

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No. 9400 of 2016

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Binod Singh, S/o Lalita Singh, Resident of Village- Hakimpur, PO- Surkarwalia,
P.S.- Ithari, District Buxar.

.... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Panchayati Raj, Department, Government of Bihar, Patna.
2. The Director, Panchayat Raj Department, Government of Bihar, Patna.
3. The District Magistrate-cum-District Election Officer (Panchayat), Buxar.
4. The District Panchayat Raj Officer, Buxar.
5. The Block Development Officer-cum-Election Officer, Block- Ithari, Buxar.
6. The State Election Commission (Panchayat), Sone Bhawan, Birchand Patel Path, Patna through the State Election Commissioner.
7. The Secretary, the State Election Commission (Panchayat), Sone Bhawan, Birchand Patel Path, Patna.
8. Onkar Nath Ray S/o Sri Sidhnath Ray R/o-Vill- Hakimpur, P.O. Sukarwalia, P.S. Ithari, District Buxar.
9. Meena Devi W/o Bajarangi Yadav Vill- Mangolepur, P.O. Karahajhi, P.S. Ithari, Distt. Buxar.
10. Ranjana Roy, W/o Onkar Nath Rai R/o-Vill.- Hakimpur, PO Sukarwalia, P.S. Ithari, District Buxar.
11. Raj Narayan Singh S/o Not known to petitioner, R/o Vill.- Sukarwalia, P.O. Sukarwalia, P.S. Ithari, District- Buxar.
12. Raj Kumari Devi, W/o Late Surendra Singh, R/o-Vill.- Hakimpur, P.S. Ithari, District- Buxar.
13. Vinay Kumar Ray S/o Shyam Bihari Ram R/o-Vill- Hakimpur, P.O. Sukarwalia, P.S. Ithari, District Buxar.
14. Sharwan Kr Chaudhari S/o Not Known Vill.- Mangolepur, P.S. Ithari, District- Buxar.
15. Surendra Singh S/o Not Known to the petitioner, Vill.- Deoasthapur, P.S. Ithari, District- Buxar.

.... Respondent/s

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Appearance :

For the Petitioner/s	: Mr. Sandip Singh, Advocate
For the respondent no. 9 and 11 to 15	: Mr. Pankaj Kumar Singh, Advocate
For the Respondent no. 8	: Mr. Digvijay Kumar Ojha, Advocate
For the Election Commission	: Mr. Amit Shrivastava, Advocate Mr. Sanjeev Nikesh, Advocate.
For the State	: Mr. K.P. Yadav, GP-11 Mr. Santosh Chandra Bhaskar, AC to GP-11

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CORAM: HONOURABLE MR. JUSTICE AHSANUDDIN AMANULLAH
ORAL JUDGMENT

Date: 13-02-2017



Heard learned counsel for the parties.

The petitioner has moved the Court for quashing of letter of the Secretary, State Election Commission, Patna as contained in Letter No. 4956 dated 31.05.2016 by which he has directed the District Magistrate-cum-District Election Officer (Panchayat), Buxar to declare the result treating the number of votes polled at Booth No. 9, for the post of Mukhiya, to be nil.

Learned counsel for the petitioner submitted that he was also a candidate for the post of Mukhiya of Hakimpur Panchayat under Ithari Block of Buxar District and the poll was held on 06.05.2016 and counting took place on 29.05.2016. He submitted that during counting, it transpired that as per the note and entry made by the Returning Officer of the booth, only 457 voters out of a total number of 589 had cast their vote, but the number of ballot papers found, for the post of Mukhiya was 509 i.e., 50 more than the number of voters who had exercised their franchise. Learned counsel submitted that he had submitted a complaint on the same day to the Returning Officer, but no action was taken. He submitted that when the matter was referred to the State Election Commission, a report was called from the District Magistrate-cum-District Election Officer (Panchayat), who in turn had called for a report from the Returning Officer. Learned counsel submitted that the Returning Officer had



found that there was grave irregularity for which both lodging of F.I.R. and initiation of departmental proceeding have been recommended against the Presiding Officer and three other officers managing the said booth. Learned counsel submitted that when such a situation existed, the State Election Commission was required to go for re-polling at the booth and not going ahead with declaring the result treating all the votes polled at Booth No. 9 for the post of Mukhiya to be nil. He submitted that 457 voters, who had exercised their votes, cannot be said to have not voted and their vote cannot be treated to be nil, as the statutory right of 457 persons cannot be abrogated or put to naught by the State Election Commission. He submitted that once the statute provides the right to vote, such votes have to be taken into account before any declaration of result is made. It was submitted that in the present case, by treating the entire votes as nil, even the 457 genuine voters, who had cast their votes, have been prejudiced, since in effect they have been treated as if they have not voted. Leaned counsel submitted that such action is in violation of the right of the voters concerned and has also caused prejudice to the petitioner inasmuch as, if the entire 457 voters were allowed to take part in re-polling, such number far exceeds the difference between the petitioner, who was placed no. 2 and the winning candidate, the margin being of 132 votes. Learned counsel finally



submitted that the number 457 being much more than the difference between the winning candidate and the votes obtained by the petitioner, has materially affected the election and, thus, the impugned order deserves to be interfered with. Learned counsel submitted that the order impugned is in fact a nullity in the eyes of law, for the reason, that it is beyond jurisdiction, inasmuch as, the State Election Commission does not have the power to nullify the entire votes polled, which included votes which have not been rejected.

Learned counsel for the State Election Commission and the State submitted that the writ petition is misconceived. Learned counsel pointed out that on that particular booth, under one Presiding Officer, election was held for six different posts, including that of Mukhiya, and the total number of registered voters was 589, out of which, as per the entry made by the Presiding Officer and the other officials, 457 voters had cast their votes. It was submitted that with regard to six other posts, the number of ballot papers found did not exceed 457, but for the post of Mukhiya, there was an excess of 50 votes. Learned counsel submitted that there was no report of any malpractice, law and order issue or disturbance with regard to the booth in question during the election and only at the time of counting such discrepancy was noticed. Learned counsel submitted that upon



counting of the number of votes in the booth in question, it was found that in favour of the petitioner, the number of votes were 227 whereas in favour of the person, who was ultimately declared successful i.e., the respondent no. 8, the number was 220. It was submitted that upon taking into consideration the said numbers, as per the total votes polled by the petitioner in all the booths including Booth No. 9, the number came to 1645 and in the case of the respondent no. 8, it was 1770 i.e., a difference of 125 votes. Learned counsel submitted that if the votes of Booth No. 9, in favour of either of the parties was not taken into consideration, the total number of votes obtained by the petitioner would come to 1418 whereas that of respondent no. 8 would be 1550 i.e., a difference of 132 votes. Learned counsel submitted that even if the 50 excess votes polled indicated that 50 persons had wrongly voted and all of them had voted in favour of the returned candidate, then, at best, the presumption would be that 50 votes less were polled by the respondent no. 8, meaning thereby that the final numbers would show the difference in the votes between the petitioner and the winning candidate, after including the votes of the said booth, being reduced from 125 to 75, and if the votes of Booth No. 9 were not counted, the difference would be reduced from 132 to 82. Learned counsel submitted that in any case, the result would not have changed, much less materially affected, to justify any



interference. He submitted that once the Court is convinced that the result would not be materially affected, any interference would not be proper. For such proposition, he relies upon a decision of a Division Bench judgment of this Court in the case of **Heman Rai vs. State Election Commission (Panchayat)** reported as **2011(1) PLJR 570**, the relevant being at paragraphs no. 16 and 18.

“16. We do see merit in the submissions made by Mr. Mangalam. We may note here that the challenge to the election of the appellant was on none of the grounds stated in Clauses (a), (b) and (c) of Sub-section (1) of Section 139 of the Act. The only ground on which it was challenged was improper or irregular counting of the votes at booth Nos. 249 & 250. In our opinion the matter should be governed by Sub-clause (iii) of Clause (d) of Sub-section (1) of Section 139 of the Act. In other words, the election of the appellant could have been avoided had it been materially affected on account of improper or irregular counting of votes. As we have recorded hereinabove, if the benefit of excess and the deficit in the ballot papers were given to the respondent No 5, still he would not have won the election i.e. if the excess of 49 votes were deducted from the total votes counted in favour of the appellant and the deficit of 24 votes were added to the total votes counted in favour of the respondent No. 5, still the appellant would have margin of 41 votes over the respondent No. 5. In other words, still the appellant would have been returned as an elected candidate. Thus, the said irregularity or illegality did not materially affect the result of the election. The Tribunal, therefore, could not have exercised jurisdiction to avoid the election of the appellant. We, therefore, hold that the Tribunal had erred in exercising jurisdiction to avoid the election of the appellant merely on the basis that the counting of votes at booth Nos. 249 and 250 was improper or



irregular.

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18. The learned Single Judge has also erred in rejecting the said plea as being technical. It must be observed that the said plea went to the root of the jurisdiction of the Tribunal and was a substantive plea that required attention. Besides, we have noticed that the learned Single Judge has been carried away by the fact that in the re-poll the respondent No. 5 won the election by a margin of 45 votes. Since we have held that the Tribunal had no jurisdiction to avoid the election of the appellant, as the alleged irregularity did not materially affect the election of the appellant, the subsequent election held pursuant to the direction issued by the Tribunal and the result thereof are of no consequence.”

Learned counsel for the respondent no. 8 as well as respondents no. 9 to 15 have adopted the arguments advanced on behalf of the learned counsel for the State Election Commission.

Having considered the rival contentions, this Court does find substance in the contention of the petitioner that the State Election Commission does not have the power to nullify the entire votes polled at a polling booth and the same may be without jurisdiction. However, the matter is not so simple, for the reason, that the Court has also to be conscious of whether it would have changed the nature or had any effect on the ultimate result so as to materially affect the election process. In the present case, the undisputed fact is that the total number of voters registered at the booth was 598 and at



Booth No. 9, the number of voters who officially cast their vote was 457. It is also a fact that the election for the post of Mukhiya was not held in isolation, rather in tandem with five other posts on the same booth, under the same Presiding Officer. Further, there has been no report or complaint, even by the petitioner, with regard to there being any malpractice, disturbance or use of unfair means during the said poll. At the time of counting, the number of ballots which were found in the ballot box of Booth No. 9 for the post of Mukhiya, was 507 i.e., an excess of 50 from the number of voters who were officially shown to have voted, but still much less than the total number of registered voters at the booth. Once there is nothing on record to show that there was any malpractice, irregularity or disturbance at the booth, it can safely and reasonably be assumed that at least 475 votes which were polled, were genuine. Now the question is as to what should be done with regard to 50 excess votes, in the background of the fact that there is no dispute that 457 genuine voters had exercised their franchise. Thus, even if the excess 50 votes can be assumed to be in favour of the respondent no. 8, the only requirement would be that 50 votes be reduced from the tally of votes polled in his favour. In that view, the number of votes polled at the booth in question by the petitioner would remain as 227 whereas that polled by the respondent no. 8 would be reduced from 220 to 170. Even if 227 in



favour of the petitioner and 170 in favour of the respondent no. 8 is taken into account, upon counting the total votes polled in their favour in all the booths, still the difference would be of 75 votes between the petitioner and the respondent no. 8, meaning thereby that the respondent no. 8 would have won by 75 votes as against the petitioner. This being the factual and admitted position, the Court, while being in agreement with the contention of learned counsel for the petitioner that such an order nullifying all the votes ought not to have been passed, would ultimately not interference in the matter because certainly it is not a fit case where entire re-polling is required as there is no doubt with regard to 457 genuine votes, and at best 50 excess votes, which has to be reasonably dealt with. In the present case, though the most reasonable, fair and logical recourse would have been that the votes of Booth No. 9 in favour of all the candidates was taken into account and then, 50 votes, which were in excess, would notionally have been reduced from the final tally of the winning candidate and then if it was found that by doing so he was no longer the winner, as the second person would then come at the first position, recourse to re-polling was the best and most equitable way to proceed. However, in the present case, as has been discussed in detail earlier, even after the winning candidate (respondent no. 8) bearing the entire brunt and liability of the 50 excess ballots, the



result not changing, the election cannot be said to have been materially affected.

In view thereof, the Court does not find any ground to interfere in the matter and the writ petition is accordingly, dismissed.

It is made clear that the Court has not gone into the issue of maintainability of the writ petition, which was raised by the learned counsel for the State Election Commission, in view of the same not being required to be gone into in the present case, as the writ petition has even otherwise been dismissed on merits.

(Ahsanuddin Amanullah, J.)

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