

(2020) 02 PAT CK 0005

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 16215 Of 2018

Manju Devi

APPELLANT

Vs

State Of Bihar Through The Principal Secretary And Ors

RESPONDENT

Date of Decision : 06-02-2020

Acts Referred:

Constitution Of India, 1950 — Article 226, 227

Citation : (2020) 02 PAT CK 0005

Hon'ble Judges : Ahsanuddin Amanullah, J

Bench : Single Bench

Advocate : Ramakant Sharma, Lakshmi Kant Sharma, Kinkar Kumar, Deepika Sharma, Amit Shrivastava, Girish Pandey

Final Decision : Allowed

Judgement

1. Heard Mr. Ramakant Sharma, learned senior counsel along with Mr. Lakshmi Kant Sharma, learned counsel for the petitioner; Mr. Kinkar Kumar, learned SC 9 for the State and Mr. Amit Shrivastava, learned counsel along with Mr. Girish Pandey, learned counsel for the State Election Commission (hereinafter referred to as the 'Commission'). Despite service of notice, nobody appeared either on behalf of Jehanabad Nagar Parishad or respondent no. 8.

2. The petitioner has moved the Court for the following reliefs:

"That this is an application for issuance of appropriate writ/writs, order/orders, direction/directions for quashing the order contained in Memo No. 920 dated 25.04.2018 under the signature of respondent Commissioner / Joint Commissioner in case No.44/ 2017 whereby and where under petitioner has been declared disqualified on account of submitting incorrect information in the affidavit; as she made a declaration in the Form-C (Biodata of Candidate) that she had no issue after 04.04.2008 however by relying upon the same fictitious certificate said to have been issued by a private school, a complaint was made by the private respondent before respondent State Election Commission and

pursuant thereto a inquiry though petitioner produced / submitted relevant document regarding date of birth of her son but ignoring those certificate, a medical Board was constituted and said medical Board opined the age of son of petitioner as 7 to 8 yrs. And relying upon the same she has been declared disqualified.

Petitioner further seeks Hon'ble Court's indulgence commanding the respondent authority to accept the certificate issued by the Primary School regarding date of Birth of her son as well as Birth Certificate issued by Nagar Parishad as well as entry made in the Adhar Card and accordingly accept the affidavit submitted with nomination paper and allow the petitioner to function as Ward Counsellor of Ward No. 6 of Jehanabad Nagar Parishad being elected Ward Counsellor.

Petitioner further seeks any other relief/reliefs for which she is found entitled in the eye of law and in the facts and circumstances of the present case."

3. The short issue involved in the case is whether the 4th child of the petitioner was born after 04.04.2008, which is the cut off date under the Bihar Municipal Act, 2007 (hereinafter referred to as the 'Act') which bars a candidate from standing for election under the Act if there are more than two children and if any one is born after the said cut off date. In the present case, after the petitioner was elected as Ward Councillor of Ward No. 6 of Jehanabad Nagar Parishad, a complaint was received from respondent no. 8 that the said child of the petitioner was born after the cut off date and the petitioner was already the mother of three children who were alive. The issue reached the Commission and initially a report was called from the District Magistrate, Jehanabad. An enquiry report by the Sub Divisional Officer, Jehanabad was sent by the District Magistrate, Jehanabad to the Commission on 11.07.2017 and thereafter again a report of the enquiry made by the Deputy Development Commissioner, Jehanabad was sent to the Commission on 22.09.2017. The two reports differing, the Commission again asked the District Magistrate, Jehanabad for a fresh report. In terms thereof, a Medical Board was constituted to determine the age of Prem Kumar. Against that, the petitioner moved this Court in CWJC No. 1460 of 2018, which was permitted to be withdrawn on 30.01.2018 for the petitioner to pursue the matter before the Commission. Thereafter, based upon the medical report, the District Magistrate submitted his report to the Commission opining that Prem Kumar was born after the cut off date. The Commission, in turn, relying upon the report of the District Magistrate passed the impugned order dated 20.04.2018 holding that the petitioner was ineligible to stand for election and accordingly she has been removed from her post and it was also directed for lodging of an FIR against her.

4. Learned counsel for the petitioner submitted that the compliant itself was malicious and based on a certificate issued by a Play and Learn School, showing that Prem Kumar was aged 4 years on 31.03.2015, implying that he was born sometime in the year 2011. It was submitted that such certificate dated 31.03.2015 was never with regard to the son of the petitioner as he was never

admitted to that school and moreover, such school was a Play and Learn School, which has no relevance with regard to determination of age. Learned counsel submitted that when the controversy arose, the petitioner, during enquiry conducted by the Deputy Development Commissioner, Jehanabad submitted certificate of the Headmaster of Adarsh Government Middle School, Unta, Jehanabad in which the date of birth of Prem Kumar was mentioned as 06.12.2006. Learned counsel further submitted that even the birth certificate of Prem Kumar disclosing the date of birth as 06.12.2006 was submitted. Based on the same, the Deputy Development Commissioner, Jehanabad in his report has held in favour of the petitioner and in fact had stated that the school certificate produced by the respondent no. 8 was without any admission number and was also of a fake school against which action should be taken by the Education Department. After that, the District Magistrate, Jehanabad constituted a Medical Board which reported on 23.02.2018 that the age of Prem Kumar was between 7-8 years. Based on the same, the District Magistrate, Jehanabad sent his report to the Commission holding that Prem Kumar was born after 04.04.2008. In turn, the Commission, by the order impugned dated 20.04.2018 relying on the opinion of the District Magistrate, Jehanabad has held that Prem Kumar being born after 04.04.2008, the petitioner was ineligible to contest the election and she has been removed from her post and further direction has been issued to lodge an FIR against her.

5. Learned counsel submitted that such controversy was unnecessarily created and even the District Magistrate could not have gone for a Medical Board examination of Prem Kumar as on the one hand there was certificate from the Government School and the birth certificate issued from the Competent Authority of the State whereas on the other hand there was only a certificate from one Shishu Sneh Vatika which is said to be a private school and also a Play and Learn School and against which the Deputy Development Commissioner himself has written that it was a fake institution and the certificate did not disclose any admission number and he had also opined that Education Department should take action against such school.

6. Learned counsel submitted that in terms of the earlier direction of the Court for determination of the age of Prem Kumar, the Court had directed the Superintendent, Patna Medical College and Hospital for constitution of fresh Medical Board of Senior Doctors and pursuant to the same, in the report submitted of the test done on 01.02.2020, the opinion is that the age of Prem Kumar was between 10-11 years. It was submitted that based on both the medical reports, the law in this regard being settled, it would be clear that the contention of the petitioner that Prem Kumar was born prior to 04.04.2008 stands established. In this connection, he relied upon the decision of the Hon'ble Supreme Court in *Jaya Mala v. Home Secretary, Government of J. & K.* reported as AIR 1982 Supreme Court 1297, the relevant being at paragraph no. 9, in which it has been held that the margin of error in age ascertained by radiology examination is two years on either side. Learned counsel submitted that under

such circumstances and in the background of the aforesaid judgment of the Hon'ble Supreme Court, initially the Medical Board report dated 23.02.2018 in which the age has been held to be between 7 to 8 years, giving benefit of two years, would certainly lead to the conclusion that Prem Kumar was born prior to 04.04.2008. Similarly, it was submitted that in the latest report of the Patna Medical College and Hospital, the age of Prem Kumar as on 01.02.2020 having been ascertained to be between 10 to 11 years, giving benefit of one year, it can be accepted that he was born prior to 04.04.2008. Thus, learned counsel submitted that on the basis of both the medical reports, in view of the law laid down by the Hon'ble Supreme Court in *Jaya Mala* (supra), the controversy had to be decided in favour of the petitioner, but unfortunately the Election Commission has gone strictly on the basis of the report of the District Magistrate, which itself was erroneous as he has accepted the opinion of the first Medical Board, without giving any margin and has held that Prem Kumar was born not before 8 years from 23.02.2018 and, thus, the same being after 04.04.2008, the petitioner was ineligible for contesting the election. It was submitted that based solely on such presumption the petitioner has been removed from her post of Ward Councillor of Ward No. 6 of Jehanabad Nagar Parishad.

7. Learned counsel for the State fairly submitted that since the matter has been referred to the Medical Board initially by the District Magistrate, Jehanabad and now by this Court, and in both the reports, applying the ratio of the decision of the Hon'ble Supreme Court in *Jaya Mala* (supra), the benefit would accrue in favour of the petitioner and Prem Kumar has to be held to have been born prior to the cut off date 04.04.2008.

8. Learned counsel for the Commission submitted that the conduct of the petitioner is not fair and she has not come with clean hands. It was submitted that coupled with this, the petitioner may not be entitled to maintain the present writ application, as the writ petition filed by her earlier i.e., CWJC No. 1460 of 2018 was permitted to be withdrawn on 30.01.2018 without permission to institute fresh petition in the High Court. For such proposition, learned counsel relied upon the decision of the Hon'ble Supreme Court in *Sarguja Transport Service v. S.T.A.T.* reported as (1987) 1 Supreme Court Cases 5, the relevant being at paragraph no. 9. Learned counsel submitted that the petitioner in her averments in the writ petition at paragraph no. 8 has very conveniently stated that her sons Sagar Kumar and Prem Kumar never attended the private school and that they are students of Government Middle School, Unta, Jehanabad respectively in Class 6 and Class 3B and their dates of birth in the school register is 05.01.2006 and 06.12.2006, which is of no help to her for the reason that in the absence of matriculation certificate, the date of birth recorded in the school first attended can be relied upon, but such averment that the Government Middle School, Unta, Jehanabad was the first school attended by her sons not being made, such certificate would not be of any help to the petitioner. Learned counsel submitted that even in the certificate issued by the headmaster of the said Government School dated 22.08.2017, it is not mentioned that the school was

the first school attended by the said sons of the petitioner, including Prem Kumar. It was further submitted that the birth certificate of Prem Kumar was also post election, issued on 19.04.2017. Learned counsel submitted that the petitioner having submitted such document with regard to the birth of her son Prem Kumar, which was subsequent to the issue being raised clearly indicates that there was something to hide on her part as there is no reason for there being no reliable record prior to the birth certificate dated 19.04.2017 and the certificate by the headmaster of the school dated 22.08.2017 to show that Prem Kumar was born on 06.12.2006.

9. Having considered the facts and circumstances of the case and submissions of learned counsel for the parties, the Court finds that the materials which are now on record and which a court of law can safely rely on, has persuaded the Court to take a view which goes in favour of the petitioner. Though, the Court may have had reservation with regard to the conduct and the materials which were produced by the petitioner before the authorities which may or may not have been enough to hold in favour of the petitioner, ultimately, what has happened is that there was medical examination held by a duly constituted Medical Board, both at the district level comprising of five Government Doctors headed by the Civil Surgeon, Jehanabad, opining that on 23.02.2018 the age of Prem Kumar was between 7-8 years and thereafter pursuant to the order of this Court, the Medical Board of the Patna Medical College and Hospital which examined Prem Kumar on 01.02.2020 under the Chairmanship of the Superintendent himself and four other senior doctors opining that the age was between 10-11 years, applying the ratio laid down by the Hon'ble Supreme Court in *Jaya Mala* (supra), giving the benefit of one year to the report of the Patna Medical College and Hospital and two years to the report of the District Medical Board, would lead to the conclusion that Prem Kumar was born prior to the cut off date 04.04.2008. More importantly, as in the earlier order for sending the matter for examination by a fresh Medical Board of the Patna Medical College and Hospital, the Court had indicated that the direct repercussion/effect of any observation or finding would be on the child as his date of birth would have to be accordingly modified, since, now both the medical reports in the light of the law settled by the Hon'ble Supreme Court in *Jaya Mala* (supra) indicating that his date of birth can be accepted to be prior to 04.04.2008, the Court would put an end to the controversy so that the child, Prem Kumar, is not adversely affected in any way. Once the controversy being whether he was born after 04.04.2008 stands negated and is held in favour of Prem Kumar, the Court would further observe that 06.12.2006 recorded in the official documents with regard to the age of Prem Kumar shall be accepted for all purposes with regard to reckoning of his date of birth.

10. With regard to the objection raised by learned counsel for the Commission that after withdrawing CWJC No. 1460 of 2018 without permission to file fresh writ petition, the present case is not maintainable, the Court would only observe that the challenge in CWJC No. 1460 of 2018 was to the decision of the District

Magistrate, Jehanabad to refer the matter for age determination of Prem Kumar to the Medical Board and the writ petition was disposed off with liberty to the petitioner to pursue the matter before the Commission. She did the same and the present writ petition has been filed against the final order passed by the Commission. Thus, the two writ petitions having different cause of action, the decision of the Hon'ble Supreme Court in Sarguja Transport Service (supra) would not apply to the facts and circumstances of the present case. Moreover, in the aforesaid case, the Hon'ble Supreme Court had held that withdrawal of a petition under Articles 226/227 of the Constitution of India without permission to file fresh petition would bar a fresh petition in the High Court involving same subject matter, which is not the fact in the present case.

11. Having reached the conclusion that the law provides for granting benefit to Prem Kumar with regard to his date of birth, in terms of both the medical reports, and by doing so, once he is held to have been born prior to 04.04.2008, automatically the allegation against the petitioner of being ineligible to contest the election, which is the sole reason for her being removed from the post, gets washed away.

12. Accordingly, for reasons aforesaid, the application is allowed. The order impugned dated 25.04.2018 stands set aside. The petitioner stands reinstated to the post of Ward Councillor of Ward No. 6 of Jehanabad Nagar Parishad. As a consequence, the entire process and all action taken for conducting the by-election for Ward No. 6 of Jehanabad Nagar Parishad, which is scheduled to be held on 9th February, 2020, stand annulled.