

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**Civil Writ Jurisdiction Case No.22497 of 2014**

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Lucy Devi wife of Varun Mandal, resident of village- Tingharia, Police Station- Kursella, District- Katihar.

.... .... Petitioner/s

Versus

1. The State of Bihar through the District Magistrate, Katihar.
2. The District Magistrate-cum-District Election Officer, Katihar.
3. The Returning Officer-cum-District Welfare Officer, Katihar.
4. The Block Development Officer-cum-Assistant Returning Officer, Katihar.
5. Mamta Kumari Wife of Manoj Kumar Sah Resident of Mohalla- Purani Bazar, Kursela, P.S.- Kursela, District- Katihar.
6. Indu Devi Wife of Anil Yadav, resident of village- Kheriya, Yadav Tola, Police Station- Kursela, District- Katihar.
7. Kiran Devi Wife of Sanjay Yadav, resident of village- Kheriya, Yadav Tola, Police Station- Kursela, District- Katihar.
8. Chanda Devi Wife of Sanjay Sahni, resident of village- Navtoli, Tingharia, Police Station- Kursela, District- Katihar.
9. Nutan Devi Wife of Anjani Jha, resident of village- Brahman Tola Kheria, Yadav Tola, Police Station- Kursela, District- Katihar.
10. Fula Devi Wife of Bhuneshwar Mahto, resident of - Babu Tola, Police Station- Kursela, District- Katihar.
11. Fulo Devi Wife of Satyanarayan Mahto, resident of village- Gandhi Gram Toli, Police Station- Kursela, District- Katihar.
12. Ramwati Devi Wife of Devendra Mahto, resident of village- Gandhi Gram Toli, Police Station- Kursela, District- Katihar.
13. Sabita Devi Wife of Ashok Kumar Yadav, resident of village- Kheriya Yadav Tola, Police Station- Kursela, District- Katihar.
14. Sneha Lata Chaudhary Wife of Vinay Kumar Chaudhary, resident of village- Tingharia, Police Station- Kursela, District- Katihar.
15. Ruby Devi wife of Pramod Yadav, resident of village- Kheriya Yadav Tola, Police Station- Kursela, District- Katihar.
16. Ranjana Devi Wife of Ratan Mandal, resident of village- Tingharia, Police Station- Kursela, District- Katihar.

.... .... Respondent/s

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**Appearance:**

For the Petitioner/s : Mr. Ajay Kumar, Advocate  
For the Respondent/s : Mr. Anil Kumar Sinha, GA-9  
Ms. Nutan Sharma, AC to GA-9  
For Respondent No. 5: Mr. Yogendra Pd. Sinha, Advocate

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**CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN**  
**ORAL JUDGMENT**  
**Date: 29-06-2015**

Heard Mr. Ajay Kumar, learned counsel appearing on  
behalf of the petitioner, learned counsel for the State and Mr.

Yogendra Prasad Sinha, learned counsel appearing on behalf of the election petitioner who is respondent no. 5 herein.

Though notice had been issued to other respondents but they have not chosen to appear despite the notice being validly served.

The petitioner is the returned candidate and has prayed for issuance of a writ in the nature of certiorari for quashing the judgment and order dated 28.11.2014 passed by the Munsif, Katihar as an Election Tribunal in Election Petition No. 13 of 2011 whereby in exercise of powers vested under Section 137 of the Bihar Panchayat Raj Act, 2006 (hereinafter referred to as 'the Act') the election of the petitioner has been set aside.

Mr. Ajay Kumar, learned counsel appearing for the petitioner while admitting to the position that the writ petitioner did not respond to the notice issued by the election tribunal nor did he file any written statement, submits that the issue which is being raised by the petitioner through the present writ petition is entirely an issue of law and thus the non-filing of any written statement by the petitioner or his failure to contest his election case would not come in his way. It is argued by Mr. Ajay Kumar appearing for the petitioner that the election petitioner i.e. the respondent no. 5 had raised objections before the Returning Officer as regarding the polling carried out at booth nos. 55, 56 and 58 and had also prayed for recounting in those booths. The objection of the respondent no. 5 was considered by the



Returning Officer and vide order passed on 16.5.2011 whereas the Returning Officer found no infirmity at booth nos. 55 and 58 requiring a recount but insofar as the booth no. 56 is concerned, the claim of the respondent no. 5 that 26 votes of booth no. 56 which had been cast in her favour had been illegally declared invalid, were examined by the Returning Officer. The Returning Officer found that these ballots neither bore the distinguishing mark nor contained the signature of the Presiding Officer as mandated under Rule 55(2) of the Bihar Panchayat Rah Rules, 2006 (hereinafter referred to as 'the Rules') and thus were rightly rejected in the light of the provisions underlying Rule 75(1)(d) of 'the Rules'. The respondent no. 5 being aggrieved preferred the Election Petition No. 13 of 2011 and which was decided in her favour and the returned candidate is thus before this Court in the present writ petition.

A very short argument has been made by Mr. Ajay Kumar to contest the judgment passed by the Election Tribunal. He submits that the provisions underlying Rule 55(2) are mandatory and on the failure on the part of the Polling Officer to put a distinguishing mark on the ballot as well as the signature of the Presiding Officer on the ballot, the same is rendered invalid and has to be rejected by operation of law. He submits that although under the proviso to Rule 75 a discretion is vested in the Returning Officer to satisfy himself whether such omission is due to any mistake or failure on the part of the



Presiding Officer or the Polling Officer and in case he is satisfied as such then he may not reject the ballot on grounds of such defect but such is not the case in hand. With reference to the finding of the Returning Officer present at Annexure-1 to the writ petition it is stated that the objection raised by the respondent no. 5 was well considered by the Returning Officer who did not find sufficient reason to validate the invalid votes which neither bore the distinguishing mark nor contained the signature of the Presiding Officer.

With reference to the conclusions drawn by the Election Tribunal on the issue so framed as Issue No. 3, he submits that the finding is on a complete mis-appreciation of the judgment of this Court rendered in the case of **Md. Zakir Hussain Vs. State** reported in **2002 (4) PLJR 686** and the judgment of the Supreme Court rendered in the case of **Arun Kumar Bose vs. State** reported in **AIR 1983 SC 1311**. He submits that whereas in the case of Md. Zakir Hussain (supra) the rejection by the Election Tribunal of such of the votes which did not bear either the distinguishing mark or the signature of the Presiding Officer was upheld by the Bench as is manifest from paragraph-13 and 19 of the judgment, insofar as the case of Arun Kumar Bose (supra) is concerned, the facts were entirely different inasmuch as in the said case although the distinguishing mark was present on the ballot but the signature of the Presiding Officer was missing and who came forward to depose and



accept his lapse in putting the signature. He submits that there is no such material on record on the Election Case nor any such evidence was led by the election petitioner to support the lapse on the part of the Presiding Officer / Polling Officer in putting the signature and distinguishing marks respectively. He thus submits that in the circumstances discussed, the judgment and order under challenge is based on no evidence rather the Election Tribunal has exceeded its jurisdiction to reverse the discretion exercised by the Returning Officer.

The argument of Mr. Ajay Kumar has been contested by Mr. Sinha appearing for the election petitioner who submits that having failed to either register appearance or to file a written statement, the writ petitioner cannot be permitted to canvass these issues before this Court. He submits that the judgment of the Election Tribunal is based upon the materials available on record and the evidence led by the parties and which requires no interference. He submits that the reasoning assigned by the Election Tribunal to entertain the 26 votes which had been struck off as invalid insofar as the booth no. 56 is concerned, are well explained and requires no interference. Learned counsel relying upon the proviso to Rule 75 has submitted that though a discretion was vested in the Returning Officer to consider the circumstances whether there was any lapse on the part of the Polling Officer or the Presiding officer and since the Returning



Officer had illegally not exercised the discretion so vested in him, that such illegality has been corrected by the Election Tribunal. Mr. Sinha with reference to the counter affidavit filed on behalf of the respondent no. 5 has submitted that since the writ petitioner had succeeded in the election on the basis of only two votes and upon consideration of the votes which had been illegally declared invalid, it was found that six votes in booth no. 56 and one vote in booth no. 55 had been cast in favour of the election petitioner taking her tally from 934 to 941 which was far above the votes obtained by the writ petitioner at 936, hence the election of the writ petitioner was set aside and the election petitioner was declared elected.

I have heard learned counsel for the parties and I have perused the materials on record. Although the writ petitioner did not choose to contest the election case but it is to be seen whether the issue raised by the writ petitioner is capable of turning the table on the election petitioner. Mr. Ajay Kumar understanding his limitation, has rightly not relied upon any facts of the case rather he has chosen to base his contention entirely on the issue of law. It is not in dispute rather is an admitted position as is manifest from the concluding portion of paragraph 6.3 of the impugned judgment that 26 votes in booth no. 56 and one vote in booth no. 55 were rejected by the Returning Officer on grounds that it did not bear either the distinguishing (Pravedak) mark nor did bear the signature of the



Presiding Officer. It is also not in dispute that the Returning Officer is vested with discretionary power to entertain even such of the votes provided he is satisfied that it is due to the lapse of the Polling Officer or the Presiding officer. Insofar as the present case is concerned, a perusal of the finding of the Returning Officer present at Annexure-1 which was also led in evidence would show that the objection against the invalidation of 26 votes was considered by the Returning Officer but since these votes did not bear either the distinguishing mark or the signature of the Presiding Officer that the Returning Officer did not choose to exercise his discretion and upheld the invalidity of the votes.

It is a matter of record that no evidence was led by the respondent no. 5 to demonstrate that the discretion so exercised by the Returning Officer was perverse. In fact the provisions of Rule 55(2) read with Rule 75(1) (d) leaves no room for any confusion that it is by operation of law that any ballot which does not bear either the distinguishing mark or the signature of the Presiding Officer has to be rejected as invalid. Thus whereas a rejection of such ballots is by operation of law its entertainment is only where the Returning Officer would assign reasons for declaring it valid otherwise it has to be rejected. In the present case the Returning Officer did not find it reasonable enough to declare these ballots which did not bear either the distinguishing mark or the signature of the Returning Officer as



valid and has thus affirmed its invalidity. Although the Election Tribunal has rightly observed that neither the candidate nor the electorate should suffer for the lapses of the Returning Officer or the Polling Officer but whether this invalidity was attributable to the Polling Officer / Presiding Officer or was on account of corrupt practices, had to be proved as an issue of fact but no evidence was led by the election petitioner in this regard. Admittedly the election petitioner did not lead any evidence to submit that it was a lapse on the part of the Polling Officer and the Returning Officer.

The absence of the distinguishing mark or the signature of the Presiding Officer results in invalidation of the ballot which not only affects the candidate concerned but also the voter however unless there is supportive evidence to prove that the lapse is wholly attributable to the Polling Officer or the Presiding Officer, in rest of the circumstances it has to be presumed to be an electoral malpractice.

The judgment relied upon by the Tribunal rendered in the case of Md. Zakir Hussain and Arun Kumar Bose (supra) do not support the case of the election petitioner rather are supportive of the case canvassed by the returned candidate inasmuch as whereas in the case of Md. Zakir Hussain (supra) the rejection of the ballots which neither bore the distinguishing mark nor the signature of the Presiding Officer was upheld by the Tribunal and this Court, insofar as the case of Arun Kumar Bose (supra) is concerned, the facts are clearly

distinguishable inasmuch as the Presiding Officer admitted to the lapse and his absence from the booth, in his evidence. These relevant piece of evidence are completely missing in the present case and in which circumstances, the judgment of the Tribunal in reversing the opinion of the Returning Officer in rejecting the ballots in absence of the distinguishing mark and the signature of the Presiding Officer and declaring then as valid, is based on no evidence rather is contrary to the evidence on record.

For the reasons discussed hereinabove, the judgment and order dated 28.11.2014 passed by the learned Munsif, Katihar as an Election Tribunal in Election Petition No. 13 of 2011 cannot be upheld and is accordingly set aside.

The writ petition is allowed.

The election of the writ petitioner is upheld. The consequences shall follow.

**(Jyoti Saran, J)**

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