

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.19823 of 2016

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Ajay Kumar Kushwaha, Son of Sri Nathuni Prasad Singh, Resident of village-
Dumduma Hasanpur, P.O. Nandlalpur, P.S. Vaishali, District - Vaishali

... .. Petitioner

Versus

1. The Election Commission of India through the Chief Election Commissioner, Niravachan Bhawan, Ashok Road, New Delhi
2. The Chief Election Commissioner, Election Commission of India, Niravachan Bhawan, Ashok Road, New Delhi
3. The Sub Divisional officer, Vaishali - cum - Returning Officer (Legislative Council Election), Vaishali, District - Vaishali
4. Subodh Kumar, Son of Harinath Rai, Resident of village- Mohammadpur, P.O. Bavantoli, P.S. Goraul, District - Vaishali

... .. Respondents

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Appearance :

For the Petitioner	:	Mr. S. B. K. Mangalam Ms. Anita Kumari
For E. C. I.	:	Mr. Siddhartha Prasad
For Respondent No. 4	:	Mr. P. K. Verma, Sr. Adv. Mr. Suman Kumar Jha

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CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

JUDGMENT AND ORDER
ORAL

Date : 06-11-2017

The prime issue, involved in the present writ application, is as to whether the present writ application, filed under Article 226 of the Constitution of India, seeking setting aside of the election of respondent no. 4, as Member of State Legislative Council, Bihar, from Vaishali Local Authority Constituency, can be maintained.

2. The petitioner was, admittedly, a candidate, who had contested the said election, held in the year 2015. The respondent no. 4 was declared as a returned candidate. The petitioner seeks



setting aside of the election of respondent no. 4, in the light of the provisions of Section 100 (1) (d) (i) and (iv) of the Representation of Peoples Act, 1951, on the ground that the said respondent no. 4 had failed to disclose his full criminal antecedents in the affidavit, filed along with the nomination papers, and, thus, committed corrupt practice of undue influence, as contemplated under Section 123 (2) of the Representation of Peoples Act, 1951 (hereinafter referred to as the Act).

3. It appears from the record that the Registry of this Court had pointed out defect in the writ petition on the point of its maintainability. It was on the request made on behalf of the petitioner that the matter has been listed under the heading “For Orders (On Office Notes)” to consider the question of maintainability.

4. The respondent no. 4 has entered appearance by way of vakalatnama. Counter affidavit has been filed on behalf of respondent no. 4. The Election Commission of India has also filed a counter affidavit.

5. I have heard Mr. S. B. K. Mangalam, learned Counsel appearing on behalf of the petitioner, Mr. P. K. Verma, learned Senior Counsel, appearing on behalf of respondent no. 4, and Mr.



Siddharth Prasad, learned Counsel representing the Election Commission of India.

6. The respondent no. 4, by filing I. A. No. 7698 of 2017, has taken specific plea against maintainability of this application filed under Article 226 of the Constitution of India.

7. Mr. P. K. Verma, learned Senior Counsel, appearing on behalf of respondent no. 4, raising preliminary objection, has submitted that Article 329 (b) of the Constitution of India, puts complete bar on calling in question an election to either House of the Parliament or to the either House of the Legislature of State, by any authority other than before a Tribunal by way of an election petition. He has placed reliance on Supreme Court's decisions, in the cases of **N. P. Punnuswami v. The Returning Officer, Namaknhaal Constituency, Namakhal, Salem, District and Others (AIR 1952 SC 64)**, **Mohindar Singh Gill and Another v. Chief Election commissioner, New Delhi and Others**, reported in (1978) 1 SCC 405, **Krishna Ballabh Prasad Singh v. Sub Divisional Officer, Hilsa -cum- Returning Officer, and Others**, reported in (1985) 4 SCC 194, **C. Subrahmanyam v. K. Ramanjaneyullu and Others**, reported in (1998) 8 SCC 703, and **Election Commission of India v. Ashok Kumar and Others**, reported in (2000) 8 SCC 216.



8. Mr. Siddharth Prasad, learned Counsel appearing on behalf of the Election Commission of India, while broadly following the submissions advanced on behalf of respondent no. 4, has placed reliance on a Supreme Court's decision, in the case of **Kisan Shankar Kathore v. Arun Dattatray Sawant and Others**, reported in (2014) 14 SCC 162.

9. Both, learned Senior Counsel appearing on behalf of the respondent no. 4 and learned Counsel appearing on behalf of the Election Commission of India, have submitted that even if the facts asserted in the writ application are taken to be true, no case of exceptional or extra-ordinary circumstance is made out for this Court to interfere with the election of respondent no. 4, as Member of State Legislative Council, Bihar.

10. In reply, Mr. S. B. K. Mangalam, learned Counsel appearing on behalf of the petitioner, has relied on Supreme Court's decisions, in the cases of **K. Venkatachalam v. A. Swamickan and Another**, reported in (1999) 4 SCC 526 and **Smt. Bharati Reddy v. The State of Karnataka and Others**, reported in 2017 (9) SCALE 156. He has also relied on the decision, in the case of **Kisan Shankar Kathore** (supra), to submit that the non-disclosure of the information by the respondent no. 4 had materially affected the result of the election and, therefore, in the



absence of any dispute over the facts, this Court may exercise extra-ordinary power available under Article 226 of the Constitution of India. Reliance has also been placed by Mr. Mangalam in the case of **Sri Mairembam Prithviraj @ Prithviraj Singh v. Shri Pukhrem Sharatchandra Singh**, reported in **2017 (1) PLJR (SC) 50**, and Division Bench decisions of this Court, in the cases of **Sanjay Kumar @ Sanju Yadav v. The State of Bihar and Others**, reported in **2009 (3) PLJR 933** and **N. S. Madhavan v. Shaymdeo Prasad**, reported in **2010 (3) PLJR 578**.

11. Before I answer the question of maintainability of the writ application, I may briefly take note of certain facts, which are not in dispute. The election was, admittedly held on 07.07.2015, and the results were announced on 10.07.2015. The respondent no. 4 was declared elected. It is the case of the petitioner that respondent no. 4, along with his nomination papers, had given details of 7 (seven) criminal cases pending against him. There was another criminal case pending against him, namely, Vaishali Industrial Area Police Station Case No. 15 of 2013, registered on 12.02.2013, for the offences punishable under Sections 147, 148, 379, 427, 241 and 120B of the Indian Penal Code and Section 27 of the Arms Act, in respect of which, respondent no. 4 did not



make declaration in the affidavit at the time of filing of the nomination papers. It is the case of the petitioner that he did not have any knowledge about the concealment of this fact of the pendency of the said criminal case against respondent no. 4. By the time, he could learn about the said criminal case, the statutory period of 45 days was already over and, therefore, he could not file any election petition, calling in question the election of respondent no. 4.

12. I must take note of the fact this is not in dispute that the said criminal case was pending against respondent no. 4, as on the date of filing of the nomination papers. This is also not in dispute, as has already been noticed, that this case does not find place in the list of the criminal cases mentioned in the affidavit, along with the nomination papers filed by the respondent no. 4. The said Vaishali Industrial Area Police Station Case No. 15 of 2013 came to be registered under Section 156 (3) of the Code of Criminal Procedure, 1973, on the basis of a complaint petition filed in the Court of the learned Chief Judicial Magistrate, Vaishali, at Hajipur. A copy of the complaint petition has also been brought on record. This is also not in dispute that except that the name of respondent no. 4 figures in the list of accused persons, there is no



specific allegation against him in the body of the complaint; rather, his name does not figure in the body of the complaint.

13. I need not comment upon the merit of the said criminal case in the present proceeding. I have discussed this in order to consider rival contentions on behalf of the parties as to whether a case of extra-ordinary and exceptional circumstance is made out for interference by this Court in exercise of power under Article 226 of the Constitution of India, despite specific constitutional bar, under Article 329 (b) of the Constitution of India, which has been repeatedly interpreted by the Supreme Court in catena of decisions, some of which I will be referring to in the present judgment and order.

14. There is statement made in paragraph 16 of the writ application asserting ignorance of the petitioner about the pendency of the said criminal case against respondent no. 4 and concealment by respondent no. 4 about the pendency of the said criminal case in the affidavit, filed along with the nomination papers. There is not even a whisper as to when and how the petitioner could learn about the said concealment and pendency of the criminal case against the respondent no. 4.



15. For the benefit of reference, the statement, made in paragraph 16 of the writ application, is being re-produced herein below:-

“16. That the petitioner could get to know about the concealment of full criminal antecedents by the Respondent No. 4 only after the election and by that time statutory limit of 45 days was over and hence the petitioner could not espouse his remedy in election petition jurisdiction.”

16. Before I deal with the decision of the Supreme Court, relied on by the respondents, I intend to take note of the decisions, which have been relied on by learned Counsel appearing on behalf of the petitioner to assert that this writ application is maintainable and this Court, in the facts and circumstances of the case, should exercise power under Article 226 of the Constitution of India.

17. As has been noticed, the first judgment on which Mr. Mangalam has placed reliance on is in the case of **K. Venkatachalam** (supra). It is true that in the said case, the Supreme Court, upheld the exercise of power under Article 226 of the Constitution of India by the Madras High Court, but in the entirely different facts and circumstances of the case. In the said case, the candidate was found to have impersonated himself in order to be eligible to contest the election. The Supreme Court,



while upholding the decision of the Madras High Court, in the case of **K. Venkatachalam** (supra), recorded in paragraphs 26 and 27 as follows:-

“26. The question that arises for consideration is if in such circumstances High Court cannot exercise its jurisdiction under Article 226 of the constitution declaring that the appellant is not qualified to be member of the Tamil Nadu Legislative Assembly from Lalgudi Assembly Constituency. On the finding recorded by the High Court it is clear that the appellant in his nomination form impersonated a person known as 'Venkatachalam s/o Pethu', taking advantage of the fact that such person bears his first name. Appellant would be even criminally liable as he filed his nomination on affidavit impersonating himself. If in such circumstances he is allowed to continue to sit and vote in the Assembly his action would be fraud to the constitution.

27. In view of the judgment of this Court in the case of *Election Commission of India v. Saka Vankata Rao* (AIR 1953 SC 210), it may be that action under Article 192 could not be taken as the disqualification which the appellant incurred was prior to his election. Various decisions of this Court, which have been referred to by the appellant that



jurisdiction of the High Court under Article 226 is barred challenging the election of a returned candidate and which we have noted above, do not appear to apply to the case of the appellant now before us. Article 226 of the Constitution is couched in widest possible term and unless there is clear bar to jurisdiction of the High Court its powers under Article 226 of the Constitution can be exercised when 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 the appropriate relief. In circumstances like the present one bar of Article 329 (b) will not come into play when case falls under Articles 191 and 193 and whole of the election process is over. Consider the case where the person elected is not a citizen of India. Would the Court allow a foreign citizen to sit and vote in the Legislative Assembly and not exercise jurisdiction under Article 226 of the Constitution?"

18. A close reading of the Supreme Court's decision, in the case of **K. Venkatachalam** (supra), it is easily evincible that there the persons who had questioned the election of the returned candidate were found to be not eligible to file an election petition. In the present case, the petitioner himself had contested the



election and he could have challenged the election by way of filing an election petition. The supreme Court, in the case of **K. Venkatachalam** (supra), had found the returned candidate to be suffering from disqualification to contest the election.

19. In the case of **Sri Mairembam Prithviraj @ Prithviraj Singh** (supra), the Supreme Court was dealing with an election petition. It is the case of the petitioner that in view of incorrect information having been furnished by respondent no. 4, along with nomination papers, acceptance of nomination papers by the Returning Officer itself was illegal and, therefore, there would have no necessity of any further proof that the result of the election was materially affected.

20. The question in the present case is that whether a case of exceptional or extra-ordinary circumstance is made out, requiring this Court to exercise power under Article 226 of the Constitution of India by setting aside the election of respondent no. 4 on the ground that he failed to furnish the details of one of the criminal cases pending against him, namely, Vaishali Industrial Area Police Station Case No. 15 of 2013.

21. It is not that respondent no. 4 did not disclose any of the criminal case pending against him. He disclosed 7 (seven) of them pending against him. Mere non-disclosure of one of the



criminal cases in the information so furnished, in my view, does not constitute exceptional or extra-ordinary circumstance for this Court to interfere. It is not a case of disqualification of a candidate to contest the election as was in the case of **K. Venkatachalam** (supra). It is also not a situation here where the petitioner did not have any *locus standi* to question the election of respondent no. 4, which was the case in **Smt. Bharati Reddy** (supra). The petitioner himself was a contesting candidate. In the case of **Kisan Shankar Kathore** (supra) also, the Supreme Court, while dealing with an election petition, observed, in paragraph 38, as follows:-

“38. At the same time, it would not be possible for the Returning Officer to reject the nomination for want of verification about the allegations made by the objector. In such a case, when ultimately it is proved that it was a case of non-disclosure and either the affidavit was false or it did not contain complete information leading to suppression, it can be held at that stage that the nomination was improperly accepted. Ms. Meenakshi Arora, learned senior counsel appearing for the Election Commission, right argued that **such an enquiry can be only at a later stage and the appropriate stage would be in an election petition as in the instant case, when the election is challenged.**”



(Emphasis is added)

22. In view of above discussions, in my view, this writ application, under Article 226 of the Constitution of India, is not maintainable and is dismissed accordingly.

23. I. A. No. 7698 of 2017 stands disposed of accordingly.

(Chakradhari Sharan Singh, J.)

Prabhakar Anand/-

AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	21-11-2017
Transmission Date	N/A

