

(2016) 02 RAJ CK 0124

In the Rajasthan High Court

Case No : Civil Writ Petition Nos. 16070, 18246, 18830, 13812, 17981, 18978/2015, Civil Writ Petition No. 964/2016, Civil Writ Petition Nos. 6846, 19022, 13528, 8686, 9105, 9970, 11779, 13054, 13059, 13063, 13541, 13615, 13617, 13642, 13643, 13652, 1

Bhupendra Singh Hada and Others

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 11-02-2016

Acts Referred:

Orissa Panchayat Samiti Act, 1959 — Section 44-A, Section 44-L, Section 45-B
Rajasthan Panchayati Raj Act, 1994 — Section 19(1), Section 38(4), Section 39, Section 43

Citation : (2016) 1 WLN 423

Hon'ble Judges : Alok Sharma, J.

Bench : Single Bench

Advocate : Suresh Pareek, Sr. Advocate, Dharmendra Jain, Rajvir Sharma, Satish Khandelwal, Naina Saraf, R.K. Kasana, N.C. Sharma, Tanveer Ahmed, P.C. Dewanda, Mahesh Gupta, Gaurav Gupta, Sanjay Mehrishi, R.K. Daga, Lokesh Sharma, Sashi Kant Saini, Sahilesh P. Sharma

Final Decision : Allowed

Judgement

Alok Sharma, J.—1. The issue in all the petitions is as to whether the Chairpersons/Members of the Panchayati Raj Institutions can be removed, proceeded against in an enquiry under Section 39 of the Rajasthan Panchayati Raj Act, 1994 (hereinafter "the Act of 1994") read with Rule 23 of the Panchayati Raj Rules, 1996 (hereinafter "the Rules of 1996") and/or suspended under Section 38(4) of the Act of 1994 in respect of pre-election disqualifications.

2. Counsel for the petitioners have submitted that the issue referred to above is covered on all fours by the Full Bench judgment of this Court in the case of Smt. Sameera Bano v. State of Rajasthan [, 2007 (2) RLW 1674] wherein it was held that an elected Sarpanch/Member of the Panchayat, cannot be proceeded against by the government for alleged pre-election disqualification in an administrative

enquiry or removal in the exercise of powers under Section 39 read with Section 19(1) of the Act of 1994. It has been submitted that the same issue was subsequently adjudicated by the Single Bench of this Court, following the Full Bench judgment aforesaid, in the case of Seema Devi Tomar v. State & Ors. [, 2008 (2) RLW 1764 (Raj.)]. It has been submitted that various election petitions against the elected Chairpersons and Members of the Panchayati Raj Department are pending as provided for under the Act of 1994 as also are First Information Reports on allegations of forgery in obtaining qualifications making the candidates eligible for the election, yet the State Government is seeking to initiate parallel statutory enquiry in respect of the same alleged pre-election disqualifications/forgeries and in the course thereof has even suspended the elected Chairpersons and Members of the Panchayati Raj Institutions by resort to Section 38(4) of the Act of 1994 in a manner wholly illegal and arbitrary. The very maintainability of enquires under Section 39 of the Act of 1994 and Rule 23 of the Rules of 1996 and suspension under Section 38(4) of the Act of 1994 for reason of alleged pre-election disqualification has been impugned.

3. Mr. Anurag Sharma, AAG appearing for the respondents has relied upon the judgment of the Apex Court in the case of Rabindra Kumar Nayak v. Collector, Mayurbhanj, Orissa & Ors. [, (1999) 2 SCC 627] to contend that the judgment of the Full Bench of this Court in the case of Smt. Sameera Bano (Supra) is per incuriam. He submitted that a similar issue arose before the Apex Court where the question formulated was whether for impugning the election of a returned candidate only an election petition under Section 44-A of the Orissa Panchayat Samiti Act, 1959 (hereinafter "the Act of 1959") was maintainable on ground detailed in Section 44-L or proceedings under Section 45-B of the Act of 1959 for the same purpose would also be maintainable. Sections 44-A, 44-L and 45-B of the Act of 1959 read as under:

Section 44-A.

No election of a person as a member of a Samiti held under this Act shall be called in question except by an election petition presented in accordance with the provisions of this Chapter.

Section 44-L.

(1) The Election Commissioner shall declare the election of a returned candidate void, if he is of the opinion--

(a) that such person committed during or in respect of the election proceedings a corrupt practice as specified in section 4-N;

(b) that such person was declared to be elected by reason of the improper rejection or admission of one or more votes or for any other reason was not duly elected by a majority of lawful votes;

(c) that such person was disqualified for election under the provisions of this Act;

(d) that any nomination paper has been improperly rejected; or

(e) that there has been any non-compliance with, or breach of any of the provisions of, this Act or the rules made thereunder.

(2) The election shall not be declared void merely on the ground of any mistake in the forms required thereby or of any error, irregularity or informality on the part of the Officer or Officers charged with carrying out the provisions of this Act or of any rules made thereunder unless such mistake, error, irregularity or informality has materially affected the result of the election.;

Section 45-B.

(1) Whenever it is alleged that any member of a Samiti is or has become disqualified, or whenever any such member is himself in doubt whether or not he is or has become disqualified such member or any other member may and the Chairman at the request of the Samities shall, apply to the District Judge, having jurisdiction over the place where the office of the Samiti is situated, for a decision on the allegation or doubt.

(2) The District Judge after holding an enquiry in the prescribed manner shall determine whether or not such member is or has become disqualified and his decision shall be final.

(3) Pending such decision the member shall be entitled to act as if he was not disqualified."

4. The AAG submitted that it was held by the Apex Court in the above referred case that while an election petition under Section 44-A of the Act of 1959 could be filed only by a candidate who need not be a member of the Samiti but an application under Section 45-B of the Act of 1959 could be filed by a member of the Samiti, the Chairman of the Samiti at the request of the Samiti or any other member. And whereas in an application under Section 44-A of the Act of 1959, a candidate could claim not only that a declaration be made that the election of all or any of the returned candidates was void but also could seek a further declaration that he himself or any other candidate was duly elected, proceeding under Section 45-B of the Act of 1959 were not concerned with either declaring the election void or granting any consequential declaration as to who was duly elected. In the aforesaid context, it was held that even though there was some overlapping between Section 44-A and Section 45-B of the Act of 1959, the two Sections were different in their core content as also procedure and therefore the remedy of laying a challenge to an election under Section 44-A of the Act of 1959 was not to the exclusion of an enquiry by a District Judge under Section 45-B of the Act of 1959 as to the disqualification of a member. The AAG submitted that on analogy, an enquiry under Section 39 of the Act of 1994 read with Rule 23 of the Rules of 1996 in respect of a pre-election disqualification would be available even if an election petition could inter alia could be filed under Section 43 of the Act of 1994 read with Rule 22 of the Rules of 1996 on the very same grounds at

the instance of an aggrieved party. He submitted that a vibrant democracy cannot countenance representative elected on forged eligibility nor can this Court in the exercise of its equitable extraordinary jurisdiction come to their rescue.

5. Heard. Considered.

6. For one, I am of the considered view that this Court sitting signally cannot hold that the judgment of the Full Bench of this Court in the case of Smt. Sameera Bano (Supra) is per incuriam. Aside of the aforesaid, the aforesaid judgment is well considered, based on the Constitution Bench judgment of the Apex Court in the case of Election Commission, India v. Saka Venkata Rao [, AIR 1953 SC 210] and sets out in detail multiple reasons why in respect of pre-election disqualifications only an election petition under Section 43 of the Act of 1994 read with Rule 23 of the Rules of 1996 is maintainable to the exclusion of an enquiry under Section 39 of the Act of 1994 read with Rule 23 of the Rules of 1996. Further the contention of the AAG with regard to the issue in the writ petition being covered by the judgment of the Apex Court in the case of Rabindra Kumar Nayak (Supra) is untenable. The judgment was rendered by the Apex Court (two Judges) in the context of the scheme of the Orissa Panchayat Samiti Act, 1959. The scheme of the Act of 1994 as applicable to Rajasthan is different, of note being the fact that enquiry envisaged under Section 45-B of the Act of 1959 was through a District Judge while in the present case it is at the instance of the State Government. The separation of powers under the Constitution cannot countenance parallel proceedings on the same cause of action before both the judicial branch and the executing branch. Disputes as to qualification to contest an election being conferred by Section 43 of the Act of 1994 read with Rule 80 of the Rules of 1996 on the Election Tribunal by way of an election petition, the power to decide similar disputes cannot be conferred on the executive by an enquiry under Section 39 of the Act of 1994 read with Rule 23 of the Rules of 1996. The AAG's argument of representative elected on forged eligibility criterion is emotive and attractive but has to be balanced with the potential mischief of the Government of the day targeting the Sarpanch's unpalatable for extraneous reasons. Where a statute provides for judicial determination of a pre-election dispute, it cannot be eclipsed by the side-wind of executive determination. The executive is not without remedy and can invoke both a writ of quo warranto and criminal proceedings whereon in the event of framing of a charge the elected representative can be suspended where the offence be one of moral turpitude. In this view of the matter, I am of the considered view that there is no plausible ground/reason to overlook the authoritative pronouncement of the Full Bench in the case of Smt. Sameera Bano (Supra). Consequently, the writ petitions are liable to succeed.

7. The petitions are accordingly allowed. The enquiry under Section 39 of the Act of 1994 read with Rule 23 of the Rules of 1996 and suspension of elected members for allegations of pre-election disqualification under Section 38(4) of the Act of 1994 except where charges have been framed for offences of moral

turpitude are quashed.

8. It is however clarified that the State Government however would be free, if warranted in specific cases, to conduct only a fact finding enquiry for taking other proceedings in accordance with law including that of lodging a FIR. It is also made clear that for post election misconduct, the State Government will be entitled to take proceedings for removal of the delinquents and suspend the Chairpersons/Members of the Panchayati Raj Institutions by resort to Sections 39 and 38(4) of the Act of 1994. Finally in the event of elected Chairpersons/Members being charged for an offence involving moral turpitude even in respect of the period prior to the elections, the State Government would be free to suspend such Chairpersons/Members of Panchayati Raj Institutions under Section 38(4) of the Act of 1994.

9. A copy of this order be placed in each file.