

(2009) 04 PAT CK 0098

In the Patna High Court

Case No : CWJC Nos. 4168 and 4374 of 2009

Magadh University Post Graduate Teachers Association

APPELLANT

Vs

The Bihar State Election Commission and The State of Bihar

 Shikshak Sangh, Ram Krishna Dwarika College and Dr.
Chakradhar Prasad Pandey Vs The State of Bihar, The Chief
Electoral Officer and The District Magistrate-Cum-Returning
Officer

RESPONDENT

Date of Decision : 08-04-2009

Acts Referred:

Citation : (2009) 04 PAT CK 0098

Judgement

J.B. Kosy, C.J.—Petitioners in these two writ petitions, pray for restraining the respondents from posting the petitioners or University teachers on election duties for the ensuing Lok Sabha election. CWJC No. 4168 of 2009 is filed by Magadh University Post Graduate Teachers Association, Bodh Gaya. CWJC No. 4374 of 2009 is filed by the teachers of the College affiliated to Magadh University. A supplementary affidavit is also filed today in Court adding further grounds in the writ petitions. Since the election is nearing, the matter was heard and the learned Counsel for the Election Commission submitted that he is ready to argue the matter even though supplementary affidavit is filed and served today in the morning.

Heard both sides.

2. Section 159 of the Representation of the People Act, 1951 (in short "the Act"), directed the District Election Officer to make available for election work staff of certain establishments. Section 159 of the Act is as follows:

159. Staff of certain authorities to be made available for election work.—(1) The authorities specified in Sub-section (2) shall, when so requested by a Regional Commissioner appointed under Clause (4) of Article 324 or the Chief Electoral Officer of the State, make available to any returning officer such staff as may be necessary for the performance of any duties in connection with an election.

(2) The following shall be the authorities for the purposes of Sub-section(1), namely:

(i) every local authority;

(ii) every university established or incorporated by or under a Central, Provincial or State Act ;

(iii) a Government company as defined in Section 617 of the Companies Act, 1956;

(iv) any other institution, concern or undertaking which is established by or under a Central, Provincial or State Act or which is controlled, or financed wholly or substantially by funds provided, directly or indirectly, by the Central Government or a State Government.

3. First argument addressed before us is that University teachers were summoned for election duty by the District Electoral Officer although he is not authorized to do so. This is highlighted in the supplementary affidavit though it is not mentioned in the writ petition. It is argued that in view of Section 159(1), the authorities specified in Sub-section (2) shall make available to any returning Officer such staff as may be necessary for the performance of any duty in connection with an election by a Regional Commissioner or the Chief Electoral Officer of the State and the District Magistrate or the District Returning Officer has no power to summon the teachers of the University to work for an election. Next contention is that considering the fact that right to education is a fundamental right, teachers cannot be summoned for election purpose as that would affect the education. Finally, it was contended that when there are sufficient government Officers it was unnecessary for posting the university teachers for doing polling work. Third contention raised was that though Sub-section (2) authorizes that staff of the University can be summoned, teachers are not included and teachers cannot be summoned.

We shall consider the arguments in seriatim.

4. Learned Counsel for the Election Commission has submitted that when election was announced the Election Commission vide its letter dated 05th March, 2009 has written to various authorities including the Universities to make available staff of the University on the requisition of the Returning Officer concerned. A copy of the direction made by Section 159(1) by the Chief Election Officer of the State to the University was shown to us for perusal. It can be seen that sufficient staff should be requisitioned by the Chief Electoral Officer for the purpose of Section 159(1). The Returning Officer has requested the University and the College requesting to send the list of Staff available. After the list was given appointment letters were issued by the District Returning Officer vide order dated 24th March, 2009 issued by the University appointing him as Patrolling Magistrate as produced in Annexure-1 in CWJC No. 4168 of 2009. The order issued to the first petitioner (a teacher of the College) in CWJC No. 4374 of 2009

show that he was appointed as a Presiding Officer in a Booth at Bankipur Girls High School, Patna. The above order is produced as Annexure-3 in the writ petition. It is also mentioned in the orders that if there is any personal difficulties they can contact the District Magistrate. Posting of such staff was only done by the District Returning Officer as authorized u/s 26 of the Act. Section 26 is also quoted below:

26. Appointment of presiding Officers for polling stations.-(1) The District Election Officer shall appoint a presiding officer for each polling station and such polling officer or officers as he thinks necessary, but he shall not appoint any person who has been employed by or on behalf of, or has been otherwise working for, a candidate in or about the election:

Provided that if a polling officer is absent from the polling station, the presiding officer may appoint any person who is present at the polling station other than a person who has been employed by or on behalf of, or has been otherwise working for, a candidate in or about the election, to be the polling officer during the absence of the former officer, and inform the District Election Officer accordingly:

Provided further that nothing in this Sub-section shall prevent that District Election Officer from appointing the same person to be the presiding officer for more than one polling station in the same premises.

(2) A polling officer shall, if so directed by the presiding officer, perform all or any of the functions of a presiding officer under this Act or any Rules or orders made thereunder.

(3) If the presiding officer, owing to illness or other unavoidable cause, is obliged to absent himself from the polling station, his functions shall be performed by such polling officer as has been previously authorized by the District Election officer to perform such functions during any such absence.

(4) References in this Act to the presiding officer shall, unless the context otherwise requires, be deemed to include any person performing any function which he is authorized to perform under Sub-section (2) or Sub-section (3), as the case may be.

5. Learned Counsel for the petitioners relied on a decision of the Hon''ble Supreme Court in the case of Election Commission of India Vs. State Bank of India, Patna and others, . Paragraph 22 of the above judgment is as follows:

Merely because the provisions of the two acts require that they must be officers of Government or local authority, unlike in the case of Officers falling u/s 26 of 1951 Act, it does not, in our opinion, follow that the services of the officers of the State Bank of India could be requisitioned. Section 26 of the 1951 Act is not a source of power at all. It does not, in any manner, enable the Election Commission to draft in the services of Officers other than officers of Government and Local authority. To draw inspiration from these sections to support an

argument that the services of any person could be drafted for the purpose of election is untenable. May be, to conduct the elections many polling stations are set up. Consequently, the services of many persons may be required. May be, the election commission may draw the minimum staff from the banks to ensure that the banking business is not disrupted but the question here is of power and not direction. If there is power it may be exercised with circumspection and minimum staff may be requisitioned but if there is no power the question of the mode of its exercise will not arise at all. It is a question of existence of power and not the manner of its exercise.

The above observations were made considering the provisions of the Act before it is amended in 1998.

Before amendment of Section 159 only Central Government and State Government employees could have been called for election duties but Section 159 was amended and substituted by Act 12 of 1998 with effect from 23rd December, 1997. Thereafter every University established or incorporated by or under a Central, Provincial or State Act was also included u/s 159(2)(ii). In view of the amendment the decision in Election Commission of India Vs. State Bank of India, Patna and others, , is not applicable on the fact of these cases. The Hon"ble Supreme Court noticed that u/s 26 of the Act authorizes the District Election Officer, can not summon Officer of the Local University in absence of authorization of Section 159, but now after the amendment, the Staff of the University was also included u/s 159(2)(ii) of the Act as due requirement was made by the Chief Electoral Officer of the State for the appointment u/s 26 by the District Electoral Officer.

6. The learned Counsel for the petitioners submitted that in. State Bank of India Officers Association, Patna Vs. The State Election Commission, Bihar, Patna and Others, , following the Supreme Court decision, cited earlier, held that requisition of the State Bank Officers in election was not warranted in that case. It is also stated that requisition of the Officers can be made only by the Regional Commissioner or by the Chief Electoral Officer. Since that was not done the requisition of the State Bank employees was incorrect. In this case we are not of the opinion that letter of the Chief Electoral Officer dated 03rd March, 2009 is a requisition u/s 159(1) as therein it is specifically required that University and College to make available staff of the University or College as requested by District Returning Officer and they should be deputed as and when Returning Officer request. Thereafter the appointment is done u/s 26 of the Act by the District Returning Officer. Therefore, we are of the opinion that in this case there is no violation of Section 159(1) of the Act. u/s 159(1) of the Act the Chief Electoral Officer of the State shall request the University and College concerned to make available teachers and non-teaching staff to the Returning Officer as may be necessary and u/s 26 of the Act appointment is done through District Election Officer. But we are of the view that staff includes teaching staff and non-teaching staff.

7. The second contention that teachers cannot be summoned as right of education is a fundamental right; considering Article 21A of the Constitution of India Hon''ble Supreme Court in the case of Election Commission of India v. St. Mary's School 2008 (3) PLJR 368 (SC), set aside the requisition of Primary Teachers for election duties. It is also held by the Hon''ble Supreme Court that teachers can be summoned also on holidays. The Hon''ble Supreme Court was considering the case of Primary education which is a guaranteed fundamental right now. Article 21A reads as follows:

21A. The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.

8. Apart from that those primary teachers were called for the election duty. There was also revision of electoral rolls which require more days of work and which cannot be completed. Election day is a holiday. It is true that few days also will be leave. But at the same time, we have to consider the fact that holding of election is a sovereign function of the State. It is obligatory on the part of the Election Commission that voting take place in accordance with law. Democracy being the basic features of the Constitution of India, same work will have to be done for upholding the democracy and for holding election and we are not concerned with the Primary Teachers and University Teachers. It is also reported that University examinations were also postponed because of the election and not merely because some teachers are summoned for the election duty as in some of the Colleges Para Military forces are stationed and in some of the Institution Polling Stations are being arranged.

9. After considering the Articles 324 and 327 of the Constitution of India the Hon''ble Supreme Court in Election Commission of India v. St. Mary's School (Supra) held as follows:

We would, however, notice that the Election Commission before us also categorically stated that as far as possible teachers would be put on electoral roll revision works on holidays, non-teaching staff be put on duty anytime. We, therefore, direct that all teaching staff shall be put on the duties of roll revisions and election works on holidays and non-teaching days. Teachers should not ordinarily be put on duty on teaching days and within teaching hours. Non-teaching staff, however, may be put on such duties on any day or at any time, if permissible in law.

10. Hon''ble Supreme Court also considered and distinguished earlier decision in the State Bank of India Officers' Case (Supra) and held that in view of the amendment earlier decision is not applicable as can be seen from paragraph 26 of the judgment. In any event since the University teachers are not teaching children aged up to 14, Article 21A of the Constitution as well as arguments based on decision of the Supreme Court is not applicable in this Case.

11. It was also contended that staff means only non-teaching staff. We are unable to agree that staffs means only non-teaching staffs. Staff means teaching

staff and non-teaching staff. In view of Section 159(2)(ii) teachers can also be summoned on holidays. In St. Mary School Case Hon''ble Supreme Court also held that besides teaching, they can be deputed also on holidays in view of Article 21A.

12. The learned Counsel for the petitioners further relied on a decision of a single Bench of this Court in CWJC No. 5390 of 2006 and another connected cases. The above order is annexed as Annexure-4 in CWJC No. 4168 of 2009. The above order is interim order and the question was regarding summoning of teachers of the Universities and Colleges for Panchayat election. Unlike, the Representation of Peoples Act there is no provision in the Panchayat Act or any other law enabling summoning the staff of the Universities and teachers of the Colleges. u/ s 125 of the Panchayat Raj Act the District Election Officer of Panchayat / the District Magistrate are to appoint any person who is a government servant or a servant of Government Company or servant of Government aided Institutions to work as a Presiding Officer (Panchayat) / Polling Officer. On that basis interim relief was granted by the learned single Judge and, therefore, that decision is not applicable on the facts of the case. We are not interfering in the matter under Article 226 of the Constitution of India by exercising our extra ordinary jurisdiction. It is true that there will be disturbance to the students if teachers are deputed for election purposes. Under the UGC norms academic teachers in Colleges and Schools no working days are fixed and posting teachers will create practical difficulties. There will be also difficulty in posting them in remote stations. Considering all observations of the Hon''ble Supreme Court in St. Marys School case, we are of the opinion that as far as possible teachers in the Schools and Universities should be avoided for election duty and they shall be posted only in exceptional circumstances. The Chief Election Commissioner shall make appropriate directions in the future elections. But since now alternative arrangement cannot be made and elections are fixed on 16th April, 2009 onwards, we see no ground to interfere in the matter of petitioners'' posting in the ensuing Lok Sabha Elections.

13. With the observations made above, these applications are disposed of.

Ravi Ranjan, J.

14. I agree.