

IN THE H IGH COURT OF JUDICATURE AT MADRAS

DATED: 23.12.2010

CORAM

THE HONOURABLE Mr. JUSTICE T.RAJA

W.P.No.16460 of 2010

M.R.Kannan

... Petitioner

Vs.

1. Tamil Nadu State Election Commission,  
rep. by its Principal Election Officer  
(Panchayats),  
208/2, Jawaharlal Nehru Road,  
Arumbakkam, Chennai - 600 106.

2. The District Election Officer/  
District Collector, Thiruvarur.

3. The Returning Officer  
for Ward No.17 of Thiruvarur District,  
Panchayat/District Revenue Officer,  
Thiruvarur.

4. K.Murugian ... Respondents

PRAYER: Writ Petition filed under Article 226 of Constitution of India praying to issue Writ of declaration declaring that the election conducted to Ward No.17 of Thiruvarur District Panchayat on 22.07.2010 as invalid for violation of the mandatory provisions contained in Rules 62 and 66 of the Tamil Nadu Panchayats (Election) Rules, 1995 and consequently fresh election has to be conducted as per law and pass such further orders.

For Petitioner :Mr.K.Duraisami, SC  
for Mr.Muthumani Duraisami

For Respondents :Mr.I.Paranthaman, AGP for R1 & R3  
Mr.A.Arumugham, Spl.GP for R2  
Mr.S.Ayyathurai for R4

## ORDER

The petitioner has filed the present writ petition under Article 226 of the Constitution of India seeking issuance of writ of declaration declaring that the election conducted to Ward No.17 of Thiruvarur District Panchayat on 22.07.2010 as invalid for violation of the mandatory provisions contained in Rules 62 and 66 of the Tamil Nadu Panchayats (Election) Rules, 1995 and consequently to hold fresh election as per law.

2. Mr.K.Duraisami, learned Senior counsel appearing for the petitioner submitted that the petitioner contested as a candidate for Ward No.17 of Thiruvarur District Panchayat Election, which was held on 22.07.2010 and on completion of the polling, total number of votes polled in all 83 polling stations of Ward No.17 were 29070. Thereafter, the counting of votes were undertaken by the 3rd respondent on 24.07.2010 and after the counting, it was found that the number of votes counted were 28966 and thereupon, it was found that 104 votes were found missing in the counting process. In spite of the written objections were submitted before the declaration of the result for recounting of the ballot papers, as against the Rules 62 and 66 of the Tamil Nadu Panchayat (Elections) Rules, 1995, the 3rd respondent, by his communication dated 24.07.2010, sent a detailed communication to the 2nd respondent admitting that 104 polled ballot papers were missing at the time of counting. However, the 3rd respondent declared the election to the effect that the petitioner obtained 14245 votes and the 4th respondent obtained 14285 votes and as a result, the 4th respondent was declared as elected. Therefore, the petitioner has filed the present writ petition challenging the election held on 22.07.2010.

3. Mr.I.Paranthaman, learned Additional Government Pleader appearing for the respondents 1 and 3 contended that the present writ petition filed by the petitioner challenging the election to Ward No.17 of Thiruvarur District Panchayat held on 22.07.2010 to declare as invalid, cannot be entertained by this Court under Article 226 of the Constitution of India, in view of the absolute and explicit constitutional bar imposed by the Constitution of India under Article 243-O(b). Therefore, he further pleaded that the petitioner has to necessarily approach the District Court as per Section 258 r/w Rule 123(1) of Tamil Nadu Panchayat (Elections) Rules, 1955, as there is no violation of Rules 62 and 66 of the Tamil Nadu Panchayat (Elections) Rules, 1955.

4. Mr.Ayyathurai, learned counsel appearing for the 4th respondent also resorting to Section 258(1) of the Tamil Nadu Panchayat Act, emphatically brought to the notice of this Court, the ratio laid down by the Apex Court in the case of Jaspal Singh Arorar Vs. State of M.P reported in (1998) 9 SCC 594 for a proposition that

the election petition filed under Article 226 of the Constitution of India is not maintainable and therefore, he sought for dismissing the present writ petition as not maintainable.

5. In his further submission, he urged before this Court to dismiss the writ petition as he has got effective and alternative remedy by way of filing the election petition under Section 258(1) of the Tamil Nadu Panchayat(Elections) Act, 1955 before the District Court. Further, it was also contended that immediately after polling was over, Form 20 was prepared by the polling officer in each booth and the same was also sent along with ballot box to the counting centre. Once Form 20 is sent along with ballot box, Form 20 will be the authoritative record of actual votes polled, therefore, there was no missing of any votes, even if the allegation of the petitioner is to be enquired into regarding the number of votes polled were missing and the issue raised in the present writ petition cannot be decided by this Court on the basis of the affidavit and counter affidavit as the same can be decided only by the election petition before the District Court in accordance with the procedure prescribed therein.

6. Heard the learned counsel appearing on either side and perused the materials available on record.

7. Let us see the Constitutional bar imposed by the Constitution of India under Article 243-O(b), which is extracted as under:-  
Article 243-O - Bar to interference by Courts in electoral matters.

Notwithstanding anything in this Constitution ---

(b) no election to any Panchayat shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any Law made by the Legislature of a State.

The Apex Court on considering the bar imposed by Article 243-O(b) as absolute and explicit in the case of Jaspal Singh Arora Vs. State of M.P. (1998 9 SCC 594) has ruled that no election of president can be challenged by filing writ petition under Article 226 of the Constitution of India. A mere cursory look at the non-abstante clause embedded in Article 243-O viz; notwithstanding anything in this constitution, increasingly clear the doubt that inspite of Article 226, no election petition can be entertained by the High Court. Therefore, I am of the view that the constitutional embargo imposed by Article 243-O does not permit the High Court to entertain any election petition under Article 226 of the Constitution of India, hence, I dismiss the writ petition as barred by Article 243-O.

8. When the matter was argued, the learned Senior counsel agreeing to go before the competent authority by filing election petition, as per Section 258 of the Act before the District Judge, further in his own inimical style pleaded that the time limit for filing election petition is only 45 days from the date of declaration



of results and since the petitioner in good faith has filed the writ petition under Article 226 before this Court, he may be given liberty to file an election petition by excluding the period of pendency spent in the present writ proceedings, as otherwise, the election petition would not be entertained in view of delay. In support his submission, he has also relied upon a judgment of the Apex Court in the case of M/s.Consolidated Engineering Enterprises Vs. Principal Secretary (Irrigation Department) and Others reported in 2008 AIR SCW 4182, for a proposition that the period of pendency and time taken diligently pursuing remedy before the wrong forum may be considered as sufficient cause for condoning the delay and therefore, sought for extension of limitation and such limitation cannot be unreasonable in excluding the period of pendency while computing the period of limitation. But the Hon'ble Apex Court in the said judgment has held that the general rule as far as special and Local Acts are concerned is that the specified provisions including Section 5 of the Limitation Act will apply provided the special or local Act provides a period of limitation different from that prescribed under the Limitation Act. There is an additional requirement viz. that the special or local Act does not expressly exclude the application of the Limitation Act. On that basis, it was held that Section 14 (2) of the Limitation Act, 1963, is applicable to proceedings under Section 34(1) of the Arbitration and Conciliation Act. Therefore, the bar of limitation should not affect a person honestly doing his best to get his case tried on merits but failing because the Court is unable to give him such a trial, would not be applicable to an application filed under Section 34 of the Act of 1996. In view of the plea for exclusion of time taken by the writ petitioner, it is relevant to refer Sections 5 and 14 of the Limitation Act.

"5. Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period, if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period."

14. In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instances or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it"

9. The Apex Court, in the case of M/s.Consolidated Engineer Enterprise (supra), upholding the judgment of the Division Bench of Karnataka High Court, made it clear that the appellant had not prosecuted the matter in other courts with due diligence and in good faith and therefore, he is entitled to claim the exclusion of time in

prosecuting the matter in wrong courts. But, in the present case, the facts are all together different. Instead of challenging the election petition under Section 258 of the Act before the District Court, he has wrongly come to this Court by filing writ petition under Article 226 of the Constitution of India. When the Constitution of India specifically imposes absolute and explicit bar under Article 243-O(b) making the position all time clear with non-abstante clause that notwithstanding anything in this Constitution, no election to any Panchayat shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any Law made by the Legislature of a State, the command is unambiguous that the bar is absolute and therefore, in view of the ratio laid down by the Apex Court in the case of Jaspal Singh Arora (supra), this Court cannot exclude the period of pendency of the writ petition to file an election petition, which will otherwise amount to circumventing the explicit bar imposed under Article 243-O and also Section 258(1) and Rule 123(1) of the Tamil Nadu Panchayat (Elections) Act and Rules, 1955 respectively. Further, in this case, when legislature have given 45 days from the date of publication of the result of the election for filing election petition, this is the period prescribed to file an election petition. Further, in view of the authoritative pronouncement of the Apex Court referred hereinabove, I hold that the High Court has no power to condone the delay in filing the election petition, after the expiry of forty five days by excluding the period of pendency of writ petition filed by the petitioner.

10. In the case of M/s.Consolidate Engineering Enterprises (supra), the appellant instead of filing an application to set aside the award before the Principal District Judge, Bangalore Rural District, Bangalore, he filed the said application before the Civil Judge (Senior Division), Ramanagaram, Bangalore Rural District. Both are Civil Courts and there was no constitutional bar for filing writ petition. But, in the present case, he has come to the Writ Court under Article 226 of the Constitution of India by filing this writ petition, which has been explicitly barred by Article 243-O(b) which commands, notwithstanding anything in this Constitution, no election to any Panchayat shall be called in question except by an election petition presented before the competent authority constituted under the Act enacted by State. Therefore, the argument advanced by the learned Senior counsel appearing for the petitioner that there was a bonafide mistake in choosing the High Court under Article 226 for filing election petition, cannot be an acceptable argument and accordingly, the judgments cited by the learned Senior counsel for the petitioner is distinguishable both on facts and law.

11. It is relevant to refer to Section 258(1) and Rule 123(1) of the Tamil Nadu Panchayat (Elections) Act and Rules, 1995, respectively, which are extracted as under:-

Section 258(1) : No election of a president or a chairman or a member shall be called in question except by an election petition presented to the district judge of the district in which the panchayat is situated, within [forty five days] from the date of the publication of the result of the election under this Act.

123.(1) An election petition shall be presented within 45 days from the date of publication of the result of the election under the Act.

Explanation:- If the Court of the District Judge is closed on the last day, the petition may be presented on the next following day on which the said Court is open.

12. After a cursory reading of the above provisions, if we apply the ratio laid down by the Apex Court held in the case of Commissioner of Customs and Central Excise Vs. Hongo India Private Limited and Another reported in (2009) 5 SCC 791, which says that in the absence of any clause permitting the condonation of delay by showing sufficient cause after the prescribed period, there is complete exclusion of Section 5 of the Limitation Act, I am of the view that there is no power to condone the delay after the expiry of the prescribed period of 45 days from the date of publication of the result of the election under the Act. When it is well settled by the Apex Court in the above mentioned case that it is the duty of the Court to respect the legislative intent and by giving liberal interpretation, limitation cannot be extended by invoking the provisions of Section 5 of the Limitation Act, I am justified in holding that there is no power for condoning the delay in filing election petition after the expiry of the time limit given under Section 258 r/w Rule 123(1) of the Tamil Nadu Panchayat (Election) Act and Rules, 1955. The Tamil Nadu Panchayat (Elections) Act, 1955, is a complete code by itself, which alone should govern the matters provided for by the Act. Further, the Tamil Nadu Panchayat Act, being a special Act, no provision therein does exclude the provisions of Sections 4 to 24 of the Limitation Act by any express reference. Therefore, when there is no express reference to exclude the provisions of the Limitation Act, the period of pendency of writ petition before the wrong court or any other delay cannot be excluded. In other words, in the absence of any clause in the Panchayat Act permitting the condonation of delay, I hold that there is a complete exclusion of Section 5 of the Limitation Act.



13. In the light of the above discussion, the present writ petition stands dismissed. No Costs. Consequently, connected M.P.No.1 of 2010 is closed.

Sd/  
Asst.Registrar

/true copy/

Sub Asst.Registrar

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To

1. The Principal Election Officer (Panchayats),  
Tamil Nadu State Election Commission,  
208/2, Jawaharlal Nehru Road,  
Arumbakkam, Chennai - 600 106.
2. The District Election Officer/  
District Collector, Thiruvarur.
3. The Returning Officer  
for Ward No.17 of Thiruvarur District,  
Panchayat/District Revenue Officer,  
Thiruvarur.

- 1 cc To Mr.S.Ayyathurai, Advocate, SR.91574  
1 cc To M/s.Muthumani Doraisami, Advocate, SR.91697  
1 cc To M/s.I.Paranthaman, Advocate, SR.92245  
1 cc To The Government Pleader, SR.92326

Order in  
W.P.No.16460/2010

KSK (CO)  
RH (6.1.11)

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