
(2012) 07 JH CK 0202
In the Jharkhand High Court
Case No : L.P.A. No. 420 of 2011

Basanti Devi

APPELLANT

Vs

The State of Jharkhand and Others

RESPONDENT

Date of Decision : 24-07-2012

Acts Referred:

Limitation Act, 1963 — Section 14

Citation : (2012) 4 JCR 671

Hon'ble Judges : Prakash Tatia, C.J.;Jaya Roy, J

Bench : Division Bench

Advocate : V. Shivnath and Mr. P. Mukhopadhyay, for the Appellant; V.P. Singh Mr. A.K. Sahani, Sumeet Gadodia and Rajesh Shankar, (G.A.), for the Respondent

Judgement

1. Record of Election Commission was summoned and has been returned back. Heard learned counsel for the parties.
2. The appellant is aggrieved against the order dated 19.10.2011 passed by the learned Single Judge in W.P. (C) No. 299 of 2011 whereby the writ petition of the petitioner-respondent was allowed.
3. The brief facts of the case are that the election of Mukhiya of Gram Panchayat (village Headman) under the provisions of Jharkhand Panchayati Raj Act, 2001 was held for Arari Gram Panchayat on 6th December, 2010. After counting of votes, for which, procedure has been prescribed in Jharkhand Panchayati Raj (Election) Rules, 2001, a certificate of election was issued in Form 22, as provided under Rule 84 of the Rules of 2001 in favour of the writ petitioner-respondent. However, that certificate dated 29.12.2010 was cancelled by the Election Officer by impugned order (Annexure-1 annexed with the L.P.A.) dated 30.12.2010 and the appellant was declared elected.
4. Learned Single Judge following the decision of Division Bench of Patna High Court delivered in the case of Sanjay Kumar @ Sanju Yadav Vs. The State of Bihar & others passed in L.P.A. No. 229 of 2008 held that the respondents-

authority could not have recalled the said certificate and could not have declared the appellant as elected, once the result is declared. Learned Single Judge was also of the view that any dispute with respect to the election and its declaration of result, the only remedy is to prefer an Election Petition. But as is clear from the ratio of the order dated 19th October, 2011, the Returning Officer had no jurisdiction to cancel the certificate of election issued in favour of writ petitioner-respondent.

5. Learned counsel for the appellant vehemently submitted that a bare perusal of the pleadings, as averred in the writ petition, it is clear that petitioner nowhere said in his entire writ petition that she secured highest votes in the election and one of the candidates who secured highest votes could have been declared elected under sub-rule 1 of Rule 83 and certificate in Form 22 can be issued only in favour of that person who is declared elected under Sub-rule 1 of Rule 83 of Rules, 2001. It is submitted that a bare perusal of the record will show that the appellant secured the highest votes, therefore, certificate in Form 22 Rule 83 could have been issued in favour of the appellant and since the earlier certificate dated 30th December, 2010 in favour of the respondent-writ petitioner was not issued in terms of Sub-Rule 1 of Rule 83 of Rules, 2001, therefore, that certificate was issued wholly without jurisdiction. Further, it is submitted that, when the facts are clear and the petitioner wants to take benefit of illegal order then in that situation, the learned Single Judge could not have interfered in the impugned order, which is wholly without jurisdiction as well as will result in perpetuating the illegality. Learned counsel for the appellant placed heavy reliance upon a judgment of the Hon''ble Supreme Court delivered in the case of M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa, and drew our attention to the powers of the High Court, which according to the said judgment, are inherent and plenary and are unlimited also, if not restricted, the High Court can pass any appropriate order being Court of Record. Learned counsel for the appellant also placed heavy reliance upon another recent judgment of the Hon''ble Supreme Court delivered in the Case of Margret Almeida & Ors Vs. Bombay Catholic Coop. Housing Society Limited & Ors. reported in 2012 (2) SC 265 wherein the Hon''ble Supreme Court held that:

if on account of act of one party persuading the court to pass an order resulting in one party gaining an advantage which it would not have otherwise earned; or the other party suffering an impoverishment which it would not have suffered; such order should be reviewed and modified.

6. With the help of above judgments, learned senior counsel submitted that the result of the impugned order is certainly an unwanted advantage to the writ petitioner as well as certainly a grave injury to the appellant who secured highest votes in the election, who is appellant. Therefore, in that situation in the light of the authority pronounced by the Hon''ble Supreme Court, impugned order passed by learned Single Judge may be set aside. Learned counsel for the

appellant very fairly submitted that the appellant submitted an application for recounting, but in fact, in the present election process neither there was need of any recounting nor any recounting was ever conducted. It is further submitted that the application for recounting was filed under wrong impression or wrong advice and the Returning Officer instead of proceeding for recounting proceeded to correct the mistake, which was committed by him.

7. Learned counsel for the contesting respondent-petitioner submitted that the process of election was over with the declaration of result, therefore, all disputes could have been raised and decided only in Election Petition. And as per the impugned order passed by the Returning Officer himself, after declaration of election result in favour of the writ petitioner, the Returning Officer recounted the votes and passed the impugned order. The Returning Officer had no jurisdiction to entertain application for recounting after declaration of election results, and therefore, the order of cancellation of petitioner's election was wholly without jurisdiction. It is also submitted that if the judgment impugned is set aside, it will bring into order which is wholly without jurisdiction.

8. Mr. Sumeet Gadodia, learned counsel for the State Election Commission controverted the pleas of learned counsel for the appellant and submitted that recounting of the votes was done on the application field by the appellant, for recounting of votes and in consequence thereof, the impugned order was passed.

9. From the facts referred above, it is clear that the process of election was started under the provisions of Jharkhand Panchayati Raj Act, 2001 and particularly in accordance with the provisions and Rules of 2001 framed under the same Act. Once a certificate is issued in favour of a candidate under Form 22 in accordance with Rule 84 of the Act of 2001, then that declaration is final and can be annulled only by order of Election Tribunal or the Court authorized to entertain election petition. After declaration of result of election by the Returning Officer, he becomes functus officio and the Returning Officer, neither can entertain application for recounting nor can cancel the declaration of result and consequential certificate.

10. Learned counsel for the appellant submitted that the certificate issued in favour of the writ petitioner was wholly without jurisdiction.

11. We are of the considered opinion that there is lot of difference between "order wholly without jurisdiction" and in "illegal order". An authority having jurisdiction by virtue of law, if passes an illegal order that order cannot be an order "without jurisdiction". Such order is illegal order. An authority who has a jurisdiction to pass order also has a jurisdiction to pass order which may ultimately found illegal but that is not the order passed by an authority who had no jurisdiction. Therefore, in our opinion, the order declaring result of election and issuance of certificate in favour of writ petitioner by the Returning Officer, while discharging his duties under the Jharkhand Panchayati Raj Act, 2001, and the rules framed thereunder, even if it was in favour of a wrong person then also

it was declared and issued by exercise of power within his jurisdiction subject to its illegality which can be examined by the appropriate forum, who has jurisdiction to examine that illegality.

12. It is well settled law that all election disputes should be resolved only by a procedure provided by the Acts and Rules under which elections are conducted. The exclusion of the election disputes is express and clear from the Act of 2001 and the rules framed thereunder. This is well settled law and which is well settled in the entire country that all election disputes should be raised and resolved through election petitions only when remedy is provided under the Act and Rules which provides for the Election Petition.

13. The Hon''ble Supreme Court in the case of M.V. Elisabeth (Supra) held that the High Courts in India are superior Courts of record having original and appellate jurisdiction and they have inherent and plenary power and these powers are restricted when those jurisdiction and powers are expressly and impliedly barred and subject to appellate or discretionary jurisdiction of the Supreme Court, apart from the cases where the jurisdiction of the High Court is expressly barred the High Court has unlimited jurisdiction, in our opinion jurisdiction to limit their own power. We would like to quote paragraph 66 of the said judgment, which is as under:

66. The High Courts in India are superior court of record. They have original and appellate jurisdiction. They have inherent and plenary powers. Unless expressly or impliedly barred, and subject to the appellate or discretionary jurisdiction of this Court, the High Courts have unlimited jurisdiction to determine their own powers.

(Emphasis supplied)

14. Therefore, in view of the said judgment of the Hon''ble Supreme Court, when a power of the High Court has been limited by any statute lawfully then in that situation the High Court is slow in exercising even equitable writ jurisdiction and will not use the power of that authority, in which, such power has been vested by statutory provisions framed under the Constitution of India.

15. Here in this case, as we have already observed, the order passed by the Returning Officer giving certificate in Form-22 under Rule 84 of the Rules of 2001 cannot be said to be wholly without jurisdiction. We are of the considered opinion that if the certificate was wrongly issued or illegally issued in favour of the writ petitioner-respondent, then only course open for the appellant to file election petition. Learned counsel for the appellant vehemently submitted that the writ petitioner in his writ petition did not mention that she secured the highest votes and, therefore, for want of pleadings, the certificate given in favour of the respondent-writ petitioner on the face of it is absolutely without jurisdiction. As we have earlier stated, if declaration and certificate have been made issued in favour of any person then it may be illegal but not such declaration is without jurisdiction in above facts.

16. When the Court finds that there is no jurisdictional error and the Court is of the view that alternate remedy is available then the Court should not comment on the merits of the case. In this case, as we have already observed that it is a matter of election and declaration of result under the Act of 2001 and, therefore, the Court having no jurisdiction to enter into the factual aspect of the matter, the court should avoid to look into election record and matter can be left for the election tribunal. The distinction is required to be drawn between the "ordinary matters" and "election matters" and in view of the catena of authorities of the Hon"ble Supreme Court restricting the Court in exercising its jurisdiction in the election mater, in a fact situation, where an effective alternate mode has been prescribed by the Act and Rules itself. Therefore, going deep into the facts by proving the record is not permissible and this court cannot decide who secured more votes?

17. At this juncture, it will be relevant to mention here that Hon"ble Supreme Court in the case of Margret Almeida (Supra) has held as under:

The erroneous conclusion of the Division Bench cannot operate to the prejudice of the plaintiffs, who successfully demonstrated before this Court that the order of the Division Bench cannot be sustained. The settled principle of law is that the act us curiae neminem gravabit- "act of the court shall not harm anybody.

18. Hon"ble Supreme Court in the said case considered the earlier judgment of the Supreme Court delivered in the case of South Eastern Coalfields Ltd. Vs. State of M.P. and Others, , portion of which has been quoted in the said judgment is also quoted herein below:

27. That no one shall suffer for an act of the court is not a rule confined to an erroneous act of the court; the act of the court embraces within its sweep all such acts as to which the court may form an opinion in any legal proceeding that the court would not have so acted had it been correctly appraised of the facts and the law. The factor attracting applicability of the restitution is not the act of court being wrongful or mistake or error committed by the court; the test is whether on account of an act of the party persuading the court to pass an order held at the end as not sustainable has resulted in one party gaining an advantage which it would not have otherwise earned; or the other party has suffered a impoverishment which it would not have suffered but for the order of the court and the act of such party.

19. In this case, the subject matter is the order dated 30.12.2010 (Annexure-1, annexed to the L.P.A) which was passed by the Returning Officer canceling the declaration of result and certificate of declaration in Form-22 under Rule 83 of the Act of 2001 and not the election result. There is no provision under the Act of 2001 or the Act of 2001 by which any power has been given to the Returning Officer to review its decision once he has declared the result and issued the certificate in Form-22. Such review was not permissible. Power to review of a decision of an Administrative Authority or Court is also a creature of statute and

unless such power is given to the such authority it cannot be exercised even in the name of correction of mistake. After declaration of result, the Returning officer become ex-officio and, therefore, in fact, the order dated 30.12.2010 was rightly held to be wholly without jurisdiction. At this juncture, it would be relevant to mention that it was not a case of illegality in the order dated 30.12.2010 but it was a case passing of the order wholly without jurisdiction and, therefore, the learned Single Judge has rightly undone the wrong committed by the authority.

20. It will be relevant to be mention here that in the impugned order dated 30.12.2010, it is mentioned that after one hour of the declaration of result, an application was submitted by the appellant for recounting and that application was entertained and recounting was done. However, learned counsel for the appellant's stand is that it was not a case of recounting but it was an application for making correction in declaration of the result. Be that as it may, that is also a question of fact and learned counsel for the Election Commission has submitted that not only application for recounting was moved but it was entertained and recounting was conducted and thereafter, order dated 30.12.2010 was passed. As per the Rule 81 of the Rules of 2002, any application for recounting of votes can be submitted but it can be submitted before declaration of result of election under Rule 83. Therefore, the Returning Officer had no jurisdiction to recount the vote after declaration of result of the election.

21. In view of the above reasons, this L.P.A is dismissed. However, we are making it clear that if law permits and if any Election Petition is filed by the appellant in proper form, then any of our observations will not prejudice anybody for the issue which has not been decided because of the reason that by us we have not enquired into the issue, who had secured more votes and declaration of result in favour of respondent is legal or illegal. We examined the legality of the order of cancellation of result of election and that cancellation was found to be wholly without jurisdiction.

22. Learned counsel for the appellant submitted that the appellant bonafidely approached this Court and consumed the time of the court in litigation and by this time the limitation for filing the election petition has expired. If it is so, then the appellant may move an appropriate application for condonation of delay and may take the help of Section 14 of the Limitation Act provided such is permissible in election petitions.

In view of the reasons mentioned above, the L.P.A. Is dismissed.