

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.1556 of 2012

IN

Civil Writ Jurisdiction Case No. 16611 of 2011

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Dhirendra Tiwary, S/O Rishikesh Tiwary, R/O Village- Nimej, P.S.- Brahmpur,
District- Buxar

.... Appellant

Versus

1. The State of Bihar
2. The Chief Election Commissioner, State Election Commission, Bihar, Patna
3. The Collector, Buxar-cum-District Election Officer, namely, Ajay Yadav
4. The Sub-Divisional Officer, Dumraon, District- Buxar, namely, Rajani Kant
5. The Returning Officer, Brahmpur posted as the Executive Magistrate, Buxar, namely, Arun Kumar
6. Sri Din Dayal Prasad, the then Block Development Officer-cum-Assistant Returning Officer, Brahmpur at present posted as Block Development Officer, Hasanpur, District- Samastipur
7. Sri Raj Shekhar Kumar, the Circle Officer, Brahmpur, District- Buxar
8. Smt. Manju Devi, W/O Sri Santosh Singh, R/O Village- Purwan, P.O.- Brahmpur Chaurasta, P.S.- Brahmpur, District- Buxar, teacher in Prathmik Vidyalaya, Purwan
9. Sri Ashwani Kumar Singh, S/O Sri Chandra Bans Singh, R/O Village- Purwan, P.O. Brahmpur Chaurasta, P.S.- Brahmpur, District- Buxar
10. Kamala Devi, Mukhiya, Nimej Gram Panchayat, P.O.- Brahmpur Chaurasta, P.S.- Brahmpur, District- Buxar

.... Respondents

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Appearance :

For the Appellant	:	Mr. Damodar Prasad Tiwary, Advocate Mr. Braj Bhushan Mishra, Advocate
For the SEC	:	Mr. Mr. Amit Shrivastava, Advocate Mr. Girish Pandey, Advocate
For the State	:	Mr. Shyameshwar Kumar Singh, AC to GP-12
For Private Respondent	:	Mr. Bindhyachal Singh, Advocate

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CORAM: HONOURABLE MR. JUSTICE V.N. SINHA

and

HONOURABLE MR. JUSTICE JITENDRA MOHAN SHARMA

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE V.N. SINHA)

Date: 13-08-2015

Appellant is the election agent of Geeta Devi,
wife of Dhirendra Kumar, who contested election for the office of



Mukhiya, Nimej Gram Panchayat within Brahmpur P.O. and P.S. in the district of Buxar held on 12.05.2011 and was defeated by Respondent No. 10 by a margin of one vote. He filed the present Letters Patent Appeal assailing Order No. 3 dated 30.08.2012 whereunder C.W.J.C. No. 16611 of 2011, praying, inter alia, to set aside the election of Respondent No. 10 on the ground of corrupt practice conducted by State officials, Respondent Nos. 3 to 7 not only while conducting the election but also at the time of counting votes resulting in her victory, has been dismissed holding that election of Respondent No. 10 should have been challenged by the petitioner or Geeta Devi (the candidate) by filing election petition before the appropriate forum, the writ petition is devoid of any merit.

2. Learned counsel for the appellant-writ petitioner assailed the impugned order passed by the learned Single Judge on the ground that the writ petition was considered on 06.03.2012 when learned Single Judge issued notice to Respondent No. 10 and further directed the State counsel to file counter affidavit explaining as to why recounting of polled votes of booth nos. 21, 22, 23, 24 situate at Girls Middle School, Nimej and Primary School East, as requested by Geeta Devi under her two applications dated 18.05.2011 filed at 08.03, 08.05 P.M.,

Annexures- 7, 7A to the writ petition, was not considered in view of the margin of one vote between Geeta Devi and Respondent No. 10 allegedly on account of malpractice during counting of votes in the last round of counting.

3. In spite of order dated 06.03.2012 State-Respondents did not file any counter affidavit. The writ petition was considered on 30.08.2012 and after hearing the counsel for the petitioner, Respondent No. 10 and the State writ petition was dismissed under order dated 30.08.2012 even without taking note of the two petitions dated 18.05.2011, Annexures-7, 7A to the writ petition.

4. Learned counsel for the appellant-writ petitioner submitted that in the final round of counting Geeta Devi noticed the counting personnel committing manipulation of votes in favour of Respondent No. 10, no sooner counting was concluded and announcement made in FORM-20 that she has secured one vote less than Respondent No. 10 she filed two petitions on 18.05.2011, one before the Returning Officer at 08.03 P.M. and the other before the Sub-Divisional Officer, Dumraon at 08.05 P.M. requesting the two officials to undertake fresh counting of votes on polling booth nos. 21, 22, 23, 24 situate at Girls Middle School, Nimej and Primary School, East but without considering the said



petitions Returning Officer proceeded to issue election result-sheet in FORM-20, details of election result in FORM-21 as also election certificate in favour of Respondent No. 10 in FORM-22. It is submitted that both the petitions dated 18.05.2011, Annexures-7, 7A, seeking recounting of votes, were filed in view of the general announcement made by the State Election Commission (hereinafter referred to as the Commission) asking the District Administration to undertake recounting of votes provided the margin of victory is between 0-9 votes and there is request by the losing candidate to undertake recounting.

5. It is further submitted on behalf of the appellant- writ petitioner that no sooner petition, Annexure-7 addressed to the Returning Officer was filed requesting him to undertake recounting of votes polled at polling booth nos. 21, 22, 23, 24 on the ground that there was manipulation of votes in the last round of counting in favour of Respondent No. 10, it was incumbent upon the Returning Officer to have considered the said petition by passing order over the same and then only to have issued election certificate in favour of Respondent No. 10. It is submitted that failure of the Returning Officer to consider the petition, Annexure-7 and to issue election certificate in FORM-22 is not only arbitrary but also abdication of authority by the

Returning Officer who was duty bound to obey the instructions of the Commission to undertake recounting provided margin of victory is less than nine votes and there is request by the losing candidate to recount the votes.

6. Learned counsel for the appellant-writ petitioner further submitted that the Returning Officer, Respondent No. 5 is required to conduct, supervise the Panchayat Election in the light of the instructions issued by the Commission from time to time. In this connection, he referred to Article 243K of the Constitution and Section 123 of the Bihar Gram Panchayat Raj Act, 2006 (hereinafter referred to as the Act) which make it abundantly clear that the Returning Officer has to conduct the Panchayat Election subject to superintendence, direction and control of the Commission. It is submitted that the Commission having not denied in its counter affidavit that instructions issued to undertake recounting at the instance of loser provided the margin of victory is less than nine votes, the Returning Officer had no option but to undertake recounting. In case, Returning Officer was not inclined to undertake recounting then he was required to have given reasons for rejecting the request made in the petition dated 18.05.2011, Annexure-7. It is submitted that in no case, the Returning Officer could have ignored the petition, Annexure-7. In support of the

aforesaid submission learned counsel for the appellant-writ petitioner has relied on the judgment of this Court in the case of ***Devaki Devi @ Debaki Debi v. The State of Bihar & Ors. 2013(2) BBCJ V-115, Suresh Baitha v. The State of Bihar & Ors. 2013(1) BBCJ V-114 and Sri Bhagwan Singh v. The State of Bihar & Ors. 2010(4) BBCJ V-593.***

7. Learned counsel for the Commission assailed the aforesaid submission and submitted that in case appellant- writ petitioner or Geeta Devi was aggrieved by the irregularities committed in the last round of counting either of the two should have filed election petition and the writ petition, letters patent appeal assailing the said election is not maintainable.

8. Learned counsel for the Commission further submitted that the circular of the Commission having been issued on 24.05.2011 asking all the District Magistrates to ensure recounting of votes at the request of the losing candidate provided the margin of votes is less than nine will not apply to the facts of the present case as the said instruction has been issued on 24.05.2011 and the counting of impugned election was held on 18.05.2011. From the counter affidavit filed on behalf of the Commission, it does not appear that no press conference was held by the Commission before 18.05.2011 asking the Returning

Officer(s) to ensure recounting of votes at the instance of losing candidate provided the margin of victory is less than nine.

9. Learned counsel for Respondent No. 10 submitted that writ application under Article 226 of the Constitution of India is not maintainable in view of the admitted fact that result of Respondent No. 10 was declared on 18.05.2011 and accordingly an Election Certificate was issued to her on the same day under signature of the Election Officer and the appellant preferred writ application before this Court on 03.09.2011 instead of filing Election Petition before competent authority, whereas after declaration of result the election of any office of Panchayat shall not be questioned except by filing Election Petition before the competent authority in view of the provisions of Article 243-O of the Constitution of India, Sections 137, 138 (b) of the Act. Article 243-O(b) provides as “No election to any Panchayat shall be called in question except by an election petition presented to such authority and in such manner as it provided for by or under any law made by the Legislature of a State.” Section 137 (1) of the Act provides as “The election to any office of a Panchayat or a Gram Kutchery shall not be called in question except by an election petition as prescribed.” Section 138(b) of the Act provides as “No election to any Panchayat shall be called in except by an election

petition presented to the prescribed authority under the Act.” In support of his submission learned counsel relied on the judgment of this Court in the case of *The Bihar State Election Commission & Ors. v. Meera Devi & Ors. 2008(4) PLJR 114 Paragraphs 6, 8, 10 and 11.*

10. Learned counsel for Respondent No 10 further submitted that prayer was made in the writ application on behalf of the appellant for conducting an enquiry against officials of State Government (Respondent Nos. 3 to 7) who indulged themselves in corrupt practice during election held on 12.05.2011 and counting held on 18.05.2011. However, there was no prayer in the writ application regarding recounting of votes. As such, the Court cannot travel beyond the prayer made before it by making any other directions.

11. Learned counsel for Respondent No. 10 further submitted that the case of appellant is that he filed an application before Returning Officer with prayer for recounting of the votes on 18.05.2011 but no recounting was done in pursuance thereof. However, after declaration of result, there is no role of Returning Officer in the Panchayat Election matter who decide as to whether the application for recounting was filed before him or not. However, the illegality in counting/utilizing unfair



means/derelection of duty by the Returning Officer etc. can only be reopened in Election Petition by leading evidence in this respect as to whether objection of the appellant was filed or not before Returning Officer just after recounting of votes or after declaration of result of Respondent No. 10. In this connection, learned counsel has relied on the judgment of the Supreme Court in the case of ***Vadivelu v. Sundaram and others AIR 2000 Supreme Court 3230, Paragraph 20*** as also of this Court in the case of ***Meena Devi v. The State of Bihar & Ors. 2009 (4) PLJR 440 Paragraph 7.***

12. Learned counsel for Respondent No. 10 further submitted that the power already vested in the competent court in election matter by way of Statute and the same cannot be taken away by the court in exercise of power conferred under Article 226 of the Constitution by allowing the Returning Officer to see as to whether objection of the appellant was filed or not before him just after counting of the votes or after declaration of the result. In this connection, learned counsel relied on the judgment of the Supreme Court in the case of ***Ram Rati (Smt) v. Saroj Devi and others (1997) 6 Supreme Court Cases 66 Paragraph 8.***

13. Learned counsel for Respondent No. 10 next submitted that recounting may be directed keeping in view the requirement of maintaining the secrecy of ballot papers. Mere



narrow margin of votes between the appellant and Respondent No. 10 by itself would not be sufficient for issuing a direction for recounting. In this connection learned counsel has relied on the judgment in the case of *Chandrika Prasad Yadav v. State of Bihar & Ors.* 2004(3) PLJR (SC) 133, Paragraphs 20, 21 and 30, *Sohan Lal v. Babu Gandhi and others* (2003) 1 Supreme Court Cases 108, Paragraph 13, *Vadivelu v. Sundaram* (supra), Paragraph 18, *Meena Devi* (supra) Paragraph 13, *Banwari Yadav v. The State of Bihar & Ors.* 2007 (4) PLJR 169 Paragraphs 16, 22, further affirmed in appeal in the case of *Raj Kishor Shukla v. Banwari Yadav & Ors.* 2008(1) PLJR 592 Paragraph 8.

14. Having heard counsel for the appellant- writ petitioner, the Commission and Respondent No. 10, we are of the view that the Commission constituted under Article 243K of the Constitution and Section 123 of the Act is vested with the authority, jurisdiction to not only supervise the Panchayat Election but also to issue such direction as may be necessary for ensuring free and fair election. The purpose for which Commission has been constituted is to ensure free and fair Panchayat Election. Fairness in the election can be ensured not only by ensuring free and fair poll but also by securing fair counting. To ensure fair counting Commission made public announcement reported by Dainik Jagran

Patna Edition dated 21.05.2011 calling upon the District Magistrates to ensure recounting provided margin of victory is less than nine votes. There is no material on record to suggest that such announcement by the Commission was not made prior to 18.05.2011. From the counter affidavit filed on behalf of the Commission as also Respondent No. 10 also it does not appear that the Commission did not instruct the District Magistrate(s) prior to 18.05.2011 to ensure recounting of votes provided the margin of victory is less than nine votes. In the circumstances, it was incumbent upon the Returning Officer, Respondent No. 5 to have considered the application dated 18.05.2011, Annexure-7. Had he considered the application dated 18.05.2011 and rejected the same and then declared Respondent No. 10 victorious in FORM-22, this Court may have rejected the writ petition at the instance of election agent of losing candidate asking him to avail the alternative remedy and to approach the Election Tribunal. In the instant case, Returning Officer has chosen not to consider the petition dated 18.05.2011, Annexure-7 which is abdication of the authority lawfully vested in a statutory authority. The High Court in its writ jurisdiction is empowered to direct the statutory authority to discharge its statutory function in accordance with law. The Returning Officer chose not to exercise power vested in it by Rule

79 of the Bihar Gram Panchayat Election Rules, 2006. Learned Writ Court while considering the writ petition under the impugned order dated 30.08.2012 should have asked the Returning Officer to discharge its statutory function but the Court also chose not to do so, as such, impugned order passed by the learned Single Judge dated 30.08.2012 is liable to be set aside, which is, accordingly, set aside with direction to the Returning Officer, Respondent No. 5 to consider the petition dated 18.05.2011, Annexure-7, as early as possible, in any case, within a period of two weeks from the date of receipt/ production of a copy of this judgment/ order before him and pass reasoned order in the matter in accordance with law.

15. The appeal is, accordingly, allowed.

(V.N. Sinha, J.)

I agree
Jitendra Mohan Sharma, J.

(Jitendra Mohan Sharma, J.)

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