

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.1678 of 2015

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Bibi Rukhsana Khatoon @ Roksana Khatoon, wife of Md. Safi Ahmad @ Gonar,
resident of village and P.O. Saraunja, P.S. Birpur, District- Begusarai.
..... Petitioner/s

Versus

1. The State Election Commission (Panchayat), Sone Bhawan, Birchand Patel Path, Patna through the Secretary.
2. The State Election Commissioner, the State Election Commission (Panchayat), Sone Bhawan, Birchand Patel Path, Patna.
3. The District Election Officer (Panchayat), Begusarai, District- Begusarai.
4. Janki Devi, wife of Sri Lal Bahadur Sharma, resident of village and P.O. Saraunja, P.S. Birpur, District- Begusarai.
5. Pushpa Devi, wife of Sri Janardan Mahto, resident of village- Parra, P.O. Saraunja, P.S. Birpur, District- Begusarai.
6. Raj Kumari Devi, wife of Sri Jai Jai Ram Paswan, resident of village- Laxmipur, P.O. Saraunja, P.S. Birpur, District- Begusarai.
7. Sabitri Devi, wife of Sri Rampriti Tanti, resident of village and P.O. Saraunja, P.S. Birpur, District- Begusarai.

..... Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. S.B.K. Manglam Mr. Ravi Ranjan Mr. Chandan
For State Election Commission :		Mr. Amit Shrivastava Mr. Girish Pandey
For the private Respondent No.4:		Mr. Jitendra Kumar Roy Mr. Rajesh Kumar Ms. Nikki Singh
For private Respondent Nos.5 to 7:		Mr. Shashi Bhushan Singh

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN

C.A.V. JUDGMENT

Date: 03-07-2015

The writ petitioner by invoking the extraordinary jurisdiction under Article 226 of the Constitution of India has questioned the judgment and order dated 12.1.2015 passed by the Civil Judge (Junior Division)-II –cum- Election Tribunal, Begusarai in Election Petition No.23 of 2011, whereby the court below has been pleased to set aside the election of the writ petitioner to the

post of Mukhiya, Gram Panchayat Raj, Para under Birpur Block in the district of Begusarai.

Facts of the case are in very narrow compass. The election to the post of Mukhiya, Gram Panchayat Raj, Para in the district of Begusarai was held on 3.5.2011 in which the petitioner was declared elected. An election petition was filed on behalf of the respondent no.4 and which has been allowed, inter alia, on grounds that 75 votes polled at booth no.102 was invalid and thus on grounds of improper reception of votes/reception of void votes, the result drawn in favour of the writ petitioner was materially affected and stood vitiated. The returned candidate being aggrieved is before this Court.

Mr. S.B.K. Manglam, learned counsel has appeared for the returned candidate who is the writ petitioner before this Court. While the State Election Commission is represented through its counsel, the election petitioner is represented by Mr. Jitendra Kumar Roy and respondent nos.5 to 7 have appeared through counsel Mr. Shashi Bhushan Singh.

Mr. Manglam, learned counsel appearing for the writ petitioner submitted that the election to the post of Mukhiya was held on 3.5.2011 and the counting was carried out on 23.5.2011 in which the writ petitioner was declared elected by a margin of 53 votes. He submits that the election was free and fair and at no stage



did the election petitioner raise any objection as to the illegal reception of votes. He thus submits that in absence of any objection filed by the election petitioner on the issue of improper reception of votes, the election petition itself was not maintainable on the principles of waiver. He submits that the election petitioner filed the election petition complaining of improper reception of votes at booth no.102, inter alia, on grounds that (1) dead persons had voted; (2) the voters whose names appear in two wards had voted; and (3) some of the persons had cast their votes twice and since the total number of improper reception of votes was 75 and the winning margin of the returned candidate was only 53 hence the results were declared materially affected by such improper reception of votes.

Mr. Manglam straightaway invited the attention of the Court towards the provisions underlying section 137 of the Bihar Panchayat Raj Act, 2006 (hereinafter referred to as 'the Act') which enables a person aggrieved to question any elected office of a Panchayat by way of an election petition which is to be filed before the Munsif. With reference to section 139 of 'the Act' he submits that the circumstances under which an election can be declared void has been enumerated thereunder. With reference to section 139(1) (d) (iii) of 'the Act' it was submitted that in so far as the present contest is concerned, it is taken care of by the said provision but any such declaration in such circumstances has to be with due care



and caution and not routinely exercised. It was submitted that until such time that the Election Tribunal was satisfied that 75 votes polled at booth no.102 which were held invalid in its entirety had been cast in favour of the returned candidate, there was no occasion for declaring the entire election void since there were no complaint in respect of the other booths. It was contended that the admitted position is that 75 votes were cast by persons whose names did not figure in the voter list available with the Polling Officer. It is also an admitted position that a winning margin of the writ petitioner was 53. He submits that unless the Election Tribunal recorded satisfaction that the entire election had been materially affected by such improper reception of votes, there was no occasion to declare the election void. He submits that the proper exercise for the election Tribunal in the circumstances existing where no corrupt practice has been alleged by the election petitioner and there are no complaint regarding the polling held at other booths, was that before declaring the election void on grounds of improper reception of votes at booth no.102, the Election Tribunal ought to have extricated 75 votes from the poll count and ought to have satisfied himself that upon such exercise being carried out the result of the election stands materially affected. He submits that it is only in these circumstances that the election tribunal could have declared the election void and not on account of mere invalid poling at a

single booth no.102.

The sum and substance of the argument of Mr. Manglam is that in absence of any charge of corrupt practice against the returned candidate, a mere reception of improper votes at a particular booth on its own would not be sufficient to declare the entire election void and in such circumstance there should be an extrication of such invalid votes to ascertain whether after extrication of these votes from the poll count, the result of the returned candidate stood affected for in circumstances where even after such extrication the result does not get materially affected than there would be no occasion to declare the entire election void in absence of any specific charge of corrupt practice by the returned candidate.

Mr. Manglam in support of his submission has relied upon a judgment of the Supreme Court reported in **(1985) SCC 61 (Bhag Mal vs. Ch. Prabhu Ram)**, more particularly paragraph 20 thereof to submit that the Supreme Court in consideration of the provisions underlying section 100(1)(d) (iii) of Representation of People Act, 1951 which is pari materia to section 139 (1)(d) (iii) of 'the Act' has held that improper reception of any vote which is void can relate only to improper reception of any vote or reception of any vote which is void in regard to a returned candidate and refusal and rejection of any valid vote cast in favour of any candidate other

than the returned candidate.

The arguments of Mr. Manglam has been seriously contested by Mr. Roy, learned counsel appearing for the election petitioner to submit that since there is no confusion that 75 votes at Booth no.102 had been cast by persons whose name did not figure in the voter list available with the Polling Officer and the winning margin of the returned candidate was only 53, this by itself constituted sufficient reason to declare the election void inasmuch as should the 75 votes be taken out of the count, the result stands affected. Mr. Roy in support of his submission has referred to the decision of the State Election Commission on the issue of improper reception of votes arising from Misc. Case No.15 of 2011 filed by the election petitioner which was also led as Exhibit-1 before the Election Tribunal and in which the improper reception of 75 votes at booth no.102 stood confirmed and the Commission was of the opinion that the election on the said booth no.102 was not impartial. The Election Commission further recommended for initiation of departmental proceeding against the defaulting officers. With specific reference to the finding of the Election Tribunal on the issue whether the result of the election stood materially affected by improper reception of votes/reception of void votes at booth no.102 he submits that the finding of the Tribunal is that not only the voter-list at booth no.102 was not correctly prepared rather the persons

whose names had been deleted in the final published voter list had been allowed to cast their votes and thus the election stood materially affected. He thus submits that in view of the conclusive evidence on record on the issue of improper reception of 75 votes at booth no.102 the declaration by the Tribunal suffers from no infirmity warranting interference.

Counsel for the State Election Commission also stood up to support the impugned judgment, inter alia on grounds that once there is no dispute that 75 voters whose names stand deleted from the voter list were allowed to vote, there could not have been any other declaration than as made by the Election Tribunal by the impugned judgment.

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

On consideration of the pleadings and documents on record, the following issues were framed by the court below:

- (1) Is the Election Petition is maintainable?
- (2) Has the election petitioner got any valid cause of action to file this election petition?
- (3) Whether the result of the election for the post of Mukhiya of Gram Panchayat Raj- Parra held on 03.05.2011 has been materially affected by improper reception of votes or reception of void votes at booth no.102 at Ward no.3?"
- (4) Whether there was any double voting by same persons at different booth or at the same booth in the impugned election?
- (5) Whether votes were cast in the name of dead persons at booths of ward no.2 & 3?

- (6) Whether the result of the election for the post of Mukhiya of gram Panchayat Raj-Parra held on 3.5.2011 is fit to be set aside or cancelled or fit to be declared void?"

Issue nos.1 and 2 relating to maintainability of the election petition and cause of action are formal in nature and have been decided in favour of the election petitioner which suffers from no infirmity.

Although the election petitioner had also raised the issue of improper reception of votes even at booth nos.101 and 103 and had also raised issues regarding casting of two votes by 25 voters, casting of votes by dead persons etc. but in absence of any evidence led by the election petitioner, the issues so raised were rejected by the court below as is manifest from the findings given in paragraph 13 of the judgment relating to issue nos.4 and 5 so framed on this aspect and which suffers no infirmity.

The only issue thus that remained and which led to the fall of the returned candidate is the issue of improper reception of 75 votes at booth no.102 and which stood covered by issue nos.3 and 6. The finding of the tribunal regarding such improper reception is based upon evidence and stands admitted even by the returned candidate as is manifest from the impugned judgment. In fact there is no dispute between the parties that 75 voters at booth no.102 whose names stood deleted from the voter list had forced their way

into casting of votes. The issue thus which falls for consideration before this Court is whether the finding of the tribunal on issue nos. 3 and 6 that the improper reception of 75 votes at booth no.102 on its own was sufficient to declare the entire election void in the backdrop of the fact that the winning margin in between the election petitioner and the returned candidate was only 53 is correct or there is substance in the argument advanced by Mr. S.B.K. Manglam that even in view of the admitted position regarding casting of 75 invalid votes at booth no.102, this on its own was not sufficient to declare the entire election void until such time that the election tribunal also recorded a satisfaction that these 75 invalid votes had contributed to the result of the returned candidate.

Section 139 of ‘the Act’ enumerates the circumstances in which an election can be declared void and the relevant provisions in so far as the present case is concerned would be section 139(1)(d)(iii) which runs as follows:

“139. Grounds for declaring election to be void.-

- (1) Subject to the provisions of sub-section (2) if the prescribed authority is of opinion-
- (a) xxx xxx xxx xxx
 - (b) xxx xxx xxx xxx
 - (c) xxx xxx xxx xxx
 - (d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected-
 - (i) xxx xxx xxx xxx
 - (ii) xxx xxx xxx xxx
 - (iii) by the improper reception, refusal or rejection of any vote or reception of any vote which is void; or

(iv) xxx xxx xxx xxx;
 the prescribed authority shall declare the
 election of the returned candidate to be void.”

It is manifest from the provisions itself that until such time that the election tribunal is satisfied that the entire election is marred with improper reception of votes or reception of void votes, there would not be any occasion to countermand the entire election where a challenge has been made on this ground in respect of a lone booth.

Indisputably the challenge to the election is made on the sole count of improper reception of vote/reception of void vote at booth no.102 and on no other ground. There is no charge by the election petitioner that the returned candidate had indulged in corrupt practice or has facilitated casting of invalid votes nor any evidence was led by him. On the contrary the evidence on record makes it manifestly clear that these 75 voters have forced their way into casting of votes and the poling officials facilitated the same. There is also no evidence regarding unfair poling on any other booth. Meaning thereby it was exclusively the poling at booth no.102 which is the centre of attention on the issue raised.

The term ‘improper reception of vote’ or ‘reception of void vote’ or ‘rejection of valid vote’ has been explained by the Supreme Court in the judgment rendered in the case of **Bhag Mal** (supra) in paragraph 20 with reference to identical provisions at

section 100(1)(d)(iii) of the Representation of Peoples Act, 1951 in the following manner:

“20.
... ..

The improper reception or the reception of any vote which is void, referred to in Section 100(1) (d) (iii) can relate to only to the improper reception of any vote or reception of any vote which is void in regard to the returned candidate and the refusal or rejection of any vote referred to in that sub-clause could relate only to refusal or rejection of any vote cast in favour of any candidate other than the returned candidate.”

The explanation aforementioned is eloquent of the fact that it is not simply on confirmation of improper reception of void vote or refusal of valid vote that can lead to countermanding of an election until such time that it is proven beyond any shadow of doubt that such reception of void vote in favour of the returned candidate and refusal of valid vote in favour of the candidate other than the returned candidate has contributed to the success of the returned candidate. Since in the present case there is no issue regarding refusal of valid vote in favour of the election petitioner or any other candidate we are only concerned with the reception of 75 invalid votes at booth no.102. Definitely if these 75 votes in its entirety were cast in favour of the returned candidate obviously the election was void but in case a physical verification of these 75 votes would reflect that less than 53 votes were cast in favour of the returned candidate, then there would be no alteration in the result

since the winning margin is 53 votes.



In my opinion, although the election tribunal has proceeded well in course for deciding the issue raised by the election petitioner but unfortunately the tribunal has missed to take the contest to its last step regarding physical verification of the 75 votes so as to confirm as to how many of these invalid votes were cast in favour of the returned candidate and the election petitioner and whether if these votes are taken out from the vote count of the returned candidate and the election petitioner, the result would be otherwise. In my opinion, the failure of the tribunal to undertake such exercise has resulted in a presumptuous finding where the election of the returned candidate has been set aside on a presumption that the 75 invalid votes cast at booth no.102 had materially affected the election. This finding of the tribunal suffers from manifest error of law and fact inasmuch as a mere reception of 75 invalid votes at booth no.102 on its own cannot be a basis for declaring the entire election void until it was confirmed that these invalid votes had contributed to the success of the returned candidate upon its physical verification.

In my considered opinion unless there is evidence of improper reception of invalid votes or rejection of valid votes at each of the polling booths; that there are evidence to support that the returned candidate has indulged into corrupt practice to garner such



votes and that these invalid votes or rejection of valid votes have contributed to the success of the returned candidate, an election cannot be set aside under section 139(1)(d)(iii) of 'the Act'. Countermanding an election is an extreme step and the election tribunal has to be fully satisfied that there are evidence on record for such declaration. An election cannot be set aside as void merely on assumptions and presumptions rather its void character should be clear as a crystal and be staring at the returned candidate.

In the present case there is no evidence on corrupt practices nor is there any issue of rejection of valid votes or improper reception of votes on other booths. In fact of the issues raised, the only issue that stands upheld is the reception of 75 invalid votes at booth no.102. Now this admitted circumstance on its own means nothing until upon physical verification of the 75 invalid votes cast at booth no.102, the number of votes secured by each of the candidate at the said booth is ascertained. Once the 75 invalid votes cast at booth no.102 are extricated and physically verified to determine the exact number of votes polled in respect of each of the candidates, then the next step would be to confirm whether by reducing these invalid votes from the votes secured by the returned candidate and the election petitioner in case he also is a beneficiary of such votes, the result stands materially affected for in case this exercise does not alter the final result then there would be

no occasion to countermand the election.

Unfortunately the election tribunal even while expressing its opinion on issue nos.3 and 6 and upholding the improper reception of 75 votes at booth no.102, has failed to appreciate that the responsibility of the tribunal did not end at that and yet a satisfaction of the tribunal had to be recorded that these 75 invalid votes had contributed in the success of the returned candidate. The learned tribunal has faltered in discharging this obligation.

In the circumstances discussed, this Court without interfering with the findings of the election tribunal as regarding other issues i.e. issue nos.1, 2, 4 and 5 would set aside the finding recorded by the tribunal in respect of issue nos.3 and 6 in so far as it proceeds to declare the election void and would remit the matter back to the election tribunal to record his finding afresh on the issue nos.3 and 6 after carrying out the exercise in the manner discussed above. The tribunal should carry out a physical verification of the 75 invalid votes cast at booth no.102 and thereafter record its finding whether the election petitioner as well as the returned candidate are beneficiary of these invalid votes and that if these invalid votes are taken out from the respective total vote count of the two contesting candidates, it would materially affect the result of the election.

For the reasons aforementioned the judgment and order passed by the Civil Judge (Junior Division) II –cum- Election Tribunal, Begusarai in Election Petition No.23 of 2011 dated 12.1.2015 is set aside and the matter is remitted to the court below for its disposal afresh in the light of the observations/directions of this Court but after opportunity of hearing to the contesting parties.

The writ petition is allowed with the observations and direction aforementioned and as a consequence the petitioner stands restored to the post of Mukhiya, Gram Panchayat Raj, Parra in the district of Begusarai.

(Jyoti Saran, J)

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