

(1988) 11 PAT CK 0014
In the Patna High Court
Case No : C.W.J.C. No. 7774 of 1988

Krishna Kumar Singh and Another	Vs	APPELLANT
State of Bihar and Others		RESPONDENT

Date of Decision : 30-11-1988

Acts Referred:

Bihar Municipal Act, 1922 — Section 15, 19, 356, 386
Bihar Municipal Election and Election Petitions Rules, 1953 — Rule 7(1)
Criminal Procedure Code, 1973 (CrPC) — Section 3

Citation : AIR 1989 Patna 201 : (1989) PLJR 184

Hon'ble Judges : P.S. Mishra, J; B.N. Sinha, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. Heard learned counsel for the petitioners and the learned counsel for the Respondents.
2. Petitioners' counsel has questioned the "validity of the election of Municipal Commissioners of Hajipur Municipality. He has moved this Court on the ground, inter alia, that the election was conducted by the Returning Officer, namely, Respondents 3 & 4, who were appointed for the said purpose by a notification under the orders of the District Magistrate, Vaishali on 29-6-1988. Constituents, however, were called to elect their representatives by a notification published for the said purpose by the District Magistrate on 16-7-1988. This, according to learned counsel, violates Rule 8 of the Bihar Municipal Elections and Election Petitions Rules, which states that immediately after the issue of a notification under Sub-rule (1) of Rule 7, the District Magistrate shall appoint a Magistrate of the first class to be the Returning Officer for the Municipality.
3. Violation of the said Rule, according to learned counsel, is not only in notifying Respondents 3 & 4 as the Returning Officer on 29-6-1988 that is to say before the issue of the notification under Sub-rule (1) of Rule 7 which lays down that for the purpose of constituting the municipality or re-constituting it on the expiration

of the term of office of the Commissioners or u/s 386, the District Magistrate shall, by a notification published in the Official Gazette and in the manner laid down in Section 356, call upon all the wards of the municipality to elect Commissioners but in ignoring the mandate that such Returning Officer shall be a Magistrate of first class and none-else.

4. Rule 8 which provides for appointment of Returning Officer says that the appointment shall be made after the issue of a notification under Sub-rule (1) of Rule 7. It, thus, means that when the electoral process is started the Returning Officer is appointed in course of the said process. Since the Returning Officer has to exercise several functions which are enumerated in the Rules, election cannot be held unless there is a Returning Officer. Appointment, however, before the issue of a notification will not render the process invalid because the Returning Officer will be available to discharge his duties and functions in course of the election, while requirement of the Returning Officer is a must for the election and unless there is a Returning Officer election cannot be held, appointment after the issue of a notification under Sub-rule (1) of Rule 7 is not mandatory. It may be simultaneously made with the notification for election of the Commissioners as required by Rule 7. It may be before or after the said notification but until the Returning Officer is appointed the election process shall be at a stand-still.

5. Magistrate of the first class, who could be appointed as a Returning Officer was so appointed under the Cr. P.C. 1898 (Act 5 of 1898). The said Code was repealed by the Cri. P.C. 1973 (Act 2 of 1974). Section 3 of the 1974 Act provides in its Sub-section (4) that where, under any law, other than this Code, the functions exercisable by a Magistrate relate to matters --(b) which are administrative or executive in nature, such as, the granting of a licence the suspension or cancellation of a licence, sanctioning a prosecution or withdrawing from a prosecution, they shall, subject as aforesaid, be exercisable by an Executive Magistrate, Although no corresponding amendment has been made in Rule 8 aforesaid, reference therein to a Magistrate of first class has now to be read as a reference to an Executive Magistrate. It has not been disputed before us that Respondents 3 & 4 are Executive Magistrates. They in our view were eligible for appointment as Returning Officers.

6. Since election has already been held, we in given circumstances would have considered whether the petitioners should exhaust the remedy by way of election petition under the Bihar and Orissa Municipal Act, 1922 or not. This court has always taken the view that when alternative remedy is efficacious and speedy unless the cause giving rise to the writ application is one touching jurisdiction in the action impugned a writ or a Rule should not issue. Since, however, we are of the opinion that the two contentions raised before us do not render the election invalid, we decline to give any further consideration to the matter.

7. In the result this application is dismissed.