

IN THE COURT OF THE MUNSIFF, VARKALA

PRESENT: Sri. ARAVIND. P., MUNSIFF

TUESDAY 15th OCTOBER, 2024

I.A. 3/ 2022 IN O.P (ele) 1/2021

PETITIONER:-

Jaseera. S, W/o Alsahar, aged 39 years, residing at
Roshani Villa, Navaikulam P.O., Kudavoor Village.

By Adv. Sri. Chirayinkeezhu A. Babu.

RESPONDENTS:-

1. Shajeena, D/o Abdul Salam, aged 48 years, residing at
Elanthoor Melathil Veedu, Navaikulam P.O., Navaikulam
Village, Pin-695603.
2. Ammini, W/o Raju, aged 42 years, residing at Charuvila
Puthen Veedu, Nainamkonam, Navaikulam P.O.,
Navaikulam Village, Pin-695603.
3. Shylaja, W/o Pradeep, aged 57 years, residing at Ambika
Vilasom, Navaikulam P.o, Navaikulam Village, Pin-695603.
4. Sumayya Ramzan, D/o Suby, aged 29 years, residing at
Sumayya Manzil, Maruthikunnu P.o, Navaikulam Village,
Pin-695603.

By Adv.Sri. S. Ramesan for R 1.

R2 to R4- Exparte.

This OP(ELECTION) Petition having been finally heard on **15-10-2024** and the court on the same day, delivered the following

ORDER

This is a petition filed by the petitioner u/s 87 of the Panchayath Raj Act, 1994 and Section 151 of the C.P.C for counting the tender vote .

2. **Brief averments in the affidavit are as follows:-** Petitioner herein is the original petitioner in O.P.(Ele.) 1/2021. The first respondent is declared as the returned candidate in the local self government election conducted for 5th ward of Navaikulam panchayath. Against the said declaration and for declaring the petitioner as the returned candidate, the original petition is filed. Originally, Mrs. Anju. J.G has casted vote as tendered vote because another person has already casted voted in her serial number.

3. On 16.12.2020, when the counting of the votes were completed petitioner and the first respondent secured 420 votes each. One voter has casted her vote as tendered vote. The polling agent of the petitioner has requested to count that tender vote also. But the returning officer was not ready to count the tender vote. If the tendered vote were counted, the petitioner would have won in the election. So, the present petition is filed for counting the tendered vote and declare the petitioner as the returned candidate.

4. The first respondent has not filed any recrimination/counterclaim to the original petition. Without recrimination, the court can't count the votes of the first respondent or remove any vote. So the only option is to count the tendered vote.

5. As per Ext.A8-voters list serial No. 849 was one Mrs. Anju. J. G. But her vote was casted by another person who has signed as Shahina. The same is proved through Ext.X4 and X4(a) documents and the depositions of PW5-presiding officer, PW4- Anju. J.G, PW6- Shahina and PW1- Jaseera. Moreover, the said Mrs. Shahina's serial number was 863. As per Ext.X4 voters list, she mistakenly casted her vote in serial No. 849. The first respondent could have claimed for verification of prior vote casted by the voter through recrimination. But without recrimination, it is not possible to count that vote. As per the judgment of the Hon'ble Supreme Court, it is specifically stated also. Petitioner has got right to count the tendered vote also. If the tender vote is counted, it will affect the election result itself. Moreover, that will seriously affect the declaration of the returned candidate. It is already proved that initial vote was casted by another person and tendered vote is casted by the real voter. So tendered vote is also to be counted. Hence the petition.

6. **Respondents 2 to 4 were served with notice but they have not entered appearance. So they were called absent and set-exparte.**

7. **The first respondent entered appearance and filed objection contending as follows:-** The petition is not maintainable either in law or on facts. The averments contained in the affidavit filed in support of the petition are false and legally unsustainable. The crucial question to be decided in the case is whether the tendered vote is openable or countable as the concerned voter has once casted the vote through the voting machine. It is further submitted that a tendered vote can be considered only when the actual vote cast by the alleged voter is found out and deleted or nullified by the court. Such a process is not done in this case. If the tendered vote is also opened or counted, it will tantamount to doubling of a particular vote, which is impermissible in law. It is further submitted that the main relief sought for in the original petition is the counting of the tendered vote. The main relief in a suit or petition can't be considered or allowed through an interlocutory application.

8. The case of the petitioner is that another person has casted the vote of the tendered voter by mistake on the part of the election officials. But the alleged person herself has appeared before the court as a witness of the petitioner and deposed that she has not participated in the election process. So it is revealed that the vote was cast by the tendered voter herself.

In such case the tendered vote is not at all considerable or openable. So objection of the first respondent concluded with a prayer to dismiss the petition.

9. Based on the rival contentions, the following points arise for consideration:

1. Is the petitioner entitled to get an order to count the tendered vote casted by PW4?
2. Relief and costs?

10. The court heard the learned counsel for the petitioner, learned counsel for the first respondent and perused the records.

11. **Point No.1:-** The learned counsel for the petitioner submitted that the petitioner has contested in the Local Self Government Election conducted in the year 2020 on 08.12.2020. Ext.A7 is the first voters list published by the State Election Commission on 11.08.2020. Ext. A8 is the final voters list published by the State Election Commission on 25.11.2020. As per Ext.A7, serial number of PW4 is 835 and PW6 is 849. But as per Ext. A8- final voters list serial number of PW4 has become 849 and serial number of PW6 has become 863.

12. On the election date, PW6 has reached the polling station and casted her vote in serial no.849. When PW4 has reached the polling station for

casting her vote in serial No. 849 as per Ext. A8, it is informed that her vote was already casted. So PW4 has requested for permit her to cast tendered vote. Then the presiding officer has verified her identity by removing her mask and comparing the same with her election identity card the presiding officer put necessary questions to ensure her identity. After getting satisfaction with her identity and other aspects, the presiding officer had permitted PW4-Smt. Anju. J.G to cast tendered vote. Thereafter the election proceedings were completed.

13. When the vote was counted both petitioner and first respondent scored 420 votes each. Then the election agent of the petitioner submitted an application for counting tendered vote also. But the same was rejected as per Ext. A5-order. As per which, the application of the agent of the petitioner was rejected and the first respondent got declared as the returned candidate by conducting draw. So the learned counsel further submitted that the original petition is filed to declare the election of the first respondent as null and void and also for declaring the petitioner as the returned candidate. So the present petition is filed for counting the tendered vote in the presence of the court.

14. The learned counsel for the first respondent submitted that Ext.X4 is the voters register. Ext. X4(a) would go to show that PW4- Smt. Anju. J.G has already casted her vote. When she came for casting her vote again, it was

objected. So she casted the vote again as tendered vote. So there is no need to count the tendered vote. So the learned counsel concluded her argument with a prayer to dismiss the petition.

15. The learned counsel for the petitioner submitted that as per Section 102 (d)(iii) of the Kerala Panchayath Raj Act, 1994, this court has got jurisdiction to declare an election to be void on the ground that the election of a returned candidate has been materially affected by the improper acceptance, refusal or rejection of any vote or the reception of any vote which is void. Here, improper refusal or rejection of the tendered vote casted by PW4 is materially affected the election of the returned candidate. So if tendered vote is counted, the petitioner will become the returned candidate in the election. So the petitioner has filed this petition for counting the tendered vote and on the basis of which the petitioner is to be declared as the returned candidate. The learned counsel for the petitioner relied on the decision in **Wilfred D'Souza Vs Francis Menino Jesus Ferrao** reported in **AIR 1977 SC 286**. Paragraph 14 and 15 of the said decision are extracted below for easy reference:

“Learned counsel for the parties are, however, agreed that such tendered ballot papers, even though excluded from consideration at the time of counting of votes after the poll, can be taken into account in proceedings to challenge the validity of the election of the returned candidate provided certain conditions are fulfilled. We agree with the learned counsel for the parties in this respect, and find that this position of law is supported by two English decisions, *Borough of St. Andrews*(1) and *The Stepney Division of the Borough of Tower Hamlets*(2) as also by two Indian

decisions, *Kalicharan Singh v. Ramcharitar Rai Yadava & Ors* (3) and *A.K. Subbarava Gounder v.G. Palanisami Gounder & Ors.*(4) Before, however, a tendered ballot paper can be taken into account during the proceedings of election petition, evidence would have to be led on the following two points:

(1) The person who cast the initial vote as a voter on a particular serial number in the electoral roll was someone other than the genuine voter mentioned at that number.

(1)4 *Omelly & Hardcastle* 32, (2) *Omelly & Hardcastle* 34.

(3) 5 E.L.R, 98. (4) 11 E.L.R. 251. (2) It was such genuine voter who marked the tendered ballot paper.

So far as the first point is concerned, the evidence of the genuine voter that he had not cast such initial vote would normally and in the absence of any circumstance casting doubt regarding its veracity be sufficient. Once the above two points are proved, the following consequences would follow:

(a) The court would exclude the vote initially cast by the person other than the genuine voter from the number of votes of the candidate in whose favour it was cast; and

(b) The court would further take into account the tendered ballot paper in favour of the candidate in whose favour it is duly marked.

It may also be mentioned that the proper occasion for scrutinising tendered ballot papers would normally arise only when the difference between the number of votes polled by the candidate declared elected and his nearest rival is so small that there is a possibility of that difference being wiped out and the result of election being thus materially affected if the court takes into account the tendered ballot papers and excludes from consideration the corresponding votes which were cast by persons other than the genuine voters.”

The learned counsel for the petitioner submitted that in the light of the dictum laid in the above mentioned decision the tendered vote can be counted. So the learned counsel prayed for allowing the petition.

16. The learned counsel for the first respondent vehemently objected and argued that the tendered vote casted by PW 4 can't be counted because PW 4

has already casted her vote through voting machine. When that voter has reached the polling station for casting her vote for the second time, then it was found that her vote was already casted. So as per her request, she was allowed to cast tendered vote. PW 4's original vote was entered in the voting machine. That was already counted. If the tendered vote is counted by this court, then that will amounts to doubling of votes. That can't be permitted.

17. Moreover, there is a procedural formality for counting the tendered vote. Before counting, the court should be able to delete or eliminate the original vote which was already casted. Here there are no methods available to delete or eliminate that vote. So it is not possible to count the tendered vote. Otherwise all votes need to be counted again. If the VV Pat system were used for the local self government election 2020, then it was easy to identify and eliminate the original vote casted by PW 4. Here in the local self government election, 2020 no VV Pat system was used. So in that way also there is no possibility to delete and eliminate that vote.

18. Moreover, the learned counsel argued on the basis of Section 56(1) of the Conduct of Election Rules, 1961. The relevant portion is extracted below for easy reference:

“56. [Counting of votes] – (1)The ballot papers taken out of each ballot box shall be arranged in convenient bundles and scrutinized.]

(2) The returning officer shall reject a ballot paper-

(a) if it bears any mark or writing by which the elector can be identified, or

[(b) if it bears no mark at all or, to indicate the vote, it bears a mark elsewhere than on or near the symbol of one of the candidates on the face of the ballot paper or, it bears a mark made otherwise than with the instrument supplied for the purpose, or]

(c) if votes are given on it in favour of more than one candidates, or

(d) if the mark indicating the vote thereon is placed in such manner as to make it doubtful to which candidate the vote has been given, or

(e) if it is a spurious ballot paper, or

(f) if it is so damaged or mutilated that its identity as a genuine ballot paper cannot be established, or

(g) if it bears a serial number, or is of a design, different from the serial numbers, or, as the case may be, design, of the ballot papers authorised for use at the particular polling station, or

(h) if it does not bear [both the mark and the signature] [Substituted by S.O. 4542, dated 20.12.1968 (w.e.f. 1.1.1969).] which it should have borne under the provisions of sub-rule (1) of rule 38:

Provided that where the returning officer is satisfied that any such defect as is mentioned in clause (g) or clause (h) has been caused by any mistake or failure on the part of a presiding officer or polling officer, the ballot paper shall not be rejected merely on the ground of such defect:

Provided further that a ballot paper shall not be rejected merely on the ground that the mark indicating the vote is indistinct or made more than once, if the intention that the vote shall be for a particular candidate clearly appears from the way the paper is marked.

(3) Before rejecting any ballot paper under sub-rule (2), the returning officer shall allow each counting agent present a reasonable opportunity to inspect the ballot paper but shall not allow him to handle it or any other ballot paper.

(4) The returning officer shall endorse on every ballot paper which he rejects the word "Rejected" and the grounds of rejection in abbreviated form either in his own hand or by means of a rubber stamp and shall initial such endorsement.]

(5) All ballot papers rejected under this rule shall be bundled together.

(6) Every ballot paper which is not rejected under this rule shall be counted as one valid vote:

Provided that no cover containing tendered ballot papers shall be opened and no such paper shall be counted."

19. The learned counsel for the first respondent further submitted that the tendered vote can't be counted. If it is counted, it will affect the secrecy of the whole election procedure. Secrecy is the basic element of the whole election process. If the tendered vote is opened then it will affect the secrecy of the whole election procedure. So the learned counsel for the first respondent concluded his argument with a prayer to dismiss the petition.

20. At the same time, the learned counsel for the petitioner vehemently objected the replied that even as per Section 48 of Kerala Panchayath Raj (Conduct of Election) Rules, 1995 the tendered ballot papers can't be opened while counting votes. So that can't be considered as a ground to not to open the tendered vote through the process of this court. Moreover, the learned counsel further submitted that without recrimination, the first respondent can't claim for counting of the whole votes. The learned counsel relied on a decision in **Ahammed Kabeer Vs Azeez** reported in **AIR 2003 SC 2271**. The relevant portion is extracted below for easy reference:

“5. An election petition was filed by the appellant laying challenge to the election of the respondent No. 1 on very many grounds. The appellant in his election petition submitted, inter alia, that there were three voters who had voted twice, that there were nine voters who were actually dead, thirty voters were actually aborad and twenty seven voters were actually out of station; and hence these forty voters were not available for voting on the date of polling and yet ballots in their names were cast by impersonators; that five voters who reached the polling station were told that impersonators had already cast ballots in their names and therefore they were permitted to cast tender ballots; that forty eight voters could not cast their ballot as the copy of the voter list supplied at booth No. 185 was defective and the relevant pages on which the names of these voters appeared were missing; that six voters entitled to exercise their franchise through postal ballots could not do so as some impersonators had exercised franchise in their place; that there were postal ballots attested by incompetent officers and hence invalid and so on. There were other illegalities committed during polling and also at counting, alleged the election petition.

6. The relief sought for by the appellant was the setting aside of the election of the respondent No. 1 as also declaring the appellant as elected.

7. The respondent No. 1 filed his written statement and also delivered a recrimination notice as contemplated by proviso to Section 97(1) of the Act. Briefly stated the pleas raised by way of recrimination by the respondent No. 1 are: that there were four persons who had voted twice in favour of the appellant and therefore the votes were liable to be excluded from the votes counted in favour of the appellant; that five persons were dead and not available for casting the ballots yet impersonators cast ballots in the names of the dead persons in favour of the appellant; that seven persons whose names were deleted from the voters list were also permitted to vote by the Presiding Officer, which ballots were cast in favour of the petitioner. The recrimination petition was filed within the prescribed period of limitation, in the prescribed manner, and was accompanied by the security deposit as required by Section 117 of the Act”.

21. Here, the learned counsel for the petitioner further submitted that PW6 has rightly casted her vote through voting machine. But there occurred a mistake with regard to the serial number. Smt. Anju. J.G has casted her vote through ballot paper as tendered vote. She has not casted her vote through voting machine. So there is no bar to count tendered vote. Moreover, if it is opened that will not affect the election process. So the learned counsel concluded his argument with a prayer to count the tendered vote.

22. This court considered the contentions in detail. Here the case of the petitioner is that PW6 has casted her vote through voting machine with serial no.849. When PW 4 has reached to cast her vote it is found that her vote was

already casted. So she requested for permitting her to cast her vote as tendered vote. After completing the procedural formalities, the presiding officer has permitted her to cast tendered vote. Here the peculiar question is with regard to counting of tendered vote. The decision in **Wilfred D'Souza Vs Francis Menino Jesus Ferrao** would go to show that if the initial vote was casted by someone other than the genuine voter in a particular serial number and that the genuine voter has casted tendered vote then court can exclude the initial vote casted by the person other than genuine voter and take into account and consider the tendered vote casted by the genuine voter. Here, PW 6 has casted her genuine vote in serial No. 849. That means PW 6 has casted the vote initially and PW 4 has casted her genuine vote as tendered vote.

23. It is important to note that PW 6 has deposed that she has not casted her vote in the election and she was at her residence for looking after her age old mother. This court has compared the signature put by PW6 in Ext. X4(a), deposition sheet and in the summons ass s.73 of the Indian Evidence Act, 1872. Same signature is seen in all the records. So this court is not inclined to accept the deposition of PW6 as such since records are against her.

24. Apart from that, booth agents of each candidates were there in the polling station. If the PW4- Anju. J.G attempted to cast vote for the second

time, definitely that would have objected by them. A criminal case would have registered also. Here, no such arguments are put forwarded. So the argument that PW 4 has casted her vote initially through voting machine need to be rejected only.

25. Here, there is no need to delete or eliminate the first vote casted by the person other than the genuine voter why because PW6 has casted her genuine vote in the election and she was the genuine voter as per serial No. 863 as per Ext. A8-final voters list dated 25.11.2020. So this court is of the view that this court can consider the tendered vote casted by PW 4. As pointed out earlier, there is no question of deleting votes arises in the particular case at hand as the facts are quite strange than the facts in the reported decisions. This court is inclined to rely the decision in **Joshi. C.P. Vs Kalyan Singh Chouhan and Another** reported in **AIR 2010 Rajasthan High Court 48**. The relevant portion is extracted below for easy reference:

“Therefore, in view of the Rules as framed as well as in view of the fact that there is no rule specifically providing how and when a tendered vote can be considered and in view of the decisions referred above, it is clear that the tendered vote may constitute a cause of action for filing the election petition, where alone on proving certain facts, the tendered ballot paper can be taken into account. The petitioner, in the present petition, therefore, has not pleaded in para nos.13 to 18 unnecessarily nor the pleading is scandalous, frivolous or vexatious, the pleadings in para nos.13 to 18 cannot prejudice or embarrass or delay the fair trial of the suit nor is otherwise an abuse of process of the court. Rather say, the pleadings in para nos.13 to 18 are statements in concise form, that is of material facts and further more, is necessary pleadings for the relief claimed by the petitioner.

The learned counsel for the respondent also submitted that the petitioner has not pleaded that genuine voter had not cast vote on earlier occasion, therefore, the petitioner cannot lead evidence that the vote cast on earlier occasion was not cast by genuine voter. The learned counsel for the respondent relied upon the judgment delivered in the case of Raimal vs. Lakha (1967 RLW 103), wherein it has been observed that it is only when a person has already cast a vote representing him to be a particular elector and another person appears and claims that he is the real elector, that a tendered ballot paper is handed over to him when the Returning Officer is satisfied that he is the real voter. Raimal's case (supra) was in relation to the challenge to an election of member of Gram Panchayat, where also there was no provision in the Panchayath Act or in the Rules, expressly authorising the Tribunal to count a tendered vote on being satisfied that the ballot paper which was put in the ballot box was marked by imposter in the name of the elector who subsequently cast the tendered vote . Following the earlier judgment of this Court delivered in the case of Roop Narain vs. The Munsif Behror and others (SB Civil Writ Petition No.125 of 1966 decided on 5.5.1966), it has been held that on general principles that the Tribunal should count a tendered vote on being satisfied that the ballot paper which was put in the ballot box was marked by an imposter in the name of the elector who subsequently cast the tendered vote. In Raimal's case(supra), it has been held that the tendered vote cannot obviously counted unless it is proved that the first vote in the name of the elector was cast by an imposter. The High Court was conscious of the fact that there may be possibility that the elector may cast vote twice; one as first voter then as second voter by casting tendered vote. Then this Court allowed the petition of the petitioner and allowed the petitioner to summon the elector who cast tendered ballot paper so that the Tribunal may record its finding that whether another person cast the vote for the genuine elector. The above judgment do not help the respondent in any manner inasmuch as that view which has been taken by this Court in Raimal's case, is the same view as has been taken in the case referred above in Wilfred D'Souza's case. The tendered vote if accepted and the difference between the margin of votes of the petitioner and the winning candidate is higher, then that can be a ground to challenge the election of the respondent and for that purpose it was necessary for the petitioner to plead that on which polling stations for which of the voters, votes alleged to have been cast by other persons and the tendered ballot papers were issued by the Returning Officer and tendered votes have been cast and those tendered votes are required to be counted by excluding the earlier

cast votes. The petitioner was not supposed to even plead that who cast the earlier votes because there is prima facie satisfaction of the election officer about the genuineness of the voters seeking tender vote to whom he issued the tender ballot paper and that person has cast tendered vote. The petitioner was not supposed to know nor he could have known to whom the first vote was cast and to whom tendered vote was cast. The tendered vote is required to be counted on proving required facts and as held in Wilfred D'Souza's case (supra), **counting of tendered vote is not the re-counting of votes but is counting of genuine vote which is a right of a candidate."**

26. Counting of tendered vote is not re-counting of votes but it is only counting of a genuine vote which is the right of a candidate. But for counting tendered vote necessary facts are pointed out. Here as pointed out earlier, the petitioner has successfully established that tendered vote is to be counted. Moreover, if the tendered vote is counted that will not amount doubling of votes since PW 4 and PW 6 casted only their genuine votes. Hence point no. is found in favour of the petitioner and found against respondent no.1.

27. **Point No.2:-** Considering the facts and circumstances of the petition, both parties can be directed to suffer their respective costs. Hence this point is found accordingly.

In the result, petition is allowed and the tendered vote will be counted in the open court at 3:00 pm, today. No order as to costs.

(Dictated to the Confidential Assistant, transcribed and typed by her, corrected and pronounced by me in Open Court, this the 15th day of October, 2024)

**ARAVIND.P,
MUNSIFF**

APPENDIX:- Nil

MUNSIFF

