

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No. 148 of 2019

Shahina Khatoon @ Sahina Khatun, Wife of Md. Arshad Alam @ Md. Arshad, Resident of Malahbigha, P.O. and P.S.- Islampur, District- Nalanda.

... .. Petitioner/s

Versus

1. The State of Bihar through the Secretary, Panchayti Raj, Government of Bihar, Patna.
2. The State Election Commission through the State Election Commissioner, Bihar, Patna.
3. The District Magistrate cum District Election Officer, Biharsharif, District- Nalanda.
4. The Sub-Divisional Officer, Hilsa, District- Nalanda.
5. The Civil Surgeon, Biharsharif, District- Nalanda.
6. The In-Charge Medical Officer, Primary Health Centre, Islampur, District- Nalanda.
7. Mokhtar @ Md. Mokhtar Anssari, Son of Late Abdul Rahim Ansari, Resident of Mohalla- Malah Bigha, P.S.- Islampur, District- Islampur.
8. The Superintendent PMCH, Patna.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Niraj Kumar, Advocate
For the State	:	Mr. Ajay, GA 5
		Mr. Pratik Kumar Sinha, AC to GA 5
For the SEC	:	Mr. Amit Shrivastava and
		Mr. Girish Pandey, Advocates
For the Private Respondent/s	:	Mr. Ravi Ranjan and
		Mr. Ranjeet Kumar Choubey, Advocates

CORAM: HONOURABLE MR. JUSTICE AHSANUDDIN
AMANULLAH

ORAL JUDGMENT

Date : 21-01-2020

Heard learned counsel for the petitioner; learned GA 5 for the State; learned counsel for the State Election Commission (hereinafter referred to as the 'Commission') and learned counsel for the respondent no. 7.



2. The petitioner has moved the Court for the following relief:

“That this an application for issuance of appropriate writ/order to set aside the order dated 29.11.2018, as passed by the State Election Commission, Bihar in Case No. 19/2018, whereby and where under the learned State Election Commission, Bihar exercising its power conferred under Section 18 (2) of the Bihar Municipal Act, 2007 has been pleased to declare the petitioner disqualify for holding the post of Councillor/Ward, Ward No. 14, Islampur Nagar Panchayat, District-Nalanda.”

3. The relevant facts required for consideration of the issue involved in the present writ petition is that the petitioner was elected to the post of Ward Councilor of Ward No. 14 of Islampur Nagar Panchayat (hereinafter referred to as the ‘Nagar Panchayat’) in the district of Nalanda in the year 2017. Thereafter, the respondent no. 7, who was the Ward Councilor prior to the petitioner and had lost the election to the petitioner in the year 2017, filed complaint before the Commission on 05.06.2017, alleging that the petitioner had three living children prior to 04.04.2008 and thereafter, in the year 2009, another child was born which clearly made her ineligible to contest the election. Based on the same, the Commission, after getting an enquiry done from the District Authorities through the District Magistrate, Nalanda has passed final order on 29.11.2018 in Case No. 19 of 2018, by which



under Section 18(2) of the Bihar Municipal Act, 2007, the petitioner has been declared to be ineligible and accordingly, she has been removed as Ward Councilor of Ward No. 7 of the Nagar Panchayat.

4. Learned counsel for the petitioner submitted that the initial complaint of the respondent no. 7 was based on a birth certificate of Moni Parween, the 3rd female child of the petitioner whose date of birth was recorded as 06.01.2008 and the name of the mother was Mun Khatoon and the father Md. Arshad. It was submitted that the same cannot be said to be any evidence against the petitioner for her name has not been written as that of the mother, she being Shahina Khatoon @ Sahina Khatun and not Mun Khatoon. Learned counsel submitted that such birth certificate was not got issued by the petitioner and it is for the respondent no. 7 to disclose as to from which source he has procured the same. It was further submitted that even otherwise, in such an important certificate nobody would get the name of the mother wrongly written as it would later on adversely affect the child which no parent would ever do. It was further submitted that if at all, the certificate was correct, then the same having been issued on 22.06.2010 and the election being held in the year 2017, the petitioner could not have even imagined that she should



incorrectly disclose her name. It was further submitted that the certificate has been issued by the local Nagar Panchayat on 22.06.2010 i.e., after two and a half years of the birth which has been recorded as 06.01.2008, which also raises serious questions about its veracity and authenticity. Learned counsel submitted that along with the complaint copy of the beneficiaries of Anganwari Centre No. 181 showing Moni Parween to be a beneficiary and her name being entered at serial no. 25 showing her date of birth as 06.01.2008 was also enclosed. Learned counsel submitted that mere perusal of the same would indicate that there is overwriting and cutting in such entry which clearly cannot be said to be reliable. It was further submitted that in the column of name of father-mother, it was written Md. Arshad Khatoon and even there, there is interpolation as something which was written has been erased and then Khatoon has been written, which is clearly visible to the naked eye. Learned counsel submitted that the complaint was forwarded by the Commission to the District Authorities of Nalanda seeking a report and in the report, after enquiry by the DCLR, Hilsa, a report was submitted which did not express any opinion and has only considered the allegations made by the respondent no. 7 and the defence of the petitioner, but has not given any clear-cut finding. Learned counsel submitted that the



consideration based on the same by the State Election Commissioner in the impugned order is equally vague and even the State Election Commissioner himself in the impugned order, has written that the report submitted by the District Administration 'could be believed'. Learned counsel submitted that once the State Election Commissioner himself was not sure of the report as he has commenting that such report of the District Administration could be believed, clearly the controversy becomes such which could not have been adjudicated by the Commission/State Election Commissioner. It was submitted that once the facts become highly contested/disputed, the Commission is left with no option but to relegate the parties to a competent Court/Tribunal or a fact finding body competent to decide such contentious issues after taking evidences and till such time, the Commission cannot take a decision on such complaint either *suo motu* or otherwise. For such proposition, learned counsel relied upon a Full Bench decision of this Court in **Rajani Kumari vs. State Election Commission** reported as **2019 (4) PLJR 673**, the relevant being at paragraphs no. 183 and 184. Learned counsel submitted that all the so called materials which have been produced by the respondent no. 7 ultimately could not convince even the fact finding authority and, thus, no clear-cut finding was given and even before the State



Election Commissioner those documents have not been found to be fully reliable due to which the State Election Commissioner has adopted a shortcut method by relying upon the enquiry report submitted by the District Administration which he has opined can be accepted. Learned counsel submitted that such casual passing of orders which have strict penal consequences is even otherwise impermissible in law. It was submitted that once after facing an election the petitioner has been elected, any attempt to dislodge her would amount to negating the will of the public/electorate and, thus, against public interest and public policy. Learned counsel submitted that the onus was on the other side to come with unimpeachable evidence against the petitioner in support of his contention, failing which there was no option left to the Commission but to relegate the parties to the competent Court/Tribunal for getting a clear-cut finding on facts before proceeding in the matter. It was submitted that the Commission has notified the date of the by-election for 9th February, 2020.

5. Learned counsel for the State submitted that there are strong indications with regard to the petitioner not being eligible to contest the election as at least her fourth child was born after the cut-off date i.e., 04.04.2008 and the consequences which have resulted are justified. With regard to the decision of the Full Bench



in **Rajani Kumari** (supra), it was submitted that the same was decided on 17.09.2019 and the order impugned has been passed prior to that on 29.11.2018.

6. Learned counsel for the Commission submitted that the statute has given power to the Commission to go into such aspect and rightly a decision has been taken. However, to a direct query of the Court as to how such action could have been taken in light of the Full Bench decision in **Rajani Kumari** (supra), where it has categorically been held that in the absence of unimpeachable evidence and the facts being disputed, the parties have to be relegated to the competent Court/Tribunal or a fact finding body competent to decide such contentious issues after taking evidences and till such time, the Commission cannot take a decision, learned counsel was not in a position to justify or defend the order impugned.

7. Learned counsel for the respondent no. 7 submitted that there is sufficient evidence to indicate that the petitioner has filed a wrong affidavit stating that she had no child born after 04.04.2008, as her 4th son was born after that date and, thus, she becomes ineligible for contesting the election. It was submitted that during enquiry many issues have cropped up for which there is no explanation by the petitioner. It was further submitted that a



very strong presumption, even at this stage, is available to indicate that the petitioner has not been truthful with regard to disclosing the date of birth of her children as she herself has claimed that the eldest daughter was born on 19.02.2003 followed by a son born on 02.11.2003, thereafter another daughter born on 01.07.2004 and finally the 4th son born on 09.04.2005. It was submitted that mere perusal of the aforesaid dates would indicate that the difference between the 1st and 2nd child is less than nine months; between the 2nd and 3rd child is exactly eight months and between the 3rd and 4th child, nine months. It was submitted that all this, coupled with the evidence which has been brought on record by the respondent no. 7 as also before the authorities, clearly indicates that at least the 4th child has been born after the cut-off date 04.04.2008. It was further submitted that for maintaining purity of the system, such conduct should not be condoned.

8. Having considered the facts and circumstances of the case and submissions of learned counsel for the parties, the Court finds that as far as the settled legal position is concerned, the order impugned of the Commission cannot be sustained. Clearly, the fact with regard to whether the petitioner has given birth to a 4th child after 04.04.2008 lies in a grey area as there is strong indication, both in favour of such stand as also against the same. Moreover,



circumstantial evidence with regard to there being gap in the birth of the four children of the petitioner also gives rise to a strong probability that the date of birth of the four children, as disclosed by the petitioner, may not be correct. However, the only thing which cannot be denied is that the issue is highly disputed and even on facts, there are materials which support the case of either the petitioner or the respondent no. 7. Thus, the same is not a case where there was unimpeachable material before the Commission to pass such an order. At the cost of repetition, the Court may indicate that in the impugned order itself, the State Election Commissioner has proceeded to pass the order on the basis of the report submitted by the District Administration which he himself refers to as being fit to be relied upon (“*maan liya ja sakta hai*”). Thus, in such view of the matter, especially, the answer to question no. 1 of the reference at paragraph no. 183 which is squarely on this issue, supports the contention of the petitioner that in the background of disputed questions of fact, such contentious issue could not have been decided by the Commission. For the purpose of convenience, paragraphs no. 183 and 184 of the judgment are quoted hereinbelow:

“183. I, therefore, find that the cumulative impact of the entire discussion in the separate judgments would take us to answer the reference in the following terms:-



Question No. 1- Whether the State Election Commission will have power to consider disqualification of a candidate after election as such Election Commission is constituted for conduct of elections?

184. We are in agreement that the State Election Commission has got power under sub-section (2) of Section 18 of the Bihar Municipal Act, 2007 and sub-section (2) of Section 136 of the Bihar Panchayat Raj Act, 2006 to consider an issue of pre or post-election disqualification of a candidate subject to a caution which we have pointed out in our judgments in respect of a case which is in the nature of a purely election dispute and then a matter which cannot be decided without adducement of evidence by a competent court and authority in accordance with law. The State Election Commission shall entertain and consider the 'disqualification' issues on the basis of the unimpeachable materials placed before him. Whether a complaint brought before the Commission either suo-motu or by any other person, the Commission shall at the first instance enquire whether it is a purely election dispute and only when it is found that the dispute brought before it is not a purely election dispute, the Commission shall proceed to consider the same on the basis of unimpeachable materials. Whenever a disputed question of facts and a contentious issue is brought before the Commission as a ground and basis to render a candidate disqualified, the Commission would be required to relegate the parties to a competent court/tribunal or a fact finding body competent to decide such contentious issues after taken evidences and till such time the Commission shall not take a decision on such complaint either suo-moto or otherwise"

9. With regard to the contention of learned counsel for the State that the said judgment was delivered on 17.09.2019 and the order impugned is dated 29.11.2018, the Court would only



indicate that the same would not make any difference when the matter is being considered by the Court today for the simple reason that even in the cases before the Full Bench, the writ petitions were of the year 2014 and the Full Bench having answered the reference, the matters were sent back to the respective Benches for adjudication. This clearly indicates that the Full Bench has merely clarified the legal position and, therefore, has sent the matters back to the respective Benches for adjudication even with regard to issues which arose in the year 2014. Thus, the decision of the Commission dated 29.11.2018, but necessarily, and even otherwise, would be amenable to the decision of the Full Bench in **Rajani Kumari** (supra).

10. For reasons aforesaid, the order impugned dated 29.11.2018 passed by the Chief Election Commissioner in Case No. 19 of 2018, cannot be sustained and is accordingly set aside. The petitioner stands reinstated on the post of Ward Councilor of Ward No. 14 of the Nagar Parishad.

11. Having done that, the Court would not leave the issue open ended for the reason that it finds there is strong indication of the dates of birth disclosed by the petitioner with regard to her four children not being correct. This is the main issue which requires to be sorted out. Under normal circumstances, the



Court would not have gone beyond taking a call with regard to the order impugned, but in view of the materials which are now before the Court, in the considered opinion of the Court, it is required to take a holistic view in the matter keeping in mind that purity in public life has to be maintained and statutory provisions not manipulated, twisted or misused by unscrupulous elements.

12. Thus, the Court would require the petitioner to get her 3rd and 4th children examined by a Medical Board which shall submit a report to the Election Commission and based on the same and hearing the parties and taking into consideration the law settled with regard to the margin which is permissible in the report of the Medical Board, the Commission shall pass fresh orders in the case. The petitioner, along with her 3rd and 4th children shall appear before the Superintendent, Patna Medical College and Hospital on 17th February, 2020 at 11:00 AM in his office. The same has been agreed by learned counsel for the petitioner. There the 3rd and 4th child of the petitioner shall be duly identified by the petitioner. They shall also have with them Photo Identity Cards issued by any Government Organization and even before the Superintendent, Patna Medical College and Hospital, their photographs would be taken, matched and then counter signed, both by the concerned child as well as the petitioner. Thereafter,



the Superintendent would constitute a high powered Medical Board comprising of an Orthopaedic, a Radiologist and a Dentist as also other members at the discretion of the Superintendent. They shall not be below the rank of Associate Professor. The required tests would be conducted within the next three working days and a report shall be submitted by the Superintendent, Patna Medical College and Hospital to the State Election Commissioner under sealed cover latest by 25th February, 2020. The State Election Commissioner shall thereafter give copy of the same to the petitioner and permit her to assist in the matter and after giving her reasonable opportunity of hearing, fresh reasoned order shall be passed by the State Election Commissioner, latest by 31st March, 2020.

13. By election for the seat of the petitioner shall not be held on 09.02.2020 and shall abide by the fresh order which shall be passed by the State Election Commissioner in the present matter.

14. For the sake of convenience, let the Superintendent, Patna Medical College and Hospital be impleaded as respondent no. 8. Necessary correction be made in the cause title of the writ petition by learned counsel for the petitioner during the course of the day.



15. Learned counsel for the State accepts notice on behalf of the newly added respondent no. 8.

16. The writ petition stands disposed off in the aforementioned terms.

17. Before parting, the Court would only observe that the present order has been passed in the peculiar facts and circumstances of the case, basically, in view of the Court being persuaded to take an approach not confined to mere technicalities of law but for an overall public purpose, for securing ends of justice and most importantly, for ensuring that for public posts, no manipulation or abuse should be permitted to occur and at least should not be allowed to be perpetuated.

(Ahsanuddin Amanullah, J.)

P. Kumar

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