

Court No. - 8

Case :- MATTERS UNDER ARTICLE 227 No. - 581 of 2024

Petitioner :- Shiv Kumar

Respondent :- Hanuman Sharan And Another

Counsel for Petitioner :- Rajeiu Kumar Tripathi

Counsel for Respondent :- Bal Krishna Shukla, Atul Kumar Dubey, Alok Kumar Mishra

Hon'ble Jaspreet Singh, J.

1. Heard Shri Rajeiu Kumar Tripathi, learned counsel for the petitioner and Alok Kumar Mishra learned counsel appearing for the private respondent no.1.
2. Since the pleadings have already been exchanged, accordingly with the consent of the learned counsel for the parties, the petition is being disposed of at the admission stage itself.
3. The petitioner is the returned candidate having been declared successful on the post of Pradhan of village Paidi, Development Block and Tehsil Payagpur, District Bahraich, in Panchayat Elections held in the year 2021. The private respondent no.1 being an unsuccessful candidate assailed the election of the petitioner by filing an election petition before the Prescribed Authority which was registered as Case No.2880 of 2021. The petitioner contested the said election petition and after framing of issues, the party lead evidence and at the end stage of the trial before the Prescribed Authority the private respondent no.1 filed an application alongwith which the alleged photocopy of the nomination paper of the petitioner alongwith its enclosures were filed before the Prescribed Authority. The petitioner

contested the said application by stating that the photocopy filed by the respondent no.1 was forged and fabricated, hence the original may be summoned from the office of the Returning Officer. In the meantime, the election petition filed by the private respondent no.1 was dismissed on merits by means of order dated 02.02.2023 passed by the Prescribed Authority.

4. The private respondent no.1 being aggrieved against the said order preferred a revision before the District Judge, Bahraich. During the pendency of the revision, it was again pressed by the private respondent no.1 that the nomination paper of the petitioner was not complete; inasmuch as it suffered from concealment of the criminal antecedent. Since the petitioner had concealed his criminal antecedents, hence his nomination paper was defective, consequently the election petition was liable to be allowed on this score alone.

5. Since the petitioner had already contested and stated that the private respondent no.1 had not indicated the source from where he procured the photocopy of the alleged nomination paper said to be of the petitioner, hence the original may be summoned from the office of the Returning Officer. Considering the aforesaid, the Revisional Court by means of its order dated 06.10.2023 directed that the original nomination paper alongwith its enclosures to be summoned.

6. In furtherance of the said order, the Assistant Returning Officer sent a set of photocopy stating that they were the nomination paper

alongwith the enclosures relating to the petitioner. At this stage, it was again pointed out to the Revisional Court by the petitioner that since the Court had required the original to be placed and the Assistant Returning Officer had sent only the photocopy, hence it was not complete compliance of the order dated 06.10.2023. The revisional Court once again directed the Assistant Returning Officer to furnish the original nomination paper of the petitioner alongwith its enclosures.

7. Yet again the Assistant Returning Officer submitted the very same set of documents but alongwith a covering letter dated 16.11.2023 stating that the originals were not traceable and were mislaid, hence the said photocopies were certified by the Assistant Returning Officer after comparing it with the one available on the website of the election commission and sent it to the Court.

8. In the meantime, the petitioner got lucky and he also got a photocopy of his nomination paper alongwith all enclosures which had been retained by one of the proposers of the petitioner, namely, Tirath Ram Tiwari. Having received the said documents, the petitioner made an application for taking additional evidence on record before the Revisional Court and the said application was allowed on 02.12.2023. While allowing the said application, the Revisional Court also noticed that the genuineness and the admissibility of the said documents would taken into

consideration at the time of final hearing/judgment.

9. Once the said order dated 02.12.2023 was passed taking the said documents on record as additional evidence, the petitioner filed another application stating that the said documents which are the true photocopies of the original nomination papers alongwith the enclosures, hence in order to prove the same, leave be granted to lead secondary evidence and the witness, namely, Tirath Ram Tiwari be examined to explain the custody of the documents, the loss of the original and the relevancy of the said documents.

10. Against the said application seeking leave of the court to examine Tirath Ram Tiwari, the private respondent no.1 filed objections. The Revisional Court by means of order dated 29.01.2024 rejected the said application and fixed the matter for final hearing. The petitioner being aggrieved has assailed the said order dated 29.01.2024 by filing the instant petition.

11. Shri Rajeiu Kumar Tripathi, learned counsel for the petitioner has attacked the said order primarily on two grounds. It is urged that at the fag end of the trial, it was the private respondent no.1 who had filed certain manipulated documents alleging it to be the photocopies of the nomination paper of the petitioner alongwith its enclosures. Since they were not the correct copies, hence the petitioner had sought indulgence of the Court for summoning the originals which the revisional court had permitted by means of order dated 06.10.2023.

12. It is further urged that once the Assistant Returning Officer had submitted the photocopies certifying it by himself and also in the same breath admitting that the originals were mislaid and not traceable then in such circumstances the said documents filed from the office of the Assistant Returning Officer cannot be treated as authentic documents. It is further urged that in this way there were two sets of documents: **(i)** photocopies filed by the private respondent no.1; **(ii)** photocopies filed by the petitioner alongwith his application for taking the said documents as additional evidence and needless to say the Revisional Court by means of its order dated 02.12.2023 had allowed the said documents to be taken on record.

13. It is urged that once the said documents had been taken on record and the court also was of the opinion that the said documents were necessary to adjudicate the controversy completely and effectually between the parties and forming the said satisfaction, the Revisional Court had taken the documents on record subject to an endorsement that the genuineness and admissibility will be seen at the time of hearing.

14. It is further submitted that at the relevant stage once the documents had been taken on record at the first given opportunity, the petitioner had moved the application seeking indulgence of the court to examine Tirath Ram Tiwari as a witness to prove the documents furnished as secondary evidence.

15. It is further submitted that in light of the aforesaid, it was incorrect on the part of the Revisional Court to have rejected the application as it would run contrary to the settled legal principles and it also made the earlier order passed by the Revisional Court dated 02.12.2023 redundant. In the aforesaid circumstances, it is urged that the impugned order deserves to be set aside and permission be granted to the petitioner to prove the additional documents filed as secondary evidence.

16. Shri Alok Kumar Mishra, learned counsel appearing for the private respondent no.1 has submitted that the impugned order does not suffer from any error; inasmuch as the Revisional Court does not have the power and jurisdiction to reappraise the evidence. The Revisional Court also does not have the power to take the additional evidence, consequently the order rejecting the prayer of the petitioner to examine Tirath Ram Tiwari as a witness, cannot be said to be erroneous.

17. Shri Mishra has further submitted that before the Prescribed Authority the petitioner had filed his objections against the documents filed by the answering private respondent no.1 relating to the alleged nomination of the petitioner and in his objections dated 30.06.2022, the petitioner in paragraph-7 had clearly stated that he had informed about all the cases which were pending against the petitioner but on account of inadvertence, the counsel for the petitioner did not disclose the same in the nomination form and its enclosures. It is, thus,

submitted that this in itself was sufficient material available on record to clinch the issue regarding nomination papers being incomplete and that it suffered from material concealment and thus there was no further requirement to get anything proved and the order dismissing the election petition on merits was *per se* bad.

18. It is also urged by Shri Mishra that the entire endeavour of the petitioner is to delay the proceedings and keeping the same in mind frivolous applications have been moved before the Revisional Authority and once they were rejected, the petitioner has approached this Court. In the aforesaid circumstances, it is submitted that the petition deserves to be dismissed and some expedite order be passed so that the proceedings can reach its logical conclusion within such day and time to be fixed by the Court.

19. The Court has heard the learned counsel for the parties and also perused the material on record.

20. Certain facts which are not in dispute between the parties are being noted hereinafter: **(i)** The petitioner was the successful returned candidate having defeated the private respondent no.1 by 107 votes, it is in the aforesaid backdrop that the private respondent no.1 had filed the election petition; **(ii)** before the Prescribed Authority at the fag end of the trial, the private respondent no.1 alongwith a document list dated 29.06.2022 filed photocopy of the alleged nomination paper and affidavit pertaining to the petitioner bearing paper No.123. This was contested by the petitioner stating that the said documents were forged

and fabricated and being photocopies were inadmissible.; **(iii)** on 02.02.2023, the election petition came to be dismissed by the Prescribed Authority on merits against which the private respondent no.1 filed a revision before the Revisional Authority and the same controversy was raked and the petitioner requested that the photocopies filed by the private respondent no.1 were manipulated hence, the originals be summoned to test the veracity and authenticity of the said documents from the office of the Assistant Returning Officer; **(iv)** on 06.10.2023, the Revisional Court called for the original nomination papers alongwith its enclosures from the Assistant Returning Officer. However, the same were not filed rather on 16.11.2023, the photocopies of the documents alongwith a covering letter dated 16.11.2023 was furnished whereby it was informed that the originals have been mislaid and the photocopies are being certified and submitted before the Court verifying its from the web portal of the election commission; **(v)** The petitioner moved an application for taking additional evidence on record which was allowed on 02.12.2023 with the endorsement that the genuineness and admissibility would be seen at the time of final hearing/judgment; **(vi)** In the aforesaid backdrop an application was moved by the petitioner for proving the documents filed by the petitioner as secondary evidence by examining Tirath Ram Tiwari.

21. In light of the aforesaid undisputed fact, the issue before the Court is whether the impugned order by which permission to prove

the documents furnished by the petitioner through secondary evidence is just and appropriate or it requires interference.

22. In the controversy at hand, it would reveal that one set of photocopies of the documents alleging it to be the nomination papers of the petitioner alongwith its enclosures are on record, as certified by the office of the Assistant Returning Officer. In respect of these documents, the letter dated 16.11.2023 clearly states that the originals were mislaid, accordingly the photocopies have been certified by comparing it with the documents available on the web portal of the election commission.

23. In this regard, it will be relevant to notice that the petitioner in paragraph no.3 of the rejoinder-affidavit had brought on record the documents relating to the petitioner as down loaded from the web portal of the election commission and it is stated that the down loaded copy is completely illegible and therefore the same cannot partake the nature of an authentic documents. Admittedly, the original nomination papers are not available in the office of the Assistant Returning Officer.

24. One set of photocopies of the documents have been filed by the private respondent no.1 which have been stated by the private respondent no.1 to be the true photocopy of the nomination paper of the petitioner but nonetheless in this backdrop, the Revisional Court had already passed an order dated 06.10.2023 summoning the originals and the said order is not under challenge.

25. The petitioner also filed another set of nomination paper alongwith an application for taking the same on record as additional evidence indicating that his proposer had retained a complete set of the nomination papers and the same be taken on record which vide order dated 02.12.2023 has already been taken on record.

26. Once the said document has been taken on record and the order dated 02.12.2023 was never assailed by either of the parties, accordingly the said documents becomes part of the record of the Revisional Court. It is at this stage that the petitioner had moved the application to prove the said documents as secondary evidence for which he wanted to examine Tirath Ram Tiwari. Once the document has been taken on record subject to its admissibility and its genuineness and for which the petitioner had moved an application to prove it then in all fairness such an opportunity ought to have been granted to the petitioner rather than rejecting it for the reason that in case if the Court was not in favour of the said documents it ought not to have taken the same on record in the first place but once it was part of the record and at the first given opportunity the petitioner had made an application to prove it, this opportunity could not be denied. Moreover, the private respondent no.1 in any case would have a right to cross-examine and raise any other objections as may be available to him in law, thus the issue of prejudice to the respondent no.1 stands factored.

27. By taking the documents on record and refusing permission to a

party to prove it, this in itself would give rise to inconsistency which cannot be reconciled. The documents were taken on record with the endorsement made by the Court that it shall be subject to admissibility and genuineness and then in order to prove it the permission to the party filing it cannot be refused. It would have been a different situation where the Court would have refused to take the said documents on record but in the instant case the fact situation is different and the documents were allowed to be taken on record. Accordingly, this Court finds that the reasoning given by the Revisional Court for refusing the permission is not sustainable.

28. The reference made by the Revisional Court to the certified photocopies brought on record through the office of the Assistant Returning Officer will not lead to any credence since admittedly the originals are not available in the office of the Assistant Returning Officer and the documents which as per the Assistant Returning Officer was verified from the documents on the web portal of the election commission and if they are compared to annexure R.A.3 and noting the with a specific contention of the petitioner that the documents available on the website of the election commission is illegible. In such circumstances, it would have been expedient for the Revisional Court to have permitted the parties to lead limited evidence in respect of that documents alone, as it was an important document which would have a substantial impact on the respective case of the parties.

29. As far as the submission of the learned counsel for the private respondent no.1 that the Revisional Court does not have the jurisdiction to take additional documents on record, apparently is misconceived for the reason that the order passed by the Revisional Authority dated 02.12.2023 was never challenged and now it cannot be said that the Revisional Authority did not have the jurisdiction to take the said documents on record. Moreover, the power of the Revisional Court to take additional evidence stands presumed and in this regard the Division Bench of this Court in ***Virendra Sing Kushwaha Vs. VII Additional District Judge, Agar and others (1996) 2 AWC 1232*** will be relevant to be noticed so also the decision of the Apex Court in ***The Swastik Oil Mills Ltd. Vs. H. B. Munshi, Deputy Commissioner of Sales Tax, Bombay (1968) 21 STC 383***.

30. In so far as the other submissions advanced by the counsel for the private respondent no.1 that there was no requirement to examine any witness since in the objections filed by the petitioner himself, a copy of which has been brought on record as annexure C.A.2 filed alongwith the short counter-affidavit of the private respondent no.1 that in paragraph-7, the petitioner admitted that he had informed the entire details as well as the criminal antecedents to his lawyer who inadvertently did not mention it in the election form, this contention can be taken note of by the Revisional Authority while dealing with the matter on its merit.

31. Needless to say that any observations made by this Court in this

regard would prejudicially affect the case of either of the parties whereas the said issue is not before this Court, hence leaving it open for the parties to raise the said objection which will be considered by the court below, hence, the Court is refraining to give any finding in respect thereto.

32. Since the issue before the Court is limited as to whether the permission to prove the documents filed as secondary evidence is to be granted and for the reasons given herein above, the Court has found that the refusal to grant leave to lead evidence was not appropriate, hence the writ petition succeeds. The impugned order dated 29.01.2024 is set aside. The petitioner shall be entitled to lead evidence only in respect of the documents which already have been taken on record by means of order dated 02.12.2023 passed by the Revisional Authority.

33. For the aforesaid purpose, it will be open for the Revisional Authority to either take the evidence itself or may remit the matter only for recording of evidence before the Prescribed Authority and after getting the evidence on record the revision itself shall be decided expeditiously.

34. It is made clear that none of the party will be entitled to any undue and unnecessary adjournments and the evidence shall be recorded as per law preferably within a period of four weeks and once the same is done, the revision itself shall be heard and decided within a further period of six weeks thereafter.

35. With the aforesaid directions, the petition is allowed. The impugned order dated 29.01.2024 is set aside. Costs are made easy.

Order Date :- February 28, 2024
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