

(2010) 11 PAT CK 0074

In the Patna High Court

Case No : Letters Patent Appeal No. 900 of 2008 in Civil Writ Jurisdiction Case
No. 9840 of 2008

Heman Rai

APPELLANT

Vs

The State Election Commission (Panchayat) and Others

RESPONDENT

Date of Decision : 25-11-2010

Acts Referred:

Citation : (2010) 11 PAT CK 0074

Final Decision : Allowed

Judgement

R.M. Doshit, C.J.—This Appeal preferred under Clause 10 of the Letters Patent arises from the judgment and order dated 22nd October 2008 passed by the learned Single Judge in above C.W.J.C. No. 9840 of 2008.

2. The subject matter of dispute is the election of the appellant- writ petitioner as Mukhiya, Gram Panchayat Raj, Musepur, District-Saran held on 31st May 2006. The appellant won the said election over the respondent No. 5 by a margin of 114 votes.

3. Feeling aggrieved by the election of the appellant, the respondent No. 5 challenged the said election in Election Petition No. 21 of 2006 before the Election Tribunal at Chapra, District-Saran (hereinafter referred to as "the Tribunal"). The respondent No. 5 alleged that there was an irregularity committed in counting of votes at booth Nos. 249 and 250. At Booth No. 249 total votes cast were 261. However, while counting a total of 310 votes were counted. Similarly at booth No. 250 total votes cast were 400 but the votes counted were 376. In other words, there was an excess of 49 ballot papers at booth No. 249 and a deficit of 24 ballot papers at booth No. 250. But for this irregularity, the respondent No. 5 would have been elected.

4. The election petition was contested by the appellant. According to the appellant even if the 49 excess votes were ignored and 24 deficit votes were counted in favour of the respondent No. 5 it could not have materially affected

the result of the election. The Election Tribunal, therefore, had no jurisdiction to entertain the Election Petition.

5. The Election Tribunal by its judgment and order dated 25th June 2008 upheld the challenge to the election of the appellant. The Tribunal ordered re-polling at the above referred booth Nos. 249 and 250.

6. Feeling aggrieved the appellant filed above C.W.J.C. No. 9840 of 2008 before this Court.

7. We are informed that pending the above C.W.J.C. No. 9840 of 2008 the re-polling at booth Nos. 249 and 250 was held on 20th July 2008. The respondent No. 5 was returned as the elected candidate. Since then the respondent No. 5 is holding the post of Mukhiya, Gram Panchayat Raj, Musepur.

8. The learned Single Judge, by the impugned judgment and order dated 22nd October 2008, upheld the order of the Tribunal. The learned Single Judge has noted that after the counting of votes at the aforesaid booth Nos. 249 and 250 the respondent No. 5 had lodged a complaint to the District Magistrate and the State Election Commission and had demanded recounting as envisaged by Rule 79 of the Bihar Panchayat Election Rules, 2006 (hereinafter referred to as "the Rules"), but to no avail. The learned Single Judge also noted that the counting of the votes at the aforesaid booth Nos. 249 and 250 was not done in a proper manner and that it had given undue and illegal benefit to the appellant. The learned Single Judge noted that there was no infirmity in the order of the Tribunal in not setting aside the entire election and in ordering re-poll at the two booths Nos. 249 and 250 alone. The learned Single Judge also noted that after the re-poll at the aforesaid two booths the respondent No. 5 was declared elected. The learned Single Judge rejected the plea in respect of the maintainability of the Election Petition as technical plea not supported by the material or the evidence. The learned Single Judge was also pleased to note that the respondent No. 5 had, prima-facie, established the before Tribunal that in the election, the counting had not been done in fair and proper manner.

9. Therefore, the present Appeal.

10. This Appeal was earlier heard and dismissed by the judgment and order dated 23rd March 2009 (CORAM: J.B. Koshy, C.J. and Dr. Ravi Ranjan, J.). The said judgment and order was recalled by order dated 7th April 2010 made on Civil Review No. 106 of 2009 (CORAM: Dipak Mishra, CJ. (as he then was) and Dr. Ravi Ranjan, J.). Since recall of the judgment the Appeal has come up for hearing before us.

11. Learned Advocate, Mr. S.B.K. Mangalam appears for the appellant. He has submitted that the learned Single Judge as well as the Tribunal below have erred in entertaining the Election Petition lodged by the respondent No. 5. He has submitted that the Election Tribunal did not gain jurisdiction to entertain the Election Petition unless the result of the election were materially affected by the

alleged irregularities. In the present case there was an excess of 49 votes at booth No. 249 and a deficit of 24 votes at booth No. 250. If the said excess and the deficit were given effect in favour of the respondent No. 5 still the respondent No. 5 would not have been elected as the appellant had won by a margin of 114 votes. Unless it were pleaded and established that the alleged irregularity had materially affected the result of the election, the Tribunal could not have entertained the Election Petition. In support of his argument Mr. Mangalam has relied upon Section 139 (1)(d)(iii) of the Bihar Panchayat Raj Act, 2006. He has also relied upon Section 141 of the Act which defines the "corrupt practice". In support of his argument he has relied upon the judgments of the Supreme Court in the matters of Vashit Narain Sharma Vs. Dev Chandra and Others, Paokai Haokip Vs. Rishang and Others, Chandrika Prasad Yadav Vs. State of Bihar and Others, and the judgments in the matters of Smt. Nagma Khatoon v. the State of Bihar and Ors. AIR 2008 PLJR 87, Sayed Mustafiz Ahmed v. Samir Dey and Ors. AIR 1997 Ori 151, Sudhir Nayan Vs. The State of Bihar and Others, Kapildeo Singh v. Md. Mushtaque 2010 (4) PLJR 595 and Phulia Tudu and Another Vs. The State of Bihar (now Jharkhand), The Appeal is contested by Mr. Ashok Kumar Mishra. He has appeared for the respondent No. 5, now elected candidate and the election petitioner. He has submitted that a grave irregularity was committed in counting ballots at the aforesaid booth Nos. 249 and 250. The Tribunal, therefore, rightly ordered re-polling at the said two booths alone. He has relied upon the pleadings paragraph 9 of the plaint and upon the judgment of this Court in the matter of Devender Yadav Vs. The State of Bihar and Others

12. The learned Advocate Mr. Kumar Brajendra Nath has appeared for the State Election Commission. He has supported the judgments of the Tribunal and of the learned Single Judge. He has submitted that it is the duty of the State Election Commission to ensure that the elections are conducted in free and fair manner. In the instant case there was absence of free and fair election at booth Nos. 249 and 250. The order for re-polling was therefore, justified. In support thereof he has relied upon the pleadings at paragraph 13 of the plaint.

13. Section 139 of the Act and Rule 79 of the Rules read as under:

Section 139. Grounds for declaring election to be void - (1) Subject to the provisions of Sub-section (2) if the prescribed authority is of opinion-

(a) that on the date of his election, a returned candidate was not qualified or was disqualified, to be chosen as a member under this Act; or

(b) that any corrupt as been committed by a returned candidate or his agent or by any other person with the consent of a returned candidate or his agent; or

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

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected-

(i) by the improper acceptance of any nomination; or

(ii) by any corrupt practice committed in the interests of returned candidate by an agent; or

(iii) by the improper reception, refusal or rejection of any vote or reception of any vote which is void; or

(iv) by any non-compliance with the provisions of this Act or of any rules or orders made thereunder; the prescribed authority shall declare the election of the returned candidate to be void.

(2) If in the opinion of the Prescribed Authority, any agent of a returned candidate has been guilty of any corrupt practice, but the prescribed authority is satisfied-

(a) that no such corrupt practice was committed at the election by the candidate and every such corrupt practice was committed contrary to the orders and without the consent of the candidate;

(b) that the candidate took all reasonable measures for preventing the commission of corrupt practices at the election; and

(c) that in all other respects the election was free from any corrupt practice on the part of the candidate or any of his agent; then the Prescribed Authority may decide that the election of the returned candidate is not void.

(d)"

Rule 79. Recounting of votes:

The candidate or in his/her absence his/her election agent or counting agent may make a written application to the Returning Officer or the Officer authorized by him/her for recounting of votes stating therein the grounds for the same.

(2) The Returning Officer or the Officer authorized by him/her may, fully or partially, accept or reject the application stating the reasons for the same.

(3) If the Returning Officer or the Officer authorized by him/her accepts fully or partially the application under Sub-rule (2), he/she shall get the ballot-papers recounted and amend the result of the counting in the form prescribed in Sub-rule (2) of Rule 76 and declare the result.

(4) After that, any application for further re-counting shall not be entertained.

14. We have considered the above referred legal provisions and the judgments. We need not deal with each judgment as all the above referred judgments including one relied upon by learned Advocate Mr. A.K. Mishra lay down a single proposition of law. The common thread that runs through the said judgments is the challenge to the election of returned candidate on the grounds either of absence of fair and free election or of some irregularity committed in holding election or counting of votes etc. The law settled is that the challenge to an election is neither a fundamental nor a constitutional nor a common law right. It

is a statutory right that can be enforced within the four corners of the legal provisions. In challenge to an election of a returned candidate, the election petitioner is required to set out a definite plea of alleged irregularity and to establish the same. Mere absence of free and fair election or an irregularity in conducting the election or counting of votes would not vitiate election of a returned candidate unless it were pleaded and established that such illegality or irregularity has materially affected the election of the returned candidate.

15. We do see merit in the submissions made by Mr. Mangalam. We may note hear that the challenge to the election of the appellant was on none of the grounds stated in Clauses (a), (b) and (c) of Sub-section (1) of Section 139 of the Act. The only ground on which it was challenged was improper or irregular counting of the votes at booth Nos. 249 & 250. In our opinion the matter should be governed by Sub-clause (iii) of Clause (d) of Sub-section (1) of Section 139 of the Act. In other words, the election of the appellant could have been avoided had it been materially affected on account of improper or irregular counting of votes. As we have recorded hereinabove, if the benefit of excess and the deficit in the ballot papers were given to the respondent No 5, still he would not have won the election i.e. if the excess of 49 votes were deducted from the total votes counted in favour of the appellant and the deficit of 24 votes were added to the total votes counted in favour of the respondent No. 5, still the appellant would have margin of 41 votes over the respondent No. 5. In other words, still the appellant would have been returned as an elected candidate. Thus, the said irregularity or illegality did not materially affect the result of the election. The Tribunal, therefore, could not have exercised jurisdiction to avoid the election of the appellant. We, therefore, hold that the Tribunal had erred in exercising jurisdiction to avoid the election of the appellant merely on the basis that the counting of votes at booth Nos. 249 and 250 was improper or irregular. The learned Single Judge also has erred in not considering the specific provision contained in Section 139 of the Act and in holding that the alleged irregularity in counting with regard to booth Nos. 249 and 250 had an impact on the final declaration of the result.

16. The learned Single Judge has also erred in rejecting the said plea as being technical. It must be observed that the said plea went to the root of the jurisdiction of the Tribunal and was a substantive plea that required attention. Besides, we have noticed that the learned Single Judge has been carried away by the fact that in the re-poll the respondent No. 5 won the election by a margin of 45 votes. Since we have held that the Tribunal had no jurisdiction to avoid the election of the appellant, as the alleged irregularity did not materially affect the election of the appellant, the subsequent election held pursuant to the direction issued by the Tribunal and the result thereof are of no consequence. For the aforesaid reasons, we allow this Appeal. The impugned judgment and order dated 22nd October 2008 passed by the learned Single Judge in C.W.J.C. No. 9840 of 2008 is set aside. C.W.J.C. No. 9840 of 2008 is allowed. The impugned judgment and order dated 25th June 2008 passed by the Election Tribunal,

Chapra in Election Petition No. 21 of 2006 is quashed and set aside. Consequently the election of the respondent No. 5 in the election held on 20th July 2008 stands quashed and set aside. The legal consequences shall follow. The parties shall bear their own cost.