

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.9918 of 2016

=====

1. Usha Devi Wife of Pawan Kumar Chaudhary Resident of village and P.O. Kanshi,
P.S. Simri, District - Darbhanga

.... Petitioner/s

Versus

1. The State Election Commission (Panchayat), Sone Bhawan, Birchand Patel Path,
Patna through the State Election Commissioner
2. The State Election Commissioner
3. The Secretary, the State Election Commission (Panchayat), Sone Bhawan,
Birchand Patel Path, Patna
4. The District Magistrate, Darbhanga - Cum - District Election Officer
(Panchayat), Darbhanga, District - Darbhanga
5. The Block Development Officer - Cum - Returning Officer (Panchayat Election
2016), Sadar Darbhanga Block, District Darbhanga
6. Bibha Devi Wife of Abinash Kumar Thakur Resident of village and P.O. Kanshi,
P.S. Simri, District - Darbhanga

.... Respondent/s

=====

Appearance :

For the Petitioner/s	:	Mr. S.B. K. Manglam, Adv.
For the Respondent/s	:	Mr. K.C. JHA A.C. to AAG 8
For the Commission	:	Mr. Amit Srivastava, Adv. Mr. Sanjeev Nikesh, Adv.
For the respondent No.6	:	Mr. P.K. Shahi, Sr. Adv. Mr. Manish Kumar, Adv.

=====

CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN
ORAL JUDGMENT
Date: 12-08-2016

The case in hand is a classical example of abuse of power by a Returning Officer, who though assigned with the pious duty of ensuring a fair and free election, has hijacked the democratic process and the reasons are not known.

This writ petition filed under Article 226 of the Constitution of India though endeavours to question the declaration of result to the post of Mukhiya, Gram Panchayat Raj, Kanshi in the district of

Darbhanga but the foundation of the writ petition does not rest on election rivalry rather the complaint is on the victimization faced by the contestants on account of the whimsical acts of the Returning Officer who has not chosen to include the votes cast in one of the election booths and again the reason is not known.

The matter in contest relates to the election of the Mukhiya, Gram Panchayat, Kansi in the district of Darbhanga. It is following the notification issued by the State Election Commission under Section 124 of the Bihar Panchayat Raj Act, 2006 (hereinafter referred to as 'the Act') and the Bihar Panchayat Election Rules, 2006 (hereinafter referred to as 'the election rules') framed thereunder that the election process for filling up of the various representative posts under 'the Act' was set in motion . In so far as the present case is concerned, it relates to the post of Mukhiya, Gram Panchayat Raj Kansi, District Darbhanga. The Block Development Officer, Darbhanga Sadar was notified as the Returning Officer. The date of election to the post of Mukhiya, was fixed on 26.5.2016. The petitioner, the private respondent and two others filed their nominations for the post and succeeded in scrutiny and whose name finds mention at Annexure-1. 16 booths were established by the State Election Commission for holding the election in question. The election was peacefully held on 26.5.2016. The counting of the votes



cast at each of the booths took place and the result of such counting together with the votes secured by the respective candidate is placed on record, vide Annexure-2 series in Form 20(part-1) of the form prescribed under 'the election rules'. The booth wise result sheet in Form 20 (part-2) under Rule 76(2) of the rules is enclosed at Annexure-3 and the serious lapse committed by the Returning Officer is apparent from its bare perusal for while the result sheet present at page 29 of the proceedings is in relation to Booth Nos. 1 to 7, the result sheet at page 30 relates to Booth Nos. 9 to 15. In between, the Returning Officer has committed a serious blunder in omitting to include the votes secured by the candidates at Booth No. 8 as per the vote count present at Annexure-2 series page 21 of the proceedings which relates to booth No.8. The petitioner made a complaint before the Returning Officer which was ignored. He thereafter approached the District Election Officer- cum- District Magistrate, Darbhanga vide his representation present at Annexure-4 and whereupon a show cause was issued to the Returning Officer cum Block Development Officer, Kewati on 19.6.2016 vide Annexure-5 to the writ petition but the same was not responded to rather the Returning Officer went ahead to administer oath to the returned candidate i.e. respondent no.6 herein on 23.6.2016. A second show cause was issued by the District Magistrate on the same date vide Annexure 5/1 which again was not

responded to and which led to the framing of charge vide letter dated 25.6.2016 issued under the signature of the District Election Officer-cum- District Magistrate, Darbhanga. The petitioner aggrieved is before this Court.

Mr. S.B.K. Mangalam has appeared for the petitioner, Mr. K.C. Jha A.C. to AAG 8 appears for the State, the State Election Commission is represented by Mr. Amit Srivastava and Mr. Sanjeev Nikesh and Mr. P.K. Shahi learned Senior Counsel appears for the returned candidate along with Mr. Manish Kumar.

A preliminary objection is raised by Mr. Shahi learned Senior Counsel appearing for the returned candidate as to the maintainability of the writ petition inter alia on grounds that any opinion by this Court would be effecting the election result and thus in view of the prohibition present in Article 243O of the Constitution of India read along with Section 138 of the Act, the remedy for the petitioner would lie in an election petition and since according to Mr. Shahi an election petition has already been filed by the petitioner, hence the issue raised did not require any indulgence.

Mr. Mangalam, learned counsel for the petitioner while responding to the preliminary objection raised by Mr. Shahi on the issue of maintainability has referred to the following judgments:

(1) (1999) 4 SCC 526 (K.Venkatachalam Vs. A. Swamickan & Anr.) paras 27 and 28

(2) 2010(3) PLJR 578 (N.S.Madhavan vs. Shyamdeo Prasad) paras 20 and 21

(3) 2016 (3) PLJR 474 (Ranju Kumari Vs. The State of Bihar)

On the strength of the judgments referred to above, it is argued by Mr. Mangalam that the extraordinary jurisdiction vested in the High Court under Article 226 of the Constitution of India is very wide and even though there is a bar to interference in electoral matters but the bar is not absolute and in exceptional circumstances, the jurisdiction can well be exercised.

Arguing next on the merits of the dispute, it is submitted by Mr. Mangalam that an election process commences from the issuance of a notification in this regard on the recommendation of the Election Commission and concludes by the declaration of result. It is argued by Mr. Mangalam that the petitioner is not questioning the election on the merits of the contest rather it is the process adopted by the Returning Officer to declare the result which is being put to question by the petitioner. With reference to the final result sheet prepared in Form- 21, copy of which has been enclosed in the counter affidavit filed by the State Election Commission at page 73 he submits that it is on the basis of the position reflecting from Annexure-3 series which does not take into account the votes secured by each of the candidate at Booth No. 8. The petitioner was shown to have secured 1378 votes,



on the other hand the resident no. 6 was shown to have secured 1476 votes and it is on the basis of this result sheet that the respondent no.6 was declared returned, even though the vote count at Booth No.8 was not taken into consideration. Mr. Mangalam next reverting to the votes secured by each of the candidates at Booth No.8 the details of which is present at page 21 of the proceedings submits that whereas the petitioner has secured 178 votes, the private respondent has secured only 81 votes. According to Mr. Mangalam if these 178 votes are added to the vote count of the petitioner present at page 73 then it comes to $1378+178=1556$ and on the other hand if the votes secured by the private respondent at Booth No. 8 is added to her vote count then her final count would come to $1476+81=1557$. He submits that the Returning Officer has committed a fraud on the power so vested in him in not declaring the results in tune with the statutory provisions. Mr. Mangalam has referred to Rule 81 of 'the election rules' to submit that a declaration of result can only be made after taking into account the votes secured by each of the candidate at each of the polling booths and since in the present case the vote secured by the candidates at Booth No.8 has not been taken into account hence the result declared is illegal and is founded on incomplete data. Mr. Mangalam while admitting to the fact that the petitioner has preferred an election dispute as well submits, that it is filed by way of a abundant

precaution and in consideration of the limitation so prescribed under 'the Act' but it would yet not take away the right of the petitioner for invoking the constitutional remedies available to her.

The argument of Mr. Mangalam is seconded by Mr. Srivastava learned counsel appearing for the Commission duly assisted by Mr. Sanjeev Nikesh and who with reference to the counter affidavit filed in the proceedings has submitted that the erring Returning Officer is being proceeded for his lapse. Learned counsel admits that the declaration of result suffers from gross infirmity since the records confirm that a losing candidate has been declared elected. To support his contention Mr. Srivastava learned counsel for the Commission has invited the attention of this Court to the statement made at paragraph 9 of the counter affidavit which contains the details of the votes secured by the two candidates at each of the polling booths which after inclusion of the votes secured at Booth No.8 gives a result in favour of the writ petitioner.

Mr. Shahi learned counsel for the private respondent while reiterating his objections as to the maintainability of the writ petition has submitted that since any intervention would have a consequence of upsetting the result, the appropriate remedy for the petitioner would yet be in an election petition. Learned counsel has referred to a bench decision of this Court reported in **2007(2)PLJR 801 (Harendra**



Kumar Vs. State) to submit that any irregularity in the counting process can only be assailed in an election petition. For the same proposition, learned counsel has referred to a Division Bench judgment of this Court reported in **2009(3)PLJR 933 (Sanjay Kumar Vs. State of Bihar)** and with particular reference to the conclusion drawn by the Court at paragraphs 10 and 11 it is submitted that this Court has held that after declaration of the election result any challenge to the election has to be brought by way of an election petition. Learned counsel has again referred to a judgment of the supreme Court reported in **(1996) 6 SCC 1999 (Danda Rajeshwari Vs. Bodavula Hanumayamma)** to submit that in view of the alternative remedy available to the petitioner by way of election dispute which he has already raised, there is no cause for interfering with the result in a writ jurisdiction. Learned counsel has lastly referred to the judgment of the Supreme Court reported in **AIR 1977 SC 898 (Jai Singh vs. Union)** to submit that the High Court would not enter into disputed questions of fact.

I have heard learned counsel for the parties and I have perused the records.

The facts narrated hereinabove, leaves no room for any doubt that the Returning Officer has committed a serious breach and considering the materials on record, the breach complained of, does

not appear to be a case of bona fide inadvertence. Strictly speaking the case in hand is a litigation generated by the Returning Officer because it does not raise any election dispute rather complains of the abuse of powers by the Returning Officer who has failed in his duty to ensure that the election process is completed in a fair and impartial manner.

The facts are not in dispute rather it is a matter of record that the votes secured at Booth No.8 by each of the candidate was never included in the final result sheet and the results was declared on an incomplete data. It is not a case where the petitioner endeavours to question the election of the private respondent on any of the grounds mentioned in Section 139 of 'the Act' nor does she seek her disqualification or a declaration in her own favour. On the contrary the petitioner while questioning the result sheet prepared by the Returning Officer on the infirmity discussed above, has sought for a writ of mandamus commanding of the respondent authority of the State Election Commission to rectify the error and accordingly correct the result sheet by taking into account the votes secured by the candidates at each of the 16 booths. The petitioner thus merely prays for rectification of the error which has crept in the election result by non inclusion of the votes cast at Booth No. 8.

Article 243O of the Constitution of India read along side the provisions underlying Section 138 (b) of 'the Act' inter alia provides



that no election to any Panchayat shall be called in question except by an election petition. In so far as the case in hand is concerned, there is no challenge to any election rather the complaint is on the procedure followed by the Returning Officer which suffers from admitted infraction. Had there been any dispute on the infraction, perhaps the remedy for the petitioner in such circumstance would have been in an election dispute but then there is no disagreement amongst the contesting parties on the fact that the vote cast at Booth No.8 was not included in the result sheet.

In my opinion, in the undisputed circumstances discussed above where there is no dispute on the abdication of statutory responsibility by the Returning Officer in declaring the result in the manner provided under rule 81 of the Election Rules, relegating the petitioner to the remedy of election dispute would be a hyper technicality and travesty of justice. Even otherwise, the extra ordinary jurisdiction vested in the High Court under Article 226 of the Constitution of India to grant indulgence in the election matters even though circumscribed, is not completely prohibited and the High Court in exceptional circumstances would not shirk from exercising the extraordinary jurisdiction so vested.

The issue regarding exercise of jurisdiction by the High Court under Article 226 of the Constitution of India in election related



matters has been a subject matter of discussion in a number of cases and reference in this regard is made to two of such judgments since reported in **AIR 1952 SC 64 (N.P. Ponnuswami Vs. Returning Officer)** and **AIR 1978 SC 851 (Mohinder Singh Gill Vs. Chief Election Commission)**. The Supreme Court while clearing the decks as regarding the scope of intervention by the High Court in election related matters under Article 226 of the Constitution of India yet has upheld interference but only in exceptional circumstances. Although there are several judgments discussing such scope of intervention but to name of few, I would be referring to the judgments reported in **(1999) 4 SCC 526 (K. Venkatachalam Vs. A. Swamickan & Anr.)** and **(2000) 8 SCC 216 (Election Commission of India Vs. Ashok Kumar)**.

The Supreme Court in the case of Ashok Kumar (supra) while examining the jurisdiction of the High Court under Article 226 of the Constitution of India to issue interim directions after commencement of electoral process, has on examination of a number of judgments including that of **N.P. Ponnuswami and Mohinder Singh Gill** (supra), concluded in paragraph 32 as under:-

"32. For convenience sake we would now generally sum up our conclusions by partly restating what the two Constitution Benches have already said and then adding by clarifying what follows therefrom in view of the analysis made by us hereinabove:

(1) If an election, (the term election being widely interpreted so as to include all steps and entire proceedings commencing from the date of notification of election till the date of declaration of result) is to be called in question and which questioning may have the effect of interrupting, obstructing or protracting the election proceedings in any manner, the invoking of judicial remedy has to be postponed till after the completing of proceedings in elections.

(2) Any decision sought and rendered will not amount to "calling in question an election" if it subserves the progress of the election and facilitates the completion of the election. Anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the election.

(3) Subject to the above, the action taken or orders issued by Election Commission are open to judicial review on the well-settled parameters which enable judicial review of decisions of statutory bodies such as on a case of mala fide or arbitrary exercise of power being made out or the statutory body being shown to have acted in breach of law.

(4) Without interrupting, obstructing or delaying the progress of the election proceedings, judicial intervention is available if assistance of the court has been sought for merely to correct or smoothen the progress of the election proceedings, to remove the obstacles therein, or to preserve a vital piece of evidence if the same would be lost or destroyed or rendered irretrievable by the time the results are declared and stage is set for invoking the jurisdiction of the court.

(5) The court must be very circumspect and act with caution while entertaining any election dispute though not hit by the bar of Article 329(b) but brought to it during the pendency of election proceedings. The court must guard against any attempt at retarding, interrupting, protracting or stalling of the election proceedings. Care has to be taken to see that there is no attempt to utilise the court's indulgence by filing a petition outwardly innocuous but essentially a subterfuge or pretext for achieving an ulterior or hidden end. Needless to say that in the very nature of the things the court would act with reluctance and shall not act, except on a clear and strong case for its intervention having been made out by raising the pleas with particulars and precision and supporting the same

by necessary material.”

The conclusion drawn by the Supreme Court in sub paragraphs (1) to (4) above squarely applies to the issue raised herein.

A division bench of this Court in a case reported in **2010(3)PLJR 578 (N.S. Madhavan Vs. Shyamdeo Prasad)** had an occasion to deal with a similar issue and upon examination of the judicial pronouncement on the issue including the judgment of **N.P. Ponnuswami** (supra), the division bench has concluded that in exceptional circumstances, a writ court is not precluded to exercise its extraordinary jurisdiction where the issue raised rests on abuse of statutory power. Reference is made to the opinion of the Division Bench present in paragraphs 20 and 21 of the judgment, the relevant extract whereof is reproduced hereinbelow for ready reference:-

“20. ...As is luminescent from the decisions in the field and the provisions contained in the 2008 Act and the Rules framed thereunder, an election has to be called in question by filing an election petition. Thus, there is a statutory bar and there is only one remedy. **The issue of rejection or acceptance of the nomination paper can be raised in an election dispute. However, when there are exceptional circumstances the writ court would not refuse to entertain the writ.** If such circumstances exist, the alternative remedy can be by-passed. **For taking the path of departure, there should be circumstances which would justify the same.**”

21. The question that emanates in the case at hand whether the order passed by the learned Single Judge can be treated to be one founded on the base of an exceptional circumstance. On a scrutiny of the order of the learned Single Judge it is evident that the writ petitioner was given a “No Dues Certificate” by the Assistant Manager, Magadh Central Co-operative Bank, Gaya on 25.9.2009. The same



authority before expiry of two days issued another certificate in which it was stated that a certain sum was due. It is worth noting the said certificate was filed by one Satyendra Singh before the Returning Officer. The petitioner was asked to clarify the position. The Returning Officer also asked the District Co-operative Officer to enquire into the matter with regard to issue of the „No Due Certificate“. On 5.10.2009, on an enquiry a certificate was granted by the Managing Director, Magadh Central Co-operative Bank, Gaya to the District Co-operative Officer clearly stating therein that there was no due as against the writ petitioner. It is also interesting to note that all the nomination papers were rejected. As is evincible, the Returning Officer, for reasons best known to him, did not give weightage to the certificate issued by the Managing Director. **When the authority had directed an enquiry and the maze was clear there was no reason to reject the nomination paper. On the contrary, the second certificate that was given at the instance of another is an erroneous one.** Two aspects need to be highlighted. **An incorrect certificate was issued to debar the petitioner from contesting the election, and further all the nomination papers were rejected. This tantamounts to total abuse of exercise of power vested in a statutory authority.** When a statutory authority acts in such a manner, it can be said with certitude that the doctrine of abuse of the process of law comes into play. In fact, it would not be an exaggeration to say it creates a concavity in the system which is governed by ‘Rule of Law’. When the exercise of power is in total disregard of all canons of justice and violative of acceptable norms and manifestly exposes clear abuse of the process of law, a writ court **cannot ignore it.** ” (Emphasis is supplied by me)

The judgment of the Supreme Court relied upon by Mr. Mangalam rendered in the case of **K. Venkatachalam** (supra) again confirms this position. In the said case the appellant before the Supreme Court though was not an elector in the assembly



constituency yet he was declared elected and which was questioned before the High Court under Article 226 of the Constitution of India and his election was set aside resulting in the appeal before the Supreme Court. The Supreme Court in paras 27 and 28 of the judgment has upheld the exercise of jurisdiction by the High Court to unsuit the said appellant and the civil appeal preferred by the returned candidate who had been unsuited by the judgment of the writ court was dismissed by the Supreme Court. The Supreme Court has held that the High Court can exercise its power under Article 226 of the Constitution where there is any act which is against any provision of law or violative of constitutional provisions and when recourse cannot be had to the provisions of 'the Act' for appropriate relief.

The legal position so settled in the judgment of this Court and the Supreme Court, as to the exercise of jurisdiction by the High Court under Article 226 of the Constitution of India puts at rest the preliminary objection of Mr. Shahi regarding the maintainability of the writ petition. The court's have upheld the jurisdiction of the High Court under Article 226 of the Constitution of India to interfere in election related matters though in exceptional circumstances and in my opinion, there cannot be a better instance of an 'exceptional circumstance' then the case in hand.

As rightly canvassed by Mr. Mangalam the act of the



Returning Officer in not taking into account the votes cast in Booth No.8 is an act of fraud on the statutory powers vested in him. In fact such act has left the election process incomplete. A half baked declaration by the Returning Officer in exclusion of the votes cast in Booth No. 8 cannot be held a valid declaration in the eyes of law for until such time that the votes cast in each of the polling booths is taken into account and the result sheet is prepared accordingly, a declaration of result in Form 21 would be an invalid declaration.

The prayer of the petitioner for quashing the result sheet in the circumstances explained above and seeking a mandamus to the election authorities to correct the result sheet after taking into consideration the votes cast in all the 16 booths and for declaration of result accordingly, in my opinion is not in the nature of an election dispute rather adopting the words of the Supreme Court it sub serves the progress of election and facilitates the completion of election process and thus would not amount to calling in question an election. The act of the Returning Officer is a fraud on statutory powers conferred upon him as a Returning Officer. Chapter 10 of the Election Rules discusses the counting process and which is left incomplete by the Returning Officer while declaring the results to the post of Mukhiya, Gram Panchayat, Raj Kansi in the District of Darbhanga.

In the admitted circumstances discussed above, the result sheet prepared in Form 20 (part-2) under rule 76(2) of the election rules present at Annexure-3 as well as the final declaration under Form 21 under Rule 81 of ‘the rules’ brought on record by the Election Commission in their counter affidavit at page 73, is held invalid on grounds that it does not take into account the votes cast at booth no.8 and is accordingly set aside. Consequently, the election result declared in favour of the respondent no.6 to the post of Mukhiya, Gram Panchayat, Kansi is also set aside.

The Election Commissioner and the District Election Officer- cum- District Magistrate, Darbhanga i.e. respondent nos. 2 and 4 herein are directed to take expeditious steps for preparation of result sheet afresh in Form 20 (part 2) under Rule 76(2) of the rules by taking into account the votes cast at all the 16 booths including booth no.8 and for declaration of election results under rule 81 in Form 21 accordingly. Considering the urgency of the matter, it is expected that the process would be completed by the respondent nos. 2 and 4 within two weeks of receipt/production of a copy of this judgment.

The writ petition is allowed.

Bibhash/-

(Jyoti Saran, J)

AFR	
CAV DATE	
Uploading Date	17.8.16
Transmission Date	