

**IN THE GAUHATI HIGH COURT**  
**(THE HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)**

**ITANAGAR BENCH**

**WP(C) 276 (AP) 2016**

Shri Khoda Lelu,  
Son of Shri Khoda Tapuk, resident of Taigi Village,  
PO Yachuli, PS Ziro, District Lower Subansiri District,  
Arunachal Pradesh.

.....Petitioner.

By Advocates:

Mr. P. Taffo  
Mr. T. Lamgu  
Mr. J. Singhi

**-Versus-**

1. Shri Dora Duri, Son of Dora Tapuk, resident of Taigi Village, PO Yachuli, PS Ziro, District Lower Subansiri District, Arunachal Pradesh.
2. The State Election Commission, represented by Secretary, State Election Commission, Itanagar.
3. The District Election Officer, Ziro, Lower Subansiri District, Arunachal Pradesh.
4. The Returning Officer, 2-Yachuli Zilla Parishad Constituency, Yachuli, Lower Subansiri District, Arunachal Pradesh.

.....Respondents

By Advocates:

Mr. T. T. Tara, AAG  
Ms. L. Hage  
Mr. A. Apang, Sr. Advocate,

MS. N. Anju  
Mr. G. Tarak  
Mr. S. Tada  
Mr. L. Asha  
Mr. M. Babla  
Mr. L. John  
Mr. D. Panging

**::BEFORE::**

**THE HON'BLE JUSTICE DR (Mrs.) INDIRA SHAH**

Date of hearing : 20.06.2016  
Date of Judgment & Order : 10.08.2016

**JUDGMENT & ORDER (CAV)**

Heard Mr. P. Taffo, learned counsel appearing for the petitioner and Mr. T. T. Tara, learned Addl. Advocate General assisted by Ms. L. Hage, learned Govt. Advocate appearing on behalf of the State. Also heard Mr. Ajin Apang, learned Sr. Counsel assisted by Ms. N. Anju, learned counsel and Mr. D. Panging, learned counsel appearing on behalf of respondent No. 1.

**2].** The judgment and order dated 26/05/2016 passed by the Presiding Judge of the Panchayat Raj Election Tribunal in Case No. PRET-03/2013 is under challenged under Article 226 & 227 of the Constitution of India.

**3].** The facts leading to filing of application under Section 122 (3) of Arunachal Panchayat Raj Act read with Rule 69 of Arunachal Panchayat Raj (Conduct of Election Rules), 2001 are that the petitioner and the respondent No. 1 both contested for ASM from 24<sup>th</sup>-Tajgi Anchal Samiti Segment in Lower Subansiri District in the year 2013. The election/voting were held on 16/05/2013 and counting was completed on 21/05/2013. Thereafter, it was declared that the petitioner secured 206 votes in ballot box and 8 votes through postal ballot. The respondent No. 1 secured 206 votes in ballot box and 1 vote through postal ballot. Thus, the petitioner won by margin of 1 vote.

**4].** The respondent No. 1 approached this Court by filing writ petition No. 201 (AP) 2013 challenging the election of the petitioner as no Panchayat Election Tribunal was till then constituted. After establishment of Election Panchayat Tribunal in Arunachal Pradesh, the writ petition was transferred to the Tribunal for hearing and disposal.

**5].** The respondent No. 1 in her petition before the Tribunal alleged that some persons have casted their postal ballot on behalf of Tania Kord & Tania Haring at 24<sup>th</sup>-Tajgi Anchal Samiti Segment, though, the aforesaid persons were engaged in Election duty in Kurung Kumey District and they had already casted postal ballot in the 34<sup>th</sup> Keming Anchal Segment. The said Tania Kord & Tania Haring also lodged a complaint before the District Election Officer, Ziro and Returning Officer, Yachuli on 22/05/2013 against Khoda Bida & Tanya Taku. The contention of the respondent No. 1 was that the petitioner won the election by margin of 1 vote only and had there been no impersonation, the petitioner would have been elected as ASM. It was also contended that, though, the petitioner submitted representation to the Returning Officer/District Election Officer and State Election Commission for re-counting of votes and exclusion of two impersonated vote, no action thereon was taken. The Election Officer and the Returning Officer filed their joint written statement and contested the case. The petitioner also filed separate written statement denying the allegation made by the respondent. On the basis of the pleadings, learned Presiding Judge, framed the following issues:-

- (i) Whether the election petition is maintainable in law and facts.
- (ii) Whether the result of the returned candidate has been materially affected on account of counting Postal Ballot Vote of Mr. Tania Kord and Tania Haring.
- (iii) Whether the elector Mr. Tania Kord and Tania Haring casted their vote by Postal Ballot or their votes were casted by impersonation.
- (iv) To what relief is petitioner entitled to, if any.

**6]** The respondents adduced evidence of 3 witnesses including himself and 2 witnesses were examined on behalf of the petitioner. While, deciding the issue No. 1, learned Presiding Judge, observed that the election petition particularly in Para-3,4,5,6,7 & 9 disclose that there is a cause of action for the petition and accordingly, decided the issue No. 1 in affirmative and in favour of respondent.

While deciding the issue No. 2, it was observed that the allegation of forgery and impersonation of the two votes, namely, Tania Kord & Tania Haring has not been specifically denied. After analyzing the evidence adduced by the parties, it was held that Tania Kord & Tania Haring did not cast their votes by Postal Ballot for 24<sup>th</sup>-Tajgi Anchal Samiti Segment Constituency. The aforesaid Tania Kord & Tania Haring who were examined as P.W. 2 & P.W. 3 were not cross-examined on material particulars. The learned Tribunal taking note of the investigation of Police case observed that it is prima-facie established that the Postal Ballots of Tania Kord & Tania Haring were casted by some other persons. The learned Tribunal held that the Postal vote alleged to be casted by Tania Kord & Tania Haring were counted at the time of counting and after these 2 votes are excluded from counting, in that event, there would remain 7 postal votes out of which the election petitioner got 1 and the remaining 6 would go to the returned candidate. The decision in issue No. 3 was that the Postal vote of Tania Kord & Tania Haring were casted in 24<sup>th</sup>-Tajgi Anchal Samiti Segment by impersonation. Thus, the respondent secured 207 votes including 1 Postal Ballot whereas the petitioner secured 206 votes including Postal Vote, therefore, the respondent No. 1 having secured more votes than the petitioner, the result of election declaring the petitioner elected was set aside and the respondent No. 1 was declared as elected member of 24<sup>th</sup>-Tajgi Anchal Samiti Segment.

**7].** It is submitted by the learned counsel for the petitioner that in the entire election petition filed by respondent No. 1 there was no material pleading to show that the postal ballot have been materially affected the election result of the petitioner. There was neither pleadings nor evidence that 2 disputed Postal Ballot alleged to be casted by impersonation went in favour of the petitioner. The learned counsel for the respondent No. 1, per contra, submitted that the respondent in the election petition specifically alleged that the appointment order for election duty of Tania Kord & Tania Haring was forged and by impersonating, someone else casted the Postal Ballot against those 2 persons in connivance with the returned candidate and one Officer of Deputy Commissioner. The Returning Officer, Yachuli allowed through Khoda Bida & Tania Kaku to caste EGC Vote of Tania Kord & Tania Haring, with knowledge that they are different persons, at the instance and pressure of Political leaders. There is specific pleading that Tania Haring & Tania Kaku lodged a complaint against Khoda Bida and Tania Tapuk in respect of casting of their vote

through Postal Ballot forging appointment order and impersonation. There is averment in the pleadings of the respondent that in spite of complaint against impersonate voting of Postal Ballot lodged to the Returning Officer and District Election Officer, no steps was taken against those persons.

**8].** It is urged by the learned counsel for the petitioner that in an Election Petition, the provisions of Code of Civil Procedure applies and therefore, an Election Petition must contain concise statement of material facts. The learned counsel for the petitioner has relied on the cases of *M. Chinnasamy-vs-K.C. Palanisamy and Others, (2004) 6 SCC 341, Hari Shanker Jain-vs-Sonia Gandhi, (2001) 8 SCC 233, Samant N. Balkrishna-vs- George Fernandez, AIR 1969 (SC) 1201.*

**9].** In the cited cases, provision of Representation of Peoples Act were discussed and it was held that the Election petition must contain and concise statement of the materially facts on which the petitioner relies and further that he must also set forth full particular of any corrupt practice that the petitioner alleges including as full a statement as possible of the names of the parties alleged to have been committed such corrupt practice etc. The difference between material facts and particulars was observed in the case of *Samant N. Balakrishna* and it was held that word 'material' shows that the facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad.

**10].** In the case of *Azhar Hussain-vs-Rajiv Gandhi (1986) Supp SCC 315*, it was held in Para-14:-

**"14.** Before we deal with these grounds seriatim, we consider it appropriate to restate the settled position of law as it emerges from the numerous decisions of this Court which have been cited before us in regard to the question as to what exactly is the content of the expression "material facts and particulars", which the election petitioner shall incorporate in his petition by virtue of Section 83(1) of the Act.

(1) What are material facts and particulars? Material facts are facts which if established would give the petitioner the relief asked

for the test required to be answered is whether the Court could have given a direct verdict in favour of the petition petitioner in case the returned candidate had not appeared to oppose the election petition on the basis of the facts pleaded in the petition.

(2) In regard to the alleged corrupt practice pertaining to the assistance obtained from a government servant, the following facts are essential to clothe the petition with a cause of action which will call for an answer from the returned candidate and must therefore be pleaded:

- (a) mode of assistance;
- (b) measure of assistance; and
- (c) all various forms of facts pertaining to the assistance.

(3) In the context of an allegation as regards procuring, obtaining, abetting or attempting to obtain or procure the assistance of government servants in election it is absolutely essential obtained or procured;

- (a) kind or form of assistance obtained or procured;
- (b) in what manner the assistance was obtained or procured or attempted to be obtained or procured by the election candidate for promoting the prospects of his election.

(4) the returned candidate must be told as to what assistance he was supposed to have sought, the type of assistance, the manner of assistance, the time of assistance, the persons from whom the actual and specific assistance was procured.

(5) there must also be a statement in the election petition describing the manner in which the prospects of the election was furthered and the way in which the assistance was rendered.

(6) the election petitioner must state with exactness the time of assistance, the manner of assistance, the persons from whom

assistance was obtained or procured, the time and date of the same, all these will have to be set out in the particulars”.

**11].** Mr. D. Panging, learned counsel for the respondent No. 1 has submitted that even if a plea is not specifically made and if it is covered by an issue, by implication and the parties knew that the said plea was expressly taken in the pleading would not necessarily disentitle a party from relying upon it, if it is satisfactorily proved by evidence. He has relied on the case of *Bhagwati Prasad-vs-Chandramaul AIR (1966) SC 735*, wherein, in Para-10, it was observed as under :-

**“10.** But in considering the application of this doctrine to the facts of the present case, it is necessary to bear in mind the other principle that consideration of form cannot over-ride the legitimate considerations of substance. If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence., the general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is: did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another.

**12].** Similar view was taken in the case of *M. Venkataramana Hebbar-vs-M. Rajagopal Hebbar (2007) 6 SCC 401*. In the case of *Ram Sarup Gupta-vs- Bishun Narain Inter College (supra)*, it was observed as under:-

“6. The question which falls for consideration is whether the respondents in their written statement have raised the necessary pleading that the license was irrevocable as contemplated by Section 60 (b) of the Act and, if so, is there any evidence on record to support that plea. It is well settled that in the absence of pleading, evidence, if any produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should state the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction; no pedantic approach should be adopted to defeat justice on hair splitting technicalities. Sometimes, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law, win such a case it is the duty of the Court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of the pleadings, instead the Court must find out whether in substance the parties knew the case and the issue upon which they went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence, in that event it would be open to a party to raise the question of absence of pleadings in appeal. In *Bhagwati Prasad Vs. Shri Chandramaul, (1966) 2 SCR 286: (AIR 1966 SC 735)* a Constitution Bench of this Court considering this question observed.

“If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily

proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another. The corollary of the judgment in Ram Sarup Gupta (supra) are that it is the duty of the Court to find out the issues upon which parties went to trial and also as to whether in subsistence the party knew the case. In spite of deficiency in the pleading, the pleading should receive a liberal construction and no pedantic approach should be adopted to defeat justice on hair splitting technicalities”.

**13]** On perusal of the pleading of the respondent, herein, it appears that the respondent specifically pleaded in his petition that vote of Smti. Khoda Yaya daughter of Sri Kholda Tajak in serial No. 167 of 24<sup>th</sup> Tajgi Anchal Constituency was casted by some other person. It was also pleaded that Sri Tania Kord and Sri Tania Haring of keming Anchal Constituency under 3-Gangte Tarak-Lendi Zila Constituency had casted their vote “in postal ballot at 24<sup>th</sup> Tajgi Anchal Samiti Constituency under Lower Subansiri District”. Accordingly, objection was raised not to count the votes of Tany Kord and Tania Haring because they were engaged in the Election Duty as first Polling Officer and second Polling Officer at 89<sup>th</sup> Pakpu-Jiri and 122<sup>nd</sup> Wabia under Kurung Kumey District, Arunachal Pradesh. It was specifically pleaded that the Returning Officer, Yachuli allowed the respondent Nos. 5 & 6 (in election petition) to cast EDC votes of Tania Kord and Sri Tania Haring, with knowledge that they are different persons. Thus, the election petition contains the material facts on which the petitioner relies, it also put forth the allegation of bogus practices etc.

**14]** The learned Tribunal has observed that the election petitioner secured 206 votes in ballot box and one vote through Postal Ballot whereas the respondent No. 4, the returned candidate secured 200 votes in ballot box and 8 votes through Postal Ballot. Thus, the returned candidate won by margin of one vote. The postal votes casted by Tania Kord and Tania Haring were counted and if these 2 votes are excluded from counting in that event there would remain 7 postal votes out of which the election petitioner got one and the remaining 6 would go to the returned candidate. Thus, the total number vote in favour of returned candidate would be  $200+6=206$  and so far the election petitioner is concerned it would be  $206+1=207$ . The learned Tribunal, however, failed to decide whether both the excluded vote of casted by Tania Kord and Tania Haring were in the favour of the petitioner or in favour of the returned candidate. So how the 2 votes were decided to excluded from only 8 votes casted through the Postal Ballot. Admittedly, the election petitioner (respondent, herein) also secured one Postal Ballot and if the Postal Ballot secured by the petitioner is to be excluded, it cannot be said that the election petitioner (respondent) has secured 207 votes. There is no evidence that 2 impersonated votes were casted in favour of the present petitioner and therefore, the judgment passed by the learned Tribunal is liable to be set aside and quashed. This writ petition is accordingly allowed to the extent that the respondent No. 1 cannot be declared as winner. In the circumstances, the respondents will be at liberty to take steps for holding fresh election of Member of Anchal Samity from 24<sup>th</sup> Tajgi in Lower Subansiri District in accordance with prevailing Rules and procedures.

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**JUDGE**