
(2009) 03 PAT CK 0085
In the Patna High Court
Case No : CWJC No. 5948 of 2007

Gazala Khatoon

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 18-03-2009

Acts Referred:

Citation : (2009) 03 PAT CK 0085

Final Decision : Dismissed

Judgement

Ramesh Kumar Datta, J.—Heard learned Counsel for the petitioner, learned Counsel for respondent No. 6 and learned Counsel for the State.

2. The petitioner seeks quashing of the order dated 24.3.2007 passed by the Munsiff-III, Chapra in Election Case No. 5/48/2006, by which he has rejected the petition dated 3.2.2007 for recalling P.W. 4, who allegedly is the custodian of the application for recounting of votes which has not been exhibited.

3. The petitioner, respondent No. 6 and 7 other candidates had contested the election on the post of Mukhiya of Olhanpur Gram Panchayat. Respondent No. 6 was declared as elected candidate. The petitioner filed the above election petition claiming that as per the actual results, the petitioner had secured 650 votes whereas respondent No. 6 had obtained only 512 votes, but on account of manipulations by the Returning Officer and other officials, respondent No. 6 was declared elected. In the election petition an allegation is made that knowing the corrupt approach of the Returning Officer, the petitioner filed a petition for recounting of votes in her presence. The Returning officer refused to give receipt of the petition filed for recounting, upon which the petitioner complained to the Election Commissioner and the District Election Officer-cum-District Magistrate, Chapra, but all in vain. No such application for recounting under Rule 79 forms part of the list of documents of the petitioner nor was it produced before the settlement of issues and only after three witnesses of the petitioner have been examined, a petition for recounting was kept in the safe custody of the Court. Thereafter P.W. 4, who is the husband and election agent of the petitioner, was

examined. Subsequently, the petition for recall of witness was filed on 3.2.2007 stating that the petition for recounting which is in the safe custody of the Court has not been formally exhibited and since the same was in the custody of P.W. 4 as election agent, it was necessary to recall the said witness but the same was rejected by the Munsiff-III, Chapra, the Election Tribunal on the ground that no explanation or reason has been cited for non- production of the document within the time permitted by C.P.C. nor any explanation has been given that the production of the said document at that stage would not adversely affect the other side.

4. Learned Counsel for the petitioner submits that there is a provision for recall of witness under Order 18 Rule 17-A which before its deletion by the C.P.C. amendment Act, 1999 was in the following terms:

Rule 17A - Production of evidence not previously known or which could not be produced despite due diligence- Where a party satisfies the Court that, after the exercise of due diligence, any evidence was not within his knowledge or could not be produced by him at the time when that party was leading his evidence, the Court may permit that party to produce that evidence at a later stage on such terms as may appear to it to be just.

5. It is submitted by learned Counsel that although the said provision has been deleted by the Amendment Act of 1999 with effect from 1.7.2002, but the Apex Court in the case of Salem Advocate Bar Association, Tamil Nadu Vs. Union of India (UOI), in paragraph No. 14 of the said decision held as follows:

14. In Salem Advocates Bar Association's case, it has been clarified that on deletion of Order XVIII Rule 17-A which provided for leading of additional evidence, the law existing before the introduction of the amendment, i.e. 1st July, 2002, would stand restored. The Rule was deleted by Amendment Act of 2002. Even before insertion of Order XVIII Rule 17-A, the Court had inbuilt power to permit parties to produce evidence not known to them earlier or which could not be produced in spite of due diligence. Order XVIII Rule 17-A did not create any new right but only clarified the position. Therefore, deletion of Order XVIII Rule 17-A does not disentitle production of evidence at a later stage. On a party satisfying the Court that after exercise of due diligence that evidence was not within his knowledge or could not be produced at the time the party was leading evidence, the Court may permit leading of such evidence at a later stage on such terms as may appear to be just.

6. It is thus submitted by learned Counsel that even the deletion of the said Rule 17A of Order 18 does not change the legal position and disentitle the party for production of evidence at a later stage. It is, therefore, contended by learned Counsel that unless P.W. 4 is recalled and the document brought on the record, the same would seriously prejudice the case of the petitioner.

7. Learned Counsel for respondent No. 6, on the other hand, submits that the present matter is not a case where the petitioner has been able to satisfy the

Court that after exercise of due diligence, the evidence in question was not within her knowledge or could not be produced at the time when she was leading evidence. It is urged by learned Counsel that from perusal of the petition for recall of witness, it is evident that no explanation at all has been given to satisfy the Court that the prayer made was a genuine one. Learned Counsel also submits that the document in question was not produced along with the election petition or at any time before the settlement of the issues and the respondent No. 6 was not even aware of the said document which was kept in safe custody of the Court in a surreptitious manner after as many as three P.Ws. had already been examined and thus, he had no occasion to raise his objection against the said document. Learned Counsel points out that even in the election petition, a stand has been taken that the document was filed before the Returning Officer, but no receiving has been given; in the said circumstances, it is argued that the said document, which is annexed as Annexure-3 to the writ petition and shown to be received by the Assistant Returning Officer on 18.6.2006 coupled with the fact that it has been produced by the petitioner at a much belated stage obviously, goes to show that the same has been manufactured for the purpose of litigation and in terms of the provisions of Order 13 of the C.P.C., it is not fit to be allowed to be exhibited by the Court at such a belated stage when there is absolutely no explanation for the same and the same is not a document of unimpeachable character. In support of the same, learned Counsel relies upon a decision of the Rajasthan High Court in the case of Mohan Raj v. Karan Chand and Ors. AIR 2003 Raj 1, in paragraph Nos. 17 and 18 of which it has been held as follows:

17. Order 13, Rule 2 of the Code specifically provides that no document can be taken on record at any subsequent stage of the proceedings unless the party intends to rely upon them and shows good cause for their non-production earlier. Thus, if a party files an application to take the documents on record without furnishing any satisfactory explanation of inordinate delay, the Court must refuse to admit the documents on record.

18. The case requires to be considered in the light of the aforesaid settled legal propositions. Admittedly, the documents, which the revisionists wanted to be taken on record, related to the year 1992. Revisionists had not denied the factum of their knowledge about the said documents while the suit was filed in 1995; issues had been framed on 6.4.98; three witnesses had already been examined by the other side when revisionists filed the said application. No satisfactory explanation has been furnished for not filing the documents earlier, nor the revisionists have submitted that filing of the documents at such a belated stage had not caused any prejudice to the other party, or the documents would not have any bearing on the evidence which had already been recorded. For want of such pleadings and submission, the impugned order does not seem to be a case of improper exercise of jurisdiction by the trial Court.

8. On a consideration of the aforesaid submissions and the facts and

circumstances of the case, this Court does not find any merit in the submission of learned Counsel for the petitioner.

9. It is evident from the decision of the Apex Court in the case of Salem Advocates Bar Association (*supra*) that the mere fact that the production of evidence can be permitted at a later stage does not give indefeasible right to the party in that regard, since he has to satisfy the Court that after exercise of due diligence the evidence was not within his knowledge or could not be produced at the time when the party was leading evidence. In the present matter, the further question would be that when the petitioner had herself failed to produce the said document at the earliest, although claiming the same to be in safe custody all through of her election agent, P.W. 4, who is also her husband, the requirement of either Order 18, Rule 17-A or Order 13 in this regard is not satisfied, as no reason or explanation has been assigned in the petition for recall of witness and only a one sentence petition has been filed in this regard.

10. In the said circumstances, the Court below has rightly rejected the petition filed by the petitioner. Thus, there is no merit in the writ petition and it is, accordingly, dismissed.