that they should vote by secret ballot and they should vote by putting, either ''x'' mark or ''V'' mark against the name of the candidate for whom he wants to vote. Voting followed.

The Petitioner has also stated about the instructions given by the block Development Officer in this behalf, though the first Respondent does not admit the issuance of such instructions. We have therefore no hesitation in accepting the evidence of the Block Development Officer and Ext. P-2 and holding that the learned Munsiff was justified in coming to the conclusion that the Block Development Officer had instructed all the members of the Panchayat before the election took place that they are free to put either ''tick'' mark or ''cross'' mark against the name of the candidate for whom they want to vote. The finding recorded by the Munsiff in this behalf is not vitiated in any manner and is therefore liable to be affirmed.

6. What we are now required to examine is the consequence of the manner in which the election was conducted and the manner in which the members of the Panchayat exercised their votes. It is not disputed that there are six ballot papers in which tick marks have been put by the members against the name of the Petitioner. If the ballot papers are examined in the light of the instructions given by the Block Development Officer it would follow that six members of the Panchayat have voted in favour of the Petitioner by affixing ''tick'' marks in the ballot papers against his name. So far as the three ballot papers in which ''x'' marks have been put to signify their preference in favour of the first Respondent is concerned, there is no controversy whatsoever.

7. Shri Gopalakrishnan Nair, the learned Counsel for the first Respondent, invited our attention to rules 7 and 3 of the Kerala Panchayats (Election of President and Vice President) Rules, 1963, the relevant portions of which read as follows:

7. Manner of recording votes-Counting and declaration of result.-(1) Every member wishing to vote shall be supplied with voting paper on which the names of all the candidates shall be typed or legibly written in the following form.

Ballot Paper
Name.

1.

2.

3.

4.

(2) Every member wishing to vote shall then proceed to the place set apart for the purpose and place a mark ''x'' on the voting paper against the name of the candidate for whom he wishes to vote. He shall then fold up the voting paper so as to conceal his vole and deposit it in a ballot box placed in the view of the President

of the meeting and so constructed that the paper may be placed therein but not extracted therefrom without the box being opened. The President of the meeting shall then open the box and count the votes in the presence of the members and declare the results of the election in accordance with the following instructions:

(i) If there are only two candidates, the one who secures the large number of valid votes shall be declared to have been elected. In the event of there being an equality of votes, between the two candidates in the case of an election of President, the procedure laid down in Clause (a) of Sub-section (1) of Section 24 of the Act and in the case of an election of the Vice-President, the procedure laid down in Clause (b) of Sub-section (1) of Section 24 of the Act, shall be followed.

(ii) * * * :

(8) Rejection of Votes. Any Voting paper which does not contain the mark ''x'' as specified in Rule 7(2) or which contains the signature or writing of any of the voting members or on which the mark ''x is placed against more than one name, shall be-treated as invalid.

It is thus clear that Rule 7 expressly speaks of the manner in which a voter has to exercise his vote. He can exercise his vote only by placing the mark ''X'' on the voting paper against the name of the candidate for whom he wishes to vote. In other words, the statutory provision restricts the mark to be put by the voter to indicate his preference to ''X'' mark. Rule 8 provides that any voting paper which does not contain the mark ''X'', shall be treated as invalid. It further provides that a voting paper which contains the signature or writing of any of the voting members or on which the mark ''X'' is placed against should be utilised for exercising the vote, Rule 8 further provides more than one name shall be treated as individual. Thus it is clear that not only Rule 7(2) prescribes that ''X'' mark alone should be utilised for exercising the vote, Rule 8 further provides that any voting paper which contains any mark other than ''X'' mark, shall be rejected as invalid. As there is express provision which requires that a voting paper containing any other mark than ''X'' should be rejected as invalid, we have no hesitation to hold that Rule 8 is mandatory and if any mark other than ''X'' mark is used in the ballot paper, the same is liable to be rejected. The learned Munsiff was therefore right in holding that the six ballot papers which contained the use of tick mark to indicate the preference of the voters in favour of the Petitioner are invalid and are liable to be rejected, having regard to the mandatory provision contained in rules 7(2) and 8 of the Kerala Panchayats (Election of President and Vice President) Rules, 1963.

8. The next question for consideration is as to whether the election of the Petitioner as the President of the Panchayat is liable to be set aside and the first Respondent is entitled to be declared as duly elected President, having regard to the various infirmities aforesaid. Whereas Sri Rajamony, the learned Counsel for the Petitioner, contends that neither the Petitioner nor the six members of the Panchayat who

utilised the tick mark should be penalised for no fault of theirs, they having acted in accordance with the instructions of the Presiding Officer, namely, the Block Development Officer. Sri Gopalakrishnan Nair, the learned Counsel appearing for the first Respondent, maintains that if the instructions of the Block Development Officer are contrary to the provisions of the mandatory rules, there is no option left except to reject all the six ballot papers which contain the tick marks and to set aside the election of the Petitioner. He further maintains that as there are only three valid ballot papers cast in favour of the third Respondent, the third Respondent is entitled to be declared as duly elected. Though this would be the consequence that would flow, where transgression of a mandatory provision under Rule 7(2) is clearly established, we are inclined to take the view having regard to the facts and circumstances of this case, that though election of the Petitioner is liable to be set aside, it would not be legal and proper to declare the first Respondent as duly elected in his place. This is a case in which the Block Development Officer, who is the statutory authority to preside over the meeting and to conduct the election, has given clear and unequivocal instructions in regard to the manner in which the voters should exercise their votes. As already held, the Block Development Officer told at the inception of the meeting itself before the election was held fiat the candidates are free to choose either tick marks or cross marks "for signifying their choice on the voting paper. Thus the statutory authority presiding over the election meeting gave clear instructions to all the members of the Panchayat to prefer either tick mark or cross mark to indicate their preference, contrary to the rule which prescribes only the cross mark None of the Members of'' the Panchayat raised any objection at that meeting to the effect that the instructions of the Presiding Officer are contrary to Rule 7(2) of the Kerala Panchayats (Election of President and Vice President) Rules, 1963. The members having proceeded to exercise their votes in accordance with the instruct ions of the Presiding Officer, it would be manifestly unjust to penalise the candidate as well as the voters who have exercised their votes in accordance with the instructions of the Presiding Officer. The Block Development Officer conducted the election in violation of Rule 7(2) which is mandatory in character. It is on account of this illegal instructions that six voters put the tick mark to signify their vote. Those six votes are liable to be rejected in view of the mandate of Rule 8. As six out of the nine votes cast are liable to be rejected because the Presiding Officer issued illegal instructions, we are satisfied that the result of the election is materially affected. The entire election stood vitiated on account of the fundamental mistake committed by the Block Development Officer in the conduct of the election. Therefore none can be regarded as having been duly elected at the said election. As the entire election stands vitiated what is required to be done is to hold a fresh election. The learned Munsiff was therefore not right in declaring the third Respondent as duly elected.

For the reasons stated above, this writ petition is partly allowed. While affirming the decision of the Munsiff netting aside the election of the Petitioner, we quash that portion of ''the judgment by which the first Respondent is declared as having been

elected as President in the place of the Petitioner. We further direct that a fresh election be held for electing the President of the Panchayat within a period of two months from the date of receipt of a copy of this judgment.

Let a copy of this judgment be forwarded to the second Respondent, forthwith, for prompt compliance.