

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.2437 of 2013

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1. Md. Javed Son of Md. Sahabuddin Resident of Village and P.O. Mahpatia, P.S. Bheja, District- Madhubani

.... Petitioner/s

Versus

1. The State Election Commission (Panchayat) through the State Election Commissioner, Sone Bhawan, Birchand Patel Path, Patna
2. The State Election Commissioner, the State Election Commission (Panchayat), Sone Bhawan, Birchand Patel Path, Patna
3. The Secretary, the State Election Commission (Panchayat), Sone Bhawan, Birchand Patel Path, Patna
4. Raja Ram Yadav Son of Not Known to the Petitioner Resident of Village- Mehssa, P.O. Mahpatia, P.S. Bheja, District- Madhubani

.... Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. S. B. K. Mangalam, Adv.
For the Respondent-S.E.C	:	Mr. Amit Shrivastava, Adv.
		Mr. Girish Pandey, Adv.
For the private respondent	:	Mr. Bindhyachal Singh, Adv.
		Mr. Yeshraj Bardhan, Adv.

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN
C.A.V. JUDGMENT
Date: 07-01-2015

The petitioner has prayed for the following reliefs:

“RELIEFS

- (I) For issuance of an appropriate writ in the nature of **CERTIORARI** for quashing the order dated 23.01.2013 passed by the Respondent No. 2 in Case No. 26 of 2011 and communicated to the petitioner under memo No. 220 dated 24.01.2013, the Respondent No. 2 has been pleased to disqualify the petitioner to hold the post of Mukhiya of Gram Panchayat Raj, Mahpatia under Madhupur Block of Madhubani District on the ground that when the petitioner had filed his nomination to contest the said election, he was only aged about 17 years and thus disqualified to contest the Panchayat Election in view of the provisions contained in proviso to Section -156(1)(b) of the Bihar Panchayat Raj Act, 2006.
- (II) For a declaration that for determination of age of a returned candidate, the Respondent No. 2 cannot import

the provisions of the Juvenile Justice (Care & Protection) Act and the judgment rendered by the Hon'ble Supreme Court in a case under the said Act and he cannot rely upon the educational certificates only ignoring all other evidences produced by the returned candidate.

- (III) For issuance of any other appropriate writ/writs, order/orders, direction/directions for which the writ petitioner would be found entitled under the facts and circumstances of the case.”

Facts of the case are in a very narrow compass. The petitioner contested the Panchayat Election held in the year 2011 for electing Mukhiya for the Gram Panchayat Raj Mahpatia in the District of Madhubani and was declared elected. Respondent No.4 questioned his election by filing an election petition before the Munsif, Jhanjharpur on 24.6.2011 inter alia on grounds that the petitioner was disqualified for contesting the election in as much as he had not attained the age of 21 years on the date of filing of the nomination which was registered as Election Petition No. 20 of 2011. Even when the election petition was pending consideration before the Election Tribunal, a second petition was filed by the respondent No.4 before the State Election Commission on 27.7.2011 praying for removal of the writ petitioner on the self same grounds and which was registered as Case No. 26 of 2011. The Election Petition No. 20 of 2011 was dismissed for default on 29.6.2012. The matter progressed in Case No. 26 of 2011 and notice was issued to the petitioner. The complaint of the respondent No.4 before the State Election Commission in the



case in question was that as per the Wastaniya (8th pass) Certificate and the Foqania (Matriculation) Certificate, the date of birth of the petitioner was recorded as 7.2.1994 thus making him only 17 years old on the date of filing of the nomination in the year 2011. The petitioner appeared and filed his show cause denying the allegations and also produced the voter list published in January, 2011 which reflected his age as 24 years. He also produced the voter identity card issued by the Election Commission which again recorded his age as 24 years. In view of the divergent information on record as regarding the date of birth, the State Election Commission directed for an enquiry by the District Magistrate-cum-District Election Officer (Panchayat), Madhubani who submitted his report vide letter No. 1534 dated 4.10.2012 raising doubts about the age of the petitioner. The matter was adjudicated and the State Election Commission while upholding the date of birth of the petitioner as reflected in his Wastaniya (8th pass) Certificate/ Foqania (Matriculation) Certificate as 7.2.1994 held him to be under age on the date of filing of the nomination on 9.3.2011 and thus not eligible to contest the election. The petitioner was disqualified under Section 136(1)(b) of the Bihar Panchayat Raj, 2006 (hereinafter referred to as 'the Act') and also found guilty for violating Section 125(A) (i)(3) of the Act. The petitioner having been found disqualified to hold the post of Mukhiya

Gram Panchayat Raj, Mahpatiya Block Madhupur District Madhubani under Section 136(1)(b) and 136(2) and Rule 117 of the Bihar Panchayat Election Rules, 2006 was removed from the said post which was declared vacant and being aggrieved by the order dated 23.1.2013 passed by the State Election Commission bearing Memo No. 220 dated 24.1.2013 that the petitioner is before this Court.

Mr. S.B.K. Mangalam has appeared on behalf of the petitioner, the State Election Commission is represented by Mr. Amit Srivastava assisted by Mr. Girish Pandey and the complainant private respondent is represented by Mr. Bindhyachal Singh assisted by Mr. Yeshraj Bardhan.

This matter was heard by a Bench of this Court on 13.2.2013 and a bench while permitting time to the respondents for filing counter affidavit, stayed the operation of the order impugned in the writ petition and as a consequence the petitioner has continued on the post of Mukhiya.

Mr. Mangalam has referred to the impugned order passed by the State Election Commission to submit that the Election Commission even while observing that the materials on record reflected a suspicion as regarding the age of the petitioner but even in absence of material confirming the age of the petitioner, the Election Commission has relied upon the certificate issued by the Madarsa



Board recording date of birth as 7.2.1994. According to Mr. Mangalam there were other documents on record which demonstrated that the petitioner was an adult on the date of his nomination and that he got married as back as in the year 2006 and had three children from the wedlock, but the Election Commission ignored these documents. He submits that the petitioner would be only 12 years on the date of his marriage on the basis of date of birth entered in his Wastaniya/Foqania Certificates as 7.2.1994.

Learned counsel for the petitioner has referred to Annexure-9 which is a voter list published on 15.6.2010 and showed his age as 23 years on the said date. He has also referred to the voter identity card issued in October, 2010 which again showed his date of birth as 1987. He submits that these documents were issued much prior to the filing of the nomination by the petitioner and would have a strong bearing on the contest. Referring to the enquiry conducted by the District Magistrate in the light of the order passed by the State Election Commission placed at Annexure-5 it was submitted that even when the local villagers confirmed that the petitioner was 21 years of age at the time of filing of the nomination and had got married in the year 2006 and that the eldest daughter was born in the year 2007, yet the District Magistrate has expressed suspicion on the issue of age of the petitioner. He further submits that the petitioner having been declared

successful in the election, it can not be set aside merely on suspicion more particularly when there were evidence reflecting that the petitioner was within the prescribed age at the time of filing of the nomination.

It is further argued by Mr. Mangalam that the sheet anchor for maintaining the election petition is the Wastaniya/Foqania Certificates which showed his date of birth as 7.2.1994. Learned counsel has submitted that the petitioner had enclosed the relevant extract of the admission register while filing a supplementary show cause before the Commission with specific prayer for summoning the same. He submits that an application for correction of the said date of birth had been filed by the petitioner and which fact is duly noted in the admission register of the Madarsa Board. It is stated that the prayer for summoning the admission register was not accepted.

Learned counsel has relied upon judgment of the Supreme court reported in **AIR 1965 SC 282 (Brij Mohan Singh v. Priya Brat Narain Sinha & Ors.)** more particularly paragraph 20 thereof to submit that an educational certificate cannot be a sole basis for such adjudication and the accompanying circumstances would also have a bearing.

The sum and substance of argument of Mr. Mangalam is that the State Election Commission has committed a serious error in

exclusively relying upon the Wastaniya/Focania Certificates in view of the contemporaneous documents available and the fact that an application for correction of the date of birth in those certificates had been filed before the Madarsa Board.

The argument of Mr. Mangalam has been seriously contested by learned counsel for the State Election Commission as well as learned counsel appearing for the private respondent-the election petitioner.

Mr. Bindhyachal Singh appearing for the election petitioner has relied upon the exhaustive counter affidavit filed on his behalf and to submit that once the petitioner does not disown the Wastaniya/Foqania Certificates issued by the Madarsa Board there would be no escape for the petitioner. He submits that even the enquiry report submitted by the District Magistrate, supports this contentions. It is stated that during the enquiry conducted by the Block Development Officer Madhepur, Madhubani, although opportunity was provided to the petitioner to produce all documents in support of his age but he did not choose to do so. It was thus submitted that in view of the uncontested circumstances where the date of birth of the petitioner continues to remain 7.2.1994 in the certificates issued by the Madarsa Board, no infirmity exists in the order of the Election Commission requiring any interference

therewith.

It is a matter of record that the election petitioner had initially filed an election petition before the Election Tribunal and subsequently also filed an application before the Election Commission which was objected to by the writ petitioner by moving this Court in C.W.J.C. No. 1999 of 2012. The writ petition was disposed of with a direction to the private respondent for choosing one of the two forums invoked by him. The order of the writ Court is present at Annexure-K to the counter affidavit of the private respondent and is dated 8.5.2012. It is again a matter of record that no steps were taken by the private respondent in the light of the order passed by this Court rather the Election Petition No. 20 of 2011 was allowed to be dismissed for default on 29.6.2012. What would be the consequence of the dismissal of the election petition on default? For the purpose and since this issue was never argued by the parties that they were afforded opportunity to address the Court on this issue as well.

Mr. Mangalam learned counsel for the petitioner has submitted that the petitioner not only has refused to abide by the directions of the writ Court in choosing his forum rather the act of the petitioner in allowing the election petition which was filed earlier, to be dismissed for default, it would bestow no right for him to pursue the election case before the Election Commission. It was contended that since the



petitioner has allowed the election petition to be dismissed for default and did not choose to withdraw the same hence the order would bind the subsequent proceedings as well. He further submits that the private respondent while filing the election case before the Election Commission, suppressed the fact of having already filed an election petition and the factum of the private respondent pursuing two remedies, was brought to the notice of the High Court as well as the Election Commission by the petitioner himself.

Mr. Singh learned counsel appearing for the election petitioner contesting such argument has submitted that there was no laches on the part of the petitioner in not abiding by the directions of this Court rather allowing the election petition to be dismissed for default would amount to choosing a forum by the petitioner and would in no matter effect the proceedings before the Election Commission. According to Mr. Singh, an order of dismissal for default would not act as a resjudicata to a subsequent proceedings for it is not an adjudication on merits. Learned counsel in support of his submission has relied upon a judgment of this Court reported in **2014(3)PLJR 624 (Md. Shakil Vs. the State of Bihar & Ors.)** and a judgment of Supreme Court reported in **AIR 1961 SC 1457 (Daryao and Ors. Vs. State of U.P. and Ors.)**.

Learned counsel for the State Election Commission while

supporting the impugned order passed by the Election Commission has submitted that the opinion expressed by the Commission is on the basis of materials on record and since there was nothing on record to dispute the date of birth as occurring on the certificates issued by the Madarsa Board, the opinion of the Commission required no interference.

I have heard learned counsel for the parties and I have perused the materials on record.

The sheet anchor for the election petitioner is the certificates issued by the Madarsa Board reflecting the age of the petitioner as 7.2.1994.

The supplementary show cause filed before the Election Commission is on record and shows that the petitioner while enclosing an extract of the admission register had prayed to summon the same to establish that a prayer was made by the petitioner for correction of his date of birth. The relevant extract of the admission register which is in Urdu, when translated in Hindi shows that an application had been submitted by the petitioner for correction of the date of birth. The supplementary show cause also shows that a request was made to the Commission for summoning the register but was not accepted. This single document creates a cloud as regarding the date of birth entered in the certificate issued by the Madarsa Board.



The very fact that even when these certificates were the foundation for the election case, an enquiry was directed by the State Election Commission to be conducted through the District Magistrate. The exercise shows that the Election Commission itself was in doubt and required a report for its clarification. The report is present at Annexure-5 to the writ petition. The report also mentions that an application was filed for correction of the date of birth before the Madarsa Board. The report also mentions about the evidence collected by the Block Development Officer upon examining the local villagers and who confirmed that the petitioner was aged more than 21 years on the date of Panchayat Election and that he got married in 2006 and the first of the child who is a daughter was born in 2007.

The report thus confirmed that an application was filed by the petitioner for correction of the date of birth before the Madarsa Board and also takes note of the evidence given by the local villagers. Clearly, in such circumstance, the Election Commission could not have relied exclusively on the date of birth entered in the certificate issued by the Madarsa Board. The petitioner has filed a supplementary affidavit in which he has enclosed a date of birth certificate issued by the Directorate of Statistics and Evaluation on 7.4.1987 reflecting his date of birth as 7.2.1987. The petitioner admits that this certificate was not produced before the State Election Commission. The petitioner has



also enclosed a voter list published on 15.6.2010 in which his name appears at Serial No. 1580 and shows his age as 23 years. The voter list is placed at Annexure-9. The petitioner has also enclosed a copy of the voter identity card issued in October, 2010 and in which the date of birth has been mentioned as 1987 which confirms the date of birth issued by the directorate of Statistics and Evaluation present at Annexure-8. These certificates were admittedly not on the records of the proceedings before the State Election Commission. However, these are documents of statutory character and having been placed on record on 9.9.2014, there is no challenge as to the veracity of these documents. All these documents have been issued much before the filing of the nomination by the petitioner. The objection of the private respondent that since these documents were not part of the proceedings before the Election Commission hence they should not be relied upon no doubt carries weight but considering that these documents are of unimpeachable character and have not been questioned by the private respondent or the State Election Commission as to its genuineness, in my opinion, there would be no impediment in relying upon these documents since these documents have not been issued after the disposal of the matter by the State Election Commission rather they are of the year 2010 and which is much prior to the filing of the nomination by the petitioner.



Perusal of the impugned order manifests that the Election Commission even while taking note of the documentary evidence and the oral evidence on record has merely opined that there is a suspicion as regarding the age of the petitioner. Thus the finding of the Election Commission is based on suspicion and not on a confirmation of a fact. The judgment of the Supreme Court rendered in the case of **Shah Nawaz versus State of Uttar Pradesh** reported in (2011) 13 SCC 751 relied upon by the Commission, is in entirely different circumstances and the opinion expressed by the Supreme Court is in view of the statutory provisions underlying the Juvenile Justice (Care and Protection of Children) Act, 2000. The impugned order reflects that the opinion of the Election Commission rests entirely on the date of birth mentioned in the Wastaniya/Foqania Certificates issued by the Madarsa Board which in my opinion is not a correct reflection of the fact in view of the circumstances accompanying the case of the petitioner discussed hereinabove. Unseating of an elected representative is to be done with utmost care and caution and cannot be founded on mere suspicion.

For the reasons aforementioned, the order dated 23.01.2013 passed by the State Election Commission in Case No. 26 of 2011 bearing Memo No. 220 dated 24.1.2013 as contained in Annexure-7 cannot be upheld and is accordingly set aside. The writ petition is

allowed. Interlocutory Application stands disposed of.

Since the petitioner has continued on the post of Mukhiya by virtue of the interim order passed on 13.2.2013, the position stands confirmed.

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(Jyoti Saran, J.)