

IN THE HIGH COURT OF JUDICATURE AT PATNA
Letters Patent Appeal No.287 of 2018

In

Civil Writ Jurisdiction Case No.11499 of 2017

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Ram Roop Devi, Wife of Sri Mankeshwar Sah, Resident of Village-Patahi, P.O. and P.S. Patahi, District-East Champaran at Motihari.

... .. Appellant/s

Versus

1. The State of Bihar through the District Magistrate, East Champaran at Motihari, District-East Champaran at Motihari.
2. The Block Development Officer, Patahi District-East Champaran at Motihari
3. Krishna Mohan Kumar, Son of Sri Shiv Narayan Thakur, Resident of Village-Patahi, Tole-Nanhakar, P.O. and P.S. Patahi, District-East Champaran at Motihari.

... .. Respondent/s

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Appearance :

For the Appellant/s	: Mr. S.B.K. Mangalam, Advocate
	: Mr. Ravi Ranjan, Advocate
	: Mr. Kislay Raj, Advocate
For the State	: Mr. Dharendra Kumar, AC to AAG-6
For the Respondent No. 3:	Mr. S.N.P. Singh, Advocate
	: Mr. Sanjay Kumar No. 7, Advocate
	: Mr. Anant Kumar Mishra, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE JUSTICE SMT. ANJANA

MISHRA

ORAL JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 11-01-2019

We have heard Sri S.B.K. Mangalam, Mr. Ravi Ranjan and Mr. Kislay Raj, learned counsels for the appellant, Sri S.N.P.



Singh, Mr. Sanjay Kumar and Mr. Anant Kumar Mishra, learned counsels for the respondent no. 3 and Sri Dharendra Kumar, learned Assistant Counsel to Additional Advocate General-VI for the State.

This appeal arises out of an election petition that was filed assailing the election of a Mukhiya of Village-Patahi East, Block-Patahi, District-East Champaran under the provisions of the Bihar Panchayat Raj Act, 2006. The said Election Petition No. 6 of 2016 filed by the appellant challenging the election of the respondent no. 3 was dismissed by the Election Tribunal, Raxaul at East Champaran, Motihari.

A writ petition challenging the same was filed by the appellant that has also been dismissed giving rise to the present appeal.

Sri S.B.K. Mangalam, learned counsel for the appellant has advanced his submissions primarily on the ground that this was a case of an improper acceptance of the nomination paper of the respondent no. 3 who had not filled up column no. 4 (kha) and column no. 5 disclosing the details of assets and liabilities of the respondent no. 3 which was completely blank and, therefore, such a nomination paper could not have been accepted as this was a vital defect. It has



also been urged that in view of the provisions of Section 137 of the Bihar Panchayat Raj Act, 2006 read with Section 139 thereof the results of the election have been materially affected by such improper acceptance of nomination.

It is next contended that the appellant for the first time came to know through the disclosure made in the written statement of the respondent no. 3 that an alleged affidavit dated 04.03.2016 had been filed to supplement the said lacuna containing details of assets of respondent no. 3, which affidavit according to him was non-existent and the original affidavit was never brought on record. The Tribunal as well as the learned Single Judge have completely misconstrued this plea on behalf of the appellant and have not dealt with this fact of non-production of the original affidavit and its proof by the respondent no. 3, as such, the impugned order and judgment are vitiated.

It is the contention of Sri Mangalam that the plea having been taken by the third respondent in the written statement, the burden lay on him to prove that such an affidavit was on record or otherwise had been taken into consideration at the time of the acceptance of the nomination. In the absence of any such evidence or proof thereof, the



presumption of the nomination of the respondent no. 3 being valid is a perverse finding recorded by the Tribunal and as accepted by the learned Single Judge. It has been emphasized by Sri Mangalam that the burden of proving of a fact which is in the special knowledge of the respondent no. 3, namely, the affidavit filed by him, lay on the respondent no. 3 which burden was never discharged inasmuch as neither the original affidavit was produced nor the Assistant Returning Officer who is stated to have received the said affidavit was summoned by the respondent no. 3 in the witness box to establish that such an affidavit was ever tendered.

Sri Mangalam has also urged that the said affidavit on which reliance was placed by the respondent no. 3 is a manipulated document, and is a photostat copy, which was not proved with the aid of the original. It is urged that the said affidavit appears to have been prepared later on and that is why it was not part of the record of the nomination papers that was summoned by the Tribunal and received by it. To establish this manipulation, he further submits that four affidavits have been filed by the respondent no. 3 which were available on record and they were all stamped through a franking machine whereas the disputed affidavit on which reliance was placed



by the respondent no. 3 is manually stamped for which there was no valid reason, inasmuch as, if all the other affidavits tendered by the respondent no. 3 were stamped through a franking machine, the manual stamping of the disputed affidavit clearly indicates that it was prepared later on.

To Supplement the aforesaid argument, it has further been submitted that the entire documents pertaining to the nomination had been summoned by the Tribunal including the affidavits filed by the respondent no. 3 and such compilation of documents, the list whereof was available on record did not contain even a copy of the affidavit that was relied on by the respondent no. 3 in his defense. Thus, the existence of the document in the records of the Office of the Returning Officer nowhere establish the existence of the said affidavit and secondly, the evidence recorded by the Tribunal as well as by the learned Single Judge do not conform to the provisions of law relating to evidence, and consequently such improper acceptance of nomination was sufficient to strike down the election of the respondent no. 3.

He has relied on the judgments in the case of **Sri Mairembam Prithviraj @ Prithviraj Singh vs. Shri Pukhrem Sharatchandra Singh** reported in **2017(1) PLJR**



SC 50 and the judgment in the case of **Resurgence India vs. Election Commission of India and Anr.** reported in **2014(14) SCC 189**. He has also placed reliance on the judgment in the case of **Sushil Kumar vs. Rakesh Kumar** reported in **2004(1) PLJR SCC 261** to explain the provisions of the Evidence Act as applicable on the facts of the present controversy.

We had proceeded with the matter on 4th of January, 2019 and we had noted the submissions as follows:-

“Heard Shri S.B.K. Mangalam, learned counsel for the appellant, Shri S.N.P. Singh, for the Respondent No. 3 and the learned counsel for the State of Bihar Shri Dharendra Kumar, Assistant Counsel to Additional Advocate General No. VI.

2. The contentions raised in this appeal are primarily three fold; firstly, that the Tribunal and the learned Single Judge have both proceeded on the assumption of the existence of the affidavit which otherwise was only a photocopy and was not available with the Returning Officer at the time of the acceptance of the nomination of the respondent. The second ground taken is that the results have been materially affected on account of such improper acceptance of the nomination of the respondent and thirdly the findings which have been recorded are not based on any primary evidence corroborated by any material secondary evidence. Hence, the order of the Tribunal and that of the learned Single Judge suffer from perversity, hence this appeal.



3. The rebuttal to the same has been made by Shri Singh, learned counsel for the respondent contending that there was no such plea raised before the Tribunal about the non-existence of the affidavit and to the contrary the evidence of the Returning Officer, that of the respondent and also that of the Notary affidavit clearly established that the information tendered in the affidavit in support of the nomination paper had led to the acceptance of the nomination of the respondent and not only this the appellant himself had accepted that all the nomination papers of the candidates had been found to be in order. It is urged that no such objection was taken before the Returning Officer and rather it was a plea taken for the first time in the Election Petition about the nomination paper having not been filled up along with an affidavit as desired under the rules. It is urged that even this contention stood disproved with the evidence on record and apart from this in the absence of any proper verification of the plaint, the Election Petition itself was invalid as has been found by the Tribunal as well as by the learned Single Judge. It is submitted that if the Election Petition itself was not verified in terms of the rules, there was no occasion for the Tribunal or the learned Single Judge to have entered into any other submission and, therefore, the Tribunal as well as the learned Single Judge have rightly rejected the claim of the appellant on this ground as well.

4. It is further submitted that in the absence of any such material which could be construed as having materially affected the result, then the order of the Tribunal as well as of the learned Single Judge does not require any interference.



5. The arguments could not conclude today.

6. Put up on Monday (07.01.2019).”

Sri S.N.P. Singh, learned counsel for the third respondent has vehemently contested the aforesaid submissions and his first objection is that the election petition was not maintainable as the plaint had not been verified in conformity with Rule 108 of the Bihar Panchayat Raj Rules, 2006. It is his submission that a perusal of the verification clause of the plaint would indicate that all the contents have been verified in one stroke which is not in terms of Rule 108 read with the provisions of Order 4 Rule 1 read with Order 6 Rule 15 of the Civil Procedure Code. The verification clause of the plaint leaves blanks and in the end declares that the paragraphs 1 to 21 of the plaint are by way of submissions which the election petitioner believes to be true. The column of information being true to the knowledge of the election petitioner, the information derived from the records and the information received by the petitioner are all blank. It is in this context that the Tribunal as well as the learned Single Judge has rightly held that there was no substantial compliance of verification and this was not a minor discrepancy or a curable



defect and, therefore, applying the principles of Order 7 Rule 11 the plaint itself ought to have been rejected. It is therefore the contention of Sri Singh that in fact the claim could not have been tried at all and which has been decided as an issue against the appellant clearly recording that there was a serious defect in the verification clause.

He then contends that there was no pleadings in the plaint even by way of amendment to contest the existence of the affidavit which was a defense set up by the answering respondent at the threshold in his written statement. No pleadings were brought forth and, therefore, to raise issues of fact before this Court would not be permissible.

To substantiate this plea Sri Singh also contends that the nomination paper of all the thirteen candidates were found valid by the Returning Officer who accepted the nomination papers of all the thirteen candidates in Form- VII. Out of the said thirteen candidates, two withdrew their nomination and, therefore, eleven remained in the fray. At that stage, no objection was taken by the appellant-petitioner to the nomination of the answering respondent no. 3 that was also found to be valid.



The sole ground taken in the election petition was that there was no disclosure of the assets as compulsorily required in terms of Section 125 A of the 2006 Act read with Rule 39 of the 2006 Rules in the form that was submitted. No challenge was raised in respect of the affidavit which had been filed by the answering respondent to supplement the nomination papers disclosing his assets through the affidavit which is also of the same dated 4th of March, 2016.

Sri Singh then contends that the burden lay on the election petitioner to substantiate his pleadings. Firstly there were no pleadings of such facts and secondly the affidavit had been tendered and accepted with the nomination papers before the Assistant Returning Officer who could have been summoned by the election petitioner for verification thereof. The contention that burden lay on the answering respondent, and it was not discharged, is not correct inasmuch as it is evident from the proceedings of the election petition that the answering respondent moved an application on 3rd of January, 2017 for summoning of the Assistant Returning Officer and for allowing the answering respondent to move an interrogatory to have a response from the Returning Officer about the acceptance of such an affidavit and also as to why



the original affidavit was being withheld. It is urged by Sri Singh that it was categorically urged in the said application that the Block Development Officer who was the Returning Officer was in collusion with the appellant-petitioner and, therefore, it was necessary to allow the answering respondent to interrogate the said Officer on this point. This application was resisted by the appellant-petitioner and the Tribunal accepted the objection and rejected the application on behalf of the answering respondent vide order dated 2nd of May, 2017. Thus, the answering respondent was ever ready to discharge his burden and as a matter of fact the claim of the answering respondent stood proved as the very execution of the affidavit by the Oath Commissioner was established by the Oath Commissioner who was produced as a Court witness who verified the execution of the affidavit on 4th of March, 2016.

He further submits that the Returning Officer in his deposition clearly admitted that whatever he was saying was his own information as he had no time to interact with the Assistant Returning Officer with regard to the papers of nomination. This deposition therefore did not all amount to accepting the non-existence of the affidavit as the deponent did no seem to be aware about the facts of nomination at all.



Sri Singh contends that it was the Assistant Returning Officer who had received the said affidavit along with the nomination papers, and not the Returning Officer, but at the same time the nominations were scrutinized and were found to be valid. He contends that the nomination could not have been declared to be valid in the absence of such declaration and, therefore, the nomination of the answering respondent together with all the candidates were found to be valid without any objection. There is therefore a valid presumption under law of the existence of facts relating to the validity of the nomination papers which could not be dislodged by any cogent evidence led by the appellant.

He further submits that apart from that, this issue of fact was not even pleaded nor raised and, therefore, it cannot be raised first time through the oral arguments in the Letters Patent Appeal where also such pleadings were missing. He therefore submits that this argument also does not hold water.

Sri Singh then urges that once there were eleven candidates in the fray, then it was the duty of the election petitioner to have arrayed all the candidates so as to arrive at a finding as to how the results would be materially affected. Thus non joinder of necessary parties was a serious defect and



no material was adduced to establish as to how the results were materially affected except the bald allegation of the absence of information relating to the assets of the answering respondent which otherwise was not correct. Thus, the results of the election have not been materially affected as urged and, therefore, no ground is made out for the interference.

Applying the law cited at the Bar, it is evident that the verification clause of the plaint has been very casually filled up and is a serious defect. The argument advanced about the non-existence of the affidavit could not have been appreciated without the plaint having been verified on the basis of the records that were available. There is no swearing in the plaint that the allegations in the plaint were based on record. It is correct that the form which had been filled up by the respondent no. 3 did contain columns 4(kha) and 5 made for disclosure of asset and liabilities as blank but once the defense had been set up of the existence of a supplemental affidavit, then the burden lay on the election petitioner to dislodge the same. Instead the election petitioner examined the Returning Officer whose deposition and cross-examination fairly disclosed that he had no contact with the Assistant Returning Officer who had actually received the nomination



papers as well as the affidavit moved by the respondent no. 3 to supplement the aforesaid blank columns.

The contention of Sri Singh appears to be correct that the attempt made by the respondent not 3 to interrogate the said issue further was resisted by the election petitioner himself. The withholding of the affidavit was an issue that was clearly raised by the respondent no. 3 but the election petitioner did not make any effort to dislodge the stand of the respondent no. 3 that the said affidavit had been received by the Assistant Returning Officer.

Sri Singh is therefore correct in his submission that the fact of receipt of the affidavit was in the knowledge of the Assistant Returning Officer who could have been summoned by the election petitioner to examine him about the receipt of the said affidavit. The burden therefore lay on the election petitioner as the onus had been discharged by the respondent no. 3 coupled with the fact that the execution of the affidavit was proved through the production of the Oath Commissioner who deposed as a Court witness. Thus, the existence of the affidavit and its execution stood established from the evidence on record. It was therefore a clear case where the respondent no. 3 through his deposition and the deposition of other



witnesses did substantiate his written defense. Not only this, Sri Singh is right in his contention that once the nomination papers were accepted by the Returning Officer as valid with no objection from the election petitioner or any person then there is a clear presumption of fact regarding the validity of the nomination of the respondent no. 3. It is not the case of the election petitioner that the assets as disclosed in the disputed affidavit by the respondent no. 3 are incorrect or otherwise false.

In our considered opinion, the fact of the execution of the affidavit was proved and established and its filing before the Assistant Returning Officer was clearly pleaded supported by the deposition of the respondent no. 3 whose request to further get it interrogated was resisted by the election petitioner himself as is evident from the facts narrated above. In these circumstances, there is no reason to draw an adverse inference against the respondent no. 3 and hold that the respondent no. 3 did not discharge his onus of bringing the fact of the disclosure of assets through an affidavit.

Apart from this, the issue raised with regard to the affidavit having not been stamped through a franking machine, was not an issue pleaded or advanced either before the learned



Single Judge or before the Election Tribunal. This question of fact, therefore, cannot now be entertained to create any doubt. Moreso, when it is urged on behalf of the respondent no. 3 that the affidavit was prepared on the same day when the facility of franking machine was not available at the time when the affidavit was tendered and, therefore, a manual stamp was pasted on it. This issue even otherwise is not worth believing once the Oath Commissioner himself accepted the execution of the affidavit who had been examined as a Court witness. Whatever doubt did exist therefore stood dissolved with the deposition of the Oath Commissioner.

Then again Sri Singh is right in his submission that if there were only two candidates in the fray, this issue of improper acceptance of nomination paper by itself would have gained significance for accepting the arguments about the results having been materially affected, but in the instant case there were eleven candidates whose nomination papers were accepted and who contested the elections. In this context, Sri Singh is right that in order to establish that the results had been materially affected, all the candidates ought to have been arrayed in the election petition and the number of votes polled



by them that would have been a relevant factor to determine as to whether the results have been materially affected or not.

In the absence of any such pleadings in the election petition and in the absence of necessary parties, the argument of learned counsel for the appellant, therefore, does not appear to be correct as no attempt was made to establish as to how the results were materially affected when eleven candidates had contested the election.

In the background aforesaid, we find that the election petition was bound to fail on all scores and, accordingly, in view of the conclusions drawn hereinabove, we find no merit in this appeal, which is, hereby, dismissed.

(Amreshwar Pratap Sahi, CJ)

(Anjana Mishra, J)

Vikash/-

AFR/NAFR	AFR
CAV DATE	NA
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